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# A Farewell to (Private) Law: Musings on the Belgian Law of Obligations\*

## Introduction

According to Hegel's Philosophy of Law, '[l]aw (right) considered as the realisation of liberty in externals, breaks up into a multiplicity of relations to this external sphere and to other persons' (§496). This and other statements are symptomatic of a received understanding of nineteenth-century (private) law as the legal expression of economic liberty, or personal freedom—in short, of the individual's subjectivity, written with a capital 'S', as it were. Although this received understanding may be overstated if not mythologised *in toto*<sup>1</sup>, it is nonetheless the common self-understanding of the legal profession (as discussed in Section 1 of this paper).

Any move away from this golden age of contractual freedom and spontaneous order, through, for example, the advent of the welfare state, the juridification of social relations<sup>2</sup>, or the birth of the European Union, automatically threatens to diminish the Subjectivity of the individual as epitomised by the sacrosanct freedom of contract

Indeed, the Subjectivity in private-law settings is increasingly limited by scores of national statutes or European initiatives limiting contractual freedom, usually motivated by an argument referring to market failure (e.g., for consumer protection) or an expansion of fundamental rights (e.g., anti-discrimination clauses).

As comprehensive coverage of this vast topic is inconceivable within the confines of a short paper we will highlight some features of the transformation process by referring to the Belgian example in the field of obligations and briefly sketch some recent developments in legislation, jurisprudence, and doctrine<sup>3</sup>, in Section 2.<sup>4</sup>

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<sup>1</sup> S. Hofer. *Freiheit ohne Grenzen? Privatrechtstheoretische Diskussionen im 19. Jahrhundert*. Tübingen: Mohr (Siebeck) 2001; J. Rückert. Zur Legitimation der Vertragsfreiheit im 19. Jahrhundert. – D. Klippel (ed.). *Naturrecht im 19. Jahrhundert*. Goldbach: Keip Verlag 1997, pp. 135–183.

<sup>2</sup> M.E. Storme. *De juridisering van sociale verhoudingen van de negentiende eeuw tot vandaag*. Leuven 2002, pp. 78–121; L. Blichner, A. Molander: What is juridification? Arena Working Paper 14.3.2005. Available via <http://www.arena.uio.no/>.

<sup>3</sup> For a more comprehensive overview of recent developments, see S. Stijns, V. Sagaert, I. Samoy, A. De Boeck (eds). *Themis 75 – Verbintenissenrecht*. Brugge: Die Keure 2012; M.E. Storme. *Recente ontwikkelingen verbintenissenrecht 2000–2011*. Brussels: Syllabus Vormingsinstituut Advocaten 2012; I. Samoy, T. Dang Vu. Belgium. – J. Herbots (ed.). *International Encyclopaedia of Laws: Contracts*. Alphen aan den Rijn: Kluwer Law International 2011; P. Van Ommeslaghe. *Droit des Obligations*. Brussels: Bruylant 2010; P. Wéry. *Droit des Obligations I, Théorie Générale du Contrat*. Brussels: Larcier 2010.

<sup>4</sup> At the conference titled 'Kümme aastat võlaõigusseadust Eestis ja võlaõiguse areng Euroopas' ['Ten years of the Law of Obligations in Estonia and developments of the law of obligation in Europe'] held in Tartu on 29–30 November 2012, I had to cut short my paper and presented only the Belgium-focused portion.

Section 3 is dedicated to the European input, and in Section 4 we attempt to formulate a preliminary conclusion and examine whether the traditional main pillars of contract law (freedom of contract, party autonomy, and consensualism) have survived the modernisation onslaught intact or whether, instead, a substantive transformation has occurred.

## 1. Legal subjectivity and private law

Our understanding of private law and legal subjectivity cannot be separated from their philosophical (Enlightenment) and economic (liberalism) background.

The Enlightenment saw the emergence of the modern, scientific paradigm centred on the new concepts of formal logic, universal principles, and abstract axioms.<sup>5</sup> Jürgen Habermas has described this grand enterprise as ‘the extravagant expectation that the arts and sciences would promote not only the control of natural forces but also understanding of the world and self, moral progress, the justice of institutions and even the happiness of human beings’.

The scientific method became the new paradigm, and it was taken as axiomatic that there was only one correct answer to any question. The word and the law could be controlled and rationally ordered if we could represent it properly—i.e., with mathematical precision, *more geometrico*.

These efforts have directly influenced law by putting forward objectivity, equality, and subjectivity as the new key words. Modern law also swept away the remains of feudalism and its various categories of people, replacing it with the concept of equal citizens and the slogan of the French Revolution that a ‘good law must be good for everyone in exactly the same way that a true proposition is true for all’.

The predominant feature of the new legal paradigm, however, was the emergence of subjectivity. Hegel’s Philosophy of Law describes subjectivity as the distinctive feature of modern times. Indeed, ethics and law no longer reflect an objective natural or divine order; they are now centred on the free will and self-actualisation of the ahistorical, discorporated, and decontextualised individual. Subjective rights are the law’s *modus operandi*, serving the open ends of much-vaunted freedom of contract in any given case.

