

## EDITORIAL

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This issue of the European Journal of Legal Studies is the second of its second volume.<sup>1</sup> It focuses on European Private Law. Europeanisation, globalisation and advances in communications technology have presented new challenges to cross-border activity and revitalised the field of private law. As private individuals and commercial entities engage in potentially multi-jurisdictional activities, solutions must be found which avoid conflict, confusion, inequality and legal uncertainty. In public law, the problem of multi-level jurisdiction, *i.e.* various layers of jurisdiction existing within an uncertain hierarchy, is well-known. Private law may well face even more complicated issues, as it entails potentially conflicting and even contrary jurisdictions, and their interplay is complicated by unifying forces at the top - the EU has attempted to harmonise some rules, but not others, and finds itself dealing with longstanding state legal practices that have developed in relative isolation. On a global level, these jurisdictions multiply, and although legal traditions on both sides of the Atlantic share a relatively common history, these traditions have diverged in important ways.

The contributions to this issue of the Journal provide snapshots into various private law topics affected by the aforementioned developments. Each of the authors points to the challenges posed by globalisation and Europeanisation, and proposes solutions and new ideas for further thinking, reflecting the cutting-edge of current research in the field.

The first of these authors is Fabrizio Cafaggi. In his article, “Creditor’s Fault: In Search of a Comparative Frame”, Professor Cafaggi compares the role of the conduct of the creditor or the promisee in contractual relationships in the legal systems of the United States and Europe. The fact that there are two different words for the same actor already demonstrates the existence of different approaches, and Professor Cafaggi

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<sup>1</sup> This issue is long overdue. The delay has in fact been so long that I wish to offer a heartfelt apology on behalf of the editorial board to both our readers and especially the contributors, some of whom have really waited too long for the publication of their articles. The editorial board is in the process of reforming its methods of operation to prevent any such delays in the future, and the result of this process will be borne out, I am confident, by the next volume.

clearly sets out where the legal systems diverge. The focal points in his discussion are the doctrines of comparative negligence and mitigation. He reveals that the degree of convergence or divergence between the US and continental Europe depends on the level of analysis: “if we consider only comparative negligence in contract, divergences are relatively high, whilst when mitigation is included, divergences decrease.” Although they may operate as functional equivalents, divergences between the two are still relevant, as they go to the core of the different approaches to contractual relationships and contract law in Anglo-American and continental European systems. Professor Cafaggi then explains these divergences from three complementary perspectives: the historical, the philosophical, and the functional. He concludes that the lack of comparative negligence in the US is explained by the fact that different business practices and community norms have been internalised in the legal systems: US contract law is primarily aimed at risk allocation, whereas contractual relationships in continental Europe are placed in a legal framework which aims at fostering a higher level of cooperation.

Professor Cafaggi’s insightful article takes due account of societal factors to explain differences in private law systems. Other contributions to this issue focus on communication between them. A bridge between these two topics is built by Jan Smits in his essay, “Democracy and (European) Private Law: a functional approach”. He assesses the current state of the development of a Common Frame of Reference (CFR) for European private law. In particular, he addresses whether the drafting of the CFR should follow the same kind of rules as the intricate drafting procedure at the national level to ensure legitimacy, where private law is made in close cooperation by courts and legislature with input from legal academia.

Professor Smits rejects criticism that the drafting of the CFR has so far been lacking in democratic legitimacy, and proposes to “radically change our views” of how rules in the area of private law are legitimised in this age of Europeanisation and globalisation. He focuses on rules that seek to regulate the conduct of private parties – “the core of private law”, and specifically the law of contract. He provides an overview of the new types of rule-making which, despite evading the democratic decision-making process, are important in regulating the behaviour of individuals and states. Professor Smits argues that these new types of rules only pose a problem for the legitimacy of private law if legitimacy is conceptualised in a very restrictive way. Departing from a narrow focus on decision-making by national parliaments, he then proposes a functional approach which deconstructs the concept of democracy. In a wide-ranging and provocative section, he first suggests that legitimacy provides a more useful analytic term than democracy, and then breaks it down in terms of participation,

accountability and transparency, and considers some additional factors. He then argues that when we look at the draft CFR from the perspective of transnational law-making and take into account the specificities of private law, the criteria described do not necessarily need to be met or are not met by traditional parliamentary democratic procedures. Professor Smits thus concludes that we should look beyond territorial entities such as national parliaments when looking for democratic legitimacy. He also emphasises that in the case of the draft CFR, it serves no further purpose than to provide inspiration to national legislators in any case.

In her article, “*Bibliotecas Digitales y Obras Cautivas*”, Maria Iglesias addresses a slightly different topic: digital libraries and captive works. She discusses a problem which stems from the organisation of intellectual property rights: even though the very purpose of intellectual property is to reach the public, certain works are lost to it: either the owner can no longer be found or identified, and obtaining the permission of the rights holder then becomes impossible; or when works are abandoned for other reasons. Specifically, she addresses the issue of what can be done with these ‘captive’ or ‘orphan’ works in digital libraries, as the problem is exacerbated by technological developments and the accompanying changes in intellectual property law. Due to the increased (over)protection of these works, they pass less frequently into the public domain.

Professor Iglesias places this *problématique* in the context of the current shift towards a knowledge-based economy, which turns access to knowledge into a matter of public interest. In the past fifteen years legislative focus has been strongly protective of creation. Both national and European legislators (notably in the context of the Lisbon Agenda) have now placed access and use of information at the centre of the political agenda, and the most important aim is to balance the protection of knowledge with the facilitation of access. She argues that it will not be sufficient to leave this to the market and illustrates this by discussing various (partial) solutions which have been developed in Europe and North America, ranging from *ad hoc* solutions to doctrinal proposals fundamentally overhauling the entire field of intellectual property law. She concludes that in all cases, the existence of captive works reflects a common deficiency in the system of intellectual property, which is incapable of responding to cases in which the market fails and causes works to become unavailable. She argues for the promotion of a legal regime or at least some common principles to address these failures. In the case of digital libraries, which serve the public interest by enabling preservation and wider availability of these works, governments should encourage the adoption of voluntary schemes to diminish the cost of transfer of works into these libraries. Instead, Professor Iglesias proposes a

subsidiary rule of intellectual property law, activated only when the rights holder does nothing to exploit her works and shows no intent of doing so in the future. Moreover, she suggests that legislatures define which type of digitalisation project should be considered to serve the public interest notably libraries, archives and museums, and projects which do not serve a commercial purpose. This system should then authorise that ‘silenced’ works are made available to the public.

The final two contributions describe different aspects of the ECJ’s judgment in *Cartesio*.<sup>2</sup> This judgment is essential to understanding the Court’s current approach to the interplay between European and private law. In his article, “*Cartesio* and *Grunkin-Paul*: Mutual Recognition as a Vested Rights Theory Based on Party Autonomy in Private Law”, Jan-Jaap Kuipers discusses the relationship between private law and Community law. Whereas Jan Smits discussed the legitimacy of the development of new rules, Kuipers’ article concerns current practice and how it can be improved, particularly when reconciling rules and principles of private international law with Community law. He suggests the two can complement each other, and proposes to use the principle of mutual recognition, as it is used in the area of free movement of goods, as a guideline.

As in the other contributions, Kuipers identifies technological development and globalisation as catalysts for a change that substitutes the strong link private parties have to one state for several looser links with various legal systems, thus increasing private autonomy and decreasing the role of conflict of law rules and public law considerations. He demonstrates that in cases dealing with the transfer of commercial entities and concerning surname law, the ECJ has taken an approach which is not of a completely Community law nature, does not solely refer to national law, and also does not take a (traditional) private international law approach. He explores to what extent a vested rights doctrine can be discerned from the Court’s decisions, how it differs from taking an approach solely based on mutual recognition, and what general conclusions may be drawn for private law, while warning against judicial overstretch in the application of EU citizenship rules. As Kuipers argues, academic interpretations of ECJ case law have often neglected the private international law perspective, and in his article, he endeavours to rectify this oversight, suggesting that application of the doctrine of vested rights serves both the interests of the EC as well as the national states when they wish to preserve their own identities.

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<sup>2</sup> European Court of Justice, Case C-210/06, *Cartesio*.

In the final article in this issue of the Journal, Beata Węgrzynowska also discusses the *Cartesio* judgment, and situates it within the context of company law and freedom of establishment under Community law, both with reference to prior case law and prospective Community legislation. She concludes that the judgment failed to deliver on some of the expectations leading up to it, most notably not bringing the expected clear rules on cross-border transfer of the seat of a company. She notes that after the judgment, the question that remains unresolved is whether there is a need for harmonisation and secondary law on companies' cross-border seat transfer. From her reading of the judgment, Węgrzynowska concludes that the ECJ adopted neither the incorporation nor the real seat theory, as the judgment does not impose a general obligation for companies to change the applicable law when they move their seats. It rather chose to deal with the matters at hand based on the provisions on freedom of establishment. She then discusses the question of whether different rules should apply to 'immigrating' and 'emigrating' companies, and whether the *Cartesio* judgment should be seen as overruling or systematising previous case law. She concludes that the *Cartesio* rule may lead to different treatment of companies moving out and moving in to member states, and also companies emigrating from countries which follow different theories.

Additionally, Węgrzynowska argues that more secondary law is needed on the issue of cross-border transfer of companies, and that the ECJ should not be left to fill the lacunae with its case-law.

To conclude the issue's focus on European Private Law, in the first of several book reviews featured in this journal, Marija Bartl discusses Fabrizio Cafaggi and Horatia Muir Watt's book, *Making European Private Law: Governance Design*. This book addresses issues and topics also discussed by the authors in this issue, notably what is private law in this changing day and age; how it changes due to globalisation; and what European law is doing with it.

Moving away from European Private Law, the remaining review essays turn to issues of public international law. Sacha Garben's review of Finn Laursen's book on *The Rise and Fall of the EU's Constitutional Treaty* provides a timely retrospective on the process which led to the creation and ultimate failure of that ill-fated document. On a global level, Valentina Vadi examines John W. Head's *Losing the Global Development War: A Contemporary Critique of the IMF, the World Bank, and the WTO*, addressing current issues surrounding the international institutions most involved in development, while Ciarán Burke reviews Philip Alston and

Euan McDonald's edited collection of essays on humanitarian intervention: *Human Rights, Intervention, and the Use of Force*. Finally, Axelle Reiter-Korkmaz takes us back into the neverending debate on the differences and relationship between law and morality in her review of Sean Coyle's *From Positivism to Idealism: A Study of the Moral Dimensions of Legality*.

On behalf of the Editorial Board of the European Journal of Legal Studies, I hope that you will enjoy reading the contributions to this issue and that they will make a valuable contribution to further development and renewal of European private law, a field which remains as dynamic as all the private actors in what is too often unjustifiedly dismissed as the 'old world'.

## **CREDITOR'S FAULT: IN SEARCH OF A COMPARATIVE FRAME**

Fabrizio Cafaggi\*

### **I. INTRODUCTION**

In this article, I compare the role of the creditor's (promisee's) conduct in contractual relationships in US and European legal systems. Different approaches to comparative negligence<sup>1</sup> and mitigation are first considered, and then a more general analysis of doctrines dealing with the creditor's position in the contractual relationship and the role of cooperation is carried out.

In this area, legal systems display significant divergences – partly rooted in their historical antecedents, and partly related to different concepts of contracts and contractual relationships. Continental European systems (with significant differences between Germany and France) recognise a strong role for comparative negligence and the duty to cooperate, while common law jurisdictions (with important differences between England and the US) limit the scope of comparative negligence and the duty to cooperate whilst attributing a wider role to the duty to mitigate.<sup>2</sup>

The divergence between the Continental European and common law regimes can largely be explained by their different forms of regulatory capitalism, as market structures and contractual interdependencies especially in the context of business transactions may influence the emergence and operation of a system's comparative negligence rule.<sup>3</sup> In

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<sup>1</sup> The term 'comparative negligence' in the American legal system can be translated into non-absolute contributory negligence. Within the text it will be used as the partial legal defense that reduces the amount of damages that a plaintiff can recover in a negligence-based claim based upon the degree to which the plaintiff's own negligence contributed to cause the injury. See: SMITH and ATIYAH, *Atiyah's Introduction to the law of contract*, 6<sup>th</sup> ed., OUP, 2006, 398, and more below text and footnotes.

<sup>2</sup> For a comparative analysis, see: PORAT, "Contributory Negligence in Contract Law: Toward a Principled Approach", 28 *U. Brit. Colum. L. Rev.*, 1994, p. 141. In general comparative in fault in contract law has been denied in the US: see: e.g. HAYSVILLE U.S.D. No. 261 v. GAF Corp., 666 P.2d 192, 199 (Kan. 1983). I should clarify that, in relation to the US, I will examine only the Restatement 2d of contract, leaving out the UCC.

<sup>3</sup> On the role of regulatory capitalism and its different models J. BRAITHWAITE, *Regulatory Capitalism: How it Works, Ideas for Making it Work Better*, Edward Elgar, 2008.

particular the different role of the judiciary in relation to private autonomy and to contractual freedom can at least partly be explained by the different relationships between States and markets.<sup>4</sup> The resulting comparative negligence and mitigation rules not only influence parties' *ex ante* risk allocation, but also have an impact on adjustments made in light of unanticipated events – including the choice between remaining in the contractual relationship versus deploying market alternatives. Where markets are thin and likely to fail, the relevance of the creditor's conduct will be heightened. As is common in many contractual relationships, new circumstances may require contract or market adaptations. Market prices of the traded commodity may increase or decrease to unexpected levels, new technologies may make the goods unsuitable for the buyer, or the seller may face an unexpected rise of production costs. But where markets are thin or where substitute performance is difficult to obtain due to high specific investments and/or interdependencies, the need for cooperation within the transaction will be amplified.

The duty to cooperate gains further importance in the case of collaborative contracts,<sup>5</sup> wherein the exchange of performances is aimed at achieving a common objective unlike conventional sales contracts.<sup>6</sup> In the context of 'business to business' transactions, where parties agree to co-design a product or jointly develop a research project, the role of the creditor in ensuring conforming performance by the debtor gains significance. The creditor's failure to cooperate may affect both the likelihood of breach and the consequences flowing therefrom. In some contractual relationships, such as joint ventures, the distinction between creditor and debtor may be difficult to maintain, and a failure to achieve the agreed upon outcome will often be the result of a lack of mutual cooperation.

As we shall see, the rules of comparative negligence and mitigation incentivise different types of behaviour among contracting parties. While the comparative negligence rule is primarily aimed at fostering contractual cooperation, mitigation encourages parties to seek alternative performance in the market.<sup>7</sup>

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4 See: C. MILHAUPT and K. PISTOR, *Law and capitalism*, U. Chicago Press, 2008.

5 See: F. CAFAGGI, "Contractual Networks and the Small Business Act: Towards European Principles?", *Eur. Rev. of Contract Law*, 2008, vol. 4, p. 493.

6 See: R. J. GILSON, C.F. SABEL, & R.E. SCOTT, "Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration", *Colum. L.R.*, 2009, vol. 109, p. 431.

7 See: C. J. GOETZ & R. E. SCOTT, "The Mitigation Principle: Toward A General Theory of Contractual Obligation" *Va. L. Rev.*, 1983, vol. 69, p. 967. (hereinafter GOETZ & SCOTT, "The Mitigation Principle").

Often within the contractual relationship performance is the outcome of a sequential game wherein the debtor and the creditor interact strategically. The creditor's conduct may precede or succeed the debtor's (promisor's) performance, and this interaction may generate reliance on the promise and its execution by the debtor which in turn may affect the decision-making process of the debtor concerning performance or breach. Reliance may occur before the contract is signed or after the promise becomes binding and legal systems give different weight to the role of reliance if it occurs before or after the contract is signed. In light of the fluid nature of the contractual relationship, the creditor's conduct should be analysed with regard to this sequential frame. Although the optimal level of a creditor's reliance and his related levels of investment in precautions and performance are not directly controlled by the doctrines of comparative negligence and mitigation, these doctrines play a significant role in shaping rules concerning the creditor's conduct.

## **II. COMPARATIVE NEGLIGENCE AND MITIGATION IN CONTRACT LAW COMPARED**

The core investigation concerns the relationship between comparative negligence and mitigation as regulatory principles of the creditor's conduct and its effect of debtor's decision making process. The first issue is whether these divergent rules concerning the creditor's conduct can be traced back to a unitary principle of cooperation among contracting parties, or if they instead perform different functions, varying in accordance with the nature of the contractual relationships and market structures. Three answers are currently provided by legal systems: (1) to combine comparative negligence and the duty to mitigate into a unitary principle; (2) to group them under a common principle of mitigation, but subdivide operational rules between the duty to mitigate and comparative negligence; and (3) to radically distinguish them by referring to different functions (*i.e.* deterrence and compensation).

In Continental Europe, legal systems like those of Germany, Austria and Italy adopt a unitary principle, differentiating between pre- and post-breach; while in other systems, comparative negligence and mitigation are distinguished. In the US, mitigation is well recognised while comparative negligence is not.<sup>8</sup> In France, comparative negligence (*faute de la victime* or *du créancier*) has been adopted by the Cour de Cassation, but the duty to

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<sup>8</sup> See: Restatement (Second) of Contracts § 350. For general rule that there is no apportionment of contractual damages based upon comparative fault of parties, see *Farnsworth on Contracts*, vol. III, 3rd ed., 2004, § 12.8, pp. 195-196.

mitigate has been rejected.<sup>9</sup> In England, the duty to mitigate is widely recognised while contributory negligence with apportionment, which was introduced in tort with the 1945 Act, is limited in contract common law.<sup>10</sup> It should be underlined that even those jurisdictions which reject or limit comparative negligence in the context of a two-party contract often allow apportionment, based on fault, in multiparty contracts.<sup>11</sup>

Comparative negligence and the duty to mitigate share the common feature of being defenses pleaded by the debtor. They are not affirmative claims, unlike the duty to cooperate, whose breach by the creditor can give rise to an obligation of the debtor to pay damages. There are differences between the two concerning the applicable standard: care in comparative negligence and reasonableness in mitigation. These differences may lead to different considerations concerning an individual party's ability to act in order to prevent the breach or to minimize its consequences. Reasonableness, in the context of mitigation, often allows subjective elements to be factored in, including, to a limited extent, impecuniosity. These elements are less frequently considered in comparative negligence. However, the key difference between comparative negligence and mitigation relates to creditor's expectations. In the case of comparative negligence, precautions by the creditor are based on the expectation of performance, not on that of breach. The opposite is true for mitigation, where the creditor is required to act upon the knowledge of breach or upon the expectation, after repudiation, that the debtor will breach. One additional difference between comparative negligence and mitigation, present in all legal systems to varying degrees, is that expenses incurred by the creditor to take precautions may not be recovered under comparative negligence, but will be recoverable under mitigation if deemed reasonable.

We find comparative negligence in systems that have opted for strict liability for the debtor as well as in fault-based regimes. Thus comparative negligence, when adopted, does not require a particular rule of debtor's liability, being compatible with both strict liability and fault. However, modes of damages' apportionment may change depending upon the debtor's liability regime in place. In a strict liability regime with comparative negligence, the debtor will bear all losses but for those 'attributable' to the creditor's negligence. In a negligence based regime, the creditor will bear all the losses from the breach but for those 'caused' by

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9 C. ANDRE, *Le fait du créancier contractuel*, LGDJ, Bibliothèque de droit privé, 2002, S. REIFERGESTE, *Pour une obligation de minimiser le dommage*, PUAM, 2002.

10 See: E. PEEL, *Treitel, The Law of Contract*, 12th ed., London, Thomson Sweet & Maxwell, 2007, pp. 1064-1066.

11 D. J. BUSSEL, "Liability for Concurrent Breach of Contract", *Washington University Law Quarterly*, 1995, vol. 73, p. 97, at p. 124 and p. 126.

the debtor's fault.

### III. COMPARATIVE NEGLIGENCE

Comparative negligence in contract is expressly recognised by legislation in Germany and Italy, Austria, the Netherlands and Switzerland.<sup>12</sup> Similar principles apply in Poland and Slovenia.<sup>13</sup> In France, recognition has occurred through judicial interpretation.

The rule applied both to contractual and extracontractual liability is often framed within the broader context of causation and is explicitly associated with the limitation of damages.<sup>14</sup> The creditor who has contributed to the breach (or whose conduct has increased the losses flowing therefrom) cannot be fully compensated.<sup>15</sup>

Creditor's conduct may concern a duty to take precautions affecting probability of breach – e.g. a duty to provide information about the effects of debtor's future performance on creditor's economic activity, a duty to warn about risks associated with debtor's performance or a duty to inspect the good or services and verify lack of conformity once performance is rendered.<sup>16</sup> There is then a wide array of creditor's conducts which do not directly affect the probability of breach, but instead impacts its consequences (e.g. the amount of losses).<sup>17</sup>

The creditor's cooperation may often be necessary to the debtor's performance. A failure to cooperate making performance more difficult or impossible may lead to the reduction of damages and/or to discharge of damages entirely. Even when the creditor's cooperation is not required, negligent or intentional conduct by the creditor that makes the debtor's performance more difficult may limit the creditor's recovery. The

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<sup>12</sup> In Germany, a general principle of contributory negligence, applying to both tort and contract, is provided for by § 254 BGB. In Italy it is regulated by art. 1227 CC. In Austria by § 1304 ABGB. In the Netherlands by art. 6:101 BW and in Switzerland by art. 44 CO.

<sup>13</sup> In Poland art. 362 CC and in Slovenia art. 243-244 CC.

<sup>14</sup> See: G.H. TREITEL, *Remedies for Breach of Contract (Courses of Action Open to a Party Aggrieved)*, Chapter 16, International Encyclopedia of Comparative Law (J.C.B. Mohr (Paul Siebeck), The Hague, Tübingen and Mouton, 1976, pp. 75-76.

<sup>15</sup> Paradigmatic is § 254 BGB.

<sup>16</sup> For a detailed examination concerning different groups of cases, see: A. PORAT, "Comparative Fault Defense in Contract Law", *Mich. L. Rev.*, 2009, vol. 107, p. 1397 (hereinafter PORAT, "Comparative Fault Defense", *o.c.*).

<sup>17</sup> For this distinction see: R. COOTER, "Unity in Tort, Contract and Property: The Model of Precaution", *Cal. L. Rev.*, 1985, vol. 73, p. 1 and A. PORAT, "Comparative Fault Defense", *o.c.*

boundaries between comparative negligence associated with breach and impossibility due to creditor's negligent behaviour are not always clear-cut.<sup>18</sup> When creditor's cooperation is 'necessary', a non-negligent failure by the creditor to cooperate may still place the entire burden on the debtor, while a negligent or intentional violation of the duty to cooperate may affect: (a) the choice of remedies available, *e.g.* making specific performance unavailable; (b) the level of recoverable damages; or (c) the possibility of creditor's discharge. In the latter case, the creditor may have contributed to making performance either more burdensome or partially or wholly impossible. This may occur due to the creditor's fault or even due to his faultless conduct. Legal systems attribute different roles to creditors' negligence which causes impossibility.<sup>19</sup>

In Germany, § 254 finds its origins in the principle of good faith.<sup>20</sup> In France, where no codified rules relating to comparative negligence exist, the negligent conduct of the creditor can diminish recoverable damages on the basis of causation even while no mitigation of damages is recognised on the basis of full compensation principle.<sup>21</sup>

In England, contributory negligence (equivalent to comparative negligence) as a means to apportion losses was introduced by statute in the area of tort law in 1945.<sup>22</sup> Its application to contract law has been limited, however, in order to avoid shifting the task of risk allocation from parties to courts. The application of contributory negligence to contract is well accepted when a breach of contract coincides with a tort.<sup>23</sup> Contributory negligence has also been applied to those cases, as in service provision, where the standard of liability is care rather than strict liability. It does not apply when liability for breach of contract is strict and not associated with carelessness, and its applicability is disputed when the defendant is liable for a contractual duty of care but carelessness does not make him liable in

18 F. CAFAGGI, *Comparing comparative negligence in contract law: in search for a framework*, unpublished, on file with the author.

19 F. CAFAGGI, *Comparing comparative negligence in contract law: in search for a framework*, *o.c.*

20 See: R. ZIMMERMAN and S. WHITTAKER, *Good Faith in European Contract Law*, Cambridge, Cambridge University Press, 2000, pp. 173-174.

21 See: M. FABRE MAGNAN, *Droit des obligations, 1 Contrat et engagement unilatéral*, Themis de droit, PUF, 2008, pp. 661-662, Y. M. LAITHIER, *Etude Comparative sur l'inexécution du contrat*, LGDJ, 2004, S. LE PAUTREMAT, "Mitigation of damages: a French perspective", *ICLQ*, 2006, vol. 55, p. 205 ff.

22 "The Law Commission, Contributory negligence as a defence in contract", w.p. 219, London, 1993, para 1.4.

23 *Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 852 ("Vesta v Butcher").

tort.<sup>24</sup> In some circumstances, English Courts have apportioned damages under causation, thereby allowing for a similar result as would have been achieved under comparative negligence.<sup>25</sup>

In the US, the application of comparative negligence to contractual liability has generally been rejected.<sup>26</sup> Although a small handful of courts have begun to explicitly recognise its applicability in certain circumstances, the majority of courts and the Restatement 2d of Contracts continue to hold the opposite view.<sup>27</sup>

Among those legal systems that expressly recognise the principle of comparative negligence, many identify the degree of negligence as a criterion relevant to the apportionment of liability.<sup>28</sup> Thus, while the presence of debtor's fault affects the 'if' question of liability (e.g. whether the debtor can be held liable) regardless of the degree of fault, the level of creditor's fault is important to both the questions of 'if' and 'how much' liability will be attributed to the creditor. In some legal systems, creditor's negligence becomes relevant only when it is preponderant, *i.e.* beyond 50%.

Two concluding remarks should be made. First, those systems that have introduced a specific rule to apportion liability for breach of contract distinguish this case from that of causation. Comparative negligence is typically depicted as conduct that concurs to the breach without breaking the causal link. Second, there are no strong reasons to exclude apportionment based on causation, even in a pure strict liability regime where both parties have 'contributed' to the breach with no fault. For example, it is possible to allocate losses between parties by alternatively looking at comparative foreseeability.<sup>29</sup>

#### IV. MITIGATION

The principle of mitigation has been widely adopted, but its scope and

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24 See: G.H. TREITEL, *An Outline of the Law of Contract*, London, Butterworths, 1995, p. 397.

25 See: *Tennant Radiant Heat Ltd v Warrington Development Corp* [1988] 1 E.G.L.R. 41.

26 See: R. SCOTT, "(partial) defense of strict liability", *U. Mich. L. R.* 1381, 2009, vol. 107, p. 1381 and A. PORAT, *Comparative Fault Defense*, *o.c.*

27 See: e.g. *Gateway Western Railway Co. v. Morrison Metalweld Process Corp.*, 46 F.3d 860 (8th Cir. 1995).

28 See: the Italian Civil Code under art. 1227 para. 1.

29 See: R. DANZIG, "*Hadley v. Baxendale*: A Study in the Industrialization of the Law", *J. LEG. STUD.*, 1975, vol. 4, p. 249.

domain vary across legal systems.<sup>30</sup> Mitigation is well recognised in common law jurisdictions, such as those of the US and England. Mitigation has been recognised within a general principle in Continental European countries such as Germany, Italy, Austria, the Netherlands, Poland, Slovenia and others. In France, mitigation has been rejected, although similar results may be attained through the principle of *faute de la victime*.<sup>31</sup> This alternative route, however, allows substitute performance by a third-party at the expense of the debtor when judicially ordered.<sup>32</sup> Outside of the European Union, the rule of mitigation is recognised in the new Russian Civil Code.<sup>33</sup>

The scope of the mitigation rule, however, varies even within Continental European countries. In Germany, it includes two situations: first, a creditor cannot recover if she could have avoided the losses flowing from the debtor's breach at a reasonable cost; and second, damages are reduced to account for any gains accrued to the creditor as a result of the breach.

Other legal systems distinguish between cases in which the injured party has acted after the breach, increasing the amount of losses, and cases in which she has failed to reduce losses causally linked to the breach. In the former hypothesis, courts often refer to causation and consider the creditor's conduct to be an intervening cause, interrupting the causal link and thus preventing full recovery. In the second hypothesis, they frame the conduct as mitigation and exclude recovery of the losses that the injured party could have avoided with a reasonable effort.<sup>34</sup> In case of violations by the creditor, the difference concerns the liability standard, in case of compliance the difference relates to the costs of precautionary measures:

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30 See: GOETZ & SCOTT, "The Mitigation Principle", *o.c.*, pp. 967-968.

31 In two judgments of 19 June 2003, the French Supreme Court explicitly rejected the introduction of a general principle of mitigation in the French law of tort, thereby departing from the solutions reached in England and other legal systems: Cass 2ème civ (19 June 2003) No 930 FS-PBRI, *Xbauflaire c/Decrept* and No 931 FS-PRBI, *Dibaoui c/ Flamand*, Bull Civ II No 203, D 2003 Jur 2396; Petites Affiches 2003, No 208, 16.

32 While the duty to mitigate imposes a legal obligation on the injured party without any need for judicial intervention, in France the creditor can seek an alternative performance at the expense of the debtor only if authorized by the judge. See: S. WHITTAKER, *Contributory Fault and Mitigation; Rights and Reasonableness: Comparisons between English and French Law* in L. TICHY, ed., *Causation in Law*, Univerzita Karlova v Praze, 2007 [hereinafter Whittaker, *Contributory Fault and Mitigation*] (p. 17 of the file with author).

33 See: Art. 404 of the Russian Civil Code.

34 In England, often even the duty to mitigate is framed under causation principle. See: S. WHITTAKER, *Contributory Fault and Mitigation, o.c.*, (p. 2 of the file with author).

on the creditor in comparative negligence, on the debtor in mitigation.

Mitigation is generally required after breach has occurred, and forces the creditor to seek alternative performance in the market or, when alternative performance is unavailable, to act reasonably to minimise losses flowing from the breach.<sup>35</sup>

Mitigation can occur in two cases: (a) where the contract has been terminated by the injured party after a material breach; or (b) where the obligations under the contract are still in force, and the injured party has not been discharged from performing its own obligation.

The duty to mitigate is generally referred to in the latter case, but in some legal systems it may also operate in the former. In the latter, the creditor will have to counterperform and seek alternative performance in the market. In the former, the content of the duty may be affected by the decision to terminate. The creditor faces some uncertainty stemming from the risk that termination was wrongful. If that proves to be the case, then seeking alternative performance may be deemed unreasonable mitigation and the creditor may have to bear the costs associated with its decision to seek such alternative performance.<sup>36</sup>

Does mitigation impose a duty to deal with the breaching promisor? Rarely, a duty to mitigate will translate into a duty to renegotiate the contract after breach. More frequently, mitigation is framed as part of the duty of good faith or, in the international contract law context, the duty of cooperation.<sup>37</sup> The implications are related to criteria concerning the distribution of gains and losses following renegotiation.

When is mitigation reasonable? What is the standard for the mitigator? Generally speaking, the injured party is only required to take reasonable steps to mitigate. This reasonableness is measured both subjectively and objectively. At least two dimensions of reasonableness are considered: one relating to the performance of the specific contract and the costs of

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<sup>35</sup> In the US, mitigation duties arise after repudiation. See: *Edward M. Crough, Inc. v. Department of General Services*, 572 A.2d 457, 467 (D.C. 1990); Restatement (Second) § 350, comment B.

<sup>36</sup> In relation to England, S. WHITTAKER, See: *Contributory fault and mitigation*, o.c. (p. 11 of the file with author). For a more detailed analysis, see: F. CAFAGGI, *Comparing comparative negligence in contract law: in search for a framework*, unpublished, on file with the author.

<sup>37</sup> See: Unidroit Principles of International Commercial Contracts 2004, Article 5.1.3: ("Each party shall cooperate with the other party when such co-operation may reasonably be expected for the performance of that party's obligations.")

mitigation (e.g. repair or cure by the injured party), and the other relating to the market structure. The two dimensions are related when the Court has to define what constitutes substitute performance and how far the injured party must go in accepting substitute performance. This issue concerns both the offer of a substitute performance by the debtor and the search for an alternative performance in the market.<sup>38</sup>

Mitigation through cover is more likely to be reasonable when the market is competitive and alternative performances are easily available. The less competitive the market, the more difficult it becomes to find alternative performances and the more 'unreasonable' mitigation through cover becomes, forcing parties to find alternative solutions within the relationship. Thus, the market form is an independent variable that, via reasonableness, affects the existence and the breadth of the duty to mitigate.<sup>39</sup>

The doctrine of mitigation, as it has particularly been applied in Continental Europe, has important drawbacks insofar as it fails to account for market form. If the market is competitive, it is generally accessible both to the debtor and the creditor. A duty should arise on the creditor only if it is cheaper for him to seek alternative performance than it is for the debtor. If the market is not competitive, it will be difficult for either party to seek alternative performance. In this case cover is unavailable and mitigation will consist of reducing the losses stemming from the breach by negotiating contractual modifications (e.g. reduced quantity, providing alternative goods, etc.). The current mitigation doctrine available in continental Europe, unlike in the US, does not provide a sufficiently clear menu of choices for cover between debtors and creditors interacting in competitive markets, and does not give clear indication of what should the promisee do when alternatives in the markets are unavailable.

## V. REASONABLE RELIANCE

While the role of creditor's reliance in contract law is widely recognised via several doctrines in the US, it is less relevant in Continental European systems, except during the precontractual stage. Beneficial reliance is protected by making promises enforceable or by ensuring damages if there is unreasonable refusal to conclude a contract. Detrimental reliance is discouraged through a number of doctrines, among which causation and foreseeability bear a primary role. To induce reasonable reliance implies

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<sup>38</sup> See: S. WHITTAKER, *Contributory Fault and Mitigation*, o.c.

<sup>39</sup> This is one of the most important insight of GOETZ & SCOTT, *The Mitigation Principle*, o.c. 1024.

discouraging over-investment by both parties: by the creditor seeking to maximise the gain from performance, and by the debtor in precautions taken to avoid breach and in facing unanticipated circumstances. To a certain extent, protection of only 'reasonable' reliance may induce the creditor to take additional precautions in order to protect the profitability of his investments, thereby leading to similar results as those achieved by comparative negligence in Continental European systems.

The different doctrines that promote reasonable reliance operate as functional equivalents to comparative negligence only to a limited extent. They share with comparative negligence the fact that reasonable reliance becomes legally relevant only if the debtor breaches, and it reduces compensation only for those losses incurred by making reasonable commitments to take advantage of the expected performance. Unreasonable reliance, outside of breach, cannot constitute an affirmative claim for the debtor. It differs from comparative negligence because it deals predominantly with decisions influencing the consequences of excuses and breach and not the breach itself. In fact, conducts relevant under reasonable reliance concern more the consequences of the breach (L) than its probability (P). Though the issue is hotly debated, reasonableness related to reliance should not be associated with the probability of breach but with that of impossibility or impracticability of performance. Creditors should rely on performance by debtors and reasonableness should limit the level of investments in relation to impossibility due to force majeure and hardship or frustration. As in comparative negligence, when reasonable reliance applies, the creditor should expect performance unlike in mitigation when she reacts to a breach which has already materialised.

When reliance damages are granted instead of expectation damages,<sup>40</sup> two goals are pursued: protection of the creditor's interest and provision of incentives to rely reasonably on the promised performance. Absent comparative negligence, reliance damages may provide the creditor with better incentives than expectation damages to invest reasonably.

The fault standard, deployed to reduce recoverable damages in comparative negligence when the creditor is negligent, may bring about different results than the reasonableness standard used in reliance when the promisee has overrelied.

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<sup>40</sup> Reliance damages is the measure of compensation given to a person who suffered an economic harm for acting in reliance on a party's promise who fails to fulfill its obligation, while expectation damages are damages recoverable from a breach of contract. The former is generally limited to incidental damages while the latter is composed of incidental damages and consequential damages.

## VI. CAUSATION

Comparative negligence, associated with causation as a means to apportion liability between contracting parties, plays an important role in Germany, in countries that follow the German system, as well as in Italy and France. In England, causation operates more as an alternative to comparative negligence.<sup>41</sup> In general, causation does not lead to apportionment since it operates through either/or mechanisms.<sup>42</sup> Only in rare cases have courts been willing to apportion losses under 'comparative' causation.<sup>43</sup>

Causation as a means to allocate liability from breach has two dimensions: (a) the domain of the risk associated with performance; and (b) the risk's distribution between the debtor and the creditor. When a loss is deemed to be too remote, courts conclude that the risk is not part of the contractual allocation and thus place the burden entirely on the creditor.<sup>44</sup> But remoteness can also be used to distribute the risk among parties. If the risk was contemplated by both parties, the creditor's conduct may operate as an intervening cause, breaking the causal link.<sup>45</sup> More often, however, a lack of contemplation is framed within foreseeability. In this context, the relevant question concerns whether the risk, associated with the creditor's conduct, was contemplated by the parties and, if so, how was that risk allocated.<sup>46</sup>

Causation can thus have two different consequences on creditor's conduct: (1) if the creditor's conduct breaks the causal link, the debtor is not liable and the creditor bears all the losses; or (2) if she only contributes to the breach, liability is 'shared' and apportionment of damages follows. In the first scenario, what is really considered is the but for causality of the creditor's conduct and negligence is not relevant. In the second scenario, the existence of fault and the degree of negligence are relevant to the apportionment of the consequences of the breach. However in this case references directly to comparative negligence are more frequent given the 'resistance' to apply comparative causation, deploying an apportionment

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41 In England, see: The Law Commission, "Contributory Negligence as a Defence in Contract", 1993, LAW COM. No. 219, cit. § 3.9 and 3.10.

42 See: A. S. BURROWS, "Contributory Negligence in Contract: Ammunition for the Law Commission", *L. Q. Rev.*, 1993, vol. 109, p. 175.

43 See: *Tennant Radiant Heat*, [1988] 1 E.G.L.R. 41.

44 In the US, see: e.g., *Suitt Constr. Co. v. Ripley's Aquarium, LLC*, 108 Fed. Appx. 309, 314 (6th Cir. 2004).

45 In the US, see: *Suitt Constr. Co.*, 108 Fed. Appx. 309 for premise that only damages proximately caused by the debtor's breach are recoverable to the creditor.

46 In the US, see: Restatement (Second) of Contracts § 351, comment A.

criterion regardless of relative fault of the parties. The second scenario is very rare since risk distribution in causation generally operates as an either/or rule.

## VII. FORESEEABILITY

Foreseeability as a means to allocate risks and liabilities between contracting parties plays an important role in France and Italy but not in Germany.<sup>47</sup> It has great relevance in Anglo-American law under the cases following the doctrine announced in *Hadley v. Baxendale*.<sup>48</sup> In particular, it has been used in the U.S, as an alternative to comparative negligence and as a means to control reasonable reliance.<sup>49</sup> The rule does not directly affect the role of the creditor but it can influence the allocation of risks and losses. However, there are several dimensions in which the doctrine of foreseeability may indirectly affect the creditor's conduct in relation to debtor's breach.

On the one hand, foreseeability incorporates the debtor's expectations concerning the creditors' conditions into the contract. These expectations may concern the creditor's needs but might also relate to his economic or physical conditions relevant for debtor's performance.

On the other hand, foreseeability reduces the creditor's incentive to opportunistically increase the losses related to a potential breach between the time of formation and the time of breach. For instance, additional investments aimed at 'exploiting' opportunities from the use of the good to be delivered by the debtor may not be recoverable because they are unforeseeable and thus not contemplated by the parties at the time of contract.<sup>50</sup>

The foreseeability rule is aimed at promoting communication among parties for risks known to the creditor or that ought to be known at time of contracting.<sup>51</sup> On the basis of the foreseeability rule, a risk and the occurrence of a loss can be transferred from the creditor to the debtor only if the former informs the latter, making him aware of its existence.<sup>52</sup>

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47 But see: creditor's duty to warn under § 254 II BGB.

48 *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854).

49 For the US, see: B. HERMALIN, A. KATZ and R. CRASWELL, "The Law and Economics of Contracts," in M. POLINSKY and S. SHAVELL, *Handbook on Foundations of Law and Economics*, Elsevier, 2007, p. 104

50 See: Illustration 2 to Restatement (2d) § 351.

51 I. AYRES and R. GERTNER, "Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules", *Yale L. J.*, 1989, vol. 99, p. 87.

52 See: GOETZ & SCOTT, *The Mitigation Principle*, o.c.

If the creditor fails to inform the debtor about the specific contingencies, damages are not recoverable because unforeseeable. In this case only those losses associated with ordinary market ones can be recovered.<sup>53</sup> Whether the failure to inform depends on negligent conduct is in principle irrelevant when foreseeability is applied, unlike in the case of comparative negligence.

### **VIII. EXPLAINING THE DIFFERENCES BETWEEN ANGLO-AMERICAN AND CONTINENTAL EUROPE APPROACHES**

The degree of convergence or divergence between the US and Continental Europe depends on the level of analysis: if we consider only comparative negligence in contract, divergences are relatively high, whilst when mitigation is included, divergences decrease. Furthermore, if – when the debtor's performance is rendered impossible due to the creditor's own conduct – the creditor's duty to cooperate is integrated into the analysis, divergences over the existence of a general principle further decrease. The brief and extremely synthetic examination of different doctrines across jurisdictions has shown that some of them combine allocation of liability and apportionment of damages whilst others allocate liability on the basis on an either-or criterion without apportioning damages. In the former, we should include comparative negligence, mitigation, reasonable reliance and, to a limited extent, foreseeability. Only indirectly, the reciprocal duties of cooperation and good faith constitute a means to apportion damages. Causation and impossibility deploy primarily either/or mechanisms, although for the latter fault and some type of apportionment are sometimes considered.<sup>54</sup>

The Continental European approach, with important differences among its legal systems, adopts a cooperation principle highlighting the relevance of creditor's pre- and post-breach conduct based on risk-sharing and leading towards loss apportionment.

The US seem to distinguish sharply between a creditor's pre- and post-breach conduct, limiting the mitigation principle to the post-breach phase despite proposals to introduce comparative negligence principles in contract law.<sup>55</sup> However upon deeper scrutiny, the principle (not the rules!) of apportionment related to comparative fault emerges in several doctrines

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53 See: *Transfield Shipping Inc v. Mercator Shipping Inc. the Achilles* [2009] 1 A.C.

54 For broader and more detailed analysis see: F. CAFAGGI, *Comparing comparative negligence in contract law: in search for a framework*, unpublished, on file with the author.

55 For proposals concerning the introduction of comparative negligence, see: A. PORAT, "The Contributory Negligence Defence and the Ability to Rely on the Contract", *L.Q.R.*, 1995, vol. 111, p. 228.

where part of the loss is allocated to the creditor primarily because the risk was initially borne by her or because the risks' allocation has shifted over time, due to unanticipated circumstances. In particular, reasonable reliance, and to some extent foreseeability when apportionment is allowed, seem to play similar functions to comparative negligence in allocating both liabilities and damages in the case of breach: providing incentives to adopt precautionary measures to tackle risks of non-performance and to avoid over-investments.<sup>56</sup>

How can the differences between the US and England, on the one hand, and part of Continental Europe and international regimes, on the other, be explained?

There are three categories of complementary explanations: historical, philosophical and functional.

Historically, the departure from contributory negligence as a total bar from recovery in both contract and tort predates codifications in Continental Europe. The approach taken by European codifications relates to the law of obligations, including both contractual and extracontractual relationships. The reference point in the law of obligations is the creditor both as a promisee and as a potential victim of the breach. The regime referred to the law of obligations has been designed to be applicable to contractual and extracontractual settings.

The departure from contributory negligence and from binary risk allocation is much more recent in the US in the context of tort law. In contract law, the application of comparative negligence has been generally rejected while other doctrines, primarily those promoting reasonable reliance, foreseeability and causation, have operated as functional equivalents to affect the creditor's conduct and the allocation of risks which reduced the need for comparative negligence.

Though they may operate as functional equivalents, divergences are still relevant, going to the core of the different approaches to contractual

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<sup>56</sup> For premise that the use of foreseeability functions in a similar fashion to comparative negligence on the part of creditor, see *Afram Export Corp. v. Metallurgiki Halyps, SA*, 772 F.2d 1358, 1368 (1985) (stating that debtor could not foresee "imprudent" conduct by creditor and thus damages attributable to creditor's imprudent conduct not recoverable) and *Rexnord Corp. v. DeWolff Boberg & Associates, Inc.*, 286 F.3d 1001, 1003-05 (7th Cir. 2002) (noting that the result in *Hadley* "may have depended on the mill's failure to have protected itself against the consequences of a delay by the carrier by having a spare part on hand" and there "was a sense in which the mill was the author of its own loss").

relationships and contract law in Anglo-American and European continental systems, with all the internal distinctions pointed out earlier. Differences between the US and England – the two common law systems – seem to be more a matter of degree than a divergence of the foundations upon which they are grounded. Overall, considering the deployment of other doctrines, England seems to preserve the more traditional view of Anglo-American contract law as a risk allocation device despite the introduction of comparative negligence, whereas the growing importance of reliance in US contract law partially counteracts strong opposition in the US to comparative negligence.

The philosophical explanation for this divergence builds on the distinction between the higher emphasis on corrective justice in Continental Europe and the more realist and consequentialist approach in the US which is grounded on risk allocation. This distinction may contribute to explaining the use of different doctrines to achieve similar results. Comparative negligence, more so than mitigation, can be grounded on corrective justice,<sup>57</sup> reducing recoverable losses ‘caused’ by the negligent conduct of the creditor, whereas the use of foreseeability and mitigation can be better justified on consequentialist grounds. Comparative negligence, whose introduction can also be justified on efficiency grounds, recalls the concept of reciprocity and the obligation to ‘protect’ the other party’s interest. Failure to do so would impose an additional and unfair burden on the debtor.

Beyond the historical and philosophical explanations there is perhaps a functional distinction that may further shed light on the different place of comparative negligence in contract and tort law in the U.S. and the (theoretically) uniform regime, based on the law of obligations, of some Continental European systems.

Contract law in the US and England is still predominantly seen as a risk allocation device.<sup>58</sup> While it is recognised that contract law can also

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<sup>57</sup> On corrective justice as a foundation of continental contract law see: e.g. R. ZIMMERMANN, *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today*, Oxford, Oxford University Press, 2001, and J. GORDLEY, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment*, Oxford, Oxford University Press, 2006.. In general see: A. T. VON MEHREN, “A General View of Contract, Chapter 1”, in J.C.B. MOHR (Paul SIEBECK), *International Encyclopedia of Comparative Law*, The Hague, Tübingen and Mouton, 1982, pp. 64-65.

<sup>58</sup> See: e.g., O. W. HOLMES, *The Common Law* (Dover Publications, Inc., New York 1991), 299-301; A. SCHWARTZ & R. E. SCOTT, “Contract Theory and the Limits of Contract Law”, 113 Yale L. J. 541, 556 (2003); R. A. POSNER, “Let Us Never Blame a Contract Breaker”, 107 Mich. L. Rev. 1349 (2009).

perform other functions such as fostering cooperation and preventing opportunistic behavior, these other functions are seen as ancillary.<sup>59</sup> This could explain reluctance to adopt a comparative negligence regime which aims at fostering cooperation and is at odds with risk allocation. The duty to mitigate, distinguished from the rule of comparative negligence, reflects the idea that parties should use market alternatives when available to minimise losses or maximise gains stemming from new opportunities arising outside the contractual relationship. Thus, the duty to mitigate is perceived as compatible with risk allocation or fostering optimal risk allocation across different states of the world.

European systems focus more attention on the cooperative nature of the venture created when parties enter into contractual relationships and the opportunity to share the risks of non performance.<sup>60</sup> The relevance of the market structure and the availability of alternative options when one party is in breach bears a more limited role than that of cooperation. When the emphasis is on the cooperative venture then risk sharing, comparative negligence becomes more appropriate.

To what extent does the increased focus on risk allocation over cooperation in the US explain the resistance to the introduction of comparative negligence in US contract law? In theory risk allocation can occur by using either an either/or system (*e.g.*, strict liability or negligence without defence) or a 'sharing' system, where defences that include apportionment are allowed. In practice, however, US courts continue to be reluctant to address risk allocation through an apportionment-based, risk 'sharing' system.

## IX. CONCLUDING REMARKS

In this paper I have shown that the great divergence concerning the rule of comparative negligence in contract law between England and the US on the one hand, and among European continental systems with the exception of France on the other, needs to be rethought. A wider range of doctrines beyond mitigation should be considered on the ground that they

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59 See: *Market Street Associates v. Frey*, 941 F.2d 588 (7th Cir. 1991); see: also R. A. POSNER, *Economic Analysis of Law*, 7th ed., 2007, pp. 94-95.

60 On the role of different institutional environments in shaping contracting practices, see: S. DEAKIN, Ch. LANE, & F. WILKINSON, "Contract Law, Trust Relations, and Incentives for Co-operation: A Comparative Study" in S. DEAKIN & J. MICHIE (eds.) *Contracts, Co-operation, and Competition*, Oxford, Oxford University Press, 1997, pp. 105-139 and G. TEUBNER, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences", *Modern Law Review*, 1998, vol. 61, p. 11.

act, at least partially, as functional equivalents to comparative negligence.

The divergence diminishes if we move away from specific doctrines to the general principle of creditor's cooperation. This cooperation is relevant in many doctrines of contract law in the US, and to a lesser extent, England, although it has different scope in these legal systems. In England, where comparative negligence has limited application, the doctrines of causation and foreseeability provide some recognition of creditor's conduct and apportionment of losses. The narrow and very limited recognition of the rule of comparative negligence in the US is 'compensated' for by reference to other apportionment techniques in different doctrines such as those fostering reasonable reliance, mitigation and foreseeability.

