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## Rise and fall of the classic concept of private law : lessons from the legal consciousness of european private law

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ASCENSÃO E QUEDA DO CONCEITO CLÁSSICO DE DIREITO PRIVADO:  
LIÇÕES DA CONSCIÊNCIA JURÍDICA DO DIREITO PRIVADO EUROPEU

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# RISE AND FALL OF THE CLASSIC CONCEPT OF PRIVATE LAW: LESSONS FROM THE LEGAL CONSCIOUSNESS OF EUROPEAN PRIVATE LAW

## ASCENSÃO E QUEDA DO CONCEITO CLÁSSICO DE DIREITO PRIVADO: LIÇÕES DA CONSCIÊNCIA JURÍDICA DO DIREITO PRIVADO EUROPEU

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**Abstract:** is there such a thing as European private law, a set of rules of EU law distinguished by the binary opposition public and private law? This article aims to shed light on the debate over the rise and the fall of the classic concept of private law and how the legal consciousness of the latter enhanced the legal awareness of European private law. Philosophy and sociology of law claim reasons in the search for answers, from a metaphysical and epistemological points of view. Furthermore, the reality of private law in practice put the ancient concepts in challenge by the phenomena of transnationalization of Law. Globalization, europianization, and the privatization of private Law are factual claims against the persistence of the classic concept of private law. These categories reveal the inconsistencies between the theory of will in books and law in practice, suggesting that pluralism can face the lack of sense of a universal model of private law to all the realities involved in the European Union. The belief that the harmonization (or systematization) of national Civil Codes at the European level would lead to the coherence of private law is one of the bases to a final question about the extent to which the persistence of the classic concept of private law among legal scholarship is still an obstacle to the effectiveness of EU integration through the combination of public and private enforcement.

**Keywords:** private law; pluralism; globalism; integration; transnational law.

**Resumo:** existe algo como um direito privado europeu, um conjunto de regras do direito da União Europeia derivado da oposição binária entre os direitos público e privado? Esse artigo pretende lançar luzes sobre a ascensão e a queda do conceito

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<sup>1</sup> The author thanks the editorial board for the invitation to publish in the inaugural issue of the Academic Review DESC (Law, economics and contemporary society). I'd like to express my sincere appreciation.'

clássico de direito privado e sobre como a consciência legal deste último reforça a atenção dos juristas em torno de um direito privado europeu. A filosofia e a sociologia do direito reivindicaram razões nessa investigação, a partir de pontos de vista metafísicos e epistemológicos. Além disso, a realidade prática do direito privado desafia os conceitos antigos diante dos fenômenos da transnacionalização do direito. A globalização, europeização e a privatização do direito privado são reivindicações reais contra a persistência de um conceito clássico de direito privado. Essas categorias revelam as inconsistências entre a teoria da vontade na teoria e na prática, sugerindo que o pluralismo pode enfrentar a falta de sentido de um só modelo universal de direito privado para todas as realidades envolvidas na União Europeia. A crença de que a harmonização (ou sistematização) dos códigos civis nacionais a nível europeu conduziria à coerência do direito privado está na base de uma pergunta final sobre o quanto a persistência do conceito clássico de direito privado entre os juristas é ainda um obstáculo à eficácia da integração da UE ainda com base na combinação de regras públicas e privadas.

**Palavras-chave:** direito privado; pluralismo; globalização; integração; direito supranacional.

“Most questions and propositions of the philosopher result from the fact that we do not understand the logic of our language. They are of the same kind as the question whether the Good is more or less identical than the Beautiful”

Ludwig Wittgenstein, *Tractatus Logico-Philosophicus*

## Introduction

Is there such a thing as European private law; a set of rules of EU law distinguished by the binary opposition public and private law? And if so, is this conceptual distinction anyhow functional to the way in which lawyers perceive or operate in plural legal systems? Over the years of research in the field of European Union (EU) law, I have continued searching for meaningful answers to these questions.<sup>2</sup> By doing so, I witnessed two opposite reactions to the question of whether European private law is such a thing. On one side are those who think these are the meaningful questions; on the other are those who dismiss them.

Between dismissals and acceptance of the European private law as a thing, there is a learned lesson. The reason for the opposite reactions does not lie in the genuine disagreement of whether the substantive dimension suggested as European private law exist or not; or

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<sup>2</sup> As Research Associated to the European Regularity Private Law Project financed by the European Research Council Advanced Grant [Project ID: 269722]. See ALMEIDA, Lucila, *Integration through Self-Standing European Private Law* (2017).

whether the dichotomic distinction is a mere theoretical debate without practical effects. The reason, instead, lies in the logic of our language. It lies in the different, and mostly divergent, concepts of private law – what is here distinguished as the classic versus the modern concepts.

This article aims to shed light on the debate over the rise and the fall of the classic concept of private law.<sup>3</sup> It does so through explaining how the awareness of the latter enhanced the legal consciousness of European private law. Provoking a reflection over the rise and fall of the classic concept of private law in Europe is then the mean to better understand how plural legal orders interact and shape individuals' behaviors, and, above all, why it should matter to legal scholarship and legal practice within and beyond the boundaries of the EU. Taking a leaf out of the Wittgenstein's book on the logic of our language, the meaning of a sentence is determined as soon as the meaning of the components of the words is known.<sup>4</sup> The words are then private law.

On the one hand, those who perceive private law through a classic conceptual lens define its subject as a coherent codified body of rules, made by States, and grounded in autonomy-based value (i.e. freedom of contract).<sup>5</sup> The expression European private law is therefore senseless as long as it refers to a body of rules that is not autonomous based-value, is supranational and made by transnational governmental bodies. The persistence of the classic concept of private law has hampered debates over the private law dimension of the European integration project; as well as its interaction with national legal systems of private law, its remedies, and procedures.<sup>6</sup> As a result of legal practice, lawyers are short-sighted to think of the horizontal effect of EU law. In other words, whenever individuals or private legal entities violate EU law (e.g. the use of a certain selling arrangement that discriminates

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3 The title of this chapter borrows the dichotomy – “Rise and Fall” – as a reference to the remarkable works of private legal scholars who employed the expression to discuss the transformation of Private Law thinking focusing on British and American legal systems. Atiyah in “The Rise and Fall of Freedom of Contract” and Duncan Kennedy in “Rise and Fall of Classic Legal Thought” adopt genealogy to deconstruct the classic theory of private law as the result of the mainstream ideology of the 19<sup>th</sup> century. Kennedy, Duncan. *Rise and Fall of Classical Legal Thought*. Washington, DC: BeardBooks, 2006. Atiyah, P. S. *The Rise and Fall of Freedom of Contract*. Clarendon Press; Oxford University Press, 2017.

4 Wittgenstein, Ludwig, David Pears, and Brian McGuinness. *Tractatus Logico-Philosophicus*. Routledge, 1975.

5 There are two formalistic approaches to private law. One claims the private law is a system of rules with neutral-values. These arguments are commonly associated with Will Theorists of the 19<sup>th</sup> century. The other advances a more sophisticated argument. It does not deny the moral ethics of private law, but grounds the moral ethics in deontological autonomy values. Ernest Weinrib develops this argument best. The classic Concept of Private Law as mentioned in this chapter refers to these two formalistic approaches to private law. See Weinrib, Ernest J. *The Idea of Private Law*. Revised edition. Oxford, United Kingdom: Oxford University Press, 2012.

6 This article is not the first piece of academic work blaming the persistence of Classic Legal Thinking (or Formalism) in Europe as a reason to reject the private dimension of EU Law. See Caruso, 1997, 2013; Kennedy, 1997, 2000. Caruso, Daniela. “The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration.” *European Law Journal* 3, no. 1 (1997); Caruso, Daniela. “The Baby and the Bath Water: The American Critique of European Contract Law.” *American Journal of Comparative Law* 61 (2013): 479–506. See also Kennedy, Duncan. “The Paradox of American Critical Legalism.” *European Law Journal* 3, no. 4 (1997): 359–77. See also the historical approach by Letto-Vanamo, Pia. “Fragmentation and Coherence of Law - a Historical Approach.” In *Coherence and Fragmentation in European Private Law*, edited by Pia Letto-Vanamo and Jan M. Smits. Sellier European Law Publishers, 2012.

undertakings based on the nationality of the controlling shareholder), harmed individuals could challenge violations before national Civil Courts through private legal remedies such as financial compensations.

Two intellectual developments have long contested the classic concept of private law during the 20<sup>th</sup> century: one based on philosophy of law and committed to challenge formalism; the other bringing a perspective from the sociology of law. Both intellectual developments, underpinned by metaphysical and epistemological reasons respectively, converge into one conclusion: the classic concept of private law is dead; or must be so.

