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Gennaio 2024

THE MAKING OF EUROPEAN PRIVATE LAW: CHANGES AND CHALLENGES

ed. by
LUISA ANTONIOLLI
PAOLA IAMICELI

Università degli Studi di Trento 2024

To our students, and to the precious gift of learning together

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CONCLUDING REMARKS

THE NEW EUROPEAN PRIVATE LAW: WHICH WAY FORWARD?

Luisa Antoniolli and Paola Iamiceli[*]

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1. General issues of European private law

The contributions to this book, together with the other contributions to the roundtables that were not transposed in a written version, point out to a variety of issues that are highly significant for European private law. In these last pages, we will highlight some common themes underpinning them, as well as point to some related issues and trends, which will hopefully be the object of future roundtables.

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As part of the book design, the structure of both the introductory and the concluding chapters has been jointly devised and developed by the two editors; within this shared work, Paola Iamiceli has individually written the Introduction and Luisa Antoniolli the Concluding remarks.

1.1. The process of integration of European private law

All the contributions of this book concern aspects of the current evolution of European private law, with particular emphasis on the area of digitalisation[1] and fundamental rights[2], and share some common themes. One of these is the tension between the drive for uniformity and harmonisation at the European level, and the contrasting pressure to allow differentiation and pluralism, recognising the heterogeneity and complexity of national legal systems, which are due to a variety of factors: political, but also technological, cultural, social and economic[3].

At first sight, legal integration is a powerful driving force both for digitalisation and fundamental rights protection: the last decades have witnessed a veritable flood of regulation in both areas, of various kinds, moving from general binding instruments such as the EU Charter of Fundamental Rights, to secondary EU legislation (regulations and directives), rules and principles deriving from case law (both of the European Court of Justice and the European Court of Human Rights) and soft law instruments[4]. Yet, pressure to allow for legal differentiation and pluralism is strong, particularly in the area of fundamental rights, where national constitutional traditions play an important role in defining the applicable standards. In fact, it is increasingly clear that funda-

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[1] See U. BERNITZ, X. GROUSSOT, J. PAJU, S. DE VRIES (eds.), *General Principles and the EU Digital Order*, Alphen a/d Rijn, 2020.

[2] See G. BRUEGGERMEIER, A. COLOMBI CIACCHI, G. COMANDÉ (eds.), *Fundamental Rights and Private Law in the European Union*, 2 Vols., Cambridge, 2010; H.-W. MICKLITZ (ed.), *Constitutionalization of European Private Law*, Oxford, 2014; C. BUSCH, H. SCHULTE-NOELKE, *EU Compendium – Fundamental Rights and Private Law*, Munich, 2011.

[3] See A.S. HARTKAMP, *European Law and National Private Law*, Cambridge-Antwerp, 2016; for a discussion of this trend on a global level see H. COLLINS, *Cosmopolitanism and Transnational Private Law*, in *Eur. Rev. Contract L.*, 2012, p. 315.

[4] See S. DE VRIES, U. BERNITZ, S. WEATHERILL (eds.), *The Protection of Fundamental Rights in the EU After Lisbon*, Oxford, 2013; S. DE VRIES, U. BERNITZ, S. WEATHERILL (eds.), *The EU Charter of Fundamental Rights as a Binding Instrument – Five Years Old and Growing*, Oxford, 2015; H. COLLINS (ed.), *European Contract Law and the Charter of Fundamental Rights*, Cambridge-Antwerp, 2017; S. GRUNDMANN (ed.), *Constitutional Values and European Contract Law*, Deventer, 2008.

mental rights' impact is becoming stronger and deeper in the EU, particularly through the impact of the Charter of Fundamental Rights and the judicial activism of the European Court of Justice.

Yet, even in those areas where uniformity is of paramount importance, as in the case of digitalisation[5], a significant level of differentiation remains, for example in the variety of implementation of EU rules, as well as in procedural aspects and legal process features. Mapping with accuracy the areas of uniformity and differentiation is particularly relevant, and it is no easy task, both because of the complexity of the legal framework, and because of the dynamic nature of these areas, which are rapidly evolving[6].

1.2. Tension between legal pluralism and uniformity

The tension between pluralism and uniformity in the relationship between EU law and the national laws of the Member States is a fundamental feature of European private law, with significant variations depending on the areas involved and the timing. Lawyers are increasingly resorting to a concept developed by political scientists in order to analyse and describe this interaction, that of multi-level systems, which highlights the plurality of levels, actors and rules that interact and define the law in action[7].

As a consequence, awareness of the context is particularly important, covering many aspects: the legal process of law-making, the substantial features of the rules (rules/standards, soft/hard, etc.), the role that legal rules play in relation to other kinds of rules (social, technological, economic, etc.). This is true not only in Europe, but also at a

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[5] See R. SCHULZE, A. DE FRANCESCHI, *Digital Revolution – New Challenges for Law*, Munich - Baden-Baden, 2019; E. ARROYO AMAYUELAS, S. CÀMARA LAPUENTE (eds.), *El derecho privado en el nuevo paradigma digital*, Madrid, 2020.

[6] See G. BENACCHIO, *Diritto privato dell'Unione europea*, 7th ed., Padova, 2016; F. CAFAGGI (ed.), *The Institutional Framework of European Private Law*, Oxford, 2006; F. CAFAGGI, H. MUIR-WATT (eds.), *Making European Private Law – Governance Design*, Cheltenham-Northampton, 2008.