In Continental Europe the doctrine of comparative negligence is widely recognised, and its influence has spread into international commercial laws such as CISG and Unidroit principles where both comparative negligence and mitigation are recognised. The principle of creditor's cooperation is well grounded in Continental European legal systems and has also found its way into the new proposal from PECL to DCFR.

The potential explanation for this divergence may vary if we consider the rule of comparative negligence or the principle of creditor's cooperation and its apportionment of losses regime as encompassing different doctrines. The recognition of the principle, under different doctrines but with different weight, does not eliminate the divergence, rather forces us to rethink its reasons. The lack of comparative negligence in the US, when considered along with the deployment of other forms of risk-sharing and apportionment of losses stemming from breach of contract, conforms to the idea that contract law is mainly directed at risk allocation. In European continental systems, the recognition of a general rule of comparative negligence and mitigation delineates a general principle based on the law of obligations, applicable to both contract and tort. Contractual relationships are generally characterised by a legal framework fostering higher level of cooperation. These divergences have been explained with reference to different business practices and community norms which legal systems have internalised. This 'sociological' perspective can partly shed light on these divergences but needs to be complemented by a deeper understanding of the core function of contract law and business rules.

# DEMOCRACY AND (EUROPEAN) PRIVATE LAW: A FUNCTIONAL APPROACH

Jan M. Smits\*

## I. INTRODUCTION

The development towards a Common Frame of Reference for European private law<sup>1</sup> not only raises questions about what should be the contents of private law rules for the European Union,<sup>2</sup> but it also challenges our traditional understanding of how rules of private law should come into being. In the European member states, private law is traditionally ‘made’ in close cooperation between the national legislatures and the courts: it is the result of an intricate decision-making process at the national level, in which legal academia is often also involved.<sup>3</sup> This is, to varying degrees, true for both civil law and common law jurisdictions.

The drafting of the Common Frame of Reference prompts the question to what extent its rules should meet similar requirements as to legitimacy as the national rules in the member states. The prevailing view seems to be that the rules of the Draft CFR (DCFR) do not meet the requirements of democratic legitimacy necessary in the field of private law. Given that the DCFR was drafted by legal scholars, united in the Study Group on a European Civil Code and in the Research Group on the Existing EC Private Law, the DCFR would, in this respect, be a typical example of *Professorenrecht*. This is also acknowledged by the drafters, who presented

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<sup>1</sup> C. VON BAR *et al*, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference*, Interim Outline Edition, München, Sellier, 2008.

<sup>2</sup> The Draft CFR was already elaborately discussed from this, and other, perspectives. See, e.g., A. VAQUER, *European Private Law Beyond the Common Frame of Reference*, Groningen, Europa Law Publishing, 2008, special issue of the *European Review of Contract Law*, 2008, No 3, pp. 223-454; F. CAFAGGI and H. MICKLITZ, *After the Common Frame of Reference: What Future for European Private Law?*, Cheltenham, Edward Elgar, 2009.

<sup>3</sup> Cf R.C. VAN CAENEGEM, *Judges, Legislators and Professors: Chapters in European Legal History*, Cambridge, Cambridge University Press, 1987.

their text as an “academic CFR”, a scholarly product that is not politically legitimised and that, at best, could form the basis for a “political CFR” to be drafted by the European Commission. But it is difficult to deny that, in drafting the DCFR, many relevant choices were made. In a recent book, Bastiaan van Zelst therefore sketches the following objections against this working method:

“This seems worrying from two different angles. First of all, the scholars that are involved in the drafting of the DCFR lack democratic legitimacy. The group represents neither all of the populations of the member states, nor their political convictions. Secondly, it is questionable whether professors should be vested with the translation of social-political reality into legislation. In a democratic society, this would seem to principally be the task of the (democratically legitimised) legislature [...]”.<sup>4</sup>

Other authors, most of them united in another group, namely the Study Group on Social Justice in European Private Law,<sup>5</sup> also hold the view that the Europeanisation of private law should take place in a much more democratic way than is the case at present. This would not only be true for the DCFR, but for any attempt to create a European private law. These authors are clearly influenced by the Critical Legal Studies view that all law, including private law, is politics.<sup>6</sup> In other words, if private law shapes the distribution of wealth in a modern society, creating a future European private law would primarily be a political process. Therefore, the rules of contract law that account for the right balance between the free market and social justice should be determined in a democratic way. Only consulting ‘stakeholders’ and legal practice in drafting new European rules –as the European Commission proposes– is then not enough; instead, the European Parliament and national legislators, including national

<sup>4</sup> B. VAN ZELST, *The Politics of European Sales Law*, The Hague, Kluwer Law International, 2008, pp. 244–245.

<sup>5</sup> STUDY GROUP ON SOCIAL JUSTICE IN EUROPEAN PRIVATE LAW, “Social Justice in European Contract Law: A Manifesto”, *European Law Journal*, 2004, pp. 653–674. See also: M.W. HESSELINK, “The Politics of a European Civil Code”, *European Law Journal*, 2004, pp. 675–697; M.W. HESSELINK, “The Ideal of Codification and the Dynamics of Europeanization: The Dutch Experience”, in S. VOGENAUER and S. WEATHERILL, *The Harmonisation of European Contract Law*, Oxford, Oxford University Press, 2006, pp. 39–70; U. MATTEI, “Hard Code Now! A Critique and a Plea for Responsibility in the European Debate over Codification”, in U. MATTEI, *The European Codification Process: Cut and Paste*, The Hague, Kluwer Law International, 2003, pp. 107–128.

<sup>6</sup> Cf. D. KENNEDY, “Form and Substance in Private Law Adjudication”, *Harvard Law Review*, 1976, pp. 1685–1778; D. KENNEDY, “The Political Stakes in ‘Merely Technical’ Issues of Contract Law”, *European Review of Private Law*, 2002, pp. 7–28.

parliaments, must be involved.<sup>7</sup> From a different theoretical perspective, Alain Verbeke recently also argued that the Europeanisation process of private law should be “re-politicised”.<sup>8</sup> This is an important view: if these authors are correct about their ‘democracy thesis’, it means that European private law needs to be ‘made’ in a very different way than it is now.

In this contribution, I argue that this view -the ‘democracy thesis’- is mistaken. The present Europeanisation and globalisation processes should radically change our view of how rules, either existing or new ones, in the area of private law are legitimised. My aim is not to reiterate the entire debate about the legitimacy of new modes of governance,<sup>9</sup> but to focus directly on rules that seek to regulate the conduct of private parties. It is thus the core of private law, and specifically the law of contract, with which I am concerned. In this area, I argue that there are different (and better) ways of legitimising private law outside of national parliaments.

This contribution is structured as follows. Section II begins with a more general overview of new types of rule-making that, although they evade the democratic decision-making process, are important in regulating the behaviour of individuals and states. This raises the question of to what extent the emergence of these new types of rules pose a problem for the legitimacy of private law. I argue that the problem arises only if we perceive legitimacy in a very restrictive way, limiting it to democratic decision-making by national parliaments. Section III therefore proposes an alternative approach, a functional one, in which the concept of democracy is deconstructed into various building blocks. This more general theoretical framework should then allow us to assess the Draft CFR in more detail in section IV. Section V sums up the main argument.

## II. LAW WITHOUT A STATE: A PROBLEM OF DEMOCRACY?

The drafting of legal rules by academics for the future application of these rules by private parties or states -as in the case of the Draft CFR- is only one example of so-called “private global norm-production”.<sup>10</sup> Over the last decades, an increasing number of rules and policies were developed beyond

<sup>7</sup> Cf. STUDY GROUP ON SOCIAL JUSTICE, “Manifesto”, *o.c.*, p. 669.

<sup>8</sup> A. VERBEKE, “Negotiating (in the Shadow of a) European Private Law”, *Maastricht Journal of European and Comparative Law*, 2008, pp. 395-413, at note 15.

<sup>9</sup> Cf. e.g. D. CURTIN and R.A. WESSEL, *Good Governance and the European Union*, Antwerp, Intersentia, 2005; B. EBERLEIN and D. KERVER, “New Governance in the European Union”, *Journal of Common Market Studies*, 2004, at p. 121.

<sup>10</sup> See, for this term, G. TEUBNER, “Breaking Frames: The Global Interplay of Legal and Social Systems”, *American Journal of Comparative Law*, 1997, pp. 149-169, at p. 157.

the nation-state.<sup>11</sup> Apart from the European Union, which has its own procedures for legitimising the rules it produces, important policy decisions are made by organisations such as the WTO, IMF and World Bank. In the area of private law, the age-old example of the *lex mercatoria*<sup>12</sup> is now supposedly supplemented by the “*lex laboris internationalis*”<sup>13</sup> and the “*lex sportiva internationalis*”.<sup>14</sup> In addition to this, types of voluntary law,<sup>15</sup> such as norms adopted by corporate networks –the most important example being codes of conduct for corporate social or environmental responsibility–, rules of standardisation organisations for technical standards, such as the “*codex alimentarius*”, and other types of self-regulation<sup>16</sup> are also supposed to influence the conduct of private parties.

Most of these authoritative rules, norms and policies from “sites of governance beyond the nation-state”<sup>17</sup> would not count as binding law in a traditional conception of legal rules: they do not meet the formal criterion of being enacted by the relevant authorities. But they often do set the norms for specific groups of people and are important in predicting their behaviour. One can argue that, as the legitimacy of law was found in the laws of nature in the seventeenth and eighteenth centuries and in democratic political legislation in the nineteenth and twentieth centuries, it is now time to find again a new source of legitimacy for legal rules.<sup>18</sup> It is clear that such a new source of legitimacy cannot be found in the authority of the state. Not only is the authority of the norms that were just described not dependent on the state, their authority is also no longer exercised within clearly defined territorial entities; instead, the relevant

<sup>11</sup> See, for an elaboration of the idea of private law beyond the nation-state, R. MICHAELS and N. JANSEN, “Private Law Beyond the State? Europeanization, Globalization, Privatization”, *American Journal of Comparative Law*, 2006, pp. 843–890; N. JANSEN and R. MICHAELS, “Private Law and the State”, *Rabels Zeitschrift*, 2007, pp. 345–397; and the special issue of the *American Journal of Comparative Law*, 2008, pp. 527–844.

<sup>12</sup> Cf recently V. PIERGIOVANNI, *From Lex Mercatoria to Commercial Law*, Berlin, Duncker & Humblot, 2005.

<sup>13</sup> Cf the contributions in J.D.R. CRAIG and S.M. LYNK, *Globalization and the Future of Labour Law*, Cambridge, Cambridge University Press, 2006.

<sup>14</sup> See F. LATTY, *La “Lex Sportiva”: Recherche sur le Droit Transnational*, Leiden, Martinus Nijhoff, 2007; K. FOSTER, “Is There a Global Sports Law?”, *Entertainment and Sports Law Journal*, 2003, pp. 1–18.

<sup>15</sup> See, for this term, A.-M. SLAUGHTER, “International Law in a World of Liberal States”, *European Journal of International Law*, 1995, pp. 503–538, at p. 518.

<sup>16</sup> See F. CAFAGGI, *Reframing Self-Regulation in European Private Law*, The Hague, Kluwer Law International, 2006; D. SCHIEK, “Private Rule-Making and European Governance: Issues of Legitimacy”, *European Law Review*, 2007, pp. 443–466.

<sup>17</sup> G. DE BURCA, “Developing Democracy Beyond the State”, *Columbia Journal of Transnational Law*, 2008, pp. 101–158, at p. 104.

<sup>18</sup> Cf G. TEUBNER, “Breaking Frames”, *o.c.*, p. 157.

rules are often chosen and applied across existing borders.<sup>19</sup> Issues that were previously within the domain of democratic decision-making at the national level have thus shifted to the international level.

If we accept that this type of lawmaking beyond the national state is becoming more and more important, what does this mean for the democratic legitimacy of the rules created in this process? In a recent article, Grainne De Burca distinguishes several approaches in understanding the relationship between democracy and trans-national law.<sup>20</sup> If legitimacy is a legal concept that cannot be replaced by efficiency or expertise -meaning: public power exercised outside of the authority of the state should not escape the expectation of democratic legitimation-<sup>21</sup> the best approach is one that tries to find *alternatives* for democracy. The democratic ideal should then be pursued in forms other than through the national parliament. With the multiplication of legal sources, the need for such a rethinking of democracy is very clear.<sup>22</sup> The opposing view -now that there is no trans-national demos and electorate, democracy at another level than the national one is impossible-<sup>23</sup> cannot be accepted.

The important insight to be derived from this is that (private) law does not necessarily have to find its legitimacy in the decisions of national parliaments.<sup>24</sup> Such a view would regard legitimacy in a very restrictive way. It is true that, since the eighteenth century, democracy was closely associated with the state, but this need not be the case. The idea of democracy was present long before the nation-state was developed,<sup>25</sup> and now that we accept law that transcends the boundaries of a territory and a

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<sup>19</sup> J. DELBRÜCK, "Exercising Public Authority Beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies?", *Indiana Journal of Global Legal Studies*, 2003, pp. 28-43, at p. 29.

<sup>20</sup> G. DE BURCA, "Developing Democracy", *o.c.*, p. 117.

<sup>21</sup> G. DE BURCA, "Developing Democracy", *o.c.*, p. 113.

<sup>22</sup> See also J. WEILER, quoted by DE BURCA, "Developing Democracy", *o.c.*, p. 105: "what is required is [...] a rethinking of the very building blocks of democracy to see how these may or may not be employed in an international system which is neither state nor nation"; reference is sometimes made to the need for a "cosmopolitan democratic theory".

<sup>23</sup> See R. DAHL, "Can International Organizations be Democratic: A Skeptic's View?", in I. SHAPIRO and C. HACKER-CORDON, *Democracy's Edges*, Cambridge, Cambridge University Press 1999, pp. 19-36; R. DAHL, *On Democracy*, New Haven & London, Yale University Press, 1998.

<sup>24</sup> See also, for this debate, MICHAELS and JANSEN, *o.c.*, p. 879; criticised by F. RÖDL, "Private Law Beyond the Democratic Order? On the Legitimatory Problem of Private Law 'Beyond the State'", *American Journal of Comparative Law*, 2008, pp. 743-767, at p. 751.

<sup>25</sup> J. DUNN, *Democracy: A History*, New York, Atlantic Press, 2005.

people, we need to again dissociate democracy from the state. The question therefore is how to change our conception of law, very much based on the nation-state experience, so as to meet the different conditions of global governance.<sup>26</sup> The importance of such a venture is paramount because, as one author puts it, “democracy will be possible beyond the nation-state – or democracy will cease to be possible at all”.<sup>27</sup>

In the next section, it is attempted to deconstruct democracy into various building blocks. If we establish the functions that democracy currently fulfils, we can subsequently see whether these functions can be fulfilled in another way than through national parliaments.

### III. DECONSTRUCTING DEMOCRACY

The approach followed in this section is one in which the concept of democracy is deconstructed into various building blocks. If we are able to define the functions of democracy, it is possible to establish whether these functions can also be fulfilled in another way in the area of European or even global lawmaking. It is clear that finding such substitutes for the democratic legitimacy of law is only possible when we stop thinking in terms of national states or parliaments. Instead, the legitimacy of law should be found in other factors. It is also important to realise that our concern is not with *all* aspects of democracy or of tasks of national parliaments: as indicated above, this paper only deals with the lawmaking process, in particular, in the area of private law. Having said this, this section first suggests that it is not democracy that is at stake when drafting law, but rather the *legitimacy* of the rules in question. Second, it is argued that such legitimacy can be found in three different factors.

It should first be acknowledged that it is difficult to use the *term* democracy for something that is not related to representative government. The present connotation of the word refers so much to parliamentary representation that it can be confusing to use it for mechanisms that are equal to democratic decision-making at other levels than the state. This is one of the reasons why Rubin suggests abandoning the term in political analyses.<sup>28</sup> It seems better to use the word legitimacy instead, even though

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<sup>26</sup> See J. HABERMAS, “The Postnational Constellation and the Future of Democracy”, in J. HABERMAS, *The Postnational Constellation: Political Essays*, Cambridge, Polity Press, 2001, at p. 58.

<sup>27</sup> A. PELINKA, “Democracy Beyond the State: On the (Im-)Possibilities of Transnational Democracy”, *Trans: Internet-Zeitschrift für Kulturwissenschaften*, No 15/2003.

<sup>28</sup> E.L. RUBIN, “Getting Past Democracy”, *University of Pennsylvania Law Review*, 2001, pp. 711-792.

this term does not have a fixed meaning.<sup>29</sup> The legitimacy of a rule could refer to the political procedures used to put that rule into place, but also to its moral contents or acceptance. In my view, it is this latter meaning that is most important: the legitimacy of a rule refers to the perception that it is the most desirable or proper rule to be adopted in the given circumstances.<sup>30</sup> This makes legitimacy not only dependent on the acceptability of those being affected by the rule, but also on the acceptance by society in general or by the academic forum.<sup>31</sup> It still leaves open the question of which criteria are decisive for this legitimacy to exist.

Political science tells us that democracy fulfils three different functions: participation, accountability and transparency.<sup>32</sup> Participation at the national level traditionally consists of the parliamentary representation of everyone in everything. However, when the polity is no longer defined along territorial lines or on the basis of a people -as is the case with the type of rules discussed here- such participation can no longer be based on state institutions. With the trans-nationalisation of law, the more effective forms of participation are likely to be based on groups, creating new political communities along functional lines.<sup>33</sup>

Accountability can be defined as the principle that one is responsible for one's conduct *vis-à-vis* another person or organisation. Such responsibility usually includes the obligation to inform that person or organisation about one's past or future actions, to justify them and to be held responsible in

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<sup>29</sup> Cf J. DELBRUCK, "Exercising Public Authority Beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies", *Indiana Journal of Global Legal Studies*, 2003), pp. 29-43.

<sup>30</sup> Cf W.R. SCOTT, *Institutions and Organisations*, Thousand Oaks, Sage, 2nd ed., 2001: "a generalised perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions"; see also J. BLACK, "Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes", *LSE Legal Studies Working Paper*, No 2/2008.

<sup>31</sup> In the definition of SCOTT, *Institutions and Organisations*, *o.c.*, it is only the perception of the governed that is important.

<sup>32</sup> Cf B. KINGSBURY *et al.*, "The Emergence of Global Administrative Law", *Law and Contemporary Problems*, 2005, pp. 15-61.

<sup>33</sup> Cf DELBRÜCK, *o.c.*, p. 38: "functional authorities of varying geographical scope run by individuals selected by lot from among those with a material interest in the issue in question"; see also G. DE BURCA, "Developing Democracy", *o.c.*, p. 123; P. HIRST, *Associative Democracy: New Forms of Economic and Social Governance*, Amherst, University of Massachusetts Press, 1994, p. 19: affairs of society should as much as possible be managed by voluntary and democratically self-governing associations as these have more information than central bureaucracies.

case of misconduct.<sup>34</sup> Accountability is thus primarily an “ex post governance mechanism”. Traditionally, accountability at the national level is an electoral one: officeholders have to account to those who are entitled to vote for their election. If their performance is insufficient, they will not be re-elected. But this is not a very precise or efficient accountability mechanism: voters do not provide reasons for their votes and can be motivated by many other motives than the standards one wants the officeholders to meet. There are many other types of accountability one can think of,<sup>35</sup> including fiscal accountability through audit regimes, legal accountability -the accountholder is held liable for a violation of a standard-, hierarchical accountability of employees *vis-à-vis* their superiors and accountability through the market where the satisfaction of those affected by a policy decides its success.

Transparency, finally, refers to decision-making that is open to the gaze of others -does not take place behind closed doors- and that is based on freely available information. As a political norm, however, transparency is rather vague:<sup>36</sup> it does not make clear who these others are and which information exactly is to be shared with them. Surely, there can be no complete access to government information for everyone and for everything. This makes it important to ask why we actually need transparency. In any democratic theory, the need for openness of government follows from the fact that people can only on the basis of such a theory make a well-informed, rational choice for the government by which to be governed. It also facilitates the public debate crucial in a democratic society and a prerequisite for holding government officials accountable.<sup>37</sup> Again, this presumes that the transparency requirement is directed towards the public at large. Another approach is to apply the transparency requirement to the group of people most affected by the rules in question. If an important condition for a democracy to be successful is the quality of the deliberation,<sup>38</sup> it may well be that informed

<sup>34</sup> Cf. A. SCHEDLER, “Conceptualizing Accountability”, in A. SCHEDLER *et al.*, *The Self-Restraining State: Power and Accountability in New Democracies*, London, Lynne Rienner Publishers, 1999, pp. 13-28.

<sup>35</sup> See *e.g.* the overview, with many references, by G. GARN, “Moving from Bureaucratic to Market Accountability: The Problem of Imperfect Information”, *Educational Administration Quarterly*, 2001, pp. 571-599, at p. 578.

<sup>36</sup> This is the point made by M. FENSTER, “The Opacity of Transparency”, *Iowa Law Review*, 2006, pp. 885-949, at p. 889.

<sup>37</sup> See for all these aspects M. FENSTER, *o.c.*, pp. 895-ff., with reference to James Madison’s statement that “a popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both”.

<sup>38</sup> Deliberative democracy emphasises the importance of a free, rational, debate among citizens, however difficult this may be in practice. The obvious references are

deliberation among specialists leads to greater legitimacy than a general debate among non-specialists.

If we accept these factors as the building blocks of democracy, we have a tool to deal with legitimacy at the trans-national level. One important advantage of this approach is to recognise that these criteria can be met to a greater or to a lesser extent. Often, we do not need the full participation of everyone when dealing with certain issues. Likewise, accountability and transparency are also gradual concepts.<sup>39</sup> The exact levels of participation, accountability and transparency to meet the legitimacy requirement can thus be made dependent on several factors.<sup>40</sup> One factor concerns the type of rules: rules of a more technical nature require less 'democratic' legitimacy than rules about issues that are already highly politicised.<sup>41</sup> Thus, legitimacy can lie in the merits of the decision-makers, such as their ability to give independent expertise.<sup>42</sup> Another factor concerns the level of harmonisation: minimum harmonisation may need less legitimacy than full harmonisation.

It should be emphasised that this approach also works in the other direction: rules that *did* pass through the national democratic decision-making process may not meet the requirements of legitimacy as just defined.<sup>43</sup> The mere fact that a democratic process took place is then not enough to conclude that a rule is sufficiently legitimate.<sup>44</sup>

#### **IV. THE LEGITIMACY OF THE DRAFT CFR**

With the framework provided in the previous section, we are now able to turn back to the Draft Common Frame of Reference for European private law. Are Van Zelst and others right in claiming that private law should come about in a democratic process with the involvement of national parliaments -the 'democracy thesis'- or is there another way to legitimate

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to J. RAWLS, *Political Liberalism*, New York, Columbia University Press, 1993; and J. HABERMAS, *Faktizität und Geltung*, Frankfurt am Main, Suhrkamp, 1992.

<sup>39</sup> G. DE BURCA, "Developing Democracy", *o.c.*, p. 107, claims that we need to have "the fullest possible participation and representation of those affected".

<sup>40</sup> See A. HÉRITIER, "Elements of democratic legitimation in Europe: an alternative perspective", *Journal of European Public Policy*, 1999, pp. 269-282, at p. 270.

<sup>41</sup> See e.g. F. FISCHER, *Technocracy and the Politics of Expertise*, London, Sage, 1990.

<sup>42</sup> G. DE BURCA, "Developing Democracy", *o.c.*, p. 122.

<sup>43</sup> There is no need to refer to the extensive literature on public choice. Instead of all, see D.A. FARBER and P.P. FRICKEY, *Law and Public Choice: A Critical Introduction*, Chicago, University of Chicago Press, 1991.

<sup>44</sup> Democratically made deficient legislation can lead to people questioning the usefulness of democracy as a whole. See J. GOLDRING, "Consumer Protection, the Nation-State, Law, Globalization, and Democracy", *Journal of Computer-Mediated Communication*, 1996, No 2.

the rules of the DCFR? In this section, I provide three arguments as to why (European) private law may not need a democratic basis in the traditional sense because it can meet the three building blocks of democracy in another way. After a discussion about accountability (A) and participation (B), the section on transparency (C) reveals that the nature of private law partly stands in the way of considering it as an area subordinate to policymaking.

#### 1. *Accountability: Legitimacy through jurisdictional competition*

In the brief characterisation of accountability provided above, it became clear that the core of the concept consists of a relationship between the relevant actors and a forum and that such a relationship can be established in different ways. If the rule-maker cannot be held responsible in the traditional way -by being voted away-, what could be an alternative? Without claiming this is the only possible way of enhancing the legitimacy of trans-national rules,<sup>45</sup> I believe that market accountability can be much more important in legitimating law than is usually assumed. This is in particular true in those areas of law that contain many non-mandatory rules, such as the law of contract. If market accountability in, for example, schools means that good schools attract students whereas bad schools are held accountable by students that leave, a similar mechanism can operate in the fields of facilitative law.

This view is, of course, not new. The theory of jurisdictional competition, as developed by Charles Tiebout,<sup>46</sup> emphasises that when parties have the freedom of choice as to the applicable legal regime -as is the case in large parts of contract law-, they will choose the regime they like best. Such jurisdictional competition is an alternative to allocating local public goods in a political decision-process: the preferences of citizens can be established by allowing the citizens to choose for a particular legal regime, even without these citizens moving physically.

There are limits to establishing preferences by jurisdictional competition.<sup>47</sup> The most important limit arises when law is regarded as

<sup>45</sup> One other way of enhancing accountability is to label and rate types of self-regulation or even of contracts: see OMRI BEN-SHAHAR, "The Myth of the 'Opportunity to Read' in Contract Law", *University of Chicago Law & Economics Olin Working Paper*, 2008, No 415.

<sup>46</sup> C. TIEBOUT, "A Pure Theory of Local Expenditures", *Journal of Political Economy*, 1956, pp. 416-424. See also A. OGUS, "Competition between National Legal Systems: A Contribution of Economic Analysis to Comparative Law", *International and Comparative Law Quarterly*, 1999, pp. 405-418.

<sup>47</sup> See in more detail, also on the question of 'voice' and 'exit', J.M. SMITS, "European Private Law and Democracy", 2008, *o.c.*, pp. 49-ff.

mandatory by the state. It is difficult to imagine that such mandatory national law would be set by an authority beside the national lawmaker because this concerns the fundamental social contract between the governed and the government.<sup>48</sup> But when designing the structure of relationships between economic entities, primarily driven by market efficiency, it is not clear why it is the state that should guarantee a democratic process.<sup>49</sup>

But even if this restriction is accepted, jurisdictional competition remains an important alternative to centralist lawmaking in the area of contract law, the backbone of the DCFR. This does mean, however, that we have to abandon the idea that there is only one legitimate group responsible for lawmaking. Too often, only nation-states are seen as legitimate democratic lawmakers. But in an increasingly globalising and interconnected world, there is no necessary relationship between the nation-state and the legitimacy of law. The number of legal regimes need not be the same as the number of nation-states.<sup>50</sup> Consequently, multiple, overlapping authorities may come to coexist, with individuals primarily choosing their own authority.<sup>51</sup>

Particularly in the context of the Common Frame of Reference, we should be aware that choice is essential for its proper functioning. The DCFR provides definitions of legal terms, fundamental principles and model rules and can be used as a ‘toolbox’<sup>52</sup> by the European legislator as a source of inspiration for the ECJ and national courts and as an optional code for contracting parties that want to make the CFR the law applicable to their contract. All these functions imply that the DCFR is only applicable if the relevant actors prefer it over national law. If the DCFR is *not* made applicable by the contracting parties or is *not* used as a source of inspiration by legislators or courts, the drafters are held accountable for the lack of success of this particular legal regime.

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<sup>48</sup> Thus HADFIELD and TALLEY, “On Public versus Private Provision of Corporate Law”, *Journal of Law, Economics and Organization*, 2006, pp. 414-441, at p. 415.

<sup>49</sup> Cf HADFIELD and TALLEY, *o.c.*, p. 415.

<sup>50</sup> Cf A. FISCHER-LESCANO and G. TEUBNER, “Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law”, *Michigan Journal of International Law*, 2003-2004, pp. 999-1046.

<sup>51</sup> Cf S. TARROW, “Building a Composite Polity: Popular Contention in the European Union”, *Institute for European Studies Working Paper*, No 3/98; A. HÉRITIER, *o.c.*, p. 276.

<sup>52</sup> European Commission, *Communication on European Contract Law and the Revision of the Acquis: The Way Forward*, COM (2004) 651 final, *Official Journal*, 2005, C 14/6, p. 14.

## 2. *Participation: The experience with optional instruments*

It was seen above<sup>53</sup> that the legitimacy of rules does not necessarily have to be based on the participation of everyone in everything. The adherents of the ‘democracy thesis’ set out in section I seem to suggest the opposite: since all law is politics, changing the law requires a political decision by a parliament that should be involved in both the drafting and the adoption of the rules. This is a rather traditional view of democratic input and one that is clearly contradicted by our experience with the drafting of civil codes.

First, even mandatory national civil codes were often drafted without much input from parliaments. It is true that the final decision about the enactment of a code is taken by national parliaments -and when it would come to the introduction of a *binding* European civil code, this should also be the case-, but in drafting the code, the relevant decisions are usually made by the drafters themselves.<sup>54</sup> This makes sense because of the often highly detailed and technical questions involved in the drafting process. Only when it comes to politically sensitive issues, such as the establishment of the proper level of consumer protection, parliaments should be involved. An important exception to this working method was the procedure followed in the establishment of the new Dutch civil code. Immediately after the start of the drafting process in 1947, a list of questions about key issues was presented to Dutch parliament.<sup>55</sup> However, insofar as these questions involved matters of the code’s structure and other typically scholarly issues, I do not see how any parliamentary input can be helpful. For instance, the question of whether a general action for unjust enrichment should be part of the code<sup>56</sup> is not a question to be decided by parliament.

Second, it should be re-emphasised that present efforts to Europeanise private law -and in particular the work on the DCFR- will not lead to rules that are binding in the same way as we are familiar with at the national level. If the DCFR is primarily a source of inspiration for the European legislator and the courts, or is at most an optional contract code, its legitimacy need not be found in the traditional democratic decision-process. This is confirmed by the success of various optional instruments

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<sup>53</sup> Section III.

<sup>54</sup> See also P.A.J. VAN DEN BERG, *The Politics of European Codification*, Groningen, Europa Law Publishing, 2007.

<sup>55</sup> See, for more details, M.W. HESSELINK, “The Ideal of Codification and the Dynamics of Europeanization: The Dutch Experience”, in *The Harmonisation of European Contract Law, o.c.*, pp. 39-ff.

<sup>56</sup> This was a question that had in fact to be answered by Dutch parliament.

that came into place without any input of parliaments in the drafting stage. Instead, the input consisted of a parliamentary decision to adopt an already *existing* instrument drafted by legal experts. The two most important examples of such instruments are the American *Uniform Commercial Code* (UCC) and the United Nations *Convention on the International Sale of Goods* (CISG). In these two cases, the only ‘democratic’ input consisted of individual American state parliaments –in the case of the UCC– and of national parliaments –in the case of the CISG– adopting an already existing instrument. These experiences indicate that parliaments may not necessarily be involved in the drafting of a successful code.

### 3. *Private law: Design or organism?*

The third building block of democracy relates to the requirement of transparency. If applied to rule-making in the field of private law, it is my view that, in particular, the quality of the deliberation is important: we have seen before that informed deliberation among specialists may lead to greater legitimacy than a general debate among non-specialists. When applied to private law, what comes closest to the transparency requirement is that new statutes and case law are assessed on the basis of the already existing coherent system, which provides us with the criteria to assess to what extent the new rules fit into the existing normative order.<sup>57</sup>

At the same time, however, we should be cautious in applying the requirement of transparency to the field of private law as if this is just another policy field. The reason for this relates to a more general understanding of private law. It would only be necessary to render private law completely subordinate to democratic decision-making if it is a means to a (political) end.<sup>58</sup> The question is whether this view of private law as a matter of conscious *design* by some legislator is in line with the nature of the field. Most of the time, private law is seen as independent from state institutions, having a rationality of its own.<sup>59</sup> The private law system has developed over the ages in a long process of trial and error.<sup>60</sup> The spontaneous development towards the standards that a community prefers

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<sup>57</sup> This can be argued for from different theoretical perspectives. See, e.g., E.J. WEINRIB, *The Idea of Private Law*, Cambridge, Harvard University Press, 1995; R. DWORKIN, *Law's Empire*, Cambridge, Harvard University Press, 1985.

<sup>58</sup> Cf. B.Z. TAMANAHA, *Law as a Means to an End*, Cambridge, Cambridge University Press, 2006.

<sup>59</sup> See, e.g., WEINRIB, *The Idea of Private Law*, *o.c.*; see, for a general framework, N. JANSEN, “The Authority of the DCFR”, W. MICKLITZ and F. CAFAGGI, *After the Common Frame of Reference: What Future for European Private Law?*, 2009.

<sup>60</sup> This is not to deny there are differences between civil law and common law, though not as profound as suggested by, e.g., E.L. GLAESER and A. SHLEIFER, “Legal Origins”, *Quarterly Journal of Economics*, 2001, pp. 1193-1229.

provides this area of law with a rationality of its own which is independent from most public aims.<sup>61</sup>

If we thus understand private law more as an *organism* than as a product of explicit design, it becomes clear why democratic input in this area of law can only have a limited impact. The *Machbarkeit* [“makeability”] of the law of contracts, tort and property is limited, and the view that private law is an instrument with which to change the existing distribution of power and richness<sup>62</sup> should be regarded with suspicion. This would mean that private law serves distributive justice, a view defended before by Anthony Kronman.<sup>63</sup> The most important objection against this position is that distributive justice requires a political decision to choose, out of all possible distributions of wealth, one that best establishes the desired collective social, economic or political goal. If private law is thus made part of establishing distributive justice, it is made subordinate to this goal; if this goal is not reached, private law fails. In my view, however, it is not the state that is to decide *ex ante* what a just private law requires. At best, the result can be corrected *ex post*.<sup>64</sup> Moreover, the redistribution of welfare through (in particular) contract law is doomed to fail because future contracting parties are not likely to contract with ‘weaker’ parties if they would run the risk of avoidance of their contract. This is also the message of Charles Fried:

“Redistribution is not a burden to be borne in a random, ad hoc way by those who happen to cross paths with persons poorer than themselves. Such a conception, heart-warmingly spontaneous though it may be, would in the end undermine our ability to plan and to live our lives as we choose”.<sup>65</sup>

The above does not imply that democratic input is never useful; it does imply, however, that the degree of legitimacy is dependent on the type of law being put into place. Facilitative law needs less legitimacy than mandatory law. Put otherwise: national democratic input is useful in the case of interventionist law, such as consumer protection and employment law, because preferences as to the level of intervention differ between countries. In facilitative law, preferences are better revealed by

<sup>61</sup> Cf F.A. HAYEK, *Law, Legislation and Liberty*, London, Routledge, 1973-1979.

<sup>62</sup> Cf STUDY GROUP ON SOCIAL JUSTICE IN EUROPEAN PRIVATE LAW, *o.c.*, pp. 653-ff.

<sup>63</sup> A. KRONMAN, “Contract Law and Distributive Justice”, *Yale Law Journal*, 1980, pp. 472-511.

<sup>64</sup> Cf WEINRIB, *The Idea of Private Law*, *o.c.*, pp. 211-ff.

<sup>65</sup> C. FRIED, *Contract as Promise: A Theory of Contractual Obligation*, Cambridge, Harvard University Press, 1981, p. 106.

jurisdictional competition.<sup>66</sup>

## V. CONCLUSIONS

The main argument of this article is that ‘democratic’ legitimacy does not have to come about through territorial entities such as national parliaments. There are other methods of legitimating law; which method is best, depends on a range of factors such as the type of rules and the level of harmonisation. In the case of the Draft CFR, it is important to realise that it is at most a source of inspiration for European and national legislators and courts and an optional code to be chosen by contracting parties if they believe it serves their interests better than national law. This optional character of the DCFR must mean something for its legitimacy. It is primarily the participation of the mentioned actors that decides on the actual legitimacy of the non-binding DCFR. This does not exclude that parliaments can still play a role –for example, by *ex post* accepting “public acts characterised by expertise and rationality”<sup>67</sup> but it is different from the role they have to play in setting mandatory rules.

The approach set out in this contribution opens the possibility to investigate whether the new types of law described in section II meet the necessary requirements of legitimacy. The mere fact that these types of law are often set at the European or global level and do not pass through national parliaments is, as such, not relevant in assessing their merits. What is relevant is to what extent they meet the requirements of participation, accountability and transparency. This differentiated approach, in which each new type of rules is assessed on the basis of these factors, was applied here to the case of the DCFR. It shows that the ‘democracy thesis’ cannot be accepted: new forms of private law require new forms of legitimacy.

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<sup>66</sup> N. GAROUPA and A. OGUS, “A Strategic Interpretation of Legal Transplants”, *Journal of Legal Studies*, 2006, pp. 339-363, at pp. 341-342.

<sup>67</sup> See DELBRÜCK, *o.c.*, p. 40.

## BIBLIOTECAS DIGITALES Y OBRAS CAUTIVAS

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### I. INTRODUCCIÓN

El destino natural de una obra es el público. La mayoría de las creaciones intelectuales, en todo caso las publicadas, incorporan un discurso para ser transmitido al público. Sin embargo, se dan situaciones en las que las obras se ven obligadas, a causa de la configuración específica de los derechos de propiedad intelectual,<sup>1</sup> a permanecer calladas. El caso paradigmático es el de las denominadas obras huérfanas, obras respecto de las cuales es imposible identificar o localizar al titular de derechos. Sin la posibilidad de obtener su permiso, tales obras no pueden ser reproducidas ni comunicadas al público. Su papel en la esfera pública se ve drásticamente mutilado. Un silencio similar irrumpe de nuevo en el caso de las obras descatalogadas, obras que están al margen del mercado. Podría decirse que una obra descatalogada es una obra abandonada.<sup>2</sup> A diferencia de las obras huérfanas, se conocen los titulares de derechos e incluso pueden llegar a localizarse, pero éstos no muestran un interés inmediato en la explotación de sus obras. Dado que las obras están aún protegidas por los derechos de propiedad intelectual y que tal protección persiste durante 70 años a la

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\* El contenido del presente artículo se corresponde con dos ponencias presentadas por la autora precisamente sobre el tema que da título al *paper*: Bibliotecas digitales y obras cautivas. La primera: COMMUNIA conference on Public Domain in the Digital Age, fue organizada por el proyecto COMMUNIA (La red temática europea sobre el dominio público digital: <http://communia-project.eu> ) y celebrada en Louvain-la-Neuve entre el 30 de junio y el 1 de julio de 2008. La segunda: “The future of...” Conference on Law & Technology (<http://www.one-lex.eu/futureof/>), organizada por el Grupo de Trabajo InfoSoc en colaboración con el Departamento de Derecho del Instituto Europeo de Florencia, y celebrada en Florencia el 28 y 29 de Octubre del mismo año. Me gustaría agradecer a los organizadores y especialmente al público de ambas conferencias los comentarios a las dos exposiciones que han sido tenidos en cuenta en la elaboración del presente trabajo. Trabajo que, no obstante, es aún un *work in progress*. De ahí mi invitación a que los futuros lectores a que me remitan todas las críticas y sugerencias que estimen convenientes ([maria-jose.iglesias@fundp.ac.be](mailto:maria-jose.iglesias@fundp.ac.be)).

<sup>1</sup> En este artículo utilizamos indistintamente los términos derechos de propiedad intelectual y derechos de autor para referirnos a los derechos de autor y los derechos afines. Tal denominación se justifica en el hecho de que buena parte de los textos legislativos en lengua española utilizan ambas expresiones. Recordemos por ejemplo que la ley española en este ámbito se denomina *Ley de Propiedad Intelectual*.

<sup>2</sup> Véase al respecto: D. KHONG, “Orphan Works, Abandonware and the Missing Market for Copyright Goods”, *International Journal of Law and Information Technology*, 2007, pp. 57-58.

muerte del autor,<sup>3</sup> las bibliotecas digitales no pueden digitalizarlas ni, mucho menos, hacerlas accesibles al público. Así, una obra estéril desde un punto de vista puramente comercial, se convierte en una obra estéril desde una perspectiva cultural. La cautividad reaparece de nuevo en el caso de otras situaciones de abandono, por ejemplo, cuando los titulares de derechos no responden a las peticiones de los usuarios. De acuerdo con la normativa en vigor, los titulares tienen el derecho de no contestar. Su silencio equivale, por tanto, a una respuesta negativa. Las obras cautivas o silenciadas pueden también ser obras no publicadas, materiales que en su origen ni siquiera fueron concebidos como obras, sin vocación de pasar a formar parte de la esfera pública. Pensemos, por ejemplo, en las cartas o en los diarios personales. Tales documentos pueden tener un valor inestimable para las generaciones futuras. Todas estas situaciones se complican todavía más en el caso de obras de autoría múltiple: obras en las que diferentes autores, artistas o intérpretes u otros titulares de derechos retienen la titularidad conjunta de la obra. El silencio o la negativa injustificada de uno de ellos pueden originar el silencio absoluto de la obra.

Aunque la importancia práctica del problema aún no ha sido del todo demostrada,<sup>4</sup> no es aventurado concluir que la cautividad más que tratarse de una excepción representa la regla. Las estimaciones recogidas en el *Gowers Review* apuntan en este sentido. Allí se sugiere, aún sobre una base anecdótica, que el 40 por ciento de todas las obras impresas son obras huérfanas o que sólo el 2 por ciento de las obras protegidas por la propiedad intelectual se comercializan.<sup>5</sup> Por otro lado, en el Informe de Enseñanza a Distancia, la Oficina de Copyright de los EEUU reconoce que, además de los problemas relativos a la localización de los titulares de derechos, las principales dificultades para utilizar obras protegidas en actividades educativas a distancia son los largos retrasos en la respuesta a las peticiones de los usuarios, la ausencia de respuesta y los precios o condiciones irrazonables exigidos por los titulares de derechos.<sup>6</sup>

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<sup>3</sup> Art. 1 Directiva 2006/116/CE del Parlamento Europeo y del Consejo, de 12 de diciembre de 2006, relativa al plazo de protección del derecho de autor y de determinados derechos afines (Versión codificada), DO L 372 de 27.12.2006, pp. 12-18.

<sup>4</sup> S.V. GOMPEL, "Unlocking the Potential of Pre-existing Content: How to Address the Issue of Orphan Works in Europe" [Borrador, Julio 2007], *International Review of Intellectual property and Competition Law*, 2007, pp. 669-702), p. 7, accesible en [http://www.ivir.nl/publicaties/vangompel/IIC\\_2007\\_6\\_orphan\\_works.pdf](http://www.ivir.nl/publicaties/vangompel/IIC_2007_6_orphan_works.pdf); Copyright Office, *Report on Orphan works*, 2006, p. 92.

<sup>5</sup> A. GOWERS, *The Gowers Review of Intellectual Property*, 2006, pp. 69-70, accesible en [http://www.hm-treasury.gov.uk/media/6/E/pbro6\\_gowers\\_report\\_755.pdf](http://www.hm-treasury.gov.uk/media/6/E/pbro6_gowers_report_755.pdf).

<sup>6</sup> Copyright Office, *Report on Copyright and Digital Distance Education*, 1999, pp. 17 y 79-seq. Léase también su Appendix B: I. HINDS, *Marketplace for Licensing in Digital Distance Education*, pp. 249-326.

Preocupaciones similares se concluyen de su Informe sobre obras huérfanas.<sup>7</sup> Así, una parte importante de los materiales que tienen el potencial de modelar e influenciar la sociedad queda limitada a bienes comercializados o bienes en dominio público. Las denominadas obras silenciadas ven drásticamente mutilada su contribución a la esfera pública.

El problema de las obras cautivas no es nuevo. Obras huérfanas o descatalogadas han existido siempre. No obstante, diversos factores han contribuido a hacer el problema más agudo y a captar el interés de los utilizadores y del legislador. Por un lado, el desarrollo de las tecnologías de la información y la comunicación (TICs) ha facilitado nuevos modelos creativos<sup>8</sup> y de disseminación, lo que fomenta el interés por utilizar obras silenciadas. Es más, las TICs ofrecen herramientas valiosísimas para facilitar y garantizar el acceso y la preservación de las obras protegidas e incluso la existencia misma de las bibliotecas digitales. Por otro lado, la naturaleza intangible y efímera de algunas obras, la ausencia de información sobre la titularidad de derechos en copias disseminadas por Internet -y también a través de otros medios- y la utilización de medidas tecnológicas de protección que restringen el acceso representan un riesgo para la proliferación de futuros silencios, especialmente en lo que se refiere a obras incorporadas en formatos digitales. Otra razón que ha contribuido a la aparición más obras silenciadas es la expansión de las condiciones y los plazos de protección para los materiales o prestaciones protegidos. Los cambios padecidos en el Derecho de propiedad intelectual durante los últimos años han provocado una sobreprotección de las obras o prestaciones. Más y más obras están protegidas mientras menos y menos obras pasan al dominio público.<sup>9</sup>

En la mayoría de las situaciones referidas no se conoce la voluntad del titular de derechos. La única información que poseemos es que ha abandonado su obra y que parece no tener un interés inmediato en

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<sup>7</sup> Copyright Office, *Report on Orphan works*, 2006, <http://www.copyright.gov/orphan/orphan-report-full.pdf>.

<sup>8</sup> J. COHEN, "Copyright, Commodification, and Culture: Locating the Public Domain", in L. GUIBAULT & B. HUGENHOLTZ, *The Future of the Public Domain*, 2006, pp. 121-166; URS GASSER & SILKE ERNST, "From Shakespeare to DJ Danger Mouse: A Quick Look at Copyright and User Creativity in the Digital Age", *Berkman Center Research Publication*, 2006, accesible en [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=909223#](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=909223#).

<sup>9</sup> Vid. para una visión más detallada de las causas que han contribuido a la aparición de obras huérfanas: Copyright Office, *Report on Orphan works*, *supra* nota 7, pp. 23-ss.; B. HUGENHOLTZ, M.M.M. VAN EECHOU, S.J. VAN GOMPEL ET AL., *The Recasting of Copyright & Related Rights for the Knowledge Economy*, 2006, pp. 162-ss.; S.V. GOMPEL, "Unlocking the Potential of Pre-existing Content: How to Address the Issue of Orphan Works in Europe", *supra* nota 4, pp. 4-7.

proceder a su explotación. Tal inactividad no implica ningún cambio en el estatus de la obra. Sin una autorización clara, y siempre más allá de las utilizaciones toleradas por las limitaciones a la propiedad intelectual, no se permite hacer uso de la obra. No obstante, los derechos de propiedad intelectual tienen una función social. Sin perjuicio de la justificación para los derechos morales, los derechos de explotación operan como un incentivo para la creación y la innovación. Pero tal incentivo sirve a un fin último: promover el progreso de la ciencia y de las artes<sup>10</sup> y contribuir así a alimentar la esfera pública. Es extremadamente importante retener esta perspectiva y no detener el análisis de la justificación de la propiedad intelectual en el objetivo mediato de la creación o la productividad. La subordinación de los intereses privados al interés público justifica el reconocimiento de determinados límites<sup>11</sup> y limitaciones a los derechos de autor, y podría amparar la formulación de nuevos límites o limitaciones si así lo exigiera el interés público. En lo que a nosotros nos concierne, baste señalar que la inacción, el abandono pasivo por el titular de sus derechos de explotación, ni justifica el privilegio de que se le hayan otorgado derechos exclusivos ni coadyuva a alcanzar la finalidad última de la propiedad intelectual. Es más, la existencia de obras silenciadas, cautivas, no beneficia ni al autor ni a la sociedad. Por el contrario, genera un fuerte desequilibrio en el que se protegen derechos abandonados, vacíos, y se impide de manera injustificada el acceso a la cultura. El abandono de derechos lleva a una infrautilización de las obras protegidas<sup>12</sup> con efectos perversos para la creatividad y, sobre todo, para el acceso a la cultura y al conocimiento. La normativa en vigor viene a restringir de modo aparentemente injustificado el acceso al conocimiento, por lo que podría cuestionarse si es o no contraria al interés público. Si los derechos de explotación no garantizan incentivos a la creación, sino, al contrario, su único resultado es impedir el acceso y reutilización de las obras por los ciudadanos, algunos de ellos futuros creadores: no tiene sentido reflexionar sobre la posibilidad de introducir nuevos límites o limitaciones a los derechos de explotación? Los cambios a los que se ha visto sometida la sociedad a lo largo de los últimos años pueden ayudarnos a fundamentar una respuesta afirmativa.

Y es que, en efecto, vivimos una época de transición a la Economía del conocimiento. A diferencia de las sociedades pasadas, el conocimiento se convierte en la fuente fundamental de creación de riqueza; en lugar del capital o el trabajo. La producción -en nuestro caso la creación- y el acceso

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<sup>10</sup> Artículo I, Sección 8, Cláusula 8 de la Constitución Estadounidense.

<sup>11</sup> A saber: la dicotomía idea y expresión y la delimitación del objeto y los plazos de protección.

<sup>12</sup> Vid, B. HUGENHOLTZ, M.M.M. VAN EECHOU, S.J. VAN GOMPEL ET AL., *The Recasting of Copyright & Related Rights for the Knowledge Economy*, 2006, p. 178; en relación con las obras huérfanas.

al conocimiento devienen así una cuestión de interés público. Si durante los últimos 15 años el legislador, comprensiblemente, concentró sus esfuerzos en garantizar una fuerte protección a la creación, en la actualidad el péndulo oscila hacia el lado del acceso. La cuestión del acceso y de la utilización de la información están en el centro de la agenda política del legislador, europeo y nacional, al considerarla un punto clave para avanzar hacia la Sociedad del conocimiento. El principal desafío es cómo conciliar la protección del conocimiento con la facilitación del acceso.