The modern concept of private law, instead, departs from the definition of private law according to its subjects. Private law is defined as any rule applied to the subject of contracts, torts, property, and associations. Regardless of whether the provision is found in a civil code, a Decree-Law issued by a regulator, trade agreements, or a sophisticated transnational legal system like the EU, what defines them as a rule of private law is the commonality of a regulated subject. Therefore, the modern concept rejects the misleading definition of private law as power-conferring rules intended to protect the will of parties only. But it also reveals private law as a set of duty-imposing rules enshrining duties<sup>7</sup> on individuals to make transactions under obligations of non-discriminate, or fair competition, and other legal obligations embedded on a plurality of moral ethics ranging from utilitarian, social, to autonomous-based values.<sup>8</sup>

To understand the relevance of the modern concept of private law to legal practice, EU law does matters. The EU legal system is the epitome of a transnational legal system grounded in a policy-oriented mandate: the creation of an integrated and competitive transnational market. To pursue its mandate, the EU has advanced a set of rules regarding product liability, rights to withdraw, information duties, and other duties and rights governing contracts, property, and liability. These rules make the private law dimension of EU law uncontestable. The legal consciousness of the private law dimension of EU law matters. For instance, a right to withdrawal established at transnational level is only effective if legal practitioners share a certain level of legal consciousness about those rights to enforce them in private disputes.<sup>9</sup> This is the reason for beginning this chapter by quoting Wittgenstein's

7 Klass, Gregory. "Three Pictures of Contract: Duty, Power, and Compound Rule." *New York University Law Review*, 2008, 1726–83; Hart, H. L. A. (Herbert Lionel Adolphus). *The Concept of Law*. Clarendon Press, 1961.

8 Gordley, James. *The Philosophical Origins of Modern Contract Doctrine*. Clarendon Law Series. New York: Oxford University Press, 1991. The three moral ethics approach to consent in private law – led-rights, led-utilitarianism, led-duty – refer to moral autonomy, utilitarian, and social value respectively. Beyleveld, Deryck, and Roger Brownsword. *Consent in the Law*. Hart, 2007.

9 Denis Galligan identified "the Contours of Compliance" as the main conditions to promote social "changes through Law" in Modern Societies. Between them, he listed Legal Consciousness, a Settle Disposition to Comply with Law, and Legal Architecture that allows the dynamic change of the law. Denis, ed. *Law in Modern Society*. Oxford: Oxford University Press, 2016, pp. 332-341.

book “Tractatus Logico-Philosophicus”: “most questions and propositions of the philosopher result from the fact that we do not understand the logic of our language”.

The paper has three parts. The first part (1) introduces the problem of how different concepts of private law have hampered genuine discussions on European private law in the context of the Draft Common Frame of Reference (hereinafter DCFR). It also introduces the first hints of claims developed in the next two subsections on why the classic concept of private law needs to be reviewed. The second part (2) of this chapter borrows a genealogical account from legal historians and philosophers to understand the origins of the classic concept of private. This sets the groundwork for the subsequent map of arguments raised by two different intellectual projects that both end by deconstructing this classic way of thinking: one based on the philosophy of law (2.1), and the other on the sociology of law (2.2). The latter intellectual development is then subdivided in two more subsections to observe the phenomenon of the transformation of private law: one that explains the transformation of private law within and by States (2.2.1), the other that observes the transformation of private law beyond States (2.2.2). The third part (3) then raise a question about the extent to which the persistence of the classic concept of private law among legal scholarship is still an obstacle to the effectiveness of EU integration through the combination of public and private enforcement.

## **1. Breaking paradigms: Draft Common Frame of Reference and the awakening of the European private lawyers**

The beginning of the 21<sup>st</sup> century was also the beginning of a new round of debates among private lawyers in Europe motivated by the Commission’s audacious plan to draft the European civil code. Before it, the last two decades of the 20<sup>th</sup> century were marked by the academic debate about the EU’s bold move from solely negative integration towards the political process of positive integration.<sup>10</sup> Rules on consumer and company law were seen as the most advanced intervention of EU law into private law.<sup>11</sup>

The European codification project in the early 21<sup>st</sup> century set new ground for the debate on European private law. The 2001 Communication of the European Commission launched the first initiatives of what was “the action plan on a more coherent European

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10 The distinction of *negative integration* and *positive integration* employed along this chapter follows the definition created by Fritz Scharpf in 1999, in which the former refers to the community integration mostly based on the enforcement of rights in the Treaties, and the latter refers to the positive integration through the approval of Secondary Law. Later, Hugh Collins used the same distinction to explain the process of Europeanization of private law. See chapter 2 “Negative and Positive Integration” in Scharpf, Fritz. *Governing in Europe: Effective and Democratic?* Oxford University Press, 1999. Collins employs the same term to discuss European Private Law. See Collins, Hugh. *The European Civil Code: The Way Forward*. Cambridge University Press, 2008.

11 The consumer legal measures at EU level started with the Directive 85/374/EEC on product liability and later moved towards the Directive 93/13/ECC on unfair terms in consumer and Directive 1999/44/EC on consumer sales.

Contract Law”.<sup>12</sup> The Commission’s plans provoked a large academic debate across Europe on the legitimacy of a European code of contract, which would have precluded national civil codes totally or partially.

The project, which started with the establishment of a working group, a so-called network of excellence, reached its highest point in 2008 with the release of the first edition of the DCFR, which was reedited and released in its full in 2009.<sup>13</sup> Ten comprehensive books together with “the Fundamental Principles of European Contract Law” would have formed, as the authors said, a coherent body of “European Contract Law”. Resembling the codification of private law in civil law systems, the DCFR addressed book-by-book, chapter-by-chapter, the core concepts of private law common to all legal systems – such as obligation, contractual liability, and unjust enrichment – which would have normative standards of conduct applicable to any individuals engaged in transactions within the EU’s jurisdiction. Moreover, besides the duties and obligation, the DCFR determined four principles as fundamental *values*: freedom, security, justice, and efficiency.<sup>14</sup>

Despite the fact that approximately 200 academics were behind the draft of the DCFR, the European codification project triggered different reaction among legal scholars in Europe, which instigated the vivid academic debate *pro and contra* the DCFR. By observing the arguments from both sides, one could map the debate in claims and arguments that circle around key conceptual and normative questions: what private law is – the concept of private law – and what private law should be.<sup>15</sup>

The first layer of argument *contra* the DCFR circled around the metaphysical concept

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12 European Commission Communication, “A more Coherent European Contract Law – An Action Plan”, COM (2003) 68 final, 2003.

13 The Study Group on a European Civil Code and Research Group on the EC Private Law, “Principles, Definition and Model Rules of European Private Law: Draft Common Frame of Reference”, the Study Group on a European Civil Code and Research Group on the EC Private Law. Acquis group’ in Christian von Bar, Eric Clive and Hans Schulte-Nölke (eds) (2009).

14 The first version of the DCFR was released in the 2008 edition, in which it enumerated a broad list of principles as principles of Contract law. In the 2009 full edition of the DCFR entitled “Principles, Definition and Model Rules of European Private Law: Draft Common Frame of Reference”, the Study Group on a European Civil Code and Research Group reduced the long list of principles to “four fundamental principles”: freedom, security, justice and efficiency.

15 For detailed discussions of competences with respect to private law: Micklitz, Hans W. “Review of Academic Approaches on the European Contract Law Codification Project.” In *Liber Amicorum Guido Alpa: Private Law Beyond the National Systems*, edited by Mads Tønnesson Andenaes, Silvia Diaz Alabart, Sir Basil Markesinis, Hans-Wolfgang Micklitz, and Nello Pasquino. British Institute of International and Comparative Law, 2007. Weatherill, Stephen. “The European Commission’s Green Paper on European Contract Law.” *Journal of Consumer Policy* 24, no. 3–4 (December 1, 2001). Weatherill, Stephen. “Why Object to the Harmonization of Private Law by the EC?” *European Review of Private Law* 12, no. 5 (January 1, 2004): 633–60. Weatherill, Stephen. “Reflections on the EC’s Competence to Develop a European Contract Law.” *European Review of Private Law* 13, no. 3 (January 1, 2005): 405–18. Kenny, M. “The 2003 Action Plan on European Contract Law : Is the Commission Running Wild?” *European Law Review*. 28, no. 4 (March 22, 2007): 538–50; Ziller, Jacques. “The Legitimacy of the Codification of Contract Law in View of the Allocation of Competences between the European Union and Its Member States.” In *The Politics of a European Civil Code*, edited by Martijn Willem Hesselink. Kluwer Law International, 2006. Hesselink, Martijn W. “The Politics of a European Civil Code.” *European Law Journal* 10, no. 6 (November 1, 2004): 675–97. Van Gerven, Walter. “Codifying European Private Law: Top Down and Bottom Up.” In *An Academic Green Paper on European Contract Law*, edited by Stefan Grundmann and Jules Stuyck. London: Kluwer Law International, 2002.

of what private law is. Some legal scholars asserted that the EU wouldn't have had the delegated authority to enact a European civil code or even regulate private law as long as the conferred powers of the Treaty were restricted to improving the conditions of the functioning of the international market. That limited private law to its classic concepts. On the other hand, legal scholars countered this point by holding that the EU's conferred powers are not organized in line with the classic concepts of public and private law. Thomas Wilhelmsson<sup>16</sup> stressed the point that multiculturalism in Europe hampered the development of a coherent European Contract Law. Leone Niglia argued that, though the DCFR embraced pluralistic vocabulary, it perpetuated the hierarchical thinking of universal principles (universalism in pluralistic thinking).<sup>17</sup>

The second layer of arguments *contra* the DCFR challenged the normative approach to private law as a coherent system of norms based on deontological-autonomous virtuous. The DCFR established four principles as fundamental principles of European contract law: contractual freedom, security, justice, and efficiency. One could claim that the four fundamental principles are conflictual by themselves. By stressing the horizontal dimension of pluralism in European private Law, Norbert Reich, and Hans Micklitz questioned the “four main European Contract law principles” of the DCFR by shedding light on the already existing “pluralism of – possibly conflicting – principles in private law and the EU on which the DCFR is based”.<sup>18</sup> In parallel, the Study Group of private legal scholars published a paper entitled “Social Justice and European Contract Law: the Manifesto”.<sup>19</sup> By departing from the assumption that private law has long been instrumentalised by States to accomplish social justice, the article served as a manifesto to reassure the continuity of the social values of private law.