[7] See S. PIATTONI, *The Theory of Multi-Level Governance – Conceptual, Empirical and Normative Challenges*, Oxford, 2010.

wider level: borrowing a vague but effective term, law has increasingly a «glocal» nature: there is a growing drive for convergence of legal rules, and yet local contexts and circumstances continue to influence the way in which law is defined and applied[8].

The time dimension is also particularly relevant: both the area of fundamental rights and that of digitalisation are undergoing rapid change, due to new needs, challenges, and risks. In fact, in many cases new rules are the result of veritable crises and emergencies[9], as for the rules (both of public and private law) related to the health crisis of the Covid19 pandemic, those connected to climate change and connected extreme events, as well as in the previous decade the regulation wave that was spurred by the global financial crisis.

Often these crises have a global nature, and while this pushes a certain global convergence on regulatory patterns, yet the regulatory responses in Europe have specific features which are related to its context. A significant element of analysis concerns the assessment of how much the link with various crises affects the nature, scope and duration of a certain body of law: while some have a clearly emergency nature, and as such are destined to disappear once the emergency is over, others are of a structural character, which means that they are not merely related to a transient specific emergency phase. Many important new bodies of European law have this character, for example the rules on economic governance and those on environmental protection and sustainability. While this phenomenon may be less pressing in the area of digitalisation, it is still true that the «digital revolution» is creating significant challenges (and sometimes emergencies, as in the case of cybersecurity problems), which require quick but also resilient legal responses, which usually determine path-dependent patterns of regulation.

[8] For a critical analysis of the role of private law in a global context see U. MATTEI, A. QUARTA, *The Turning Point in Private Law: Ecology, Technology and the Commons*, Cheltenham-Northampton, 2019.

[9] See M. COTTA, P. ISERNIA (eds.), *The EU through Multiple Crises. Representation and Cohesion Dilemmas for a "sui generis" Polity*, London, 2020.

1.3. The changing nature of legal taxonomies

The complex patterns of interaction between international, European, national (and often sub-national) law also impacts on legal taxonomies, changing their content and meaning. For instance, the divide between public and private law has shifted significantly[10], in response to the evolving relationship between the public institutions, the market and private stakeholders; this has led to the emergence of new categories, such as that of European private regulatory law[11]. This evolution in the legal taxonomies is visible also inside private law, as is made clear in all the contributions of this book: in the law of obligations, both contract law and tort law concepts are undergoing a significant change, and the same is happening in the area of property (e.g. in the discussion on «ownership» of data). In relation to this rapidly evolving context, a most pressing question concerns how far the existing framework of legal categories and concepts may be adapted to the new circumstances, or if, on the contrary, there is a veritable paradigm shift that requires new concepts and categories in order to be duly analysed, systematised and applied.

There is no clear-cut and general answer to this question, but lawyers cannot evade the need to make a sensible balancing effort between the advantages of applying a solid, well-known conceptual apparatus, and developing an innovative framework. While this second option may be a risky and costly enterprise, on the other hand telluric changes like digitalisation may require creative efforts which may lead to new

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[10] O. CHEREDYCHENKO, *Rediscovering the public/private divide in EU private law*, in *Eur. L. J.*, 2020, pp. 27-47.

[11] F. CAFAGGI, H. MUIR-WATT (eds.), *Making European Private Law. Governance Design*, Cheltenham, 2010; R. BROWNSWORD ET AL. (eds.), *Contract and Regulation. A Handbook on New Methods of Law Making in Private Law*, Cheltenham, 2017. For a critical evaluation of this emerging partition of law, see A.-W. MICKLITZ, *European Regulatory and Private Law - between Neoclassical Elegance and Postmodern Pastiche*, in M. KUHLI, M. SCHMIDT (eds.), *Vielfalt im Recht*, Berlin, 2021; ID., *The Visible Hand of European Regulatory Private Law - The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation*, in *Yearbook of Eur. L.*, 2009, pp. 3-59.

concepts, categories and partitions[12]. This is surely not the first time in the history of law, yet what seems to be new is the speed and the breadth with which new changes are taking place. This requires a momentous effort by lawyers, particularly in research and legal education, a challenge that needs to be taken up at present.

As we are going to see in the next paragraphs, some concepts appear to be key and horizontal in all contributions, as «access» and «control». Particularly in the case of digitalisation and the regulation of data (be it in relation to a contract, or non-contractual liability, or transfer of property rights), the most relevant and contentious issues concern how access to data is acquired and transferred, and what are the legal consequences for all parties involved. While the concepts of access and control need to be related to traditional concepts and categories of private law, they are essential for analysing legal phenomena and devising suitable legal solutions to emerging needs and problems[13].

1.4. External effects of EU private law: the «Brussels effect»

The analysis of the new legal instruments and solutions developed by statutory law and case law in the area of digitalisation and fundamental rights protection in Europe shows another trend that is gaining ground over time: the European Union is devising regulatory strategies which influence not only the legal framework inside Europe, the EU itself and the Member States, but aim to steer regulation at the global level. The so-called «Brussels effect»[14] refers to the drive to set standards that can influence also other legal systems, be they national, regional, international or transnational. This is partly driven by mechanisms of regulatory competition: businesses and individuals that are

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[12] See R. SCHULZE, A. DE FRANCESCHI, *Digital Revolution – New Challenges for Law*, Munich - Baden-Baden, 2019, and, more recently, ID., *Harmonizing Digital Contract Law, The Impact of EU Directives 2019/770 and 2019/771 and the Regulation of Online Platforms*, Baden-Baden, 2023.

