

1. Introduction

Fabrizio Cafaggi and Horatia Muir-Watt

1. FRAMING THE QUESTIONS

The current debate on the desirability and modes of formation of European Private Law (hereinafter ‘EPL’) is engaging a wide number of scholars and institutions. Current work concerns the search for a common core of EPL, the rationalisation of the *acquis communautaire*, the design of a European Civil Code, the advantages and disadvantages of codification of private law or of single subject matters.¹ These ongoing projects raise at least two related questions concerning the challenges to Europeanisation of private law: first, what is the, often implicit, definition of private law underlying the debate about the creation of EPL? Second, does the process of the creation of EPL require a particular type of governance structure?

Private law definition – Private law operates through public legislation as well as private law-making. The former is ever more the combination of hard and soft law while the latter translates into codes of conduct, guidelines, principles and private regulations. European private law, marked by its regulatory function, encompasses both mandatory and default rules.² Both in relation to legislation and adjudication the potential strategic differentiation between the two sets of rules has not yet been fully analysed.³ Can we separate private law legislation

¹ See Grundmann S. and M. Schauer (2006), *The architecture of European codes and contract law*, The Hague: Kluwer; Hesselink M. (2006), ‘Introduction’, in Hesselink, M. (ed.), *The politics of a European civil code*, The Hague: Kluwer, p. 3; and also Research Group on the Existing EC Private Law (Acquis Group) (2007), *Contract I – Pre-contractual Obligations, Conclusion of Contract, Unfair Terms*, Munchen: European Law publisher.

² Hesselink, M. (2005), ‘Non-mandatory rules in European contract law’, *European Contract Law Review*, 1 (44); Storme, M. (2006), ‘Freedom of Contract: Mandatory and non-mandatory rules in European Contract law’, *Justice International*, **34**.

³ But see in relation to contract law Kerber, W. and S. Grundmann (2006), ‘An optional European contract law code: advantages and disadvantages’, *European Journal of law and economics*, **21** 215–36 and earlier F. Cafaggi (2003), ‘Introduzione’, in Cafaggi F. (ed.), *Quale armonizzazione per il diritto europeo dei contratti?*, Padova: Cedam.

by distinguishing between regulatory and facilitative, and reach different conclusions about their degree of Europeanization? Should we use the same theoretical apparatus to decide about desirability of mandatory and default rules? Or about the optimal allocation of vertical competences in relation to mandatory and default? What role should private international law play in relation to either? What are the costs of differentiating between the strategy of mandatory and default rules? These questions are crucial to the definition of a governance system.

Comparative legal analysis suggests that even acknowledging the differences between and within legal families, workable definitions of private law at national level have been reached.⁴ This definition, however, often presupposes a clear distinction between public and private law and between State and market.⁵ However, these distinctions are framed differently at the European level, assuming that they play a relevant role at all.⁶ The competence system of Europe is framed according to policy fields and not to the traditional partitioning of western legal traditions in private law, making it extremely difficult to employ conventional taxonomies.

New challenges to private law Europeanization by the governance debate –

At least two different phenomena have arisen which question this definition even at national level. First, the emergence of the regulatory function of private law and, second, the increasing contribution of public and private regulators (such as independent authorities, administrative agencies, private for profit and non profit organizations) to the production of legal norms concerning private law.⁷ They relate to contracts, property and torts, but they also affect fundamental rights.

By regulatory functions of private law⁸ we mean the ability of private law instruments, in particular contract, torts and property to address market failures. This is the result of the decline of the regulatory state and the emergence

⁴ See Reimman, M. and R. Zimmerman (2006), *The Oxford Handbook of Comparative Law*, Oxford: Oxford University Press.

⁵ For a critical examination of this divide see recently Freedland M. and J. Auby, *The public law/private law divide*, Portland: Hart, 2006.

⁶ On the distinction between private and public law at EU level see J. Ziller (2006), ‘The legitimacy of the codification of contract law in view of the allocation of competences between the European Union and its Member States’, in Hasselink, M.J. (ed.), *The politics of a European Civil Code*, Amsterdam: Kluwer, p. 89.

⁷ See the contributions by Collins and Scott in this volume.

⁸ Under certain circumstances, ‘regulation’ may be understood in a broader sense to describe any system of rules intended to govern the behaviour of its subjects and hereby encompass law as one type of regulation along with other social regulation such as custom, convention and organized bureaucracies. See Collins H. (1999), *Regulating contracts*, Oxford: Oxford University Press, p. 7.

of new regulatory modes.⁹ Regulatory functions may be performed by both mandatory and default rules. Such control of competition distortions in the market by States through a set of techniques is meant to protect participants in markets, in particular their freedom of choice, and to guard against undesirable external effects of markets. While we do not believe that addressing market failure is necessarily the dominant, let alone exclusive, function of private law, given the importance of market design and distributive factors, in the following analysis we focus on the correlation between the regulatory function of private law and the emerging need for a governance design.

The second evolutionary trend concerns the institutional framework of EPL as a multilevel system.¹⁰ In the field of private law there is a growing importance of public and private regulators, not only in their enforcement capacity but also in their rule-making functions.¹¹ Responsiveness of Member States (MS) concerning implementation is often ensured by multiple institutions whose coordination is mainly achieved by national rules which usually differ, thereby increasing the level of differentiation.

The expansion of the National Regulatory Authority (NRA) model, both in consumer protection law and in the individually regulated sector, has redefined the traditional institutional balance between legislators, judges and private parties.¹² The traditional *ex ante* (legislation) *ex post* (adjudication) equilibrium has been thus modified.

A complementary factor is the production of rules by private organisations in different capacities.¹³ This is also part of a multilevel system which operates through national and European entities. It occurs through the drafting of rulebooks, principles and guidelines concerning the activities of their members and their relationships with third parties. Examples range from Stock exchanges to professional orders, from standard setting bodies to trade associations. But it also operates through forms analogous to mutual recognition. These organisations have contributed to European legal integration to a far greater extent than it is currently recognised, particularly in the field of private law not only in their capacity as rule-makers but also as monitors and

⁹ See Black J., M. Lodge and M. Thatcher (2005), *Regulatory innovation*, Northampton, MA: Edward Elgar.

¹⁰ For an overview see Cafaggi, F. (ed.) (2006), *The institutional framework of European private law*, Oxford: Oxford University Press.

¹¹ For an overview see Cafaggi, F., (ed.) (2006), *Reframing self-regulation in European private law*, Alphen aan den Rijn: Kluwer Law International. In this volume see Tony Prosser's contribution p. 1235.

¹² See Braun, D. and F. Gilardi (eds) (2006), *Delegation in contemporary democracies*, London: Routledge/ECPR.

¹³ See Joerges, C. I.-J. Sand and G. Teubner (eds) (2004), *Transnational governance and constitutionalism*, Oxford: Hart.

enforcers.¹⁴ Such a phenomenon, recently having grown mainly in the form of co-regulation and delegated self-regulation, should warn against the total harmonization strategy. By internalizing private law making into the general harmonization strategy, different conclusions may be reached about the potential combination between European and national law-making in the field of private law.

The two outlined phenomena cast doubts on the traditional modes of governance of private law defined at the beginning of the XIX century and indicate that new modes of governance have developed or that old modes of governance (self-regulation) have gained new momentum and deserve recognition. They affect the core process of law making and the accountability systems required by the rule of law.

A third, additional, element is the growing interplay between competition law and EPL. The increasing importance of competition law affects the allocation of property rights, the structure of contractual relationships and the evolution of European principles of civil liability.¹⁵ It has strong implications for governance if we consider both rule-making and enforcement. In particular the promotion of private enforcement reallocates the power between regulators and judges in competition law and attributes to the judiciary an important policing function. The increasing importance of regulators in EPL and the expansion of private enforcement in competition law reduces the distance between the two fields.

A specific set of questions is related to the enlargement of EU and its influence on the governance of EPL.¹⁶ In the new Member States accession has coincided with market creation. Competition, consumer law and, to a lesser extent, general private law have been redefined to create a market economy. In the implementation of the Acquis the differences between policies aimed at market creation and policies aimed at market integration have not been clearly identified.

The accession process was based on a more hierarchical dimension concerning the relationship between the European community and new

¹⁴ See Cafaggi, F. (2007), 'Self-regulation in European contract law', *European Journal of legal studies*, I, available at www.ejls.eu.

¹⁵ On these questions see Reich, N. (2007), 'Horizontal liability in EC law: Hybridization of remedies for compensation in case of breaches of EC rights', *Common Market Law Review*, 44, (3), 705–42.

¹⁶ We want to explore the influence of enlargement on general policies concerning EPL, namely how the specificities of new Member States should influence institutional choices such as what to harmonize, how to harmonize, how the different institutional players, legislators, regulators and judges should be involved. More in general we ask whether an intermediate way between full and unqualified integration and no integration is desirable.