Fifteen years have already passed since the first European Commission's initiative towards the creation of a *grand* codification at the Union level. The cooldown of both political and academic debates on the European Civil Code confirmed the predicted political unfeasibility of the Commission's plan. Moreover, the later withdrawal of the draft proposal

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16 Thomas Wilhelmsson, “Varieties of Welfarism in European Contract Law.” *European Law Journal* 10, no. 6 (November 2004): 712–33. Wilhelmsson, Thomas. “Introduction: Harmonization and National Cultures.” In *Private Law and the Many Cultures of Europe*, edited by Thomas Wilhelmsson, Elina Paunio, and Annika Pohjolainen. Kluwer Law International, 2007.

17 Leone Niglia argues that the DCFR does not reproduce the hierarchical and formalistic thought of 19<sup>th</sup> century, which eliminates from the legal frame anything that is plural. For Niglia, it is a new way in which “formalism has been rearranged to meet the contingent policy demands coming from the European Commission. What matters in this perspective is the morality of the universal values that are presumed to be the best for ruling the plurality of legal orders”. Niglia, Leone. “Pluralism in a New Key: Between Plurality and Normativity.” In *Pluralism and European Private Law*, edited by Leone Niglia. Oxford: Hart, 2013, p. 250-251. See also Niglia, Leone. “The Question Concerning the Common Frame of Reference.” *European Law Journal* 18, no. 6 (2012).

18 Norbert, Reich. “Monistic Ideology versus Pluralistic Reality: Towards a Normative Design for European Private Law.” In *Pluralism and European Private Law*, edited by Leone Niglia. Oxford: Hart, 2013. pp. 78-79

19 “Social Justice in European Contract Law: A Manifesto.” *European Law Journal* 10, no. 6 (2004); Hesselink, Martijn Willem. *CFR & Social Justice: A Short Study for the European Parliament on the Values Underlying the Draft Common Frame of Reference for European Private Law: What Roles for Fairness and Social Justice?* Sellier, 2008.

on a Common European Sales Law by the Commission <sup>20</sup> reinforced the unpalatable taste of the Commission's plan in harmonizing rules of private law through broad packages, which would have invalidated large parts of civil codes.

If, on the one hand, the DCFR failed in being enacted as the first supranational civil code, on the other hand, it was very successful in gathering private legal scholars from all over Europe, unprecedentedly, to discuss what private law is and what private should be at the conceptual and normative levels. It was the awakening of European private lawyers.

Some of the arguments for and against the DCFR project revealed that lawyers do not agree on the concept of private law in Europe or worldwide. One of the reasons is the persistence of the use of classic private law among lawyers, particularly in civil law traditions. Within the traditional frame, the concept of private law has defined itself as a coherent (or uniform), and hierarchical (monistic) system of law based on the virtue of autonomy (or individuals' will). <sup>21</sup> If one applies this concept of private law to understand how the law has governed transactions, they will find evidence for and against to maintain their perception. The traditional definition of private law would depict power-conferring rules which allow individuals to establish obligations between each other: the law created by private parties and enforced between these private parties while doing transactions or joint ventures.

Both civil and common law systems embrace principles of *pacta sunt servanda* whereby *consent* is the foundations of validity: the individuals' will must be observed as the law between parties. However, this concept of private law does not capture the principles and rules that conflict with autonomy-based value. It struggles to explain principles rooted in private law that have existed since Roman Law such as *culpa in contrahendo*, which is found today in both the civil and common law systems; the private law within States. <sup>22</sup> Even those who consider *culpa in contrahendo* as positive duties of information aligned rather than conflicting an autonomy-based theory of private law, <sup>23</sup> get into trouble when explaining why notions of good faith and fair dealing, misrepresentation, and unjust enrichment are chapters of textbooks on contract

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20 COM(2011) 635 final.

21 The assertion that the classic concept of private law tends to be endorsed by private lawyers in Civil Law system, where Private Law is systematized in Civil Codes, it does not mean there are no legal scholars in common law system advocating for the traditional concept of private law. In fact, Professor Ernest Weinrib, who is the most preeminent *defender* of Formalism in Private Law nowadays, has a common law as a reference to defend his idea of an "Immanent Rationality of Law". Weinrib, Ernest J. "Legal Formalism: On the Immanent Rationality of Law." *Yale Law Journal* 97, no. 6 (1988).

22 The concept of *culpa in contrahendo* could go back in time to the seminal article written by Rudolf von Jhering in 1861, entitled "Culpa in contrahendo, oder Schadensersatz bei nichigen oder nicht zur Perfektion gelangten Verträgen". Rudolf von Jhering advanced the thesis that private parties in private relationships have the duty of acting in good faith and, if so, sellers have the obligation to inform (information duty) certain conditions features of good or service to buyers during negotiations, which has long been recognized as principles of Private Law in German Private Law and beyond. Frederich Kessler and Edith Fine published in 1964 the comparative studies on how the notion of good faith and fair dealing in the American legal system have served many of the doctrinal functions of *culpa in contrahendo*. Kessler, Friedrich, and Edith Fine. "Culpa in Contraendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study." *Harvard Law Review* 77, no. 3 (1964): 401-49.

23 Dagan (2005).

law. Besides all the inconsistencies between the classic theory of private law and private law within States, it gets even worse when rules dealing with preliminary negotiation, default, and information duties are enacted by supranational bodies, which overlap with national systems of private law and sometimes have conflicting values.

Considering the EU Legal System is *per se plural* and *functional*, those who read those through the classic concept of private law tend to deny the existence of European Private Law. However, if interlocutors who reject European private law are the same scholars who agree with the proposition that *culpa in contrahendo* is a private law doctrine, what could be their answer when the Product Liability Unfair Term Directives is under scrutiny? Though EU Law, both have rules imposing information duties and withdrawal rights. If the classic concept of private law solely captures one part of a whole body of rules commonly described as private law, why are lawyers and (some) legal scholars still replicating and reproducing a Theory of Private Law is a coherent system of rules based on autonomy-based value or neutrality?<sup>24</sup>

There are two reasons for the persistence of the classical theory of private law in lawyers mind, particularly those in civil law systems. It starts with the way in which legal education programs have been systematized. To accommodate the debate on the public and private law divide raised by Welfare States,<sup>25</sup> legal subjects were allocated in rigid boxes: one for national public law, another for national private law; one for international public law, another for international private law.

Moreover, program content of national private law was and is still divided according to civil codes: civil, obligations, property rights, tort, family, or succession. Within this frame, disciplines like labor law, competition law, and sectorial regulation are treated either as public law or disciplines in the peripheries of private law.<sup>26</sup>

Yet the public and private law divide of legal education is not the only cause for path-dependence on the classic theory of private law, but merely a facilitator. The nexus of causality lies in the persistence of the classic concept of private law in legal scholarship, which spills

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24 Hans-W. Micklitz described his own experience as a private lawyer engaged in conversations and academic debates about “Autonomy”, where people use the same term but have a different concept in their minds. He does call it (un) consciousness lost in translation. Micklitz, Hans-Wolfgang. “On the Intellectual History of Freedom of Contracts and Regulation.” *Penn State Journal of Law & International Affairs* 4, no. 1 (December 2015).

25 Micklitz, Hans-W. “Rethinking the Public/Private Divide.” In *Transnational Law: Rethinking European Law and Legal Thinking*, edited by Miguel Maduro, Kaarlo Tuori, and Suvi Sankari. Cambridge: Cambridge University Press, 2014. Reich, Norbert. “The Public/Private Divide in European Law.” In *European Private Law after the Common Frame of Reference*, edited by Hans W. Micklitz and Fabrizio Cafaggi. Cheltenham: Edward Elgar Publishing Ltd, 2010.

26 Kaarlo Tuori’s contribution to the 1<sup>st</sup> Annual ERPL Conference describes the public and private law division as a systematization that no longer represents Law in modern societies. Tuori continues arguing that terms like hybridity, commonly associated with transitional legal systems, is sometimes used to cover “conceptual confusions” about what law is and what is not law. See Tuori, Kaarlo. “On Legal Hybrids.” In *A Self-Sufficient European Private Law: A Viable Concept?* edited by Hans W. Micklitz and Yane Svetiev. EUI Working Paper 2012/31, ERC-ERPL 01/2012. Florence: European University Institute, 2012.

over into legal practice. Teaching private law categorically as means to autonomy-based value or neutrality inhibits lawyers from thinking about private law through a broader lens. It presents private law as an apolitical or neutral body of law when in fact the whole substance of private law reflects political choices and moral values. This is the truth that explains rules protecting individuals will written in testaments, rules determining contractual capacity above or below a certain age, which by the way were denied to women just a few decades ago,<sup>27</sup> and rules avoiding slayers to profit from wrongdoing.<sup>28</sup>

In opposition to the classic concept of private law, an acute awareness of the incompatibility between private law in books and private law in practice has pushed the agenda on the modernization (or transformation) of private law thinking. Scholars claim there is a need to reconnect the theory of private law with what private law is within and beyond States. Rather than having a concept of private law define the feature of its rules (i.e. systematic and coherent) or restrain its ends to one value or no value, the modern concept of private law has two dimensions. It embraces the concept that first identifies the *subject* of private law, and further provides conceptual tools to *validate* the law regulating the subject, rules and values.