El impulso de la política europea para la Sociedad del conocimiento arranca en 2000 con la *Agenda de Lisboa* que pretende hacer de Europa la economía basada en el conocimiento más competitiva y dinámica del mundo.<sup>13</sup> Un elemento clave para alcanzar los objetivos de Lisboa es el *programa i2010* que define la política europea para la Sociedad de la información.<sup>14</sup> En el marco del programa i2010, la Comisión Europea (EC) lanza en 2005 la Iniciativa Bibliotecas Digitales (de ahora en adelante IBD) con el propósito de fomentar un “uso más ameno e interesante del inmenso patrimonio cultural y científico europeo para fines profesionales, recreativos o educativos”.<sup>15</sup> La IBD presta especial atención a algunos tipos de obras silenciadas: las obras huérfanas y las descatalogadas. En este ámbito puede afirmarse que la IBD ha alcanzado dos logros indiscutibles: por un lado, ha estimulado un diálogo realmente productivo entre los sectores interesados;<sup>16</sup> por otro, sin echar mano de medidas reguladoras, ha provocado la reacción muy positiva de casi todos los Estados miembros que, como veremos a continuación, están valorando cómo afrontar el problema de las bibliotecas digitales y la propiedad intelectual. Además, la problemática de las obras huérfanas es una de las cuestiones clave en el debate abierto por el *Libro Verde sobre Derechos de autor en la economía del conocimiento*.<sup>17</sup> Recordemos que, con el *Libro Verde*, la Comisión Europea

<sup>13</sup> Consejo Europeo de Lisboa, 23 y 24 de marzo 2000, *Conclusiones de la presidencia*.

<sup>14</sup> [http://ec.europa.eu/information\\_society/eeurope/i2010/index\\_en.htm](http://ec.europa.eu/information_society/eeurope/i2010/index_en.htm).

<sup>15</sup> [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/index\\_en.htm](http://ec.europa.eu/information_society/activities/digital_libraries/index_en.htm).

<sup>16</sup> Fruto del cual se han publicado los diversos informes del Subgrupo en Derecho de Autor del Grupo de Expertos de Alto Nivel sobre Bibliotecas Digitales y el *Memorandum of Understanding* sobre las obras huérfanas (*cf infra*).

<sup>17</sup> Libro Verde sobre Derechos de autor en la economía del conocimiento, COM/2008/0466 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0466:FIN:ES:PDF>.

El Libro Verde [p. 12] plantea, en concreto y respecto a las obras huérfanas, las siguientes cuestiones: Es necesario adoptar otro instrumento legislativo comunitario para abordar el problema de las obras huérfanas, además de la Recomendación 2006/585/CE de la Comisión de 24 de agosto de 2006? En caso afirmativo, debería consistir en una modificación de la Directiva de 2001 sobre derechos de autor en la sociedad de la información o en un instrumento independiente? Cómo deberían resolverse los aspectos transfronterizos del problema de las obras huérfanas para

pretende “promover un debate sobre la mejor manera de garantizar la difusión en línea de los conocimientos en los ámbitos de la investigación, la ciencia y la educación [...] plantea[ndo] una serie de cuestiones relacionadas con el papel de los derechos de autor en la economía del conocimiento”. Allí también se reflexiona sobre el rol de las bibliotecas y la propiedad intelectual.<sup>18</sup>

La IBD revela el potencial de las bibliotecas para facilitar el acceso a la información y avanzar hacia la Sociedad del conocimiento. Este potencial está íntimamente ligado al rol tradicional de los archivos, las bibliotecas o los museos: preservar y facilitar el acceso al patrimonio cultural por el público en general. En la era pre-Internet, las bibliotecas garantizaban la preservación de las obras protegidas -entre ellas las obras descatalogadas- y facilitaban el acceso público y la consulta de esas obras. En este contexto, las bibliotecas convivían de manera pacífica con el mercado editorial y representaban, en cierto modo, un complemento a tal mercado: servían a un público muy específico, sin competir con los intereses del sector comercial.<sup>19</sup> En la era de Internet, las bibliotecas tienen también un papel relevante en la preservación y el acceso a las obras protegidas. Es más, las TICs les proporcionan los medios técnicos para cumplir de manera incluso más eficiente que en el pasado con esta función fundamental. Gracias a las nuevas tecnologías, las bibliotecas pueden poner en marcha proyectos de digitalización que facilitan la conservación y el acceso a información y recursos que posteriormente podrán ser utilizados por los ciudadanos, los investigadores y, también, el sector empresarial.<sup>20</sup> Las obras silenciadas representan un porcentaje considerable de las obras protegidas por la propiedad intelectual que no debería quedar al margen de los proyectos de digitalización. Si el mercado no garantiza un acceso mínimo a las obras cautivas, las bibliotecas, a través de sus proyectos de digitalización, parecen

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garantizar el reconocimiento a escala comunitaria de las soluciones adoptadas en los diferentes Estados miembros?

<sup>18</sup> Para un análisis de la Iniciativa Bibliotecas Digitales en relación con el marco europeo de la propiedad intelectual léase M. IGLESIAS & L. VILCHES, “Les bibliothèques numériques et le droit d’auteur en Europe: Qu’en est-il?”, *Cahiers de Propriété Intellectuelle*, 2007, pp. 937-987; M. IGLESIAS, “Digital Libraries: Any Step Forward?”, *Auteurs & Media*, 2008.

<sup>19</sup> R. CASAS, “Derecho de autor y bibliotecas: Historia de una larga amistad”, Seminario Internacional sobre Derecho de Autor y Acceso a la Cultura, organizado conjuntamente por IFRRO y CEDRO, 28 de octubre de 2005, accesible en <http://www.cedro.org/Files/RamonCasas.pdf>.

<sup>20</sup> Para una visión general del potencial de las nuevas tecnologías y los proyectos de digitalización y accesibilidad véase la *Comunicación de la Comisión al Parlamento Europeo, al Consejo, al Comité Económico y Social Europeo y al Comité de las Regiones - 12010 : bibliotecas digitales*, COM/2005/0465 final, en <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0465:FIN:ES:PDF>.

ser el actor natural para hacerlo. Pero, como avanzábamos en los párrafos precedentes, los derechos de propiedad intelectual pueden limitar la posibilidad de devolverle la voz a las obras silenciadas, de rescatarlas de su cautividad. Los derechos de propiedad intelectual frustran los proyectos de digitalización, dictando su contenido y agudizando los riesgos del denominado agujero negro cultural.<sup>21</sup> La preservación y el acceso a la cultura quedan, en cierto sentido, a manos del mercado. Los potenciales efectos negativos sobre la creatividad (reduciendo el material sobre el cual construir nuevas obras) y sobre la diseminación de la cultura son claros. La propiedad intelectual en lugar de actuar como un incentivo a la creación actúa, en este ámbito, como una barrera a la economía creativa y del conocimiento.<sup>22</sup>

## II. LAS OBRAS CAUTIVAS EN LA AGENDA DE LA PROPIEDAD INTELECTUAL

Algunos países han implementado o están discutiendo soluciones parciales para enfrentar algunas de las situaciones de silencio. En los párrafos siguientes se dará cuenta de algunos de los modelos previstos a tal efecto. Trataremos en primer lugar de las soluciones *ad hoc* propuestas para solucionar situaciones singulares de silencio, en particular las relativas a las obras huérfanas o descatalogadas. A continuación, aludiremos a otros modelos de naturaleza transversal u horizontal que, sin tener como objetivo principal facilitar la utilización de las obras cautivas, contribuyen, no obstante, a aliviar el problema.

Un primer grupo de soluciones se centra en las obras huérfanas. En Europa, ha de destacarse el trabajo realizado por la Comisión Europea y por el Grupo de Expertos de Alto Nivel sobre Bibliotecas Digitales<sup>23</sup> en el

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<sup>21</sup> O. NIIRANEN, "Online access to the World's Libraries: Legal Risk Analysis of Book Scanning and Indexing Projects in Europe and their Implications for the Freedom of Information", *Computer Law Review International*, 2006, p. 70.

<sup>22</sup> En este punto, es importante recordar que la doctrina ha llegado incluso a cuestionar si la propiedad privada, los derechos exclusivos absolutos, contribuyen inexorablemente a la creación y a la innovación. En un artículo muy interesante, E.M. SALZBERGER concluye que en algunos casos (cuando no en todos) mejorar el acceso mediante la introducción de flexibilidades en la normativa de propiedad intelectual, también opera como un incentivo a la creación al estimular nuevas formas de creatividad. Vid. "Economic Analysis of the Public Domain", in L. GUIBAULT & B. HUGENHOLTZ, *The Future of the Public Domain*, 2006, pp. 27-57.

<sup>23</sup> El Grupo de Expertos tiene como misiones principales asesorar a la Comisión sobre la mejor manera de afrontar los desafíos organizativos, jurídicos y técnicos a escala europea y contribuir a definir una visión estratégica común de las bibliotecas digitales europeas. Léase la *Decisión de la Comisión, de 27 de febrero de 2006, por la que se*

marco de la IBD. La Comisión Europea en su *Recomendación de la Comisión sobre la digitalización y la accesibilidad en línea del material cultural y la conservación digital*,<sup>24</sup> aconseja a los Estados miembros que creen mecanismos que faciliten la utilización de las obras huérfanas y promuevan la publicación de listas de obras huérfanas y de obras de dominio público.<sup>25</sup> La reacción de los Estados miembros ha sido bastante positiva. De la lectura de los Informes nacionales relativos a la implementación de la Recomendación<sup>26</sup> puede concluirse que la mayoría de los Estados miembros han creado comisiones especiales o grupos de trabajo para elaborar propuestas y en algunos de ellos ya se han presentado iniciativas legislativas [*cf infra*]. Ni la Comisión Europea ni el Grupo de Expertos se pronuncian a favor de una opción concreta basada en soluciones voluntarias o legislativas para favorecer la utilización de obras huérfanas. El Subgrupo en Derecho de Autor del Grupo de Expertos -de ahora en adelante Subgrupo en Derecho de Autor- recomienda, no obstante, que las soluciones nacionales operen bajo el principio de reconocimiento mutuo, de modo que se facilite el efecto transfronterizo de las bibliotecas digitales.<sup>27</sup> Además ha convenido una serie de principios que deberían respetar todas las soluciones para las obras huérfanas. Entre otros, ha sugerido que las soluciones nacionales cubran toda clase de obras huérfanas, exijan una búsqueda diligente (y documentada) previa a la utilización, incluyan disposiciones para la retirada de la obra y la remuneración si los titulares de derechos reaparecen y ofrezcan a los

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constituye un Grupo de Expertos de alto nivel sobre bibliotecas digitales, DO L63, 4.3.2006, pp. 25-ss.

<sup>24</sup> DO L 236, 31.8.2006, pp. 28-30.

<sup>25</sup> Punto 6 (b) de la Recomendación.

<sup>26</sup> Publicados en

[http://ec.europa.eu/information\\_society/activities/digital\\_libraries/experts/mseg/reports/index\\_en.htm](http://ec.europa.eu/information_society/activities/digital_libraries/experts/mseg/reports/index_en.htm).

Léase igualmente la *Comunicación de la Comisión al Consejo, al Parlamento Europeo, al Comité Económico y Social Europeo y al Comité de las Regiones - El patrimonio cultural europeo a un clic del ratón : avances en la digitalización y el acceso en línea al material cultural y en la conservación digital en la UE*, Bruselas, COM/2008/0513 final, 11.8.2008, COM (2008) 513 final, y el Documento de trabajo que acompaña a la Comunicación (*Commission Staff Working Document accompanying the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Europe's cultural heritage at the click of a mouse - Progress on the digitisation and online accessibility of cultural material and digital preservation across the EU*, 11.8.2008, SEC(2008) 2372) en

[http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/communications/progress/swp.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/communications/progress/swp.pdf).

<sup>27</sup> Subgrupo en Derecho de Autor, *Final Report on Digital Preservation, Orphan Works and Out of Print works*, 2008, pp. 14-ss,

[http://ec.europa.eu/information\\_society/activities/digital\\_libraries/experts/hleg/index\\_en.htm](http://ec.europa.eu/information_society/activities/digital_libraries/experts/hleg/index_en.htm).

establecimientos culturales sin ánimo de lucro un tratamiento específico.<sup>28</sup> Muy relevante, como una *spin off* del Grupo de Expertos, se ha creado un grupo de trabajo formado por representantes de titulares de derechos e instituciones culturales, que ha publicado un *memorandum of understanding* sobre Directrices para la Búsqueda Diligente de Obras Huérfanas.<sup>29</sup> El Memorándum contiene una definición común de obras huérfanas y unas directrices sectoriales<sup>30</sup> que definen qué puede considerarse una búsqueda diligente. Las directrices incluyen una lista de recursos disponibles para la búsqueda. Además, el Subgrupo en Derecho de Autor recomienda la creación de bases de datos nacionales de obras huérfanas así como de centros y procedimientos para la adquisición de derechos. Para asegurar la interoperabilidad de las iniciativas nacionales y facilitar su coordinación y, en su caso, un punto de acceso multilingüe, ha publicado un *set* de principios clave para centros de adquisición de derechos y bases de datos de obras huérfanas.<sup>31</sup> El objetivo principal de las bases de datos es facilitar la identificación de los titulares de derechos y evitar la duplicación de esfuerzos. En cuanto a los centros de adquisición de derechos, el fin último es que actúen como portal y punto de acceso común para la adquisición de derechos cuando existan mecanismos a tal efecto.<sup>32</sup>

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<sup>28</sup> Subgrupo en Derecho de Autor, *Final Report*, supra nota 27, pp. 10-ss. Nótese que en sus informes anteriores, el Subgrupo en Derecho de Autor incluía entre los principios sobre los que desarrollar mecanismos para facilitar la utilización de obras huérfanas, el reconocimiento de que la adquisición de derechos, especialmente en lo que se refiere a colecciones grandes, puede no ser siempre posible título a título. Consúltense su *Interim Report on digital preservation, orphan works and out-of-print works*, de 2006, y su *Report on Digital Preservation, Orphan Works and Out-of-Print Works, Selected Implementation Issues*; ambos publicados en [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/experts/hleg/meetings/index\\_en.htm](http://ec.europa.eu/information_society/activities/digital_libraries/experts/hleg/meetings/index_en.htm).

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[http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/hleg/orphan/mou.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/mou.pdf). El Memorandum ha sido firmado por 27 organizaciones.

<sup>30</sup> Vid. *Joint Report on Sector-specific guidelines on diligence search criteria for orphan works* ([http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/hleg/orphan/guidelines.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/guidelines.pdf)) y sus anexos que contienen informes sectoriales y directrices específicas para el sector audiovisual, el de las obras visuales y las fotografías, el sector de la música y el sonido y el sector del texto ([http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/hleg/orphan/appendix.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/appendix.pdf)).

<sup>31</sup> Subgrupo en Derecho de Autor, *Final Report*, supra nota 27, Anexo 6, *Recommended Key Principles for rights clearance centres and databases for orphan works*. Consúltense además el Anexo 5 sobre el proyecto ARROW, para la preparación de una base de datos europea de obras huérfanas.

<sup>32</sup> Para una visión más detallada del trabajo llevado a cabo por el Subgrupo en Derecho de Autor vid. M. IGLESIAS, "Digital Libraries", supra nota 18; M. RICOLFI, "Copyright Policy for Digital Libraries in the Context of the 2010 Strategy", paper presentado en International Conference on Public Domain in the Digital Age

Siguiendo las recomendaciones de la Comisión Europea algunos Estados europeos están discutiendo medidas legislativas para abordar el problema de las obras huérfanas. De acuerdo con los informes nacionales relativos a la implementación de la Recomendación sobre las bibliotecas digitales, Alemania, Dinamarca y Hungría están adecuando su normativa para facilitar la utilización de obras huérfanas.<sup>33</sup> En Francia, el *Conseil supérieur de la propriété littéraire et artistique* ha nombrado una Comisión para explorar las medidas adecuadas que faciliten la digitalización y accesibilidad de las obras huérfanas y descatalogadas.<sup>34</sup> En abril de 2008, la Comisión publica su *Avis* al respecto.<sup>35</sup> En primer lugar, propone incorporar al *Code de la propriété intellectuelle* una definición de obras huérfanas limitada a las obras publicadas. A continuación, tras haber valorado el impacto de las obras huérfanas en diferentes sectores, recomienda implementar diferentes soluciones dependiendo del tipo de obras. Así, para las impresos y las visuales propone modificar el *Code de la propriété intellectuelle* e introducir la gestión colectiva obligatoria. Para las musicales, películas y otras obras audiovisuales ha preferido no adoptar ninguna modificación y continuar con los acuerdos colectivos que pueden concluirse entre el *Institut national de l'audiovisuel* y los representantes de los titulares de derechos.<sup>36</sup> De acuerdo con el modelo propuesto, las sociedades de gestión colectiva acreditadas por el Ministerio de Cultura podrían otorgar autorizaciones para utilizar obras huérfanas impresos o visuales. Para beneficiarse del sistema, el usuario debe llevar a cabo una búsqueda seria y demostrable. La normativa no establecerá ningún criterio específico que concrete tales calificativos, no obstante, una comisión paritaria que agrupe representantes de los titulares de derechos, los usuarios y la administración pública podría fijar directrices u orientaciones para la búsqueda. La Opinión también recomienda la implementación de una política preventiva para obras huérfanas, con la finalidad de mejorar la identificación de los

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(COMMUNIA Project), Louvain-La-Neuve, Bélgica, 30.06.2008-01.07.2008, pp. 5-7; accessible en [http://communiaproject.eu/communiafiles/conf2008p\\_Copyright\\_Policy\\_for\\_digital\\_libraries\\_in\\_the\\_context\\_of\\_the\\_i2010\\_strategy.pdf](http://communiaproject.eu/communiafiles/conf2008p_Copyright_Policy_for_digital_libraries_in_the_context_of_the_i2010_strategy.pdf).

<sup>33</sup> *Comunicación de la Comisión* COM (2008) 513 final y el Documento de trabajo que la acompaña, *supra* nota 26.

<sup>34</sup> *Lettre de mission du président du Conseil de la propriété littéraire et artistique du 2 août 2007*, accesible en <http://www.cspla.culture.gouv.fr/CONTENU/lmoeuvres07.pdf>.

<sup>35</sup> *Avis de la commission spécialisée du CSPLA sur les oeuvres orphelines*, <http://www.cspla.culture.gouv.fr/CONTENU/avis0008.pdf>. Consúltese igualmente el *Rapport de la Commission sur les oeuvres orphelines published* de Marzo de 2008: <http://www.cspla.culture.gouv.fr/CONTENU/rapoeuvoro8.pdf>.

<sup>36</sup> Vid. art. L49, *Loi n°86-1067 du 30 septembre 1986 relative à la liberté de communication*.

titulares de derechos facilitando el acceso a la información.<sup>37</sup>

La discusión sobre las obras huérfanas también está presente al otro lado del Atlántico. En 2005, la Oficina de Propiedad Intelectual de EEUU lanza una consulta pública sobre la cuestión de las obras huérfanas<sup>38</sup> que culmina con la publicación del Informe sobre obras huérfanas.<sup>39</sup> El Informe en sus recomendaciones propone la introducción en la *Copyright Act* de una limitación en las vías de recurso respecto a la utilización de obras huérfanas.<sup>40</sup> Partiendo de tales recomendaciones, en 2008 se presentan dos proyectos de ley.<sup>41</sup> Ambas propuestas se basan en una limitación de las vías de recurso: la utilización de obras huérfanas constituye una infracción a la propiedad intelectual pero, si el titular de derechos presenta una demanda contra el usuario, la indemnización e incluso la obligación de cesar en el uso pueden ser limitadas. Para beneficiarse del sistema, el usuario debe probar que antes de proceder a la utilización ha llevado a cabo, y documentado, una búsqueda diligente para localizar al titular de derechos. La mención al titular de derechos, si es conocido, es obligatoria. Además, el usuario debe adjuntar a la obra un símbolo en la manera prescrita por el Registro de Propiedad Intelectual que informe de que la obra ha sido utilizada bajo las disposiciones de la *Copyright Act* relativas a las obras

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<sup>37</sup> Para más detalles sobre el sistema propuesto, léase el *Rapport de la Commission sur les oeuvres orphelines*, *supra* nota 35. Nótese, no obstante, que algunas de las características del sistema no han sido incorporadas en el *Avis* de la Comisión. El Informe considera, por ejemplo, que las licencias deben ser temporales. Además se especifica que la cuantía a pagar por la utilización se fijará entre las sociedades de gestión colectiva y los usuarios. Si los titulares de derechos reaparecen, podrán reclamar la correspondiente remuneración a las sociedades de gestión. La reaparición del titular de derechos no determinará la caducidad de la licencia, el usuario podrá proseguir la explotación de la obra durante el período de tiempo en que la licencia permanece en vigor. Véase el *Rapport de la Commission sur les oeuvres orphelines*, pp. 19-20.

Además ha de tenerse en cuenta que el art. 122-9 de la ley francesa autoriza al juez para adoptar las medidas necesarias cuando se dé un abuso o no uso de los derechos de explotación por parte de los representantes de los autores fallecidos. La Comisión ha propuesto en su *Avis* que se introduzcan modificaciones en la disposición con el fin que resulte de aplicación a las obras huérfanas.

Sobre la propuesta francesa vid. J.-M. BRUGUIÈRE, "Ouvres orphelines" (Chroniques - Droit d'auteur et droits voisins), *Propriétés Intellectuelles*, 2008, pp. 320-321.

<sup>38</sup> *Notice of Inquiry, Library of Congress - Copyright Office, Federal Register*, 26 de enero de 2005, p. 3739, <http://www.copyright.gov/fedreg/2005/70fr3739.html>.

<sup>39</sup> Copyright Office, *Report on Orphan Works*.

<sup>40</sup> Copyright Office, *Report on Orphan Works*, *supra* nota 7, pp. 92-ss.

<sup>41</sup> La *Orphan Works Act of 2008 - A bill to provide a limitation on judicial remedies in copyright cases involving orphan works*, presentada en la Cámara de Representantes el 4 de abril de 2008 [H.R.5889]. Y la *Shawn Bentley Orphan Works Act of 2008 - A bill to provide a limitation on judicial remedies in copyright cases involving orphan works* -, presentada en el Senado el 28 de abril de 2008, [S.2913.IS].

huérfanas. De acuerdo con el texto introducido en la Cámara de Representantes, el usuario debe haber también presentado una declaración de utilización en el Registro de propiedad intelectual.<sup>42</sup> Ninguno de los proyectos especifica los requisitos que ha de respetar la búsqueda diligente. Sólo exigen que el infractor lleve a cabo un esfuerzo diligente para localizar al titular de derechos, aclarando que la ausencia de información en un ejemplar concreto de la obra no es en absoluto suficiente para concluir que se ha llevado a cabo una búsqueda diligente. Es más, ambas propuestas establecen que el Registro de propiedad intelectual deberá mantener y poner a disposición del público orientaciones o buenas prácticas para emprender las búsquedas. Si se respetan todas estas condiciones, la cuantía de la indemnización pecuniaria podrá limitarse a una compensación razonable. Es más, las instituciones educativas, bibliotecas, archivos o las entidades públicas de radiodifusión sin ánimo de lucro podrán quedar exoneradas de la obligación de pagar tal compensación si cesan en el uso tras recibir la notificación del titular de derechos de su intención de interponer una acción por infracción de los derechos de autor y demuestran que la utilización se llevó a cabo con fines educativos, religiosos o caritativos y que no perseguía un beneficio directo o indirectamente comercial. Además, tratándose de obras derivadas, podrá acordarse que el infractor prosiga la utilización, siempre, eso sí, que haga efectiva una compensación razonable y negociada. En cualquier caso, la aplicación de las limitaciones de responsabilidad queda sujeta a un requisito adicional de gran relevancia: el usuario no podrá invocar la limitación si tras recibir una notificación del titular de derechos informando de su intención de interponer una demanda por infracción, no llega a negociar de buena fe una compensación razonable con el titular de derechos o no procede al pago de la compensación en un período de tiempo razonable. Los proyectos estadounidenses resultan también aplicables a las obras no publicadas. Siguen en este extremo las recomendaciones del Informe de obras huérfanas, donde se considera que, dada la dificultad de determinar si una obra ha sido o no publicada y partiendo del hecho de que la mayoría de las obras huérfanas son obras no publicadas, un sistema que tenga por finalidad facilitar la utilización de las obras abandonadas debe también posibilitar el uso de obras no publicadas.<sup>43</sup> Implementar esta solución en los países que pertenecen a la órbita del *droit d'auteur* puede presentar mayores problemas, dado el papel tan relevante que juegan los derechos morales. Sin embargo, no podemos olvidar que algunas normas continentales autorizan la divulgación post mortem de las obras no publicadas si los titulares de derechos se oponen de

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<sup>42</sup> Según la redacción propuesta para el nuevo art. 514(b)(1)(A)(ii) por la *Orphan Works Act of 2008*.

<sup>43</sup> Vid. Copyright Office, *Report on Orphan Works*, *supra* nota 7, pp. 100-102.

manera irrazonable.<sup>44</sup>

Otro modelo para las obras huérfanas es el vigente en Canadá.<sup>45</sup> De acuerdo con la ley canadiense, el *Copyright Board* puede otorgar licencias no exclusivas a los usuarios que no han sido capaces de localizar a los titulares de derechos tras haber llevado a cabo esfuerzos razonables. Este sistema de licencias obligatorias se aplica sólo a las obras ya publicadas. La remuneración la fija, junto con las otras condiciones de explotación, el *Copyright Board*. Si el titular de derechos reaparece puede reclamar la remuneración que le corresponde antes de que expire un plazo de cinco años desde el otorgamiento de la licencia.<sup>46</sup>

Salvando algunas excepciones, como la del caso canadiense,<sup>47</sup> lo cierto es

<sup>44</sup> Cf el art. 40 de la Ley española de propiedad intelectual o el art. 122-9 de la ley francesa, *supra* nota 37. En todo caso, más allá de los problemas planteados por los derechos morales, la digitalización y puesta a disposición del público de algunas obras no publicadas podría entrar en conflicto con la normativa reguladora de la intimidad. Para un análisis crítico de la propuesta estadounidense léase J.C. GINSBURG, "Recent Developments in US Copyright Law: Part I - Orphan Works", *Revue Internationale du Droit d'Auteur*, Octubre 2008, pp. 99-197. En Estados Unidos la doctrina sobre el problema de las obras huérfanas es más abundante que en Europa. En otros, pueden consultarse: J. BRITO & B. DOOLING, "An Orphan Works Affirmative Defence to Copyright Infringement Actions", *Michigan Telecommunications and Technology Law Review*, 2005, pp. 75-113; Duke Law School Center for the Study of the Public Domain, *Orphan Works Analysis and Proposal*, 2005, <http://www.law.duke.edu/cspd/pdf/cspdproposal.pdf>; D.K. HENNING, "Copyright's Deus Ex Machina: Reverse Registration as Economic Fostering of Orphan Works", 2008, ExpressO, accessible en [http://works.bepress.com/darrin\\_henning/10](http://works.bepress.com/darrin_henning/10); HUANG, "U.S. Copyright Office Orphan Works Inquiry: Finding Homes for the Orphans", *Berkeley Technology Law Journal*, 2006, pp. 265-288; D.B. SHERMAN, "Cost and Resource Allocation Under the Orphan Works Act of 2006", *Virginia Journal of Law and Technology*, 2007, pp. 1-36; C. THOMPSON, "Orphan Works, U.S. Copyright Law, and International Treaties: Reconciling Differences to Create a Brighter Future for Orphans Everywhere", *Arizona Journal of International and Comparative Law*, 2006, pp. 787-852; S. VALKONEN & L. J. WHITE, "An Economic Model for the Incentive/Access Paradigm of Copyright Propertization: an Argument in Support of the Proposed New § 514 to the Copyright Act", *NYU Law and Economics Research Paper*, 2006, No 06-15, accessible en <http://ssrn.com/abstract=895554>.

<sup>45</sup> Art. 77 *Copyright Act*. Más información en <http://www.cb-cda.gc.ca/unlocatable/index-e.html>.

<sup>46</sup> Para más información sobre las soluciones legislativas para las obras huérfanas véase, Subgrupo en Derecho de Autor, *Final Report*, *supra* nota 27, pp. 11-ss.; B. HUGENHOLTZ, M.M.M. VAN EECHOU, S.J. VAN GOMPEL ET AL., *The Recasting of Copyright*, *supra* nota 12, pp. 178-ss.

<sup>47</sup> También existen modelos de licencias obligatorias en Corea del Sur, Japón e India. Vid Subgrupo en Derecho de Autor, *Final Report*, *supra* nota 27, p. 12.; S. V. GOMPEL, "Unlocking the Potential of Pre-existing Content: How to Address the Issue of Orphan Works in Europe", *supra* nota 4, p. 19.

que encontramos pocos ejemplos de legislación que prevea disposiciones específicas para la utilización de obras huérfanas. De aquí que el sector privado haya puesto en marcha algunas soluciones a tal efecto. Tales soluciones consisten principalmente en las denominadas cláusulas de “puerto seguro” o en la adopción de políticas de gestión de riesgo. Por ejemplo, un grupo de editores científicos ha adoptado una Política que permite la utilización de las obras que les pudieran pertenecer. De acuerdo con las disposiciones de puerto seguro incorporada en su Política, en el caso de que un titular de derechos sea identificado, el usuario debe pagar una cantidad razonable y debe asegurar que no incurrirá en una re-utilización de la obra. Si el usuario se atiene a tales obligaciones, el editor renuncia a los derechos de incoar una acción contra él.<sup>48</sup> Otro ejemplo es el de la SOFAM -la *Société belge d’auteurs dans le domaine des arts visuels*- que ofrece la denominada *convention de porte fort*: un usuario que se acoja a la convención debe pagar una remuneración a la SOFAM por el uso de una obra huérfana. Si el titular de derechos reaparece, puedo contactar con la SOFAM para recibir su remuneración.<sup>49</sup> Ya por último, algunas -aunque lo cierto es que no muchas- instituciones culturales operan bajo una política de gestión de riesgos. Valoran el riesgo potencial y, en algunos casos, deciden asumirlo y llevar a cabo la utilización.<sup>50</sup>

El segundo grupo de soluciones *ad hoc* concierne las obras descatalogadas. Éste ha sido también un tema de discusión en el marco de la IBD. Como en el caso de las obras huérfanas, la Comisión Europea ha decidido no adoptar un instrumento legislativo comunitario limitándose a aconsejar a los Estados miembros que prevean o fomenten mecanismos voluntarios que faciliten la digitalización y puesta a disposición de las obras descatalogadas.<sup>51</sup> En esta línea el Subgrupo en Derecho de Autor ha desarrollado una solución pragmática que podría ser adaptada e implementada por los Estados miembros. La solución propuesta tiene como objetivo facilitar la conclusión de contratos que autoricen la utilización de obras descatalogadas. Los elementos claves de la propuesta son (a) un modelo de licencia para la reproducción y puesta a disposición de obras descatalogadas a través de redes cerradas; (b) un segundo modelo

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<sup>48</sup> Safe Harbour Provisions for the Use of Orphan Works for Scientific, Technical and Medical Literature, An STM/ALPSP/PSP Position Paper, <http://www.alpsp.org/ForceDownload.asp?id=579>.

<sup>49</sup> Más información en <http://www.sofam.be/mainfr.php?ID=104&titel=Conventions+de+porte-fort>.

<sup>50</sup> Consúltese el ejemplo de la National Portrait Gallery en: [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/seminar\\_14\\_september\\_2007/npg\\_perspective.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/seminar_14_september_2007/npg_perspective.pdf).

<sup>51</sup> Cf punto 6 (b) de la *Recomendación sobre la digitalización y la accesibilidad en línea del material cultural y la conservación digital*.

de licencia que autoriza la puesta a disposición en línea de obras impresas descatalogadas y (c), como en el caso de las obras huérfanas, un set de principios sobre la creación de bases de datos nacionales de obras descatalogadas y de centros y procedimientos para la adquisición de derechos.<sup>52</sup>

El sistema propuesto presenta varios aspectos positivos que merece la pena destacar. Tiene como principal objetivo reducir los costes de transacción facilitando, mediante la creación de modelos contractuales, la conclusión de contratos entre las bibliotecas y los titulares de derechos.<sup>53</sup> Su finalidad principal es devolver la visibilidad a las obras descatalogadas al tiempo que garantiza una remuneración a los titulares de derechos. Las licencias pueden además ser utilizadas por los titulares de derechos para tantear las posibilidades de la obra en el mercado.<sup>54</sup> La publicación del segundo modelo de licencias para el acceso en línea representa un avance importante respecto a los informes anteriores del Subgrupo en Derecho de Autor.<sup>55</sup> También merece una valoración positiva el hecho de que en la redacción de las licencias se ha hayan tenido en cuenta aspectos internacionales. Además, ambos modelos prevén la posibilidad de que las versiones digitalizadas se hagan accesibles a las personas con discapacidad visual. Dicho esto, ha de advertirse que la posición de la biblioteca -que toma la iniciativa de digitalización y realiza la inversión- se nos antoja demasiado debilitada. Si leemos detenidamente ambos modelos de licencia, puede fácilmente concluirse que ninguno de ellos está verdaderamente ofreciendo un estatus privilegiado a las bibliotecas. Son, ni más ni menos, plantillas o modelos contractuales para un mercado muy específico: el de la explotación de las obras descatalogadas. No se diferencian de los contratos estándar y es más que cuestionable que estos modelos en sí mismos vayan a facilitar la digitalización y puesta a disposición de las obras descatalogadas por bibliotecas sin ánimo de lucro. El hecho de que el licenciante pueda en

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<sup>52</sup> Subgrupo en Derecho de Autor, *Final Report*, *supra* nota 27, pp. 17-30 y los siguientes Anexos que acompañan al informe: III (*Model agreement for a licence on digitisation of out of print works*), IV (*Model agreement for a licence on digitisation of out of print works with option for online accessibility*) y VII (*2010 Digital libraries copyright subgroup's Recommended key principles for rights clearance centres and databases for out-of-print works*). Para un análisis más completo del trabajo del Subgrupo en Derecho de Autor respecto a las obras descatalogadas léase M. IGLESIAS, "Digital Libraries", *supra* nota 18; M. RICOLFI, "Copyright Policy for Digital Libraries in the Context of the 2010 Strategy", *supra* nota 32, pp. 7-8.

<sup>53</sup> M. RICOLFI, "Copyright Policy for Digital Libraries in the Context of the 2010 Strategy", *supra* nota 32, p. 8.

<sup>54</sup> Subgrupo en Derecho de Autor, *Final Report*, *supra* nota 27, pp. 22-24.

<sup>55</sup> Para una valoración de las propuestas del Subgrupo en Derecho de Autor previas a la publicación del *Final Report*, vid. M. IGLESIAS & L. VILCHES, "Les bibliothèques numériques et le droit d'auteur en Europe", *supra* nota 18, pp. 937-987.

cualquier momento rescindir la licencia entraña una inseguridad innegable para las bibliotecas. Es más, dado que el sistema parte de unas bases puramente voluntarias, los titulares de derechos podrían, sin justificación alguna, denegar la autorización<sup>56</sup> o incluso exigir una remuneración desmesurada. No nos extrañe pues que no sean muchas las obras descatalogadas que obtengan su liberación por la vía de la propuesta del Subgrupo en Derecho de Autor.

Ninguna de las soluciones relacionadas, ni las propuestas para las obras huérfanas ni las relativas a las obras descatalogadas, se refiere a las situaciones en las que los titulares de derechos no responden a las peticiones de los usuarios. El argumento principal para no tratar tales supuestos es el derecho a ignorar las peticiones. Una excepción la constituye, sin embargo, el sistema de licencias obligatorias para los países en vías de desarrollo previsto en el Anexo al Convenio de Berna, que establece un sistema subsidiario autorizando la concesión de licencias obligatorias cuando el titular de derechos no ha procedido a una explotación específica de la obra. Para beneficiarse de las licencias, el usuario debe cumplir con ciertas obligaciones de información. Si llega a contactar con el titular de derechos, se le otorga a éste último un período de reflexión o “plazo de gracia” para decidir si procede o no a la explotación de la obra.<sup>57</sup>

Además de las soluciones *ad hoc*, han de tenerse en cuenta otros mecanismos transversales que, aunque no han sido concebidos para resolver el problema de las obras silenciadas, pueden en la práctica, minimizar sus efectos. El ejemplo más importante es, sin lugar a dudas, el de las licencias colectivas ampliadas, muy utilizadas en los países nórdicos para facilitar determinados usos de las obras protegidas. De acuerdo con este modelo, una entidad de gestión que represente un número sustancial de titulares de derechos puede otorgar una licencia sobre su repertorio para explotar las obras protegidas en áreas específicas.<sup>58</sup> Gracias a su efecto

<sup>56</sup> Subgrupo en Derecho de Autor, *Final Report*, *supra* nota 27, p. 21.

<sup>57</sup> Cf *Convenio de Berna para la Protección de las Obras Literarias y Artísticas*, Anexo: Disposiciones especiales relativas a los países en desarrollo. Para una interpretación de las disposiciones del Anexo al Convenio de Berna puede consultarse: H. DESBOIS, “La conférence diplomatique de révision des conventions de Berne et de Genève”, *Revue Internationale du Droit d'Auteur*, 1971; H. DESBOIS, A. FRANÇON & A. KEREVER, *Les conventions internationales du droit d'auteur et des droits voisins*, 1976 ; R. FERNAY, “Paris 1971, ou les aventures d'un package deal”, *Revue Internationale du Droit d'Auteur*, 1971 ; S. RICKETSON, “Chapter 14: Developing countries”, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, Vol. 2, 2.<sup>a</sup> ed., 2006.

<sup>58</sup> P.e. en Dinamarca las licencias colectivas ampliadas se utilizan, entre otros casos, en relación con la reproducción para fines educativos, para la entrega de documentos

“ampliado” las licencias también amparan la utilización de las obras cuyos titulares de derechos no son miembros de la entidad. Puede concluirse, en efecto, que el modelo es muy similar al de la gestión colectiva obligatoria. La diferencia fundamental es que los titulares de derechos pueden optar por no participar en el sistema. En Dinamarca, se ha propuesto la introducción de ciertas modificaciones a la ley de derechos de autor que permiten la aplicación del sistema de licencias colectivas ampliadas a las obras huérfanas y descatalogadas. De acuerdo con las modificaciones propuestas, las nuevas disposiciones permiten a las partes interesadas recurrir a las licencias colectivas ampliadas en áreas a determinar por los contratantes; distintas de las áreas más específicas en las que tradicionalmente se aplican las licencias colectivas ampliadas. Tales licencias podrán extender su efecto a todos los titulares de las obras de la misma clase de las que gestiona la entidad. No obstante, los titulares de derechos podrán acogerse a la cláusula *opt out* y no participar en el sistema. Las organizaciones que representen los intereses de los titulares de derechos que opten por la conclusión de los acuerdos al amparo de la nueva disposición deberán requerir la aprobación del Ministerio de Cultura.<sup>59</sup>

Más allá de las soluciones identificadas, han de tenerse en cuenta las propuestas doctrinales que abogan por la introducción de reformas de naturaleza estructural en el sistema de propiedad intelectual. Estas propuestas se construyen en torno de la reflexión sobre el plazo ideal de protección, la (re-)introducción de formalidades o la reformulación de limitaciones que garanticen un uso más amplio de las obras protegidas.<sup>60</sup> Pese a que ninguna de ellas está de manera específica diseñada para

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vía email a los usuarios de bibliotecas o a otras bibliotecas, o respecto a utilidades en beneficio de las personas con discapacidad auditiva o visual. Vid. H. VON HIELMCRONE, “Orphan Works: The Danish Solution; Extended Collective Licensing”, *EBLIDA News*, 2008, No 6, pp. 1-2.

<sup>59</sup> Cf Informe presentado por Dinamarca relativo al progreso en la implementación de la *Recomendación sobre la digitalización y la accesibilidad en línea del material cultural y la conservación digital*, p. 2; accesible en [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/experts/mseg/reports/index\\_en.htm](http://ec.europa.eu/information_society/activities/digital_libraries/experts/mseg/reports/index_en.htm). Consúltase igualmente la *Comunicación de la Comisión COM* (2008) 513 final y el Documento de trabajo que la acompaña, p. 15; supra nota 26; y H. VON HIELMCRONE, “Orphan works”, supra nota 59, pp 1-2.

<sup>60</sup> Entre otros: W. LANDES & R. POSNER, “Indefinitely Renewable Copyright”, *University of Chicago Law & Economics, Olin Working Paper*, 2002, accesible en <http://ssrn.com/abstract=319321>; “Chapter 8: The Optimal Duration of Copyrights and Trademarks”, en *The Economic Structure of Intellectual Property Law*, 2003, pp. 210-253; L. LESSIG, *Free Culture*, 2003; D. KHONG, “Orphan Works, Abandonware and the Missing Market for Copyright Goods”, supra nota 2; C. SPRIGMAN, “Reform(aliz)ing Copyright”, *Stanford Law Review*, 2004; M. RICOLFI, “Copyright Policy for Digital Libraries in the Context of the i2010 Strategy”, supra nota 32.

solucionar el problema de las obras huérfanas, lo cierto es que de ponerse en práctica, podría facilitarse la utilización de las obras huérfanas y descatalogadas. Cualquiera de estos sistemas requiere una reforma de fondo en el Derecho de Propiedad Intelectual, no sólo nacional, sino también internacional y comunitario pero es factible llevarla a cabo en un futuro próximo?

### III. UNA PROPUESTA PARA LIBERAR LAS OBRAS CAUTIVAS

Excepto las disposiciones del Anexo al Convenio de Berna y las propuestas de modificación de la ley danesa, todos los sistemas a los que hemos hecho referencia en las páginas anteriores se concentran en una situación específica de silencio: así, en las obras huérfanas, la propuesta estadounidense o la francesa o el sistema canadiense; en las descatalogadas, los modelos de licencia del Subgrupo en Derecho de Autor. Recordemos, por ejemplo, que la propuesta francesa sólo se aplica a las obras impresas y las visuales, y no cubre, como sugiere el Subgrupo en Derecho de Autor, toda clase de obras protegidas; y que ni la propuesta francesa ni el régimen canadiense autoriza la utilización de obras no publicadas. Pese a que la mayoría de los legisladores han apostado por un tratamiento diferenciado de las obras cautivas o silenciadas,<sup>61</sup> no es muy aventurado concluir que todos los casos de obras cautivas pueden relacionarse con una deficiencia común del sistema de propiedad intelectual,<sup>62</sup> incapaz de dar respuesta a un fallo de mercado que provoca la infrautilización o, incluso, la no utilización de las obras protegidas. Resulta conveniente, por tanto, en lugar de promover regímenes jurídicos diferenciados para cada una de las situaciones de silencio, diseñar un sistema, o al menos una serie de principios comunes, para tratar de forma conjunta estas situaciones. Y es que, de hecho, las obras huérfanas son un caso claro de obras descatalogadas, y ambas, al igual que los casos de ausencia de respuesta, un ejemplo de obras abandonadas.

La función social de la propiedad intelectual ha llevado al legislador a reconocer, como afirmábamos al principio de este artículo, determinados límites y limitaciones a la propiedad intelectual. La mayoría de los países han reconocido en su legislación nacional de derechos de autor

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<sup>61</sup> Aunque no siempre es el caso, en Dinamarca se ha apostado por una solución que no discrimina entre el tipo de silencio.

<sup>62</sup> M. IGLESIAS & L. VILCHES, "Les bibliothèques numériques et le droit d'auteur en Europe", *supra* nota 18, p. 971; D. KHONG, "Orphan Works, Abandonware and the Missing Market for Copyright Goods", *supra* nota 2, p. 79. En relación con las obras huérfanas, S.V. GOMPEL, "Unlocking the Potential of Pre-existing Content", *supra* nota 4.

limitaciones a favor de las bibliotecas.<sup>63</sup> No obstante, tales limitaciones no siempre han sido redactadas teniendo en cuenta las oportunidades y desafíos que presentan las nuevas tecnologías de la información. En Europa, la adopción de la *Directiva 2001/29/CE relativa a la armonización de determinados aspectos de los derechos de autor y derechos afines a los derechos de autor en la sociedad de la información* (de ahora en adelante Directiva 2001/29)<sup>64</sup> hubiera sido una buena oportunidad para reformular las limitaciones a favor de las bibliotecas. No obstante, el legislador europeo prefirió adoptar una postura cautelosa, esperando que el mercado desarrollara modelos de negocio que pudieran garantizar cierto margen para los usos que llevan a cabo las bibliotecas.<sup>65</sup> Pero lo cierto es que tales modelos de negocio no han sido desarrollados de manera eficiente. La existencia de un gran número de obras huérfanas y descatalogadas y el interés frustrado de los usuarios, deseosos de explotar y dar acceso a esas obras, pone en evidencia las carencias del mercado. La función social de la propiedad intelectual podría justificar la formulación de nuevas limitaciones que facilitaran la utilización de estas obras abandonadas, sobre la base de la inactividad de los titulares de derechos. Tales limitaciones resultarían aplicables cuando los titulares de derechos hayan abandonado pasivamente sus prerrogativas.

Las limitaciones a la propiedad intelectual, como en general todas las instituciones jurídicas, han de adecuarse a las necesidades y expectativas de la sociedad en el momento histórico en el que se contextualizan. No ha de extrañarnos pues que el contenido y alcance de las limitaciones pueda variar con el tiempo teniendo en cuenta los intereses y valores de la

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<sup>63</sup> Para mayor información sobre las limitaciones a favor de las bibliotecas alrededor del mundo, léase el Estudio sobre las limitaciones y excepciones al derecho de autor en beneficio de bibliotecas y archivos preparado para la OMPI por K. CREWS, accesible en [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=109192](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=109192). El citado estudio analiza la normativa de derecho de autor en 149 países y concluye que sólo 21 no contemplan limitaciones en favor de las bibliotecas. Sobre las limitaciones a favor de las bibliotecas en Europa, pueden consultarse las siguientes publicaciones y la bibliografía allí citada: L. GUIBAULT, "Evaluation of the Directive 2001/29/EC in the Digital Information Society", paper presentado en International Conference on Public Domain in the Digital Age (COMMUNIA Project), Louvain-La-Neuve, Bélgica, 30.06.2008-01.07.2008, accesible en [http://communiaproject.eu/communiafiles/conf2008p\\_Copyright\\_Policy\\_for\\_digital\\_libraries\\_in\\_the\\_context\\_of\\_the\\_i2010\\_strategy.pdf](http://communiaproject.eu/communiafiles/conf2008p_Copyright_Policy_for_digital_libraries_in_the_context_of_the_i2010_strategy.pdf); M. IGLESIAS & L. VILCHES, "Les bibliothèques numériques et le droit d'auteur en Europe", *supra* nota 18, pp. 949-971; M. IGLESIAS, "Digital Libraries", *supra* nota 18.

<sup>64</sup> *Directiva 2001/29/CE del Parlamento Europeo y del Consejo, de 22 de mayo de 2001, relativa a la armonización de determinados aspectos de los derechos de autor y derechos afines a los derechos de autor en la sociedad de la información*, DO L 167 de 22/06/2001

<sup>65</sup> De hecho éste es el punto de partida de algunas de las cuestiones planteadas en el Libro Verde, *supra* nota 17; léanse las preguntas 6 y ss. y exposición que las precede.

colectividad sin que, no obstante, se lleguen a vaciar de contenido los derechos de explotación.<sup>66</sup> Y en este punto hemos de tener en cuenta las necesidades de la Sociedad del conocimiento y el papel que las bibliotecas pueden representar para avanzar hacia esta meta. Como las bibliotecas tradicionales, las digitales tienen un papel clave en la preservación, acceso y diseminación del conocimiento. Los proyectos de digitalización y puesta a disposición a gran escala representan un paso clave para mejorar el acceso y la utilización de información, que, sin perjuicio de los beneficios culturales y sociales que implican, generan también un importante valor añadido para el sector económico y empresarial.<sup>67</sup> Sin menospreciar el interés público que puede subyacer a las utilizaciones comerciales de las obras huérfanas o descatalogadas,<sup>68</sup> el interés público de los proyectos que pretenden la integración de tales obras en bibliotecas digitales es de una importancia vital para la generación de riqueza; cultural, científica, económica y social. De ahí que, además de defender una solución única que abarque todas las obras silenciadas, apostemos igualmente por que tal solución se refiera precisamente a este tipo de proyectos de interés público singular y actual: los proyectos de digitalización a gran escala que no persigan un objetivo comercial.

A continuación presentaré las bases para una solución inclusiva que podría aplicarse a la utilización de todas las obras silenciosas en proyectos de digitalización a gran escala. Dado que el problema de las obras silenciosas es claramente un problema de fallo de mercado, el legislador debería privilegiar, en primer lugar, la adopción de mecanismos voluntarios que contribuyan a disminuir los costes de transacción. En este sentido debería

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<sup>66</sup> Léase, en relación con la configuración del derecho de propiedad, su función social y la existencia de limitaciones a su ejercicio, el Fundamento Jurídico 2 de la *Sentencia n. 37/1987 de 26 de marzo del Tribunal Constitucional Español*.

<sup>67</sup> Vid. la *Comunicación de la Comisión al Parlamento Europeo, al Consejo, al Comité Económico y Social Europeo y al Comité de las Regiones - 12010 : bibliotecas digitales*, COM/2005/0465 final.