Member States.¹⁷ Conditionality permitted the imposition of institutional conditions associated with the transposition of the Acquis.¹⁸ Theoretically the institutional choices should have been left open, in practice the relationship between the transposition objectives and specific institutional frameworks soon became apparent. The focus was mainly on the transformation of the state and its institutions, while little attention was paid to the institutional role of private actors. New Member States have had specific patterns concerning the transformation of governance, partly driven by the European Community partly by their relationship with other trading partners, particularly the US. Thus, there are at least three different sources of institutional patterns that have crossed in CEECs during the enlargement: (1) a general private law model, designed around classical codifications, (2) a regulatory approach coming from the acquis, (3) a set of institutions and practices (i.e. twinning) associated to the institution building process, based on cooperation with single countries or international institutions.¹⁹ Only after accession the debate concerning new modes of governance has involved more actively the new Member States. Today the specificity that still characterizes in various ways these countries suggests that different arrangements may be desirable to create EPL.

In this context the new modes of governance have arisen.²⁰ They can operate both as substitutes for or complements to old modes.

The debate on governance consolidated with the White Paper, has then been enriched by the emergence and rationalisation of new modes of governance but also, and perhaps not entirely consistently, with the shift from governance to better law making and better regulation which has taken place more recently.²¹

¹⁷ See the criteria defined at the European Council in Copenhagen in June 1993 (see the Presidency Conclusions available at http://europe.eu/european_council/conclusions/index-en.htm), and the White Paper on 'Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union', COM(95) 163, May 1995 available at http://www.europa.eu/documents/comm/white_papers/index_en.htm

¹⁸ See the above mentioned White paper.

¹⁹ See Bakadjeva-Engelbrekt A. (2006), 'Grey zones, legitimacy concerns and boomerang effects: On the implications of extending the Acquis to the countries of Central and Eastern Europe', in Wahl N. and P. Kramer (eds), *Swedish yearbook of European law*, Oxford: Hart, 1–36.

²⁰ For a general introduction to the relationships between new modes of governance and law, see de Burca, G. and J. Scott (2006), 'Introduction: New governance, law and constitutionalism', in de Burca, G. and J. Scott, *Law and new governance in the EU and the US*, Oxford: Hart.

²¹ See the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *A strategic review of better regulation in the European Union*, Com (2006) 689; and the Communication from the Commission, *Implementing the Community*

New modes of governance are generally contrasted with hierarchical, rigid, top-down old modes.²² They emphasize promotion of diversity, provisionality and revisability and policy learning.²³

New modes of governance can expand the patterns of Europeanization of private law and improve some of the drawbacks associated with traditional positive and negative integration techniques. However, caution is needed given the limited scope of these instruments, and their wide heterogeneity, mainly driven by their sector specificity. Recent scholarly contributions suggest that common denominators can be found,²⁴ though the extent to which the common core of these new modes of governance can contribute to more effective legal integration of EPL is still to be seen.²⁵ A crucial question is the relationship between new modes of governance and private law, which has so far been under-investigated.

The research project which stimulated this book aims at combining different lines of research which have so far moved along parallel pathways: harmonisation of European private law, old and new modes of governance and better regulation.

Lisbon programme: *A strategy for the simplification of the regulatory environment*, Com (2005), 533. See also, Weatherill, S. (2007), *Better regulation*, Oxford: Hart.

²² When analyzed in relation to judicial governance, traditionally decentralized, the relevant distinguishing features may differ. For an analysis of the relation between new modes of governance and judicial governance see Cafaggi's contribution in this book p. 289.

²³ de Burca, G. and J. Scott, 'Introduction', in de Burca and Scott (2006), state: 'New governance processes generally encourage or involve the participation of affected actors (stakeholders) rather than merely representative actors, and emphasise transparency (openness as a means to information-sharing and learning), as well as ongoing evaluation and review. Rather than operating through a hierarchical structure of governmental authority, the 'centre' (of a network, a regime, or other governance arrangement) may be charged with facilitating the emergence of the governance infrastructure, and with ensuring coordination or exchange as between constituent parts', p. 3.

²⁴ Scott J. and D. Trubeck (2002), 'Mind the gap: Law and new approaches to governance in the EU', *European Law Journal*, **8**, 1–18; Zeitlin (2005), de Burca and Scott (2006), Sabel, C. and J. Zeitlin (2007), 'Learning from Difference: The New Architecture of Experimentalist Governance in the European Union', forthcoming in *European Law Journal*.

²⁵ Different relationships between law and new modes of governance emerge in specific fields showing that at times they operate as alternatives, new modes substituting old modes and at times as complements. Three hypotheses have been presented concerning hybridity between law and new modes of governance: Fundamental/baseline, instrumental/developmental hybridity, default hybridity. For a detailed analysis, see de Burca and Scott, 'Introduction' and Sabel C. and W.H. Simon, 'Epilogue: Accountability without sovereignty', both in De Burca and Scott (2006).

2. THE NEED FOR GOVERNANCE IN EPL AND THE POTENTIAL ROLE OF NEW MODES OF GOVERNANCE

The need for governance structures – The creation of a European private legal system has been, and will be, based on a complex multilevel structure where the different legal systems of Member States will coexist with a (uniform) European system of private law and with transversal inter-regulations.²⁶ The intellectual diagram of a hierarchy of norms has turned out to be blatantly inadequate to reflect this complexity. Such a structure implies the necessity of a higher level of vertical and horizontal coordination among different layers of the involved legal systems. However, differences may have to be governed, otherwise there is a risk that the goal of harmonisation will be seriously undermined. Furthermore, the development of the European legal system does not occur in a vacuum but it is stimulated or hindered by the globalisation of legal rules, particularly strong in the realm of private law. Institutional and economic factors that operate at the transnational level influence the modes and the content of harmonisation. The relationship between world trade rules, *lex mercatoria* and international conventions are only a few examples. The interplay between these phenomena and the activity of European harmonisation also requires strong coordination. Coordination cannot be limited to law-making, leaving to the judiciary the task of verifying the correct implementation of European law in MS and the consistency between national administrative and judicial interpretation and European law. The physiological development of differences, correlated to existing legal and socio-economic cultures of the relevant actors, will have to be governed by a more complex mechanism than that employed in the last two centuries by MS at national level. Therefore, even if we acknowledge different definitions of EPL for the purpose of determining the necessity or desirability of harmonisation, the question of governance has to be addressed.

The emergence of new modes of governance should contribute to the re-definition of some important institutional choices concerning EPL and shed light on some loops in which economics of federalism and principal-agency theories have been trapped. It should allow for the overcoming of the binary allocation scheme of legislative competences between the EU and the Member States. New modes of governance have emerged partly as a response to competence deficits but partly, and perhaps more interestingly, to address the

²⁶ See on the counter-intuitive notion of inter-regulation between sectorial regulations, Frison-Roche, M.-A., 'L'hypothèse de l'inter-regulation', in M.-A. Frison-Roche (ed.) (2005), *Les risques de régulations. Thèmes et commentaires*, Presses de Sciences-Po, Paris: Dalloz.

imperfect knowledge of both public and private law makers.²⁷ If the law maker is not considered an *ex ante*, perfectly informed agent and the scope of the law-making process is conceived as a tool to acquire information, then the binary logic of allocating the *ex ante*, well-defined power to each level loses much of its attraction. The goal of new modes of governance is to maximize cooperation among levels and actors in order to acquire information at the lowest costs about preferences and institutions to make the most effective rules. Fuzziness appears less dangerous or even advantageous. Law making becomes an iterative process between rule-givers and rule-takers. The very distinction between rule-makers and rule-takers blurs in some cases where, as for private law, the end-users have often the power to create their own rules.

New modes of governance are likely to influence also the implementation process. Implementation of European private law, predominantly consumer law, has taken different paths. Old Member States have moved from a piecemeal transposition to a more comprehensive strategy. New Member States have transposed the Acquis by enacting comprehensive Consumer Protection Acts, generally outside the Civil Code.²⁸ This choice marks a difference with many old MS, where the implementation took place initially in a fragmented way, later to be re-organised through the enactment of Consumer Codes, or the integration of the Consumer Acquis in the Civil Codes.

The focus at EU level is still on legislative implementation while a comprehensive strategy, including regulation and adjudication, is missing. Effective implementation requires coordination between legislative transposition and Courts and regulators' interpretation of the enacted legislation. New modes of governance may provide new coordination mechanisms across Member States and between them and the EU to improve the process of implementation and reduce inadequacies.²⁹ The relationship between old and new modes of governance is far from being defined and its interplay should give rise to a new architecture. In particular the role of the judiciary will be affected by the introduction of new modes of governance in EPL.³⁰

²⁷ See C. Sabel and Simon, W., 'Epilogue', in de Burca and Scott (2006), p. 398 who then infer normative implications: 'It is correct, then, that new governance repudiates the rule of law in its principal-agent variation, mostly fundamentally by disrespecting the distinction between enforcement and enactment. On the other hand, it suggests an alternative discipline that could be seen as a reinterpretation of the basic rule of law idea of accountability. The alternative, instead of looking backward to a prior enactment and upward toward a central sovereign, looks forward and sideways: forward to the ongoing efforts at implementation, sideways to the efforts and views of peer institutions.'