Andrew Burrows provides us with a very precise and succinct account of the subject of private law.<sup>29</sup>

“The law of Property defines the boundaries of our rightful possessions, while the law of torts seeks to make us whole against violations of those boundaries, as well as against violations of the natural boundaries of our physical person. Contract law ratifies and enforces our joint ventures beyond these boundaries”

If the private law is dynamic, the concept of private law firstly refers to its subject (i.e. contract, property, tort, and association), rather than the feature of its rules. Secondly, private law, as any other law, has to pass through a validity test based on social rules of recognition. Gregory Klass define rules of contract law as the combination of two pictures.<sup>30</sup> He refers to private law as a combination of power-conferring rules and duty-imposing rules.

A similar approach to private law can be found in Dyerck Beyleveld and Roger Brownsword in the ethics of consent.<sup>31</sup> While power-conferring rules provide individuals

27 See Currie, Brained. “Women’s Contracts: A Case Study in Conflict of Law Method.” *The University of Chicago Law Review* 25, no. 2 (Winter 1958).

28 See *Mutual Life Insurance v. Armstrong*, the landmark case establishing the Slavery Doctrine in the American legal system.

29 Burrows, Andrews. “Contract, Tort and Restitutions. A Satisfactory Division or Not?” *LQR* 99 (1983). Also, Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, 1996.

30 Gregory Klass (2008).

31 Deryck Beyleveld and Roger Brownsword map the Ethics of Consent though identifying three approaches to consent: A Utilitarian approach, a Right-led Approach, and a Duty-led Approach. Instead of describing private law from one of the ethics of consent, they rely on the moral theory of Alan Gewirth to explain how private law deals with the plurality of ethical

with the power to establish law between parties through the manifestation of consent, duty-imposing rules limit individuals' autonomy in light of moral and social values. The same rule of recognition that validates legal norms enshrining rights and duties and govern behavior, also validates a plurality of ethical perspectives. If so, the rule of recognition that validated rules restraining the contractual capacity of women in the 1950s is the same rule of recognition that validates equal rights for women in the 21<sup>st</sup> century. The rule of recognition did not change in half a century. What change was the duty-imposing rules and values in legal systems.

Private law is composed of *dynamic* rules that reflect the *values* of a society over time. Therefore, the theory of private law that conjures a classic sense is misleading because it, *at best*, refers to a theory of private law in conformity with liberal States in the 19<sup>th</sup> century or, *at worst*, refers to a normative theory of private law developed with descriptive term with the aim of avoiding distribution of wealth within society. At best or at worst, the classic concept of private law became obsolete throughout the time. In contrast, if the concept of private law refers to its subject, it allows an observer to see the dynamic of how law governs private relationships regardless the values of the society at a certain moment in time. One will see that private law was and is still functional and dynamic. (Private) Law is meant to ends and, along with history, these ends have oscillated between values: autonomy (moral) values, social values, and utilitarianism values.<sup>32</sup>

Since the early 1990s, legal scholars on both sides of the Atlantic have advocated for the deconstruction of classic private law thinking. Legal scholars in both the US and Europe, though disagreements about the causes that justify the detachment of laws in book and law in action (the two intellectual developments), favored private law reexamination (one conclusion). They both deconstruct the deontological-autonomous virtuous as the normative basis of private law.

In the 1980s the same discussion went beyond State borders and reached transnational legal systems. Different from prior studies, which assessed private law within States, European and International lawyers started to observe the emergence of private law beyond States. Being the most advanced transitional body of law with a policy mandate of having integrated markets, the European integration project spilled over into private law.

European private lawyers have long observed the expansion of the European integration project upon private since the late 1970s.<sup>33</sup> European Private Law thus means

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perspectives. Deryck Beyleveld and Roger Brownsword op. cit., pp. 32-38.

32 Patterson, Dennis M. "Reviewed Work: The Idea of Private Law by Ernest J. Weinrib." *Modern Law Review* 58, no. 6 (1995): 916-17.

33 Among several private law scholars that dedicated their work to understand the process of Europeanization of Private Law, special attention must be given to the *Acquis Group*, which was established to analyze the existing *acquis communautaire*. They were those who raised their voices to argue that EU legal order had interfered in contract law through the body of rules in EU

the gradual enactment of imposing-duties rules governing contract, tort, and property, and joint venture, which then overlap with national private law in contract law, tort law, property law, and company law. When the EU legal system steps into private law, legal scholars have described the intersection with national legal system as not a single path. European private law could provoke different reactions in national legal systems: divergence or convergence, resistance, or intrusion.<sup>34</sup>

As has been said, theoretical propositions about the transformation of private law thinking are not exclusive to European legal scholarship. Yet the EU legal system represents the epitome of transnational law, and, therefore, the foundations of European private law and its interaction with national private law in Member States is more complex than any other private law beyond State. These are the reasons why the next subsections are divided into two parts: one on the deconstruct of the classic private law thinking within States, the other on the rise of the modern concept of private law beyond States.

## **2. Deconstructing the Classic Concept within and beyond States: Two Intellectual Developments, One Conclusion**

The classic concept of private law does not belong to any ancient theory of law or private law. On contrary, it was brought with a 19<sup>th</sup> century codification project of national civil codes and, since it, has persisted as the mainstream way of thinking about private law within national legal systems.<sup>35</sup> The classic concept of private law derives from a well-succeed intellectual movement that intentionally defined private law as a system of rules based on the virtuous of autonomy (i.e. as a means to protect the parties will) as the normative framework of a coherent, hierarchical and monistic system is and must be challenged in legal scholarship and legal practice.

Despite the establishment of the classic concept of private law as a mainstream thinking, there have always been legal scholars criticizing the metaphysical and epistemological foundations of classic private law. In order to understand the critical thinking of those who argue in favor of the modernization of classic private law, the birth of classic private law need

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primary and secondary law and Court decision. This article has benefited immensely from the proposition on the substantive and institutional aspects of European Private Law that were formulated for their member. See Gerhard Dannemann, *Consolidating EC Contract Law: An Introduction to the Work of the Acquis Group*, in Acquis Group, *Contract I: Pre-contractual Obligations, Conclusions of Contracts, Unfair Terms*. See also Christian Twigg-Flesner, *The Europeanization of Contract Law*, 2008. Twigg-Flesner, Christian. *The Europeanisation of Contract Law: Current Controversies in Law*. Routledge-Cavendish, 2007.

34 The categories of *conflicting and resistance, convergence, intrusion and substitution*, are categories developed by Hans W-Micklitz within the framework of the ERPL Project. See Micklitz, Hans-W. “The Visible Hand of European Regulatory Private Law—The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation.” *Yearbook of European Law* 28, no. 1 (2009): 3–59. See also Micklitz, Hans-W. editor, Yane Svetiev, and Guido Comparato. *European Regulatory Private Law: The Paradigms Tested*. European University Institute, 2012.

35 Kennedy, Duncan. “From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s ‘Consideration and Form.’” *Columbia Law Review* 100, no. 94 (2000): 94–175.

to be clarified. In this regard, James Gordley is notable for tracing the origins of the legal doctrine of private law. Gordley uses his findings to underpin metaphysical and normative reasons as to why there is a need for the modernization of private law thinking.

Before the establishment of classic private law thinking in the 19<sup>th</sup> century, the philosophical school of scholasticism in the 16<sup>th</sup> and 17<sup>th</sup> centuries were recognized for their efforts in building a coherent system of doctrines and principles of Roman law. However, as James Gordley stresses, scholastics preserved key inherent concepts from Aristotle's theory of ethics such as *just price* and *equitable contract terms* in the system they built.<sup>36</sup> There was no attempt to related private law with deontological-autonomous virtuous.

In contrast to Scholastics, jurists in 19<sup>th</sup> century started to construct a legal discourse criticizing the existence of a normative system where rules and principles could conflict. Back then, the legal discourse begun to converge to the idea that conflicting principles and rules would cause legal uncertainty. The solution was then to develop a theory of private law in which the will – as the expression of individual's autonomy – was the cornerstone of a coherent, hierarchical and monistic private law system.<sup>37</sup>

The consequence was the binary division between private and public law as two separate coherent systems: private Law would be based on autonomy and corrective justice, while public law would be based on the moral and social values of distributive justice. The systematization of national private law in codes was referred to as the concrete manifestation of this paradigm, which was reinforced by the movement of national Constitutions.<sup>38</sup> Rules of private law rooted in the Aristotelian tradition of commutative justice – such as just price and equitable contract terms – were no longer explained by the theory of private law of the 19<sup>th</sup> century, despite being concepts with meaning in the philosophical synthesis of late scholastics.<sup>39</sup>

To understand why classic private law thinking was so well received in the 19<sup>th</sup> century, James Gordley builds an analogy between the proposition of the Will Theory and how the theoretical construction was attractive to both prominent philosophies present in 19<sup>th</sup>

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36 Here we are talking about the late scholastic or Spanish natural law school were the first to give Roman Law a theory and systematic doctrinal structure. Their leaders were Domingo Soto (1494-1560), Luis de Molina (1535-1600) and Leonard Lessius (1554-1623). Their work deeply influenced the 17<sup>th</sup> century founders of the northern natural law school Hugo Grotius (1583-1645) and Samuel Pufendorf (1632-1694). see James Gordley, op. cit., 1991.