<sup>68</sup> Del párrafo anterior no debe inferirse que la utilización de obras abandonadas, sobre todo obras huérfanas, en proyectos comerciales no merece una atención singular y un tratamiento específico en la normativa de propiedad intelectual. No obstante, las características especiales del uso -en relación con obras singulares, en proyectos comerciales y con fines lucrativos- reclaman unas condiciones y una lógica diferentes. Los sistemas a los que nos referíamos al tratar las soluciones *ad hoc* de obras huérfanas amparaban usos comerciales o no comerciales. Si nos centramos en el caso estadounidense, podremos concluir que las limitaciones de responsabilidad que pueden ser muy efectivas para usos singulares o comerciales no resultarán demasiado operativas para proyectos digitales a gran escala. Y ello incluso a pesar de la cláusula que posibilita las entidades sin ánimo de lucro de proceder al pago de la compensación. El riesgo continúa siendo demasiado elevado para las entidades embarcadas en proyectos de digitalización de gran escala.

animar la conclusión de acuerdos sobre las obras abandonadas, por ejemplo, fomentando la elaboración y diseminación de modelos contractuales como los preparados por el Subgrupo en Derecho de Autor para las obras descatalogadas. Igualmente, siguiendo los principios elaborados por este Grupo, deberían promoverse la creación de bases de datos, públicas o privadas, de obras silenciadas.

Pero, sin duda alguna, la intervención del poder público no debería detenerse aquí. Asumiendo que no todos los operadores del mercado se acogerían a estas iniciativas y partiendo de la base de que los acuerdos privados resultarían de poca utilidad para algunos tipos de obras silenciadas -en particular, para las obras huérfanas-, deberían modificarse la normativa de propiedad intelectual de modo que se estableciera una limitación obligatoria que entraría en juego con carácter subsidiario: sólo cuando los titulares de derechos no exploten sus obras y no manifiesten su intención de hacerlo en un futuro más o menos cercano. Este tipo de disposiciones obligatorias pero de naturaleza subsidiaria ya existen en algunas normas de propiedad intelectual. Así, en el esquema previsto, por ejemplo, en el Anexo al Convenio de Berna. A una opción similar nos remite el legislador británico en algunas de las disposiciones relativas a las limitaciones o “usos permitidos” de la *Copyright, Designs and Patents Act* -que no resultarán de aplicación cuando se ha puesto en marcha un sistema de licencias voluntaria-<sup>69</sup> o en el juego entre licencias obligatorias y voluntarias contemplado en la misma norma.<sup>70</sup> La sección 53a de la ley alemana adopta una solución similar que, además, se refiere de manera específica a las limitaciones a favor de las bibliotecas. En este caso se autoriza la reproducción y transmisión electrónica de artículos individuales publicados en periódicos u revistas y pequeñas partes de obras publicadas siempre que se realice en forma de archivos gráficos y para la ilustración de la enseñanza o para fines de investigación científica, en la medida en la que la utilización esté justificadas por fines no comerciales. Tales reproducciones y transmisiones están permitidas sólo en tanto el acceso a la obra no sea posible, bajo condiciones contractuales razonables, por miembros individuales del público desde el lugar y en el momento que éstos elijan. Es decir, en tanto el titular de derechos no haya desarrollado en sistema de licencias para la puesta a disposición al público de sus obras. En todo caso, de acuerdo con lo dispuesto por la sección 53.a, el titular de derechos recibirá una remuneración por los usos realizados al amparo de la disposición. La remuneración sólo podrá reclamarse mediante una sociedad

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<sup>69</sup> D. KHONG, “Orphan Works, Abandonware and the Missing Market for Copyright Goods”, *supra* nota 2, p. 79.

<sup>70</sup> Cf secciones 116-ss. de la *Copyright, Designs and Patent Act 1988*.

colectiva.<sup>71</sup>

El legislador tiene varias opciones de política legislativa para implementar la solución propuesta. Podría optar por acordar la extensión de los efectos de los acuerdos colectivos de licencia otorgados por las organizaciones que representen a los titulares de derechos a obras pertenecientes a titulares no representados por tales entidades. La principal diferencia con las licencias colectivas ampliadas es que, en lugar de una cláusula *opt out* basada en motivaciones subjetivas -la voluntad del titulares de derechos-, el sistema que proponemos se basa en un sistema *opt out* a partir de presupuestos objetivos: la explotación efectiva de la obra o la intención de explotarla en un período de tiempo más o menos cercano. Otra posibilidad sería la imposición de la gestión colectiva obligatoria para las obras silenciadas. Finalmente también podrían considerarse el establecimiento de licencias no voluntarias. Y en este punto nos parece más adecuado descartar la aplicación de las denominadas licencias obligatorias individuales<sup>72</sup> a favor de las licencias obligatorias generales o, en su caso, de las licencias legales gestionadas por el Estado o una autoridad independiente.<sup>73</sup> La imposición de un sistema de licencias obligatorias sobre bases individuales no parece adecuada, por su carga administrativa tanto para la institución encargada del otorgamiento de licencias como para los usuarios, a los proyectos de este tipo.<sup>74</sup>

No obstante una solución basada en licencias legales es incompatible con

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<sup>71</sup> Sobre la solución alemana: H. MUELLER, "The Legal Problems of Document Supply by Libraries: An International Perspective", *Interlending and Document Supply*, 2008, No 2, pp. 68-73.

<sup>72</sup> Las licencias obligatorias establecen una verdadera obligación de contratar, permitiendo que las condiciones y, en su caso, el precio, sean libremente determinados por las partes. En la literatura se ha destacado que la principal diferencia entre las licencias legales y las obligatorias (o forzosas) es precisamente el modo en el que se determina la remuneración: mediante la negociación en el caso de las forzosas, siguiendo los criterios determinados por la ley en las legales. Vid. R. FERNAY, "Grandeur, misère et contradictions du droit d'auteur", *Revue Internationale du Droit d'Auteur*, 1981, p. 162 ; A. STROWEL, *Droit d'auteur et copyright*, 1993, p. 631. También L. GUIBAULT, *Licenses and Copyright Exemptions*, 2000, presentación realizada en la reunión Information Licensing, organizada por el Legal Advisory Board de la Comisión Europea, DGIS en Mayo de 2000; S. DUSOLLIER, *Droit d'auteur et protection des oeuvres dans l'univers numérique: Droits et exceptions à la lumière des dispositifs de verrouillage des Oeuvres*, 2005, p. 424.

<sup>73</sup> Mediante las licencias legales el legislador autoriza el uso delimitando él mismo la cuantía, o los criterios a tener en cuenta para su determinación- o remitiendo su fijación a una autoridad independiente.

<sup>74</sup> Pensemos por ejemplo en el sistema canadiense: un modelo de licencias obligatorias, que requiere ex-ante la verificación implica una carga administrativa que le resta operatividad al sistema.

la normativa comunitaria de propiedad intelectual. El art. 5 de la Directiva 2001/29/CE contiene una lista exhaustiva de limitaciones que podrán contemplarse en el Derecho nacional. Los Estados miembros no pueden contener en su normativa interna limitaciones que no estén autorizadas por la lista. La única limitación que autoriza la puesta a disposición de las obras protegidas por las bibliotecas es el art. 5 (3) (n),<sup>75</sup> pero, en los términos en los que está redactado, se muestra de muy poca utilidad para los proyectos de bibliotecas digitales.<sup>76</sup> Es más, el Considerando 40 de la Directiva dispone que:

“los Estados miembros pueden establecer una excepción o limitación en beneficio de determinados establecimientos sin fines lucrativos, como bibliotecas accesibles al público y entidades similares, así como archivos. No obstante, dicha excepción o limitación debe limitarse a una serie de casos específicos en los que se aplique el derecho de reproducción. *Tal excepción o limitación no debe aplicarse a las utilizaciones realizadas en el contexto de la entrega en línea de obras o prestaciones protegidas.* [...] Conviene, por tanto, fomentar los contratos o licencias específicas que favorezcan de manera equilibrada a dichas entidades y sus objetivos en el campo de la difusión” [énfasis añadido].

Las limitaciones que tengan como objetivo la entrega electrónica de obras protegidas queda claramente prohibida por la Directiva, excepto si se dan en el marco del art. 5 (3) (a) que autoriza las utilizaciones con fines de ilustración en la enseñanza e investigación.<sup>77</sup> Es importante en este punto advertir que el concepto de “excepciones y limitaciones” utilizado en la

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<sup>75</sup> El art. 5 (3) (n) autoriza las limitaciones a los derechos de reproducción y comunicación al público “cuando el uso consista en la comunicación a personas concretas del público o la puesta a su disposición, a efectos de investigación o de estudio personal, a través de terminales especializados instalados en los locales de los establecimientos mencionados en la letra (c) del apartado 2, de obras y prestaciones que figuran en sus colecciones y que no son objeto de condiciones de adquisición o de licencia”.

<sup>76</sup> L. GUIBAULT, “Evaluation of the Directive 2001/29/EC”, *supra* nota 64, p. 8.; M. IGLESIAS & L. VILCHES, “Les bibliothèques numériques et le droit d’auteur en Europe”, *supra* nota 18, pp. 956-958 & 986 ; M. IGLESIAS, “Digital Libraries”, *supra* nota 18.

<sup>77</sup> Al art. 5 (3) (a) dispone que “estados miembros podrán establecer excepciones o limitaciones a los derechos a que se refieren los artículos 2 y 3 [relativos a los derechos de reproducción y comunicación pública] en los siguientes casos: [...] cuando el uso tenga únicamente por objeto la ilustración con fines educativos o de investigación científica, siempre que, salvo en los casos en que resulte imposible, se indique la fuente, con inclusión del nombre del autor, y en la medida en que esté justificado por la finalidad no comercial perseguida”.

Directiva sólo abarca las excepciones gratuitas y las licencias legales. La Directiva no parece afectar a los sistemas no voluntarios de gestión colectiva; *i.e.*, la gestión colectiva obligatoria o las licencias colectivas ampliadas.<sup>78</sup> El Considerando 18 establece que la Directiva “no afectará a las disposiciones que existen en los Estados miembros en materia de gestión de derechos, como las licencias colectivas ampliadas”.<sup>79</sup> Así, el sistema obligatorio de naturaleza subsidiaria propuesto en los párrafos precedentes no podría adoptarse bajo un modelo de excepción o de licencia legal; sin proceder, claro está, a una modificación de la Directiva e incluso del Derecho internacional de Autor. Sin embargo, todo parece apuntar a la compatibilidad de la gestión colectiva obligatoria o del carácter extendido de los acuerdos adoptados por las entidades de gestión con el cuerpo jurídico comunitario e internacional.

Por otro lado, la opción por alguno de los modelos referidos dependerá de las peculiaridades de cada país. La implementación de un sistema *sui generis* de licencias colectivas ampliadas dependerá de la existencia, en cada uno de los sectores afectados, de organizaciones de titulares de derechos -no tienen por qué ser necesariamente entidades de gestión colectiva aunque, ni que decir, tiene éstas parecen los actores mejor preparados para realizar tal función- suficientemente representativas y del hecho de que tales organizaciones hayan desarrollado un sistema de licencias a tal efecto. Cuando no sea el caso, parece más adecuado adoptar un sistema de gestión colectiva obligatoria. Si no existieran entidades de gestión para toda clase de obras, entonces podrían crearse o designarse una o varias entidades u organizaciones que pudieran otorgar tales licencias.

En todo caso, el legislador debería definir el contenido, los elementos del sistema. El primer paso sería precisar su ámbito de aplicación, es decir, delimitar las situaciones de abandono o de silencio. Tal definición debería referirse a aquellas obras protegidas que no están siendo explotadas y cuyos titulares de derechos no muestran la intención de hacerlo. Otro punto de especial importancia sería identificar qué tipo de proyectos de digitalización deberían ser considerados proyectos de interés público, lo cual nos lleva a definir los beneficiarios del sistema; a saber: bibliotecas, archivos o museos accesibles al público implicados en proyectos de

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<sup>78</sup> Es más discutible se afecta o no a las licencias obligatorias.

<sup>79</sup> La redacción del Considerando 10 y la alusión explícita a las licencias colectivas ampliadas, se introduce en la Posición Común del Consejo (vid. Considerando 18 de la *Posición Común 20/95, aprobada por el Consejo el 10 de julio de 1995, con vistas a la adopción de la Directiva del Parlamento Europeo y del Consejo, sobre la protección jurídica de las bases de datos*, DO C 288, de 30.10.1995, pp. 14-29) precisamente a solicitud de Suecia, que sólo así estaba dispuesta aceptar la limitación con fines de enseñanza. Cf Documento del Consejo 9734/99, p. 6, nota 31.

digitalización a gran escala. Los proyectos no deberían perseguir un fin comercial, lo que no quiere decir, no obstante que no se pueda exigir una tasa mínima para cubrir los costes de digitalización y, en su caso, la remuneración debida en virtud del sistema de licencias (*cf infra*). El sistema debería autorizar la puesta a disposición de las obras silenciadas y las reproducciones necesarias para llevar a cabo la comunicación al público. Así la entrega electrónica de documentos resultaría permitida siempre que se respetasen, eso sí, las condiciones referidas a continuación. En primer lugar el acceso a las obras protegidas debería quedar limitado a los usuarios registrados en la biblioteca. A diferencia de la propuesta estadounidense, consideramos que el sistema debería incluir el deber de abonar una remuneración equitativa por el uso, especificando las condiciones bajo las que debería abonarse la remuneración. La configuración de la remuneración podría basarse en un sistema *ex ante* (la fijación *a priori* de la cuantía a pagar), *ex post* (basado en, por ejemplo, los accesos a la obra) o en una combinación de ambos (una parte fija más una parte variable en función de la intensidad de la utilización). Los titulares de derechos tendrían derecho a reclamar ante la organización intermediaria -i.e., las organizaciones que representen los intereses de los titulares de derechos o, en el caso de licencias legales, las autoridades competentes encargadas de la gestión de las licencias- la remuneración que le corresponda por la utilización de sus obras. A los titulares de derechos que muestren *a posteriori* su interés en explotar la obra debería además otorgárseles la posibilidad de solicitar el cese en la utilización. Por otro lado, habrían de determinarse una serie de acciones positivas para facilitar la identificación del titular de derechos o darle la oportunidad de manifestar cuáles son sus intenciones respecto a la explotación de la obra. Es decir, deberían incluirse estrictas obligaciones de información a tener en cuenta antes de proceder a la utilización de la obra o, en su caso, de conceder la autorización. Dependiendo del peso que se le conceda a las organizaciones intermediarias, serán éstas y/o los usuarios quienes deban cumplir con los deberes de información. En cualquier caso, las obligaciones de información podrán inspirarse en las orientaciones para la búsqueda diligente contempladas en el *Memorandum of Understanding* o, incluso, en las obligaciones de información establecidas en el Anexo al Convenio de Berna. Además los usuarios o las entidades intermediarias deberían realizar una declaración de utilización (con el fin de informar a los titulares de derechos sobre la explotación de la obra) que podrían publicarse en un registro gestionado por una institución pública o privada; i.e., en las bases de datos de obras cautivas a las que hacíamos referencia al introducir las opciones de política legislativa. También deberían incorporarse disposiciones que impidieran un daño injustificado en los derechos morales, requiriendo, con carácter preceptivo y siempre que fuera posible, la alusión al autor y a la fuente. Tratándose de obras no publicadas, parece

justificable limitar la utilización a las obras cuyos autores han fallecido y/o tolerarla sólo respecto a los usos que demuestren un interés científico en el acceso a la obra. Finalmente, deberían imponerse medidas que evitaran la diseminación incontrolada de la obra, por ejemplo, requiriendo a las bibliotecas la adopción de ciertas medidas tecnológicas de protección. Así, podría no ser posible realizar copias ulteriores de las obras puestas a disposición del público ni diseminarlas a usuarios no autorizados por la biblioteca. Las medidas tecnológicas de protección deberían posibilitar un cierto control de las utilidades -sin, por supuesto, invadir la privacidad de los usuarios-, y podrían, incluso, imponer restricciones temporales a la utilización. Un sistema como el propuesto parece, en efecto, sugerir la aplicación de la teoría de la equivalencia funcional respecto a lo que representa en el mundo *off line* el préstamo público. Y es que tal vez haya llegado el momento de retomar la discusión sobre el préstamo digital.

#### **IV. CONCLUSIÓN**

Las bibliotecas digitales tienen un papel determinante para contribuir a la consecución de la Sociedad del conocimiento. Las nuevas tecnologías les proporcionan además los medios para devolver la voz a las obras cautivas o silenciadas, obras respecto de las que sus titulares de derechos no muestran un interés en proceder a su explotación, y que, por la configuración específica de los derechos exclusivos de propiedad intelectual, se ven obligadas a permanecer en silencio. La Comisión Europea así como una serie de Estados europeos y no europeos se han lanzado a la búsqueda de soluciones para facilitar el uso de estas obras. En tal empresa, la mayoría de ellos han apostado por soluciones singulares atendiendo al tipo de obras silenciadas, previendo soluciones específicas para, por un lado, las obras huérfanas y, por otro, las obras descatalogadas. Consideramos que este tratamiento del problema no es el adecuado. De ahí que apostemos en este artículo por sistema inclusivo que se aplique a la utilización de todo tipo de obras silenciadas en proyectos de digitalización a gran escala con un claro interés público, describiendo las opciones legislativas y las bases sustantivas sobre las que podría erigirse tal sistema.

**CARTESIO AND GRUNKIN-PAUL:  
MUTUAL RECOGNITION AS A VESTED RIGHTS THEORY  
BASED ON PARTY AUTONOMY IN PRIVATE LAW**

Jan-Jaap Kuipers\*

**I. INTRODUCTION: PRIVATE INTERNATIONAL LAW AND  
COMMUNITY LAW**

PIL lawyers often submit that their topic is neglected by Community lawyers.<sup>1</sup> It is true that the EEC Treaty merely made one reference to PIL, stipulating that member states will enter with each other into negotiations concerning the simplification of recognition and enforcement of judicial decisions,<sup>2</sup> which resulted in the Brussels I Convention.<sup>3</sup> The 1980 Convention on the Law applicable to Contractual Obligations even had no direct basis in the EEC Treaty. Member states simply desired to continue the unification of PIL as set in motion by the Brussels I Convention in the field of applicable law.<sup>4</sup> Striking was that both instruments were international conventions and not Community instruments. With the small role PIL has played in the early years of the Community in the back of our mind, it seems not self-evident to search for an explanation of the *Cartesio* and *Garcia Avello* decisions in PIL. In recent years however, the Community interest in PIL has been growing. The Treaty of Amsterdam introduced the first direct PIL competence: the Community is empowered to take measures in the field of PIL when this is necessary for the internal market (art. 65 EC). The Treaty of Nice lowered, save in family matters, the voting requirements from unanimity to qualified majority voting. The Lisbon Treaty will continue this trend: art. 81 TFEU empowers the Community to take legislative measures in particular when necessary for the internal market.<sup>5</sup> Anno 2009, the Brussels and Rome Conventions have been transformed into regulations and more codification projects

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<sup>1</sup> J. BASEDOW, "The Communitarisation of the Conflict of laws under the Treaty of Amsterdam", in: *Common Market Law Review*, 2000, vol. 37, pp. 687-708; H. JESSURUN d'OLIVERIA, "The EU and a Metamorphosis of Private International Law", in: J. FAWCETT ed., *Reform and Development of Private International Law: Essays in honour of Sir Peter North*, Oxford, Oxford University Press, 2002, pp. 111-136, at p. 119. K. BOELE-WOELKI and R. VAN OOIK, "The Communitarization of Private International Law", *Yearbook of Private International Law*, 2002, vol. 4, pp. 1-36.

<sup>2</sup> Art. 220 EEC (currently 293 EC)

<sup>3</sup> OJ L 299/32 (1972).

<sup>4</sup> OJ L 266/19 (1980), compare the 3<sup>rd</sup> recital of the preamble.

<sup>5</sup> G. DE GROOT and J.-J. KUIPERS, "The New Provisions on Private International Law in the Treaty of Lisbon", *Maastricht Journal of European and Comparative Law*, 2008, vol. 15, (1) pp. 109-114.

have been undertaken by the EC.<sup>6</sup>

There is still a long way to go. In a number of judgments on the Brussels I Regulation the ECJ has far from rebutted the old criticism that Community lawyers have a poor understanding of PIL. The Court seems more concerned with the mandatory nature of the Regulation rather than preserving its underlying PIL rationale.<sup>7</sup> The growing interest of the Community in PIL is however quite understandable. The general consensus seems to be that, despite calls for the creation of a European Civil Code,<sup>8</sup> the Community has no competence to introduce a comprehensive codification.<sup>9</sup> Even the Commission has acknowledged that some areas of private law will not be harmonised in the near future, or even never.<sup>10</sup> Such areas will essentially be governed by national private law. Private international law constitutes a good alternative for harmonisation of private laws since it is able to enhance legal certainty while at the same time does not necessitate any change of substantive and is therefore better able to respect legal diversity.<sup>11</sup> The absence or impossibility of positive harmonisation of private law does however not exclude the possibility of negative harmonisation. In other words, although a certain rule is completely national in nature it still has to be in conformity with (primary) Community law.<sup>12</sup>

The application of a conflict of law rule will not in all cases be compatible with the exercise of the fundamental freedoms or European Citizenship. If member states apply to every situation their own conflict of law rule, it

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<sup>6</sup> For example: *Proposal for a Council Regulation of 15 December 2005 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations* COM (2005) 649 final and the *Green Paper on succession and wills* COM (2005) 65 final.

<sup>7</sup> J. HARRIS, "Understanding the English response to the Europeanisation of Private International Law", *Journal of Private International Law*, 2008, vol. 4, pp. 347-395.

<sup>8</sup> European Parliament Resolution Pb C 158/400 (1989). See: M. RÖTTINGER, "Towards a European Code Napoléon/ABGB/BGB? Recent EC Activities for a European Contract Law", *European Law Journal*, 2006, vol. 12, pp. 807-827.

<sup>9</sup> W. VAN GERVEN, "The ECJ Case law as a Means of Unification of Private Law?", in: A. Hartkamp (ed.), *Towards a European Civil Code*, Nijmegen, Ars Aequi Libri, 2005, p. 102.

<sup>10</sup> Commissioner Vitorino: "*Il existe certains domaines du droit civil en du droit pénal, tant en ce qui concerne le fond que la procédure, qui ne seront pas harmonisés pendant très longtemps entre les membres de l'Union européenne, et peut-être même jamais*", quoted in: O. REMIEN, "Private International Law, the European Community and its Emerging Area of Freedom, Security and Justice", *Common Market Law Review*, 2001, vol. 26, p. 63.

<sup>11</sup> H. MUIR-WATT, "European Integration, legal diversity and the Conflict of Laws", *Edinburgh Law Review*, 2005, vol. 9, pp. 6-31.

<sup>12</sup> ECJ, Case C-120/95, *Decker*, 1998 ECR I-1831, para. 22-23; ECJ, Case C-446/03, *Marks & Spencer*, 2005 ECR I-10837, par. 29.

might occur that a situation is lawful in one member state but not recognised, or even unlawful in another member state. The application of the Savignian conflict of law rule, based on the localisation of the centre of gravity or natural seat of a legal relationship, to rights duly formed seems not apt to deal with these problems satisfactorily. Member states do not always agree about what constitutes the natural seat of a legal relationship. They apply their own conflict of law norms to determine whether a right has been validly created. The resulting legal uncertainty is detrimental for a common European justice area. This critique does not mean that PIL as such is inadequate. The Savignian, multilateral conflict of law rule is merely one conception of PIL and could be complemented or replaced by others.

Connection may be sought with the principle of mutual recognition. In the free movement of goods, mutual recognition means that if a French manufacturer can lawfully market its goods in France it should in principle also be allowed to do the same in Germany. Similarly, one could argue that if a situation is lawful in France, it should in principle also be lawful in Germany. Rights acquired in one jurisdiction should in principle also be sustained in other jurisdictions. The rebirth of acquired, or vested rights fits into the changing paradigm of PIL. Due to increasing globalisation individuals are increasingly replacing a strong link with one state with several looser links to different states. Recent technological developments have provided the individual with more factual possibilities to escape the state model, leading to a stronger private autonomy. With the increased possibility to circumvent the conflict of law rules of states and the interference of public law considerations becoming more and more an exception, the decline of the conflict of law rule has been set in.<sup>13</sup>

In the next sections it will be demonstrated that the ECJ case law relating to the transfer of undertakings and concerning surname law is neither of a completely Community law, nor national company law but also not really (traditional) PIL nature. It will be explored to what extent a vested rights doctrine can be retrieved in the court's decisions and what possible general conclusions can be drawn for private law. By referring to academic interpretations of the ECJ case law, it will be demonstrated that the PIL perspective has often been neglected.

## **II. THE CASE OF COMPANY LAW: A RIGHT TO ENTER, NOT TO EXIT?**

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<sup>13</sup> C. PAMBOUKIS, "La renaissance-métamorphose de la méthode de reconnaissance", *Revue Critique de Droit International Privé*, 2008, vol. 97, pp. 513-560, at p. 519.

The core principle of the Brussels Convention and the Brussels I Regulation is the mutual recognition of judgments between member states. Member states cannot apply their own substantive law to check the content of a judgment rendered in another member state.<sup>14</sup> The Treaty of Lisbon would have incorporated mutual recognition as guiding principle for PIL in a common European Justice Area. One of the core pillars of European PIL is thus the confidence in the conflict of law mechanism of other member states. With this idea in the back of our mind it might be interesting to shortly revisit the case law of the ECJ concerning the freedom of establishment of companies and analyse the role of mutual confidence. Art. 48 in conjunction with art. 43 confers upon companies or firms that are formed in accordance with the law of a member state and have their registered office, central administration or principal place of business within the Community the freedom of establishment.<sup>15</sup> The article does however not provide for a clear-cut right of transfer.<sup>16</sup>

In *Daily Mail* a company desired to move its headquarters from the United Kingdom to the Netherlands, but this was opposed by the UK authorities.<sup>17</sup> The Court held that, with a view to the widely differing connecting factors between the member states, Community law as it stood did therefore not confer a right upon Daily Mail, incorporated under the legislation of England, and having its registered office there to transfer its central management and control to the Netherlands.

In *Centros* the Court held the refusal to register a branch of companies duly formed under the law of another member state to be a restriction on the freedom of establishment.<sup>18</sup> The host member state (Denmark) could not impose upon a company which had been duly formed in England its own substantive company law. Although Denmark was allowed to impose

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<sup>14</sup> The Brussels I Regulation provides for a narrow public policy exception to refuse a foreign judgment. Usually this will require a breach of fundamental rights, such as art. 6 ECHR. Case C-7/98, *Krombach*, 2000 ECR I-1935; Case C-394/07, *Gambazzi*, 2009 ECR I-0000, see: as well in the UK: Court of Appeal, *Maronier v Larmer*, 2002 EWCA Civ 774.

<sup>15</sup> The incorporation theory declares the *lex societatis* (law applicable to the company) to be the law of the place where company is registered, whereas the real seat doctrine declares the law of the place applicable where the company has its main centre of business. See: S. RAMMELOO, *Corporations in Private International Law: A European Perspective*, Oxford, Oxford University Press, 2001.

<sup>16</sup> A proposal for the 14<sup>th</sup> Company Law Directive on the transfer of undertakings is in the pipeline. See: Draft Report with recommendations to the Commission on cross-borders transfers of company seats (2008/2196(INI)).

<sup>17</sup> ECJ, Case 81/87, *Daily Mail v. UK*, 1988 ECR 5483.

<sup>18</sup> *Centros*, para. 20 and 21.

safeguards to avoid evasion of its laws, the refusal did not pass the suitability test. The registration of a branch of a company that carried out business in the UK would have equally deprived Danish creditors of their protection.<sup>19</sup>

In *Überseering*, a company was denied legal standing as plaintiff in a legal proceeding because after a transfer of ownership it had moved its actual centre of business from the Netherlands to Germany.<sup>20</sup> The shift of actual centre of business without any change in legal personality was possible under Dutch PIL, but not under German. The Court held that a company duly set up under the legislation of one member state can ‘transfer its registered office or its actual centre of administration to another member state without losing its legal personality under the law of the member state of incorporation, and, in certain circumstances, the rules relating to that transfer, are determined by the national law in accordance with which the company was incorporated’.<sup>21</sup>

In *Inspire Art* the Netherlands sought to impose additional registration requirements upon pseudo foreign companies, including a minimum capital requirement.<sup>22</sup> The additional requirements failed the proportionality test: potential creditors were already sufficiently warned by the fact that Inspire Art held itself out as a company governed by the law of England and not by the law of the Netherlands.<sup>23</sup> The Court favoured self-help: potential creditors in the Netherlands should apparently know that the minimum capital requirements in England are significantly more lenient than in the Netherlands and could therefore take appropriate securities to ascertain the fulfilment of Inspire Arts obligations.

In its judgments the ECJ did not seem to attach much importance to the distinction between primary and secondary establishment, nor to the intention of the undertaking to evade stricter standards in the host member state. The essence of the internal market is that individuals can take advantage of differences between national legislations. Academic commentators predicted a regulatory competition, or a race to the bottom whereby member states would try to attract as many companies as possible by offering the most lenient standards.<sup>24</sup> It is true that after the judgments

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<sup>19</sup> *Centros*, par. 35.

<sup>20</sup> ECJ, Case C-208/00, *Überseering*, 2002 ECR I-9919.

<sup>21</sup> *Cartesio*, par. 107.

<sup>22</sup> ECJ, Case C-167/01, *Inspire Art*, 2003 ECR I-10155.

<sup>23</sup> *Inspire Art*, par. 135.

<sup>24</sup> On the debate: M. SIEMS, “Convergence, competition, Centros and Conflicts of Law: European Company Law in the 21<sup>st</sup> Century”, *European Law Review*, 2002, vol.

member states started revising their company and private international laws. For example, in the Netherlands the European developments were specifically named as reason for the proposal to make the limited liability company (BV) more internationally competitive by abolishing the minimum capital requirement and introducing in general more flexibility.<sup>25</sup>

### III. REAL SEAT DOCTRINE 'BURIED ALIVE'

The decisions in *Centros*, *Überseering*, and *Inspire Art* made many question whether *Daily Mail* was still standing. Did the ECJ, despite its vow to respect the plurality of connecting factors, not give the dead blow to the real seat doctrine or at least give preference to the incorporation theory?<sup>26</sup> The Austrian *Oberste Gerichtshof* (Supreme Court, OGH) answered that question apparently in the affirmative. The OGH held, without making a reference to the ECJ, the application of the real seat doctrine to companies established in other member states to be incompatible with the freedom of establishment.<sup>27</sup> There seemed to be a broad consensus that the rationale of

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27, pp. 47-59; G. SPINDLER and O. BERNER, "Inspire Art - Der europäische Wettbewerb um das Gesellschaftsrecht ist endgültig eröffnet", *Recht der internationalen Wirtschaft*, 2003, p. 949; C. KIRCHNER, R. PAINTER and W. KAAL, *Regulatory Competition in EU Corporate Law After Inspire Art: Unbundling Delaware's Product for Europe*, University of Illinois Law & Economics Research Paper no. LE04-001 (2004); E. KIENINGER, "The Legal Framework of Regulatory Competition Based on Company Mobility: EU and US Compared", *German Law Journal*, 2005, vol. 6, pp. 741-770; J. McCAHERY, "Harmonisation in European Company Law: The Political Economy of Economic Integration", in: D. CURTIN *et al.* (eds.), *European Integration and Law*, Antwerpen, Intersentia, 2006, pp. 155-194.

<sup>25</sup> Memorie van Toelichting, Wijziging van Boek 2 van het Burgerlijk Wetboek in verband met de aanpassing van de regeling voor besloten vennootschappen met beperkte aansprakelijkheid (Wet vereenvoudiging en flexibilisering bv-recht), Tweede Kamer der Staten Generaal 2006-2007, 31 058, no. 3. At the time of writing, the bill was still pending in the Tweede Kamer (House of Commons).

<sup>26</sup> H. HALHUBER, "Das ende der Sitztheorie als Kompetenztheorie- Das Urteil des Europäischen Gerichtshofs in der Rechtssache C- 208-00 (*Überseering*)", *Zeitschrift für Europäisches Privatrecht*, 2003, vol. 8, pp. 418-438 S. RAMMELOO, "Vrij verkeer van rechtspersonen in Europa na HvJ EG *Überseering*. Ipr-zetelleercontroverse beslecht?", *Nederlands Internationaal Privaatrecht*, 2003, pp. 134-144; S. RAMMELOO, "Vrij verkeer van rechtspersonen in Europa na HvJ EG *Inspire Art*: zetelleercontroverse beslecht!", *Nederlands Internationaal Privaatrecht*, 2004, pp. 283-295. S. RAMMELOO, "Freedom of Establishment for Legal Persons in Europe Accomplished", *Maastricht Journal of European and Comparative Law*, 2004, vol. 11, pp. 398-413. For an overview: H. MUIR-WATT, Case Note to *Inspire Art*, *Revue Critique de Droit International Privé*, 2004, vol 93, pp. 151-184.

<sup>27</sup> OGH, Beschluss v. July 15, 1999 -- 6 Ob 123/99 b, 'Der Begriff "Ansässigkeit" setze eine enge wirtschaftliche Verbindung mit der Gemeinschaft voraus, es müsse somit Hauptverwaltung oder Hauptniederlassung in einem Mitgliedstaat, nicht notwendig

the ECJ with regard to host member state also affected the position on the member state of origin. The distinction made by the Court between restrictions imposed by host member state and the member state of origin was found unconvincing.<sup>28</sup> It even led an AG to conclude that the distinction was artificial and found no support in the wording of the judgments.<sup>29</sup> Although the Court reaffirmed in *Überseering* and *Inspire Art* its distinction between the relation of the company with the member state of incorporation and the member state of registration, it could not count on academic approval. To quote a leading textbook on EU law:

“Although the ECJ distinguished the *Daily Mail* case on its facts (where the restriction on the company’s right to retain legal personality in the event of a transfer of registered office or centre of administration was imposed by the member state of incorporation), the reality is that the reasoning in *Überseering* clearly moves away from the underlying broad rationale in *Daily Mail*”.<sup>30</sup>

A Hungarian law professor therefore decided to set up a company (Cartesio) and test the compatibility of a Hungarian law providing the loss of Hungarian legal personality in the case of transfer of the real seat of an undertaking abroad. Would the ECJ in *Cartesio* abandon *Daily Mail*?

#### IV. CARTESIO

In *Cartesio* a company wished to transfer its real seat from Hungary to Italy whilst retaining its incorporation in Hungary and thus without changing the *lex societatis*.<sup>31</sup> Hungary provided in such cases for the loss of Hungarian legal personality and required the prior winding up and liquidation of the company.<sup>32</sup> AG Maduro concluded that art. 43 in conjunction with art. 48

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aber im Gründungsstaat, begründet sein.’ see: M. HEIDINGER, “Austria: Company Law – Branch Office”, *Journal of International Banking Law*, 2000, vol. 15, p. 8. More correct is the decision of the German BGH, Bundesgerichtshof 13 March 2003 (BGHZ 154/185): “Diese Anknüpfungsregel (Sitztheorie) werde durch die im EG-Vertrag geregelte Niederlassungsfreiheit nicht verdrängt”.

<sup>28</sup> W. RINGE, “No freedom of migration for European Companies?”, *European Business Law Review*, 2005, vol. 16, pp. 621-642.

<sup>29</sup> AG COLOMER in *Überseering*, par. 37.

<sup>30</sup> P. CRAIG and G. de BURCA, *EU Law: Text, Cases and Materials*, 4th ed., Oxford, Oxford University Press, 2007, p. 810.

<sup>31</sup> ECJ, Case C-216-06 *Cartesio*, 2008 ECR I-0000.

<sup>32</sup> There is confusion as to whether Hungary adheres to the real seat or incorporation doctrine. See: V. KOROM and P. METZINGER, “Freedom of Establishment for Companies: The European Court of Justice Confirms and Refines its *Daily Mail* Decision in the *Cartesio*”; ECJ, Case C-210/06, *European Company and Financial Law*

precluded “national rules which make it impossible for a company constituted under national law to transfer its operational headquarters to another member state”.<sup>33</sup> The AG however formulated a reply to a question different than posed by the referring court and answered by the ECJ. What was at stake was not whether Hungary could prevent the establishment of Cartesio in Italy, but whether Hungary could provide for the loss of Hungarian legal personality. The refusal of the right to maintain Hungarian law as *lex societatis* did in itself not prevent the relocation to Italy. The AG argued that the case law on the right to establishment evolved since *Daily Mail* and repeated the well-known criticism that the distinction between laws that restrict the freedom of establishment in the member state of origin and the host member state was unconvincing. He added that in particular the distinction did not fit in the general analytical framework of the Court with regard to arts. 43 and 48 EC. The emphasis on the laws that restrict the freedom of establishment rather than the rights of the individual is the key as to why the AG was not followed by the Court.

The Court pointed out that while in *Überseering* Dutch law (incorporation theory) provided for a right of to the company to transfer its actual centre of business abroad, Hungarian law did not.

“Consequently, in accordance with Article 48 EC, in the absence of a uniform Community law definition of the companies which may enjoy the right of establishment on the basis of a single connecting factor determining the national law applicable to a company, the question whether Article 43 EC applies to a company which seeks to rely on the fundamental freedom enshrined in that article – like the question whether a natural person is a national of a member state, hence entitled to enjoy that freedom – is a preliminary matter which, as Community law now stands, can only be resolved by the applicable national law. In consequence, the question whether the company is faced with a restriction on the freedom of establishment, within the meaning of Article 43 EC, can arise only if it has been established, in the light of the conditions laid down in Article 48 EC, that the company actually has a right to that freedom”.<sup>34</sup>

So the power of a member state to define the connecting factor to

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*Review*, 2009, vol. 6 (1), pp. 125-161, at pp. 141-144. For the present purposes it is sufficient that Hungary did not foresee in the transfer of real seat without changing legal personality.

<sup>33</sup> AG MADURO in *Cartesio*, par. 35.

<sup>34</sup> *Cartesio*, par. 109.

determine whether a company is regarded as incorporated under its laws includes the power to refuse a company governed by its law to retain that status if it desires to re-establish in another member state by moving its real seat. Did the ECJ then fully confirm *Daily Mail*? Not really, in an *obiter dictum* the Court continued that the power to define the connecting factor did not place the rules on transfer of undertakings outside the scope of Community law. Those rules came under the scrutiny of the freedom of establishment to the extent that the law of the member state of origin allows for a transfer. Contrary to *Daily Mail* the Court held that the winding-up or liquidation of the company prior to a transfer to another member state would violate the freedom of establishment if it could not be justified by an overriding public interest.<sup>35</sup>

A lot can be said about the judgment.<sup>36</sup> The impossibility under the law of the member state of incorporation to re-establish an undertaking in another member states can be easily circumvented by performing a so-called vertical merger in reverse.<sup>37</sup> If Hungarian law would not provide for the possibility of re-incorporation in Italy, Cartesio could simply establish an empty shell in Italy and subsequently merge the two legal entities whereby the Hungarian company would transfer all of its assets and be completely absorbed by the Italian company. The ECJ held in *Sevic Systems* that the commercial registrar of the member state of the first undertaking (empty shell) is obliged to register a cross-border merger by dissolution without liquidation of one company and transfer of the whole of its assets to another company if such registration is possible when both companies are established within the member state involved.<sup>38</sup> Cartesio would of course then have to accept that the *lex societatis* of the new legal entity is to be determined by Italian law, and will presumably be Italian.

The Court explicitly draws a parallel with the status of natural persons. Art.

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<sup>35</sup> *Cartesio*, par. 112-113.

<sup>36</sup> P. BEHRENS, "Cartesio bestätigt, aber korrigiert Daily Mail", *Europäische Zeitschrift für Wirtschaftsrecht*, 2009, vol. 20, V. M. PIEßKALLA, "EuGH: Verhinderbare Gesellschaftssitzverlegung in einen anderen Mitgliedstaat als den Gründungsmitgliedstaat – Cartesio", *Europäische Zeitschrift für Wirtschaftsrecht*, 2009, vol. 20, pp. 75-83; C. GERNER- BEUERLE and M. SCHILLING, "The Mysteries of Freedom of Establishment after Cartesio", 2009, available at SSRN: <http://ssrn.com/abstract=1340964>, KOROM/ METZINGER, *supra* note 32. Unfortunately, it is beyond the scope of this paper to discuss the various interpretations of *Cartesio*.

<sup>37</sup> U. KLINKE, "European Company Law and the ECJ: The Court's judgments in the years 2001-2004", *European Company and Financial Law Review*, 2005, pp. 275-304.

<sup>38</sup> It is assumed that the registration of a vertical merger without liquidation of one of the parties is possible under Italian law.

43 however guarantees for individuals also the right to exit. The discrepancy in the approach towards the home member state in cases relating to the establishment of legal and natural persons has been found unconvincing.<sup>39</sup> The analogy between legal and natural persons can however not fully be maintained. Unlike natural persons, legal persons are creatures of law and only exist by grace of the national law. It is very well possible for an individual to have multiple nationalities, but it would be highly infeasible for a company to have multiple 'nationalities' and subsequently be governed by various laws. Although one can require companies to give up their legal nationality, one cannot require citizens to give up their nationality when moving to another member state. It is for this reason the ECJ does not prohibit member states from refusing a company to retain legal personality under its laws when the company moves beyond the boundaries of the jurisdiction involved.

*Cartesio* could invoke a right against Hungary since Hungary already recognised all privileges resulting from incorporation under Hungarian law.<sup>40</sup> Has the ECJ by refining, but in the main confirming *Daily Mail* implicitly overturned *Centros*? Is regulatory competition now dead? The wide interpretation of *Centros* and *Überseering* as nails to the coffin of the real seat doctrine can certainly no longer be maintained, but that interpretation was incorrect anyway. What the Court did in those cases was oblige the host member state to recognise a company duly set up under the laws of another member state. As the section below will demonstrate, the decision of the Court in *Cartesio* is in harmony with *Centros* and in harmony with the approach the Court takes in the area of surname law.

## V. THE VESTED RIGHTS THEORY REBORN

A company duly set up under the law of one member state shall be recognised in other member states. The language of the Court might sound familiar to the older generation of common lawyers. It seems the revival of a PIL doctrine declared dead many years ago. It was the Frisian scholar Ulrik Huber (1636-1694) who developed the idea that comity (fellowship of

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<sup>39</sup> PIEßKALLA *supra* note 36, p. 82.

<sup>40</sup> There might be situations conceivable where a right against the home member state can be invoked. For example when a tax scheme allows for the off-set of losses incurred by subsidiaries for the benefit of the parent company, this right would also apply to subsidiaries set up and operating in other member states. The home member state of the parent is then bound to recognise the capacity of the subsidiary awarded by the home member state of the subsidiary. ECJ, Case C-446/03, *Marks & Spencer plc v HM's Inspector of Taxes* 2005 ECR I-10837.

nations)<sup>41</sup> and the general pressure of international commerce required that acts duly performed in one jurisdiction shall be sustained in other jurisdictions. This idea became very influential in common law jurisdictions, in the form of the vested rights doctrine.<sup>42</sup> There has never been a universal conception of the vested rights doctrine.<sup>43</sup> In England the theory was most notably promulgated by Dicey who presumed that in English courts the applicable law was always English, but that English law would enforce rights duly acquired under foreign law unless this would violate English public policy.<sup>44</sup> In the United States, Beale favoured the universal recognition of rights created by the appropriate law.<sup>45</sup> Unlike Dicey, Beale formulated a rule to determine the law that created those rights: the law of the place where the last legal act necessary for the completion of the right took place.<sup>46</sup> The vested rights theory was also influential in French academia.<sup>47</sup> For Pillet the enforcement of a vested right was not a conflict of laws; at stake was not the question which jurisdiction was entitled to create it, but under what conditions a right had to be recognised in a jurisdiction different from which created it.<sup>48</sup> Pillet created in addition to the acquired rights doctrine a full system for designating the applicable law.<sup>49</sup>

## VI. VESTED RIGHTS AND MUTUAL RECOGNITION

The vested rights doctrine has some striking similarities with the principle

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<sup>41</sup> H. YNTEMA, "The Comity Doctrine", in: E. VON CAEMMERER, A. NIKISCH and K. ZWEIGERT, (eds.), *Vom Deutschen zum Europäischen Recht, Festschrift für Hans Dölle*, Tübingen, Mohr Siebeck, bd. II, 1963, pp. 65-72.

<sup>42</sup> P.M. NORTH and J.J. FAWCETT, *Cheshire and North Private International Law*, 11th ed., London, Butterworths, 1987, p. 21; L. STRIKWERDA, *Fries recht in Amerika. Over Ulrik Huber, Josph Story en internationale contracten*, *Groninger Opmerkingen en Medelingen IV*, 1987, p. 55.

<sup>43</sup> J. MAURY, "Règles générales des conflits de lois", *Recueil des Cours*, 1936, vol. 57, p. 329.

<sup>44</sup> A. DICEY, "On Private International Law as a Branch of the Law of England", *Law Quarterly Review*, 1890, vol. 6, pp. 1-21 and pp. 113-137, at pp. 114-118.

<sup>45</sup> J. BEALE, "Dicey's Conflict of Laws", *Harvard Law Review*, 1986, vol. 10, p. 168.

<sup>46</sup> R. MICHAELS, "EU Law as Private International Law? The Country-of-Origin Principle and Vested Rights Theory", *Journal of Private International Law*, 2006, vol. 2, pp. 195-242, at p. 215.

<sup>47</sup> H. MUIR-WATT, "Quelques remarques sur la théorie anglo-américaine des droits acquis", *Revue Critique de droit international privé*, 1986, pp. 425-455.

<sup>48</sup> A. PILLET, *Traité pratique de droit international privé I*, Paris, Sirey, 1923.

<sup>49</sup> MICHAELS, *supra* note 46, p. 216.

of mutual recognition.<sup>50</sup> In essence, the principle of mutual recognition combined with a country of origin principle is nothing more than the inability of the host member state to apply its legislation to a situation when that situation is already covered by the legislation of the home member state.<sup>51</sup> Neither the principle of mutual recognition nor the vested rights doctrine determines by itself the applicable law.<sup>52</sup> The fact that Germany cannot apply its beer purity laws to French imports does not mean French law is applicable, but rather that Germany cannot apply its legislation to French beer when that legislation is more restrictive than French legislation. Vested rights can seem circular. The question that duly acquired rights have to be respected does not answer the question according to which law the rights have to be established. An additional concept that can determine the competent legal order(s) is therefore necessary. Similarly, it is not in the scope of the principle of mutual recognition and vested rights to completely replace the otherwise applicable law. Regulatory gaps may therefore occur.<sup>53</sup> Finally, from a political legitimacy perspective it can be argued that both doctrines do not necessarily attribute regulatory competence to the member state with the largest regulatory interest. Was the regulatory interest of Germany to control the sale of spirits on its territory not larger than the regulatory interest of France to promote exports?<sup>54</sup> Did Denmark not have a larger

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<sup>50</sup> E. JAYME and C. KOHLER, "Europäisches Kollisionsrecht 2001: Anerkennungsprinzip statt IPR?", *IPRax*, 2001, vol. 21, pp. 501-514; J. ISRAEL, "Europees internationaal privaatrecht", *Nederlands Internationaal Privaatrecht*, 2001, vol. 19, pp. 135-149; M. FALLON and J. MEEUSEN, "Private International Law in the European Union and the Exception of Mutual Recognition", *Yearbook of Private International Law*, 2002, vol. 4 pp. 37-66 ; M. BOGDAN, *Concise introduction to EU Private International Law*, Groningen, Europa Law Publishing, 2006, pp. 26-30. For the general influence of Community law upon PIL: W. ROTH, "Der Einfluß des Europäischen Gemeinschaftsrechts auf das Internationale Privatrecht", *RabelsZ*, 1991, vol. 55 pp. 623-673; L. RADICATI DI BROZOLO, "L'influence sur les conflits de lois des principes de droit communautaire en matière de liberté de circulation", *Revue Critique de Droit International Privé*, 1993, vol. 82, pp. 401-423.

<sup>51</sup> *Commission Communication on Mutual Recognition*, OJ C256/2 [2008]. J. WEILER, "The Transformation of Europe", *Yale Law Journal*, 1991, vol. 100, pp. 2403-2483; R. STEFFENSON, *The EU's Exportation of Mutual Recognition: A Case of Transatlantic Policy Transfer?*, EUI Working Paper 2002/73; F. KOSTORIS PADOA SCHIOPPA, *The Principle of Mutual Recognition in the European Integration Process*, New York, Palgrave Macmillan, 2005.

<sup>52</sup> J. ISRAEL and K. SAARLOOS, *Europees Internationaal Privaat- en procesrecht*, in: A.S. HARTKAMP, C.H. SIEBURG, L.A.D. KEUS (eds.) *Serie Onderneming en Recht deel 42-II*, Deventer, Kluwer, 2007, pp. 629-698, at p. 651.

<sup>53</sup> MICHAELS, *supra* note 46, 230.

<sup>54</sup> Case 120/78 *REWE-Zentral v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649.

regulatory interest in the registration of the Danish branch of an English company that factually carried out no business in the United Kingdom?

For Michaels mutual recognition demonstrates a paradigm shift in PIL. The country of origin principle “is a choice-of-law principle albeit not one according to classical conflict of laws but a new form of vested rights principle”.<sup>55</sup> Although it is beyond doubt that the vested rights doctrine is a PIL principle, one can doubt whether vested rights are really a new form of mutual recognition. Mutual recognition concerns public law rules, or since the divide between public and private in Community law seems to be fading more and more,<sup>56</sup> rules concerning administrative authorisations, prudential supervision or product quality.<sup>57</sup>

Community law is in principle not interested in origin or national classification of a rule. Rather the ECJ establishes the restrictive effects of a rule on the internal market. So, why would Community law care about the public/private distinction, especially since there is on the continent no common consensus about what is public and what is private and moreover, the distinction as such is rejected by the common law traditions?<sup>58</sup> The meaning of the public/private divide should be interpreted in the light of the original objective of the Community: the creation of an internal market by the elimination of artificially created obstacles to trade. Community law thus, with the exception of competition laws, principally did not address horizontal relations but was addressed to member states. Mutual recognition was developed in this framework. Starting with *Defrenne II*,<sup>59</sup> where the ECJ held that the non-discrimination principle embodied in art. 141 EC also applied in a contract between two private

<sup>55</sup> R. MICHAELS, “The New European Choice-of-Law Revolution”, *Tulane Law Review*, 2008, vol. 82, pp. 1607-1644, at p. 1628.