This open-end-oriented, liberal society was constructed from a radically atomistic perspective. The new rule of law stands for a neutral system of codified, subjective rights allowing all citizens individual-level pursuit of happiness rather than promoting a shared, communitarian concept of the good, as was the case in pre-modern societies. Whilst the material law is in itself open-ended, the formal aspects of modern law can be characterised as emphasising moral neutrality, autonomy, internal unity, and procedural rationality.<sup>6</sup>

Modern law presents itself as a relatively autonomous social practice, distinct from politics, ethics, and religion. Positivism was the credo of the nineteenth century and found its most eloquent representative in Hans Kelsen’s *Reine Rechtslehre* or ‘pure’ theory of law.

Even if after the Second World War the questions of foundations, of the boundaries between the legal and the non-legal, of the relationship between law and justice, were raised again, positivistic practice of law remained untouched by it, by and large. Last but not least, law in modern society understands itself as a unitary and coherent system of rules and norms. The consistency and coherence of the system are guaranteed by *Legitimation durch Verfahren*, legitimisation by internal procedural rationality.

The step from this general characterisation to the early economic liberalism that emerged in the nineteenth century is but a small one. Private law understood in this sense is ‘a system of unlimited liberal freedom, which claimed that fairness would automatically result from a formal law of obligations based especially on formal equality’<sup>7</sup>.

<sup>5</sup> Stephen Toulmin describes the transition with the following catch phrases: ‘General principles were in, particular cases were out’, ‘General principles were in, rhetoric was out’, ‘Abstract axioms were in, concrete diversity was out’, and ‘The permanent was in, the transitory was out’ (S.E. Toulmin. *Cosmopolis: The Hidden Agenda of Modernity*. Chicago: University of Chicago Press 1990, p. 30).

<sup>6</sup> A. Zaccaria. *Il diritto privato europeo nell’epoca del postmoderno* [‘European private law in the postmodern era’]. – *Rivista di diritto civile* 1997/1, pp. 367 ff.; P. Wagner. *A Sociology of Modernity: Liberty and Discipline*. Abingdon: Routledge 1993; B. de Sousa Santos. *Law and community: The changing nature of state power in late capitalism*. – *International Journal of the Sociology of Law* 1980, pp. 379–397.

<sup>7</sup> A. Fouillée. *La science sociale contemporaine*. Paris 1880, p. 410, quoted by S. Hofer (see Note 1), p. 1.

In our *idealtypisches* view of the nineteenth century, private law is entirely based on private autonomy and its manifestations in property, obligations, and will. In only a limited number of exceptional situations would private law be placed in the straightjacket of constraint by special legislation.<sup>\*8</sup>

As we have already hinted, in the introduction this stereotype of a liberal *Paradise Lost* might not be entirely correct, as limits to the principle of freedom were already imposed in early liberalism and several socially inspired incursions into contract law (e.g., rent control) have a history of well over a century. Where then does the stereotype come from?

Hofer has advanced the thesis that the nineteenth-century German, French, and English private-law systems were far from dominated by a unifying idea of unlimited freedom. Rather, the stereotyping appears to have its origin in the opposition to the drafting of the *Bürgerliches Gesetzbuch*, the German Civil Code, allowing scholars such as Gierke<sup>\*9</sup> and Menger<sup>\*10</sup> to oppose the Roman-law model of liberalism found in the social features of the BGB as an expression of Germanic thinking, an opposition that ultimately would make its way into the programme of the NSDAP.<sup>\*11</sup>

Another challenge to the private-law stereotype as a haven of subjectivity has arisen, from the emerging welfare state of the early twentieth century. No-one less than Max Weber characterised this as a turn toward substantive justice and away from the pinnacle of formal legal rationality.

Whatever the degree of counter-factuality in the private-law-equals-pure-subjectivity stereotype might be, the fact remains that a huge corpus of scholarly output, along with general self-understanding of the legal profession, upholds the premise, thereby legitimising this enquiry.

## 2. The fragmented modernisation of Belgium's law of obligations

Belgium has retained the French Code Civil of 1804, albeit with numerous revisions. However, the chapter containing the general rules for all obligations<sup>\*12</sup> has survived remarkably intact—so well, in fact, that the Belgian Civil Code has retained more of the original articles than the present-day French Code Civil does.

When assessing the tenets of the civil code, one should not forget that it was crafted a century before the German *Bürgerliches Gesetzbuch* and nearly double that time before the new codes of the Netherlands, Québec, and Estonia. In other words, the code was drafted well before the boom of international capitalism, the computer age, and e-commerce. Its framework was still very much that of small businesses and small-scale employers confronting an equally small workforce, *du petit commerce et du petit patronat en face de la petite main d'oeuvre*.<sup>\*13</sup>

Naturally, the civil code has been adapted to new realities. This has occurred in several ways.