37 About the break that emerged in the 19<sup>th</sup> century by the will theorists, see James Gordley (1991); Kennedy (2006). See also the historical account of David Ibbetson, where he writes about the Modern Theory of Contracts, the rise of the Will Theory and its declined with the implementations of Legal Regulations and Contractual Fairness. Ibbetson, David. *A Historical Introduction to the Law of Obligations*. Oxford University Press, 2001.

38 See Micklitz (2014); Reich (2010).

39 James Gordley distinguished the jurists – Will Theorists – from philosophers who were utilitarian like Bentham or rights based as Kant and Hegel. While the former had a philosophical meaning of will, the jurists adopted the simplistic idea of what will means and impressed it into service. Gordley, James. *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment*. Oxford, New York: Oxford University Press, 2006.

century: the utilitarianism of Jeremy Bentham; and rights based theories of Immanuel Kant and Friedrich Hegel.<sup>40</sup> In utilitarianism, if the task of law is to ensure that people's preferences are satisfied to the greatest extent possible, the Will Theory is attractive for protecting and enforcing parties' preferences; individuals' choices. For rights-based philosophers, if law is obligatory because it is rooted in human freedom and autonomy, the will theory in private law provides the status of a right to individuals' expression of freedom. Classic private law thought flourished in legal discourse with this philosophical meaning of will.

The Will Theory separated law into two different boxes: private v. public law, corrective v. distributive justice, apolitical v. political, neutral v. values. The supremacy of the will of the parties – captured by the expression's autonomy-based value and freedom of contract – serves as justification for private law thought rooted in an individualistic and philosophical conception of autonomy.

To explain the difference between scholars who still uphold the classic private law thinking in the 21<sup>st</sup> century and those who argue in favor the modernization of private law, Hugh Collins illustrates the separation of the public and private systems of law as semi-detached houses: one representing private law, the other public law. For classic private law thinking, the structural relation between private and public law resembles semi-detached houses that are inhabited entirely separately. Each legal system develops its own autonomous integrity and coherence and there is no interconnection.<sup>41</sup>

There have been two intellectual movements that uphold the deconstruction of classic private law thinking.<sup>42</sup> While one intellectual development dismisses the doctrinal and legal theoretical foundation of classic private law by revealing its unrealistic grounds and social construction project, the other perceives classic private law as a theory suitable for the liberal State, yet that it needs to be adapted to the continuous transformations of the State in modern and postmodern societies.

### *2.1 Adjusting Theory to Realism by Philosophers of Law*

The first intellectual development arguing for the modernization of private law *thinking* arose among legal philosophers who refused both the epistemological and the metaphysical foundations of classic, 19<sup>th</sup> century private law theory. For them, classic private law thinking - intentionally or non-intentionally - distorts reality because it bases its metaphysical

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40 James Grodley (2006).

41 The two characterizations of the two intellectual developments were borrowed by Hugo Collins. Collins, Hugh. "The Impact of Human Rights Law on Contract Law in Europe." *European Business Law Review* 22, no. 4 (2011): 425–35.

42 Hugo Collins uses the analogy of the two semi-detached houses to draw the distinction between two theories of private law. Collins, Hugh. "On the (In)compatibility of Human Rights Discourse and Private Law." In *Constitutionalization of European Private Law*, edited by Hans-W. Micklitz, First edition. The Collected Courses of the Academy of European Law, volume XXII/2. Oxford, United Kingdom: Oxford University Press, 2014.

proposition of private law on arguments that goes far from features of what private law is in practice. Put simply, the first intellectual development sees classic private legal thinking as a patient that has become ill with a condition of cognitive distortions. This is the reason why they do not claim to be in favor of the transformation of private law, but rather they favor the transformation of classic private law thought.

There are two schools of legal thought that undermine the foundation of the classic theory of private Law: legal realism, and critical legal studies. For legal realists, describing private law as an autonomous system based on the supremacy of the will of the parties is founded on an erroneous formalistic approach to law. If legal theories must represent the metaphysical views of the world, an empiricist proves that there have always been propositions of law solving substantive legal issues that are based on opposite rhetorical modes: individualism and altruism.<sup>43</sup> As it stands, the claim that private law is not in the service of any external moral obligation is metaphysically and epistemologically debatable. This is the core point of departure for those who claim there is a disconnect between the “law in books with law in action”.<sup>44</sup>

Critical legal scholars, who moved beyond the realists by applying genealogical methods to the study of classic private law theory, argue that the legal doctrine of an autonomous values was a normative theory of private law built to support the contingent distribution of wealth in the 19<sup>th</sup> century.<sup>45</sup> What was a normative will theory, which might have been well suited to the political conjuncture of the 19<sup>th</sup> century, has been twisted into descriptive rhetoric about the foundation of private law perpetuating the contingent distribution of wealth of the 19<sup>th</sup> century over subsequent years.<sup>46</sup>

## 2.2. *Adjusting Theory to the Transformation of the State by Sociologist of Law*

Rather than rejecting the foundations of classic private law thinking as a theoretical construction, the second intellectual development perceived it as a legal doctrine conforming the purposes of liberal States in the 19<sup>th</sup> century and the codification movement in Continental Europe.<sup>47</sup> However, it became obsolete over time with the transformation of States. The

43 Kennedy, Duncan. “Form and Substance in Private Law Adjudication.” *Harvard Law Review* 89, no. 8 (June 1976): 1685–1778.

44 The distinction between “Law in book and Law in practice” is commonly associated with Oliver Wendell Holmes’ Legal Empiricism. About the influence of Holmes in the Realism movement see Twining, William. *Karl Llewellyn and the Realist Movement*. Second edition. Cambridge University Press, 2014. Holmes, Oliver Wendell. “The Path of Law.” *Harvard Law Review* 10 (1897): 457.

45 Kennedy, Duncan. “Toward and Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940.” *Research in Law and Sociology* 3 (1980): 3–24.

46 Kennedy, Duncan. “From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s ‘Consideration and Form.’” *Columbia Law Review* 100, no. 94 (2000): 94–175. Kennedy, Duncan. “Formalism.” In *International Encyclopedia of the Social Behaviour Science*, Vol. 13. Amsterdam: Elsevier, 2001.

47 Wieacker, Franz. *A History of Private Law in Europe with Particular Reference to Germany*. Oxford : New York: Clarendon

challenge of those who argue in favor of the modernization of private law is to reconcile private law thinking with modern and postmodern societies.<sup>48</sup> To do so, the modernization of private law could be described from the observation of the transformation of the State from two dimensions, which is expressed in the metaphor of the *inner* and the *outer face* of the State firstly coined by Phillip Bobbitt.<sup>49</sup>

### 2.2.1. *The inner face of States: Towards Welfare and Regulatory States*

If the classic theory of private law represented a metaphysical account of law in liberal States, it could no longer represent private law in welfare States in the early 20<sup>th</sup> century,<sup>50</sup> nor could it represent private law in Regulatory<sup>51</sup> or Market States.<sup>52</sup> Whereas Will Theorists have persisted in articulating private law as a coherent, monistic system grounded in autonomy (in its individualistic and philosophical conception), private law has changed through legislation and adjudication to accommodate the values of modern and postmodern societies.<sup>53</sup>

In this account, the classic thinking started to be undermined with the rise of the welfare State in the early 20<sup>th</sup> century. In Europe, the pressure of social movements over States led to legislative reforms to protect weaker parties exposed to contractual relationships with an imbalance of bargaining power. Back then; Franz Wieacker classified these new rules restricting freedom as implications of social solidarity.<sup>54</sup> Labor and Consumer law created

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Press; Oxford University Press, 1995.

48 Franz Wieacker (1995).

49 This work borrows from Phillip Bobbitt the terms “*Inner and Outer face of States*”. Nevertheless, it does so with a slight difference in meaning, in particular when it concerns the outer face of States. In relation to the inner face of States, Bobbitt uses the term to depict the way in which States regulate their own nation through State laws. To what concerns the outer face, Bobbitt describes how States have a strategic relationship with other States. In this article, the outer face of States represents the relationship that States pursue with other States and also private and public organizations that does not fall into the institutional category of Sovereign State. As it stands, the definition of the Outer and Inner faces of States applied in this work is more aligned with the description employed by Dennis Patterson and Ari Afilalo. See Bobbitt, Philip. *The Shield of Achilles: War, Peace and the Course of History*. First edition. Knopf, 2002. Patterson, Dennis M. (Dennis Michael), and Ari Afilalo. *The New Global Trading Order: The Evolving State and the Future of Trade*. Cambridge University Press, 2008.

50 Franz. Wieacker (1995).

51 Majone, Giandomenico. “The Rise of the Regulatory State in Europe.” *West European Politics* 17, no. 3 (July 1, 1994): 77–101.

