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Regulating the periphery – shaking the core
European identity building through the lens of contract law

Keiva Carr



European University Institute
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European Regulatory Private Law: The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation (ERPL)

A 60 month European Research Council grant has been awarded to Prof. Hans-Wolfgang Micklitz for the project “European Regulatory Private Law: the Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation” (ERPL).

The focus of the socio-legal project lies in the search for a normative model which could shape a self-sufficient European private legal order in its interaction with national private law systems. The project aims at a new-orientation of the structures and methods of European private law based on its transformation from autonomy to functionalism in competition and regulation. It suggests the emergence of a self-sufficient European private law, composed of three different layers (1) the sectorial substance of ERPL, (2) the general principles – provisionally termed competitive contract law – and (3) common principles of civil law. It elaborates on the interaction between ERPL and national private law systems around four normative models: (1) intrusion and substitution, (2) conflict and resistance, (3) hybridisation and (4) convergence. It analyses the new order of values, enshrined in the concept of access justice (*Zugangsgerechtigkeit*).

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Author Contact Details

Keiva Carr

keiva.carr@eui.eu

Abstract

The impetus for this research stems from the assumption that by regulating the periphery of any legal relationship, the core is necessarily – to a lesser or greater extent depending on the circumstances – shook. The legal relationship we will evaluate in this contribution is that of contract law. Contract law is used as the basis to test the hypothesis that peripheral forces, in this instance increased regulation at the EU level, coupled with equal treatment, fundamental rights and EU citizenship, and, even more so, judicial intervention by the CJEU, are chipping away at the core of contract law in the Member States. The results of this, it is argued, are contributing to the European identity-building project.

Keywords

European private law; contract law; European regulation; equal treatment; fundamental rights; citizenship; CJEU; European identity-building]

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Introduction

This contribution aims to test the hypothesis that *peripheral forces, i.e. increased regulation at the EU level, and, even more so, judicial interpretation by the Court of Justice of the European Union, are chipping away at the core of contract law in Member States and, consequently, are contributing to the European identity-building project.*

The impetus for this research stems from the assumption that by regulating the periphery of any legal relationship, the core is necessarily – to a lesser or greater extent depending on the circumstances – shook. A parallel aspect to this research stems from the apparent overall consensus in political sciences and legal research that the nation state is undergoing a transformation.¹ Even though the concepts and methodological lenses differ, we note the trend recognizing the evolving nature of the European transnational legal order which provides a forum within which both citizens and private actors can avail of increased opportunities to participate in the changing economic and political environment.

The principal goal therefore is to analyse contract law against the background of diverse cycles of historical, economic and political changes in consideration of fluctuations between various legal perceptions necessarily impacting the regulation of private relationships and their relation to market ideologies. This will permit us to establish a framework within which the current situation, that is, the regulation of the periphery of contract law at the EU level and more particularly the adjudication of peripheral contractual issues by the Court of Justice of the European Union, can be examined.

In order to structure the analysis of this hypothesis, the research presented herein follows a genealogical approach to developments concerning contract law based on a framework adopted from Duncan Kennedy's Three Globalizations thesis². It begins with an analysis of contract law during the first globalization, Classical Legal Thought, during which contract law relationships were dominated by individual will. Following this, we trace the effects of the second globalization of legal thought, that is, The Social, where we note the altering influence of interdependence on the essence of contractual relations. Finally, we arrive at the crux of the paper in deciphering how the third globalization, Neo-formalism, influences the core of contract law.

Analysing the changing nature of contract law in this way will allow us to identify how external forces, in particular from the second globalization onwards, have fundamentally altered the concept of private dealings. By way of brief introduction, we can indicate already that the first globalization of Classical Legal Thought³ was centred on legal formalism, that is, the idea that law provided facilitative rules lending themselves to formal equality for the parties concerned on the basis of procedural

¹ We can think here about the effects of globalization on the nation state, the effects of international agreements and the establishment of international institutions, such as the World Trade Organization, but more specifically for our purposes we focus attention on the influence of the European legal order on the individual nation states as constitutive members. See Slaughter, A.M., "Global Government Networks, Global Information Agencies, and Disaggregated Democracy", *Harvard Law School, Public Law Working Paper* No. 18.; Slaughter, A.M., *A New World Order* (Princeton University Press, 2009); Fischer-Lescano A., & Teubner G., "Regime-Collision: The Vain Search for Legal Unity in the Fragmentation of Global Law", *25 Mich. J. Int'l L.* 999 (2004); Sassen S., *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press, 2006).