²⁸ See in this volume the contribution of Bakardjeva-Engelbrecht, p. 98.

²⁹ On these matters see Cafaggi in this volume p. 289.

³⁰ See in relation to fundamental rights C. Sabel and W. Simon, 'Epilogue', in

Governance techniques and regulatory legitimacy – The EU must craft new governance techniques that prove effective, efficient, and most important, democratically accountable in the context of multi-level regulation and considerable diversity in national legal systems. The traditional methods used by nation states in fixing those settlements of fundamental values in private law through the enactment of Codes and respect for the evolution of judicial precedents must be adapted, or even completely revised, in order to develop a workable union of shared values in the multi-level governance structures of the EU. The governance system of the multi-level pluralistic EU requires new methods for the construction of this union of shared fundamental values (which includes respect for cultural diversity) as represented in the law of contract and the remainder of private law.

Context of harmonisation debate and narrow approach – Acting within its sphere of competence, the Commission's emphasis in its *Action Plan* and in other proposals for harmonisation of EPL is to devise initiatives that will promote a competitive, free market within Europe.³¹

Much recent academic attention has focused on the cultural³² and economic

de Burca and Scott (2006), p. 407 pointing to non-court-centred forms of judicial review. In relation to the new European Agency of fundamental rights they claim: 'The intent of the agency, and of other such benchmarking institutions is to establish a kind of non-court-centric judicial review, horizontalising determination of fundamental values by engaging elements of civil society in their interpretation (via the regular survey of changing practice), and so extending the range of justiciable claims to protection in ways that courts can not.'

³¹ See the *Action Plan* (COM (2003) 68 final): problems of differing or uncertain interpretation of Directives could be resolved by the construction of a *common frame of reference*. This proposed document would provide settled meanings for concepts and principles used in European Contract law. For example, the common frame of reference might define what is meant by a 'contract', or 'breach of contract', or 'compensation for damage'. These concepts and definitions could then be used both in the creation of new Directives and for the purpose of ensuring the consistent interpretation of existing Directives. The *Way Forward* (COM (2004) 651 final) then outlines how the common frame of reference is to be developed in order to improve the coherence of the *acquis*, particularly in respect of consumer protection, and continues reflection on an 'optional instrument' of European contract law. See further the Commission's first Annual progress report (COM (2005) 456 final) and the European Parliament Resolution on European contract law and the revision of the *acquis*: the way forward (2005/2002(INI)). Notice that the European Parliament while stressing the political nature of the choices concerning codifications claims that 'the European contract law initiative should be seen primarily as an exercise in better law making at EU level'.

³² See Legrand, P. (1996), 'European legal systems are not converging', *International & Comparative Law Quarterly* 45, 52–82; Legrand, P. (1997), 'Against a European civil code', *Modern Law Review* 60, 44–62; and for the debate generally see

values of diversity,³³ and the need for more imaginative tools of multi-level governance than can be provided by a nineteenth century model of unified codification.³⁴ The assumption that ‘merely technical’ rules of contract law,³⁵ can readily be approximated according to the sort of ‘common-denominator’ approach contained in the Commission’s idea of a ‘common frame of reference’, without adhering to an implicit regulatory scheme, is challenged in the name of both comparative theory³⁶ and contract law.³⁷ The narrow internal market focus adopted by the Commission, which might be accounted for on the basis of institutional boundaries, excludes consideration of those other dimensions addressed by national private law systems involving concerns for fairness, solidarity, equality, and other basic values which contribute to social cohesion. Arguments from political science³⁸ and the economics of federalism³⁹ fuel debate as to the desirability of decentralised decision-making, while increasing awareness of the symbolic dimensions of codification of private

the various contributions in Van Hoecke, M. and F. Ost (ed.) (2000), *The harmonisation of European private law*, Oxford: Hart.

³³ See Grundmann, S. (2001), ‘The structure of European contract law’, *European Review of Private Law*, **9**, 505–28; Van den Bergh R. (1996), ‘Economic Criteria for Applying the Subsidiarity Principle in the European Community: The Case of Competition Policy’, *International Revue of Law & Economics*, **16**, 363–83; Kerber, W. (2000), ‘The deregulation of globalizing markets: Interjurisdictional competition within the EU’, *Fordham International Law Journal*, **23**, 217–49; and Snell, J. (2002), *Goods and services in EC law, a study of the relationship between the freedoms*, Oxford: Oxford University Press.

³⁴ See The Study Group on Social Justice in European Contract Law, (2004) ‘Social Justice in European Contract Law: a Manifesto’, *European Law Journal*, **10** (6), 653–74; Grundmann and Kerber (2006).

³⁵ Kennedy, D. (2002), ‘The Political Stakes in “Merely Technical” Issues of Contract Law’, *European Review of Private Law*, **10**, 7–28.

³⁶ On the enterprise of unification as revealing complexity, see G. Samuel (2002), ‘English private law in the context of codes’, in Van Hoecke, M. and F. Ost, *The harmonisation of European private law*, Oxford: Hart..

³⁷ Collins, H. (2002), ‘Transaction costs and subsidiarity in European contract law’, in Grundmann, S. and J. Stuyck (eds), *An academic green paper on European contract law*, The Hague: Kluwer, p. 269.

³⁸ Joerges, C., ‘On the legitimacy of Europeanising private law: Considerations on a law of justifi(cation) justum facere for the EU multi-level system’, in A. Hartkamp et al. (eds), *Towards a European civil code*, The Hague: Kluwer, 2004.

³⁹ For an enlightening account of the contribution of the economic model of fiscal federalism to legal theory, taking account of the constraints of the real world, see Bratton, W. and J. McCahery (1997), ‘The new economics of jurisdictional competition: devolutionary federalism in a second best world’, *Georgetown Law Journal* **86**, 201–78. On the economics of federalism see Inman, R. T. and D. L. Rubinfeld (1997), ‘Rethinking federalism’, *Journal of Economic Perspectives*, **11**, 43–64, Kerber (2003).

law as the constitution of civil society⁴⁰ counsels caution both as to process and content of any future common rules for Europe.⁴¹ Although it is unquestionably interesting to speculate on the existence of a common core of EPL,⁴² it is at least as politically premature and economically unsound to embark upon a unification enterprise without deep and prior reflection on these points.⁴³ *Inter alia*, the issue of the transformation of the fictions and scope of private law is curiously absent, or rather unacknowledged, in current institutional initiatives.

The constitutionalisation of EPL – The unification of contract law in Europe poses profound questions concerning the values which should underpin the market order and the institutional vehicles through which they have to be integrated. Just as the nineteenth century civil codes and the common law contained a scheme of basic values about the appropriate standards for governing economic and social relations between citizens, so too a European law of contract will enact a scheme of social justice. A unified law will similarly have to strike a balance between, on the one hand, the weight attached to individual private autonomy as expressed in the idea of freedom of contract, and on the other hand, principles which respect other equally important demands for social solidarity, which prohibit persons from taking advantage of superior market power or from ignoring the claims of justified reliance upon others. In striking this balance, any system of contract law expresses a set of values,

⁴⁰ For a very critical perspective on the Commission's initiative, perceived as dismantling civil society, by a French civil lawyer, see Lequette, Y. (2003), 'Vers un Code Civil Européen?', *Pouvoirs* 107, 97. It is no coincidence that much reflection on the contribution of codes to cultural identity has appeared during the year of the bicentenary of the French Civil Code. See too, from a different ideological perspective Collins (2002).

⁴¹ Is the legislative process democratic? What are the values to be embodied in the new codified rules? See Study Group on Social Justice in European Contract Law (2004).

⁴² As does the Trento project led by U. Mattei and M. Bussani, which claims not to unify but to explore (see the General Editors' Preface to the first published research using the Trento methodology, in Zimmermann, R. and S. Whittaker (2000), *Good faith in contract law*, Cambridge: Cambridge University Press).

⁴³ The Commission's various publications, including its appeal to public response, has betrayed little concern for the symbolic aspects of codification, focusing as it does on internal market objectives. This is no doubt dictated by the fact that Article 95 of the EC Treaty is the likely legal basis for any Community regulation (see Staudenmayer, D. (2002), 'The Commission communication on European contract Law and its follow-up', in *An Academic Green Paper on European contract law*, The Hague: Kluwer, p. 47, discussing the choice of the appropriate legal basis and its constraints for the Community legislator).

which strives to be coherent, and is regarded as fundamental to the political morality of each country. The creation of EPL fits into the broader evolution of Europe towards the construction of a political entity. Initiatives with respect to private law fit into the increasing emancipation of the EU from a limited focus on an internal market towards becoming a political entity with its own constitutional values, predominantly embedded in fundamental rights.⁴⁴ Moreover, it should be recognised that a regulated market may increasingly be expected to deliver the most essential needs of citizens ranging from water and power, to communications, and access to credit (which itself is often necessary for other goods such as shelter and higher education). It is therefore important to appreciate that the regulation of markets is not only significant for its contribution to material wealth, but also it helps to structure access to basic needs of citizens and supplies them with essential protection of their interests. It is wrong to suppose that there is a sharp separation between the public sphere of constitutional rights and the private sphere of market relations. National constitutional traditions and a relatively stabilised jurisprudence of ECJ reveal that private law has been largely constitutionalised, though perhaps in uneven ways.