52 For Hans Micklitz, Market State is “With a view of regulatory integration, the main features of the EU Market State are the following: the shift from private into public - the State outsources its regulatory functions; the shift from law and regulation to regulation and outsourcing privatization, such as may be observed in the areas of utilities, transportation and health care. The bottom line: sovereignty loses its Nation State force and preserving market conditions for the maximization of economic opportunity”. Footnote 21, Micklitz in Lioni 2013.

53 Caruso, Daniela. “Contract Law and Distribution in the Age of Welfare Reform Symposium: AALS Section on Contracts: New Frontiers in Private Ordering.” *Arizona Law Review* 49 (2007): 665–94.

54 The claim of private legal scholars in middle 20<sup>th</sup> century for the modernization of private law thinking could not be better represented than the words written by Franz Wieacker in 1952. “When the exercise of its classical institutions does involve the use of economic or social power, the question of the role and the status of private law in the social state under the role of law arise starkly. Here too the Basic Law in Western Germany irrefragably guarantees rights of ownership and inheritance, and also, according to the prevalent and correct interpretation of its second and tenth article, freedom of contract: consistently with traditional individual rights, these are the freedom of individual choices. At the same time the social function of contract, economic rights, land ownership, capital the means of production, and economic association in our present system is undeniable: unlike the entrepreneurial economy the social economy sees them as a means of ensuring the distribution of sources, the creation of assets, and the maintenance of the necessities of life are affected in a just manner. When social considerations of this

rules affecting transactions and liability.

If one takes the transformation of States hand-in-hand with the dynamic change of law, private law presented itself as a dynamic instrument.<sup>55</sup> In 1936, the French government approved the Accords of Matignon after the May-June general strike. It restrained the prior autonomy of employees and employers to freely negotiate weekly working hours and wages. By the time the German government had already passed a cartel ordinance, during the inflation crisis of 1923. This act reinforced State authority to restrict the autonomy of parties when the terms and conditions of contracts resulted in inflating surplus revenue to the detriment of consumers.<sup>56</sup> Decades later, the House of Lords confirmed the punitive damages awarded by the jury in the famous 1964 case *Rookes v Bernardes*, and tort law became a regulatory instrument to dissuade outrageous behavior, which is far from its corrective justice purposes in classical private law terms.<sup>57</sup>

With the decline of welfare States and the emergence of Regulatory States, the system of private law took another turn in the late 20<sup>th</sup> century. Trust in market mechanisms pushed wide reform to open markets for competition. Public operations in heavy industries and public utilities were privatized and exposed to hybrid rules. Both regulation and competition impact private law creating duty-imposing rules to govern human behavior and, at the best, to pursue utilitarian values. In electricity markets, States have conferred rights for competitors to access transmission and distribution systems as means to increase competition and reduce marginal costs. There are cases in which States regulated price caps in wholesale markets (e.g. Ramsey pricing).<sup>58</sup> Rights to access networks and obligations to respect price caps could be mandatory rules applied to transmission/distribution service contracts and supply agreements respectively. Both regulations are also justified through utilitarian values.

Despite undeniable changes of law and social changes through law in the last century, the classic concept of private law persists. This is thanks to the rhetorical discourse of Will Theorist in the 20<sup>th</sup> century. To defend the “Purenness” of private law, Will Theorists have argued that labor law and consumer law were not private law, but rather rules marginalized

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order are taken into account in way the law is applied, private rights arising from contracts (exchange, use, employment, and insurance), tort or liability insurance appear in a new light. They may still represent areas of freedom (notably guaranteed by the fundamental rights) but such freedom is now limited not only by the freedom of other individuals but also by the implications of social solidarity for the relationship between individuals”. Franz. Wieacker (1995), p. 486.

55 Micklitz, Hans-W. “Social Justice and Access Justice in Private Law.” *EUI Working Paper LAW 2011/02* (2011).

56 Example cited by Wieacker when arguing about the “disintegration of private law” and social law. Franz Wieacker (1995), p. 433.

57 Weir, Tony. *An Introduction to Tort Law*. Second Edition. Clarendon Law Series. Oxford, New York: Oxford University Press, 2006, p. 219-220.

58 Ramsey Pricing are temporary mandatory rules imposed to every transaction of electricity wholesale throughout a certain period of time, when high demand picks increases excessively revenues of producers for natural accidents or some sort of market failure. Cap prices are regulatory mechanism imposed by States on market actors. Differently from traditional protective measures of consumer law, these rules aim is to protect demand-side.

as hybrid law. The same argument was extended to justify the exclusion of market regulation rules from the branch of private law to a sort of economic/administrative law.

When the Will Theorist marginalized this set of rules based on social values from what they perceive as the “pure private law”, it provoked not only the rupture between private law in books and law in action, but it also provoked a negative impact upon the latter. The impact upon legal practice happens where there is a lack of legal consciousness among individuals about their rights and duties and how to privately enforce them. If regulation enshrines duties of contracts applied to two persons making transactions, the non-compliance with duty-imposing could hold complaints based on private remedies (e.g. breach of contract). The lack of legal consciousness, therefore, diminishes the effectiveness of the legal systems.

### *2.2.2. The outer face of States: Globalization, Europeanization, and Europeanization of Private Law*

If explaining the transformation of States together with the transformation of private law is a way to deconstruct the classic concept within States, this exercise is harder when the objective is deconstructing the classic thought of law beyond States.

There is one reason why international lawyers are even more resistant to the modern theories of private law. While the classic concept within States restrains private law thinking to conferring-power rules, there are no conferring-power rules beyond national legal systems ensuring the enforcement of individuals’ will. There are agreements between States committed to the mutual recognition of conferring-power rules given by States to individuals. These are the grounds of International private law. If so, international public lawyers are inclined to deny that supranational imposing-duties rules governing transactions, property or torts are hybrid rules with characteristics of public and private law at the transnational level.

International private law corresponds to a set of rules determining the applicable law and competent jurisdiction to solve conflicts in cross-border transactions. Therefore, as Horatia Murr-Watt asserts,<sup>59</sup> international private law has little to say about the reconfiguration of sovereign authority<sup>60</sup> and the rise of transnational functional regimes.

By functional regimes, Horatia Murr-Watt means the growth of duty-imposing rules at transitional level governing commercial contracts, (intellectual) property rights, and the liability of multinational corporations which is neither captured in the classic concept of private law, nor international private law. Therefore, there is a tendency of public International

59 Muir-Watt, Horatia. “Private International Law beyond the Schism.” *Transnational Legal Theory* 2 (2011).

60 Hans Lindahl starts his new book on “Legal Authority and Globalization of Inclusion and Exclusion” by contextualizing the conflict between Monsanto and Indian farmers regarding the enforcement of patent rights against Indian farmers. However, the understanding of the phenomenon from the Private Law perspective is not his focus. Private Law plays an important role to explain the reaction of Indian farmers against the charge of royalties. Hans Lindahl, “Authority and Globalization of Inclusion and Exclusion”, Cambridge University Press, 2018.

lawyers to combine duty-imposing rules applied to States to remove tariffs for trade together with imposing-duties rules prohibiting individuals from using seeds with patents in foreign jurisdictions. The issue here is that International public law can explain the public enforcement of WTO rules obliging States to remove tariffs for trade, but it cannot explain the second phenomenon properly. It lacks tools to explain the impact of TRIPs upon private law, as well as how Monsanto conducted the private enforcement of patent rights against farmers in Indian National Courts before recognition of the patent by India.<sup>61</sup>

Unfortunately, the persistence of the classic concept of private law is then reproduced in the studies of law beyond States; in transitional and international law. The theory of private law as a coherent, hierarchical, monistic system of law based on autonomy based-values is the product of the vertical modulation of law into a black-box model.<sup>62</sup> The black-box model is the metaphor first used by William Twining to represent the misrepresentation of the phenomenon of law in general and, most importantly, to represent the transnational law. Law is still taught through the binary of national and international private law, and public and private law. Therefore, if national lawyers are still narrowing down private law as conferring-power rules at the national level because of the classic concept of private law, imposing-duties rules of private law beyond States are left drifting along lifeless. Neither International private law, nor the classic concept of private law is useful to explain globalization.

Globalization refers to the increasing cross-border movement of goods, services, capital, and citizens which affect both traditional fields of international law. For International Public Law, States are still holding authority to either rule their nations or delegate that authority to supranational bodies, on the other hand States no longer have the capacity to regulate actions and events that transcend territorial jurisdictions of sovereign States<sup>63</sup> International law represented by the black-box model is bound to fail in postmodern society, where law needs to be *dynamic* as much as technology changes.

Being Law a social phenomenon, globalization demands transnational rules to govern

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61 Bobbitt named as Opaque Sovereignty. See Bobbitt, Philip. *Terror and Consent: The Wars for the Twenty-First Century*. First American edition. A.A. Knopf, 2008. See also MacCormick, Neil. *Questioning Sovereignty*. Oxford: Oxford University Press, 1999.

62 The metaphor of the black-box model was firstly coined by William Twining and later used by Tuori. Twining, William. *General Jurisprudence: Understanding Law from a Global Perspective*. Cambridge: Cambridge University Press, 2009.

