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Editorial

The Privatization of European Law and Constitutionalization of Private Law: Two Sides of the Same Coin

1. Introduction

Death and taxes are not the only certainty in life: nowadays, the European citizen must, in his private sphere, add to this the omnipresence of EU law.[1] The wide array of directives aimed at protecting consumers' interests[2] attests to this, let alone other instruments of European origin (such as those implementing EU equality law) directly regulating private actors' behaviour.[3] In this way, EU law imposes yet another layer of regulation, together with fields traditionally associated with the private sphere, like that of national private law.

While EU law and national private law have different institutional characteristics and histories, their ultimate goals may either be complementary or in tension. Thus where positive and negative harmonization are aimed at establishing the internal market and deepening economic integration, such measures can also be understood as strengthening private autonomy – allowing private actors the freedom to choose how and where to perform an economic activity.[4] At the same time, positive and negative harmonization function as a constraint on private autonomy. The four freedoms, thus, prevent private actors from discriminating on grounds of nationality. In similar fashion, directives or regulations may mandate that firms comply with specific standards before being allowed to trade across the internal market.

EU law was initially crafted to regulate inter-state relationships. That much is trite and explains why it bears characteristics that at the national level would be considered public law. Yet, what implications are there for EU law, if any, of its increasing regulation of the private sphere? Clearly, from the previously mentioned examples, EU law is now saddled with values and functions of private relationships different than what it may hitherto be used to dealing with.

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1 See the contribution by C. SIEBURGH in this issue.

2 For an overview, see H. SCHULTE-NÖLKE, C. TWIGG-FLESNER & M. EBERS (eds), *EC Consumer Law Compendium*, Selliers European Law Publishers, Munich 2008. See also contributions by C. MAK and M. KAWAKAMI in this issue.

3 We have in mind the prohibition of discriminations on grounds of nationality, sex, ethnic origin and other Art. 19 TFEU criteria *inter alia* which function to regulate private relationships. See the contribution by E. MUIR in this issue.

4 See the contribution by H. SCHEPEL in this issue.

One such example of difference arose in the recent case of *Jivraj* v. *Hashwani*,[5] where the haloed European principle of equality (in this case, the prohibition against discrimination in an employment relationship) was pit against what a private lawyer might consider the equally sacrosanct principle of private autonomy (i.e., the freedom to choose one's arbitrator). The English Court of Appeal caused a ripple of discontent throughout the arbitration community when it struck out an arbitration clause for an ostensible breach of anti-discrimination legislation – that is to say, one set of values trumping another. Acting quickly, the UK Supreme Court quashed the decision on the technical ground that an arbitrator's link to the parties cannot be classified as falling within an employment contract. In so doing, it not only protected a lucrative industry but also cleverly avoided the need to resolve a conflict between private law values and the EU principle of equality. This is not the last word on the saga, however, since a complaint currently lies before the European Commission to initiate infringement proceedings against the United Kingdom.[6]

On a distinct though related note, one can characterize the recent academic disputes on the horizontal direct effects of EU law as the intensification of debate on the role of EU law as regards private autonomy. This is well illustrated by reactions to the recent *Fra.Bo* case on the horizontal effects of the Treaty provisions on the free movement of goods[7] as well as the now seminal judgments in *Viking* and *Laval* on the freedom of establishment and free movement of services.[8] The furore raised by stakeholders[9] regarding the *Mangold* and *Kücükdevici* cases,[10] in which the Court found domestic rules regulating employment contracts for youths and older workers to be in breach of the general prohibition on age discrimination as expressed in the Framework Equality

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5 [2011] UKSC 40.

6 See Legal Week, *Supreme Court Ruling in Jivraj* v. *Hashwani could face ECJ Challenge* (19 Sep. 2012) (accessed at http://www.legalweek.com/legal-week/news/2206552/supreme-court-ruling-in-jivraj-v-hashwani-set-for-ecj-challenge).

7 ECJ 12 Jul. 2012, C-171/11 *Fra.bo SpA* v. *Deutsche Vereinigung des Gas- und Wasserfaches eV* (DVGW) – Technisch Wissenschaftlicher Verein N. NIC SCHUIBNE, 'The Treaty is coming to get you …', 4. *European Law Review* 2012, pp. 367–368.

8 ECJ 11 Dec. 2007, C-438/05 *International Transport Workers' Federation and Finnish Seamen's union* v. *Viking Line ABP and Oü Viking Line Eesti* and ECJ 18 Dec. 2007, C-341/05 *Laval un Partneri Ltd* v. *Svenska Byggnadsarbetareförbundet* and Others. See, for instance, C. JOERGES & F. RÖDL, 'Informal Politics, Formalised Law and the "Social Deficit" of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval', 15(1). *EJL* (*European Law Journal*) 2009, pp. 17–19; B. BERCUSSON, 'The Trade Union Movement and the European Union: Judgment Day', 13(3). *EJL* 2007, p. 294.