[13] See D. KENNEDY, *The Rise and Fall of Classical Legal Thought*, Washington (DC), 2006.

[14] See A. BRADFORD, *The Brussels Effect – How the European Union Rules the World*, New York, 2020.

acting according to EU legal standards can better operate and move in external contexts that have a similar regulatory framework. Yet, it is also a consequence of the EU commitment to push towards standards at the international level that it considers efficient, reasonable and fair: this is particularly clear in area of digitalisation and data protection, but also in environmental protection, climate change and sustainability, health protection and other areas related to the protection of fundamental rights and the rule of law[15]. While not all of these efforts have been successful (and even if they are, implementation is frequently insufficient, even by the EU itself), undoubtedly the EU is playing a major role in the dynamics leading to the establishment of global standards. This expansion of the scope and reach of EU law, both formal and informal, raises issues related to its extra-territorial application, which can be problematic because of potential frictions and clashes with other systems both in establishing the applicable rules and in guaranteeing their implementation. This is consequently an element that must be taken into account in analysing and assessing the evolution of EU law, which is influenced both by its internal and external dimension.

2. The relevance of fundamental rights

Fundamental rights have an extremely wide scope, covering all aspects that are related to the human and social dimension of law. Historically they have been analysed mainly under the lens of constitutional and public law, i.e. in the relations between individuals and public powers, but their horizontal dimension, i.e. their impact on private legal

[15] In this regard, the role of the Court of Justice has been particularly relevant, e.g. in the field of data protection: based on the principles of effectiveness of EU law and of effective judicial protection, the scope of application of EU law has been extended to extra-EU controllers operating in the EU (see Judgment of 24 September 2019, *Google LLC v. CNIL*, C-507/17, EU:C:2019:772); moreover, based on EU legislation, international agreements have been scrutinised through the lens of effective judicial protection to ensure that data could be safely transferred outside the EU (see, among the first ones, Judgment of 6 October 2015, *Schrems v. Data Protection Commissioner* (*Schrems I*), C-362/14, EU:C:2015:650).

relations, is increasingly recognised, which leads to a significant change in the scope and content of private law itself, both in the national legal systems and in the EU[16]. In the contributions of this volume, this issue is analysed in a variety of areas, which span from environmental protection to consumer protection, property rights, privacy, and social right to housing[17]. We will now try and highlight some common themes.

2.1. Balancing conflicting rights

A critical and essential aspect of the protection of fundamental rights concerns the balancing of conflicting rights, which is a feature that is intrinsic to the definition of rights as fundamental[18]: exactly because they are fundamental and still may be limited by law to pursue general interest, provided that their essence is preserved, the law needs to find rational, equitable and reliable mechanisms dealing with the manifold and unpredictable ways in which they can clash, and compromise or prevalence must be determined. In this context, of critical importance is the principle of proportionality, which, based on national constitutional traditions and now enshrined in Art. 52 CFR, has been thoroughly developed in EU law, first by case law and then also in stat-

[16] S. WALKILA, *Horizontal Effect of Fundamental Rights in EU Law*, Groningen, 2016. See, in particular, Judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257.

[17] See for example S.A. DE VRIES, *The Protection of Fundamental Rights within Europe's Internal Market – An Endeavour for More Harmony*, in S. DE VRIES, U. BERNITZ, S. WEATHERILL (eds.), *The Protection of Fundamental Rights in the EU After Lisbon*, cit., p. 76; H. COLLINS (ed.), *European Contract Law and the Charter of Fundamental Rights*, Cambridge-Antwerp, 2017; S. GRUNDMANN (ed.), *Constitutional Values and European Contract Law*, Deventer, 2008; S. DE VRIES, *11-The EU Single Market as 'Normative Corridor' for the Protection of Fundamental Rights: The Example of Data Protection*, in S. DE VRIES, U. BERNITZ, S. WEATHERILL (eds.), *The EU Charter of Fundamental Rights as a Binding Instrument – Five Years Old and Growing*, cit., p. 242; I. DOMURATH, C. MAK, *Private Law and Housing Justice in Europe*, in *Mod. L. Rev.*, 2020, pp. 1188-1220; R. ROLLI, *Il diritto all'abitazione nell'Unione europea*, in *Contratto e impresa/Europa*, 2013, p. 722.

[18] See Symposium *Balancing of Fundamental Rights in EU law*, in *Cambridge Yearbook of Eur. Leg. Stud.*, 2017.

utory law[19]. Indeed, this principle sets the limits to which fundamental rights limitations can be established, ensuring that such limitations are necessary and genuinely meet objectives of general interest recognised by the Union, or the need to protect the rights and freedoms of others. This balancing exercise, which has generated an intense dialogue between national and EU courts, can only work if there is a solid ground of fundamental values and principles which underpin it. EU law has built over the decades an extensive body of law establishing fundamental values[20]: the EC and EU Treaties have incorporated them in the opening norms (see Art. 2 TEU), the EU Charter of Fundamental Rights is based on them, and the case law of the Court of Justice has developed an extensive body of principles, based both on the national constitutional traditions and the European Convention on Human Rights, which was then embodied in the Treaties (see Art. 6 TEU); moreover, this relates to a significant body of international law on human rights.