First of all, certain articles of the code have been abolished<sup>\*14</sup>, altered, or added. Several chapters have been replaced with incorporated statutes<sup>\*15</sup>, which retain their own numbering and, worse still, apply their own style of numbering. As a result, '[t]he current version of the Civil Code does not deserve to get any prizes for its beauty and one can only wonder what its original framers would think of the horrible creature the Belgian legislator has made of it'<sup>\*16</sup>.

<sup>8</sup> H. Coing. *Handbuch der Quellen und Literatur der neueren Europäischen Privatrechtsgeschichte*. Band III: Das 19. Jahrhundert, Tlbd. 3: Gesetzgebung zu den privatrechtlichen Sondergebieten. München: Beck 1986, p. 2874.

<sup>9</sup> O. von Gierke. *Der Entwurf eines bürgerlichen Gesetzbuches und das deutsche Recht. – Schmollers Jahrbuch für die Gesetzgebung, Verwaltung und Volkswirtschaft*. Berlin: Duncker & Humblot 1889.

<sup>10</sup> A. Menger. *Das bürgerliche Recht und die besitzlosen Volksklassen*. Tübingen: Laupp 1890.

<sup>11</sup> Article 19: 'We demand that Roman law, which serves a materialist ordering of the world, be replaced by German common law.'

<sup>12</sup> Book III, Title III, *Des Contrats ou des Obligations conventionnelles en général*, containing Articles 1101–1386. An astonishing 239 articles are still identical to the original text, according to H. Bocken and W. De Bondt (eds). *Introduction to Belgian Law*. Brussels 2001, p. 224.

<sup>13</sup> G. Morin. *La loi et le contrat. La décadence de leur souveraineté*. Paris: Alcan 1927, p. 57.

<sup>14</sup> Including even the very first article of the code.

<sup>15</sup> E.g., the Mortgages Law of 18 December 1851 and the Commercial Leases Act of 30 April 1951.

<sup>16</sup> D. Heirbaut, M.E. Storme. *Private Law Codifications in Belgium*. Taipei May 2012.

Secondly, several issues have been dealt with in separate statutes that remained outside the civil code<sup>\*17</sup>. This method has been extensively used in dealing with the transposition of European Union directives. What typically happens is that the law is rushed through Parliament on a just-in-time basis. Here one finds a rather pale comparison to the German *Schuldrechtreform*, which, while it too was completed in a hurry, produced a complete overhaul of the law of obligations. In all fairness, one has to mention that Belgian company law and international private law received more attention and were fully codified, in 1999 and 2004, respectively.

The third road to *aggiornamento* has been offered by a vast amount of case law. Over the past 200 years, a mountain of output of case law has fine-tuned (and in some cases completely transformed) the old texts, especially with respect to the general principles related to obligations and tort law.

Finally but not least, doctrine has been as abundantly rich as one might have expected from eight faculties of law, 100 (print-form) legal journals, and almost 13,000 attorneys. A multitude of monographs, journal articles, and conference papers cover just about any conceivable topic.

Completeness has never been an idle word (De Page's elementary treatise on civil law weighed in at more than 10,000 pages, while Van Ommeslaghe's handbook on obligations provided 2,680!), and the computer age has greatly added to this *logorrhoea* of handbooks, papers, and comments. In December 2012, Kluwer's legal database Jura contained no fewer than 70,000 legislative acts, 180,000 judgements, and 220,000 scientific articles and notes.

The interaction between doctrine and jurisprudence has been particularly significant in the development of tort law (entirely based on Articles 1382–1386 of the Civil Code) and concepts such as abuse of rights, good faith, and promissory estoppel (the latter only being accepted as a special case of abuse of rights).

A recent overview intended for European researchers<sup>\*18</sup> dealt with developments of matters such as 'Basic principles of contract law and the role of good faith and fair dealing', 'Dynamic conclusion of the contract and proof', 'Performance and non-performance and termination of the contract', 'Contractual liability by non-performance and termination by fault', and 'Non-performance and termination without fault: impediment, hardship and ending by notice'.

Another influential overview<sup>\*19</sup> concentrated on the diminishing difference between rules of public order and mere compulsory rules and on the ensuing consequences in terms of relative versus absolute nullity, the Cour de Cassation's position on promissory estoppel, extra-judicial termination of contracts, and the co-existence of contractual liability and tort law.

Doctrine has always been in the habit of seeking inspiration from across the border, and it is to be expected that the DCFR will exert a great influence, whether or not it eventually evolves into a full-blown European civil code.

Indeed, a common feature of legislation, jurisprudence, and doctrine alike is their comparative stance, unquestioning europhilia, and automatic embracing of harmonisation initiatives.

Heirbaut and Storme have—though in a slightly different context—denounced the 'pragmatic laziness' of legal transplanting as a national characteristic.<sup>\*20</sup>

Whatever the origin of this attitude, the fragmented, patchwork approach seems to have yielded satisfactory results, but no doubt a new code will be embraced with the usual pragmatism.

A last feature that should not be forgotten is the good-natured disposition of academic writing. Harsh polemics in the vein of Legrand's 'AntivonBar' are a rarity in Belgian legal culture, if not altogether absent.<sup>\*21</sup>

<sup>17</sup> E.g., the Sale of Unfinished Houses Act of 9 July 1971 and the Law of 14 July on Trade Practices. Literally, hundreds of them are connected to the broad field of civil law.