² For an analysis of the genealogy of family law see Carr, Keiva, *Deconstructing and Reconstructing Family Law through the European Legal Order*, PhD Thesis, Florence: European University Institute, 2014; Halley, Janet. & Rittich, Kerry. "Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism," *The American Journal of Comparative Law* 58, no. 4 (October 1, 2010): 753–75.; Halley, Janet. "What Is Family Law?: A Genealogy Part I," *Yale Journal of Law & the Humanities* 23, no. 1 (May 8, 2013), <http://digitalcommons.law.yale.edu/yjlh/vol23/iss1/1>; Halley, Janet. "What Is Family Law?: A Genealogy Part II," *Yale Journal of Law & the Humanities* 23, no. 2 (May 8, 2013), <http://digitalcommons.law.yale.edu/yjlh/vol23/iss2/1>

³ For a more detailed discussion of Classical Legal Thought see Chapter I.

fairness. In other words, the rules of the game during Classical Legal Thought applied equally to all therefore the outcomes, even those resulting in distributive inequality, were also fair. This globalization was essentially characterised by ‘law *without* politics’. The second globalization, The Social,⁴ on the other hand, was typified by a ‘law *versus* politics’ approach and an increase of using law to meet social ends. During this period, private law in general, and contract law in particular, was overlain with an increased awareness of social obligations and the idea of social protection. When we come to the third globalization, Neo-formalism,⁵ we witness a change in legal grammar in an attempt to integrate ‘*politics through law*’ via rights discourse which can be exemplified via the employment of proportionality, balancing, the emergence of identity rights and the use of law to meet a variety of ends including distributive and social functions.

It is precisely here we begin to question the extent to which this ‘politics through law’ approach is paving the way to the construction of a European identity. Therefore, we necessarily question the shift in discourse at the EU level meaning a perceived shift from market logic to a more socially inclined grammar. In this vein, the effects of the EU Citizenship provisions and their influence on the grammar of the CJEU are investigated so as to delineate how the periphery is affecting the core in the midst of the identity-building project.

Framing the hypothesis

In 2001, Professor Weatherill, in the context of discussing the Unilever ruling⁶ by the Court of Justice, made the following comment:

The opportunities for parties seeking to escape obligations that have become unappealing because of changing market conditions are real, and await the attention of ingenious legal minds ready to exploit the Unilever ruling.⁷

It took quite some time, fourteen years to be exact, but it seems that those “ingenious legal minds” have raised their heads. In December, 2014, a request for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union was made by the Irish Supreme Court⁸ according to which the Court of Justice has been asked to consider the following questions:

1. (a) Where the terms of a private contract oblige a party to supply a product produced in accordance with a national standard, itself adopted in implementation of a European standard made pursuant to a mandate issued by the European Commission under the provisions of the Construction Products Directive (89/106/EEC)⁹, is the interpretation of the said Standard a matter upon which a preliminary ruling may be sought from the Court of Justice of the European Union pursuant to Article 267 TFEU?
- (b) If the answer to question 1(a) is yes, does EN13242:2002 require that compliance, or breach of the said Standard, be established only by evidence of testing in accordance with the (unmandated) standards adopted by CEN (*Le Comité Européen de Normalisation*) and referred to in EN13242:2002, and where such tests are carried out at the time of production and/or supply; or may breach of the

⁴ The characteristics of this globalization are detailed in Chapter II.

⁵ See Chapter III below.

⁶ Case C-443/98 *Unilever Italia SpA v. Central Food SpA*

⁷ Weatherill, S., “Breach of Directives and Breach of Contract” [2001] 26 (2) EL REV 177-186

⁸ Order of the Supreme Court in the matter of Article 267 of the Treaty on the Functioning of the European Union and in the matter of a reference to the Court of Justice of the European Union between James Elliott Construction Limited and Irish Asphalt.