<sup>56</sup> D. KENNEDY, “The Stages of Decline of the Public/Private Distinction”, *University of Pennsylvania Law Review*, 1982, pp. 1349-1357; M. LOUGHLIN, *The idea of public law*, Oxford, Oxford University Press, 2004; D. WYATT, *Horizontal Effect of Fundamental Freedoms and the Right to Equality after Viking and Mangold, and the Implications for Community Competence*, Oxford Legal Studies Research Paper No. 20/2008. The distinction between public and private is also fading from the rulemaking lens: P. VERBRUGGEN, *The Public-Private divide in Community law: Exchanging Public and Private law functions across the divide*, EUI Term Paper (2009), not published but available with author.

<sup>57</sup> H. MUIR-WATT, “The Conflict of Laws as a Regulatory Tool”, in: F. CAFAGGI (ed.), *The Institutional Framework of European Private Law*, Volume II, Oxford, Oxford University Press, 2006, pp. 107-148, at p. 110.

<sup>58</sup> M. HEIDEMANN, “Private Law in Europe: The Public/Private Dichotomy Revisited”, *European Business Law Review*, 2009, vol. 20, pp. 119-139.

<sup>59</sup> ECJ, Case 43/75, *Defrenne II*, 1975 ECR 455.

parties, the influence of Community law in private law was gradually acknowledged. The Court first recognised in the nineties the direct applicability of art. 39 EC in a purely private dispute<sup>60</sup> and later accepted the same with regard to the freedom of establishment.<sup>61</sup> Also regulations can be directly applied between two individuals.<sup>62</sup> Despite the growing acknowledgement of the role of private law it is clear that the Community lacks a general competence in private law.

Indeed the public/private distinction is on itself of little value, but its underlying rationale helps to explain why we should approach rules concerning administrative authorisations, prudential supervision or product quality different from rules exclusively interfering with private relations. Public laws are by definition mandatory and its application can therefore not be evaded by private parties. Rules in private law, even when they are mandatory, can be avoided by parties to an international contract. In *Ahlstrom Atlantique* the ECJ held that rules whose application can be avoided by the parties by a simple choice of law are not able to constitute a restriction to the internal market.<sup>63</sup> Artificially created obstacles to trade created by 'public laws' cannot not be effectively struck down by private parties, which creates the need for an instrument such as mutual recognition, but this does not apply to large parts of private law, where private autonomy is able to avoid the application of restrictive laws.<sup>64</sup> Mutual recognition can therefore not fulfil the same role in private laws as it does with respect to public laws.

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<sup>60</sup> ECJ, Case C-415/93, *Bosman*, 1995 I-4921; ECJ, Case C-281/98, *Angonese*, 2000 ECR I-4139.

<sup>61</sup> ECJ, Case C-438-05, *Viking*, 2007 ECR I-10779. The prevailing opinion is that the Court attributed also in *Laval* direct horizontal effect to art. 49, see: D. WYATT, *Horizontal Effect of Fundamental Freedoms and the Right to Equality after Viking and Mangold, and the Implications for Community Competence*, Oxford Legal Studies Research Paper No. 20/2008, N. REICH, "The Public/Private Divide in European Law", pp. 9-10 (forthcoming), but critical: J.-J. KUIPERS, "The Social Dumping Debate in Luxembourg: The Laval Case before the European Court of Justice", *Cambridge Student Law Review*, 2008, vol. 4, pp. 243-244.

<sup>62</sup> ECJ, Case 93/71, *Leonesio v Italian Ministry of Agriculture*, 1972 ECR 293; ECJ, case 39/72, *Commission v Italy*, 1973 ECR 101.

<sup>63</sup> ECJ, Case C-339/89, *Ahlstrom Atlantique*, 1991 ECR 107, par. 29. About the possibility for contract law to constitute a restriction to free movement: J. RUTGERS, "Free Movements and Contract Law", *European Review of Contract Law* (forthcoming).

<sup>64</sup> J. BASEDOW, "Der kollisionsrechtliche Gehalt der Produktfreiheiten im europäischen Binnenmarkt": *favor offerentis*, in: *RabelsZ*, 1995, vol. 59, pp. 1-55, at p. 12; but critical: FALLON/MEEUSEN *supra* note 50, pp. 55-57.

Vested rights are therefore strongly centered around the individual. As observed in the literature, with regard to the recognition of acquired rights:

“L’individu acquiert une dimension autonome au plan transnational. Il résulte de cette consécration de l’autonomie que chaque situation ou rapport juridique n’est pas forcément rattaché à un seul ordre juridique mais rayonne et peut être appréhendé par plusieurs. Il en résulte également que l’hypothèse de l’autonomie participe à un besoin de réglementation d’un rapport par la collaboration des ordres juridiques concernés, sans porter, autant que possible, atteinte à la cohérence du rapport privé”.<sup>65</sup>

Mutual recognition is about the avoidance of a double burden: a manufacturer should not be asked to comply with the rules of both the member state of origin and the host member state. These ‘public’ laws are perceived as the imposer of duties, rather than the creator of rights. This is fundamentally different from ‘private law’ rules. Private law enables individuals to perform legal acts and to enter into legal relations and subsequently enforce the obtained rights. Private law thus ensures that individuals can create rights and obligations between each other. Legal subjects may benefit from the potential application of various sets of private law since this broadens the array of potential private law rights. On a European level, the impediment to free movement does not originate in the diversity of private law rights, but in the non-recognition of rights acquired under the private law system of a member state by another member state.

Vested rights are therefore more than the inability to apply legislation of the host member state to a situation already governed by the laws of the member state of origin. Vested rights do not only require the host member state to refrain from imposing its conditions to creation of the right, but also the duty to accommodate the foreign rights into its own legal system. For example if Überseering would have gone bankrupt, it would for the German authorities not be sufficient to establish that limited liability existed and subsequently treat the company as a GmbH (German private limited company). Not only the creation but also the extent and conditions of the limited liability under Dutch law have to be incorporated into German law, even if the law applicable to the insolvency proceedings

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<sup>65</sup> C. PAMBOUKIS, “La renaissance-métamorphose de la méthode de reconnaissance”, *Revue Critique de Droit International Privé*, 2008, vol. 97, pp. 513-560, at p. 527.

is German.<sup>66</sup>

## **VII. TO WHAT EXTENT DO EUROPEAN VESTED RIGHTS DIFFER FROM THE VARIOUS HISTORICAL CONCEPTIONS?**

The vested rights doctrine in the European Union can overcome the critique that led to its original decline half a century ago. As von Savigny noted, it can only be ascertained if a right is duly acquired when one has identified the law applicable to the creation of that right.<sup>67</sup> Pillet developed a separate PIL system to determine the competent legal order. In the Community, the development of a new system to establish the law applicable to the creation of a right would not be necessary. It is true that the recognition of an existing right should be separated from the applicable law, but the PIL systems of the member states that determine the applicable law can be maintained. Subsequently, it can occur that different member states declare themselves, or are declared, competent. It is up to Community law to verify whether the connecting factor used by the member state is legitimate. If several member states use different legitimate connecting factors it is for private autonomy to decide the law applicable to the creation of the right. It is the introduction of party autonomy that avoids the rigidity that brought the vested rights of Beale and Pillet down. It should be recalled that the main criticism against the First Restatement, where a vested rights doctrine was laid down, was not directed against vested rights as such but rather at the rigid way of determining the applicable law. Where the obligation for recognition was initially sought in the *comitas* doctrine of Huber and later in principles of international law, it is within the common European justice area beyond doubt that the duty to recognise directly originates in Community law.

## **VIII. VESTED RIGHTS: A BETTER INSIGHT OF ECJ CASE LAW?**

Having the vested rights theory in the back of our mind we can also explain why the ECJ allows member states in tax law matters to combat wholly artificial arrangements for tax evasion purposes,<sup>68</sup> but is not concerned with the setting up of a company in a member state, while all business is carried

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<sup>66</sup> Art. 3(1) of Regulation 1346/2000 confers jurisdiction in insolvency proceedings upon the courts of the member state where the main centre of the debtors' interest are situated, which is presumed to be the place of registration. A creditor would thus have to prove that although *Überseering* had its registered office in the Netherlands, the main centre of interest was situated in Germany. Art. 4(1) declares the *lex fori* to be applicable to the insolvency proceedings.

<sup>67</sup> F. VON SAVIGNY, *System des Heutige Römische Recht*, VIII Band, 1849, p. 132.

<sup>68</sup> Case C-196/04, *Cadbury Schweppes*, 2006 ECR I-7995.

out in another member state, with the sole purpose of avoiding the latter member states stricter company laws. Company law entails a set of obligations, such as minimum capital requirement and disclosure, which a company accepts in order to obtain a predetermined set of privileges, such as limited liability. Potential establishers of companies can only choose between company types that are created by the member state involved. There is already within a national legal system no choice about what type of tax payer one desires to be, let alone that on the international plane one can choose where one wants to pay tax. Fundamentally, there is an obligation to pay tax, but not a directly corresponding right. An undertaking does not obtain more rights when it pays a million euro company taxes instead of a euro. Tax law can therefore out of principle not be incorporated in a vested rights doctrine but has to be dealt with under the principle of mutual recognition.

The vested rights theory is able to effectively distinguish between *Daily Mail* and *Cartesio* on the one hand, and *Centros* and *Überseering* on the other. The Court never distinguished between the right to exit and the right to enter. As soon as there exists a possibility under national law of the member state of origin to re-establish in another member state, Community law safeguards that right of establishment in the sense that a restriction of that right on either side has to be justified by an overriding provision of public interest.<sup>69</sup> What matters is whether the company can invoke against the host member state a duly acquired right, the recognition of its privileges under a foreign law (for example limited liability). Whether a right is duly acquired depends on principle on the competent legal order. Art. 48 EC determines what the competent legal order is: either the jurisdiction where the company has its registered office, central administration or principal place of business. If the company desires to rely on its right, it could also very well prefer to be incorporated under German law if it moves its real seat from the Netherlands to Germany, the host member state is bound to respect it. *Cartesio* then perfectly fits in the pre-existing case law: there was no right that *Cartesio* could invoke against Hungary since Hungary already recognised all privileges resulting from incorporation under Hungarian law.

Explaining *Cartesio* with the vested rights theory would not contribute much to a better understanding of the interrelationship between Community law, national private laws and PIL if its reasoning could not be expanded beyond the scope of company law. Art. 48 EC places legal persons on the same footing as natural persons with regard to the freedom of establishment. It might therefore be interesting to have a closer look at the Court's case law in personal status issues.

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<sup>69</sup> *Cartesio*, par. 113

## IX. SURNAME LAW

The approach of the Court can also be retrieved in surname law, equally an area where the Community has no direct competence and where between member states discrepancies in connecting factors exist.

In *Konstantinidis* the transliteration of the name of a self-employed masseur into the Roman alphabet on his marriage certificate diverged from the transliteration in his Greek passport.<sup>70</sup> The ECJ held that the national rules on transliteration are incompatible with the Community law if it causes a Greek national such a degree of inconvenience that it infringes his right of establishment. This would be the case if the divergence in transliteration modifies the pronunciation and would create the risk that potential clients may confuse him with other persons. In other words: Konstantinidis had the right to use his name duly acquired under Greek law also in Germany.

In *Garcia Avello*, two children were born in Belgium out of a marriage between a Belgian and a Spanish national.<sup>71</sup> According to Belgian and Spanish nationality law the children possessed the nationality of both member states. According to Belgian surname law the children bore the family name of the father, 'Garcia Avello'. Spanish surname law allowed the parents to opt for a combination of the surnames of both parents. The couple registered the children at the Spanish embassy in Belgium under the surname 'Garcia Weber' and subsequently requested the Belgian authorities to change the surname, which was refused. The ECJ used European Citizenship to bring the situation into the scope of Community law.<sup>72</sup> The fact that the children had Belgian nationality and were resident in Belgium since birth was irrelevant; the children were also Spanish nationals living in Belgium and could therefore not be discriminated against on the ground of nationality. Non-discrimination requires that equal situations should be treated equally and unequal situations unequally. Dual citizens are in a different situation compared to Belgians that only possess one nationality, since dual citizens can bear different surnames under different laws. Treating a request of change of surname of a dual citizen equal to that of a 'single citizen' would therefore amount to unequal treatment.<sup>73</sup> Art. 12 in

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<sup>70</sup> ECJ, Case C-168/91, *Konstantinidis v Stadt Altensteig*, 1993 ECR I-1191.

<sup>71</sup> ECJ, Case C-148/02, *Garcia Avello*, ECR 2003, I-11613.

<sup>72</sup> T. BALLARINO and B. UBERTAZZI, On *Avello* and Other Judgments, "A New Point of Departure in the Conflict of Laws?", *Yearbook of Private International Law*, 2004, vol. 6, pp. 85-128, at pp. 106-111.

<sup>73</sup> Critical: P. LAGARDE, Note to *Garcia Avello*, *Revue Critique de Droit International Privé*, 2004, vol. 93, pp. 184-202.

conjunction with art. 17 EC therefore prevented a member state from refusing a change of surname if the requested surname would be in accordance with the law of a member state whose nationality the applicant also possessed.

In the light of mutual recognition the case is problematic since it does not seem possible to establish a country of origin. Could it not be argued that the Spanish embassy was bound to refuse the registration of the surname 'Garcia Weber' since a different surname had already been attributed to the child in Belgium? The case is less problematic from the point of view of the vested rights theory. In both member states a right to a surname had been duly acquired under the same connecting factor (nationality), it is within the private autonomy of an individual to choose whether he desires to enforce a right or not.

In *Grunkin Paul*, a child was born out of a marriage between two German nationals living in Denmark.<sup>74</sup> Both the parents and the child only possessed German nationality. 'Grunkin-Paul', an accumulation of the surname of both parents, was mentioned as surname on the Danish birth certificate of the child. Such an accumulation was possible under Danish law, but not under German law. Under Danish PIL the law applicable to the determination of a surname is the law of the place of habitual residence, while German PIL uses nationality as connecting factor. When the marriage broke down, the father moved to Germany and sought to register the child in Germany. Registration of the surname was refused since under German PIL the surname had to be determined according to German law, which required the parents to choose between the surname of the father and mother. A discrimination such as in *Garcia Avello* could not occur since the child only possessed German nationality and was treated equally compared to all other German nationals. The Court concluded however that a difference in surname could give rise to such an inconvenience (different surnames on diplomas, proof of identity) to create a disadvantage merely because the child exercised its freedom to move and to reside in another member state. The refusal therefore constituted a restriction on European Citizenship that could not be justified by any overriding public interest.<sup>75</sup>

Also, *Grunkin and Paul* demonstrates the difficulty of perceiving vested rights as a new form of mutual recognition combined with a country of origin approach. The parents exercised a fundamental freedom and the child

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<sup>74</sup> ECJ, Case C-353/06, *Grunkin and Paul*, 2008 ECR I-0000.

<sup>75</sup> T. KONSTADINIDES, "Citizenship within the scope *ratione materiae* of Community law: the current approach of the European Court of Justice" (2008), available at SSRN, 4-5.

born on the territory of Denmark only acquired German nationality; should Germany then not be classified as the country of origin? Rather, the Court resorts again to a party autonomy oriented approach. A member state is bound to respect a choice of law made by the parties. If the situation would have been the reverse, so that German surname law would have been more liberal than Danish surname law, it seems that Denmark would have to respect German law if the parties desired to invoke their right under German substantive law for the determination of the surname on the Danish birth certificate.

Whereas the restriction in *Garcia Avello* originated in the joint reading of the general principle of non-discrimination on the grounds of nationality and European Citizenship, the Court based its judgment in *Grunkin Paul* on citizenship alone. The Court in *Grunkin and Paul* moved away from the discrimination test it established in *Garcia Avello*, towards a test whether the difference in surname could create such a degree of inconvenience that it became more difficult for the individual concerned to exercise his rights as a citizen of the Union to move and reside freely throughout the territory of the member states. The shift of the Court fits into the gradually increasing attention of the Community of the free movement of citizens apart from economic transactions.<sup>76</sup>

Vested rights allow member states to maintain their connecting factor and perhaps more importantly, does not require change of the substantive law. National cultural identities can be preserved. Since vested rights only impact the existing legal norms in a very limited way and operate independently from the connecting factors of the host member state they are able to significantly simplify current legal problems.<sup>77</sup> Vested rights are specifically not meant to replace the normal conflict of law system, but at the avoidance of 'limping relationships'; relationships that are lawful in one member state but not in others.<sup>78</sup> Such situations are incompatible with the idea of a common European justice area. Legal fiction should be brought back in line with factual reality. What the vested rights doctrine does

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<sup>76</sup> M. FALLON, "Les conflits de lois et de juridictions dans un espace économique intégré. L'expérience de la Communauté européenne", *Recueil des Cours*, 1995, vol. 253, pp. 13-281 ; J. MEEUSEN, "Instrumentalisation of Private International Law in the European Union: Towards a European Conflicts Revolution?", *European Journal of Migration and Law*, 2007, vol. 9, pp. 287-305.

<sup>77</sup> D. COESTER-WALTJEN, "Das Anerkennungsprinzip im Dornröschenschlaf?", in: H. MANSEL *et al* (eds.), *Festschrift für Erik Jayme*, Band I, München, Sellier, 2004, pp. 121-129, at p. 123.

<sup>78</sup> R. BARATTA, "Problematic elements of an implicit rule providing for mutual recognition of personal and family status in the EC", in: *IPRax*, 2007, pp. 4-11, at p. 5.

require is that purely domestic situations are treated differently from situations involving a link with another member state. A different treatment of international situations is for European PIL not anything substantially new, but it narrows the question down. As AG Sharpston observed in her opinion in *Grunkin and Paul*:

“I would stress therefore that my approach would not require any major change to Germany’s substantive or choice of law rules in the field of names, but would simply require them to allow greater scope for recognising a prior choice of name validly made in accordance with the laws of another member state. To that extent, it involves no more than an application of the principle of mutual recognition which underpins so much of Community law, not only in the economic sphere but also in civil matters”.<sup>79</sup>

AG Jacobs, on the other hand, incorporated in his opinion in *Konstantinidis* a fundamental rights perspective.<sup>80</sup> European citizens could rely on their status as such and invoke a core of rights (*civis europeus sum*), in particular the observance of fundamental rights.<sup>81</sup> Such a political rights approach seems indeed to push back the role of PIL. From the outset it should be observed that citizenship and fundamental rights are two different things. Although both are claimed by individuals against the state, the latter are universal while the aim of the former is to make a distinction between the have and the have-nots. By reason of belonging to a certain political community, the citizen can claim certain rights that cannot be exercised by individuals not belonging to that political community.<sup>82</sup> Nevertheless, AG Jacobs held in *Konstantinidis* that the transliteration could infringe Konstantinidis’ fundamental rights, in particular his right to private life as laid down in art. 8 of the European Convention on Human Rights. The obligation to bear different surnames under the law of different member states would be incompatible with private life, and therefore the status and rights of a European Citizen, since a name forms an intrinsic part of a person’s

<sup>79</sup> AG SHARPSTON, *Grunkin Paul*, par. 91.

<sup>80</sup> A fundamental rights perspective for the unilateral recognition of family relationships was also defended by Muir Watt. The recognition of the personal status is in her opinion is not dependent upon the possession of European Citizenship and may therefore have a more universal application. H. MUIR-WATT, “Family Law: European Federalism and the ‘New Unilateralism’”, *Tulane Law Review*, 2008, vol. 82, pp. 1983-1999.

<sup>81</sup> AG JACOBS, *Konstantinidis*, 46.

<sup>82</sup> D. CHALMERS *et al.*, *European Union Law*, New York, Cambridge University Press, 2006, pp. 561-603.

identity.<sup>83</sup> Obviously, one cannot be required to maintain two different identities. A similar line can be discovered in his opinions in *Standesamt Niebüll*<sup>84</sup> and *Garcia Avello*.<sup>85</sup> The fundamental rights perspective does not come back in the decisions of the Court, which seems more concerned with the classical internal market rationale. We must be careful with such an approach since it would enormously expand the scrutiny of the ECJ over national measures.

Despite the hopeful words of AG Jacobs, '*civis europeus sum*'<sup>86</sup>, European Citizenship in itself is not an autonomous generator of rights.<sup>87</sup> Legal scholars must be careful not to take again an overexpansive interpretation of ECJ case law, as they did in company law. In a Community law context, European Citizenship might be used to broaden the interpretation of pre-existing rights. European Citizenship becomes instrumental for bringing a situation within the scope of Community law, triggering the obligation to recognise duly acquired rights. European Citizenship then does create any new rights, but ensures that not only rights obtained under Community law shall be sustained in member states, but also rights duly created in other

<sup>83</sup> The ECHR seems to interpret art. 8 differently: European Court of Human Rights, *Kuharec v Latvia* (2004) and European Court of Human Rights, *Mentzen v Latvia* (2004).

<sup>84</sup> Case C-94/04, *Standesamt Niebüll* (Grunkin Paul I), 2006 ECR I-3561. The case was held inadmissible on procedural grounds but the same facts reappeared in 'Grunkin Paul'.

<sup>85</sup> J. MEEUSEN, "Instrumentalisation of Private International Law in the European Union: Towards a European Conflicts Revolution?", *European Journal of Migration and Law*, 2007, vol. 9, pp. 287-305, at pp. 295-297.

<sup>86</sup> Further discussion and references: D. BINDER, *The European Court of Justice and the Protection of Fundamental Rights in the European Community: New Developments and Future Possibilities in Expanding Fundamental Rights Review to Member State Action*, Jean Monnet Working Paper 95/9504 (1995); see also: O. CHEREDNYCHENKO, *Fundamental Rights, Contract Law and the Protection of the Weaker Party*, Utrecht, Molengraaff Instituut voor Privaatrecht, 2007, pp. 217-218.

<sup>87</sup> European Citizenship has had a large impact on in social security matters and residency rights whereby the Court held that European Citizens lawfully resident on the territory of another member state could not be discriminated against on the grounds of nationality. The rights are however limited to those conferred by the EC Treaty. See: M. DOUGAN and E. SPAVENTA, "Educating Rudy and the (non-) English Patient: A double-bill on residency rights under Article 18 EC", *European Law Review*, 2003, vol. 28, pp. 699-712; N. REICH, 'Union Citizenship—Metaphor or Source of Rights?', *European Law Journal*, 2001, vol. 7 (1), pp. 4-23; N. REICH and S. HARBACEVICA, "Citizenship and Family on Trial: a Fairly Optimistic Overview of Recent Court Practice with Regard to Free Movement of Persons", *Common Market Law Review*, 2003, vol. 40, pp. 615-638; F. WOLLENSCHLÄGER, *Grundfreiheiten ohne Markt Die Herausbildung der Unionsbürgerschaft im unionsrechtlichen Freizügigkeitsregime*, Tübingen, Mohr Siebeck, 2006.

member states. It is true that the Court has gradually moved from establishing an economic link. One should be careful not to misinterpret this shift as replacing the red line of creating an internal market that runs through ECJ case law with a political rights approach centered around the individual. Rather, the red line has become wider as to include, next to the creation of an internal market, the creation of a common justice area. The expansion of the Courts' *leitmotiv* also reappeared in the attribution of competences in the Lisbon Treaty; art. 81 TFEU would do away with the internal market criterion.<sup>88</sup>

#### **X. EXTRAPOLATION OF *CARTESIO* AND *GRUNKIN AND PAUL*: VESTED RIGHTS IN OTHER AREAS OF PRIVATE LAW?**

The vested rights seem therefore to have returned in the case law of the ECJ in two areas of private law. To what extent can it be incorporated in other areas of private law? Especially concerning questions of personal status the vested right doctrine seems to be able to make a more general contribution.<sup>89</sup> Rights in surname and company law are however unilaterally created by registration, private autonomy thus means the liberty of a legal or natural person to choose the applicable PIL. Could the vested rights doctrine also be applied against more horizontally acquired rights, where private autonomy of two or more individuals is at stake, as for example in contract or torts?<sup>90</sup> Especially with regard to security rights in (im)movables the vested rights doctrine seems to be able to make a useful contribution. Should for example a lawfully established German retention of title clause (*Eigentumsvorbehalt*) on a delivery of computers be recognised in the context of the insolvency proceedings of the Latvian buyer in Latvia?<sup>91</sup>

Pamboukis stresses that rights obtained through registration by a public

<sup>88</sup> DE GROOT/KUIPERS *supra* note 5, pp. 111-112. Of course, the EC remains restricted by its general objectives.

<sup>89</sup> P. LAGARDE, "Développement futurs du droit international privé dans une Europe en voie d'unification: quelques conjectures", *RechtsZ*, 2004, pp. 225-243; D. HENRICH, "Anerkennung statt IPR: Eine Grundsatzfrage", *IPRax*, 2005, vol. 25, pp. 422-424 ; D. COESTER-WALTJEN, "Anerkennung im Internationalen Personen-, Familien und Erbrecht und das Europäische Kollisionsrecht", *IPRax*, 2006, vol. 26, pp. 392-401; P. LAGARDE, "La Reconnaissance mode d'emploi", in: T. AZZI *et al.* (eds.), *Vers de nouveaux équilibres entre ordres juridiques, Liber amicorum Hélène Gaudemet-Tallon*, Paris, Dalloz, 2008, pp. 481-501, at pp. 488-490.

<sup>90</sup> COESTER-WALTJEN, *supra* note 89, pp. 397-398.

<sup>91</sup> Unfortunately space prevents us from developing this argument in detail. In member states with a closed system of property rights the acceptance of vested rights would mean a modification to the property rights system in the sense property rights are not closed in a national context, but in a Community context.

authority are an *acte quasi public*. The state by exercising its authority confirms the existence of a right. The semi-public nature justifies an analogy with the principle of mutual recognition of judgments.<sup>92</sup> With regard to horizontally acquired rights, what Pamboukis finds troublesome is that without state interference it is difficult to establish whether a right has been truly created. Normal conflict of laws rules are not apt to deal with existing rights, creating legal uncertainty and unforeseeability for the individual. Despite the difficulty of establishing whether a right has been truly created, Pamboukis accepts that effect should also be given to real and existing private relationships under a foreign law.<sup>93</sup>

From the outset, there seems indeed to be nothing that prevents a party from relying on a right acquired in another member state. Limited liability could be invoked against all creditors, thus including private parties. If duly acquired rights can be relied upon in horizontal situations, there seems to be no objection why they cannot also be created in horizontal situations.

From the cited case law three conditions for the application of the vested rights doctrine can be inferred. The situation should fall into the scope of Community law, the PIL rules of member states must lead to the application of different substantive rules and finally, differences must exist between the potentially applicable legal systems.

## **XI. THE DUTY TO RECOGNISE ORIGINATES IN COMMUNITY LAW**

Community law can only generate the duty to recognise a right duly acquired right when the situation falls within its scope.<sup>94</sup> The first important

<sup>92</sup> A similar analogy is drawn by: P. MAYER, "Les méthodes de la reconnaissance en droit international privé", in: *Le droit international privé: esprit et méthodes; Mélanges en l'honneur de Paul Lagarde*, Paris, Dalloz, 2005, pp. 547-573.

<sup>93</sup> C. PAMBOUKIS, "La renaissance-métamorphose de la méthode de reconnaissance", *Revue Critique de Droit International Privé*, 2008, vol. 97, pp. 513-560. Pamboukis proposes the approach of 'reconnaissance' for quasi public actes and 'relevance' for rights created without state intervention (545). On the recognition of public rights: C. PAMBOUKIS, *L'Acte Public Étranger en Droit International Privé*, Paris, Librairie générale de droit et de jurisprudence, 1993. On the recognition of factual situations: P. PICONE, "La méthode de la référence à l'ordre juridique compétent en droit international privé", *Recueil des Cours*, 1986, vol. 197, pp. 229-419, at pp. 274-302.

<sup>94</sup> P. LAGARDE, "La Reconnaissance mode d'emploi", in: T. AZZI *et al.* (eds.), *Vers de nouveaux équilibres entre ordres juridiques, Liber amicorum Hélène Gaudemet-Tallon*, Paris, Dalloz, 2008, pp. 481-501. "Le droit communautaire n'impose pas de façon générale et inconditionnelle la reconnaissance de telles situations. Il n'en impose la reconnaissance que dans les cas où la non-reconnaissance serait une entrave non justifiée par l'intérêt général aux grandes libertés du traité." (p. 483)

limitation is thereby already given. The vested rights doctrine cannot apply to rights duly acquired in a non-member state. Germany is thus not obliged to recognise legal personality of a company incorporated under the laws of Switzerland, but with its main centre of business in Germany.<sup>95</sup> To bring the situation into the scope of Community law, European Citizenship is of particular importance with regard to personal status.<sup>96</sup> The test adopted in *Grunkin and Paul*, which determines whether a difference in surname could create such a degree of inconvenience that it causes a disadvantage to the right to freely reside in the territory of another member state, can also be applied to other personal status areas such as the recognition of adoption, lack of legal capacity, marriage or divorce.

With regard to divorce the approach that a divorce promulgated in another member state should be recognised is laid down in the Brussels IIbis Regulation.<sup>97</sup> Non-recognition of divorce promulgated in another member state would impede the possibility of remarriage in the member state of non-recognition. Art. 21(1) therefore provides that judgments relating to divorce, legal separation or marriage annulment shall be recognised in other member states without any special procedure being required. Courts only possess limited grounds of non-recognition, including a public policy exception that has to be defined narrowly.<sup>98</sup> Art. 25 provides explicitly for the possibility of multiple applicable national laws; “the recognition of a judgment may not be refused because the law of the member state in which such recognition is sought would not allow divorce, legal separation or marriage annulment on the same facts.”

Party autonomy also becomes clear on a different point. The Regulation only applies to positive decisions, the recognition of a decision not to grant a divorce therefore falls outside the scope of the Regulation.<sup>99</sup> Thus if a

<sup>95</sup> Bundesgerichtshof 27 October 2008, II ZR 158/06.

<sup>96</sup> More reluctant: H. MANSEL, “Anerkennung als Grundprinzip des Europäischen Rechtsraums”, *RabelsZ*, 2006, vol. 70, pp. 651-731.

<sup>97</sup> Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility. The Regulation repealed Regulation 1347/2000, but maintains the same starting principle. The regulation is not based upon European Citizenship, but on Article 61(c) and Article 67(1) EC.

<sup>98</sup> Art. 22 Regulation 2201/2003.

<sup>99</sup> P. MOSTERMANS, “De wederzijdse erkenning van echtscheidingen binnen de Europese Unie”, *Nederlands Internationaal Privaatrecht*, 2002, pp. 263-273, but critically: H. GAUDEMET-TALLON, “Le Règlement no. 1347/2000 du Conseil du 29 mai 2000: Compétence, reconnaissance et exécution des décisions en matière matrimoniale et en matière de responsabilité parentale des enfants communs”, *Journal du Droit International*, 2001, pp. 381-445.

divorce between an Irish husband and a Belgian wife is denied in Ireland, parties could decide to file for a divorce in Belgium. Problematic is that Ireland is not bound to recognise the Belgian divorce if it is irreconcilable with a judgment given in proceedings between the same parties in the member state in which recognition is sought.<sup>100</sup> It cannot be excluded that in such a situation the ECJ would decide that Ireland is nonetheless bound to recognise the divorce on the basis of European Citizenship since the difference in civil status would create such a degree of inconvenience that it causes a disadvantage to the right to freely reside in the territory of another member state. Such an inconvenience would be likely to occur if the Irish husband would remain after the divorce in Belgium, remarry and subsequently desires to move with his new spouse to Ireland. Ireland would then due to the prohibition of polygamy not recognise the new marriage, impeding the right of the couple to move from Belgium to Ireland.<sup>101</sup>

## **XII. LEGITIMATE DIVERGENCE OF NATIONAL CONNECTING FACTORS**

The second condition for the application of the vested rights doctrine is that member states can legitimately apply different connecting factors.<sup>102</sup> In the literature, it has been debated whether nationality as such was a legitimate connecting factor or already in itself discriminatory.<sup>103</sup> The point is addressed by AG Sharpston in *Grunkin and Paul*:

“It is true that the rule in Paragraph 10 of the EGBGB [nationality as connecting factor, JJK] distinguishes between individuals according to their nationality, but such distinctions are inevitable where nationality serves as a link with a particular legal system. It does not, by contrast, discriminate on grounds of nationality. The purpose of the prohibition of such discrimination is not to efface the distinctions which necessarily flow from possession of the nationality of one member state rather than another (which are clearly maintained by the second sentence of Article 17(1) EC) but to preclude further differences of treatment which are based on

<sup>100</sup> Art. 22(c) Regulation 2201/2003.

<sup>101</sup> The idea of vested rights can also be retrieved in the *Green Paper on Succession and Wills*, COM (2005) 65, final, 11.

<sup>102</sup> W. ROTH, “Methoden der Rechtsfindung und Rechtsanwendung im Europäischen Kollisionsrecht”, *IPRax*, 2006, vol. 26, pp. 338-347, at p. 344.

<sup>103</sup> M. PUKJAK, *Le droit international privé à l'épreuve du principe communautaire de non-discrimination en raison de la nationalité*, Aix-en-Marseille, Presses Universitaires d'Aix-Marseille (2003); ISRAEL/SAARLOOS *supra* note 52 but as well case C-305/92, *Hoorn*, 1994, ECR I-1525; case C-214/94 *Boukhalfa*, 1996 ECR I-2253.

nationality and which operate to the detriment of a citizen of the Union".<sup>104</sup>

The connecting factor determines the competent legal order(s). An excessive connecting factor, and thus an excessive claim for regulatory competence could potentially be struck down by the ECJ.<sup>105</sup> The Court seems to have accepted both habitual residence and nationality as legitimate connecting factors in the area of surname law. That would *mutatis mutandis* also apply to all other areas of personal status. The different connecting factors lead to two or more potentially applicable legal systems. From a Community perspective, all national private law systems are equal and Community law cannot come up with a rule to determine the competent legal order (should nationality prevail over habitual residence, or *vice versa*). Community law can only observe that two or more member states can legitimately create the right, but the decision under which law the right has to be duly created must be left to private autonomy. It is after all for an individual to decide whether he desires to rely on a right or not.

Party autonomy in the applicable PIL constitutes a paradigm shift in PIL. Courts always resort to their own PIL to determine the competent legal order. Also, in the vested rights conception of Beale and Pillet it was the PIL of the forum that determined which legal order was competent to create the right concerned. However, *Grunkin and Paul* clearly goes further. Private parties can avoid the application of national PIL. The German court could not establish the competent legal order itself but had to accept that under Community law Denmark could declare itself to be a competent legal order and the parties had chosen the application of Danish PIL.

When member states use the same connecting factor, the applicable legal system shall in principle be the same, regardless under which PIL system that applicable legal system is determined. The connecting factors in the area of contract and tort law have been harmonised by respectively the Rome I and Rome II Regulation.<sup>106</sup> The connecting factor for contracts is the principle of the closest connection, which is in general the law of the place of the party that has to render the characteristic performance and in torts the *lex loci damni* applies. So, to a contract between a Greek seller and an Italian buyer Greek substantive law will apply regardless whether an action of enforcement is brought in Italy or in Greece. It will not be

<sup>104</sup> AG SHARPSTON, *Grunkin and Paul*, par. 62.

<sup>105</sup> A possible excessive connecting factor could be automatic application of the *lex fori*.

<sup>106</sup> Regulation 593/2008 on the law applicable to contractual obligations (Rome I) and Regulation 864/2007 on the Law Applicable to Non-Contractual Obligations (Rome II).

necessary for an Italian court to establish whether the Italian buyer duly acquired under Greek law any rights that could be enforced in an Italian court since the whole legal relationship has to be answered according to Greek law anyway.<sup>107</sup> The doctrine of vested rights is then severely restricted; it can only come into play when the right is invoked in a situation governed by a law different from the law that created the right.

It could also occur that although member states use different connecting factors, they both refer to the same applicable legal system. If Spain would have used for the determination of a surname domicile as connecting factor instead of nationality, both Spanish and Belgium PIL would have referred in *Garcia Avello* to Belgian law as the applicable law. The children would then not have acquired any right under Spanish law and could hence not invoke it before the Belgian courts. It is in principle for the member state concerned to determine whether an appropriate link with its legal system exists to trigger the application of its laws.<sup>108</sup>

To return to the example of divorce, the applicable law to a divorce still has to be determined by the court seised. Since the Brussels IIbis Regulation allows for seven grounds of alternative jurisdiction<sup>109</sup> and the member states use a plurality of connecting factors, such as nationality, domicile, habitual residence or automatic application of the *lex fori*, a risk of forum shopping arises. In divorce proceedings this may become extra problematic since it will work to the detriment of the weaker party, who can see an unfavourable law 'imposed' by the economically stronger, better informed party. In the vested rights doctrine it thus becomes crucial to delimit the competent jurisdiction that can legitimately create a right.<sup>110</sup> The proposal for a Rome III Regulation seeks to delimitate the competent legal orders by harmonising the conflict of law rules of the member states. The law applicable to a divorce can to a certain extent be chosen by the parties, and in case of lack of a choice, the law of the place where both parties have their *habitual* residence shall normally be applicable. The *lex fori* as

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<sup>107</sup> The exception are the overriding mandatory provisions (art. 9 Rome I). Although part of the applicable law, what constitutes an overriding mandatory provision is still to be determined by the member states individually. Limitation in size restricts me to develop the argument further.

<sup>108</sup> In favour of a choice of law in such cases seem: G. DE GROOT and S. RUTTEN, "Op weg naar een Europees IPR op het gebied van het personen- en familierecht", *Nederlands Internationaal Privaatrecht*, 2004, pp. 273-282, at pp. 275-276.

<sup>109</sup> Art. 3 (1) Brussels IIbis Regulation.

<sup>110</sup> On the various possible approaches: V. GAERTNER, "European Choice of Law Rules in Divorce (Rome III): An examination of the possible connecting factors in divorce matters against the background of Private International Law developments", *Journal of Private International Law*, 2006, vol. 2, pp. 99-136.

connecting factor of last resort only fulfils a residual function, thereby significantly limiting the importance of the vested rights doctrine.<sup>111</sup>

Vested rights thus do not provide an unlimited possibility of choices. Required for a right to be duly established is that the law establishes that the right is designated as applicable by one of the PIL systems of the member states. In *Grunkin and Paul* the parents could therefore not have relied on the Spanish tradition of establishing surnames. Usually this will require a link with the applicable legal system, but *Centros* and *Inspire Art* demonstrate that the link can be rather loose or even artificially created. Whereas with regard to the freedom of establishment the possible connecting factors are laid down in the Treaty (art. 48), this is not the case with surname law. The Court relied on state practice and international conventions to conclude that both the use of nationality as well as habitual residence as connecting factor was reasonable. In case of the threat of abuse, connecting factors have to be harmonised to prevent abuse to the detriment of the weaker party.

### **XIII. LEGITIMATE DIVERGENCE BETWEEN POTENTIALLY APPLICABLE NATIONAL LAWS**

Obviously the legal norm applicable should differ on a substantive level from the otherwise potentially applicable law. If the conditions of the grant of a divorce would be set by the European legislator it would not matter whether one applies the law of Belgium or Ireland to a divorce. Under both legal systems the outcome of the proceedings will be identical. Not only the of vested rights will be marginalised, but also that of PIL as a whole.<sup>112</sup>

### **XIV. PULLING THE EMERGENCY BREAK: PUBLIC POLICY**

One element of the vested rights doctrine has until so far not been discussed. Courts will not enforce a right when recognition would violate the public policy of the forum. From the outset it is clear that the grounds of non-recognition of a right acquired in another member state should be interpreted narrowly.<sup>113</sup> The intentional evasion of stricter Danish minimum capital requirements in *Centros* was not enough to justify non-recognition. What becomes also clear from that judgment and *Inspire Art* is that the application of public policy should be decided on a case by case basis.

<sup>111</sup> The proposal is the follow up of the *Green Paper on applicable law and jurisdiction in divorce matters*, COM (2005) 82 final. The fate of the proposal is currently unclear. Oral question in European Parliament with debate of E. GEBHARD, A6-0361/2008.

<sup>112</sup> G. KEGEL, *The Crisis of Conflict of Laws*, *Recueil des Cours*, 1964, vol. 95, pp. 91-268.

<sup>113</sup> Case 30/70, *Bouchereau*, 1977 ECR 1999.

Although the Brussels IIbis Regulation provides for wider grounds of non-recognition than public policy, for example a court may decide not to recognise a divorce when that is incompatible with an earlier judgment rendered in a dispute between the same parties in the member state in which recognition is sought, the automatic imposition of public policy in a situation with a certain foreign element will not pass the proportionality test. Public policy might have a stronger role in dealing with politically more sensitive rights. In the United States for example, public policy has been discussed as a potential tool for the non-recognition of same-sex marriages.<sup>114</sup> Could Poland apply its public policy as a justification for the non-recognition of a Dutch same-sex marriage?

The Dutch State Committee on PIL considered the predecessor of the Brussels IIbis Regulation, the Brussels II Regulation, also to be applicable to same-sex marriage. Since the Community lacks a common definition of 'marriage', it should be left to the member states to define what a marriage is.<sup>115</sup> Whether a marriage is validly concluded in the Netherlands should therefore be left to be determined by Dutch law. The European Commission itself recognises the Dutch same-sex marriage as 'marriage' for internal purposes.<sup>116</sup> However, the German *Verwaltungsgericht* in Karlsruhe refused on the basis of the public policy exception to recognise a Dutch same-sex marriage between a Dutch and a Taiwanese national residing in Germany, when the Taiwanese national applied as spouse of a migrant worker for a German residence permit under art. 10 of Regulation 1612/68.<sup>117</sup> France recently followed the example of the Commission and did not apply its public policy exception but instead recognised for tax purposes

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<sup>114</sup> K. WORTHEN, "Who Decides and What Difference Does It Make?: Defining Marriage in 'Our Democratic, Federal Republic'", *Brigham Young University Journal of Public Law*, 2004, vol. 18, pp. 273-307; P. BORCHERS, "*Baker v. General Motors*: Implications for Inter-Jurisdictional Recognition of Non-Traditional Marriages", *Creighton Law Review*, 1998, Vol. 32, pp. 147-185; A. KOPPELMAN, "Same-Sex Marriage, Choice of Law, and Public Policy", *Texas Law Review*, 1998, Vol. 76, pp. 921-1001.

<sup>115</sup> Staatscommissie voor het Internationaal Privaatrecht, Advies inzake het internationaal privaatrecht in verband met de openstelling van het huwelijk voor personen van hetzelfde geslacht (20010), pp. 20-21, available at: [http://www.justitie.nl/onderwerpen/wetgeving/over\\_wetgeving/privaatrecht/commissies-privaatrecht/staatscommissie-ipr.aspx](http://www.justitie.nl/onderwerpen/wetgeving/over_wetgeving/privaatrecht/commissies-privaatrecht/staatscommissie-ipr.aspx), as of 10 February 2009.

<sup>116</sup> Internal memo of 15 May 2001, see: H. JESSURUN d'OLIVEIRA, "De Europese Commissie erkent het Nederlands huwelijk. Nederlands relatierecht en de Europese Unie", *Nederlands Juristenblad*, 2001, pp. 2035-2040.

<sup>117</sup> Verwaltungsgericht Karlsruhe 9 September 2004, see: R. KOOLHOVEN, "Het Nederlands opengestelde huwelijk in het Duitse IPR. De eerste rechterlijke uitspraak is daar!", *Nederlands Internationaal Privaatrecht*, 2005, p. 138.

a Dutch same-sex marriage between two Dutch nationals residing in France.<sup>118</sup> Although it is for member states to define the notion 'marriage' it is equally within the discretion of the member state to define, within the limits of Community law, the content of their public policy. It seems unlikely that the ECJ will use European Citizenship to settle such a politically sensitive question.

## XV. CONCLUSION

The case law of the ECJ in company law and surname law is not completely Community law, because Community law in itself does not generate the right but depends on the various national solutions. Community law however requires the non-application of national rules that would prevent the exercise of a right acquired in another member state. In that sense it does not create any new rights but only enforces what is valid under the laws of the member state of creation. The case law does however also not fit in national private law since it leads to the creation of rights that are unavailable under national remedies and is neither PIL since the case law does not establish a law which is competent to create the right concerned. Instead the case law hovers between the legal disciplines and necessitates us to fundamentally rethink the relationship between Community law and PIL. A right duly created in one member state shall be recognised in other member states. It seems the revival of the vested rights doctrine, a PIL theory that has its roots in the writings of the Frisian scholar Ulrik Huber, and that was declared dead many years ago.

Vested rights do not interfere with the national private law rules. It only requires that a situation with a foreign element should be treated differently from a purely domestic situation. That is not something new. Vested rights do not require a member state to adopt a certain connecting factor. The connecting factor constitutes the link that determines the competent legal order. In the vested rights doctrine that is crucial since the acceptance that vested rights should be recognised does not answer the question according to which law the right has to be duly established. Community law controls the connecting factors and prevents member states from claiming to broad regulatory competences. On the other hand, Community law ensures that if a right is duly acquired according to a law designated by one of the PIL systems of the member states, it is not open for other member states to second-guess the operation of the connecting factors of the first member state. Private autonomy identifies from the various competent legal orders the legal order according to which the right has to be created.

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<sup>118</sup> J. STROOBANTS, "La France reconnaît le mariage d'un couple d'hommes néerlandais", *Le Monde*, 6 September 2008.

Vested rights can simplify the existing legal jungle when the situation falls into the scope of Community law, the PIL rules of member states lead to the application of different substantive rules and finally, differences exist between the potentially applicable legal systems. The link with Community law generates the obligation to recognise, whereas the practical effect of vested rights would be severely limited if all PIL systems would refer to the same applicable law or where the application of the law of the different member states would lead to identical results.

Although a right may be duly established it could still manifestly violate the public policy of the member state in which recognition is sought. The public policy has however to be construed narrowly. It can only protect the core values of the forum.

The doctrine of vested rights allows us a better insight into the company and surname case law of the ECJ. There is no principal differentiation between the right to entry or the right to exit. Restrictions on both rights will be under the scrutiny of Community law. A vested right can however only be invoked against the host member state and not the member state of origin. There was no right that Cartesio could invoke against Hungary since Hungary already recognised all privileges resulting from incorporation under Hungarian law. The decision of the Court in *Centros* is therefore still standing and regulatory competition is far from dead.

In family law European Citizenship may trigger the application of Community law. The Court has moved away from the establishment of economical links or the existence of discrimination on the grounds of nationality but instead adopted a test aimed at establishing whether a difference in surname (but potentially also other personal statutes) could create such a degree of inconvenience that it causes a disadvantage to the right to freely reside in the territory of another member state. It seems that vested rights can therefore especially in the field of family provide for increased legal certainty and above all, simplification.

The private international law solution as represented by the vested rights approach should be welcomed since it is able to serve two often conflicting ends. Vested rights serve the interest of the Community by taking away obstacles as a result of discrepancies in personal status and thereby promoting the common European justice area. At the same time vested rights do not necessitate any change of connecting factor or substantive law and thus allows member states to preserve their national identity.

## CARTESIO: ANALYSIS OF THE CASE

Beata Węgrzynowska

### I. INTRODUCTION

The judgment of the European Court of Justice in the *Cartesio*<sup>1</sup> case delivered another interpretation of Articles 43 and 48 EC Treaty.<sup>2</sup> In the latest judgment on companies' mobility, the ECJ examined the case of the Hungarian partnership Cartesio that wished to transfer its registered seat abroad without changing the applicable law. Since the Hungarian law followed the rule whereby a change of company's registered seat to a foreign country required liquidation procedure in order to re-incorporate in another member state, it was not possible that after the seat transfer Cartesio could be still governed by the law of its incorporation. Therefore, the national court sought the ECJ's interpretation on Articles 43 EC and 48 EC in reference to the national provisions concerning the rules which prevented a Hungarian company from transferring its seat to another member state by requiring its prior winding-up. The European Court of Justice ruled that Articles 43 EC and 48 EC do not preclude national legislation that prevents a company from transferring its seat to another member state while remaining under governance of the law of the member state of incorporation.

The judgment in *Cartesio* touched upon several issues fundamental to European company law. The Court referred to the idea of companies as "creatures of national laws" and analysed the role of the national laws in shaping the rules on companies' mobility. The judgment established rules concerning the change of the law applicable to the company that transfers its seat. Further, the Court emphasised the distinction between case law on 'emigration' and 'immigration' of the companies. In that respect the judgment clarified and systematised the previous case law on Articles 43 EC and 48 EC. However, the *Cartesio* case is not only about the interpretation of Treaty provisions. It should be also looked at from the regulatory perspective. The question that still remains unresolved after the judgment is whether there is a need for harmonisation and secondary law on companies' cross-border seat transfer. Therefore, it is important to situate the judgment in *Cartesio* in the on-going process of shaping the rules on companies' mobility under the principle of freedom of establishment both in reference to the previous case law and prospective Community legislation.

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<sup>1</sup> E.C.J., Case C-210/06, *Cartesio Oktató és Szolgáltató bt*, 2008, not yet reported (henceforth, '*Cartesio*').

<sup>2</sup> This paper will only analyse the issues relating to Articles 43 EC and 48 EC, without reference to the issues relating to Article 234 EC.