<sup>18</sup> I. Samoy, B. Lambrecht (eds). *Consortium Agreements for Research Projects: Multiparty Agreements under Belgian Contract Law*. Antwerp: Intersentia 2011.

<sup>19</sup> A. Van Oevelen. Enkele knelpunten in het verbintenissenrecht ['Some bottlenecks in the law of obligations']. – *Rechtskundig Weekblad* 2011–2012, pp. 55–61. Amongst other things, Van Oevelen points out that, since the ECJ's *Océano Grupo* and *Pannon* cases, Belgian judges have started to scrutinise unfair consumer contract clauses *ex officio*, thereby influencing the traditional dichotomy between absolute nullity reserved for breaches of the *ordre public* and relative nullity for private interests.

<sup>20</sup> D. Heirbaut, M.E. Storme: 'De Belgische Rechtstraditie: Van een lang zoeken naar onafhankelijkheid naar een verlangen naar afhankelijkheid', Belgisch rapport voor het XVIIe Internationaal Congres voor rechtsvergelijking. – *Tijdschrift voor privaatrecht* 2008, pp. 979–1041 (p. 26 of PDF version).

<sup>21</sup> P. Legrand. AntivonBar. – *The Journal of Comparative Law* 2006, pp. 13–40.

### 3. Features of European harmonisation in the field of law of obligations

The present Europeanisation of private law as a whole is a process that consists of several components.

First, there is a constantly growing body of applicable secondary law that concerns itself with the direct or indirect regulation of certain fields of law (i.e., taking a vertical approach). Nearly all of these initiatives within the *acquis communautaire* concern themselves with harmonisation in view of the completion of the internal market. However, by invalidating certain contract clauses and imposing minimum standards, they make a distinct mark on private law.

Second comes the constitutionalisation drive and the anti-discrimination law cutting across all fields of law (i.e., applying a horizontal approach). Anti-discrimination rules do not govern a particular field of law in a particular setting; they address all contractual relations as such.

Last but certainly not least, one can look at the imminent advent of a European civil code.

#### 3.1. EU Secondary law takes primacy

Historically, the EEC/EC/EU has not been concerned with private-law-making in the traditional sense of drafting and implementation of rules addressed at private parties for the conduct of their business. Rather, it has intervened in a particular sector of the internal market by outlawing certain practices (that is, applying blacklists) and imposing protection for the weaker party to a contract. In doing so, it has increasingly replaced the public/private distinction with a classification by field of policy.<sup>\*22</sup>

The European Union has been paying particular attention to the following fields: intellectual property rights, company law, insurance and financial law, cross-border credit transfers, e-commerce, distribution agreements, product safety and product liability, and consumer law (commercial practices).

Commercial practices, unfair contract terms, and advertising are especially heavily regulated, by means of several, successive directives.<sup>\*23</sup> Also, there is hardly any other branch of private law in which the European Court of Justice has been so active in defining, *inter alia*, unfair contract terms<sup>\*24</sup> and the boundaries of consumer credit<sup>\*25</sup> laid down by the oft-modified document 'Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit'.<sup>\*26</sup>

The way in which these directives have affected the Member States' consumer law is typical of the manner in which the EU has permeated all fields of private law whilst leaving the overall national structures intact. In the words of Whittaker<sup>\*27</sup>:

EC commercial practices law affects the terms on which the contract is concluded; it demonstrates how EC law leaves basic principles of national private legal orders, such as offer and acceptance, in place, whilst at the same time making them superfluous. It sets standards for the interpretation of private law relations (the average consumer), introduces new regulatory devices, such as the duty to disclose information at the pre-contractual stage and post-contractual monitoring, and reaches beyond the privity of contract law.

<sup>22</sup> H.-W. Micklitz. The visible hand of European regulatory private law: The transformation of European private law from autonomy to functionalism in competition and regulation. – *EUI Working Paper Law* 2008/14, p. 26; B. Lurger. The future of European contract law between freedom of contract, social justice, and market rationality. – *European Review of Contract Law* 2005/1, p. 442.

<sup>23</sup> Directives 2005/29/EC (OJ L 149, 11.6.2005, 22) and 2006/114/EC (OJ L 376, 27.12.2006, 21); I. Klauer. General clauses in European private law and 'stricter' national standards: The Unfair Terms Directive. – *European Review of Private Law* 2000/8, pp. 187–210; The E-Commerce Directive, 2000/31/EC. – OJ L 178, 17.7.2000, 1; Directive 99/44/EC 43. – OJ L 171, 7.7.1999, 12.

<sup>24</sup> Case C-244/98, *Océano*. – ECR 2000, p. I-4941; Case C-473/00, *Cofidis*. – ECR 2002, p. I-10875; Case C-237/02, *Freiburger Kommunalbauten*. – ECR, p. I-3403.

<sup>25</sup> Case C-481/99, *Heininger*. – ECR 2001, p. I-234.