9 E.g., R. HERZOG & L. GERKEN, 'Stop the European Court of Justice', *EUObserver* (10 Sep. 2008, http://euobserver.com/opinion/26714).

10 CJEU 22 Nov. 2005, Case C-144/04 *Werner Mangold* v. *Rüdiger Helm* [2005] ECR I-9981 and 18 Jan. 2010, C-555/07 Seda Kücükdeveci v Swedex GmbH & Co. KG [2010] ECR I-365.

Directive, is yet another prime example of the aforementioned tension within EU law on how to deal with different values.

Given these prefatory comments, the contributions within this special issue are less concerned with examining the impact of EU law on national private law[11] or the nature and purpose of EU intervention in the private sphere[12] (no less important issues) than they are with reconciling the potential conflicts of functions or values within EU law itself. A – perhaps – textbook answer is to cite the principle of supremacy and to therefore arrive at the hierarchically laced conclusion that one set of values simply trumps the other within EU law's system of conflict resolution. Such a remark is conceivably outmoded and in this context anachronistic, especially given that the principle was crafted with inter-state rather than private relationships in mind. Underlying all the contributions is the need for a more heterarchical, conciliatory approach to the problem. In other words, a paradigm shift.

This shift in thinking has both theoretical and practical implications: the former entails a reconsideration of the very character of EU law, while the latter leads one to reflect on its *effet utile*. Both are dealt with as follows.

2. Recasting the Public/Private Debate for EU Law

Notably, the bulk of the contributions refrain from framing the debate in terms of a principled opposition between public and private law values or as an inherent antagonism between EU law – assumed to perform primarily public functions – and domestic private law. Private law, according to Sieburgh, may serve public law concerns (such as the reliability and stability of contractual relations or societal peace), and conversely public law concerns may be built within private law (e.g., the protection of weak parties to a contract). Furthermore, as pointed out above, EU law affects both the public and the private spheres. It is thus 'fluid' and 'unstable',[13] and those characteristics render it impossible to clearly distinguish and oppose public and private values. Yet, Sieburgh also broadly acknowledges that private and public values do at times diverge and conflict as illustrated by the multitude of recent EU law controversies on the matter (above). It is thus natural for lawyers to search for a framework to rationalize the relationship between both sets of interests.

Both Sieburgh and Mak argue that the tension between conflicting public and private values can and ought to be addressed within EU law itself. In the

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11 See, for example, A.S. HARTKAMP, *European Law and National Private Law. Effect of EU Law and Human Rights Law on Legal Relationships between Individuals*, Kluwer, Deventer 2012.

12 See the collection of essays gathered by D. LECZYKIEWICZ & S. WEATHERHILL, *The Involvement of EU Law in Private Law Relationships*, Hart, Oxford 2013.

13 See D. LECZYKIEWICZ & S. WEATHERHILL, 'Private Law Relationships and EU Law', in D. Leczykiewicz & S. Weatherhill (eds), *The Involvement of EU Law in Private Law Relationships*, Hart, Oxford 2013, p. 1, at 2.

views of Sieburgh, the solution is threefold. First, the tension between conflicting values should be addressed on a case-by-case basis so that the precise function of the conflicting norms can be assessed in situ. Second, the principle of supremacy suggests a hierarchical relationship between erstwhile public values embedded in EU law and those cherished in the private sphere. In order to avoid the constant development of EU law to the detriment of these private values, Sieburgh suggests amongst others using the Charter of fundamental rights to cloak these private values as being part and parcel of EU (primary) law and thereby placing the two in a heterarchical position. Third, the tension between EU and private values ought thereby to be balanced in light of their impact on the horizontal relationship. Interestingly, all this is not dissimilar to the position taken by the Commissaire du gouvernement in *Societe Arcelor*, in which he argued for the French Conseil d'Etat to reclassify a national constitutional right as that of a European principle and, in the process, casting the analysis in European terms and avoiding a conflict between the European and national legal order.[14] In that light, the approach advocated by Sieburgh need not be restricted to only private values.

Mak also supports the idea that both sets of values can cohabit within EU law. Though different than suggested by Sieburgh, cohabitation is possible for Mak through recourse to a 'pluralist' approach. There is, for her, no conflict in many situations especially since different rules or norms tend to apply to different situations. Furthermore, it is not always necessary to balance conflicting values nor to search for a unifying value within EU law. It may also be useful to be able to choose among the variety of values (*EU* v. *national or public* v. *private*) applicable to a case; the focus would then be on clarifying the rules governing the choice of applicable value within EU law.

The contribution by Schepel offers interesting insights on both proposals. Through a thorough analysis of CJEU internal market case law, he reveals how the interaction between EU law and private law has led to the hybridization/bastardization of both into what he terms 'privatized constitutional law' and 'constitutional private law'. The conflict of values is at once within and between legal orders. Taking the perspective of a somewhat schizophrenic public/private EU law, Schepel – similar to Sieburgh – advocates that the tensions caused by conflicting values can and ought to be solved within EU law itself through a balancing exercise, regretting that this case-by-case approach inevitably comes at the expense of legal certainty, uniformity, and effectiveness of EU law.