## II. *CARTESIO* AND THE COMPANY LAW PERSPECTIVE

### I. *Companies as 'creatures of law' and the role of national laws*

#### a. Company versus natural person in respect of the freedom of establishment

The judgment in *Cartesio* referred to the fundamentals of the company law concerning the legal status of companies.<sup>3</sup> Precisely, in respect of the referring courts' explanation on the Hungarian company law based on the real-seat theory, the ECJ referred to the core rule of company law that companies exist by the virtue of law. The ECJ evoked the statement from the judgment in *Daily Mail and General Trust* that "companies are creatures of national law".<sup>4</sup> This finding of the Court reflects upon the distinction of legal persons from natural persons and the notion that companies cannot be treated as natural persons.<sup>5</sup> Contrary to natural persons, companies have legal personality that inevitably binds their existence to the rules of law. This feature has further significant consequences in regard to the freedom of establishment. Although Articles 43 EC and 48 EC literally provide that companies should be treated in the same way as natural persons, companies as 'creatures of law' are limited by the frameworks of national laws. In order to enjoy freedom of establishment Treaty provisions require from a natural person nationality of a member state.<sup>6</sup> However, an analogous requirement -i.e., 'corporate nationality'- could not be applied to companies. While a natural person's nationality is not influenced by migration, the nationality of a company, according to national laws, might be influenced by both companies' emigration and immigration.<sup>7</sup> The Treaty took the difference between legal and natural persons into consideration.<sup>8</sup> Therefore, the prerequisites for companies'

<sup>3</sup> *Cartesio*, § 104.

<sup>4</sup> E.C.J., Case 81/87, *The Queen v HM. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc.*, 1998 ECR 5483 (henceforth, '*Daily Mail and General Trust*'), § 19.

<sup>5</sup> The Court in *Daily Mail and General Trust* in § 16 referred to Article 58 [now, Article 48 EC] and stated that natural persons and companies should enjoy freedom of establishment in the same way. However, due to the fact that companies are creations of law, they additionally need to respect the national laws and cannot be treated identically. See also: E.C.J., Case C-208/00, *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)*, 2003 ECR I-09919 (henceforth, '*Überseering*'), § 81.

<sup>6</sup> In case of primary establishment even domicile within the EU is not required. See: S. GRUNDMANN, *European Company Law: Organization, Finance and Capital Markets*, Intersentia, 2007, p. 123.

<sup>7</sup> Depending on the national laws of home and host member states.

<sup>8</sup> *Cartesio*, § 106; *Daily Mail and General Trust*, § 21.

freedom of establishment are more complex. Firstly, in order to benefit from the freedom of establishment a company has to be formed in accordance with the law of a member state.<sup>9</sup> The second prerequisite requires that the locus of company's registered office, central administration or principal place of business is located within the Community.<sup>10</sup> In that respect the Treaty provisions rely on the laws of member states. National laws regulating companies' 'birth' serve the *function* of nationality of natural persons.<sup>11</sup>

b. Determining 'corporate nationality' and its consequences

The law determining 'corporate nationality' can be divided in two sets: the rules concerning company's 'birth'; *i.e.*, creating a connection -connecting factor- between the company and national and the rules on maintaining the connection. Corporate nationality is not a unified concept. Each set of rules governing corporate nationality can be regulated differently in member states. However, there are two dominant concepts; *i.e.*, the incorporation theory and the real-seat theory.<sup>12</sup> A company's nationality results from creating the *connection* between a company and a national law. While under incorporation theory, the connection is created solely by incorporation,<sup>13</sup> under the real-seat theory the connection between a national law and a company is determined by the place of the centre of administration.<sup>14</sup> Thus, in the latter case the nationality of the company is

<sup>9</sup> J. RENAULD, *Droit européen des sociétés*, Vander, 1969, p. 228.

<sup>10</sup> Article 48 EC. However, it should be noted that the Treaty does not name that the location of company's registered office, central administration or principal place of business must be in placed one member state.

<sup>11</sup> See: *Überseering*, § 57; E.C.J., Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd*; 2003 ECR I-10155 (henceforth, '*Inspire Art*'); § 97; E.C.J., Case 79/85, *D. H. M. Segers v Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen*, 1986 ECR I-02375, § 13; E.C.J., Case 270/83, *Commission of the European Communities v French Republic*, 1986 ECR I-00273, § 18. However, national regulations on maintaining 'corporate nationality' modify such function and distinguish companies from natural persons.

<sup>12</sup> E. WYMEERSCH, *The Transfer of the Company's Seat in European Company Law*, European Corporate Governance Institute, Working Paper, No 8/2003, 2003, pp. 8-10.

<sup>13</sup> See: V. EDWARDS, *EC Company Law*, Oxford, Clarendon, 1999, p. 335. Consequently, nationality of a company is preserved both on the territory of incorporation and abroad. However, it should be noted that national law can impose additional requirements on cross-border transfer which would also impede emigration despite legal framework generally allowing that; *i.e.*, tax law in case of *Daily Mail and General Trust*.

<sup>14</sup> S. GRUNDMANN, *European Company Law*, *o. c.*, p. 116.

preserved only on the territory of the real seat, not abroad.<sup>15</sup> As a consequence, incorporation theory and real seat theory have different implications when it comes to emigration and immigration of a company. A company's emigration, according to the incorporation theory regime, results in maintaining its nationality.<sup>16</sup> On the other hand, a company's emigration, according to the real seat theory regime, results in loss of nationality.<sup>17</sup> A company's immigration, seen from the incorporation theory regime, should have no company law implications, as no connecting factor is created. Such a rule was confirmed in the *Inspire Art* case.<sup>18</sup> On the other hand, immigration to the country following the real-seat theory regime might be perceived as creating the connecting factor by setting up the centre of administration. Such an approach was however abolished by the judgment of the ECJ in *Überseering*.<sup>19</sup>

## 2. *Cartesio on the scope of the national company laws*

The judgment in *Cartesio* not only discussed the concept of companies as "creatures of law", but also the scope of national laws determining the existence of companies. As the freedom of establishment principle influences the scope of national substantive company laws and conflict of laws rules, these two areas in respect of Treaty principles can be treated together as a whole<sup>20</sup> or separately.<sup>21</sup> As the judgment in *Cartesio* shows strong emphasis on the role of national laws and refers first to the substantive law and subsequently to the conflict of laws,<sup>22</sup> these aspects will be discussed separately. Firstly, it has to be noted that the Court

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<sup>15</sup> Company may not move its centre of administration abroad as it will break the connecting factor and will no longer be governed by the national law.

<sup>16</sup> E.C.J., Case C-212/97, *Centros Ltd v Erhvervs- og Selskabsstyrelsen*, 1999 ECR I-01459 (henceforth, '*Centros*'), § 36; *Überseering*, § 70.

<sup>17</sup> It was a factual background of the *Cartesio* case.

<sup>18</sup> In the *Inspire Art* case a company wanted to establish a branch under the law of Netherlands which adheres to the incorporation theory. The host member state required the company to meet additional conditions set for formally foreign companies. Such additional requirements were abolished by the ECJ's judgment.

<sup>19</sup> In the *Überseering* case, the national court stated that to the company incorporated under Netherlands law, that was operating in Germany -i.e., according to German law it had transferred its actual centre of administration- German law was applicable and the company was required to be reincorporate in Germany.

<sup>20</sup> C. GERNER-BEUERLE and M. SCHILLING, "The Mysteries of Freedom of Establishment After *Cartesio*", at <http://ssrn.com/abstract=1340964>, p. 9.

<sup>21</sup> S. GRUNDMANN, *European Company Law*, o. c., p. 494.

<sup>22</sup> As mentioned above, the Court referred to the very core principles of company law by reflecting judgments in *Daily Mail and General Trust* and in *Überseering*; i.e., the Court pointed out the role of national laws in determining the connecting factor and consequences of its modification [*Cartesio*, §§ 104-108].

interpreted Treaty provisions only in respect of the powers of the home member state; *i.e.*, member state of incorporation.<sup>23</sup> The Court stated that the role of national *applicable* law<sup>24</sup> is to resolve whether a company may rely on Article 43 EC. However, this power is not arbitrary, as a company's right to freedom of establishment should be "established, *in the light* of the conditions laid down in Article 48 EC".<sup>25</sup> Thus the Court concluded that a member state by virtue of national law has the power to determine: (1) the connecting factor between company and national law as well as (2) requirements for maintaining that connection. Based on these conditions, a member state by allowing for a company's creation under its law, 'qualifies' it for the entitlement to rely on the freedom of establishment. Such interpretation implies that once the connecting factor is established and as long as the connecting factor is maintained according to the national laws,<sup>26</sup> a company is entitled to rely on the freedom of establishment.

The judgment in *Cartesio* opposes national legislation against the freedom of establishment principle<sup>27</sup> and states that national laws concerning incorporation *and* winding up or liquidation of companies must respect Treaty rules. In particular, they cannot justify the country of incorporation *preventing a company from transferring* to another jurisdiction. Although the statement of the Court is not very clear, it is of great importance as it shows a new approach towards interpreting the scope of national law in respect of the freedom of establishment. *Cartesio* is the first case in which the Court analysed national laws against the Treaty rules in a situation when a company leaves the home member state. In previous judgments, the Court either did not regard national law that hindered a company's emigration as incompatible with Treaty rules<sup>28</sup> or did not touch upon this

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<sup>23</sup> Such notion can be drawn from Court's distinction between cases on inbound and outbound establishment and dealing with *Cartesio* as an 'emigration' case. From the Court's analysis it seems that the Court referred to the powers of a member state from which company emigrates. Moreover, the Court indicated that it referred to "national law *applicable* to a company". The law *applicable* is undoubtedly one under which company was formulated.

<sup>24</sup> Namely, substantive company law; contrary to conflict of laws rules which will be discussed in the subsequent part of the paper.

<sup>25</sup> *Cartesio*, § 109.

<sup>26</sup> It follows from subsequent Court's statement in § 110, concerning "breaking the connecting factor".

<sup>27</sup> See also: Opinion of Advocate General Maduro, § 31.

<sup>28</sup> *Daily Mail and General Trust* case.

issue.<sup>29</sup> However, the Court is not precise on the scope of national laws. The uncertainty that follows from the Court's statement is twofold. Whereas it is clear that the rules on winding up cannot prevent a company from "converting itself into a company governed by the law of the other member state",<sup>30</sup> it is not clear in what way national rules on incorporation should respect Treaty provisions. One possible answer could be that the rules of incorporation cannot be formulated in a way that prevents a company from a *conversion* into another jurisdiction. However, the law on incorporation, as it is strictly understood as creating the connecting factor between the company and national law, does not directly influence companies' conversion into another jurisdiction. Rather, it would be reasonable to stick to the Court's statement that the function of the law on incorporation is to allow the company to rely on the freedom of establishment, whereas rules on winding up of companies cannot prevent a company from a transfer. Secondly, it should be noted that the transfer to another jurisdiction is allowed "to the extent that it is *permitted* under that law [law of the host member state or home member state] to do so".<sup>31</sup> The Court did not mention precisely whether conversion of the company to another jurisdiction should respect the 'permission' of the law of the home member state or the host member state. In the former situation, the extent of conversion would depend on national law. The effect of such an interpretation would be that a country of origin that adheres to the real seat theory would allow for such conversion to the full extent, as after the seat transfer, the company would stop being governed by that law. On the other hand, under the national law following incorporation theory such conversion would not be required at all as the company would remain governed by the law of incorporation also after the transfer. It seems that the judgment accepts both options. The second possible interpretation is that the extent of the company's conversion would depend on the host member state. Such a reading of the judgment has to be limited by the previous case law on inbound establishment; *i.e.*, under previous judgments the host member state was required to respect lawful incorporation of the company [*Centros*, *Überseering* and *Inspire Art*], its legal capacity [*Überseering*], governance of the home member state law [*Centros*] and was denied the possibility of imposing additional conditions on an immigrating company [*Inspire Art*].<sup>32</sup>

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<sup>29</sup> The Court did not refer to the scope of national laws of member state in terms of hindering company's emigration, as the companies in cases such as *Centros* or *Überseering* were already allowed for the transfer by home member states.

<sup>30</sup> *Cartesio*, § 112.

<sup>31</sup> *Ibid.*

<sup>32</sup> However, the last two rules could not be strictly followed when the company would convert under the jurisdiction of another member state.

3. *Cartesio on the scope of national conflict of laws rules*

- a. The requirement of changing applicable law after a transfer of the registered seat

The Court in *Cartesio* examined the rules on conflict of law by making a distinction between transfer of the seat with and without a change of applicable law.<sup>33</sup> The ECJ's judgment formed a rule allowing national laws to prevent companies from transferring the seat without a change of applicable law.<sup>34</sup> Although in the previous judgments the Court tended to opt for the incorporation theory,<sup>35</sup> it seems that in the *Cartesio* case, the Court opts for neither the incorporation nor the real seat theory as the judgment does not impose a general obligation so that the companies change the applicable law when they move their seats. Rather, it accepted such a possibility under the provisions on freedom of establishment. However, the judgment lacks any comment on another scenario; *i.e.*, when the national law does not prevent transferring the seat without a change of the applicable law.<sup>36</sup> As a result, the ruling can be interpreted as delivering a solution that can be applied to home member states that follow either the incorporation theory or the real seat theory. In both cases the effect will be that a company is able to move abroad. Such an approach might deliver different outcomes of companies' emigration in terms of the change of law, dependent on whether a company leaves the country following the real seat theory or the incorporation theory.

In the *first variant -i.e. in Cartesio-like scenarios-*, when a company moves its seat or head office<sup>37</sup> *according to a real seat regime*, to succeed with the transfer, it would have to change the applicable law. In the *second variant*, a company that moves out *according to an incorporation theory regime* would be able to transfer but not necessarily with a change of the applicable law. The company would be able to choose either to adhere to the incorporation theory principle and remain being governed by the law of the home country or to choose relying on *Cartesio* and change the applicable law; which cannot be forbidden by the home member state,

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<sup>33</sup> *Cartesio*, § III.

<sup>34</sup> This rule will be later referred to as a '*Cartesio* rule'.

<sup>35</sup> See: *Centros*; *Überseering*; E. WYMEERSCH, "Centros: A Landmark Decision In European Company Law", p. 22.

<sup>36</sup> This scenario is possible in countries where company law is based on incorporation theory.

<sup>37</sup> This situation would concern both transfer of the registered seat and head office as under real seat theory these two places are inseparable and transfer of head office entails transfer of the registered seat; "real seat theory inextricably entwines a company's nationality and residence". See: EDWARDS, *EC Company Law, o.c.*, p. 336.

according to the judgment in *Cartesio*.<sup>38</sup> The only exception to the free choice of the company could be if national law –probably other than company law, like tax law– would put a condition of winding up or liquidation of the company on its transfer abroad without a change of applicable law. Then, the company could rely on the *Cartesio* rule and would have to transfer itself to another jurisdiction by giving up the connection with the law of incorporation.

The change of applicable law after the transfer will also influence host member states in different ways, dependent whether a company enters country following real seat theory or incorporation theory. The company's emigration to the country following real seat theory will be in line with principle of the national law of the host country, as the company will form the *connection* with the host member state by setting up its central administration there. On the other hand, the company's emigration and change of applicable law to the law of a member state following incorporation theory will result in setting up a new *connecting factor* with that member state on the ground of the seat transfer; whereas incorporation theory requires establishing a connecting factor by incorporation of the company under this law.

It follows from the above considerations that the *Cartesio* rule approximates freedom of establishment to companies, despite providing for different outcomes. The aim of the rule is to afford the company to undergo structural change while preserving its existence or legal personality. Such a right was awarded to *Cartesio* on a condition of changing the applicable law. In this sense it seems that *Cartesio* left behind *Daily Mail and General Trust*. In *Daily Mail and General Trust* a company could not transfer without losing its legal personality under the law of incorporation and was denied the right to transfer at all.<sup>39</sup> In *Cartesio* the company was denied the possibility to transfer while remaining under governance of home law but it was awarded a possibility to rely on the freedom of establishment, retain legal personality and transfer with a change of the applicable law.

Another concern is that the *aim* of preserving legal personality of the company contrasted with the *means* proposed by the Court and might be in contradiction. It seems that a company is supposed to jump into a new

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<sup>38</sup> Presented *Cartesio*'s interpretation in reference to company's emigration from incorporation theory regime is supported by the judgments in *Überseering* or *Inspire Art*, whereby the result was that the companies could rely on laws of their incorporation.

<sup>39</sup> *Daily Mail and General Trust*, § 24.

legal environment after “breaking the connecting factor” with the home member state. It is not clear what is meant by the conversion into a “form of a company governed by the law of the member state to which it has moved”<sup>40</sup> and how a company converts in terms of the procedure. Should such a company be recognised as a company incorporated in the home member state<sup>41</sup> or should it be recognised as a company under the law of the host member state and if so, what would be a starting point for the recognition? Moreover, another uncertainty is the scope of rules that the host member state should apply. Should it apply the same rules as apply to national companies from the moment of incorporation<sup>42</sup> or should it apply national rules on assumption that the company was lawfully formed in the home member state although it has no more connection with that state? These concerns are discussed in the following part.

b. Breaking the connecting factor versus understanding of Article 48 EC

The rule concerning conversion from a company governed by one member state to a company under governance of another member state by “breaking the connecting factor”<sup>43</sup> seems to be in conflict with the aim of setting up this rule; *i.e.*, allowing a company to transfer while retaining legal existence and changing only the law applicable. Such a notion results from analysis of the concept of “breaking the connecting factor” in reference to the Article 48 EC. As noted above, the Treaty provision applies to the companies that meet the requirements: (1) to be “formed in accordance with a law of a member state” and (2) to have “registered office, central administration or principal place of business within the Community”. When a company breaks the connecting factor with the national law, it loses the right of having its seat there<sup>44</sup> and as a result it does not meet the second requirement under Article 48 EC. However, the moment of breaking the connecting factor is not specified. The questions that may arise are: whether the moment of breaking the connecting factor is a physical transfer of the office, changing the statute, crossing out from the companies’ registry or just notifying the home member state of such

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<sup>40</sup> *Cartesio*, § III.

<sup>41</sup> On what grounds such a company should be recognised by home member state if it changed national law applicable and law of origin does not apply to it any more?

<sup>42</sup> Among others, impose requirements concerning incorporation of the company. However, that would be contrary to the rule established in *Inspire Arts*.

<sup>43</sup> *Cartesio*, § III.

<sup>44</sup> The Court states that company breaks the connecting factor by moving its seat to another territory; *i.e.*, by losing territorial connection with the home member state [*Cartesio*, § III]. Such situation may occur if the company leaves real seat theory regime -above described ‘first variant’- or if it leaves incorporation theory regime and decides to change the applicable law.

change? The moment itself is significant as once the connection between a company and the country of incorporation is broken, a new connection with the host member state should be immediately established; *i.e.*, as the Court says the company ‘converts’ into another jurisdiction. Otherwise, the company with no connection to a member state cannot be regarded as a company governed by the national law and consequently by the EC Treaty. The judgment in *Cartesio* did not touch upon this issue. Furthermore, the Court did not specify in what way a company converts into an entity governed by another jurisdiction. The company does not lose its legal personality after the transfer and it is recognised by the law of a host member state. However, it is uncertain from which moment the national law of the host member states starts to be applicable to the company. Again, would that be from the moment of notification or registration or another action? Defining this moment is important for the continuity of the company’s governance under national laws. Since the transfer of the company should result in retaining legal personality, there must be a certain moment from which the company stops being governed by the law of the home member state and starts being governed by the law of the host member state. If it does not happen simultaneously *-i.e.*, there is no immediate conversion- and the company would stop being governed by the law, it would not be able to retain its legal personality.

It seems that the issue can be now, in the absence of secondary law, clarified only by the national laws. The member states could either cooperate between each other in that matter by mean of agreements or they could change the national laws in order to facilitate foreign companies to convert under their jurisdiction.<sup>45</sup>

#### 4. *Emigration versus immigration of companies*

Another important ‘lesson’ from *Cartesio* is the Court’s analysis of the distinction between inbound and outbound establishment. In that respect, the Court’s conclusion was opposite to the Opinion of Advocate General.<sup>46</sup> The Court found the distinction essential because companies ‘entering’ and ‘leaving’ member states cause different legal problems. The Court referred to *Daily Mail and General Trust* as a case based on a

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<sup>45</sup> This concept might lead to regulatory competition among the member states. However, this issue will not be discussed in this article.

<sup>46</sup> Advocate General Maduro in his Opinion on the *Cartesio* case contended that there was no ground for distinguishing between *Daily Mail and General Trust* from *Centros*, *Überseering* and *Inspire Art*. He emphasised that the principle of freedom of establishment prohibits restrictions on both inbound and outbound establishment [§ 27].

“situation fundamentally different”<sup>47</sup> from *SEVIC Systems*<sup>48</sup> and cases covering similar scenarios, namely *Centros*, *Überseering* and *Inspire Art*. In *SEVIC Systems* the judgment concerned recognition “in the member state of incorporation of a company, of an establishment operation carried out by that company in another member state”.<sup>49</sup> Whereas, according to the ECJ, the problem in cases such as *Centros*, *Überseering*, *Inspire Art* and *SEVIC Systems* focused on whether the company encountered a “restriction in the exercise of its right of establishment in another member state”.<sup>50</sup> This problem should be distinguished from the other one that arose in *Cartesio*, being “whether the company [...] may be regarded as a company which possesses the nationality of the member state under whose legislation it was incorporated”.<sup>51</sup>

5. *The need for another judgment on freedom of establishment in the light of distinction between inbound versus outbound establishments*

It could be argued that in deciding *Cartesio* the Court could rely on the rules already established in the case law on freedom of establishment. Precisely, the question is whether it would be possible to find the solution that the Hungarian court sought before the ECJ, in the previous case law on freedom of establishment or there was a need for another rule that refined previous judgments. The answer seems to lie in the general approach to the problem of companies’ mobility; *i.e.*, the distinction or absence of distinction between inbound and outbound establishment. In the light of the *Cartesio* case, the distinction became an important tool in shaping interpretation of Articles 43 EC and 48 EC. In short, on the assumption that there is a distinction between ‘emigration’ and ‘immigration’ of companies, there was a need for developing the ECJ’s stand on ‘emigration’ cases; whereas, on the assumption that there is no distinction, the previous case law seems to be sufficient ground for solving the *Cartesio* scenario.<sup>52</sup>

In the literature systematisation of inbound *versus* outbound establishment

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<sup>47</sup> *Cartesio*, § 122.

<sup>48</sup> E.C.J., Case C-411/03, *Sevic SYSTEMS AG*, 2005 ECR I-10805 (henceforth, ‘*Sevic SYSTEMS*’).

<sup>49</sup> *Cartesio*, § 122.

<sup>50</sup> *Ibid.*, § 123.

<sup>51</sup> *Ibid.*

<sup>52</sup> See, *e.g.*, Advocate General Tizzano in his Opinion in *SEVIC System*; who stated that “it is evident from this case law that Article 43 EC does not merely prohibit a member state from impeding or restricting the establishment of foreign operators in its territory, it also precludes it from hindering the establishment of national operators in another member state” [§ 45].

is well established, although criticised.<sup>53</sup> Also, the ECJ noted in the judgment that legal problems that arise in ‘emigration’ and ‘immigration’ of companies differ.<sup>54</sup> Such a notion suggests that these two situations require different solutions. Therefore, it could be assumed that the Court took this distinction into consideration and found a need for analysing the *Cartesio* case. In that respect, it should be noted that the case law on inbound establishment is well developed;<sup>55</sup> whereas since *Daily Mail and General Trust*, there has been no ‘emigration’ case.<sup>56</sup> What is more, in *Daily Mail and General Trust* the part of the judgment concerning freedom of establishment was an *obiter dictum*. Therefore, strictly speaking, the ECJ had not ruled before on circumstances such as those in the *Cartesio* case. Consequently, the Court could consider *Cartesio* as an opportunity for clarification on Articles 43 EC and 48 EC in the scope of company’s ‘emigration’. Taking into consideration the above reasoning, the answer to question of necessity for the judgment on ‘emigration’ case is affirmative. In that respect, it should be noted that the Court’s decision in *Cartesio* was justified and consistent. The Court not only interpreted Articles 43 EC and 48 EC in the context of a company’s moving out but also established that under these provisions the dichotomy in rules on freedom of establishment is needed. The importance of the latter issue had not been touched upon in previous ECJ judgments.<sup>57</sup>

On the other hand, one may argue that the distinction between ‘moving out’ and ‘moving in’ cases is unfounded.<sup>58</sup> There are several arguments against distinction between ‘immigration’ and ‘emigration’. Such a distinction, on the additional assumption that “freedom of establishment relates only to immigration, but leaves the states free to deal with

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<sup>53</sup> To name a few: D. DEAK, “Outbound Establishment Revisited in *Cartesio*”, *EC Tax Review*, 2008, p. 250; M. SZYDŁO, “Emigration of Companies under EC Treaty: Some Thoughts on the Opinion of the Advocate General in the *Cartesio* Case”, *European Review of Private Law*, 2008, p. 980; E. WYMEERSCH, *The Transfer of the Company’s Seat in European Company Law*, o.c., pp. 10 and 12.

<sup>54</sup> *Cartesio*, § 123.

<sup>55</sup> M. SZYDŁO, “Emigration of Companies under EC Treaty”, o.c., p. 973.

<sup>56</sup> However, some authors find that in *Überseering* the ‘emigration’ element was raised. See: M. SZYDŁO, “Emigration of Companies under EC Treaty”, o.c., p. 984.

<sup>57</sup> Neither was it clear for the Hungarian court, that referred to both *Daily Mail and General Trust* and *SEVIC Systems*, as well as to the E.C.J. Case C-442/02 *CaixaBank France*, 2004 ECR I-8961. However, the referring court noted that the principle laid down in *Daily Mail and General Trust* “may have been further refined in the later case law of the Court” [*Cartesio*, § 35].

<sup>58</sup> F.M. MUCCIARELLI, “Company ‘Emigration’ and EC Freedom of Establishment: *Daily Mail* Revisited”, *European Business Organization Law Review*, 2008, pp. 267-303, at p. 296.

emigration” might result in national regulators imposing restrictions on freedom of establishment resulting in hindering the freedom of movement of legal persons.<sup>59</sup> Moreover, it is argued that a distinction between ‘moving out’ and ‘moving in’ cases is not consistent with EC freedom of establishment. Taking into consideration differences between natural persons and legal persons it may lead to negation of freedom of establishment of companies.<sup>60</sup> Another argument is that there is no ground for differentiation between ‘immigration’ and ‘emigration’ as recognition of these processes is only dependent on the point of view of either the home member state or the host member state.<sup>61</sup> Furthermore, the “Treaty articles are directly applicable to both immigration and emigration” and when it comes to obstacles on free movement of companies, there cannot be differentiation between outbound and inbound establishment; *i.e.*, national rules should be removed for both types of establishments.<sup>62</sup> The argument that a distinction between ‘emigration’ and ‘immigration’ of companies is unfounded was supported by Advocate General Maduro in his Opinion in *Cartesio*. The case law presented by the Advocate General seems to be convincing. Although the facts of the previous cases on freedom of establishment concerned either restriction on leaving the home member state<sup>63</sup> or on entering the host member state,<sup>64</sup> differentiation between rights of companies according to these scenarios would put the entities on unequal footing. Therefore, it can be assumed that the previous case law dealt with *migration* of companies and set rules for both companies moving out and moving in<sup>65</sup> rather than with ‘emigration’ and ‘immigration’ of companies as two different processes. On the assumption that there is no distinction between ‘emigration’ and ‘immigration’ of companies, it seems that previous case law on the freedom of establishment constitutes a sufficient basis for dealing with the circumstances of *Cartesio*. On the basis of cases such as *Centros*, *Inspire Arts*, *Überseering*, and *SEVIC Systems*, the *Cartesio* scenario could be resolved. Already in the *Überseering* case, the Court has established a rule that required the host member state to respect a legal entity incorporated in

<sup>59</sup> E. WYMEERSCH, *The Transfer of the Company's Seat in European Company Law*, *o.c.*, p. 17.

<sup>60</sup> F.M. MUCCIARELLI, “Company ‘Emigration’ and EC Freedom of Establishment”, *o.c.*, p. 298.

<sup>61</sup> M. SZYDŁO, “Emigration of Companies under EC Treaty”, *o.c.*, p. 975.

<sup>62</sup> *Ibid.*, p. 993.

<sup>63</sup> *Daily Mail and General Trust*.

<sup>64</sup> *Centros* and *Überseering*.

<sup>65</sup> Opinion of Advocate General Tizzano in *SEVIC System*, § 45.

another country.<sup>66</sup> At the same time, it prevented application of national law of the host member state to the company that immigrated from abroad. After this judgment it could be assumed that companies could move between member states and such changes did not have to entail a change of applicable law. Furthermore, in the *SEVIC Systems* case the Court also required the home member state to recognise a company incorporated abroad. In this case the company was not required to convert into a company governed by the host member state in order to undergo merger procedures in the host country.<sup>67</sup> Under the judgments in *Überseering* and *SEVIC Systems*, the companies had to be recognised by the host member states and the host member states had to respect the national law applicable to these companies instead of applying its national rules. The companies at issue were not required to undergo a conversion in order to change the applicable law to the one of the host member state. One may ask further questions about the possible outcome of *Cartesio* based on the previous case law. The possible solution based on the previous case law could be that the provisions of the Hungarian company law that prevent a *Cartesio* from moving abroad while being governed by the Hungarian law were incompatible with principle of freedom of establishment understood as a right of a company to be respected in the host member state, and the right to preserve its legal status abroad.<sup>68</sup> However, the judgment in *Cartesio* did not rely on this rule, which can be seen as overruling of previously established rules. On the other hand, it can be also seen as merely systemising previous case law in order to clarify which rules should apply and how. In this regard, the judgment did not overrule previous case law but gave guidelines on how to read case law on the freedom of establishment.

### III. *CARTESIO* AND THE REGULATORY PERSPECTIVE

The last question to be answered in the light of the *Cartesio* case is whether there is a need and space for secondary legislation on cross-border transfer of the companies' seat and by what means clarification on the issue should be achieved. Analysis of the present secondary law shows that there is a lacuna not filled so far with a comprehensive and clear set of rules. Existing Community law provides only for a narrow range of instruments for cross-border transfer.<sup>69</sup> Furthermore, the Community legislation, as mentioned

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<sup>66</sup> *Überseering*, §§ 81-82; M. SZYDŁO, "Emigration of Companies under EC Treaty", *o.c.*, p. 986.

<sup>67</sup> The judgment in *SEVIC Systems*.

<sup>68</sup> *Centros* and *Überseering*.

<sup>69</sup> Regulation on the Statute of European Company provides companies with are available only to the *Societas Europaea*, which (in fact) seriously limits application the

in the *Cartesio* judgment,<sup>70</sup> does not serve in practice as an instrument for cross-border transfer of the seat; *i.e.*, despite the stand of the European Commission concerning its *mutatis mutandis* application to the *Cartesio* scenario, it was left without any doubt by the ECJ that secondary legislation cannot be applied to the seat transfer without a change of the applicable law.<sup>71</sup>

If the secondary law has so far failed in regulating European company law on cross-border transfer of the seat, the question is whether it should be left solely to the ECJ judgements or another attempt should be made by the European legislator. In the internal market the choice of jurisdiction should be given freely,<sup>72</sup> as it gives companies an opportunity to choose the most favourable economic conditions, which also allows them to respond to economic changes.<sup>73</sup> However, it should not be the role of the Court to act as a legislator in the area of companies' seat transfer. Although the Court might set the rules that would enable companies to move across the borders, these rules will not be precise enough as to afford companies with clear and certain indications. Therefore, the case law would not offer the companies legal certainty in this area. It could be assumed that the need for secondary law remains irrespective of the judgments of the European Court of Justice.<sup>74</sup>

*Cartesio* was an anticipated case from the very beginning as it was expected to deliver "new insights" into the interpretation on the freedom of establishment of the companies. It is said that works on the 14th Directive (henceforth, 'the Directive') were suspended because of the expected verdict of the European Court of Justice.<sup>75</sup> However, after the judgment

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Regulation. The Cross-border Mergers Directive provides a framework for the companies to merge across the borders. Again, although cross-border merger can be used for the purpose of cross-border moving of the seat, it may be unattractive because it always involves at least two companies of which always at least one will be dissolved as a result of the procedure; P. PELLE, "Companies Crossing Borders within Europe", *Utrecht Law Review*, 2008, p. 9.

<sup>70</sup> Regulation No 2137/85 on the EEIG; Regulation No 2157/2001 on the SE; Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) [OJ 2003 L 207, p. 1]; *Cartesio*, § 115.

<sup>71</sup> *Cartesio*, §§ 115-120.

<sup>72</sup> P. PELLE, "Companies Crossing Borders within Europe", *o.c.*, p. 11.

<sup>73</sup> S. GRUNDMANN, *European Company Law*, *o.c.*, p. 530.

<sup>74</sup> G. VOSSESTEIN, "Transfer of the Registered Office: The European Commission's Decision not to Submit a Proposal for a Directive", *Utrecht Law Review*, 2008, p. 64; F.M. MUCCIARELLI, "Company 'Emigration' and EC Freedom of Establishment", *o.c.*, p. 277.

<sup>75</sup> *Ibid.*, p. 62.

was delivered leaving several doubts, it seems that the scale has been turned back to the European legislator. Also, the recent developments in legislature give hope that the Commission would continue works on the Directive. The European Parliament's recommendations of 10 March 2008 (henceforth, 'the Resolution') requested the Commission's submission of the proposal for the Directive on the cross-border transfer of the registered office of a company.<sup>76</sup> Interestingly the Resolution did not name *Cartesio* as one of the cases it regarded relevant for the recommendations, despite proposing solutions similar to ones in *Cartesio*; *i.e.*, transfer of the seat without loss of legal personality or winding up of the company and change of the applicable law after the seat transfer to the one of the host member state.<sup>77</sup> Moreover, the Resolution fills the spaces that the judgment in *Cartesio* left behind; *i.e.*, procedural aspects of the seat transfer both in the home member state and in the host member state.<sup>78</sup>

#### IV. CONCLUSIONS

It should be noted that *Cartesio* brings a change in interpretation of the Treaty provisions on freedom of establishment. A rule concerning change of applicable law has not been touched upon before in a way it was dealt with in *Cartesio*. The impact and significance of the judgment in *Cartesio* can be summarised in the following way. First, the judgment established that national law may require emigrating companies to change applicable law. Secondly, the judgment established that there is a clear distinction between 'emigration' and 'immigration' of companies. Such a distinction is useful and clarifies the previous case law. However, the distinction between 'emigration' and 'immigration' combined with the change of applicable law has important consequences. The rule in *Cartesio* may lead to different treatment of companies moving out and moving in and also companies emigrating from countries with the real seat theory and the incorporation theory. Finally, the change of applicable law meaning a conversion of a company governed by one member state to company governed by another member state, in the absence of specific procedures governing such conversion, is not clearly compatible with the rule under Article 48 EC on applicability of the Treaty to the companies.

A further conclusion is that existing legislation in that area of companies' mobility is insufficient and cost-inefficient. Moreover, the awaited

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<sup>76</sup> European Parliament resolution of 10 March 2009 with recommendations to the Commission on the cross-border transfer of the registered office of a company (2008/2196(INI)).

<sup>77</sup> Annex to the Resolution, Recommendation 1.

<sup>78</sup> Annex to the Resolution, Recommendation 4.

judgment in the *Cartesio* case which was expected milestone in jurisdiction on cross-border transfer of the seat did not bring the expected result of stating clear rules on cross-border transfer of the seat. The gap for further legislation or jurisprudence in this field still seems to remain unfilled. What can be now expected is that either the European legislator will provide companies with certain guidelines on the seat transfer across the borders, which would be an essential supplement of the *Cartesio* ruling or the member states will take initiative on the national level -or by international agreements-<sup>79</sup> or the private international law on companies will be still shaped by the subsequent judgments of the European Court of Justice.

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<sup>79</sup> Pursuant to Article 293 EC.

## BOOK REVIEW:

### **‘MAKING EUROPEAN PRIVATE LAW’ BY FABRIZIO CAFAGGI AND HORATIA MUIR WATT**

(CHALTENHAM, ELGAR, 2008)

Marija Bartl\*

#### **I. INTRODUCTION**

In February 2009 the final version of the Academic Draft Common Frame of Reference was published;<sup>1</sup> its political fate is however still not entirely clear.<sup>2</sup> The book under review here is a major contribution to the debate about *what kind of European Private Law do we want*: is it a European civil code (hereinafter ECC), some other sort of uniform ordering, or has the time come to consider different possibilities. Edited by Fabrizio Cafaggi and Horatia Muir Watt, it exposes the unexplored fundamentals of European private law and its future direction. Broader debate on desirability of the ECC or full harmonisation of consumer *acquis* has been forcefully launched by the Memorandum of Social Justice Group;<sup>3</sup> the book under review here brings, equally powerfully, some other perspectives which may justify reconsidering the whole process of construction of the EPL.

This is not to say that the book at hand does not have even broader standing. It goes to the heart of the following question: *what is private law today, who creates it and what are its functions*. It exposes questionable tendencies to promote the 19th century, classical conception of ‘pure’ autonomy-based private law. The sentiments toward the ‘pure private law’ based on the respect for private autonomy should be, as this book attempts to show, to a great extent abandoned in order to better understand and make use of the possibilities given by the contemporary

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<sup>1</sup> See: [http://www.sgecc.net/pages/en/home/191.new\\_dcfr\\_outline\\_edition.htm](http://www.sgecc.net/pages/en/home/191.new_dcfr_outline_edition.htm)

<sup>2</sup> See: the Report of the Justice and Home Affairs Council at: [http://ec.europa.eu/consumers/rights/concl\\_JHAC\\_1108\\_en.pdf](http://ec.europa.eu/consumers/rights/concl_JHAC_1108_en.pdf)

<sup>3</sup> Study Group on Social Justice in European Contract Law, “Social Justice in European Contract Law: A Manifesto”, *European Law Journal*, 2004, pp. 653-674.

evolution of private law in a globalised world<sup>4</sup>.

It is not valid only at the European level, but should be remembered also at the national level. Many countries, mainly among the new member states, are in the process of adopting the new civil codes. Other EU member states are in the process of re-codification or substantial amendment of their old civil codes. And all these countries stand in front of the difficult task of reconciling the traditional private law with the trends emanating from European law.

In this piece I intend to look into four major issues explored by the book under review, characterising the contemporary private law and the problems we face in relation to it. First, I will look at the dynamics of the changes of character and functions of contemporary private law. Secondly, I will address the question of different sources of private law making and actors involved in that process. Further, I will tackle the question of multi level character of contemporary private law and the possible benefits stemming therefrom and finally I will draw some lessons for the member states.

## II. CHARACTER AND FUNCTIONS OF CONTEMPORARY PRIVATE LAW

Nineteenth century civil codes were based on the principle of private autonomy of the parties, rising from the *laissez-faire* theory, where the parties were considered best suited to regulate their mutual relationships.<sup>5</sup> Public law values were supposed to be only exceptionally brought into the private law realm through public policy / morality clauses. With the great world crisis (1929), the contention that the consent makes the transaction fair was already wholly compromised and regulation, along with competition law, was introduced to discipline the oligopolies and monopolies in most of the 'Western world'.<sup>6</sup> However, this movement still did not touch the 'pure contract law', based on the principle of private autonomy, and consisting predominantly of default rules. It is only after

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<sup>4</sup> To this effect, see: F. CAFAGGI and H.M. WATT, "Introduction", pp. 1-37; W. KERBER, "European System of Private Laws: An Economic Perspective", pp. 64-97; C. SCOTT, "Regulating Private Legislation", pp. 254-268; H. COLLINS, "Governance Implications for the European Union of the Changing Character of Private Law", pp. 269-287; F. CAFFAGI, "The Making of European Private Law", pp. 289-350; all in F. CAFAGGI and H.M. WATT, *Making European Private Law: Governance Design*, Chaltenham, Elgar, 2008.

<sup>5</sup> To this effect, see: M. FREEDLAND, "Private Law, Regulation and Governance Design and the Personal Work Contract", in F. CAFAGGI and H.M. WATT, *Making European Private Law, o.c.*, p. 231.

<sup>6</sup> Of course, the process started considerably earlier but the crisis was the last blow.

World War II that the first mandatory rules -mainly in relation to consumer protection- found their way into contract law. These mandatory rules were designed, similarly to the competition law rules or regulation in a narrow sense, as a tool to address market failures.<sup>7</sup> Therefore, we can say that contract law has acquired a *regulatory* function.<sup>8</sup>

Another development distinguishing contemporary private law is the so-called 'constitutionalisation' of private law, or, as Collins puts it, the "inter-legality in reasoning".<sup>9</sup> It basically means the use of human rights or other constitutional law principles in private law reasoning, giving indirect horizontal effect to human rights. Nothing changes the fact that the courts do so through the old good public policy / morality clauses. Similar practice would hardly have been imaginable before World War II.<sup>10</sup>

Finally, the last crucial development in private law is the multi-level character of contemporary private law. This is not to say that some kind of multi-level system was not present also in the past. Beside international law, the *lex mercatoria* is a great example of early acknowledgement of the beneficial character of both private lawmaking and some sort of multi-level private law. However, the more or less marginal importance of these new phenomena dramatically increased with the creation of European Communities on the one hand and the deepening of globalisation on the other. Giuliano Amato in his contribution develops his understanding of the relation between the level of trust and the multi-level system of law.<sup>11</sup> The question of the multi-level character of private law is further developed in the following contributions, exposing its desirability from various perspectives, and trying to find an answer to the question whether the multi-level character of private law is something to be abandoned, by adopting a European Civil Code or other forms of uniform ordering at the EU level, or whether there are some advantages stemming from this characteristic, which render it worth maintaining.

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<sup>7</sup> It is perceived as a less intrusive venue to protect consumers, compared to price regulation or other more 'rudimentary' techniques.

<sup>8</sup> See, e.g., the contributions by K. CSERES, "Governance Design for European Private Law: Lessons from the Europeanisation of Competition Law in Central and Eastern Europe", p. 142; H. COLLINS, "Governance Implications for the European Union of the Changing Character of Private Law", p. 276; F. CAFFAGI, "The Making of European Private Law", p. 294; all in F. CAFAGGI and H.M. WATT, *Making European Private Law*, o.c.

<sup>9</sup> H. COLLINS, "Governance Implications for the European Union of the Changing Character of Private Law", o.c., p. 279.

<sup>10</sup> See: A. COLOMBI CIACCHI, "The Constitutionalisation of European Contract Law", *European Contract Law Review*, 2006, p. 169.

<sup>11</sup> G. AMATO, "Multilevel Europe and Private Law", in F. CAFAGGI and H.M. WATT, *Making European Private Law*, o.c., pp. 39-45.

### III. SOURCES OF PRIVATE LAW MAKING

Traditionally, private law has been created by national legislators, who would typically enact typically a civil code.<sup>12</sup> As already mentioned, the private law making (*lex mercatoria*) had some influence in the past, however limited to the small number of transactions. Today, the situation has changed considerably, mainly due to the increased complexity of the problems that have to be tackled and the multi-level character of private law, which prompted higher inclusion of other actors involved in the private law making. By this we do not mean only powers delegated to governmental bodies and regulatory agencies, eventually EU institutions, but also functions performed by standardisation organisations, sport associations, professional associations, trade associations and other private actors engaged in private law making, binding their members or even wider group; of course, ever since raising the question of legitimacy of such private law making.<sup>13</sup>

Colin Scott<sup>14</sup> helps us to develop a more appropriate account for assessing legitimacy of private law making, since standard public law principles for assessing legitimacy are not suitable for this purpose. He rather proposes the principle of 'extended legitimacy',<sup>15</sup> both procedural and substantive. Procedural legitimacy in cases of private law making can be conceptualised through the principle of *interdependence*, the key actors can not act alone, and/or principle of *redundancy*, failure of any mechanism will be met by another overlapping mechanism. Substantive legitimacy should be measured on the basis of the *competition* pressures to which rules of private law making are exposed.

Tony Prosser<sup>16</sup> shows, on the other hand, in his contribution, possible venues through which regulatory agencies are involved in private law making. He draws a distinction between two visions of regulation; *private law vision of regulation* and *public law vision of regulation*, which imply different regulatory tools used by regulators and consequently different ways in which the regulators are involved in private law making.<sup>17</sup> His analysis leads him to the fundamental questions raised also by the book at

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<sup>12</sup> Of course, with the exception of Common Law countries.

<sup>13</sup> To this effect, see: C. SCOTT, "Regulating Private Legislation", *o.c.*, pp. 261-ff.

<sup>14</sup> *Ibid.*, pp. 254-268.

<sup>15</sup> *Ibid.*, pp. 261-262.

<sup>16</sup> T. POSSNER, "Regulatory Agencies, Regulatory Legitimacy, and European Private Law", in F. CAFAGGI and H.M. WATT, *Making European Private Law*, *o.c.*, pp. 235-253.

<sup>17</sup> *Ibid.*, pp. 242-248.

hand: which principles should govern regulation, what vision of regulation should we adopt, what regulatory tools are the most appropriate to perform regulatory tasks and who is best suited to do so.

#### IV. PLEA FOR MAINTAINING THE FLEXIBILITY IN PRIVATE LAW MAKING

The existence of multi-level private law is a hardly disputable fact: taking the EU as a point of reference, at least three levels can be detected; the member states, European and global or international levels.<sup>18</sup> Additional regional levels are also possible as well as, depending on the definition we adopt, a high number of non-territorial sectoral levels. The question that arises, and that is tackled by the book at hand, is *whether such incidence is positive or negative*? The responses differ: the Commission, the European Parliament, the creators of DCFR, the authors of this book and other scholars all have different opinions and different reasons for this. In addition, they tend to change over time.

Wolfgang Kerber<sup>19</sup> in his contribution offers the analysis of this question on the basis of the economic theory of legal federalism and institutional economics. He gives us many reasons why a more decentralised solution should be preferred over a centralised one, such as a European civil code. It starts from the question of the heterogeneity of preferences and problems and the fact that the more remote the rule-giver is, the less s/he can accommodate differences. Furthermore, the problem of decentralised knowledge arises, which is related to the fact that not only the knowledge of the preferences and the problems are missing at the central level, but also the more substantive knowledge of how to solve the problems. Another question is that of innovation and adaptability, where uniformity shrinks the space for experiments and innovation, but also the possibility to adapt to the newly acquired knowledge promptly at the central level. Finally he offers also some additional normative grounds, like furthering individual freedom and private autonomy, as a reason to maintain a multi-level, un-centralised system of private law in Europe. Michele Taruffo,<sup>20</sup> on the other hand, shows in a somewhat parallel discussion on a European procedural code, what kind of obstacles and deficiencies the yearning for

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<sup>18</sup> To this effect, see: H. v. LOON, "Remarks on the Needs and Methods for Governance in the Field of Private International Law at the Global and Regional Levels", in F. CAFAGGI and H.M. WATT, *Making European Private Law*, o.c., pp. 197-ff.

<sup>19</sup> W. KERBER, "European System of Private Laws: An Economic Perspective", o.c., pp. 64-93.

<sup>20</sup> M. TARUFFO, "Harmonising Civil Litigation in Europe?", in F. CAFAGGI and H.M. WATT, *Making European Private Law*, o.c., pp. 46-63.

the uniformity may bring.

The contributions of K. Cseres<sup>21</sup> and A. Bakardieva<sup>22</sup> respectively offer examples of governance setbacks in two subfields of law and the perspective of the new member states. Their contributions once again confirm that the 'one solution fits all' adage is not the most appropriate solution. EU competition law has never taken adequately into account the specific character and needs of the newly born markets, where market creation coincided with the obligation to adopt the developed EC *acquis*, fitted primarily to the needs of the developed Western European markets.<sup>23</sup> In the field of consumer protection, the EC tendency towards regulation and enforcement by the centralised public agencies may have even exacerbated negative legacies from the period of centrally planned command and control economy.<sup>24</sup> And any accommodation of territorial or sectoral differences requires a certain level of flexibility.

The answers offered indicate that the heterogeneity of sources of private law as well as the levels of private law making in the EU are exactly the tools which could enable the accommodation of the existing differences in preferences and problems, and provide us with the most efficient solution. According to Hugh Collins, this may very well include a European civil code. However, today, the process of harmonisation must differ from that of the nineteenth's century codifications in two vital respects: "it must accommodate the requirements of a different governance system comprised of a multi-level system of rule-making and adjudication and incorporate into its reasoning processes the modern characteristics of private law systems [...] and systems of transnational self-regulation".<sup>25</sup>

Kerber maintains that a European civil code as an optional instrument functioning through the choice of law tools might be in some respects an efficient solution. But the private law scholars should not perceive this inevitably as a transitional instrument, since it may be a more permanent and efficient solution. Of course, as Giuliano Amato has pointed out, a balance has to be found between the need for flexibility and the potentially incomprehensible regulation coming from too many sources. This may be accomplished by a careful governance design.

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<sup>21</sup> K. CSERES, "Governance Design for European Private Law", *o.c.*, pp. 138-ff.

<sup>22</sup> A. BAKARDJIEVA ENGELBREKT, "The Impact of EU Enlargement on Private Law Governance in Central and Eastern Europe: The Case of Consumer Protection", in F. CAFAGGI and H.M. WATT, *Making European Private Law*, *o.c.*, pp. 98-ff.

<sup>23</sup> K. CSERES, "Governance Design for European Private Law", *o.c.*, pp. 156-163.

<sup>24</sup> A. BAKARDJIEVA ENGELBREKT, "The Impact of EU Enlargement on Private Law Governance in Central and Eastern Europe", *o.c.*, p. 127.

<sup>25</sup> F. CAFFAGI, "The Making of European Private Law", *o.c.*, p. 286.

## V. GOVERNANCE DESIGN

How to bring a sensible pattern into the multi-level European private law? What needs to be considered is the division between the different levels, most importantly between the EU and the member states. This has largely been done by the EC Treaty as well as some 'softer' legal tools, which have been developed over time; in particular, technical standardisation, OMC. Private actors are involved both in the public law-making, through co-regulation or delegated self-regulation, and outside of it. This is a resource which any law maker should benefit from, both in terms of learning and innovation. In addition, a set of meta-norms should be developed, which would govern this multi-level private law.<sup>26</sup> Such need is present in all multi-level systems, and as Loon tries to convince us, it is also strongly felt in private international law at the member states, EU and global levels.<sup>27</sup>

Mark Freedland develops an interesting inquiry into governance on the basis of personal work contracts. He identifies three major governance issues in personal work contracts, but valid equally for the rest of EPL; namely, *conflict of laws*, *OMC* and *derogation and hierarchies of norms*. He exposes their weaknesses and raises questions that are yet to be resolved in this regard.