Yet, the political, social and economic context in which these rights are defined and applied is becoming increasingly polarised, and this has significant effects also on their legal dimension, making the balancing exercise more difficult and contentious, both in setting fundamental rights protection in statutory rules, and even more in deciding specific cases in litigation.

2.2. Social justice and fundamental rights

Many of the challenges related to fundamental rights concern social justice issues. Yet, most scholars and legal practitioners share the view that the European Union has developed only a partial and insufficient notion of social justice. Historically, this is due to the fact that the em-

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[19] See T. TRIDIMAS, *The Principle of Proportionality*, in R. SCHUETZE, T. TRIDIMAS (eds.), *Oxford Principles of European Union Law*, Vol. 1, Oxford-New York, 2018, pp. 243-264.

[20] See S. DE VRIES, U. BERNITZ, S. WEATHERILL (eds.), *The Protection of Fundamental Rights in the EU After Lisbon*, cit.; S. DE VRIES, U. BERNITZ, S. WEATHERILL (eds.), *The EU Charter of Fundamental Rights as a Binding Instrument – Five Years Old and Growing*, cit.

phasis in EC law was on market integration, only indirectly touching upon social justice issues, which remained largely regulated by national law. Yet, at least since the European Single Act in the 1980s, the development of EC and then EU law has clearly proven that market integration does have deep social justice effects; moreover, the gradual but steady expansion of EU competences has clearly moved outside the economic realm. Consequently, finding a shared, even if minimal, concept of social justice for the EU is crucial for devising regulatory strategies in rapidly changing and globalised contexts. Some embryonic form of social justice is developing in EU law, as pointed out by Micklitz, who has analysed the specificities of the structure of European private law as private regulatory law, where the main emphasis is on access, rather than on equity: justice is guaranteed by allowing individuals to have access to certain rights, rather than by defining the content of these rights. This is a «thinner» version of social justice, which is usually more focused on procedural aspects (e.g. obligations to provide full information) than on substantial ones[21].

It could be expected that over time this embryonic form is destined to develop into a specific, full-fledged notion of EU social justice, but this cannot be taken for granted and in itself highly problematic[22]. Also in this area, social and political polarisation is increasing: some Member States are voicing the need for the EU to respect national differences that are mirrored in choices that affect social justice issues (e.g. access to housing, consumer protection, etc.), which makes it harder to develop a shared view and steer action at the European level. Concepts like «margin of appreciation» (which was first established in the con-

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[21] See H.-W. MICKLITZ, *The Politics of Justice in European Private Law – Social Justice, Access Justice, Societal Justice*, Cambridge, 2018.

[22] For an early discussion in the area of European contract law see STUDY GROUP ON SOCIAL JUSTICE IN EUROPEAN PRIVATE LAW, *Social Justice in European Contract Law: A Manifesto*, in *Eur. L. J.*, 2004, pp. 653-674. More recently, see L. NOGLER, U. REIFNER (eds.), *Life-Time Contracts – Social Long-Ter Contracts in Labour, Tenancy and Consumer Credit Law*, The Hague, 2014; M. FABRE-MAGNAN, *What is A Modern Law of Contracts? Elements for a New Manifesto for Social Justice in European Contract Law*, in *Eur. Rev. Contract L.*, 2017, p. 381; D. CARUSO, *Qu'ils mangent des contrats: Rethinking Justice in EU Contract Law*, in D. KOCHENOV, G. DE BURCA, A. WILLIAMS (eds.), *Europe's Justice Deficit?*, Oxford, 2015, p. 375.

text of the European Convention on Human Rights) allow to define common standards, while keeping significant flexibility for States. Yet, particularly where pressure for homogeneity is strong, like in the case of digital rights, this does not rule out problems and conflicts. The redistributive consequences of EU regulatory strategies are not merely technical decisions, but have deep political implications affecting the notion of social justice[23].

2.3. Legal process and collective dimension of European private law

The evolution of fundamental rights in the European context, both in terms of types and content, is also influenced by the EU legal process, such as the law-making procedures inside the EU, highly specific and markedly different to those of the national systems due to their specific and special nature and institutional balance (as a hybrid form between an international organisation and a State). One important element is the role of private stakeholders, which in the EU context is particularly marked. This is crucial in several areas covered by the contributions in the book: one can mention the role of big tech companies in the field of digitalisation, of large energy companies and environmental NGOs in environmental protection issues, as well as consumer and tenants associations.

All the issues covered in the contributions to the book all have a strong collective dimension that complements and influences the individual one: in areas related to the use of digital technologies, access to affordable housing and protection from environmental risks, the position of the individual is inextricably connected to a large group of people sharing the same factual and legal position. While sometimes individual and collective interests converge (e.g., when individual consumers seek remedies in sales of goods that do not comply with environmental standards), sometimes, they diverge (e.g., when the consumer

[23] For a thoughtful analysis of the political implications of technical rules see D. KENNEDY, *The Political Stakes in 'Merely Technical' Issues of Contract Law*, in *Eur. Rev. Priv. L.*, 2001, pp. 7-28; ID., *Form and Substance in Private Law Adjudication*, in *Harvard L. Rev.*, 1976, p. 1724.

preference for replacement over repair clashes with concerns for excessive waste and environmental protection).