⁹ Council Directive (89/106/EEC) of 21 December 1988 on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products, OJ L 40, p. 12

Standard (and accordingly breach of contract), be established by evidence of tests conducted later, if the results of such tests are logically probative of breach of the Standard?

2. When hearing a private-law claim for breach of contract in respect of a product manufactured pursuant to a European standard issued pursuant to a mandate from the European Commission under the Construction Products Directive, is a national court obliged to disapply the provisions of national law implying terms as to merchantability and fitness for purpose or quality, on the grounds that either the statutory terms, or their application, create standards or impose technical specifications or requirements which have not been notified in accordance with the provisions of the Technical Standards Directive (98/34/EC)¹⁰?

3. Is a national court hearing a claim for breach of a private contract alleged to arise from a breach of a term as to merchantability or fitness for use (implied by statute in a contract between the parties and not modified or disapplied by them) in respect of a product produced in accordance with EN13242:2002, obliged to presume that the product is of merchantable quality and fit for its purpose, and if so, may such a presumption only be rebutted by proof of non-compliance with EN13242:2002 by tests carried out in accordance with the tests and protocols referred to in EN13242:2002 and carried out at the time of supply of the product?

4. If the answers to questions 1(a) and 3 are both yes, is a limit for total sulphur content of aggregates prescribed by, or under, EN13242:2002 so that compliance with such a limit was required, *inter alia*, to give rise to any presumption of merchantability or fitness for use?

5. If the answers to 1(a) and 3 are both yes, is proof that the product bore the ‘CE’ marking necessary in order to rely on the presumption created by Annex ZA to EN13242:2002 and/or Article 4 of the Construction Products Directive (89/106/EEC)?

We will consider this case in more depth in Part II. By way of introduction however, let us note the somewhat obvious: this case concerns an Irish supplier and an Irish consumer who contracted for the sale and consumption of a product. According to the first globalization, they exercised their will in agreeing to the particulars of the transaction based on the economics of supply and demand. However, this case is being decided in the era of the third globalization (and perhaps even beyond as we will see). What does this mean? Simply put, Irish Asphalt argues that the European Standard EN 13242: 2000 for aggregates for unbound and hydraulically bound materials used in civil engineering work and road construction, drawn up by the European Committee for Standardisation (“CEN”) pursuant to whose internal regulations, members are obliged to give effect to the European Standard in national law, gives rise to a presumption of a product being fit for purpose in the case that the said product passed the product scrutiny phase of manufacture even in cases where tests carried out after delivery of the product rebut this presumption. If Irish Asphalt is correct in its argument, the regulation of the peripheral aspects of this particular contract, that is the drawing up and application of European standards, could have revolutionary effects on the core of contract law as we know it in that future claims in contract law could be reduced to the question of whether the product at issue complied with a particular standard proven by way of testing at the time of supply.

This example highlights that the nature of arguing and (although it remains to be seen in this particular example) resolving contract law disputes has changed dramatically from being governed by freedom of contract and the will theory to being catapulted into the post-national sphere arguably guided by a neo-formalist creed.

¹⁰ Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ L 204, p. 37

Theoretical context – a genealogy of contract law

Legal institutions and ideas have a dynamic relationship with economic activity and society.¹¹ This necessarily alters the discourse of law and the way legitimate arguments are made since various social contestations form the parole of the legal consciousness¹² at any given time. Tracing the developments of contract law is essential to any understanding of the interplay between the nation-state and the EU in terms of increased regulation and how this infiltrates domestic legal systems, and, as argued here, paves the way for a space within which European identity can germinate.

The principal purpose of this delineation is to debunk distinct historical legal ideas, structures and theoretical underpinnings that have influenced the development of contract law. The intention is to force one to consider precisely how ‘modern’ contract law has come to question the assumptions we had become accustomed to and, further, to highlight that the development thus far of private relations/contract law and future progress is historically contingent and rests on power relations. In other words, we are not concerned here with pinpointing A, i.e. the origins of contract law, but rather with gaining an understanding of how A, B, and C have influenced the construction of a contract law fundamentally different to the one grounded on the will theory.