The most comprehensive proposal for the design of governance in European private law is offered in the contribution by Fabrizio Cafaggi.<sup>28</sup> According to Cafaggi, the divergences in interpretation in EPL are presumed to be solved by the degree of harmonisation. Yet improving the governance design is a more suitable solution for reaching integration, which can bring more efficiency without compromising the diversity.<sup>29</sup> Cafaggi argues that coordination should appear between institutions and policies, not only between the rules;<sup>30</sup> this being precisely the reason why the full harmonisation strategy taken by the Commission<sup>31</sup> would not lead to the fulfilment of harmonisation objectives and genuine integration. Finally Cafaggi proposes a number of concrete ways how to improve the

<sup>26</sup> W. KERBER, "European System of Private Laws", *o.c.*, p. 87.

<sup>27</sup> H. v. LOON, "Remarks on the Needs and Methods for Governance in the Field of Private International Law at the Global and Regional Levels", *o.c.*, pp. 197-208.

<sup>28</sup> F. CAFFAGI, "The Making of European Private Law", *o.c.*, pp. 289-350.

<sup>29</sup> *Ibid.*, p. 331.

<sup>30</sup> *Ibid.*, p. 332.

<sup>31</sup> See the Proposal of the Directive on Consumer Rights:

[http://ec.europa.eu/consumers/rights/docs/COMM\\_PDF\\_COM\\_2008\\_0614\\_F\\_EN\\_PROPOSITION\\_DE\\_DIRECTIVE.pdf](http://ec.europa.eu/consumers/rights/docs/COMM_PDF_COM_2008_0614_F_EN_PROPOSITION_DE_DIRECTIVE.pdf)

governance of EPL on three levels: legislative design, implementation of legislation and coupling institutions with legislation in order to avoid resorting to complete harmonisation.

The number of contributions suggested as a tool to improve the coordination and governance of European private law the creation of the 'European ALI' or European Law Institute.<sup>32</sup> Lance Liebman describes the historical development of the American Law Institute (henceforth, ALI) and outlines the ways in which we should think about the creation of such an institution in practical terms.<sup>33</sup> The sole fact that many scholars think about the creation of ELI is a reaction to the legitimacy problems connected to the creation of the Academic Common Frame of Reference. Despite many substantial differences between the EU and USA, which could turn into considerable obstacles,<sup>34</sup> the fact that so many scholars see this as a viable option should be understood as an expression of the need for a more democratic and reflective creation of EPL.

## **VI. CONCLUDING REMARKS: LESSONS TO BE LEARNED AT THE NATIONAL LEVEL**

Private law is going through a period of upheaval in many European Countries. Many new member states are going through the process of adoption of new civil codes as a final 'good-bye' to the old communist codes. It would be highly desirable for the creators of these new codes to look at private law today as it stands, recognising the evolution which took place in private law over the past century, and being thereby able to create a code which would correspond to the changing face of private law.

The same is valid for the old member states. There is a need for scholars, legislators and the public in general to react adequately to the fact that private law is not any more solely a matter of private autonomy and formal equality of the parties, as it was the case in 19th century, but that it has acquired many other functions. It is time to stop 'closing our eyes', hoping that all these 'new trends' are going to disappear if we wait long enough, and instead to undertake steps to consciously incorporate these new trends

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<sup>32</sup> Compare: L. LIEBMAN, "The American Law Institute: A Model for Europe", p. 222; H. COLLINS, "Governance Implications for the European Union of the Changing Character of Private Law", p. 284; F. CAFFAGI, "The Making of European Private Law", p. 347; all in F. CAFAGGI and H.M. WATT, *Making European Private Law*, o.c.

<sup>33</sup> L. LIEBMAN, "The American Law Institute", o.c., pp. 209-223.

<sup>34</sup> Such as languages, representation, selection of the members, who is the one to take the initiative, considerably different tasks that the ELI would have to undertake as compared to ALI, acquiring authority at all levels of our multi-level system, etc.

into the body of traditional private law.

The book at hand is a very instructive tool, allowing us to put private law today in a contemporary perspective, which -whether we like it or not- includes a number of new actors participating in the creation of private law on different levels of our multi-level globalised world. It advances the idea that this development is, if not to be applauded, at least to be considered seriously, which would enable us to make an informed choice about the future development of European and national private law.

## **BOOK REVIEW:**

### **THE RISE AND FALL OF THE EU'S CONSTITUTIONAL TREATY BY FINN LAURSEN**

(LEIDEN, NIJHOFF, 2008)

Sacha Garben

#### **I. INTRODUCTION: THE FINANCIAL CRISIS AND THE CONSTITUTIONAL TREATY**

The recent financial meltdown has served to create a common sense in Europe that, for one, it is a good thing to belong to the EU club if such a crisis occurs, and second, that it is even better to belong to the single currency club. The introduction of the EURO, which has been identified as one of the main reasons of the infamous Dutch 'no' in the referendum on the Constitutional Treaty,<sup>1</sup> appears to have saved Europe from a currency crisis on top of the credit crunch.<sup>2</sup> In Iceland, public opinion is putting pressure on the government to consider joining the EU and adopting the EURO.<sup>3</sup> Iceland's prime minister and even the eurosceptic fisheries minister have now conceded that such appears to be the only way forward out of the country's severe financial problems. Several countries that are member states but not part of the EURO zone, such as Poland, Denmark and Sweden, are now seriously considering adopting the common coin.

This means that, ironically, the credit crisis might very well prove to have come at a convenient time, bolstering public and political views on the desirability / necessity of European integration, in the midst of the ratification process of the Lisbon Reform Treaty. This attempt to salvage the remains of the sunken Constitutional Treaty by means of a stripped-down Reform Treaty, without any Constitutional symbolism, had not so

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<sup>1</sup> See: S. WOLINETZ, "Trimming the Sails: The Dutch and the EU Constitution after the Referendum", in F. LAURSEN, *The Rise and Fall of the EU's Constitutional Treaty*, Leiden, Nijhoff, 2008, pp. 181-200.

<sup>2</sup> H. MARTENS and F. ZULEEG, "Where Would We Be Now without the Euro?", *EUobserver*, 15 Oct. 2008, available at <http://euobserver.com/19/26933>.

<sup>3</sup> The *EUobserver* reports that 69 percent of Icelanders want to join the EU and 72.5 percent want to swap the krona for the euro, based on a poll in the *Frettabladid* newspaper; P. RUNNER, "Financial Crisis Builds Polish Euro-Entry Momentum", *EUobserver*, 28 Oct. 2008, <http://euobserver.com/?aid=27004>.

long ago run afoul with the negative results of the Irish referendum.<sup>4</sup> The strenuous process of treaty reform that has been the cause of severe headaches for several clusters of politicians and policy-makers over the past years was therefore in need of a fresh impetus. Although a solution to the Irish ‘no’ and the ratification by several other member states is still needed, the recent economic events -however bad and detrimental- might pave the way to the successful adoption of the reforms that the EU so craves for.

It is from the moment of final adoption on that most of the work for the typical European lawyers really starts. Working with the new provisions, discussing and determining their correct interpretation, for jurists it is in the years after its birth that a Treaty text really becomes alive. Having never been born, let alone having become alive, the Constitutional Treaty tends to leave European jurists with mixed feelings as to whether and how to discuss it, for legally it is both a tremendously significant document as well as not being so in any way whatsoever. The really fundamental questions about the Constitutional Treaty, it seems, are about the causes of its rise and fall, which lie mostly within the domain of political science.

## II. THE RISE AND FALL OF THE EU’S CONSTITUTIONAL TREATY

The book under review happens to fit that picture exactly. *The Rise and Fall of the EU’s Constitutional Treaty*, edited by Finn Laursen, focuses on that period before the law becomes the law; the phase of political negotiations. Although somewhat interdisciplinary in character, the greater portion of the book adheres to a political science approach, and is concerned with the main actors, their aims and strategies on the European stage in the context of the Constitutional Treaty.<sup>5</sup> Encyclopaedic and wide-ranging, the various contributions offer a wealth of detailed information on exactly these key issues from different perspectives, and they succeed in pointing out patterns of increasing or decreasing influence and changing policy positions of politicians, their constituencies and countries.

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<sup>4</sup> Here, I build on the useful nautical metaphor from: J. ROY, “Between Cherry-Picking and Salvaging the Titanic: Spain and the Rescuing of the Essence of the EU Constitution”, in F. LAURSEN, *The Rise and Fall of the EU’s Constitutional Treaty*, o.c., pp. 123-144.

<sup>5</sup> Bindi puts it in her contribution that, “when we study the foreign policy of a country, the questions to deal with are: who does what? to which end? how? - hence, three different factors shall be looked at here: the actors, the aims, the strategies”; see: F. BINDI, “Italy and the Treaty Establishing a European Constitution: The Decline of a Middle-Size Power?”, in F. LAURSEN, *The Rise and Fall of the EU’s Constitutional Treaty*, o.c., p. 281.

Although this inherently bears the threat of deterring legal scholars, putting the book away because it does not entirely fit the legal discipline would be a great waste. Rich in explanation and information, the book can be of great value for all wishing to understand more of the how and why of the Constitutional Treaty and its fall, and -to a certain extent- what lessons can be learned from it. It certainly helps that most of the contributions are accessible, interesting, and well-written. It allows jurists to explore and grasp the perhaps somewhat bewildering world of negotiations and negotiators, their personal and professional interests, their party ideologies and the particular background of their countries, their statements and actions and inactions. This information is in a sense not only crucial in understanding the text of the Constitutional Treaty but also that of the Lisbon Reform Treaty. Furthermore, the saga of the European Constitution is rich in interesting events. For instance, to read about the infamous incident that caused considerable uproar all over Europe, when at the Brussels summit some Polish delegates argued that if it would not have been for World War II, Poland would have had 66 million inhabitants instead of 38, and that therefore -as a kind of reparation- more votes should be allocated to it, from a Polish perspective, is at no point tedious.

The book is divided into six parts or sections. Finn Laursen, the editor of the book, introduces the main topic in the first chapter. The introduction is not devoted to setting out and linking the various contributions into a comprehensive framework, which is to be regretted considering the vast amount of contributions and the diversity of the topics. The only reference to the structure of the book can be found in the preface, in five short and descriptive sentences. It would have greatly benefited the reader to have been provided with a more insightful, thorough and clear outline. Nevertheless, the introductory chapter is of high quality, certainly a contribution in its own right, and Laursen does succeed in effectively setting the scene.

#### 1. *Section 1: Policy and pillar aspects of the Constitutional Treaty*

The first section, following the introductory chapter, deals with the content of the Constitutional Treaty in relation to the specific areas of international trade [R. Leal-Arcas], justice and home affairs [J. Monar], the EU foreign minister [P. Norheim-Martinsen] and contains an analysis of the Treaty from an economic perspective [F. Brunet]. This first section is perhaps one of the most interdisciplinary parts of the book, and subject-wise the most compatible with the traditional interests of European lawyers. The four contributions each touch upon interesting topics, although it results more in a vague smattering of issues, represented in the

broad title “policy and pillar aspects”, than in a comprehensive discussion of the entire content of the Constitutional Treaty and the changes it was supposed to bring.

The contribution by Leal-Arcas intends to shed some light on the changes proposed by the Constitutional Treaty affecting the common commercial policy of the EU. It argues for a strong, central role for the European Commission, reduction of unanimity and exclusive EC competence, while at the same time warning of the dangers of technocratic rule. The subsequent contribution by Brunet is mainly concerned with the economic dimension of the Treaty, arguing it to be “the best representation of the European economic and social model”.<sup>6</sup> Brunet poses an overwhelming amount of interesting questions –such as, *inter alia*, “why do we need constitutions?”;<sup>7</sup> “in the EU, do the Nordic, the Mediterranean, the Eastern, the Western member states have different systems of logic?”;<sup>8</sup> and “does [the] European gap in performance show the limitations of the European model and announce its substitution by the American model?”<sup>9</sup> but regrettably does not offer an equal serving of interesting answers.

Monar’s chapter on the influence of the Constitutional Treaty on the justice and home affairs domain successfully argues that the recasting of the overall legal framework would not completely abolish the third pillar, which would survive in a hidden way, due to a range of procedural and institutional provisions separating police and judicial cooperation in criminal matters. This is an important matter, both legally and politically, and Monar manages to discuss it in a thorough and interesting way. Another laudable aspect of the contribution is the discussion of the Commission’s *passerelle* initiative, which does stand separate from the Constitutional Treaty but is all the more relevant to discuss. Equally topical is Norheim-Martinsen’s chapter on the Constitutional Treaty invention of the EU foreign minister, which would “replace the role of the presidency as the official driver for and voice on matters falling under the CFSP” and would “bring together the functions of High Representative for the CFSP and Commissioner for External Relations”.<sup>10</sup>

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<sup>6</sup> F. BRUNET, “The European Economic Constitution: An Analysis of the Constitutional Treaty”, in F. LAURSEN, *The Rise and Fall of the EU’s Constitutional Treaty*, o.c., p. 51.

<sup>7</sup> *Ibid*, p. 65.

<sup>8</sup> *Ibid*.

<sup>9</sup> *Ibid*.

<sup>10</sup> M. NORHEIM-MARTINSEN, “Who Speaks for Europe?”, in F. LAURSEN, *The Rise and Fall of the EU’s Constitutional Treaty*, o.c., p. 106.

## 2. *Section 2: Case studies of national preferences*

The second section is where the book truly comes into its own, offering in-depth “case studies of national preferences”. Laursen offers a contribution on the “two-level game” of Denmark, the ever-sceptic UK is analysed by A. Blair and J. Roy describes the role of Spain. To enable the reader to consider the role of the German presidency [A. Möller], the Dutch ‘no’ [S. Wolinetz], the French ‘no’ [C. Mazzucelli], the infamous Polish ‘nice or die’ attitude and other landmark events in the history of the Constitutional Treaty in their national contexts, is really the strength of the book. However, in dealing with the same issue from many different national perspectives, its strength is also its weakness. Although the excellent various case studies serve well to give an insider’s national take on the events, eleven different viewpoints on a certain event will necessarily overlap as they mostly still deal with that same event. In that sense, it is more a book of reference than one that reads like a novel.

In Roy’s writings, Spain is presented as one of the leading countries in the saga of the Constitutional Treaty, having been an active participant in the drafting of the text, as well as the first country to submit the Treaty to a referendum; 76.73% of the voters, representing 42.3% of the actual electorate, saying yes. And after the less successful referenda in two other countries, it was -according to Roy- again Spain to take the lead in trying to “salvage” the wreckage.<sup>11</sup> Since the disappointment and resulting political difficulties over the failure of the Constitutional Treaty in the countries that were in fact very much in favour of it, such as Spain, has been a somewhat neglected topic, this chapter serves well to bring these aspects under attention. As for leading countries that have been responsible for saving the day after the rejections of the Dutch and French electorates, Germany in fact deserves still more credit than Spain. Möller devotes his remarkably strong contribution to this imperative role played by Germany, most notably the German presidency succeeding in “organising a breakthrough on the constitutional project”,<sup>12</sup> while along the way effectively relating the history of Germany and the EU, mapping the national political scene. According to Möller, it was the “weeks of travelling and listening to the individual member states’ ‘red lines’, patience, the will to compromise, the reputation of Chancellor Merkel [...] and a tough stance on the Polish government during the final hours of the meeting” that were responsible for Germany’s success.<sup>13</sup>

<sup>11</sup> J. ROY, “Between Cherry-Picking and Salvaging the Titanic”, *o.c.*, p. 137.

<sup>12</sup> A. MÖLLER, “From Idealism to Pragmatism: Germany and the Constitutional Treaty”, in F. LAURSEN, *The Rise and Fall of the EU's Constitutional Treaty*, *o.c.*, p. 145.

<sup>13</sup> *Ibid.*, p. 154. In Chapter 11, Wilga reports that Merkel had indeed taken a tough stance on the Polish crisis, by at some point threatening: “Wenn es mit den Polen

The two culprits of the fall of the Treaty and the ensuing crisis, France and the Netherlands to be sure, are discussed back to back in chapters 8 and 9. Explaining the French rejection of the Constitutional Treaty, Mazzucelli's chapter points at then-president Chirac's "strategy to use the referendum as an instrument of executive politics to gain the domestic advantage" as a flawed one.<sup>14</sup> She convincingly explains that "the French social and economic situation and the idea that a treaty renegotiation was likely led a majority of the populace to reject the European Constitutional Treaty in favour of an alternative Europe".<sup>15</sup> Wolinetz in turn argues that the Dutch no vote was "one of a series of shocks which had shaken Dutch politics since 2002 and that the cabinet, the major parties and more broadly, the political class, responded in Dutch fashion, by adapting, absorbing dissenting points of view and making them their own", and rightly explains it as connected to a lack of information and discontent with the EURO rather than with the Constitution itself.<sup>16</sup> Supported by numbers and statistics, the chapter provides a valuable insight in why the Dutch came to vote 'no', and what it has brought them in the end.

The topic of euro-scepticism featured in the two preceding chapters is continued in Blair's story of the UK and the Constitutional Treaty. Focusing on the government's negotiating strategy in the IGC negotiations, it sets out what were the UK's 'red lines', to wit increased qualified majority voting, the foreign minister being a member of the Commission and the creation of a mutual defence pact within the EU, and how it was able to achieve most of what it wanted in the Constitutional Treaty. It discusses the role of key actors such as Peter Hain and Tony Blair, but does not devote any attention to the failure of the Treaty and the subsequent phase in the Constitutional chronicle. The UK can be qualified as difficult in European affairs, but Poland has been working hard to take over the dubious post of toughest negotiator in the EU. Most of the contributions discuss at some point the problems that arose out of Poland's 'nice or die' attitude, which makes Wilga's case study on Poland an anticipated one. It sets out how Poland infamously seized on the Constitutional Treaty's failure to challenge, most importantly, the voting

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nicht geht, dann wird es eben ohne die Polen gehen"; see: M. WILGA, "Poland and the Constitutional Treaty: A Short Story About a 'Square Root'?", in F. LAURSEN, *The Rise and Fall of the EU's Constitutional Treaty*, o.c., p. 240.

<sup>14</sup> C. MAZZUCELLI, "The French Rejection of the European Constitutional Treaty: Two-Level Games Perspective", in F. LAURSEN, *The Rise and Fall of the EU's Constitutional Treaty*, o.c., p. 177.

<sup>15</sup> *Ibid.*

<sup>16</sup> S. WOLINETZ, "Trimming the Sails", o.c., p. 181.

system. It rightly observes that “as much as the rise of the Constitutional Treaty was impressive without much contribution of Poland, its fall happened quick and certainly due to Poland’s significant role in this process”.<sup>17</sup>

Section 2 ends with Laursen’s chapter, discussing Denmark and the Constitutional Treaty. The two-level game theory that appeared in Mazzucelli’s chapter is also at the centre of this paper. In contrast with some years before, when in 1992 the Danish populace shot down the Maastricht Treaty in a referendum, the role of Denmark in the Constitutional crisis was limited. Seeing that it never came to a Danish referendum after the French and Dutch rejections, that Denmark did not have a role as presidency, and that Denmark did not have many ‘red lines’ apart from keeping its previously acquired opt-outs in place, it is commendable that the chapter, dense and informative, is still engaging.

### 3. *Section 3: Roles of presidencies and Community actors*

The third part follows a similar approach to the second. It contains two more case studies, of the two countries that happened to serve as presidencies during the Constitutional process, to with Italy [F. Bindi] and Ireland [A. Dür and G. Matteo]. The third section of the book also sheds light on the role of the two main Community actors; namely, the increasing influence of the European Parliament [D. Beach] and the ‘missed opportunities’ of the European Commission [E. Moxon-Browne]. Although the decision to make a separate section of these four chapters can be criticised, as the first two could just as well have been included in Section 2, as they are case studies all the same, the quality of the papers remains high.

Bindi’s article deals with the Italian actors, aims and strategies in the Constitutional chronicle. She reports that “the Italian members of the Convention are reported to have been quite active and present, in contrast to Italy’s tradition of absenteeism in the European Parliament - and elsewhere”. She identifies Professor Amato as the most important positive Italian influence on the Constitutional Treaty, having “worked on a consolidated version of the EU at the European University Institute” in Florence<sup>18</sup> and points out Berlusconi’s inability to close the deal “by confusing personal friendship with political collaboration” as one of the most negative influences.<sup>19</sup> Most importantly, she sets out to explain the

<sup>17</sup> M. WILGA, “Poland and the Constitutional Treaty”, *o.c.*, p. 246.

<sup>18</sup> F. BINDI, “Italy and the Treaty Establishing a European Constitution”, *o.c.*, p. 287.

<sup>19</sup> *Ibid*, p. 299.

first-ever failure of the IGC in 2003, presided by Italy. The fact that the Italian presidency “lacked the support of both France and Germany, whose support had been fundamental in the Italian Presidencies in 1984 and 1990 when Italy had to square the circle” is put forward as the main factor in that failure.<sup>20</sup> This tale of Italian failure stands in contrast with Irish fame for its highly effective 2004 presidency. Dür and Matteo devote a chapter to this success story. They analyse the conditions allowing Ireland to become such an effective mediator, developing a theoretical framework showing that both neutrality and the possession of mediation skills are necessary ingredients.

Beach then brings a new actor to the scene: the European Parliament. Refreshingly focusing on a different actor than the member states, it drives home the point that thanks to “the change in the negotiating structure from the traditional IGC method to the Convention method” the influence of the European Parliament was increased.<sup>21</sup> The Chapter is modelled around proving this increase in the Parliament’s power, containing a comparative case study of the role and impact of the European Parliament in the 2000 IGC and Constitutional Treaty negotiations in 2002-2004. The paper is based on sound methodology and proves an interesting point. A very short chapter on the role of the European Commission completes this section’s quartet of contributions. Moxon-Browne provides a stimulating treatise on how the Commission failed to have a significant impact on the deliberations and outcomes of the Conventions. As explanations, the author offers the defensive position of the Commission in the Convention, the lost opportunity of its 2001 White Paper on Governance, and the fact that the two representatives were overshadowed by Giscard d’Estaing’s strong leadership.

#### 4. *Section 4: The negotiation process*

The first one of the two chapters making up the fourth section is a study of the role of Europe’s regions [J. Laible] and could also have been included in the previous part, but is given a place in this section entitled “the negotiation process” next to Laursens third chapter focusing on the Intergovernmental Conference of 2003-2004. Laible researches “the rhetoric of legitimacy and regional participation” in the light of the

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<sup>20</sup> *Ibid*, p. 298.

<sup>21</sup> D. BEACH, “A New Pragmatism: The Role and Impact of the European Parliament in the Constitutional Treaty Negotiations”, in F. LAURSEN, *The Rise and Fall of the EU’s Constitutional Treaty*, o.c., p. 323.

Constitutional Treaty.<sup>22</sup> Indeed, legitimacy has been the key word both in the run up to the Constitutional Convention, as well as after the Dutch and French referenda, in the so-called 'reflective' phase. In what is perhaps the strongest paper of the book, Laible provides a thorough analysis of the importance of Europe's regions, how their role has been institutionalised and -paradoxically- how it has increased in terms of participation but decreased in terms of influence in the Constitutional process. This study is conducted both from the point of view of the regions and the European institutions.

The subsequent chapter is yet another penned by the book's editor, Laursen. It describes the intergovernmental conference that finalised the negotiation of the Draft Constitutional Treaty, starting during the Italian presidency in 2003 and ending during the Irish presidency in 2004. Laursen examines the question why treaty reform was considered necessary and how the issues were negotiated. Although the value of the chapter lies in the perhaps by definition somewhat more 'objective' account of the developments, when compared to the country case studies, most of the events described in the paper have already been exhaustively dealt with in the preceding chapters. That makes this contribution somewhat superfluous, something that is especially remarkable as it is a contribution by the editor himself; who therefore could have decided to leave it out.

##### 5. *Section 5: Ratification issues*

The fifth section contains papers researching "constitution making and the search for a European public sphere" [C. Lu], "elite behaviour" in the referenda [R. Nielsen] and a contribution dealing with the French 'no', by F. Vassallo. Since the sixth section also contains such a paper, authored by Paris-Dobozy, in addition to the French case study in section three, and considering that the contributions do overlap, it seems that a stricter selection should have been made. This is not to say that the chapters have no unique value at all; Vassallo offers a historical perspective of the use of referenda in France while primarily aims to focus on the aftermath of the 2005 'no'. Lu convincingly argues that "the discrepancy between the transparent and inclusive Constitution-making process and the rejection of the Treaty" by the Dutch and French voters can be explained by the fact

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<sup>22</sup> J. LAIBLE, "Producing 'Ever Closer Union'? The Rhetoric of Legitimacy and Regional Participation in the EU Constitutional Convention", in F. LAURSEN, *The Rise and Fall of the EU's Constitutional Treaty*, o.c., p. 361.

that a European public sphere was lacking.<sup>23</sup> Because of this absence, the channels that were open for citizen participation were hardly utilised. There was no meaningful debate among citizens or between citizens and elites, nor was there an effective information flow. The elites are also front and centre in Nielsen's empirical paper, which asks the pertinent question why elites convene referenda if they are so inconvenient to them. The paper addresses the question in relation to the 10 scheduled referenda in Ireland, Spain, Luxembourg, Denmark, the Netherlands, Poland, the Czech Republic, Portugal, Great Britain and France. Although to a certain extent an "elite response to the oft-decried democratic deficit", the reason appears to root more in "national dynamics", where politicians convene referenda for strategic reasons, as Nielsen's research shows.<sup>24</sup>

#### 6. *Section 6: Perspectives and assessments*

The first paper of the sixth and last section tackles the question of 'flexible integration' in the context of the European Constitution [L. Olsen]. Stripping the concept of its catch-phrase superficiality, Olsen succeeds in a thorough analysis of the changes in the flexibility provisions introduced in the Constitutional Treaty, in a remarkably short contribution. Subsequently, we find the aforementioned article on the 'no vote in France, by Paris-Dobozy. Reflecting on the crisis following the rejection, she rightly point out the paradox of France as a "driving force in EU construction", while being "responsible for halting twice a crucial step toward further political integration".<sup>25</sup> The last chapter, apart from Laursen's concluding remarks, by König, tells us again the story of the Constitutional proposal, its rejection and the subsequent aftermath. It focuses on negotiations and the German presidency, and although the chapter is well written, most of it has already been said in the 23 preceding ones.

### III. CONCLUSIONS

The book is concluded the same way it is introduced, by its editor Laursen. His final thoughts are inspiring, and his conclusion thematically ties the

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<sup>23</sup> C. LU, "Constitution-Making and the Search for a European Public Sphere", in F. LAURSEN, *The Rise and Fall of the EU's Constitutional Treaty*, o.c., p. 431.

<sup>24</sup> R. NIELSEN, "Everything Shall Now be Popular: Explaining Elite Behaviour in the Constitutional Treaty Referenda", in F. LAURSEN, *The Rise and Fall of the EU's Constitutional Treaty*, o.c., p. 472.

<sup>25</sup> M. PARIS-DOBOZY, "The Implications of the 'No' Vote in France: Making the Most of a Wasted Opportunity", in F. LAURSEN, *The Rise and Fall of the EU's Constitutional Treaty*, o.c., p. 518.

book together, although more references to the various contributions and their place in the greater scheme would perhaps have served to create a greater unity in the book. On a final note it needs to be addressed that the book generally does not deal with the Lisbon Reform Treaty. Laursen says about this point that “that Treaty is another story, which cannot be told fully before the end of the ratification process, nor can it be told or explained fully without understanding the rise and fall of the Constitutional Treaty”.<sup>26</sup> That certainly seems to be a fair point, for such an approach would otherwise simply make the book too voluminous. The importance of researching and analysing the various issues that are connected to the rise and fall of the Constitutional Treaty is certainly timeless, especially from a politico-historical perspective. And although for many, including most European lawyers, the interest in the Constitutional Treaty will fade as the Lisbon Treaty is born, this book is certainly still valuable to have on one’s shelf, to once in a while remind one of the turmoil of the past and to help understand its underlying dynamics, in order to draw lessons from it for the future.

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<sup>26</sup> Preface, p. x.

## WINNING THE GLOBAL DEVELOPMENT CHALLENGE

### BOOK REVIEW: 'LOSING THE GLOBAL DEVELOPMENT WAR: A CONTEMPORARY CRITIQUE OF THE IMF, THE WORLD BANK, AND THE WTO'

BY JOHN W. HEAD,

(LEIDEN, NIJHOFF, 2008)

Valentina Sara Vadi\*

There are not so many topics as timely as *development* in the international law discourse. This multifaceted concept and the challenge it poses have generated lively debates at the international level. Development is the major topic of *Losing the Global Development War* which not only provides an overview of the conceptual breadth of the term but also analyses and critically assesses the current criticisms against the three major international organisations dealing with this objective; *i.e.*, the World Trade Organisation (WTO),<sup>1</sup> the International Monetary Fund (IMF)<sup>2</sup> and the International Bank for Reconstruction and Development (IBRD)<sup>3</sup> or World Bank. First, the author explores the state of the art and the institutional aspects of the three international organisations. Second, he scrutinises the current criticisms directed at these organisations. He does so enucleating the major themes and highlighting the merit of some critiques, while dismissing others. He further underscores some proposals to improve the functioning of these institutions. Finally, he stresses that, in order to win the global development challenge, *internal development* within the proposed institutions is needed, in order to cope with the evolving needs of the international community.

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<sup>1</sup> Agreement Establishing the World Trade Organisation, 15 Apr. 1994, 33 ILM (1994).

<sup>2</sup> Articles of Agreement of the International Monetary Fund, 22 July 1944; entered into force 27 Dec. 1945.

<sup>3</sup> Articles of Agreement of the International Bank for Reconstruction and Development, amended in 1965, 606 UNTS 294.

In this review, after briefly defining the structure of the book, I intend to look at some of its core issues.<sup>4</sup> The volume is divided into six parts: the first is an introduction to the work and defines its scope of enquiry; the second summarises the contemporary critiques to the global economic organisations; the third describes the historical origins and the structure of these institutions. Chapters four and five offer the author's assessment of the criticisms that apply to the policies and operations of the global economic organisations. Interestingly, the author divides these criticisms in two broad categories; looking at how the organisations *in concreto* behave in relation to the populations of their member countries and then at how they *institutionally* behave in relation to their member states. Lastly, chapter six deals with the pivotal question whether the examined organisations should be reformed and, if so, what specific types of reforms should be undertaken. Three Appendixes suggesting bibliography and containing key documents for a better reading of the book respectively follow chapter two, chapter three and chapter six.

## I. THE LINKAGE BETWEEN DEVELOPMENT AND PEACE

In a preliminary way, the author explores the linkage between development and peace, as he highlights that harmonious development is conducive to peace and growth. Indeed, this idea is at the heart of the Bretton Woods system,<sup>5</sup> which stemmed from the view that the economic policy mistakes made during the inter war period from 1920 to 1940 were a major cause of the economic crises that led to World War II. The Great Depression, the harsh reparations policy toward Germany and generalised protectionist policies had led to the myopic economic and political isolationism of states. Thus, after World War II, a consensus was reached by major international actors on the importance of establishing international economic institutions that would promote peaceful and co-operative relations among nations in economic and political matters, preventing these mistakes from happening again.<sup>6</sup> Professor Head highlights that the relative unitary ideology that emerged and grew after

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<sup>4</sup> J.W. HEAD, *Losing the Global Development War*.

<sup>5</sup> The Bretton Woods conference was held in 1944 and determined the inception of the charters of the IMF and the IBRD. Although the GATT was not formed at the Bretton Woods Conference, the participants at the conference nevertheless contemplated the necessity of an international trade organisation or ITO, and it is generally held that IMF, IBRD and the GATT comprised the Bretton Woods System. As Professor Jackson highlights, "in some ways, the WTO, after many years, has become 'the missing leg' of the Bretton Woods 'stool'".

See: J. JACKSON, *The World Trading System*, 2002, p. 32.

<sup>6</sup> UN Charter, Articles 55 and 56.

World War II is now under attack.<sup>7</sup> He identifies an *ideological* war<sup>8</sup> or a “growing global ideological fragmentation” vis-à-vis the challenges posed by global development and the ways to achieve it.<sup>9</sup>

The author also suggests that the war between the established system and its opponents is currently being lost by the former in three related respects. *First*, the international community is failing to expand and improve on the multilateralism of the past. The recent deadlock of the Doha Round of trade negotiations reflects this lack of co-operation and motivation. *Second*, critics shed doubts on the global economic organisations claiming not only that the ideological foundation on which they rest is misconceived, but also that deep institutional failings require that those global economic organisations be abandoned. *Third*, “just as nature abhors a vacuum, likewise any drop in commitment to improving and expanding upon the multilateral ideology and institutions [...] will naturally attract competitors”.<sup>10</sup> The author identifies bilateralism and regionalism as such competitors.

As the author believes that the development war is now being lost, which is the reason of the awkward title of the book, his purpose is to offer views and recommendations to reverse this course of action in order to ultimately *win* the global development challenge; the reason of the wishful title of this review. After scrutinising the various and multi-faceted critiques to the global economic organisations in chapter II, he then offers a detailed analysis of the structure and functioning of these organisations. In so doing, he clarifies that while some criticisms of the global economic organisations “are simply base off because they rely on outdated information”, others rely on “fundamental misunderstandings of what those organisations are”. In this sense, clarifying the institutional structure and the operation of these organisations is fundamental to ultimately overcome unsubstantiated critiques.<sup>11</sup>

The ultimate purpose of the book is to “contribute firepower -in the form of information and persuasive explanations- to [the ideological] counterattack”.<sup>12</sup> Such ideological counterattack would be based on “the need to forge a new consensus for multilateralism and particularly to encourage the adoption of an ideology of liberal, intelligent, participatory,

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<sup>7</sup> J.W. HEAD, *Losing the Global Development War*, p. xv.

<sup>8</sup> *Ibid.*, p. xii.

<sup>9</sup> *Ibid.*, p. xiii.

<sup>10</sup> *Ibid.*, p. xvii.

<sup>11</sup> *Ibid.*, p. xvii.

<sup>12</sup> *Ibid.*, p. xv.

multilateral and sustainable human development”.<sup>13</sup> In the end, the author admits that this objective may be ultimately regarded as “an appeal to our better selves, our smarter selves to participate in the effort”.<sup>14</sup>

## II. THE GLOBAL DEVELOPMENT WAR

This section analyses and comments upon some of the key concepts of the book.

### I. *On war*

One of the most interesting claims in the book is the comparison of the global development challenge to a *war*. Although the author clarifies that the term *war* is used in a manner that “falls outside its technical definition for purposes of international law”,<sup>15</sup> and other authors have similarly used the same concept to refer to a ‘war on terrorism’, one may wonder whether using emphatic terms with regard to economic and social phenomena may lead to the perilous slippery slopes of misunderstandings. Even admitting that “the term war may be used in many ways”<sup>16</sup> and that “in a very broad sense— the development challenge may be seen as a war among different ideologies,”<sup>17</sup> the use of the term war would need more precision and determinacy.

Still, there is some value in describing development as an ideological war. First, it amplifies the concept of challenge inherent in the contemporary development discourse and practice. Second, it opens a stimulating debate on the linkage between peace and development.<sup>18</sup> The author affirms that failure to reach development “has military repercussions in the sense that many countries suffering economic distress find themselves drawn to violence, including military violence”.<sup>19</sup> The author also stresses that

<sup>13</sup> *Ibid.*, p. xv.

<sup>14</sup> *Ibid.*, p. xv.

<sup>15</sup> *Ibid.*, p. 42.

<sup>16</sup> *Ibid.*, p. 42.

<sup>17</sup> *Ibid.*, p. 28; claiming that “the global development war may be seen as a war over the developmental ideology that is to be adopted and followed in the coming years”.

<sup>18</sup> See, on the linkage between peace and trade: B.H. MALKAWI, “The WTO, Security and Peace: Are They Compatible, and If So, What Is the Framework?”, *Journal of World Investment and Trade*, 2007, at p. 303; J.H. JACKSON, “Reflections on the Trade & Peace Relationship”, in T. BROUDE *et al.*, *Trade as Guarantor of Peace, Liberty and Security? Studies in Transitional Legal Policy*, Washington D.C., American Society of International Law, 2006, pp 23-32.

<sup>19</sup> J.W. HEAD, *Losing the Global Development War*, p. 1.

poverty might be considered one of the determinants of terrorism.<sup>20</sup> Whilst one may agree on the synergy between peace and development, the linkage between poverty and terrorism seems more controversial. Does poverty constitute the real rationale behind terrorist activities? If development was achieved, would the world be free of violence? These are open questions: this review will just point out that the linkage between development and peace would surely deserve further study by political scientists.

## 2. *On development*

The book dedicates just a few lines to the historical roots of the contemporary development debate.<sup>21</sup> Further, the problems and debates related to the New International Economic Order (NIEO)<sup>22</sup> and the Declaration on the Right to Development are only cursorily mentioned.<sup>23</sup> By contrast, an accurate analysis of the historical origins of the development discourse would have been important to properly understand the current debate about development as the contemporary critiques to the international economic organisations echo the above mentioned NIEO demands.

After the break up of colonial empires more than one hundred new independent countries emerged,<sup>24</sup> for whom development became the core concern.<sup>25</sup> In this context, the NIEO was a set of proposals put forward during the 1970s by developing countries to promote their interests by improving their terms of trade, increasing development assistance, developed-country tariff reductions, and other means. The NIEO was meant to be a revision of the international economic system due to its

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<sup>20</sup> *Ibid.*, pp. 42-43.

<sup>21</sup> *Ibid.*, p. 219.

<sup>22</sup> The term was derived from a UN General Assembly Declaration and referred to a wide range of trade, financial, commodity, and debt-related issues. The bibliography is extensive.

See: UN General Assembly, *Resolution S-6/3201*, 1 May 1974, *Declaration for the Establishment of a New International Economic Order*, UN Doc. A/RES/S-6/3201; J. BHAGWATI, *The New International Economic Order: The North-South Debate*, Boston, MIT University Press, 1977.

<sup>23</sup> UN General Assembly, *Resolution 41/128*, 4 Dec. 1986, *Declaration on the Right to Development*, UN Doc. A/RES/41/128.

<sup>24</sup> UN General Assembly, *Resolution 1514 (XV)*, 14 Dec. 1960, *Declaration on the Granting of Independence to Colonial Countries and Peoples*.

<sup>25</sup> L. SABOURIN, "International Economic Development: Theories, Methods and Prospects", in R. MACDONALD *et al.*, *The International Law and Policy of Human Welfare*, Alphen aan der Rijn, Sijthoff & Noordhoff, 1978, pp. 399-424, at p. 399.

alleged inequalities. As Professor Petersmann highlighted, these demands “did not constitute a coherent system, but rather a list of sometimes inconsistent demands relating to development and to North-South relations without a consistent overall concept [...]; alongside the traditional free trade aims can be found the demand for ‘international co-operation for development’ and ‘promotion of international social justice’ [Chapter I, m, n of the Charter]<sup>26</sup> for the purposes of establishing a ‘just and equitable economic and social order’ [Preamble of the Charter]”.<sup>27</sup> As Professor Petersmann further highlighted, equity seemed to be “the fundamental principle which resolve[d] disputes between the simultaneous demand for economic independence for LDCs and organised solidarity”.<sup>28</sup> The fact that the NIEO concept was not translated into a legally binding system, as OECD countries rejected it and majority GA resolutions generally have no binding character *per se* except in a few exceptional cases, has not meant that these attempts have not generated any effect. Indeed, preferential economic treatment has been gradually introduced in international economic law lexicon, *inter alia* through a series of WTO norms.<sup>29</sup> The International Development Association,<sup>30</sup> an affiliate of the World Bank, was established to address the economic problems of the developing countries.<sup>31</sup>

Professor Head rightly clarifies that “preferential economic treatment for LDCs does not rest on a purported right to development but instead has emerged exclusively from particular circumstances specially negotiated”.<sup>32</sup> Therefore, the author defines the concept of development but carefully avoids direct reference and analysis of the Declaration on the Right to Development. Although the Declaration is not binding, it constitutes an interesting intellectual effort and would have provided an excellent starting point for definitional issues.<sup>33</sup>

<sup>26</sup> UN General Assembly, *Resolution 3281 (xxix)*, 12 Dec. 1974, *Charter of Economic Rights and Duties of States*, UN GAOR, 29th session, Supp 31 (1974) 50.

<sup>27</sup> E. PETERSMANN, “The New International Economic Order: Principles, Politics and International Law”, in R. MACDONALD *et al.*, *The International Law and Policy of Human Welfare*, *o.c.*, pp. 449-470, at p. 460.

<sup>28</sup> *Ibid.*

<sup>29</sup> See, for instance: TRIPS Agreement, Article 65.

<sup>30</sup> The International Development Association (IDA) (439 UNTS 249) was established in 1960 to provide lower-cost loans to poorer countries unable to afford the lending terms offered by the IBRC.

<sup>31</sup> J.W. HEAD, *Losing the Global Development War*, p. 13.

<sup>32</sup> *Ibid.*, p. 220.

<sup>33</sup> See, for instance: A. SENGUPTA, “On the Theory and Practice of the Right to Development”, *Human Rights Quarterly*, 2002, at p. 204.

### 3. *Defining economic, sustainable and human development*

The term development presents a cluster of meanings.<sup>34</sup> Although the author appropriately defines these different meanings, he omits any reference to human rights instruments, which have much elaborated and ‘developed’ the concept. The author firstly explains the traditional concept of economic development. In a narrow sense, *economic development* refers to the building of physical infrastructures. In a broader sense economic development also encompasses the creation and strengthening of processes and institutions involved in the operation of the economic activity.

Second, the author defines what may be called *human development*. Reference to the Declaration on the Right to Development would have provided some food for thought, as this instrument affirms that “the human person is the central subject of development and should be the active participant and beneficiary of the right to development”.<sup>35</sup> Whatever the legal status or conceptual merit of the Declaration, in recent years, the definition of development has broadened to include not only economic elements, but also social elements. As the author highlights, “the more modern view holds that the overall aim of the development process is to serve the complete well-being of people, not just their economic well-being”.<sup>36</sup> In other words, “development issues can and should be seen as inextricably linked to the well-being of the average person, whether in a rich country or in a poor country”.<sup>37</sup> Head further explains that well-being is a broad concept which includes job, comfort, future, and protection from disease and violence.

Third, the meaning of *sustainable development* is explored. **Sustainable development** can be defined as a form of development that “meets the needs of the present without compromising the ability of future generations to meet their own needs”.<sup>38</sup> In other words, sustainable is a pattern of resource use that aims to meet human needs while preserving the environment so that these needs can be met not only in the present, but also in the future. A sustainable approach to development is one that takes account of economic, social and environmental factors to produce

<sup>34</sup> J.W. HEAD, *Losing the Global Development War*, p. 14.

<sup>35</sup> *Declaration on the Right to Development*, Article 2.1.

<sup>36</sup> J.W. HEAD, *Losing the Global Development War*, p. 15.

See also, among the most prominent proponents of this view: Nobel laureate AMARTYA SEN, whose 1999 book *Development as Freedom* urges that development should be seen “as a process of expanding the real freedoms that people enjoy”.

<sup>37</sup> *Ibid.*, p. 29.

<sup>38</sup> UN General Assembly, *Resolution 42/187*, 11 Dec. 1987, *Report of the World Commission on Environment and Development (Brundtland Report)*, p. 43.

projects and programs which will have results that are not dependent on finite resources. Importantly, Head highlights how “improvident development efforts are those that do not pay [...] attention to environmental protection and resource conservation, including conservation of cultural resources such as language, sacred lands, and World Heritage Sites”.<sup>39</sup> Although global economic actors have gradually placed emphasis on environmental protection, Head questions whether they have done enough in this regard.<sup>40</sup>

#### 4. *Multilateral, bilateral or regional?*

With regard to the ways to undertake development efforts, Head highlights that a crucial question deals with the relationship between multilateralism and regionalism, a vital issue in contemporary international economic law discourse.<sup>41</sup> From an historical perspective, in the aftermath of World War II, the preferred approach was multilateralism. In the area of trade policy, for instance, the General Agreement on Tariffs and Trade anticipated worldwide participation and so did the International Monetary Fund and the World Bank.

Nowadays, there seems to be a fragmentation of regimes at the international law level. Indeed, the recent flourishing of regionalism and bilateralism in international economic relations has raised questions about the quality of these relations and the compatibility of *nested institutions* with the existing multilateral system. The rapid growth of regionalism and bilateralism carries worrying implications for the international economic system in terms of stability, fairness and coherence. Still, bilateral investment treaties and bilateral free trade agreements have been actively pursued both by developing and developed countries. Head holds that “one way in which we are losing the global development war is by permitting ideological and institutional alternatives to gain influence and to displace the kind of multilateralism that emerged out of World War II”.<sup>42</sup>

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<sup>39</sup> J.W. HEAD, *Losing the Global Development War*, p. 28.

<sup>40</sup> *Ibid.*, p. 28.

<sup>41</sup> *Ibid.*, p. 26; the literature on this topic is extensive.

See, for instance: L. BARTELS & F. ORTINO, *Regional Trade Agreements and the WTO Legal System*, Oxford, Oxford University Press, 2006; S.-H. PARK, “Regionalism, Open Regionalism and Article XXIV GATT: Conflicts and Harmony”, in F. SNYDER, *Regional and Global Regulation of International Trade*, Oxford, Hart, 2002, pp. 263-284.

<sup>42</sup> HEAD, *Losing the Global Development War*, p. 315.

### III. THE 'CACOPHONY' OF CRITICISMS ATTACKING THE GLOBAL ECONOMIC ORGANISATIONS

Chapter Two identifies the 'cacophony' of criticisms that has been directed at the global economic organisations (GEOs). According to Head, among the causes of the world development war is the widespread discontent at the seeming inability of the GEOs to deal with the growing poverty that affects a sizeable portion of the world's population.<sup>43</sup> After examining the key criticisms levelled at the GEOs in a disaggregated way - that is, on an institution-by-institution basis,<sup>44</sup> Head enucleates eight clusters of complaints to make them easier to study and evaluate. The first four criticisms relate to the policies and operations of the GEOs, and concern the *laissez-faire* policies of GEOs, and their effects on social justice, environmental protection and national sovereignty. The other four criticisms relate to the institutional aspects of these organisations such as secrecy, opaqueness, democratic deficit, mission creep and asymmetric imbalances. Interestingly, for each criticism, the appendix to chapter II offers an annotated bibliography, distilling a list of citations from a broad range of sources.

### IV. *PARS CONSTRUENS*: ADDRESSING CRITICISMS

With chapter three, the *pars construens* of the book commences, offering a description and analysis of the international economic organisations and their functions. This descriptive part reviews the historical origins of the global economic organisations, and briefly describes their institutional and structural features. This description constitutes the premise for the counterattacks contained in chapter four and chapter five, completing the *pars construens*.

#### I. *In search for a just international economic order*

Chapter four evaluates the first mentioned group of criticisms, in order to separate the valid critiques, the 'wheat', from the invalid ones, 'the chaff'. With regard to the *laissez-faire* approach, or the liberal theory that constitutes the central assumption of the Bretton Woods system, the author firstly addresses this criticism with regard to the WTO. He underlines that a number of studies confirm that increased trade among nations brings economic gain which in turn can bring other benefits, including political benefits; *i.e.*, peace.<sup>45</sup> While he rejects the claim that

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<sup>43</sup> *Ibid.*, p. 49.

<sup>44</sup> *Ibid.*, pp. 54-58.

<sup>45</sup> *Ibid.*, p. 170.

free trade *per se* is a harmful ideology, he does not reject related claims concerning distributional and social injustice that may accompany free trade.<sup>46</sup> With regard to the IMF and the World Bank, the criticism to their liberal approach often concerns the policy prescriptions attached to their infusion of funds. Professor Head denies their intrinsic incorrectness.<sup>47</sup> While admitting that in some circumstances, the promoted privatisation in unsophisticated economies without an adequate institutional framework has led to negative outcomes, he highlights that “markets must be regulated, and it is the failure to install adequate regulation -on bank lending, on consumer safety, on corporate governance, *etc.*- that have created havoc in some countries”.<sup>48</sup> Thus, he underscores the importance of “careful project appraisal and design”, with regard to the use of environmental impact assessment and social impact assessment.<sup>49</sup>

With regard to the second and third criticisms concerning social justice and environmental protection that GEOs allegedly would undermine, firstly the author analyses these critiques starting from the WTO. In relation to the WTO, some authors argue that the aggregate economic benefits of free trade would not be fairly distributed either within a national system or among nations and that free trade would trigger a race to the bottom in national environmental regulations. In particular, the environmental race to the bottom criticism would include two aspects. First, businesses would relocate their operations to countries that have lax environmental regulation. Second, governments would compete with each other in an effort to attract business within their borders. After highlighting that the evidence is not univocal, Professor Head stresses that the response to the race to the bottom “should not be to abandon free trade generally, but should instead be to pay more attention to that specific element of the free trade regime [...] by strengthening the application and enforcement of multilateral environmental regulations, especially those found in key environmental protection treaties”.<sup>50</sup> The author further points out that the criticism that the IMF and the World Bank disregard the environmental effect of the projects at both the design and the implementation phase is outdated.<sup>51</sup> Although the author does not provide counter examples, these have been studied by other authors.<sup>52</sup>

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<sup>46</sup> *Ibid.*, p. 173.

<sup>47</sup> *Ibid.*, p. 183.