As a consequence, legal rules are increasingly focused on regulating both individual and collective aspects, and devote specific attention not only to the substantial definition of rights, but also to the procedural aspects, particularly in relation to dispute resolution mechanisms, both judicial and alternative[24]. This is a development that started in the 1990s, of which the unfair contract terms directive is a major and early example, which has gained ground over time. By now, it is clear that successful regulation of issues like consumer protection in digital transactions, or product liability related to the use of AI technologies and in the case of IoT, requires an approach that takes into consideration the collective dimension of the individual rights affected.

3. Specific issues of European private law

The evolution and current trends in European private law foster a comprehensive revision of its principles, categories, concepts and rules. This an on-going and gradual process, which builds on the pre-existing framework, developed also in connection to national legal traditions, and then developed and adjusted to the EC/EU context. It is likely that the current wide-sweeping changes, which sometimes is termed as a veritable revolution (like the green and digital revolution), need new instruments, not mere «legal tinkering». Lawyers, particularly academics, need to be able to «think out-of-the-box»: where old concepts and rules become a straitjacket, new ones need to be devised, which are able to analyse, classify and regulate new realities and needs, as the discussion by van Erp on differential law shows[25].

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[24] See C. MAK, B. KAS (eds.), *Civil Courts and the European Polity: The Constitutional Role of Private Law Adjudication in Europe*, Oxford, 2016; O. CHEREDNYCHENKO, N. REICH, *The Constitutionalization of European Private Law: Gateways, Constraints and Challenges*, in *Eur. Rev. Priv. L.*, 2015, p. 827.

[25] See also S. VAN ERP, *Differential law: Towards a two-tier approach regarding data*, in A. STROWEL, G. MINNE (eds.), *L'influence du droit européen en droit économique – Liber Amicorum Denis Philippe*, Vol. 1, Brussels, 2022, pp. 783-798.

In many cases, these novelties emphasise the increased relevance of European private law vis-à-vis national ones. Not only is the importance of harmonised or unified legal solutions particularly clear in some areas (as in the case of digitalisation), but also there is a wider phenomenon of «creeping Europeanisation», as Schulze points out, through which legal principles, concepts and rules are applied outside their formal scope of application, influencing also bordering areas that on paper still fall under the competence of Member States. In this way, the dynamic evolution of European legal integration moves outside the formal borders of EU law, stressing the multi-level dimension of European private law.

In spite of this expansive trend, EU private law (and European Union law in general) still retains a fragmentary character, which means that its nature and effects can be assessed only in relation to the national laws with which it interacts. And since national laws in the Member States still have a significantly distinct and different structure and content, this means that overall European private law lacks a comprehensive and unitary nature. All complex, multi-level systems display a level of legal pluralism and variety, so in itself this is not a novelty. Yet, because of the specific features and nature of the EU context, this fragmentary character is particularly pervasive and problematic, and this limits the capacity of even wide-sweeping efforts towards harmonisation and even unification to achieve their goals. This fragmentation is partly due to structural elements that are typical of the European context; first of all, linguistic pluralism has a critical (and often underestimated) impact, since legal concepts and taxonomies are framed in manifold languages (23 in the EU!), which are not always easily translatable, and make the task of harmonisation much more difficult and challenging[26]. There is no easy solution to this problem, since linguistic pluralism is not only a fact, but also a value that is recognised and protected in the European integration process from its very start: all recognised national languages are official languages, as they are considered a fun-

[26] See B. POZZO, *Multilingualism and the Harmonization of European Private Law: Problems and Perspectives*, in *Eur. Rev. Priv. L.*, 2012, p. 1185; E. IORIATTI, *A Twenty-First Century Approach to Law and Language in Europe*, in O. MORÉTEAU, A. PARISE (eds.), *Comparative Perspectives on Law and Language*, Maastricht, 2022, pp. 35-62.

damental component of the common European heritage, mirrored in the EU motto «united in diversity». The second element is the peculiar nature of the EU, which, in spite of the enormous expansion over the years, still keeps essential features of international organisations, among which the fundamental principle of attributed competences, as further reinforced by the principles of subsidiarity and proportionality: the EU can intervene only if the Treaties establish a competence for it, while all residual competences and powers remain vested in the Member States. Although the strict nature of this allocation of competences has played out in a much more flexible and expanding manner in practice, it is nevertheless true that there are limits to what the EU can do, and this has important implications in all fields, including private law.

3.1. Contract law

Digitalisation is impacting all legal fields, and has important consequences in European contract law[27]; as Gomez Pomar writes, «digital transformation has dominated the European Union's legislative action in recent years concerning private law». First of all, it influences the way in which the decisions to contract are made, both by consumers and businesses. Then, it affects the way in which contracts are formed, and the content they enshrine. Finally, it determines the way in which contracts are performed. The whole life-cycle of contracts is deeply affected by new digital technologies, and law cannot avoid confronting this new reality and its consequences. While some elements can be defined by stretching pre-existing EU rules (e.g. those on distance contracts), many require specific regulation, and EU institutions have been very active on this front in recent years. As de Vries writes, in the EU internal market, the recent Digital Single Market strategy by the Commission «is about allowing the freedoms of Europe's Single Market to enter the digital age».