Social justice – The rules of contract, property and tort law shape the distribution of wealth and power in modern societies. To the extent that nation states reduce their use of the direct re-distributive mechanisms of the welfare state, the distributive effects of the market become the determining force governing people's life chances. A modern statement of the principles of the private law of contract needs to recognise its increasingly pivotal role in establishing distributive fairness in society. It is of course expected that a free market regime will help to generate wealth, which will benefit most citizens of the EU. What is missing from this European regime for governing markets is, of course, a vision of distributive justice or fairness in contracts and other fields. As traditionally understood, the function of the European Community is to promote the creation of an internal competitive market, not to ensure that this market is corrected in the light of distributive aims.⁴⁵ Accordingly, the European Community would lack a clear general mandate to pursue a scheme of fairness or distributive justice in its regulation of trade. In practice, the

⁴⁴ See Maduro, M.P., 'European Constitutionalism and three models of social Europe', in M. Hesselink (ed.) (2006), *The politics of a European civil code*, The Hague: Kluwer Law International. For a comparative analysis see Oliver, D. and J. Fedtke (2007), *Human rights and the private sphere – A comparative study*, London: Routledge.

⁴⁵ Majone, G. (ed.) (1996), *Regulating Europe*, London; New York: Routledge, and Id. (2005), *Dilemmas of European policy integration: The ambiguities and pitfalls of integration by stealth*, Oxford: Oxford University Press.

Commission usually presents consumer protection measures not so much as laws designed to help weaker parties but as measures for market correction, that is to prevent distortions in competition. The elimination of distortions, such as the supply of misleading information, certainly contributes to consumer protection. However, is the goal of consumer protection, adequately served by measures designed to help the confident consumer make her purchases by providing accurate and timely information? Sources of inequality other than informational asymmetries between contracting parties tend to be excluded from consideration. Furthermore, there seems to be a growing, though naive and empirically doubtful, confidence in the belief that better information and cooling-off periods will prevent unfairness to consumers from occurring in practice. The market integration agenda is now so dominant in the field of consumer protection that it seems likely to warrant new European legislation that actually diminishes levels of consumer protection in some Member States. Recent European Court of Justice (ECJ) case law in the field of product liability moves in this direction.

Transformation of private law and governance – Against the described framework, the book focuses particularly on two questions:

First, the internal transformation of private law and its increasing regulatory function to be considered in governance design. We believe that even if one takes the most conventional perspective concerning the definition of private law, the traditional governance structure employed by national legal systems will not be adequate to manage European legal integration of private law. But if we take into consideration the internal transformation of private law and its increasing regulatory function in addition to the role of private law in regulated sectors, we witness several phenomena that require deeper consideration in the governance design:

- the system of sources in private law has changed. Legislators and individuals do not have the dominant role. Public and private regulators occupy a great deal of space. This change has to be translated into a European governance system able to coordinate new and old institutions. The current relationship between law-making and adjudication, and that between legislative power and judiciary, do not fully represent the relevant actors. Public and private regulators play a very relevant role. Despite the absence of consistent empirical study in this area, it is foreseeable that they may constitute powerful engines to promote or to prevent European harmonisation of private law.
- the creation of an EPL system is a process that could never be crystallized in a single comprehensive piece of legislation. The procedural

nature of Europeanisation might require a governance system capable of reflecting the structure of this process. Therefore, in connection with a newer regulatory definition of private law, the appropriate governance structure might change accordingly.

Second, the interplay between private and private international law. Within this framework it is important to identify the interplay between EPL and private international law. The role of private international law as a vehicle to ensure choice of rules for private parties might change quite considerably depending on the choices concerning private law rules,⁴⁶ in particular whether there is harmonisation.

3. REGULATION, GOVERNANCE AND THE CONFLICT OF LAWS

Whereas normative pluralism is emerging as a foundational value in the complex, multi-level structure that Europe represents, the conflict of laws appears as a convincing alternative to centralised decision-making or top-down unification in an integrated market (see Muir-Watt 2005). In this respect, it may even constitute a distinctive feature of European governance in the field of private law.⁴⁷ In order to fulfil this function, however, the private interest paradigm on which the conflict of laws traditionally rests in Continental legal theory must be abandoned. Once the regulatory dimension of the conflict of laws is acknowledged, its status as a tool of governance at the European level requires the clarification of its relationship in respect of mutual recognition.

4. CHOICE OF LAW AS A TOOL OF MULTI-LEVEL GOVERNANCE

At a global level, it is difficult at first glance to think of choice of law in terms of the governance of diversity, given the unorganised state of the prescriptive arena.⁴⁸ However, at the federal or Community level, choice of law emerges

⁴⁶ Certainly other functions of PIL would still remain regardless the frame of Private law rules. Main reference is to those PIL rules related to conflict solving issues.

⁴⁷ On the distinctiveness of the Europeanisation process in the field of substantive private law, see Joerges (2004).

⁴⁸ However, this may be an entirely outmoded perspective, in view of the development of what has recently come to be known as 'global administrative law' (Kingsbury, B., N. Krisch, R. Stewart and J. Wiener (2005), 'The Emergence of Global

as a flexible and creative tool of multi-level governance. As has been seen, its clearest advantage is maintaining regulatory diversity, while ensuring against prescriptive over-reaching or exportation of regulatory externalities. However, once this valuable political and economic function within internal market is recognised, the relationship of the conflict of laws with other tools of multi-level governance requires clarification. One of these tools is of course unification of substantive national laws of Member States. But if diversity is to be preserved and the conflict of laws to be used as a tool of multi-level governance, the only workable option is minimal harmonisation at Community level. Indeed, such harmonisation may be necessary as a complement to the action of conflict of laws in fighting against distortions of competition within the internal market, as the Posted Workers Directive, which combines both harmonisation and choice of law, amply illustrates.

Mutual recognition. But the most difficult or at least most controversial relationship between the conflict of laws and other tools of governance concerns mutual recognition. A doctrinal debate has been raging since the 1990s as to whether mutual recognition, in the form of the country of origin principle, absorbs the conflict of laws, making traditional choice of law rules redundant within the internal market. For instance, do the economic freedoms require that the liability of a cross-border service provider be governed exclusively by the law of the country of origin, or is there still room for the application, say, of the rules in force at the place of the harm, where the claimant will generally be habitually resident? Will the rules of the country of origin continue to govern the wages and social benefits of posted workers whose services are used during the performance of a crossborder service contract? A negative answer can now be deduced from various recent Community instruments, such as the 2006/123 Services Directive under which the conflict of laws relating to the civil liability of service providers is unaffected by mutual recognition (article 17–15), or the 1996/71 Posted Workers Directive, which expressly allows for the application of local rules governing the employment relationship during the period of posting.⁴⁹ However, given the debate which still

Administrative Law’, 68, *Law and Contemporary Problems*, 3–4). While the phenomenon it covers is difficult to capture exactly, it may well include principles governing the international relationships between administrative authorities, frequently within networks, including for example market regulatory authorities (Muir-Watt, H. (2006), ‘Global regulatory governance: an outsider’s perspective’, NYU Working Paper, November). This involves an extension of the scope of the conflict of laws to conflicts in public law and requires considerable exploration. At the very least, it may go to show that governance of the global arena may require borrowing from varied fields of learning.

⁴⁹

Indeed, this is precisely the economic justification for the conflict rule, as seen

surrounds the adoption of Rome II and the important role conceded to the law of the place of the harm, further clarification of the relationship between mutual recognition and the conflict of laws is in order. In this respect, it is important to properly understand the economics of mutual recognition and, once again, to reflect upon the rationale of the public/private divide for the purpose of the conflict of laws.

Regulatory competition and the double burden test. From an economic perspective, mutual recognition of legal regimes, which accompanies the free movement of goods and services, is designed to boost regulatory competition between Member States. It creates in effect a functional equivalent to mobility for economic actors, which are thereby empowered to express their preferences for a given set of competing national legal rules by choosing a product or service originating in any other Member State. The choice of a product or service which accedes to the market as shaped by a given set of national legal rules (for instance, a product manufactured according to certain quality standards) includes an implicit preference for such rules: freedom to choose between competing products or services is also the freedom to choose between competing legal regimes, which in turn creates and intensifies competition between regulators. Clearly, therefore, competition can only take place if the importing Member State is prevented from imposing say, its own, different, quality standards, on an imported product or service. The ‘double burden’ test devised by the Court of Justice when implementing the proportionality principle rests precisely upon such a prohibition, in the interests of regulatory competition.⁵⁰ It extends to internationally mandatory norms of the host state in the field of labour law in the course of a transborder performance of services,⁵¹ or in the field of company law, where firms incorporated in one Member State must be able to move freely throughout the Community in the exercise of their freedom of establishment, without being subjected to stricter rules (relating, say, to minimal capital requirements) in the country of secondary establishment.⁵²

above. However, it may not in fact provide effective protection either against regulatory dumping or against employer abuse of the individual worker, when employers in lower wage states require disgorging of any sums gained by their employees during posting, over and above the home state’s wage (Moreau, M.A. (2006), *Normes sociales, droit du travail et mondialisation, Confrontations et mutations*, Paris: Dalloz).