Delineating the genealogy of contract law is even more pertinent when we recall the hypothesis of this research, that is, that peripheral forces - the increased regulation we refer to at the EU level - and, even more so, judicial interpretation by the Court of Justice of the European Union, are chipping away at the core of contract law in Member States and consequently are contributing to the European identity-building project. Three concepts require clarification prior to proceeding with the analysis:

- The core of contract law here is understood as contract law at its very basic level – the fundamental principles that govern the exchange of goods or services between two parties.
- The periphery of contract law refers to those influencing issues that do not concern the impetus for concluding the contract in the first place, nor the elements required for the actual conclusion of the contract (for example, offer, acceptance, and consideration), but rather those ingredients that externally influence the structure and the terms of the contract.
- Identity, not to mention European identity, is considerably more complex. How does identity relate to contract law we may wonder? For our scope, the interplay between contract law and identity invokes notions of categories of actors or players in the market. Identity is a concept that invokes a sense of belonging. Identity when further coupled with contract law invokes a sense of legal belonging. European identity-building through contract law therefore signifies the creation of a sense of belonging to a transnational legal system via the creation of certain categories within which market players, both the powerful and the weak, can place themselves in a ‘comfort zone’ one might say in terms of the assertion of their rights.

The interplay between these three principal concepts will become clear as the analysis deepens. For now, bearing these preliminary explanations in mind, it is necessary to turn to the genealogy of contract law.

¹¹ Kennedy, Duncan. “Three Globalizations of Law and Legal Thought: 1850-2000”, in Trubek, David. & Santos, Alvaro (eds.) *The New Law and Economic Development. A Critical Appraisal*, (Cambridge, 2006).

¹² Ibid. Kennedy uses the term legal consciousness in expressing how various ‘interests’ are integrated into the legal dominant language, for example, the contemporary language he talks of is neo-formalism i.e. constitutional rights. He connects shifts in legal discourse to changing attitudes about state/society relations that are subsequently reflected in new legal discourses dependent on a new dominant language.

Contract law as the web and woof of actual life

Classical Legal Thought was characterized by a clear distinction between the public and the private; individualism; and, interpretive formalism. It was centred on the imperialism of contract law and ‘The Will Theory’ which espoused that the private law rules of the ‘advanced’ Western nation states provided a rational set of derivations from the notion that governments should protect the rights of legal persons.¹³ The Will Theory was premised on the notion that restraint on a person’s will ought only be effectuated where it was necessary for others to do the same. The harm principle constituted a limit in terms of direct harm caused by X injuring Y.

During this timeframe - from approximately 1850 until 1914¹⁴ - the principle objective was economic development. Paramount to this was the private relationships that were being developed between market actors in view of individual self-realization. This first globalization was centred on the idea that law should be rules of conduct and the distributive consequences brought about by this ‘just rules of conduct’ approach would be fair and efficient. The market was the best distributionary mechanism. Law was designed to further these goals by setting down rules that furthered transactions, as opposed to being used as a tool to perfect perceived ‘socially just’ outcomes. It was essentially characterised by law without politics with a view to realizing economic development.

In essence, this first globalization espoused a legal consciousness that viewed law as a system of spheres of autonomy. From this, the development of a private law of contract – and to a lesser extent tort – emanated based on the will of actors and private autonomy.¹⁵ One might say that the underlying foundation of The Will Theory was built upon the following reasoning: I have private law rights and I owe no obligations save the harm principle. Therefore, it adopted a belief in the virtue of permitting individuals to pursue their interests through market transactions with minimal external interference. It centred on the liberty of the parties to the contract to freely create an agreement according to their own terms and conditions.

An important distinguishing feature then revolved around the facilitative character of contract *via* the will theory. This gave rise to a differentiation of the source of rules accorded to each specific field in the sense that *will* paved the way for infinite variations of contract law rules given the changing nature of the will of parties. According to The Will Theory, commitments made between parties to a contract were enforceable before courts because the parties freely chose to be bound by the contractual agreement. In fact, traditional contract law espouses, “*the law of contract gives expression to and protects the will of the parties, for the will is something inherently worthy of respect*”.¹⁶ This principle was upheld by case law and provided the basis of economic transactions during the second half of the nineteenth century:

If there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty in contracting, and that their contracts, when entered freely and voluntarily, shall be held sacred and shall be enforced by the Courts of Justice¹⁷

Therefore, it is clear that private law, or the law of obligations, was considered as the legal core and it was characterized by a formalistic approach to legal reasoning. Positive enforceability before the courts was key.