Digitalisation implies a crucial role for data and information, and this inevitably leads to a strong interrelation with individual rights, both

[27] See R. SCHULZE, F. ZOLL (eds.), *European Contract Law*, 3rd ed., Baden-Baden, 2021.

of private nature, as in the case of contracting parties, but also of a fundamental and constitutional nature, as in the case of issues related to the protection of privacy and dignity[28]. As both Mak and de Vries underline, this implies a «constitutionalisation» of private law, and the assumption of quasi-public obligations on private parties having a strong market power, as in the case of big tech. Conversely, the interrelation between data and individual rights implies a horizontal effect of fundamental rights, either direct (*Drittwirkung*) or indirect, as in the case of judicial interpretation of private law rules based on the need to protect fundamental rights[29]. This balancing exercise between private rights and fundamental rights is very sensitive, and forces lawyers to develop new reasonings and arguments.

There are many specific changes in the EU rules on contract law and the law of obligations[30]. Schulze analyses several of them[31], for example in sales of digital products and sale of goods with digital elements with consumers, and highlights the gradual emergence of a new comprehensive regime of contractual obligations of suppliers. This covers crucial issues such as conformity and remedies for the lack of it, which have profound implications for the very concept of contract, which is now based both on a subjective (based on the buyer's expectations) and an objective notion (fit-for-the-purpose test) of conformity. While this evolution formally concerns consumer contracts, its impact is in fact much broader, and covers contract law in general: for example, it provides a normative definition of core terms, such as «digital content», «digital services», and performance features such as «compatibility,

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[28] See J. HABERMAS, *The Concept of Human Dignity and the Realistic Utopia of Human Rights*, in ID., *The Crisis of the European Union – A Response*, Cambridge, 2012.

[29] See Judgment of 14 March 2013, *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, C-415/11, EU:C:2013:164; Judgment of 10 September 2014, *Monika Kušionová v SMART Capital*, C-34/13, EU:C:2014:2189. An important related discussion has taken place in the German legal system: see BVerfG, 19 October 1993, BVerfGE, 89, 214 (*Buergschaft* case).

[30] See A. DE FRANCESCHI (ed.), *European Contract Law and the Digital Single Market- The Implication of the Digital Revolution*, Cambridge-Antwerp-Portland, 2016.

[31] See also A. JANSSEN, M. LEHMANN, R. SCHULZE (eds.), *The Future of European Private Law*, Baden-Baden, 2023.

functionality and interoperability». Also, another fundamental element concerns the fact that these digital contracts establish continuing obligations, i.e. updating obligations that extend after the moment of the passing of risk, a feature that Schulze describes as «dynamisation» of obligations. Finally, probably the most significant novelty is that EU law now openly recognises that the provision of personal data can have the same economic value as the payment of a price or fee, thereby defining the synallgmatic (rather than gratuitous) nature of these transactions, with a number of important consequences for the distinction between contract rules and property rules.

While the current EU rules on digital contract law have solved a number of problems, not all gaps and shortcomings have been remedied, as shown in the analysis of Gomez Pomar. Digitalisation has radically increased the variety and complexity of products and services, thereby enlarging consumers' options, too. Moreover, the speed of transactions has also increased enormously. While these changes potentially expand consumers' choices, they also reinforce problems of information asymmetries, adverse selection and moral hazard. The possibility of manipulating consumers' preferences, coupled with the complexity and heterogeneity of goods and services, as well as the distance with the seller or provider, all pose risks that are qualitatively and quantitatively different than in a traditional contractual setting. Gomez Pomar argues that there are some elements that can counter the negative impact of asymmetric information: on-line platforms (recently pervasively regulated by the new Digital Services Act)[32] can play an important role in providing reliable information on the quality of the goods and services offered by businesses, supervising their behaviour and channelling complaints; moreover, consumers' review and comments can also provide general useful information through a network effect, provided that they are truthful and unbiased. Yet, empirical evidence shows that rankings and scoring are often distorted and biased, thereby worsening the information problem. Moreover, the increasing personalisation of digital goods and services also impacts on the con-

[32] Symmetrically, issues related to the competition among large on-line platform is now regulated under the Digital Market Act.

tent and working of contractual warranties, since each contract can be specifically «tailored» to the contracting party. Again, while this can expand consumers' choice, it can also reinforce bias and vulnerabilities, using profiling and data mining techniques. Also, it can use granular information to diversify prices among consumers for the same kind of goods or services, so as to maximise profits. These complex and potentially problematic issues are only partially solved by the existing EU legal instruments, which fail to provide a comprehensive and clear legal framework for the new contractual problems related to digitalisation; as stated by Gomez Pomar, EU law so far «missed the chance to provide the basis for a fine-tuning of contractual instruments to reflect developments in online contracting».

As these analyses show, in spite of its growing intensity, scope and importance, European contract law still keeps a fragmentary character, directly regulating only a limited number of types of contracts and contractual elements. Yet, it significantly influences national contract laws, in a number of ways: first, it expands the range of available contractual rules and remedies where it fills existing regulatory gaps, and in some cases it can even lead to significant modifications of the structure of civil codes, as in the case of Germany and France. Second, it can raise conflicts, insofar its structure and rules are not aligned with national laws, and consequently require modifications not only of statutory law, but also case law and legal doctrine; third, it can indirectly influence areas that are not regulated but are closely connected (as it has been often the case for rules developed for consumer contracts, subsequently stretched to also cover business contracts). This process of mutual interaction, influence and also conflict is highly dynamic and complex, and requires action by all legal actors: law-makers, courts (which play a particularly important role in the implementation of EU law), administrative bodies, lawyers, legal doctrine. The ensuing picture is therefore dynamic and complex; it varies depending on the areas and the timing, and must be kept in mind in all legal analysis concerning European private law[33].