⁵⁰ See joined cases, C-267 and C-268/91 (*Keck et Mithouard*).

⁵¹ See the abundant case law concerning pre-Directive posting of workers in another Member State: C-113/89 *Rush Portuguesa*; C43/93, *Van der Elst*; C-369 and 379/96, *Arblade*; C-165/98, *Mazzoleni*.

⁵² This is the *Centros*, *Uberseering*, *Inspire Art*, *Sevic Systems* line of cases (C-212/97, 1999; C-208/00, 2002; C-167/01, 2003; C-441/03, 2005).

The design of mutual recognition. This does not necessarily mean, however, that the application of the law of the country of origin, which is clearly mandated under the double burden test in foregoing examples, leaves no room whatsoever either for the conflict of laws or more generally, for the application under other principles of the law of a Member State other than that of the country of origin. The first consideration is linked to the very design of mutual recognition and its underlying economics. Regulatory competition, which mutual recognition is designed to encourage, does not necessarily operate in the same way for different types of legal rules. If consumers do indeed vote with their purses for product quality rules (buying a more or less costly product means buying more or less stringent quality standards), which justifies the protection of the comparative advantage resulting from the application of the rules of the country of origin of the product, it is likely that they still vote with their feet for marketing rules (do I wish to live in an environment where billboard advertising, or Sunday trading, is allowed?⁵³), as do firms in search of more attractive environmental or labour standards. To the extent that diversity is acceptable in such cases, the comparative advantage to be preserved is clearly that of the host Member State.⁵⁴

Moreover, it may be that the design of regulatory competition under the mutual recognition principle does not cater for the specific interests or policies protected or promoted by the sets of rules which are traditionally the realm of private law (or at least are traditionally subject to the conflict of laws). The double burden test, devised by the ECJ, relates to rules of public or indeed administrative law governing market access, particularly those relating to prior professional qualifications or administrative authorisations (for the service provider), or quality rules (relating to goods). But tort law, which does not concern market access but regulates the standard of care due from various economic actors and the level of reparation expected by business partners, competitors and consumers, is designed to further policies whose frustration could only lead to a regulatory race to the bottom resulting in a general lowering of standards throughout the Community. This is indeed why the 'effects' or place-of-the-harm principle is perfectly sound as a general tool of governance in the field of multi-state torts.

⁵³ The 'Sunday Trading' cases went too far in subjecting marketing rules to mutual recognition: *Torfaen Borough Council*, C-145/88. On the 'saga', see Maduro, M.P. (2002), 'Harmony and dissonance in free movement', in Roth, W.H. and M. Andenas (eds) (2002), *Services and free movement in EC law*, Oxford: Oxford University Press, p. 51.

⁵⁴ Snell (2002).

The problem of cross-border services. That the limits to the scope of the principle of origin encountered within the very design of mutual recognition, and the correlative governance function which falls to the conflict of laws, are to a certain extent linked to the specific nature of the interests comprised within the various fields traditionally labelled as private law, can be demonstrated through a brief incursion into the field of cross-border services. As the difficulties raised by the *Alpine Investment* case show,⁵⁵ rules of contract law, which were designed in this case to shape the crossborder relationship between the financial service provider and consumer or private investor, retain little significance if they are allocated a purely territorial scope as are market access rules. Regulatory competition must be channelled either through party autonomy, or, if unlimited freedom to choose is considered undesirable for competing policy reasons (as in the case of consumer contracts, or under rules subject to article 7 of the Rome Convention) through freedom of establishment – i.e. allowing firms to vote with their feet by setting up in a more congenial legal environment.

Is there anything special about private law? Does this mean that there is something in the intrinsic nature of private law which excludes it from the bite of regulatory competition (and therefore from the scope of mutual recognition)? Anthony Ogus has put forward an explanatory framework applicable to the regulatory competition process in the field of private law.⁵⁶ According to this explanation, such competition affects only heterogeneous products (those which create winners and losers, the latter thereby gaining incentive to vote with their feet or exercise contractual freedom to choose another governing law). However, the increasing regulatory function of private law tends to cast doubt on the usefulness of the distinction between heterogeneous and homogeneous products. Ogus himself acknowledging the regulatory nature of tort law in this respect. It is therefore no doubt more productive to identify the types of policies of which various sets of rules are the vectors, and to relate them to the ways in which regulatory competition takes place for each of them in order to determine the adequate governing law in cross-border situations. This is in fact just another way of saying that the conflict of laws is a highly promising tool of governance of regulatory diversity within the Community, since it can give satisfactory expression to prescriptive pluralism while ensur-

⁵⁵ *Alpine Investments*, C-384/93 (1995). In this case, the ECJ does not make any reference to the existence of a double burden, and seems to imply that mutual recognition is designed to eliminate reverse discrimination. See too *Bosman*, C-415/93 (1995).

⁵⁶ Ogus, A. (1999), 'Competition between national legal systems: A contribution of economic Analysis to Comparative Law', *International and Comparative Law Quarterly*, **48**, 405–18.

ing that such diversity neither frustrates nor allows evasion of the multifarious sets of policy-driven rules which claim to govern the crossborder relationships between private actors.

5. THE STRUCTURE OF THE BOOK

The book is divided into four sections. The first is devoted to general issues relating to the governance of European law, with particular attention to the enlargement process; the second addresses, in a comparative perspective, the role of private organizations to legal integration; the third focuses specifically on the role of governance in EPL, addressing the role of private legislatures and regulators; the fourth and concluding part provides some proposals for institutional changes.

In the first section **Giuliano Amato** addresses the relationship between the multilevel system of European institutions and the governance of EPL. Multilevel system is a descriptive label with different legal meanings. The European Union presents a double identity, which makes it an hermaphrodite, encompassing both the features of an international organisation and those of a federal State. This makes it a very unique creature with its own specific legal instruments. Amato then identifies four clusters of legal instruments that characterize the multilevel system to which he associates different trust enhancing properties. These are European legislation, regulations and directives, mutual recognition, private international law, soft law, for example OMC. Amato then examines the process of Europeanization of private law. The strategy of codification is dismissed as being legally unfeasible and politically undesirable. Yet the opportunities provided by the multilevel system to harmonise EPL are far from being fully exploited. The constitutional dimension of private law is highlighted. In the framework of non-discrimination principles, where private law making does not face the same limitations as public legislation, civil law scholars can have a fair share to design the new constitutional order.

Michele Taruffo distinguishes between two sets of questions: 1) the harmonization of procedural rules concerning litigation between individuals and organisations belonging to different national systems, solved by the Brussels and Lugano conventions 2) harmonisation of procedural rules to be applied when substantive rules are harmonised. The focus of the contribution is on the latter. Taruffo claims that existing differences among Member States are wide, well beyond the traditional common-civil law divide, considering the variety of procedural systems adopted by new Member States. He reaches the conclusion that while unification of procedural rules, through a European procedural code is impossible, unnecessary and undesirable, a path towards a higher level of harmonization should be undertaken. He suggests that, given

the existence of general principles provided by the ECHR, harmonization should take place at an intermediate level by defining principles and rules that could represent the common core. In this framework the ALI/Unidroit principles could represent a good starting point, provided that a significant process of adaptation should occur. Taruffo concludes by pointing out the difficulties that this suggestion may encounter in national legal systems, cautioning about mechanical legal transplants in such a diversified legal environment.

Wolfgang Kerber provides an economic analysis of the main governance puzzles influencing EPL. He points out that the analysis concerning appropriate vertical allocation of competences and that related to market failures are intertwined at EU level. The methodological tool is constitutional economics but he also uses insights from welfare and neoinstitutional economics. The goals of the governance system encompass both responsiveness to citizens' preferences and the need to address market and government failures. He suggests that the choice between different strategies is comparative. Kerber illustrates the factors influencing the choice of the optimal degree of centralization and decentralization of legal competences. He lists seven groups of economic criteria. Five are related to the effects on welfare distribution while the sixth includes additional normative criteria. The seventh group concentrates on regulatory competition. Then Kerber suggests that different strategies may be undertaken in relation to the type of rules. Based on previous writings he claims that mandatory rules should combine minimum harmonisation and decentralization, information regulation should be centralized, while facilitative rules should be defined in an optional code which parties could select instead of national legal systems. In the final part of his contribution Kerber analyses the applicability of the 'conventional' analysis developed with respect to legislative competences to new modes of governance focusing on OMC. He concludes that the risk of OMC is to promote short term mutual learning but to prevent long-term institutional innovation.

The two following contributions concentrate on the new Member States and the issues they raise in relation to legal integration in EPL.