<sup>26</sup> OJ (L 042) 1987, 48.

<sup>27</sup> S. Whittaker. The relationship of the Unfair Commercial Practices Directive to European and national contract laws. – S. Weatherill, U. Bernitz (eds). *The Regulation of Unfair Commercial Practices under EC Directives 2005/29: New Rules and New Techniques*. Hart Publishing 2007, p. 139 (quoted by H.W. Micklitz (see Note 22), p. 19).

This permeation crops up again in each field examined: the directives and regulations set forth minimum standards of protection and render invalid contrary clauses (that is, apply blacklists) without actually replacing the national legislation in the field at hand. The same holds true for interpreting national rules according to European standards.<sup>\*28</sup>

Another influence, though less direct, has been the liberalisation of former state monopolies in the sector of telecommunications, energy, and transport, which has indirectly increased the importance of contract-law mechanisms.

Certainly, these directives deal with private-law relations only marginally. But the notion of ‘universal services’ for instance has introduced a novel legal concept in private-law relations:

The network law develops, within the boundaries of universal services, concepts and devices whose reach must be tested with regard to their potential for general application beyond the narrow subject matter. Just one example may be mentioned: despite privatisation, network industries have to guarantee the accessibility and the affordability of their services. What is at stake here is the obligation to contract and the duty to continue delivery even in cases of late payment.<sup>\*29</sup>

Yet another field in which EC influence, while unexpected, can be seen is real-property law. The rules for acquiring and transferring property definitely remain national, and so do the rules pertaining to registration and securities.

A uniform mortgage legislation has not yet been implemented, but by applying the basic freedoms to real sureties, the European Court of Justice has ruled unlawful a national prohibition of registering mortgages in foreign currencies.<sup>\*30</sup> Moreover, freedom of circulation of capital allows for smooth cross-border financing of real-estate investments. Real-estate law is affected also by the various directives on doorstep sales, consumer credit, and unfair terms.<sup>\*31</sup>

### 3.2. Anti-discrimination as a general principle of private law

A second Europeanisation of private law has taken place through the implementation of the anti-discrimination rules.

The original EEC Treaty did not contain a general equality clause. Instead, it identified two forbidden grounds for discrimination—nationality and gender—when speaking specifically of the requirement of equal pay.<sup>\*32</sup>

Fifty years on, the objective has become to eliminate all inequalities and promote gender equality throughout the EU in accordance with Articles 2 and 3 of the EC Treaty (on gender mainstreaming) along with Article 141 (on equality between women and men in matters of employment and occupation) and Article 13 (on discrimination by sex, within and outside the workplace). Also, gender-equality laws have been supplemented by general anti-discrimination legislation, applicable in other fields than economics and labour relations. Article II-81,1 of the Charter of Fundamental Rights, for instance, prohibits any discrimination on any ground:

*Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.*

A number of directives have brought every branch of private law within the scope of the anti-discrimination principle.<sup>\*33</sup> This drive was reinforced by several landmark ECJ cases.

<sup>28</sup> C. Joerges. Interactive adjudication in the Europeanisation process? A demanding perspective and a modest example. – ERPL 2000.

<sup>29</sup> P. Rott. A new social contract law for public services? – Consequences from regulation of services of general economic interest in the EC. – *European Review of Contract Law* 2005/3, p. 323.

<sup>30</sup> ECJ, C-222/97, *Trummer*, 16.3.1999.

<sup>31</sup> E.g., C-481/99, *Heininger*, 13.12.2001.

<sup>32</sup> Article 119 of the EC Treaty; Directive 75/117/EEC, on equal pay for women, and Directive 76/207/EEC, on equal access to employment.

<sup>33</sup> *Inter alia*, 2000/43/EC. – OJ L 180, 19.7.2000; 2000/78/EC. – OJ L 303, 2.12.2000, 16; 2002/73/EC. – OJ L 269, 23.9.2002, 15; 2004/113/EC. – OJ L 33, 13.12. 2004, 37; 2006/54/EC, 22. – OJ L 204, 26.7.2006, 23.

The specific way in which the secondary legislation banning discrimination (especially directives 2000/43/EC, 2002/78/EC, and 2004/113/EC) is drafted introduces a few novelties and poses a number of problems.

First, these directives have introduced anti-discrimination provisions to civil law (as opposed to labour law) and demand that the Member States provide effective civil-law remedies against horizontal discrimination of all sorts by private persons, including the refusal to deal with other parties. These directives and their transposition laws have sparked great (national-level) controversies because of their horizontal effect and the obligation for parties to form a contract without regard for personal preferences. In particular, the duty of non-refusal of tenants has led to numerous anti-discrimination and racism-related lawsuits and inquiries by monitoring agencies in Western Europe.

Second, Article 8, paragraph 1 of Directive 2000/43/EC and paragraph 1 of Article 9 of Directive 2004/113/EC reverse the burden of proof. Rather than the plaintiff having to bring proof, the respondent in a case of putative direct or indirect discrimination must either prove that there has been no breach of the principle of equal treatment or invoke justified criteria for exception. There is no need to emphasise that this has come as a shock to traditional legal thinking.