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[33] See S. DE VRIES, H. DE WAELE, M-P. GRANGER (eds.), *Civil Rights and EU Citizenship – Challenges at the Crossroads of the European, National and Private Spheres,* Cheltenham, 2018; S. DE VRIES, *The Protection of Fundamental Rights within Europe's*

3.2. Tort law

Digitalisation has significantly impacted also product liability, particularly in reference to the use of AI elements in products[34]. The rapid evolving features of these technologies make it very difficult to devise suitable legal standards. In particular, there is a strong need for rules capable of finding a fair balance between the principle of innovation, allowing the benefits of new technologies to spread to users, and the principle of precaution, which requires a careful ex ante control of technologies that may pose significant risks for users and society at large, as pointed out by Sousa Antunes. This policy choice has several consequences, for example on the discussion concerning the standard of liability: while strict liability has traditionally been applied for product liability, and seems to be the preferred option in the case of IoT regulation, there is now a debate advocating for the return to fault as a suitable standard, as it is the case in the proposal concerning liability for AI, where fault is linked to the definition of risk assessment and compliance mechanisms. This is considered to be a system better aligned with the need of not hampering technological development, and at the same time protecting the interest of potential damaged parties. Yet, this is highly problematic: a fault-liability regime places a heavy burden in terms of evidence on the damaged party, and this feature is dramatically increased for digital products, where the potential involvement of several businesses and the complexity and even obscurity of the role of AI elements, risk to make it a kind of *probatio diabolica*. Nor the imposition of a duty of disclosure on the AI operator, coupled with a presumption of fault in case of breach, as now contemplated by the AI Liability Directive Proposal, fully ensure effective protection against harm generated by high-risk AI applications. Indeed, while this approach might better protect the possibility of technological development and innovation, it definitely places victims in a worse situation compared to a strict

Internal Market – An Endeavour for More Harmony, in S. DE VRIES, U. BERNITZ, S. WEATHERILL (eds.), *The Protection of Fundamental Rights in the EU After Lisbon*, cit., p. 76.

[34] A. BECKERS, G. TEUBNER, *Three Liability Regimes for Artificial Intelligence*, Oxford-London-New Delhi-Sydney, 2021.

liability regime. In fact, this kind of argument is the very reason why strict liability regimes were established around the world starting from the mid-20th century. Also, this does not seem in line with the current expanding trend applying the principle of precaution in all situations where significant risks cannot be determined *ex ante*, as in the case of development risks[35].

The emphasis on a risk-based approach also implies an assessment of the costs and benefits of each liability regime (either fault-based or strict) vis-à-vis mandatory insurance schemes and social insurance schemes, i.e. schemes, funded either by private or public revenues and operated by private or public bodies, where the compensation of damages is no longer purely related to tortious liability, but rather to the existence of a loss[36]. The choice between these different mechanisms, or a combination thereof, depends on the political, social and economic priorities that are set, a debate that involves the EU, Member States and stakeholders, also in accordance with the principle of subsidiarity. This debate, moreover, has a global dimension that influences, and is influenced by, the European debate: how to regulate liability deriving from the use of AI, both for products and services, is a critical topic in all systems that are experiencing a rapid, and partly unforeseeable, technological evolution.

3.3. Property law

Property law is the area of private law that is generally considered more resistant to the «intrusion» of EU law, both because there are important limits to the EU competences that can encroach on national

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[35] M. BOUTONNET, *Le principe de précaution en droit de la responsabilité civile*, Paris, 2005; K. DE SMEDT, E. VOS, *The Application of the Precautionary Principle in the EU*, in H.A. MIEG (ed.), *The Responsibility of Science*, Cham, 2022, pp. 163-186; P. HARREMOES, D. GEE, M. MACGARVIN, A. STIRLING, H. KEYS, B. WYNNE, S. GUEDES VAZ (eds.), *The Precautionary Principle in the 20th Century: Late Lessons from Early Warnings*, Abingdon-New York, 2002.

[36] G. BORGES, *New Liability Concepts: The Potential of Insurance and Compensation Funds*, in S. LOHSSE, R. SCHULZE, D. STAUDENMEYER (eds.), *Liability for Artificial Intelligence and the Internet of Things*, Baden-Baden, 2019, pp. 145-163.

property laws (particularly Art. 345 TFEU), and because property is traditionally considered the area where national specificities and traditions are most significant, and consequently hinder harmonisation efforts. Yet, it is currently recognised that national property law is affected in a number of ways by European law, and that, in spite of the remaining differences, there are elements of influence and partial convergence, due both to concerted efforts and exogenous pressures.