Antonina Bakardjieva Engelbrekt underlines that while enlargement has attracted academic attention, the focus has predominantly been on constitutional matters, leaving private law issues largely under-investigated. She focuses upon the influence of enlargement on consumer law governance in CEECs. She underlines that the modes of transposition of the Acquis have been influenced by the degree of certainty about the accession. MS with more certainty have taken more liberty to devise their own strategies and accommodate European legislation with national traditions, while countries like Bulgaria and Romania have been more zealous in following the Commission prescriptions. She describes the different governance models in the area of consumer protection underlining the centrality of Agencies, semi-independent

bodies under direct or indirect control of government actors; the relative weakness of consumer organisations, despite the central role they had in the White Paper on enlargement of 1995. She underlines also the lack of self-regulatory arrangements and private regulation in general. She subscribes to the view that consumer protection has improved in CEECs but many difficulties remain: the quality of legislation has been poor, also due to the time pressure of the *acquis* transposition. Regulation has not been sufficiently selective and often there is a multiplicity of instruments and actors to pursue similar goals. The regulatory model is predominantly traditional command and control with a low level of enforcement. Bakardjeva claims that the attempt to reintroduce XIX century classical codified private law in post communist countries has been clashing with the implementation of the consumer *acquis* marked by a different institutional approach. She suggests that the enlargement process has developed institutional partnerships, such as twinning that may have affected the institutional framework of new Member States. Their design often matches with the philosophy of the OMC and more widely of new modes of governance. She concludes that the specificity of enlargement may hide a broader process: the responses to institutional deficit needed in CEECs may provide some general suggestions to the European harmonization strategies in the field of consumer law and more generally in private law.

Katalin J. Cseres focuses on the relationship between competition law, European private law and new modes of governance in CEECs. She describes the process of transposition of the *Acquis* in the field of competition, pointing to the ‘*de facto* obligation’ on CEECs to apply EU competition with the ‘Europe Agreements’, after 1993. May 1 2004 constituted at the same time the date of accession and that of the entering into force of Regulation 2003/1 for modernisation. CEECs thus had to apply directly the new regime.

Cseres, reaching similar conclusions to Bakardjeva’s in the field of consumer law, underlines that the application of competition law has brought about more radical changes than those that occurred in the conventional private law fields. Although they were not obliged to do so, the new Member States adopted a convergent strategy, following the European model without major divergences. There were obvious advantages on both sides. For Member States building on an existing and relatively successful model could warrant higher probability of success and network externalities, and for the Commission lower monitoring costs and higher coordination. Such conformity however might not have been the most effective choice. The scope of competition law in CEECs might differ from the general set of goals defined by the Treaty and implemented by the jurisprudence of the Commission and the Court. In the new Member States, market creation comes before market integration and often distortions of competition may present different features. Furthermore Cseres suggests that, given the small size of most CEECs and the

transition from planned to market economy, competition law performs additional functions and needs stricter standards. But the major concern is enforcement. While the law in the book conforms with European standards, the real impact of Competition authorities and private judicial enforcement in CEECs is not as strong as expected. She concludes with three remarks concerning CEECs: (1) the process of harmonization requires local knowledge and mutual learning; (2) implementation requires much higher attention to enforcement, both public and private, investing financial and human resources; (3) party autonomy is still underdeveloped; private actors are not well-equipped to engage in rule-making and participating in collective monitoring; these weaknesses may reduce the potentiality of the regulatory function of European private law.

The second section of the book examines the role of both private and inter-governmental organisations in promoting legal integration. Two experiences are analysed, one international and the other American. The aim of the section is to show the importance that both intergovernmental and private, independent, non-governmental organisations can play for European legal integration. This issue has been under-investigated while anecdotal empirical evidence shows that ‘interested’ and independent private organisations contribute to an important degree to the creation of EPL. The following questions arise for the institutional design of EPL: which role should they play, where should they derive their legitimacy, how and to whom should they be accountable?

Hans Van Loon explores the role of the Hague Conference on private international law as a law-making organisation. The Conference has changed its identity over the past fifty years shifting from a European to a global organisation. This institutional modification has influenced its legislative output. In recent years there has been a growing interplay between legislation in the field of PIL at global and European level. Van Loon examines the role of globalisation in the developing trend of legislation concerning choice of law in different areas ranging from securities market to parental responsibilities, from Court judgements to non-contractual obligations in the case of traffic accidents and product liability. After underlining the strict correlation with European legislation he addresses the specificity of private international law in the European context. He analyses the link between private international law and the four freedoms, focusing particularly on the relationship between freedom of persons and choice of law. The functional correlation between the creation of internal market and the four freedoms may require specific rules and special governance arrangements but does not conflict with the goals pursued at the global level. Van Loon advocates a pluralistic methodology, legitimising the combined use of hard and soft law as showed by recent successful experiences of the Hague Conference.

Lance Liebman, current director of the American Law Institute, describes

the evolution of ALI and gives some suggestions for the creation of a similar organisation in Europe. The origins of ALI are strongly correlated to the dissatisfaction expressed by academics and practitioners about the state of common law at the turn of the XX century in the US. ALI was born in 1923. A non profit organisation composed of lawyers, judges and academics whose main goal was to restate the common law in order to ensure more consistency and a higher level of harmonisation. The activity of ALI has changed over time. After the first generation of Restatements which took place in the first 25 years, a second generation was enacted to better represent the existing level of diversity. The inclusion of comments to the rules served the purpose of describing both the origin of the rule but also the divergent, majority and minority, opinions existing at time of drafting. These changes, partly driven by criticisms of legal realists, improved the accountability of ALI's products and indirectly of the organisation. A third stage is represented by the Principles. The goal here is not to restate the law but more openly to define what the law should be, starting from the current state of the law, including judge-made rules, rule-making activities of Regulators and statutory law. The Principles reflect the important changes taking place in US law-making. A fourth development is the move towards global law-making. Several projects have either been completed or are under way. They range from international insolvency to transnational civil procedure and international trade. Liebman underlines that the authority of ALI is persuasion since Restatements and Principles do not have any official authority. He concludes by asking what should Europe do. He contends that the creation of a similar organisation can be useful to promote the process of European legal integration. He points out that a non-governmental organisation may have better opportunities to explore fundamental questions and propose alternatives that might be precluded to intergovernmental organisations. He also suggests that the organisation should not be confined to private law but also address 'public law questions'. Liebman asks additional strategic questions concerning the different professional competences that such an organisation should have, in particular which combination between lawyers, judges and academics and whether its membership should go beyond the legal professions. Hopefully European scholars and institutions will soon engage in such a stimulating debate.

The third section is devoted specifically to the relationship between governance and EPL.

Mark Freedland focuses on the relationship between the domain of European private law and bordering fields, in particular that between general contracts law and employment contracts conceptually distinguished but functionally bordering. 'Personal work contracts' constitute one example of partitioning the different fields which influences significantly the harmonization process and the governance responses. Freedland examines the historical

reasons which have led labour law scholars to defend the autonomy of employment contracts and claims that a unified category of personal work contract is emerging. It is the combination of two sub-categories: contract of employment and contract for services for personal performances. Freedland wants to contrast the tendency of maintaining the separation between employment contracts and general contracts, on the one hand, and integrating contracts for self-employed services into private law of contracts on the other. He suggests that deeper integration between private law contract and personal work contracts is needed. He concludes by analysing the different governance devices currently employed in this area and their relevance for the general debate on European private law: private international law, Open method of coordination, derogation and hierarchies of norms. Freedland acknowledges the difference between the first two and the last one but suggests that the particular combination of legislation and collective agreements concerning the law of personal work contracts may represent an example of a more general problem that European private law is about to face: a different system of sources that recognize the importance of collective agreements and private law making.

Tony Prosser examines the evolution of regulation, its relevance for European private law and its governance implications. He first provides two typical models to be contrasted, i.e. the public and private law vision, and then examines the European setting. Prosser analyses the changes in regulatory strategies undertaken by public regulators and the shift from public regulation to self-regulation and regulation delegated to private actors. He points out the increased use of regulatory contracts between regulators and regulatees both at national and international level, drawing extensively on the British and European experiences. In Prosser's view there are different visions of regulation associated with private and public law. While private law emphasizes the role of private autonomy and wealth maximization, public law is designed to protect social and economic rights and to promote social solidarity. The private law vision of regulation is based on (1) efficiency maximization, separated from distributional goals to be addressed by governments, (2) the use of contract as a regulatory instrument and the contractual nature of the relationship between regulators and regulatees, (3) a liability regime to compensate victims of the regulator's wrongs. In contrast, the public law vision of regulation is based on the inseparability of efficiency and distribution, on the necessary presence of some form of public role even in relation to self-regulation, on a stakeholder model of contractual relationships between regulators and the regulatees, on the immunity of the regulator from liability. Prosser then moves to the European level. He again contrasts two regulatory models: one efficiency driven (more Anglo-Saxon) and one characterised by greater attention to public service mission (more French based). He contends that the European model tries to combine the two features in the public utility sector by defining

strong universal services obligations to be policed by the regulator. He concludes by observing that the most important challenges concerning governance of European private law rest on the ability to balance efficiency driven regulatory strategies using contracting and public interest values, in particular social solidarity.