Third, key provisions of the directives, including those for definition of the term ‘discrimination’ itself, are blanket norms left to the courts’ interpretation, thereby increasing legal uncertainty. An approximation to some principles laid out by the European Court of Human Rights might be helpful in this respect.

Fourth, national legislation (e.g., in Belgium, Italy, The Netherlands, and the United Kingdom) has often offered anti-discrimination associations *de jure* legal standing to engage in legal proceedings on behalf of the victim. The fact that legal action can now be undertaken by a third party even without the victim’s knowledge or consent has sparked fears of the dreaded *actio popularis* and of legal warfare by all against all.

Of course, much depends on the national implementation of the directives. Some, as the Kingdom of Belgium has, have been rather zealous in stretching the general non-discrimination provision to its maximum. Indeed, Article 2, Section 4 of the bill of 25 February 2003 outlaws ‘[e]very form of direct or indirect discrimination in the dissemination or publishing of a text, message, sign or other expression-bearer as well as in the participation in and exercise of economic, social, cultural and political activities accessible to the public’. This provision, which carries a stiff penalty of up to one year’s imprisonment (i.e., twice the maximum sentence for simple assault), has already served in bringing law suits against landlords who are unwilling to let flats to immigrants, asylum-seekers and people on welfare benefits.

Moreover, Belgium has also amended its criminal code: Article 405quater now doubles the minimum penalty for murder, manslaughter, and assault if these crimes were inspired by the victim’s ‘so-called race, descendance, national or ethnical background, sexual conviction, fortune, religion or beliefs, present or future state of health, handicap or physical characteristic’, thus introducing two categories of victimhood.

Finally but by no means least, there is the much-debated issue of preferential treatment—i.e., permitted discrimination.<sup>34</sup> We will not dwell on the landmark cases *Kalanke*<sup>35</sup> and *Marschall* but will simply recall that the strict reading applied by the ECJ in the *Kalanke* case as to the grounds of the non-discrimination principle did not please the political powers and, therefore, was overturned through explicit enshrining of the possibility of affirmative action in Article 141 (4) of the Treaty of Amsterdam.

From these angles, it is clear that secondary EU law is already promoting the anti-discrimination principle to a general principle of private law.

<sup>34</sup> E. Howard. The European Year of Equal Opportunities for All: Is the EU moving away from a formal idea of equality? – *European Law Journal* E 2008 (14)/2, pp. 168–185; T. Sowell. *Affirmative Action around the World: A Comparative Study*. New Haven 2004.

<sup>35</sup> Cases 450/93 (*Kalanke*) and 409/95 (*Marschall*).

### 3.3. The DCFR

As is well known, the Draft Common Frame of Reference<sup>\*36</sup> (DCFR) has codified general principles, definitions, and model rules both for contract law in general and for specific contracts.<sup>\*37</sup> Accordingly, it adopts the perspective of a legal code that, in the view of some, ‘dares not speak its name’<sup>\*38</sup>.

How much of the DCFR will eventually make its way into the future European civil code remains unclear, but at the very least this ‘toolbox for analysis and comparison’ will have indirect legal effects through (perhaps mandatory) interpretation of secondary law and will thereby affect developments in the Member States’ private-law systems.

Whereas most of the principles and mechanisms exposed in the draft code are technical and comparative in nature, adherence to the anti-discrimination ideology is clearly expressed in the seventh principle of the DCFR:

7. Restrictions on freedom to choose contracting party.

While in general persons should remain free to contract or to refuse to contract with anyone else, this freedom may need to be qualified where it might result in unacceptable discrimination, for example discrimination on the grounds of gender, race or ethnic origin.

Discrimination on those grounds is a particularly anti-social form of denying the contractual freedom, and indeed the human dignity, of the other party. EU law and the DCFR therefore prohibit these forms of discrimination and provide appropriate remedies. (See the DCFR’s Article II–2:101 to 2:105 and Article III–1:105.)

The article is drafted in such a way that it readily allows for the addition of further grounds for discrimination, as they already exist in some Member States. The open ended-phrasing of the last sentence leaves little doubt about the future potential use of these provisions.<sup>\*39</sup>

## 4. The effects on subjectivity

Several observations are permitted by our all-too-brief analysis.

### 4.1. How I learned to stop worrying and love the *acquis communautaire*

The EU *acquis* and its sector-based approach have led to a ‘pointillist’ approach to private law—more precisely, to contract law. Whilst this may frustrate national legal systems in possession of a shiny and internally coherent civil code such as the *Bürgerliches Gesetzbuch*, the detrimental effects thereof should not be overestimated, since national systems have always been tinkering with their national codes themselves and have not refrained from introducing legislation addressing specific social or political problems, tenancy law being a prominent example in all Member States. In the words of Matthias Kumm<sup>\*40</sup>:

First, the idea of an autonomous domain of private law as an integral part of an apolitical state-free sphere had collapsed. The belief in a civil society that organizes itself by means of private law, the content of which is defined by apolitical legal experts, no longer resonated. Private law, too, had become the object of self-conscious, broad-based political struggle. Private law was wrested from the legal priesthood and became a mundane object of regulatory intervention. The 19th century ideas of scholarly mandarins, who conceived of private law in natural law, historicist, or conceptual

<sup>36</sup> C. von Bar, E. Clive, H. Schulte-Nölke, H. Beale, J. Herre, J. Huet, P. Schlechtriem, M. Storme, S. Swann, P. Varul, A. Veneziano, F. Zoll (eds). *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR)*. Final Outline Edition. Munich: Sellier Publishers 2009.