Digitalisation is one of these elements: not only it is radically changing some essential features of contract and tort law, but, in fact, some of the most contentious issues concern property law: are data a form of property? And if yes, which principles and rules apply to it? Are ordinary principles and rules on property applicable, or do the specificities of data required ad hoc new concepts and rules, such as van Erp argues in relation to the new category of «differential law»[37]? This is not merely a theoretical problem: framing the control over data as a form of property, or rather as belonging to the realm of obligations, has very important practical consequences. More broadly, what is the role of private law in regulating data? It is clear that it is far from being exclusive and exhaustive, and that public and constitutional law are vital in guaranteeing the protection of fundamental rights involved, as it is shown, for example, in the debate on the need to steer private property in order to ensure environmental protection, as shown in the discussion on managed retreat by van Erp, or that on access to housing by Afonso. Private autonomy can have a different margin and room, depending on the kind of priorities and aims of regulation. In the area of data, a rapidly evolving field, existing rules are stretched to be applied to new circumstances. Moreover, a more general issue concerns the choice between *ex ante*, which aims to steer action in specific directions, and *ex post* regulation, which is crucial for guaranteeing a suitable level of protection of individual rights through a comprehensive system of procedures and remedies.

Gradually a new bulk of rules is being defined by law-makers and case law, and it is important to be able to carve out the guiding princi-

[37] See also S. VAN ERP, *Fluidity of ownership and the tragedy of hierarchy. A sign of revolutionary evolution?*, in *Eur. Property L. J.*, 2015, pp. 56-80.

ples and fundamental aims that must be achieved, and in this European private law has an important role to play. As we have mentioned in the introductory paragraph, access and control are crucial concepts in relation to the regulation of data, and they cut across the property/obligations divide.

On a different front, an issue that has a clear European constitutional dimension related to social justice is housing. And yet, EU law plays a very marginal role in it, both in terms of legal principles and concepts and in the rules that can be applied. This is partly due to the fact that a large part of the rules concerning housing are related to property law, an area where the EU lacks a competence, and where national laws display a staggering variety of rules and policies, also due to very different social and economic contexts[38].

While this is another sign of the lack of a comprehensive notion of social justice at the EU level, yet, as discussed by Afonso, there are some instruments that can be employed to frame a role for European private law in this area: principles and rules concerning anti-discrimination, consumers and users protection instruments, and unfair contract terms rules could be used to frame a European response, albeit limited, to issues that are highly significant in all EU states, where access to housing has become a priority and sometimes even an emergency. Moreover, this is a problem that can significantly affect a key element of European integration, namely free movement of persons and European citizenship: no effective movement can be established unless access to housing is guaranteed. While the limits to EU competence are an important obstacle, some results could be achieved through a bottom-up approach, such as involving stakeholders (like tenants and landlords associations, local authorities, etc.) in developing soft law instruments (e.g. model contracts and principles), also through mechanisms such as the open method of coordination.

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[38] See C. SCHMID (ed.), *Tenancy Law and Housing Policy in Europe – Towards Regulatory Equilibrium*, Cheltenham-Northampton, 2018; E. BARGELLI, *Locazione abitativa e diritto europeo. Armonie e disarmonie di un capitolo del diritto privato sociale*, in *Europa e dir. priv.*, 2007, p. 954.

4. The new European private law: which way forward?

The path of European private law highlighted by the contributions of this book is a long, winding and at times steep one. European private law has definitely enlarged its scope and variety, developing new concepts, new categories and new principles. In this evolution, it has been influenced by the national legal systems of the Member States (and sometimes also by external legal systems), and in its turn it has influenced private law of the Member States. This is not a linear process: at the side of harmonisation and convergence there have been, and there are, gaps and frictions, and it is hard to foresee future developments.

Yet, some trends seem to be firmly established. First, European private law (and EU in general) is expanding, covering new domains and introducing new legal instruments, principles and rules. Second, this new European private law is shifting the boundaries of legal areas: private law is less and less separated from regulatory/administrative law (as made clear in the term «European private regulatory law»), and from public/constitutional law, where fundamental rights protection is deeply influencing recent legal developments. Third, the blurring of the public/private divide leads to a stronger focus on the collective/general dimension of individual rights, which has significant effects both on the definition of subjective rights, and on the remedies and procedures for protecting them. Fourth, new concepts and categories of European private law are less focused on systematic coherence and on building a new system, and more aligned with a functional logic, which is meant to pursue certain goals irrespective of the variety of the national legal settings. This has been long visible for internal market issues, but is now expanding to new domains.

All these elements need to be taken into consideration by scholars of European private law, both in their research and teaching activities. And, while the contributions of this book mirror the research interests of (some of) the scholars who have participated in the series of Roundtables on European private law issues, we would like to end these remarks by closing the circle and moving back to the start: the Roundtables, and this book which stems from them, are an instrument for stimulating the critical thinking of our students, who are going to be

the next generations of lawyers. These initiatives are a window that allows students at the beginning of their career to have a glimpse of the complexity of European private law, but also of its dynamic nature, its vitality and relevance. And our students, who choose to study at the Trento Faculty of Law because they share a keen interest on European, transnational and international law, have allowed us to build an extraordinary teaching laboratory, giving us vital feedback for improving our teaching, but also research and work. Together with our foreign guests and friends, they have built a small but vibrant academic community. This is just a fragment of a wider transnational European community that is growing, where students and scholars move and share their experience, and build a body of experiences and working methods that cuts across national borders, and participate actively and critically to the European integration process. Our hope is that our students will bring with them in their future careers some of the richness of this experience. As for us, to our students and to our guests goes our deep gratitude for the road they have shared with us.