Colin Scott examines the role of private legislation in the European setting and its role in European legal integration. Scott analyses a wide array of private legislation operating in the European setting and focuses on these laws' capacity to generate binding rules and the source of their legitimacy. He starts from the assumption that neither public nor private legislation ensure compliance only by way of hierarchy. In both cases there is a plurality of instruments. He points out that a law's feature of being formally binding does not constitute the common, let alone exclusive, source of authority of private law-makers. He draws many examples from standard setting bodies, distinguishing between contractual and associational arrangements. Both legal and non legal sanctions may differ in the two models. Compliance with their rules is often incentivized through non legal devices associated with social and market mechanisms. These features suggest that the use of private legislation may have comparative advantages over public legislation. Scott then poses the question of accountability of private legislators and distinguishes between procedural and substantive legitimacy. He points out on the one hand that pure transposition to private actors of accountability rationales employed for public actors is mistaken. He suggests that the involvement of private actors in law making contributes to the legitimacy of public law making widening accountability through interdependence and/or redundancy, '... private legislative capacity may be expected to supplement public accountability mechanisms over public legislators'. He continues by indicating two sets of additional devices based on community and competition. Market mechanisms are based on the ability of consumers to exert competitive pressures over their firms by evaluating the self-regulatory regimes. Community mechanisms are related to the associational structure in which private legislators can engage. He recognises that accountability problems may arise when interdependence, redundancy, competition and community are lacking. This is the case when the private rule maker has the monopoly 'not just over the rule making but also over interpretation and enforcement'. Scott identifies three sets of possible responses: 1) hierarchical control, 2) competitive pressures to seek to exert control over private rule makers, 3) promotion of associations of private regulators which would engage in benchmarking and peer review.

Hugh Collins starts by asking the question of the desirability of a European civil code. His negative answer is based on three elements which differentiate codification of private law occurred in continental Europe in the XIX century from today's. First the legislative competence, limited in the case of EU,

unlimited in the nation states, second the changing character of private law, in particular its regulatory function, the growth of interlegality, third, the evolution of transnational private regimes. He then focuses on the relationship between European and national legal systems, underlying the transformation engendered by the former. He claims however that, despite supremacy, the process is not characterized by command and control, rather ‘each national court system creates its own private law from a constructive interpretation of European principles in the light of national legal traditions’. He then analyzes mutual influences of Member States. He shows more scepticism about the possibility of mutual learning underlying the lack of institutional capacities to institutionalize such a process. He finally focuses on the transformation of private law and its governance implications. New Private law reasoning combines both the traditional rights-oriented reasoning with the policy-oriented character of regulation. He defines the tasks by stating that,

‘Europe needs to create a modern system of private law that enables the regulatory dimensions of private law reasoning to function productively to discover an integrated approach in order to align the norms of inter-legality between the different parts of the legal order, and to find the appropriate techniques for the incorporation of transnational private ordering in its normative framework’.

He concludes by making suggestions concerning the improvement of comparative legal education and the creation of a European Private law Institute which, along the lines of the American model, should encourage evolution towards similarities and select best practices.

The fourth section includes the conclusions by **Fabrizio Cafaggi**. After describing the necessity to consider the role of private rule making and the increasing importance of national regulatory agencies in the process of European legal integration, Cafaggi focuses on the legislative design and process implementation of EPL. His starting assumption is that EPL is and will remain a multilevel system where national implementation of European legislation generates intentional and unintentional spillover effects to be ‘governed’ through horizontal devices. The main goal of the chapter is to develop horizontal, peer-based, systems of accountability concerning implementation.

He underlines that the current legislative and judicial trend towards total harmonization is the wrong response to normative differentiation occurring in the process of national implementation. He analyses in particular the areas of unfair contract terms and commercial practices, providing examples of divergent implementation which cannot be tackled only at legislative level, claiming that governance is a better response than complete harmonization. He examines traditional modes of governance and then considers the applicability of new modes of governance to EPL. He makes several reform proposals; most of them do not require legislative intervention. At the legislative level,

given that the competences are organised around policy areas while private law, following the national traditions, is conceptually organised around institutions, he proposes different ways to improve coordination at the Commission level concerning legislative drafting. Legislative drafting can also be improved by considering the different impacts of new legal categories in national legal systems, especially the general clauses. At the implementation level he emphasizes the role of judicial governance and the lack of coordination among national judiciaries, proposing the establishment of a permanent judicial conference specialised in EPL to be coordinated with TFI and ECJ. He then proposes the institution of committees operating according to subjects (contract, property, tort) that would cut across directorate's competences and analyse the impact of European legislation on private law national systems. Finally he proposes the use of OMC, adequately redefined, to evaluate the policy effects of implementation of private law, especially when it involves national regulatory agencies and judges.

6. POLICY IMPLICATIONS AND A RESEARCH AGENDA

The complex architecture of the European Union, soon to be redefined with the ratification of the changes to the Treaty approved in Lisbon in 2007, poses a relevant identity question: which Europe or, plural, 'Europes' should we be considering when addressing the modes of governance of European private law?

The contributions to the book suggest that Europe has become an increasingly diversified entity, partly due to the enlargement process, the geography of private law-making organisations and the different institutional and economic development of old and new Member States.

In this framework the development of new modes of governance in areas close to those traditionally included in EPL give rise to new questions concerning public and private rule-making. In particular they question the informational assumptions that have characterized law making in nation-states and suggest that even in the traditional areas of private law *ex ante* perfect knowledge of the rule-maker, public and/or private, should not be considered the standard.

Within the EU, legal integration of EPL has moved along different paths. Legislative harmonization has been complemented by mutual recognition, choice of law defined by private international law and, so far to a limited but significant extent, soft law. There is still quite a divergence between integration of substantive and procedural rules. The domain of the latter, still predominantly left to Member States, includes often remedial law affecting significantly modes and degrees of implementation of European legislation in the field of private law. To what extent this separation is desirable or simply

constitutes a constraint, based on the current legal framework, is an open question, but the answer certainly influences the role of new modes of governance compared to adjudication in EPL.

It is clear that the unity, be it real or artificial, of national private law systems cannot be replicated at EU level, where the dominant features of the private law system are the ‘internal market’ and fundamental rights. Conventional distinctions between public and private but also within private law (i.e. general contract and employment contract law) lose their attractiveness since they do not represent the conceptual partitioning of European law.⁵⁷ Two examples: information regulation concerning B-to-C relationships can be conceived as an integrated field where contract, property and civil liability are intertwined; product safety should be considered as a unified field to protect consumers’ health and safety, encompassing contract, civil liability and administrative regulation. Limited legislative competences but also a modified geography of subject matters (property, family, wills, contract, civil liability) organised around a different balance between Europe and Member States, depict a landscape different from that which characterized the formation of continental national legal systems in the XIX century. The strong integration between substantive and procedural law is missing, the (supposedly clear) divide between public and private law does not exist, the typical state institutions are absent, the relevance of transnational private and intergovernmental organisations contributing to law-making is much higher and the interaction with competition law is deeper, just to list a few.

The (mainly academic) project for the creation of a European civil code has immediately showed its limits and inadequacies, to be quickly replaced by a sector-specific, often fragmented, legal integration strategy. This is not a necessary trade-off.

Governance and law-making. A consistent design of legal integration in European private law can be pursued outside of the codification strategy. The price of fragmentation and inconsistency is avoidable if integration is grounded on solid governance devices.⁵⁸

As suggested by economic analysis multilevel structures should not be read by identifying ‘legal harmonization with centralization’ and ‘differentiation with decentralization’ of law-making.⁵⁹ In addition centralized decision-

⁵⁷ On these questions see Freedland and Collins contributions in this volume pp. 227, 269.

⁵⁸ On the relationship between governance and legal integration see F. Cafaggi, in this volume p. 289.

⁵⁹ See Inman and Rubinfeld (1997), Kerber and Grundman (2006), Kerber, W. and R. Van den Berg, *Unmasking mutual recognition: Current inconsistencies and future chances*, mimeo.

making does not necessarily coincide with uniform rules. European legislation may differentiate rules in relation to individual Member States or macro regions, through enhanced cooperation, according to the different needs. The factors affecting the (law making) process should not be identical to those concerning the quality of the product (the rules).

Legislative harmonization may be achieved by combining centralizing command and control with decentralized market-based techniques. Symmetrically, differentiation of rules may be centrally governed or driven by decentralized choices attributed to the Member States or directly to citizens, by empowering them with choice of law devices. To centralize differentiated law-making is not cost effective if information about heterogeneous preferences are *ex ante* available. On the contrary, if, as clearly indicated by the emergence of new modes of governance, information is acquired over time and preferences of both institutions and citizens are not *ex ante* well-defined, then a coordinated rule-making system can have comparative advantages. Coordinated law-making does not imply uniform rules, decentralized law-making does not imply differentiation (bottom-up harmonization). Processes and products have to be distinguished.

In addition it is crucial to evaluate when deciding the appropriate rule-making level the degree of spill-over effects that may occur among different legal orders, distinguishing between public and private law-making. If the goal is to generate different rules, but to allow spill-over and changes over time, then decentralization might not always be the best strategy.