<sup>37</sup> H. Collins. *The European Civil Code: The Way Forward*. Cambridge 2008, p. 65; 8.2.2007, COM(2006), 744 final.

<sup>38</sup> B. Lurger. The common frame of reference / optional code and the various understandings of social justice in Europe. – T. Wilhelmson, E. Paunio, A. Pohjolainen (eds). *The Hague: Private Law and the Many Cultures of Europe*. Kluwer 2007, p. 180; H. Collins (see Note 37), p. 86.

<sup>39</sup> The unequivocal militant stance with respect to this principle contrasts rather with the more cautious approach to the tenth principle, ‘correcting inequality of bargaining power’.

<sup>40</sup> M. Kumm. Who is afraid of the total constitution? Constitutional rights as principles and the constitutionalization of private law. – *German Law Journal* 2006 (7)/4, p. 342.



terms or thought of the code as the authoritative embodiment of legal rationality, were replaced by ideas that private law, too, was subject to political choice. Correspondingly, the regulatory state, featuring a ‘motorized legislator’ and an increasingly powerful executive branch, flexibly responding to whatever the crisis of the moment happens to be, was in full swing. Governments had already enacted competition laws prohibiting cartels and trusts, laws limiting freedom of contract to legislatively determine minimum wages and maximum hours, and more generally legislatively shape the employer–employee relationship. More radical proposals concerning the transformation of the economy were on the table politically. All this occurs in the context of a severe economic crisis and heated ideological disagreement about the basic terms of social cooperation.

Since the national legislators have intervened into private law whenever the perceived need arose, it seems only natural that the EU-legislators have done likewise, such as with regard to the maximum harmonisation of unfair commercial practices.<sup>\*41</sup> Its ramifications for private law theory (and practice)—the invalidation of scores of contractual provisions—can hardly be underestimated, although the directive is theoretically ‘without prejudice to private law’.<sup>\*42</sup>

## 4.2. The private (law) is political

Likewise, the blurring of the distinction between public and private law<sup>\*43</sup> by the European approach along the boundaries of policy fields rather than on the basis of sacrosanct doctrinal partitioning is not an EU novelty, the regulation of labour relations being a prominent example in all Member States. It would, therefore, be unfair to burden the EU with ‘all the sins of Israel’, as the tendencies were already present in the Member States’ departure from coherent codification.

But the aggregate weight of the EU initiatives that we have discussed (*acquis*, anti-discrimination directives, and the draft civil-code frame of reference) have nonetheless made a serious impact and have lent further speed and credibility to trends already present in the Member States. The process of silent constitutionalisation of private law through the elevation of certain principles and certain rights will doubtless be instrumentalised to shape society and policy even further in a certain social image.

It is important to understand how radically the meaning and definition of concepts such as rule of law, private contract, and subjectivity are changing as a result of the increasing importance attached to the material aspect of fundamental rights. This has upset the traditional balance in constitutionalism between the fundamental rights of the individual and the legality of democratically enacted civil codes. What we are increasingly witnessing today is a *Hyper-Rechtsstaat* in which the democratic legal activity of the Member States is increasingly made subordinate to a ‘thick’ type of (international) legitimacy based on fundamental rights, leaving only very limited possibilities for changing the structure and outcome of policies.<sup>\*44</sup>

The impact of the ruling in the *Metock* case<sup>\*45</sup> on the Member States’ immigration policies regarding nationals of non-member countries who are family members of European Union citizens is a fine illustration of this phenomenon.

As *acquis* policies cut across contract, property, and fundamental-rights domains, a new ‘architecture’ is warranted.

If it is to avoid total deadlock or chaos, this new architecture must address the relationship between fundamental rights and private law, a new division of competencies between the European Union and its member states, clear hierarchy of sources (including elucidation of overlapping rights), the emergence of the regulatory function of private law, and loyal implementation of the subsidiarity principle.

<sup>41</sup> E.g., Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Directives 84/450/EEC, 97/7/EC, 98/27/EC and 2002/65/EC and Regulation (EC) No. 2006/2004 (Unfair Commercial Practices Directive).

<sup>42</sup> Article 3.2. stipulates: ‘This Directive is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract’.

<sup>43</sup> M. Freedland, J.-B. Auby. *The Public Law – Private Law Divide*. Oxford 2006.

<sup>44</sup> R. Bellamy. *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy*. Cambridge 2007; R. Hirschl. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Cambridge 2004; P. Praet. Politisierung des Rechts oder Verrechtlichung der Politik – Diskurs der Grundrechte. – *Rechtstheorie* 2007 (38)/2–3, pp. 367–378.