¹³ Kennedy, Duncan. “The Three Globalizations of Law and Legal Thought”, p. 26; Kennedy, Duncan. “From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s Consideration and Form”, 100 *Colum. L. Rev.* 94 (2000)

¹⁴ Kennedy, “The Three Globalizations of Law and Legal Thought”, p. 25.

¹⁵ For a critique see Randy E. Barnett, “A Consent Theory of Contract”, 86 *Colum. L. Rev.* 269 (1986).

¹⁶ Cohen, M. “The Basis of Contract”, 46 *Harv. L. Rev.* 553, 575 (1933).

¹⁷ Sir George Jessel MR *Printing and Numerical Registering Co. v Sampson* [EQUITY]. [L R] 19 Eq 462 (1875)

The objectives and the scope of rules during this globalization were bolstered by the individualist ethos that characterized the Will Theory. The governance of relationships was not based on the nation-state but rather on the institution of *lex mercatoria*. With no nation state there was in fact no responsibility of the state to regulate or to protect its citizens which effectively enhanced the individualistic character of rules during this period.¹⁸ In a certain sense, the social aspects were ignored or simply not considered leading to the dominance of a *laissez faire* ideology¹⁹ when it came to contract. This set the scene for emerging modern capitalism and its market.²⁰

The results of this were profound. Contract law became a method of understanding. Everything that derived from either expressed or implied will came under its scope of application. This, coupled with the rise of capital, constituted the driving forces that generalized contract law. It occupied the core position in legal systems.²¹ So, since contract law/will became the core, everything else was pushed to the periphery and a process of subtraction from the core began.²² In sum, as espoused by T. Parsons in *The Law of Contracts*:

The Law of Contracts, in its widest extent, may be regarded as including nearly all the law which regulates the relations of human life. Indeed, it may be looked upon as the basis of human society. All social life presumes it, and rests upon it; for out of contracts, express or implied, declared or understood, grow all rights, all duties, all obligations, and all law. Almost the whole procedure of human life implies, or, rather, is, the conflictual fulfilment of contracts.²³

The imperialism of contract was a construct that held significant theoretical and practical weight. In this regard, it permitted a construction of the law of contract “*as including, directly or indirectly, almost all the law administered in our courts*”.²⁴ In essence, everything was considered in a contractual light and, therefore, reduced to elements of a transaction.

Socializing contract law

The dissatisfaction that arose in revolt of Classical Legal Thought began to ferment in the late 1800s and provided a forum which allowed for the embrace of a new legal consciousness. Beginning in the early 1900s and lasting until the end of World War II²⁵, a reconstruction process was set in motion based on fundamental shifts from the idea of economic development and individualism to the idea of interdependence and group rights; from formal equality to social justice; and, from private law as its core to social legislation. The concept that emanated from the second globalization reached beyond the goal of protecting David against Goliath and rather attempted to embed a collective element grounded on more than the protection of individuals but rather the protection of individuals as constitutive elements of particular groups of society. The social, in these terms, constituted an outright attack on the individualist nature of Classical Legal Thought and its tendency to abuse deduction in terms of the deductively watertight ideological basis attempting to instead instil social elements in the place of the will.

¹⁸ Farrar, John. & Atiyah, P.S. “The Rise and Fall of Freedom of Contract,” *British Journal of Law and Society* 8, no. 2 (1981): 277.

¹⁹ Nozick, Robert. *Anarchy, State, and Utopia* (Basic Books, 1974).

²⁰ Halley, “What Is Family Law?,” May 8, 2013. p. 43

²¹ Savigny and Holloway, *System of the Modern Roman Law*.

²² Here we can pinpoint the emergence of the family/market dichotomy. See Halley, “What Is Family Law?”. p. 64

²³ T. Parsons, *The Law of Contracts*, vii, (Buffalo, Willian S. Hein, 1853).