<sup>48</sup> *Ibid.*, p. 185.

<sup>49</sup> *Ibid.*, p. 187.

<sup>50</sup> *Ibid.*, p. 212.

<sup>51</sup> *Ibid.*, p. 206.

<sup>52</sup> V. VADI “Fragmentation or Cohesion? Investment versus Cultural Protection Rules”, *Journal of World Investment and Trade*, 2009, pp. 573-600.

With regard to the fourth criticism that GEOs would undermine national sovereignty, in particular with regard to social and environmental concerns, Professor Head firstly addresses this criticism with regard to the WTO and admits that it “holds water”.<sup>53</sup> He maintains that “not only should more lee-way be provided to national governments to implement - without discrimination- environmental protections and human rights protection in a [...] manner as they see fit; in addition, the relationship between GATT Rules and environmental treaties and human rights treaties should be strengthened”.<sup>54</sup> Further, he states that trade rules should not override all other rules but “the substantive protections and the procedural requirements set forth in multilateral environmental and labour treaties -and certain other human rights treaties- should [...] take precedence over GATT substantive provisions and procedural requirements”.<sup>55</sup> This is a very advanced and perhaps not immediately realisable position. The author admits that some countries have not ratified several environmental and human rights treaties<sup>56</sup> and others do not seem to support further advances either in human rights or in environmental protection.<sup>57</sup> However, he also stresses that, *de lege lata*, the WTO Charter itself mentions the objective of sustainable development and that the Ministerial Decision on Trade and Environment issued at the conclusion of the Uruguay Round noted that “there should not be any contradiction between upholding and safeguarding an open non-discriminatory and equitable multilateral trading system on the one hand and acting for the protection of the environment, and the promotion of sustainable development on the other”.<sup>58</sup>

By contrast, Head dismisses the claim that the conditionality practices of the IMF and the multilateral development banks encroach on the sovereignty of their member countries. He does so on the basis of two related arguments: first, “as a practical matter, a country objecting to the content of such conditionality can avoid it by declining a loan, or even, in an extreme case, by dropping its membership in the IMF or the multilateral development bank at issue”; second, “international law

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<sup>53</sup> J.W. HEAD, *Losing the Global Development War*, p. 214.

<sup>54</sup> *Ibid.*, p. 216.

<sup>55</sup> *Ibid.*

<sup>56</sup> Head holds that “the USA should embark [...] on a new era of multilateralism that would bear fruit not only in the area of international economic affairs but also in many other areas, including human rights and environmental protection”.

See: *Ibid.*, p. 321.

<sup>57</sup> *Ibid.*, p. 217.

<sup>58</sup> *Ibid.*, pp. 217-218.

contains no generally accepted 'right to development assistance' under which a country is legally entitled to receive financial assistance from an international financial institutions".<sup>59</sup> However, it is worth highlighting that in international relations self-isolation might not be a realistic option. As the role of the IMF and multilateral development banks on social justice is crucial, this linkage would surely deserve further enquiry.

## 2. *The critiques on the procedural aspects of the international economic organisations*

Chapter five evaluates the last four of the eight clusters of criticisms directed at the GEOs, concerning institutional and governance issues. With regard to the secrecy and opaqueness complaint, the author notes that "there is momentum towards transparency"<sup>60</sup> and that the WTO has followed in the footsteps of other GEOs that in the past few years have adopted a transparency or disclosure policy. With regard to the democracy deficit complaint, the author endorses many aspects of the criticism, admitting that too little has been done to address forms of unaccountability that arise from weighted voting system in the IMF,<sup>61</sup> but he rejects the same complaint as levelled at the WTO, because of its one-state-one-vote structure. With regard to the mission creep complaint, according to which the international economic organisations would have overstepped their authority and their competence, this claim is correctly rejected: the broad provisions of their charters allow these organisations to increasingly focus on elements of environmental protection and social justice.<sup>62</sup>

## 3. *The proposed reforms*

Chapter five proposes some reforms that would help respond to and overcome the well-founded criticisms enucleated in the previous chapters. While the author holds that "the GEOs have, in general, struck the balance well between (1) charter fidelity and (2) pressure to progress", he also reckons that GEOs need to be modified to reflect the dramatically new era of international economic relations.<sup>63</sup> In a preliminary way, the author focuses on structural and institutional matters. In particular, he proposes that five institutional principles be formally adopted by GEOs: (1) transparency, (2) participation, (3) legality, (4) competence, and (5)

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<sup>59</sup> *Ibid.*, p. 225.

<sup>60</sup> *Ibid.*, p. 232.

<sup>61</sup> *Ibid.*, p. 270.

<sup>62</sup> *Ibid.*, p. 270.

<sup>63</sup> *Ibid.*, p. 314.

accountability.<sup>64</sup>

At the substantive level, the author stresses the need to strengthen the linkage between international economic law and environmental and human rights protection, in order to ensure that the former does not sabotage the latter. In particular, he focuses on the substantive norms and standards that GEO member countries should undertake.<sup>65</sup> According to Head's proposal, a new type of membership requirement for countries to participate in the WTO or the IBRD should be added, namely a requirement that member countries accept certain key provisions of fundamental treaties.<sup>66</sup> To this end, these institutions charters should be amended to incorporate by reference those treaty provisions.<sup>67</sup> The author adds that "incorporating by reference [...] certain other treaty provisions would not only bear on the eligibility of a country to become a member, it would also impose a continuing requirement on each member to adhere to those treaties in order to remain a member".<sup>68</sup> A similar recommendation is issued with regard to the WTO that should be changed to "eliminate the trade bias",<sup>69</sup> and incorporate certain trade-related issues into its culture.<sup>70</sup>

## V. CONCLUDING REMARKS

The book under review dissects the current criticisms against the global economic institutions and critically assesses the same institutions through the lens of sustainable development. If one accepts the instrumentalist

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<sup>64</sup> *Ibid.*, pp. 276-285.

<sup>65</sup> *Ibid.*, pp. 285-288 and 307-309.

<sup>66</sup> The listed treaties that, according to Head, should be incorporated in the GEOs charters, are: the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Vienna Convention for the Protection of the Ozone Layer; the Basle Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal; the Convention on Biological Diversity; the Climate Change Convention and its Kyoto Protocol; the International Covenant on Civil and Political Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention on the Rights of the Child; the OECD Convention against bribery [p. 287]. The OECD Guidelines for Multinational Enterprises are also mentioned. A notable *lacuna* is the lack of any reference to the International Covenant on Economic, Social and Cultural Rights.

<sup>67</sup> J.W. HEAD, *Losing the Global Development War*, p. 285.

<sup>68</sup> *Ibid.*, p. 286.

<sup>69</sup> *Ibid.*, p. 307; citing A. GUZMAN, "Global Governance and the WTO", *Harvard International Law Journal*, 2004, at pp. 337-338.

<sup>70</sup> *Ibid.*, p. 308; citing C. THOMAS, "Trade Related Labour and Environment Agreement?", *Journal of International Economic Law*, 2002, at p. 791.

perspective, which deems the point of legal institutions to use the law to achieve given goals, development may indeed be considered the goal of international economic law. In this context, analysing the structure and the functioning of the IMF, the WTO and the IBRD organisations under the lens of sustainable development is not only appropriate but timely as ever. The text highlights the central issues in the global development challenge.

The entire subject is presented in a consistently thought-provoking way. The clear and concise method of exposition makes the book a suitable resource for students and “intelligent curious readers”<sup>71</sup> wishing to get a cursory but smart insight on some crucial issues of contemporary international economic law. An attractive feature of the book is its lively language. While the author ultimately offers a legal perspective, he does so trying to adopt a plain English style, making the text fluid and enjoyable.

More substantially, the major merit of the book lies in its equilibrate approach to the study of the international economic organisations and of their critiques. Although these organisations represent “the institutional means for achieving some of the great and essential aims of our age”,<sup>72</sup> the global development challenge can be won, the author asserts, only by adopting an ideology of liberal, intelligent, participatory, multilateral, and sustainable human development. One cannot but agree on such a balanced understanding: it has to be seen whether and how the global economic institutions will evolve and respond to the changing landscape of international relations.

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<sup>71</sup> *Ibid.*, p. xii.

<sup>72</sup> *Ibid.*, p. 276.

**ALL QUIET ON THE WESTERN INTERVENTION FRONT:  
A BRAVE ATTEMPT TO TRACE NEW ROUTES OVER  
WELL-TRAVELLED GROUND**

**BOOK REVIEW:  
'HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE'  
BY PHILIP ALSTON AND EUAN Mc DONALD,**

(OXFORD, OXFORD UNIVERSITY PRESS, 2008)

Ciarán Burke

**I. INTRODUCTION**

This collection of eight essays represents a detailed discussion on the legal, ethical and political framework surrounding the humanitarian intervention debate. The authors examine various different issues involved in the sphere, ranging from the impact of intervention and human rights on traditional notions of state sovereignty to the rules on 'targeted killing' and the development of the responsibility to protect initiative. Their collective work may be useful as a reference point for any student wishing to broaden his or her knowledge of this area.

Philip Alston and Euan McDonald begin with an introduction to the debate, couched in familiar terms. Noting the changes since the 2001 terrorist attacks, they argue that we now inhabit "a radically different world in which the sovereignty of Westphalia and the human rights of the Universal Declaration compete, often unsuccessfully, with issues of national security as sources of both international legitimacy and legality" [p. 1]. Nonetheless, they go on to explain that the issue at hand is vastly more nuanced than security versus sovereignty *simpliciter* and that there are a variety of factors at play which undermine the assertion that advances in human rights must necessarily undermine sovereignty. They point out that new labels like 'preventive self-defence' and 'enemy combatants', which are anathema to the human rights lobby, may erode classical notions of sovereignty as much as reinforce them. They note the fact that several discourses will often surround any one event, since states increasingly justify their actions in different ways depending on the audience. They further note the broad acceptance of the United States' bombardment of Afghanistan, pointing to just how far away from the classical doctrine of self-defence this was. This first essay ends with the conclusion that the inevitable ethical and legal dilemmas arising from the new trends brought about by sovereignty, security and human rights must be met head-on by

international lawyers. Alston and Mc Donald seemingly revel in the complex web of problems thrown up by the debate, concluding that “*everything* is dangerous; that’s what keeps things interesting” [p. 31].

## II. HUMAN RIGHTS AND STATE SOVEREIGNTY

Hélène Ruiz Fabri, in her contribution, provides insight into the history of state sovereignty in international law, and how this has been, and is being, reshaped by human rights. Examining the interplay between the two at an abstract, conceptual level, she notes that rights are traditionally portrayed in terms of individual autonomy *vis-à-vis* the sovereign, and the two thus become antithetical, whereby a gain for one represents a loss for the other. Departing from this, she proceeds to chart the ways in which the state’s freedom may become limited by human rights, distinguishing between whether a state desires such limitations and whether they are imposed upon it by external pressure, noting the variety of constraints in existence and the various modalities of the control mechanisms and their potential efficacy. Ruiz Fabri presents sovereignty as a legal fiction, presented as an ideal, but inevitably containing a plethora of exceptions. This leads her to reject the over-simplistic assertion that a gain for sovereignty must necessarily entail a loss for human rights or *vice versa*. Rather states as guardians of societal structure, must necessarily also be employed as the most effective guardians of human rights. She notes that the modern state is the subject of two notable tensions, namely nationalism and globalisation, which weaken the state itself and therefore are likely to weaken human rights protections and may often be accompanied by the trivialisation of rights violations. She notes that human rights law has a long road yet to travel to reach its goal of universal protection, and calls for a closer co-operation between states and an international civil society in which sovereignty and human rights are interlocked, co-dependent and mutual guarantors. Ruiz Fabri’s logic is coherent in the main part and her reasoning easy to follow. However, her argument is undermined somewhat by a selective reading of history, ignoring the pioneering English and Dutch experiences of limiting sovereignty and conferring individual rights, and beginning her analysis with the oft-discussed American and French declarations. She also fails to explore some interesting questions, such as whether only Western democracies can fulfil the necessary criteria to become ‘friends’ of human rights. This point in particular warrants further attention.

## III. HUMAN RIGHTS AND COLLECTIVE SECURITY

In the third essay, Olivier Corten questions whether there is an emerging right of humanitarian intervention. Framing his piece in terms of

traditional international law, he identifies two notable trends of scholarly opinion, namely those who claim that gross human rights violations can constitute a threat to the peace, thereby allowing Chapter VII action by the UN Security Council, and those who hold that the importance of human rights is so great that traditional sovereignty rules may be cast aside whenever a state is guilty of gross abuses of the rights of its nationals. Despite the absence of any real consensus on the issue, Corten focuses on the possibility that such a right has developed, either as a customary norm, or as a reinterpretation of the UN Charter. By means of an examination of past purportedly humanitarian interventions, such as those in Iraqi Kurdistan and Rwanda, Corten compares the practice and *opinio juris* of the states involved. Despite arguing that such evidence offers little to affirm the existence of a right of humanitarian intervention, and thus may not be used in order to support future interventions, he nonetheless notes that such trends may serve as proof that human rights ensure that international law is no longer oblivious to states' treatment of their own nationals. He cites the 1999 NATO operation in Kosovo as a prime example of this, exploring in detail the reasons given by the intervening states for their action. He notes the myriad of ethical and political rhetoric advanced in various *fora*, but is careful to point out that the legal basis was often rather unclear. While Security Council Resolutions were offered in support, Corten opines that this indicates a reluctance to stray too far from traditional conceptions of the international law on the use of force, and certainly no real enthusiasm for a new right of humanitarian intervention. Since Kosovo, little has changed in this regard. Corten finds meagre evidence of support for such a new right, with most states holding firmly to the idea of Security Council primacy in matters concerning the use of force. He fails to discuss self-defence in any detail here, and dismisses the responsibility to protect initiative as adopted in the 2005 World Summit Outcome Document, since it merely "reiterates the rules on the use of force as they appear in the Charter" and "leaves no doubt as to the rejection of any unilateral initiative taken in response to extreme situations" of human rights abuses [p. 128]. Overall, Corten casts a gloomy picture of the prospects for change in this sphere, noting that institutional change is quasi-impossible, and that states lack the requisite appetite for unilateral humanitarian intervention to receive support.

#### **IV. THE IMPLICATIONS OF KOSOVO FOR INTERNATIONAL HUMAN RIGHTS LAW**

Richard B. Bilder, in his contribution, assesses the implications of NATO's Kosovo intervention for international human rights law. Supporting Corten's thesis, Bilder concludes that there is little to support the claim that a right to humanitarian intervention exists. Again returning

to a familiar theme, Bilder highlights the many challenges which arise due to the interaction and conflict between human rights and state sovereignty. He strikes a conservative note, counselling against throwing caution to the wind with regards intervention, noting the value of the existing UN institutions, and the damage which may be visited upon them if states follow the knee-jerk reaction to 'do something', even against the law, when this is demanded by conscience and morality. Interestingly, however, Bilder notes that the language of the Charter prohibition upon the use of force by states may in fact permit humanitarian intervention if it is specifically in furtherance of the human rights purposes of the Charter. However, this is mentioned only as a passing thought, and Bilder avoids opening this particular Pandora's Box. Instead, Bilder goes on to challenge the traditional separation of *ius ad bellum* and *ius in bello*, arguing that a requirement of proportionality must necessarily be a component of any potential right of humanitarian intervention, and that this may only be assessed with reference to the actual conduct of the operation itself, and its conformity with international humanitarian law. This being the case, the less-than overtly humanitarian conduct of NATO's forces in Kosovo must necessarily inflict serious damage upon the legitimacy of the operation, and may thereby have lost any tentative claim to legal justification which might have been advanced. He also notes that the intervention deepened already bitter divisions in Serbian society, further fuelling regional instability, and thus reducing the action's effectiveness on the 'more harm than good' scale. Further, this mismanagement by NATO can, *per* Bilder, only create insecurity for small states and a further incentive to develop weapons of mass destruction for their own protection. Bilder curiously posits that the great disparity of forces between the two sides during NATO's Kosovo intervention is 'troubling'. However, this would seem to be an illogical conclusion, unless one is yearning for a re-hashing of the Clausewitzian '*iustes et eguales hostes*' model. If anything, in theory at least, an intervening force ought ideally to be manifestly superior in order to quickly bring an expedient end to the conflict with a minimum of damage. As noted by Bilder himself, and by Alston and Mc Donald, this chapter concludes with more questions raised than answered. This is, indeed, a common trend throughout the volume.

## V. LEGALITY *VERSUS* LEGITIMACY

In the fifth contribution, Anthea Roberts tackles the central question of the humanitarian intervention debate: what to do when the law forbids what our morality commands. Of course, this is a familiar theme, and one, again, which has divided opinion throughout the ages. She notes that the antimony is reflected here in the ambivalent reaction of many in the legal community to the Kosovo intervention: that it was illegal but legitimate.

She labels the approach as “intuitively attractive” but “ultimately not a sustainable position given the role of state practice in shaping international law” [p. 180]. She notes that describing such violations as merely ‘technically’ illegal is inappropriate given the norms with which we are dealing, namely important norms of international law dealing with the use of force. She undertakes an extensive review of the leading scholarly literature in the field, examining the various tacks which have been employed by authors to make their support for illegal action seem justified. She notes that most of these employ the language of legitimacy as a counterpoint to that of legality, and cites three reasons underpinning this discourse: firstly using legitimacy as a complete escape from the strictures of law allowing flexibility to powerful states, secondly as a tool to supplement strict notions of legality in an attempt to maintain the law’s integrity while doing justice in individual cases and thirdly as a means to critique and progressively develop the law. Roberts highlights the inherent subjectivity of moral standards, however, and warns that any attempt to set down criteria of ‘legitimacy’ that stray from international law may give rise to uses of force which are far from humanitarian and abuse of the doctrine. She herself argues for a more flexible interpretation of legality as a spectrum, ranging from fully legal to fully illegal, with many less clear cases in between. In such cases, to a varying degree, legitimacy might be useful as a (non-exclusive) means of determining where on the spectrum certain actions should be placed. Roberts’ article, while admittedly open to criticism over its conclusions, is extremely well-researched and provides excellent insight into the legality *versus* legitimacy debate. Nonetheless, her ‘legal spectrum’ model cannot be left unchallenged. The idea of ‘semi-legality’ smacks of the same logic that brought about phrases like ‘acting off the Charter’.<sup>1</sup> In attempting to criticise the mistakes of previous scholars, Roberts has, to some extent, fallen into the same trap.

## VI. INTERVENTION IN A DIVIDED WORLD

Nathaniel Berman examines the rhetorical construction of international law’s legitimacy in cases of armed intervention and their aftermath. He argues “for an understanding of international legitimacy which is less foundational and more vulnerable, less static and more tentative, less certain and more messy” [p. 218]. ‘Messy’ is indeed apt to describe Berman’s reasoning, which, although interesting, is written in a haphazard way, and which is by no means easy to follow. He draws parallels between international law’s colonial past and the mandates and protectorates of the *interbellum* and the human rights protection agenda which represents

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<sup>1</sup> B. SIMMA, “NATO, the UN and the Use of Force: Legal Aspects”, *European Journal of International Law*, 1999, p. 22.

international law's future. Berman claims that the paternalistic initiative to protect and civilise savage peoples is being repeated, in effect by external interference in war-torn, peripheral, states by the western core. Berman's paper "seeks to understand international law's attempts to achieve legitimacy in response to three kinds of challenge - attacks on the status of its identity, critiques of the coherence of its words as well as its deeds, and attempts to associate it with spectres from its unsavoury past" [pp. 220-221]. He cites the historical precedents of the Sudetenland and Abyssinia - based on (then) international norms such as minority rights and international tutelage- as a counterpoint for the modern Kosovo debate. Here, Berman makes an interesting comparison, and it is perhaps a shame that his piece chooses to be so 'messy', launching into divisions of legitimacy as a concept and thereby losing clarity, as otherwise this could be a valuable contribution. However, the essay as it is fails to meet such a billing. The clarity which is pervasive throughout most of the essays in this volume is alien to Berman, who fails to adequately communicate with his reader. One is left wondering whether it is his choice of rhetoric or his choice of reasoning which so clouds the argument, but in either case, Berman's piece is probably the least convincing and well-delivered contribution.

## VII. STATES OF EXCEPTION

Nehal Bhuta, in the penultimate chapter, detaches himself from the main debate, and focuses on the regulation of targeted killings. Borrowing heavily from Carl Schmitt's *Theorie des Partisanen*,<sup>2</sup> Bhuta argues that while the *lex specialis* model is superficially attractive as a means of conceiving of international humanitarian law, it is unsuitable in its present form for dealing with suspected terrorists. As with the partisan, to satisfy the laws of war, a terrorist "would have to give up his strongest weapons, secrecy and opacity" [p. 244]. Plainly, since he will not do so, the modern terrorist cannot be made to neatly fit into any of the Geneva Conventions' various distinctions, which seek to protect 'regular' combatants. The application of either human rights law or humanitarian law to the exclusion of the other in order to carry out targeted killings is one which entails risks, whichever course is taken. He argues that perhaps a more flexible approach to the *lex specialis* principle might reveal a better model on which to proceed, speculating that human rights provisions might, for example, be used to 'fill out' the "indispensable judicial guarantees" mentioned in common Article 3 § 1 of the Geneva Conventions. As Bhuta notes, the problem of targeted killings in general is that it is something of a 'vanishing

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<sup>2</sup> C. SCHMITT, *Theorie des Partisanen*, Berlin, Duncker & Humblot; Funfte Auflage, 2008.

point' for the two regimes, and thus the logic of 'the exception' tends to expand and intrude upon the normal. He concludes by suggesting a pragmatic, fundamental human rights-based proportionality approach, balancing risks with rights to whatever extent possible. This may well be a sensible proposal, given the legal problems surrounding targeted killings, and the fact that neither legal framework can adequately deal with this issue, but it obviously raises the possibility of abuse and subjectivity of judgment and raises questions about supervision. Yet again, legality and legitimacy come face-to-face. Unfortunately, yet again, the author seems unable to offer an adequate reconciliation of the two.

### **VIII. THE SCHIZOPHRENIAS OF R2P**

In the concluding article, José E. Alvarez discusses what he dubs "the schizophrenias of R2P", that is, of the responsibility to protect doctrine, warning against the transforming of R2P into a legal norm [p. 274]. He notes the wide, and above all diverse, array of supporters of the initiative, and says that instinct "should warn us there must be something wrong as well as right with an idea that can be endorsed by such strange bedfellows" [p. 277]. Noting, further, that the discourse has strayed far from where the original report's drafters intended, he recounts the 'horror' of many of the R2P's initial proponents, including ICISS co-chair Gareth Evans, at the bastardisation of their project. He notes further that the concept reduces sovereignty to 'abuse it and lose it'; an instrumental value, rather than an intrinsic one, which can lead down the slippery slope to the Bush administration's controversial notions of the pre-emptive use of force. Alvarez's argument has much to commend it, calling as it does for a return to the language of humanitarian intervention and a move away from a new concept which has already in the few short years since its inception, developed a variety of problems. Indeed, as the R2P has grown in renown, it has shrunk in stature, becoming progressively less and less useful to the causes which it was supposed to protect and progressively more and more a tool which can be perverted by the unscrupulous. His logic in this regard is convincing, and his citing of the 'founding fathers' as rejecting their own creation due to its abusive employment by governments opposed to the ideals for which it initially stood is a welcome wake-up call to many of those who have blindly jumped on the R2P bandwagon.

### **IX. CONCLUSION**

All in all, this collection is a useful tool for the student who wishes to garner a broader understanding of humanitarian intervention and related issues, although it must be said that while it purports to represent a state-of-the-art, it falls short in a number of key spheres. While deducing trends

from the volume is difficult due to the diversity of the offerings, one may nonetheless tentatively proffer a few comments.

Firstly, as works in this particular field are frequently wont to do, this book leaves many key questions unanswered. The same old issues are re-hashed and re-discussed by another series of authors, who, as is often the case, fail to say anything new, criticising their predecessors but often making the same elementary mistakes which have been made before. This, is, however, hardly surprising, given the material which is being discussed, and the difficulties with which even the foremost international lawyers have experienced in dealing with the interaction of general international law concerning the use of force and human rights norms. The humanitarian intervention debate, in particular, is far from settled, and this book, while being far from a significant milestone on the journey to the resolution of the issues at hand, is a useful yardstick by which we may measure how far we have come.

Secondly, the legality / legitimacy dichotomy remains the central point of contention throughout the volume, and little consensus is reached here either. Again, the fact that this is not a new trend may be evinced as a defence of the book, but it is nonetheless discouraging to see so little progress or evidence of fresh ideas in this area.

Finally, the various authors come down surprisingly firmly for a reaffirmation and in some cases even a positive strengthening of state sovereignty to protect human rights, and for a somewhat conservative, traditionalist reading of international law. This theme may be seen to run throughout the broad mass of the contributions in this volume. Given the conflict raised in the early chapters between human rights and sovereignty, this would seem remarkable, since many would argue that protecting human rights implies increased state accountability and *ergo* decreasing the effect of sovereignty as a doctrine. Nonetheless, the authors manage to present a fairly coherent defence of this position throughout, arguing that sovereignty may imply duties as well as rights, and that state power must be the primary tool in effecting actual human rights protection.

This book will find favour with the student of international law who wishes to broaden his or her knowledge of the conflicts arising between human rights and the regime governing the use of force. In this respect, it is a useful book, encompassing a variety of viewpoints, but nonetheless settling upon a clear message. The work is coherent in this regard, and the authors clearly had knowledge of one another's views before writing, so that a structured document emerges. This is something which is found lacking in many other volumes of this kind, and warrants praise. However,

despite the structure and clarity of voice, the authors deliver a message which is not new or original and which occasionally borders on the stale, and this is certainly to be regretted.

## **NOT TAKING ANALYTICS TOO SERIOUSLY - BOOK REVIEW**

**SEAN COYLE, *FROM POSITIVISM TO IDEALISM: A STUDY OF THE MORAL DIMENSIONS OF LEGALITY*, ALDERSHOT, ASHGATE, 2007**

Axelle Reiter-Korkmaz

### **I. INTRODUCTION**

The book under review proposes a vision of the ethical aspects of legality that is an alternative to that of most contemporary legal theorists. It departs from the methodology and postulates of the analytical jurisprudential tradition and attempts to reconnect law with its moral and political essence, as expressed in concrete life experiences.

### **II. THE GORDIAN KNOT**

The first chapter introduces a general reflection on the nature of law and legal theory. It begins with a criticism of analytical jurisprudence's focus on abstract conceptual issues, of its morally neutral character and of its purely clarifying aim. According to the author, it divorces jurisprudence from practical institutional realities and renders it both sterile and irrelevant to the practitioner. In the wake of this, he challenges Wittgenstein's view of the philosophical enterprise as mostly concerned with the logical elucidation of concepts and categories, and the core tenets of logical positivism. He also claims that the attachment of philosophers like Hart and Raz to the neutrality of the analytical project is misguided, as he does not believe that theorists can attain such a position without first engaging with substantive issues. Allegedly, the underlying drive to dispel misunderstandings or intellectual confusion and establish meaningful distinctions would rest on the entrenchment of axiomatic ideas and considerations about human nature, which are simply assumed to be unproblematic, whereas an adequate assessment of legal practices would be more readily attained by overtly taking into account people's particular viewpoints.

Subsequently, the author argues that the study of law should be grounded in the analysis of social and political traditions and defends a perspective both more moral and historical, centred on the role played by the legal order in the ethical construction of a given society and of its conception of the good. In this framework, he sees law as a means to deal with societal tensions or conflicts and to consolidate a specific set of values and ideals through their institutionalisation. The rule of law is then conceived as the embodiment of those ideals. From this standpoint, legal positivists would be concerned with the neutrality of the legal order between

competing visions of the good, the determinacy of legal norms and the protection of limited spheres of liberty, wherein individuals can pursue their own projects and live their preferred way of life. Contrastingly, so-called 'idealist' thinkers would aim at the rational determination -based on a specific view of humanity and justice- of a common set of (shared) values, which are then collectively applied to all people, independent of their personal interests and inclinations.

While contemporary jurisprudence mostly highlights the divergences between legal positivism and 'idealism' and the on-going debate between their respective proponents, the two positions share common metaphysical origins. In the sense that they disconnect moral questions from historical circumstances, both approaches are deemed to be manifestations of a 'protestant' ethics, modernity's individualism, and the progressive replacement of Aristotelian by Kantian theses. Morality derives directly from the need to reconcile reason with autonomy; be it through the exercise of free will and individual choice, which leads to pure subjectivism, or (alternatively) the discovery of abstract principles that transcend particular experiences. Namely, it is tightly linked to either voluntarism or rationalist postulates, both of which are upshots of Kant's theory. In any event, human agency is conceived as 'unconditioned' by the concrete context in which it evolves and legal analysis becomes disconnected from historical or practical contingencies.

The second chapter, entitled "reason, will and law", develops in more details this last point and uncovers the intellectual origins of modern legal thought. To begin with, law is defined as an historical phenomenon, grounded in concrete institutional practices, with the result that competing understandings of legal concepts and categories necessarily mirror changes in social concerns and political beliefs. In this view, conceptual clarification and theoretical coherence are only given a marginal importance in the attempt to uncover the nature of a legal order and leave place to a reflective immersion in contextual applications. Hence, it recommends a return to the classical identification of practical wisdom with knowledge of the good obtained through its realisation in ordinary life. Departure from this Aristotelian approach is explained by developments in the history of ideas.

The religious conflicts characteristic of the early modern age, the progressive decline of the influence of theology over philosophy, and the development of a secular interest for the individual exploded the previously common moral framework. The presence of tensions and disagreements led, first, to the recognition of a plurality of means of reaching the good and, in a second time, to the identification of incommensurable visions of the good itself. As a result, seventeenth

century natural lawyers like Grotius started to apply to ethics and legal theory rigorous scientific standards of analysis, which are detached from pragmatic realities and transcend social contingencies. This led, in turn, to the identification of legal rules with universal moral imperatives; to the Humean dichotomy between empirical facts and values or normative judgements; and, ultimately, to the distinction between, on one hand, justice or the right and, on the other hand, 'virtue' or the good. In this sense, both legal positivism and 'idealism' respond to the perpetuation of a search for social stability in the mist of disputes over what constitutes the good life. And they provide constructivist answers to the challenge posed by the impossibility to attain it by mere cognition.

### **III. THE 'IDEALIST' THREAD**

The third chapter on "doctrinal scholarship and the science of right" dwells on the rationalist or 'idealist' stem of modern theory. It highlights its attachment to the notion of 'right' and its ordering of a patchy and chaotic bunch of rules and precedents into an organised set of subjective rights, reflective of a more general concern for justice. The author does not merely see legal rules as the expression of societal values and conscious decisions. They would also embody implicit -and, sometimes, unintentional- shifts of ideological paradigms. Accordingly, they constitute the end product of a complex historical process, whose examination furthers the understanding of the current system. After criticising once again the analytical attachment to a scientific methodology and optimism about the progressiveness of abstract jurisprudential thought, the author goes into a fuzzy and wholly inconclusive study of the essence of legal rights.

He starts from Hohfeld's tetra-partite division of rights into claims, liberties, powers, and immunities. Then, he summarises in a sketchy fashion the debate between the 'benefit' or 'interest theory' and the 'will' or 'choice theory' of rights. He describes both conceptions as parallel efforts to unify Hohfeld's four elements into a single coherent concept. And he stigmatises their common lack of focus on morality, political controversies and concrete legal reality, before refusing to further engage into a discussion of the (dis-)advantages of each. Instead, he lingers at length on the historicity of the notion of subjective right and its emergence under the twofold and rival pressure of positivist and 'idealist' thinkers. After a short digression on Hart's point about the emptiness and formalism of equality and its connection to a rule-based view of justice, that he labels 'utilitarian', he digs into the antique and modern roots of the idea of right and its association with doctrinal scholarship.

### **IV. THE POSITIVIST THREAD**

The fourth and fifth chapters deal with the competing jurisprudential outcome of modernity; in a word, legal positivism. From the start, positivism is depicted as a “statist” understanding of law, which conceives it as “a product of human artifice and the expression of deliberately chosen goals and policies” [p. 65]. The confines of the private domains of liberty are determined entirely by state authorities and left at the mercy of their whims and discretion. The impossibility of grounding the rule of law in a set of externally imposed dictates leads inescapably to a split between the validity and legitimacy of legal norms. In this perspective, legal theory purports to reconcile the purely posited character of positive rules with their aspiration to systematic principled organisation. The ensuing concentration on adjudication as *the* forum where issues of legitimacy are discussed seriously narrows the scope of the doctrinal enquiry. Accordingly, Bentham’s version of positivism relegates legal doctrine to the secondary position of a merely descriptive exercise. And he only endorses the authority of legislative texts and their re-statement by courts and tribunals as relevant ascertainable sources of law.

The author traces back the origins of this more formalist approach to law to the philosophy of Hobbes. Whereas Grotius and Locke ground law in basic natural rights, Hobbes defines the two concepts in opposition to each other. If one bears in mind his methodological individualism and his (much more voluntarist) perception of the good as what is actually desired, this constitutes an interesting paradox. Subsequently, Hobbes dissociates legal rules from substantive claims grounded in human nature and shared moral concerns. They simply aim at maintaining social peace and order in the face of irreducible conflicts of values, interests and preferences. However, because of their inherent indeterminacy, abstract legal norms fail to provide the certainty required to reach uncontroversial decisions in concrete instances and build an encompassing social agreement. In the absence of a common language and understanding of the world, conflicts are then simply transposed from the level of rule-making to that of judicial interpretation.

Alternatively, social ordering might evolve from rule-based neutrality and the allocation of spheres of liberty where individuals can bring about their clashing conceptions of the good. Yet, the author also dismisses this solution on account of the alleged impossibility to determine one’s own vision of life independently from social and legal rules. In its place, he suggests turning Hobbes’ justification of the *Leviathan* up-side-down, as a protection of already existing shared moral ideals against their explosion into subjectivist claims and ensuing chaos. And he further grounds his revisionist reading in the assertion that any system of posited rules –be it statist or not– entails the entrenchment of moral positions in social and

political practices. In view of that, the function of law becomes the accomplishment of some specific collective goals. This obviously contradicts Hobbes' epistemology and the formalism of his brand of legal positivism.

In the next chapter, the author tackles "the changing face of positivism" in the period separating Hobbes' *Leviathan* from Hart's analytical masterpiece, *The Concept of Law*, and its growing remoteness from metaphysical questioning. The search for the concrete specification of legal rules is translated in the dichotomy between 'black letter' (common) law and equity. The latter branch appears to be tied to reason, coherence, the elements of justice embedded in posited rules and the historical pedigree of norms. In this regard, the publication of *The Concept of Law* revolutionises the classical understanding of legal positivism. In stark contrast to Hobbes and Bentham, Hart does not consider rules as mere posits but rather as normative practices grounded in reflective social attitudes or shared standards of criticism. As such, he reinstates legal rules in their broader societal context; which the author considers the most important contribution of his particular brand of legal positivism.

The sixth chapter, called "the limits of legal positivism", attempts to give a revisionist account of Hart's theory in line with the author's underlying vision and expectations about jurisprudence. It puts forward that, in order to effectively ground legal norms in actual practice -allegedly the main insight of his theory-, Hart should abandon the idea that the validity of legal rules is conditioned by their respect of a rule of recognition. More specifically, it criticises the distinction between an internal and external viewpoint; the acknowledgement from the external position of recognition processes, leading to "quite stark and implausible divisions between law and morality" [p. 112]; and the voluntarism implied in the acceptance of rules from the internal standpoint. Instead, it is suggested that the application and corollary interpretation of the law do not depend on a purely logical or formal process since they cannot be detached from moral considerations. Even the existence of a common language needs an explanation from this perspective. Besides, due to positivism and idealism's shared sweeping divide between cognition and construction, legal positivism is not fully isolable from a form of idealism, where internal coherence is becoming a necessary attribute of the notion of legality. And the legal doctrine will tend to oscillate between the two, depending on the political circumstances prevailing at the time. These criticisms and reconstruction of Hart's theory miss altogether the point that moral elements can be part of the rule of recognition, even though it need not necessarily be the case. Hence, legal validity is a question internal to a given legal order, in contrast to its legitimacy -which is to be determined 'from the outside' by meta-legal criteria-, and this allows for a

determination of what is actually the law independent of its ethical or practical value. However, this does not mean that the determination of legality issues is automatically divorced from ethical considerations or that moral concerns are prevented from playing a significant role in assessing the validity of rules, as long as they are included in the rule of recognition. Besides, Hart accepts that moral values permeate all legal orders and requires valid legal systems to include some elements of natural law.<sup>1</sup>

## V. BEYOND ANALYTICS?

The seventh chapter endeavours to go “beyond positivism and idealism”. According to the author, contemporary legal theory is nearly exclusively concerned with the soundness of legal positivism, broadly defined as the descriptive analysis of law’s essence and distinctive features from a neutral (non-moral) standpoint. He charges both positivists and their ‘idealist’ critics with similar shortcomings; namely, their allegedly unwarranted attachment to voluntarism, overall explanations and generalisations. In contrast, he proposes to uncover elements of legal practice that contradict these common suppositions. He contests the mere possibility of liberal neutrality on account of the necessity to ground individual rights in shared practices and institutional arrangements, whose preservation cannot be guaranteed by purely neutral interventions. As a result, a publicly determined joint vision of the good would inescapably emerge from rights theories. Moreover, the quest for consistency would lead to privilege some perspectives and override others, at a cost for tolerance. Counter to this approach, the author suggests that legal thought and doctrine stop focusing on abstract unification and interpretation and be rather concerned with the elucidation of a set of principles relative to specific instances.

The penultimate chapter deals with the relationship between “liberal politics and private law”. The author defends that, whereas positivist and ‘idealist’ legal theories mainly exhibit a public law structure, the common law mostly mirrors horizontal transactions and private law values at odds with notions of communal good. Then, he dwells back into the supposed failings of rights theories. He quickly brings up the controversy between proponents of the ‘interest’ and ‘choice’ variants and acknowledges the commitment of most ‘idealist’ legal thinkers to the interest theory of rights; hence, their emphasis on “passive benefit- receipt” rather than active self-direction and autonomy [pp. 148-149]. Accordingly, his criticism of right-based theories elaborates on the core tenets of the

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<sup>1</sup> H.L.A. HART, *The Concept of Law* (Oxford, Clarendon 1961), Ch 9, especially pp 189-195; 2nd edn, 1994, pp 193-200.

interest conception; such as the evaluation of entitlements against the wider background of a general theory of justice, their collective determination through political processes, their balancing, and an inherently paternalistic attachment to an allegedly objective vision of individual well-being. In addition, he refers to the Rawlsian attempt at creating a just or equal society from the hypothetical expectations of faceless actors as a prime example of this brand of self-styled individualism, even though *pace* the author- Rawls' ethics clearly are not right-based.

For sure, if such a contestable perspective is adopted, judgements about rights become counterfactual assertions divorced from people's personal assessment of their own interests, where claims to autonomy are subordinated to considerations of welfare. They further ignore the presence of disagreements and conflicting ethical views in favour of all encompassing theories of the good, with the result that "no aspect of individual lives is in principle off limits to public scrutiny and regulation" [p. 151]. And this precisely undermines the main function of liberal rights; that is, the protection of individuals from intrusive interferences by the state and the preservation of a private sphere of control. Indeed, for classical liberal philosophers, rights are *owned* by their holder and tightly connected to the idea of personal enterprise. Private law, conceived as a type of political association, fits this conception by its adaptability, its ability to answer the specific peculiarities of each case and its resistance to social engineering. Whereas public regulation regards people as the passive recipients of collectively determined benefits, private law allows a decentralised web of rules to settle individual interactions.

Hence, the author admits that the will theory evades some of the criticisms he levels against right-based philosophies, in the sense (and to the extent) that it considers legal rights as instruments of private law, which can be waived by the right-holder. However, the concession made is disputably limited and passing. Whilst the key characteristics of interest- rights theories obviously undercut the subjectivism, the pluralism and the respect of individual freedom traditionally associated with liberalism, the same cannot be said of choice-rights theories; at least, without a parallel deconstruction of their largely opposite core premises. Yet, the author assumes without any more investigation into the matter that all right-based theories present the same damaging effects and internal contradictions, and that this holds independent of the specific features exhibited by the concept of rights they espouse. His subsequent indiscriminate and across the board dismissal of right theories for their abstraction from people's actual experiences, preferences and desires is even more puzzling. Certainly, it does not apply to theorists for whom the idea of rights lies precisely in individual self- sovereignty and the

construction of one's own life and meaning through purely personal projects.

Finally, the last chapter investigates "the moral nature of law" and its connections to governance standards and the principle of legality. While this question is often portrayed to be tied to the appropriate extent of public decision powers, the author links it to the existence of shared social understandings of a more private nature. He opposes the Kantian ideas that the human mind structures and processes experience to attain knowledge and that free will creates moral reality. Instead, he suggests following an Aristotelian approach, where perception of the particulars allows a comprehension of the universal and the formulation of ethical judgements is contextualised. This negates the distinction between objective and subjective moral understandings, as individuals are constructed by their social surroundings at the same time as they construct them. Accordingly, procedural or internal questions of legality cannot be dissociated anymore from the substantive (external) ideals to which law is giving a form. From this standpoint, an 'a-contextual' formulation of legal rules and principles would distort important aspects of life in society. The entrenchment of a set of fundamental rights, against a background of moral fragmentation and plural visions of the good, is considered to be a delusion. Political philosophy is grounded in metaphysics rather than epistemology. Law is not derived from the individual will but from a common faith in social institutions. And the rule of law is not defined as government *by* law, but *according to* law.

## VI. CUTTING THE KNOT

The book under review defends a new perspective on jurisprudence, at odds with contemporary legal theories rooted in the analytical tradition. Instead of focusing on the internal discussions and debates among analytic philosophers, the author chooses to underline their commonalities in order to criticise the entire project and offer an alternative reading of the law. He puts forward a form of doctrinal analysis closely tied to the historical development, peculiarities and practical applications of different legal systems. In addition, he emphasises how this novel approach fits particularly well the specificities of the United Kingdom's legal order; above all, its preference for conflict resolution through private law mechanisms, and its attention to the concrete circumstances and idiosyncrasies of the cases it needs to settle. For this purpose, he proposes to return to a pre-modern vision of legality and morality. Accordingly, he substitutes to modern -mostly Kantian- ethics an Aristotelian conception of moral philosophy, whose foundations are metaphysical rather than epistemological.

The originality of this line of attack is merit worthy. It usefully highlights the (often neglected) moral and political dimensions of the rule of law. Besides, it uncovers the tensions, contradictions and inadequacies present in the work of many legal theorists. However, it is not free of shortcomings either. Although the enterprise undertaken is certainly interesting and commendable, the answers to several of the questions raised would benefit from a more in- depth treatment and a greater refinement of the issues and concepts tackled. Aside from the inadequacies already mentioned above, unnecessary repetitions of the same few points -over and over again- across chapters and sections give to the general structure of the book a rather messy and shaky feel. More fundamentally, hurling together the entire analytical jurisprudence tradition under the labels of 'positivism' and 'idealism' or even under the all- encompassing flag of modernism lacks both accuracy and sophistication. It demonstrates a clear absence of insight into the details of the different theories that claim to use an analytical approach and largely neglects the stark oppositions that tell them apart. Surely, they are not easily blended into such a gross amalgam. In particular, some of the arguments used by the author are simply rehashing criticisms levelled by analytical philosophers between themselves. Hence, their pre-modernist or purely Aristotelian character is at least contentious.

For example, Dworkin who is pigeonholed into the 'idealist' camp [p. 14, note 29] sharply criticises what he calls the Archimedean position of Hart and Berlin; that is, their attachment to a purely neutral, external and '*meta*' perspective. His straightforward denial of the mere possibility to adopt a neutral or non-evaluative standpoint and of the logical positivist take on epistemology is undoubtedly reminiscent of the present author's attacks.<sup>2</sup> Another unacknowledged borrowing concerns the critique of the Rawlsian vision of the individual as distinct from her personal talents, whose talents are then supposedly becoming the object of society's 'legitimate' appropriation and re-allocation. This objection has been notoriously advanced by Nozick, in order to show the illiberal nature and internal inconsistency of *A Theory of Justice*,<sup>3</sup> and later retaken by Sandel with the aim of driving Rawls altogether away from the liberal paradigm.<sup>4</sup>

<sup>2</sup> R. DWORKIN, "Do Values Conflict? A Hedgehog's Approach", *Arizona Law Review*, 2001, pp. 251-260; R. DWORKIN, "Hart's Postscript and the Character of Political Philosophy", *Oxford Journal of Legal Studies*, 2004, pp. 1-37. R. DWORKIN, "Objectivity and Truth: You'd Better Believe It", *Philosophy and Public Affairs*, 1996, pp. 87- 139. See also: A. RIPSTEIN, "Introduction: Anti-Archimedeanism", in A. RIPSTEIN, *Ronald Dworkin*, Cambridge, Cambridge University Press, 2007, pp. 1- 21; who considers that his rejection of Archimedean positions is the main unifying thread in his writings.

<sup>3</sup> R. NOZICK, *Anarchy, State, and Utopia*, New York, Basic, 1974, Chapter 7, Section 2, pp. 183-231.

<sup>4</sup> M. SANDEL, *Liberalism and the Limits of Justice*, Cambridge, Cambridge University Press, 1982; 2nd ed., 1998; pp. 77-79.

Incidentally, Sandel's entire deconstruction of the Kantian deontological project and his characterisation of the liberal individual as a disembodied and unencumbered self resonate along the same general lines as the author's. More broadly speaking, Sandel and other communitarians also call for a return to an historical, socially contingent and concretely grounded conception of humanity, justice and the law. Yet, communitarianism is not even mentioned once in the book, apart from a passing reference to the work of Walzer [p. 135].

A deeper problem lies in the demarcation line the author draws between positivism and what he calls 'idealism', and the underlying epistemological rationale he attributes to each category. Whereas the term 'idealism' does not constitute a perfect fit for most rationalist theories, some versions of legal positivism are simply irreconcilable with (individualistic) voluntarist premises. Kelsen and Austin's theories illustrate perfectly this type of incompatibility. On the other hand, some thinkers bridge the gap by identifying rational choice with the requirement of explicit personal consent. James Buchanan's reliance on Pareto optimality and unanimity rule supplies a radical example of such an interconnection.<sup>5</sup> But most classical liberals link tightly the two. More specifically, the classification of all right-based theories into the rationalist faction is highly problematic. Hart (for one), whose positivism can difficultly be contested, has a largely right-based approach to political controversies, has written more on subjective rights than on any other topic, and is even at the origins of the contemporary version of the 'choice' or 'will theory' of rights. Although the author tries to back up his controversial categorisation in several instances, he neither argues it in depth nor succeed in providing a convincing justification for it.

Typically, in an effort to substantiate his claim and demarcate rule-based from right-based conceptions of law, he suggests that, "whereas it is possible to see a body of imposed rules as the attempt to realise a stable social framework for the pursuit of private interests and goals where no common perspective on social good exist, a legal order constituted by rights is naturally thought of as identifying shared ideals through the articulation of the boundaries between competing rights" [p. 4]. No further insight is offered into how and why subjective rights or their limits would be *naturally* perceived as the expression of *shared ideals*. Libertarian philosophers, who challenge the mere possibility of a

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<sup>5</sup> J. M. BUCHANAN, "Contractarian Presuppositions and Democratic Governance", in G. BRENNAN and L.E. LOMASKY, *Politics and Process: New Essays in Democratic Thought*, Cambridge, Cambridge University Press, 1989, pp. 174-182. J.M. BUCHANAN, *Freedom in Constitutional Contract: Perspectives of a Political Economist*, College Station, Texas A&M University Press, 1977, p. 113. J.M. BUCHANAN, *The Limits of Liberty: Between Anarchy and Leviathan*, Chicago, University of Chicago Press, 1975, especially pp. 38-41, 82-84 and 151.

universally shared vision of the good and denounce attempts at the superimposition of any such thing on the individual will as a breach of personal autonomy, are more often than not right-based theorists. And they precisely define rights as private 'spheres of liberty'! So, one ends up wondering on which side of Coyle's divide this type of rights theorising would fall.

Besides, whereas the benefit or interest theory of rights is strongly concerned with the weighting and balancing of competing rights, the alternative conception of rights as choices is grounded in the co-possibility of the set of rights it recognises and aims precisely at an absence of conflicts in their enforcement.<sup>6</sup> In such a view, rights never compete. Evidently, the interest theory displays strong rationalist features and assumes a republican view of the polity constructed around shared values. By opposition, the will theory clearly sides with voluntarism, liberal neutrality and positivism. And it portrays rights as the embodiment of a general principle of equal liberty over oneself and portions of the outside world. Hence, the author might have usefully confined his claim on the 'idealism' of right-based theories to the interest variant. Alternatively, he might have wanted to explain why the benefit theory reflects better the core of the concept of subjective right for the purpose of his investigation. Yet, far from dismissing choice rights, he contends that both conceptions are equally reflective of a unification of Hohfeld's four aspects of the term and equally wanting in their tackling of legal reality, before explicitly refusing to dwell more on the matter or side with either of the parties to that debate [pp. 42-44]. Whereas he eventually admits that some of the criticisms raised need to be qualified in relation to the will theory, he remains reluctant to acknowledge the full consequences of this concession [pp. 148-160].

## VII. CONCLUSION

To conclude, by dissociating himself from the largely prevalent analytical project, the author casts some critical light on the common assumptions and axioms on which contemporary jurisprudence is built. He embarks in a totally opposite theoretical enterprise, more akin to a form of applied legal philosophy. While this provides a novel and interesting alternative to most current classics in the field, the book would benefit from a more detailed and in depth analysis of some of the theories under consideration.

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<sup>6</sup> R. NOZICK, *Anarchy, State, and Utopia*, o.c., especially pp. 92, 166 and 238.