New modes of governance stimulate new theoretical inquiries about the relevant factors to decide the levels' combination. They also suggest new experiments for the integration of public and private law-making. Integration of private international law with new modes of governance, for example, Open Method of Coordination, should be designed so as to maximize citizens choice and to reduce negative externalities.

7. A NEW ARCHITECTURE

A new architecture of EPL should be grounded on a few basic pillars:

1. European private law is the combined product of public and private law-making, where mandatory and default rules should be complemented. In this framework it should be clear that (a) private law-making may include *de facto* and to some extent *de jure* mandatory rules (b) default rules, both in public and private law-making, may perform regulatory functions in different but as effective fashion as mandatory rules. Different combinations between European and Member States can occur in public and

private law-making. While for the former the competence system rigidly defines the partitioning between the EU and Member States, for the latter it is a matter for private parties and organisations to select the appropriate law-making level(s).

2. In the field of private law, particularly in contract law, the role of private autonomy is relevant to evaluate the effects of institutional choices, in particular whether private law-making operates as an agent of harmonization or differentiation of legal norms. For example, in a world of decentralized law-making if private parties can choose the rule, they can harmonize by selecting the same rule from a very differentiated menu.

On the contrary, if European legislation with default rules were enacted, private parties can deviate from the model and differentiate not according to their citizenship but their business community. Default uniform 'public law-making' can give rise to differentiated private law-making following local practices or sector specific ones.

3. The effects of centralization may greatly diverge according to the mandatory/enabling nature of the rules. Two different dimensions have to be considered: the responses of private parties to choices made in public law-making, the choices made by private law-makers and the responses by the final users of those rules. Similarly to what I. Ayres and R. Gertner have claimed for individual transactions, default public law-making can stimulate private law-making responding to the legislation according to the preferences of private parties, *ex ante* unknown to the public legislator. Private organisations, exercising law-making, can design standard contract forms which deviate from default rules because they have better information about preferences; when explicitly delegated by a legislative act they can even deviate from mandatory rules.⁶⁰
4. The traditional institutional framework of national private law, legislators and judges, should be complemented by internalising the contributions of new institutions, actively involved in rule-making, particularly public and private regulators. Each set of institutions has different forms of cooperation at EU and national levels. While legislative bodies have gone quite far, national regulators and judges are still harnessing the best routes towards closer cooperation at European level. Institutional reforms should take place to improve judicial cooperation in civil matters.
5. Intergovernmental and private, independent, non-governmental organisations, specialized in global and European law-making, play a significant role. They operate in the areas of private law and that of private international law, often providing a framework to increase legislative harmo-

⁶⁰ See on these questions F. Cafaggi (2007).
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nization. Their growing importance poses questions about the source of their 'democratic' legitimacy, their accountability, their amenability to judicial review and their interaction with public actors.⁶¹ Their contribution shows the necessity of institutional recognition, acknowledging that normative pluralism is an important resource for the future of European legal integration in the field of EPL and beyond. Normative pluralism has also institutional implications. While the creation of a European entity with coordinating functions in the field of private law may be desirable, its identity should be oriented towards a federation of existing organisations involved in law-making while opening up to members of the legal professions, particularly European judges and lawyers.

6. The multilevel structure transforms the questions concerning the optimal allocation of vertical law-making power addressed by the economics of federalism: from the definition of the single optimal level to the identification of the best combination of different rule-making levels and governance modes. The emergence of new modes of governance suggests that information about preferences may not be *ex ante* available at either level. The goal is to engineer a governance system to produce incremental knowledge for effective law-making. This will undoubtedly affect the pre-existing balance between institutions and in particular will modify the place of adjudication in private law systems.

A multi-tool strategy. The high level of differentiation among Member States and between them and the European Union, implies that a multi-tool strategy is necessary to govern processes of legal integration in the field of EPL and beyond. The regulatory nature of EPL requires new institutions and a different governance design.⁶² The conclusion of the enlargement process raises new challenges to implement Europeanization of private law in settings where the separation between States and economic players is still limited and the independence of regulators and judiciary is more an objective than an achievement. Legal integration does not coincide with harmonization of legal rules; it involves a complex combination of harmonization and differentiation of legal cultures and institutions which represent part of national identities (article 6 TCE). Differences concerning rules and institutions are not only a value per se, they can be sources of mutual learning and institutional innovation.

New modes of governance address these questions by integrating, especially in the decentralized rule making processes, institutional devices aimed

⁶¹ See on these questions the contributions by Scott, Van Loon and Liebman. Respectively pp. 254, pp. 197, pp. 209.

⁶² See the contribution of Collins and Scott in this volume.

at exchanging information and enhancing cooperation. While new modes of governance so far have mainly been related to public actors, their expansion to EPL would imply new tools to improve knowledge formation and exchanges among private organisations engaged in law-making. Legal transplants and unintentional spillovers among legal systems have existed for a long time but they have occurred randomly, mainly due to scholarly exchanges. An institutional policy which favours their occurrence has not yet been devised. Given their importance in the development of European private law this would be highly desirable.

Judicial governance and cooperation in judicial matters. Law-making, both public and private, should not be considered the most important let alone the exclusive ‘legal formant’ of European private law. The importance of law-finding and the role of adjudication should be emphasised both in relation to integration and to a ‘policy consistent strategy’ of legal differentiation. The Restatement model employed in the US can not be mechanically replicated but it certainly provides an example of a much needed coordination in order to give judicial interpretation of European law the place it deserves.⁶³

Private enforcement both in competition and consumer law has gained further importance, conferring judicial governance a significant place in the new architecture. National Courts however are much less prepared than NRA to engage into an institution-building process towards European legal integration.⁶⁴ Cooperation in civil matters has to be reinforced to allow national Courts to act ever more as Community Courts.

Policy complementarities. The selection of the desirable law-making level should thus be defined through the use of complementary policy strategies, considering also intermediate layers between Europe and Member States. While the old-new Member States distinction might have been appropriate to widen the European Union, it is indisputably associated with the enlargement

⁶³ See the contribution by Liebman in this volume. According to Liebman ‘a restatement is a positive statement of legal doctrine on a legal subject on which American law is made by common law judges . . . It is thus both a synthesis of the law as stated in judicial opinions and an attempt to declare the correct rule of law and to recommend for the future doctrinal statements that will advance both the law’s coherence and its consistency with good public policy’, p. 209. Liebman captures the evolutionary institutional mission of ALI later to be pursued also through the use of complementary devices such as the Principles. He underlines the link between governance and legal innovation which should become a priority in the Commission’s agenda.

⁶⁴ This is certainly true for CEECs where the differences with old MS are quite significant. See Sadurski, W., J. Ziller, K. Zurek (2006), *Après Enlargement: legal and political responses in Central and Eastern Europe*, Florence: Robert Schuman Center.

process. Relevant changes in CEECs have occurred in consumer and competition law while the core private law system has not been radically transformed. While there might be formal uniformity, differences are still wide. Now that enlargement has occurred, a different, more sophisticated, framework is needed: one which at the same time considers historical paths and emerging new needs for legal integration. After the conditionality a new phase is dawning, where the specificities of CEECs may trigger institutional innovations, subject to regional, if not comprehensive, generalisation.⁶⁵ New geopolitical sub-European entities should emerge, based on similar legal traditions and institutional evolutionary patterns, the combined results of intentional choices such as twinning and the consolidation of older traditions (the choice between the French and the German models in eastern Europe, the influence of US).⁶⁶

Each macro-region may require different institutions to accommodate socio-economic factors which are country/region specific. Size of the economy together with trading relations may suggest the formation of regional economic integrated areas greater than a single State but smaller than the whole European Community.⁶⁷ They may become new references both for bottom-up forms of enhanced cooperation and for top-down implementation of European legislation in the field of private law, by differentiating macro-regions for the purpose of legal integration. This process should be limited to avoid excessive complexity and fragmentation.

This set of governance institutions should be defined according to the principle of rule of law and that of normative pluralism, giving recognition to the role of private organisations, particularly independent ones, and intergovernmental organisations which, on their part, should improve accountability and openness when operating as rule-makers and law-finders.

European public policy initiatives are needed to foster the creation of a specialised institution to coordinate law-making initiatives outside the conventional legislative process and law-finding activities, judicial application of law and the case-law developed by NRAs. The creation of a European Law Institute is advocated.⁶⁸ Such institution will not only contribute to increase

⁶⁵ See for a detailed analysis the contributions in this volume by Bakardjeva-Engelbrekt and Cseres.

⁶⁶ The emergence of regional, intermediate entities as reference points characterizes private international law. For a more detailed analysis see Van Loon's contribution below p. 197.

⁶⁷ On the importance of size economy for implementation strategies of the *acquis* in relation to competition law but generalisable to other areas, see in this volume Cseres p. 138.

⁶⁸ See Collins and Cafaggi contributions for this solution and Liebman for a comparative analysis.

certainly but also to foster legal innovation by collecting and disseminating information about practices and experiments. The contributions to the book make different complementary suggestions to pursue these goals conferring strategic importance to governance reform.

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