63 The increase of global trade has concomitantly reduced the *regulatory capacity* of the Sovereign States in the production of the transnational normativity. On the one hand, some scholars refer to this phenomenon as the vanishing of the Sovereign State. On the other hand, others hold the idea that the State is crossing a transformation process, instead of disappearing. To mention some of the latter, Dennis Patterson and Ari Afilalo (2008), Philip Bobbitt (2002). Sassen, Saskia. *Territory, Authority, Rights: From Medieval to Global Assemblages*. Princeton University Press, 2008. Stven Steimo, *The Evolution of Modern States: Sweeden, Japan, and United States*. New York: Cambridge University Press (2010). Also J Sgard, E Brousseau and Y Schemeil, 'Sovereignty without Borders: On Individual Rights, the Delegation to Rule and Globalization' Working Paper, Sciences-po, CERI, 2010.

global movement of goods, services and people.<sup>64</sup> Transnational law emerged then, and have become a field of research that has attracted massive attention from scholars. Scholars who were rooted in the traditional fields of law – constitutional law, administrative law, private law – have made efforts to understand the phenomenon of transnational law, but they did so sometimes transposing classic concepts of their disciplines to the transnational level.<sup>65</sup> As a result, some studies on the attempt to understand transnational law fail for transposing to the global arena the black-box model; the classic divisions of public and private law. Transnational law, therefore, has exposed even more the fragile foundations of the classic concept of private law. Globalization has led to a disorder of orders<sup>66</sup> and somebody inside the *black-box* cannot discern the lack of conformity between theories of law and law in action in this global era.

In an effort to systematize private legal scholarship that challenged classic private law by looking at the various manifestations of private law beyond the state, Ralph Michaels and Nils Jansen<sup>67</sup> grouped private law under *three* headings according to the subject of their research: Europeanization of private law, globalization of private law, and privatization of private law.<sup>68</sup> Considering the first session already introduced the Europeanization of private law, lets us focus in the other two categories.

The globalization of private law imagines private law made by supra-governmental bodies.<sup>69</sup> It refers to imposing-duty rules governing contract law, property rights, and tort law

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64 Phillip Jessup coined the term transnational law in 1956. “The problems to be examined are in large part those which are usually called international, and to be examined consists of the rule applicable to be to these problems. But the term “international” is misleading since it suggests that one is concerned only with the relations of one nation (or state) to the other nation (state). (...) I shall use, instead of using the term ‘international law’, the term ‘transnational law’ to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard category”. Jessup, Phillip. *Transnational Law*. New Haven: Yale University Press, 1956.

65 Legal scholars have intensively engaged in researchers whose subjects are new modes of law making, judicial and non-judicial adjudication emerging at the global level by asking how those novels could affect the traditional concept of law in itself. Among those scholars, four trends of research can be roughly identified by the similarities of their analytical arguments. Constitutionalism as Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford Constitutional Theory. Oxford, New York: Oxford University Press, 2010. Fragmentation of law as Koskenniemi, Martti. “Constitutionalism, Managerialism and the Ethos of Legal Education.” *European Jo*, 2007. Global administrative law as Kingsbury, Benedict, Nico Krisch, and Richard B. Stewart. “The Emergence of Global Administrative Law.” *Law and Contemporary Problems* 68, no. 3 (2005): 15–62. Legal pluralism as Teubner, Gunther. “Global Bukowina: Legal Pluralism in the World Society.” In *Global Law without a State*, edited by Gunther Teubner. Studies in Modern Law and Policy. Aldershot ; Brookfield, USA: Dartmouth, 1997. Benda-Beckmann, Franz von. “Who’s Afraid of Legal Pluralism?” *The Journal of Legal Pluralism and Unofficial Law*, December 2, 2013. Berman, Paul Schiff. “Global Legal Pluralism.” *Southern California Review* 80 (2007): 1155. Calliess, Galf-Peter, and Peer Zumbansen. *Rough Consensus and Running Code: A Theory of Transnational Private Law*. Hart Monographs in Transnational and International Law, v. 5. Oxford: Hart, 2010.

66 Neil Walker. “Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders.” *International Journal of Constitutional Law* 6, no. 3–4 (July 1, 2008): 373–96.

67 Michaels, Ralf. “Globalization and Law: Law Beyond the State.” In *Law and Social Theory*, edited by Reza Banakar and Max Travers, Second edition. Hart Publishing, 2013.

68 The three headings of legal scholarship studying the emergence of private law beyond the State, which are identified by Ralf Michaels and Nils Jansen, either aim to empirically prove the existence of private law beyond State or propose a theory of the about how this law affect our understanding of law. Michaels and Jansen (2013),

69 Michaels and Jansen (2013), p. 864-868

of States made by the WTO when adjudicating trade disputes.<sup>70</sup> It also defines private law derived from arbitral awards as a source of *lex mercatoria*,<sup>71</sup> whose validity and normativity is derivative of the New York Convention.<sup>72</sup> Though not a novel phenomenon, Globalization of private law serves as a counter-example to the classic concept of private law as conferring-power rules made by States. Contract law doctrines based on arbitral awards reinforce the evidence of *lex mercatoria* as a set of duty-imposing rules.

Ralf Michaels and Nils Jansen also identify another category of private law beyond States that calls classic private law into question: the phenomenon of the privatization of private law. Nowadays, a large body of empirical research underpins descriptive analyses of functional regimes made and sometimes adjudicated by private bodies like NGOs, private associations, and private corporations. Different from supranational governmental organizations, the normativity of the rules of these private regimes (or systems) is not grounded in the *social contract* as means to confer power (i.e. the *social contract* confers power to States that in turn confer power to supranational governmental bodies).

By contrast, the validation of private regimes is grounded in consent. National and supranational governmental bodies have no or have a minor role in making or adjudicating the rules. When internet users wish to register a domain name, they give their consent to be governed by the ICANN's approved terms and conditions. When a person uses a digital platform to offer or purchase goods, a click in the check box is the manifestation of consent, which makes the terms and conditions of digital platforms binding to private contractual relationships. Privatization of private law does not mean that rules don't or cannot pursue social values. This author recently received a notice about changes in standard-form contracts from Airbnb. The terms and condition were amended to include obligations of non-discrimination. Moreover, privatization of private law also does not infer the emergence of *autonomous systems* (i.e. systems independent of national and international systems of law, which is different from *autonomous value*). Anna Becker shows us how German and English Courts have turned Corporate Social Responsibility (CSR) standards into binding rules of law by recognizing their normative strength with regard to third parties.<sup>73</sup> The International

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70 Micklitz, Hans-W. "The Internal vs. the External Dimension of European Private Law – a Conceptual Design and a Research Agenda." *EUI Working Papers LAW* 2015/35 (2015).

71 *Lex Mercatoria*, which is a transnational body of substantive rules created by practices of commerce and applied by International Arbitration. See Peer Zumbansen, *Transnational Law, Evolving* (2011), and Claire Cutler, *Private Power and Public Authority: Transnational Merchant Law* (2003).

72 The Recognition of Foreign Arbitral Awards by New York Convention confers powers to Arbitral Courts the make rules of private law by adjudicating commercial disputes. Donald B. King, *Does an Unknown Exist? Impact of Commercial and Consumer Law* (2003).

73 Beckers, Anna. *Enforcing Corporate Social Responsibility Codes : On Global Self-Regulation and National Private Law*. Hart Publishing, 2015.

Safe Harbor Privacy Principles reinforces Dennis Patterson and Ari Afilalo's proposition that functional systems are not *autonomous* systems, but rather systems that work under the *acquiescence* of sovereign States.<sup>74</sup>

Like *lex digitale*<sup>75</sup> or *CSR*, there are several other functional regimes that illustrate the Privatization of private law at local, national or transnational levels. *Lex Sportiva*<sup>76</sup> is another example of a body of law at the transnational level. Intrigued by the evolving power of these functional systems, legal and political scholars have questioned to what extent someone's consent to opt-out or opt-in to these functional regimes can still be considered voluntary consent. They emphasized the fact that functional regimes work like gatekeepers. To access facilities and associations that are either part of our daily habits or conditional on access certain markets, consent is the key. Facebook's terms and conditions are not individually negotiated and users' express consent only by opting-in or opting-out. Soccer teams have to consent to FIFA's terms and conditions to access UEFA Championing Leagues. The power of these functional systems justifies what Gunther Teubner called Transnational Private Constitutional Orders aligned with traditional legal systems: national and international legal systems.<sup>77</sup>

Globalization and the privatization of private law are factual claims against the persistence of the classic concept of private law. These categories reveal the inconsistencies between the theory of will in books and law in practice. However, besides the theoretical misrepresentations, the classic concept also has a negative impact on law in practice.

When scholars observe the privatization of private law, the private law dimension is self-evident. NGOs, standard bodies, or digital platforms are organizations whose legal constitution relies on corporate and contract law. Normative theories such as Transnational Private Constitutional Orders or Global Administrative Law attempt to construct legal discourses imposing sort of (universal) social values to those systems of law, which have a widely recognized private dimension. On the other hand, the globalization of private law, which came into being through International Organizations, has delegation authority and a policy mandate set out by States and through States, which means that the private dimension is often obfuscated by the public law dimension. The reason why is (again) the misrepresentation of private law through the Will Theory. If the classic concept is put aside, the legal consciousness of the private dimension of International Treaties, either regulating

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74 Patterson and Afilalo (2008).

75 Dirk, Lehmkuhl. "The Resolution of Domain Names v S Trademark Conflicts: A Case Study on Regulation Beyond the Nation State and Related Problems." *Zeitschrift Für Rechtssoziologie* 23, no. 1 (2002): 61–78.