<sup>45</sup> Case 127/08, *Metock and Others*. – OJ C 236 of 13.9.2008, p. 4.

From a doctrinal perspective, this ambitious project is long overdue. Whereas the EU only cites the internal market as rationale for its initiatives, doctrine has embraced the project for the sake of the lost unity and rationality of multilevel civil law.

However, if one judges by the mere 27 (!) responses from practitioners to the European Commission's Communication on European Contract Law<sup>\*46</sup>, the legal 'user community' did not particularly long for a grand initiative, whilst the stakeholders had their own agenda.<sup>\*47</sup>

According to Schepel, 'the European Federation of Small and Medium-sized Enterprises, UAMPME, made it clear that the divergence in contract law did not constitute a significant problem for cross-border transactions'<sup>\*48</sup>. Conventional wisdom, moreover, suggests that SME actors are actually (rationally) ignorant of the legal framework of their transactions.

### 4.3. An app, an app, my code for an app!

Given national resentment, the non-empirical rationale for the harmonisation<sup>\*49</sup>, and its thoroughly political nature, one can hardly expect the future European civil code of the 'first non-imperial Empire'<sup>\*50</sup> to become a perennial monument.

From a Hegelian understanding of history, this need not worry us. After all, the (homologations of) customs in the *Ancien Régime* were the thesis against which the codification movement reacted. Inevitably, over time these codifications have, in turn, been amended or changed by a myriad separate acts and treaties, thereby thoroughly crushing the code's aspirations of unity, clarity, and completeness.

Given that the European Union is foremost a political-economic endeavour, the temptation will always be there to amend the future code for political purposes (as has been the case for national legislators with respect to tenancy law, consumer protection, etc.).<sup>\*51</sup> Over time, the new code will itself become unrecognisable to its godfathers in the study and *acquis* groups.

This, however, need not be a problem for the postmodern practitioner, who will just as gladly use a new 'app' related to the European civil code as he does any application on his smartphone, without worrying about the underlying structure. Legal practitioners are perfectly capable of switching from one environment to another (say, from rules for general sale via consumer sale to international sale and onward) without worrying about the architecture and unity of the underlying 'operating system' or principles.

Just as codification was driven by a desire for 'user-friendliness', for having all of the relevant text in the same, portable document, the post-codification era can easily forgo this requirement by means of search engines, selection of personal preferences, and add-on applications. In a manner of speaking, the European civil code will be an 'iCode'<sup>\*52</sup>, or will not be.<sup>\*53</sup>

<sup>46</sup> [http://ec.europa.eu/consumers/cons\\_int/safe\\_shop/fair\\_bus\\_pract/cont\\_law/comments/summaries/sum\\_en.pdf](http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/comments/summaries/sum_en.pdf).

<sup>47</sup> Not surprisingly, the Belgian Ministry of Finance reacted in its customary altruistic manner by suggesting that 'contract law harmonisation would allow the uniform classification of contracts for tax purposes and thereby avoid distortions of competition in the internal market caused by the application of different tax regimes'. *Ibid.*, p. 5.

<sup>48</sup> H. Schepel. Professorenrecht? The field of European private law. – P.A.J. den Berg (ed.). *Lawyer's Circles—Lawyers and European Legal Integration*. Amsterdam: Elsevier Reed 2004, pp. 115–124. The derogatory term 'Professorenrecht' obviously brings to mind a slogan directed against the Frankfurt National Convention of 1848: 'Drie mal Hundert Professoren, Vaterland du bist verloren', meaning 'Three times a hundred professors—Fatherland you are doomed'. Less known is the only marginally better first verse of the piece that gave rise to the slogan, 'Drie mal Hundert Advokaten, Vaterland du bist verraten' ('Three times a hundred attorneys—Fatherland, you have been betrayed').

<sup>49</sup> In 2011, the total of extra-EU imports and exports was €3.26 trillion, in contrast to €2.80 trillion for intra-EU trade. Given this globalisation trend, the European Civil Code is a clear case of 'too little, too late'. The roaring success of instruments such as the UN Convention on International Sale of Goods (CISG) or Incoterms illustrates the viability of international instruments for a global economy.

<sup>50</sup> J.M. Barroso in an interview on 10 July 2007. Available at <http://euobserver.com/institutional/24458>.

<sup>51</sup> For a specific application of these dialectics, see G. Teubner. Legal irritants: Good faith in British law or how unifying law ends up in new differences. – *Modern Law Review* 1998 (61), pp. 11–32.

<sup>52</sup> Pun intended. Incidentally, the 'tablet' had already been introduced into legal history by Moses (Exodus 34:4).

<sup>53</sup> One can only be amazed that no 'mobile tool' for finding the applicable legislation in a certain situation has been written yet, whereas exam questions typically challenge the student in this fashion by throwing in plenty of variables (parties with different nationalities and multiple legal qualities) that a computer can easily sort out. A user 'app' for the 4,795 pages of the DCFR would be welcomed too.