3. EU Law in the Private Sphere: Specific Fields of Interest

Precisely because of the difficulties in articulating the proper role of EU law in the private sphere, tensions exist as between the values underpinning EU law and

14 See Commissaire du gouvernement Matthias Gyomar in Conseil d'Etat 8 Feb. 2007, case 287110, Societe Arcelor Atlantique et Lorraine et autres, http://www.conseil-etat.fr/fr/presentation-des-grands-arrets/8-fevrier-2007-societe%C2%A0arcelor%C2%A0atlantique.html.

those which are present in private relationships. Although the nature and intensity of these tensions vary depending on the interests at hand, it is possible to distinguish between three types of settings in which such tensions may in practice arise: (i) the definition of the scope of EU law obligations and the identification of rules enforceable against private parties, (ii) the need to reconcile classical EU law obligations (such as the market freedoms) with the protection of private interests, and (iii) the search for the tools to ensure the effective enforcement of EU rules in the best interest of private parties. All three settings are addressed in this special issue.

Recently, attention has been devoted to whether the prohibitions of discriminations enshrined in EU law can be invoked in disputes between private parties. The question underlying this debate takes on a constitutional shade: it revolves around the question of whether EU internal market law as well as EU equality law are capable of governing private law relationships in the absence of national legislation giving effect to EU law in the national legal order. In so far as the four freedoms are concerned, Schepel highlights a series of recent cases (examples include *Fra.Bo* and *Laval*) suggesting that the CJEU has answered this question in the affirmative. In turn, Muir outlines that it is now also possible to rely on the EU legal regime for the protection against discrimination in the context of horizontal disputes, even in the absence of domestic intervention giving effect to EU values. The impact of EU law on private relationships is thus growing rapidly and beyond the scope of core EU private law instruments, thus confirming the need to construct a coherent conceptual framework for the interaction between public and private values within EU law.

This observation, in turn, triggers questions on the ability of the EU itself to duly protect the interests of the private actors involved in such disputes. These questions relate to the normative claim according to which private values should more often be cast as values within European (constitutional) law; they require applying the paradigm shift suggested in the first section of this Introduction to EU substantive law. For example, Muir expresses the concern that the uniformity of legal concepts relied upon in EU equality law irrespective of the function – public or private – that this field of law performs may at times afford inadequate protection to private parties unable to make use of exceptions designed for public actors. Schepel, analysing internal market case law, suggests expanding the justification regime to include freedom of contract and private autonomy. A private value is thereby recognized as a fundamental right, and doing so permits the balancing of claims to an economic freedom. Sieburgh makes similar proposals, amongst others, in relation to EU competition law. The expansive protection of private law interests within EU constitutional law could thus indeed help address some of the concerns raised by private lawyers in reaction to the growing presence of EU law in the private sphere.

Finally, the tension and overlap of functions between values within EU law create challenges of a more procedural nature. EU law's regulation of private

relationships needs to be supported by an effective set of judicial remedies, thus meeting the expectations of private beneficiaries of this regulation. On the one hand, this requires a modernization of EU judicial remedies, such as that initiated in the context of EU equality law introduced by Muir. On the other hand, this calls for a deeper reflection on the complementarities between European and national enforcement procedures as well as alternative methods of governance. Reflecting on EU consumer law, Kawakami shows that private actors may rely increasingly on mechanisms of *ex ante* collective control based on crowd sourcing (i.e., information regarding goods or services derived from peers) to avoid entering contracts that would otherwise prove to be problematic. Not only consumers but also businesses indeed have strong incentives to make the best of these networking mechanisms: organizations for the protection of consumers, the creation of which is required by EU law, may draw inspiration or that such EU law entities may seek to structure for further efficiency. In that sense, the presence of EU law in the private sphere acts as a catalyst for the modernization of mechanisms enhancing the effectiveness of both the public and private dimensions of EU law.

4. Conclusion

It is not unusual to cast social relationships – whether business or friendship or marriage – in terms of power structures and relative dependency. This lens may also be applied to the law, it being a social construct. At first blush, the principle of supremacy of EU law implies the inferior position of private values within the confines of this relationship. Instead of mounting a direct offensive against this principle, the contributions in this special issue carefully sought to redefine the balance between public and private values within EU law itself, as that between one of equals. The employment of pluralism to mediate conflict is perhaps a call for the tolerance of diversity (of values in the law). These two points, taken together, agitate for a paradigm shift from the aforementioned hierarchy to that of *primus inter pares*. The need for and usefulness of dialogue between public and private values within EU law is facilitated through the balancing exercises that must inevitably take place in the courtroom. Finally, through this exercise of navel gazing, beneficial regulatory innovations may be uncovered both within and without EU law. In summary: listen, communicate, and learn. One is tempted to say these are common sense ingredients to any successful relationship, no?

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