76 Duval, Antoine. "Lex Sportiva: A Playground for Transnational Law." *European Law Journal* 19, no. 6 (November 1, 2013): 822–42.

77 Teubner, Gunther. *Constitutional Fragments: Societal Constitutionalism and Globalization*. Oxford University Press, 2012.

intellectual property rights or Trade, will be enhanced in the legal community. The outcome would be a better understanding of how plural legal systems interact,<sup>78</sup> as well as an increase in legal consciousness and a more effectiveness International legal system. Even taking into account the *genuine* normative concerns of scholars against private enforcement,<sup>79</sup> none can deny that the European constitutionalism was the result of the infant legal consciousness of the private dimension of EU Law.

### 3. Are we all pluralists? Legal Consciousness, Private Enforcement, and Effectiveness

On one hand some private legal scholars have agreed with the empirical-analytical claim that *we are all living in legal pluralism*; therefore, the classic concept of private law is died, or must die. Yet sometimes their normative proposals to better regulate private law relation in plural legal orders go in opposite directions. Here we have arrived precisely at the point in time that this chapter began: the DCFR and the battle between the legal pluralist and the monists.

On the one side of the spectrum, legal scholars argue that pluralism and functionalism in private law is an inescapable consequence of postmodern society, as well as the transformation of the classic concept of private law. Hence, legal pluralism is not a phenomenon exclusive to private law in Europe, but to law in general.<sup>80</sup> The increase in the complexity of voluntary and involuntary transaction, driven mostly by technology and globalization, walks hand-in-hand with the increase in complexity of how to regulate these transactions,<sup>81</sup> which is done through rules of private law. Therefore, having general principles of private law that can be applied indiscriminately to all transactions is no longer suitable in postmodern era, as it was perceived to have been by the codification projects of Roman law projects in the 19<sup>th</sup> century.<sup>82</sup> For them, the “plan of a more coherent EU Contract law” is unfeasible in an *unsystematic* law. On the same side of the spectrum, there are also private lawyers who have advocated that

78 Berman (2006), Zumbansen and Calliess (2010).

79 When scholars reject the private law dimension of International Law and EU Law, but at the same endorse the proposition that they are “hybrid” legal systems, this article is not categorically inferring they are all deluded by the classic concept of Private Law. Some scholars have a normative claim that justifies their dismissive position towards private law. Some of them argue that the Sovereignty of States must be conserved, others for the coherence of International Law (or non-fragmentations). By increasing legal consciousness of the private law dimension of International Treaties, more individuals would feel entitled to rights created by International and Supranational authorities.

80 Theory and concept of legal pluralism have long spurred discussion in legal theory, legal sociology and legal anthropology. See James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, 1995. Tamanaha, Brian Z. “A Non-Essentialist Version of Legal Pluralism.” *Journal of Law and Society* 27, no. 2 (2000): 296–321. Tamanaha, Brian Z. “Understanding Legal Pluralism: Past to Present, Local to Global.” *Sidney Law Review* 30, no. 3 (September 2007). Tamanaha, Brian Z., Caroline Mary Sage, and Michael J. V. Woolcock. *Legal Pluralism and Development: Scholars and Practitioners in Dialogue*. Cambridge University Press, 2012.

81 Twining (2010).

82 Micklitz, Hans-W. “The (Un)-Systematics of (Private) Law as an Element of European Culture.” In *Towards a European Legal Culture*, edited by Geneviève Helleringer and Kai Purnhagen. Germany: Nomos Verlagsgesellschaft, Verlag C.H. Beck

pluralism in private law in Europe is not only unavoidable, but is desirable<sup>83</sup>. Regardless of the justification for legal pluralism in private law, if it is unavoidable or desirable, pluralist legal scholars have vehemently rejected any attempt to systematize European Private into what could be perceived as the harmonization of European Private Law into a transnational Civil Code.

On the other side of the spectrum, there are private legal scholars who disagree with this normative pluralist approach. The vicarious opponent of any effort of European harmonization in private law has been Pierre Legrand.<sup>84</sup> Some of the drafters of the DCFR were also scholars' discontent with Pluralism, who saw in the European Codification Project as a way out of pluralism and a way back to monism.

Thinking that private law in postmodern society is *per se* or should be functional and plural goes against the development of the DCFR in 2008/2009 and later the CFR in 2011 under the auspices of the Redding Commission, as well as the CESL. The major mistake of all the European Codification Projects in the 2000s has been the reliance on the belief that the harmonization (or systematization) of national Civil Codes at the European level would lead to the coherence of private law. Their mistake was looking at European Private law with the same lens that classic private lawyers looked at Roman law in 19<sup>th</sup> century. The DCFR then could be seen as an attempt to reproduce the same project as civil law codification in the 19<sup>th</sup> century, which could have been suitable for non-complex societies ruled by Liberal States in 19<sup>th</sup> century.

The European Codification Project was a political fiasco, as was discussed at the beginning of this chapter, and the DCFR is now relegated to scientific fiction section in bookstores. Regardless of the belief that codification might have recreated a monistic legal system, the failure of the DCFR project leads us to the conclusion that indeed *we are all living in legal pluralism* and will continue to do so.<sup>85</sup> As things stand, what is the role of European private legal scholarship in the postmodern era, when private law is unequivocally plural? To answer this question, I found inspiration in Ralf Michaels' assertion about theories

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and Hart Publishing, 2014.

83 Benda-Beckmann, Franz von. "Who's Afraid of Legal Pluralism?" *The Journal of Legal Pluralism and Unofficial Law*, December 2, 2013. Michaels, Ralf. "Why We Have No Theory of European Private Law Pluralism." In *Pluralism and European Private Law*, edited by Leone Niglia. Oxford: Hart, 2013.

84 Arguably, the most vociferous opponent of greater European Harmonization efforts is Pierre Legrand. Legrand, Pierre. "Antivonbar." *Journal of Comparative Law* 1, no. 1 (2005).

85 It is undisputable that the Euro-crisis and *Gauweiler case* revived the discussion about whether the EU legal system could still be conceived as a Constitutional plural order. Some scholars have argued that the decision of CJEU on the OMT's policy represents a new stage of constitutionalism of the EU towards a fully monist order. However, this article is in agreement with scholars who see it as foregone conclusion. CJEU's judgement in favour of the legality of the OMT emission was referred by the German Constitutional Court, which is still holding powers to review CJEU decisions in strict circumstances (*ultra-virus* review, human rights review, and identify review). If indeed the German Constitutional Court decided to follow the CJEU in such controversial case, it could be seen as a treat to the European Plural Constitutional, but any conclusion is no more than speculations. C-62-14. *Gauweiler case*. See Christiaan Timmermans, *The Magic World of Constitutional Pluralism*.

on globalization. “Paradigm shifts happen neither in reality nor in ideology but in your ways of understanding the world”.<sup>86</sup>

Even though the EU did not bring to life the supranational civil code, it left behind its legacy, which was the academic debate triggered by the draft proposal. The DCRF gathered private legal scholars from different Member-States and legal cultures to discuss Law, Civil Codes, and the concept of private law. Discussions and academic production about the DCFR and the private dimension of the European Integration project is the *true* legacy of EU. It is a large amount of material that serves as evidence to contest the validity of the classic concept of private law embedded in national legal systems in Europe and abroad. This legacy needs to shift from European Legal Scholarship to national legal Scholarships within Member States and civil law countries beyond the EU.

Within States, there is a need to increase of legal consciousness of European private law. There are national Courts endorsing the direct horizontal effects of EU law, which is combined with the EU initiative of creating procedural out-of-court mechanisms to solve private disputes. However, private enforcement will remain underdeveloped if market actors do not share awareness of the existence of their rights.

The current work of European private lawyers will create a legacy for the already ongoing debate about the emergence of private law beyond the State. Different from the worldwide literature on Privatization and Globalization of Private Law, European private law emerges in a transnational legal system as a legal system beyond State, but with policy mandate. Rather than trying to stifle conflict through an imposition of Universalist harmonizing schemes (e.g. supranational constitutions or codes), EU institutions have been innovative in seeking a wide variety of procedural mechanisms and practices for managing hybridity without eliminating it.<sup>87</sup> In an era where more and more transnational legal systems emerge with policy-driven competence to build free and common markets, the EU experience will serve as blue print. These new Integration Projects replicate European negative integration and, sometimes, even positive integration (e.g. TTIP and TTP).<sup>88</sup> If one agrees that the European Integration Project will unavoidably spill over into private law, lessons from European Private Law on how to understand these modes of transnationalization of private law are worthwhile.<sup>89</sup>

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86 Michaels, Ralf. “Globalization and Law: Law Beyond the State.” In *Law and Social Theory*, edited by Reza Banakar and Max Travers, Second edition. Hart Publishing, 2013.

87 Berman, Paul Schiff. “Global Legal Pluralism.” *Southern California Review* 80 (2007): 1155.

88 Regional Trade Agreements – like TTP (Trans-Pacific Partnership) and TTIP (Transatlantic Trade and Investment Partnership) – have raised concerns among international legal scholars with regard to the insertion of principles that have long been part of the EU legal order such as the principles of direct effect and supremacy of the supranational legal order. Since these discussions have long been in the core of the academic debate in Europe, there is a lot to learn from the old continent.

89 See the infant project of Hans-W. Micklitz (2015).

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