²⁴ T. Parsons in *The Law of Contracts*

²⁵ Kennedy, D. “Three Globalizations of Law and Legal Thought”, p. 37.

For our purposes here, we understand the second globalization of legal thought as the development of a legal consciousness that bestrode private law, for example, with such categories as labour law within the framework of developing methods that potentially could rein-in the freedom of contract ideology and the regulation of private relations based solely on the will of the parties. The result of this, as we will see, was that freedom of contract remained intact however in certain circumstances further obligations were imposed on, for example, employers.²⁶

These obligations were essentially based on the recognition of social responsibilities and the development of the idea of social protection. In regulatory terms, the law of the free market – the web and woof idea that imperialized contract law - assumed the role of a new regulatory regime where market freedoms were balanced against radiating social concerns that aimed at protecting groups in society e.g. workers, women, the disabled - we may say those previously considered contrary to the idea of individual freedom by Classical Legal Thought. The social took it upon itself to tackle that which did not fit nicely within the will theory and it provided a space for actors in shifting from individualism to collective concerns in consideration of the distributive and protective effects of the new social justice ideology. French scholars²⁷ pioneered this movement with a view to saving liberalism from itself²⁸ and once they set the discourse in motion it became clear that the role of judges, considered so critical to the classical period, was outflanked by agencies and legislative efforts during this globalization.

In short, the social reconstructed the debate replacing the will theory and individualism with social concerns and collective interests. It involved the recognition that law derives not from abstract principles but rather from the project of using law to address social needs.²⁹ It concerned a modernization of the language used to deal with legal relationships, for example, the fact that the master/servant relationship during the globalization of The Social assumed a social form and began its transformation into what we now know as labour law.³⁰ It essentially was a reconstruction project that was premised on an outright attack on the deductive and apolitical nature of classical legal thought.

The conditions defining late-C19th social structures took this evolution one step further. According to Kennedy, a social transformation was unfolding “*consisting of urbanization, industrialization, organizational society, globalization of markets, all summarized in the idea of interdependence*”.³¹

²⁶ Collins, Hugh. *Regulating Contracts* (Oxford: Oxford University Press, 2003).

²⁷ Kennedy notes that although German-speaking theorists instigated the social it was the French who took it upon themselves to globalize it. He makes reference to Raymond Saleilles, *De La Declaration de la Volonte*, (1901), Francois Geny, *Method of Interpretation and Sources of Private Positive Law* (Louisiana State Law Institute trans., 2ed. 1963) 1903, Leon Duguit, “Theory of Objective Law Anterior to the State”, in *Modern French Philosophy*, VII The Modern Legal Philosophy Series (1916), Edouard Lambert, *La Fonction du Droit Civile Compare*, (1903), Josseland, *De L’Esprit des Droit et de Leur Relative: Theorie Dite de L’Abus Des Droit* (1927, 1939), Emmanuel Gounod, *Le Principe de l’autonomie de la Volonté* (1912), and Georges Gurvitch, *L’idée du Droit Social* (1932).

²⁸ Kennedy, D. p. 38 citing Wieacker, Franz, *History Of Private Law In Europe With Special Reference To Germany* (Tony Weir trans., Oxford Univ. Press 1995) (1967); White, G. Edward. “From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America”, 58 *VA. L. REV.* 999 (1972); Arnaud, André-Jean. *Les Juristes Face a la Société du XIXieme Siècle a Nos Jours* (1975); Horwitz, Morton J. *The Transformation Of American Law 1870-1960: The Crisis Of Legal Orthodoxy* (1992); Buen, Néstor De. *La Decadencia Del Contrato* (1965); Kennedy, Duncan. & Belleau, Marie Claire. “François Gény aux Etats Unis”, in Gény, Francois (ed.) *Mythes et Réalités* (2000); Kennedy, Duncan. “From the Will Theory to the Principle of Private Autonomy: Lon Fuller's “Consideration and Form”, 100 *COLUM. L. REV.* 94 (2000); Jamin, Christophe. Une Brève Histoire Politique des Interprétations de L'article 1134 du Code Civil, 1134 Du Code Civil, *Le Dalloz*, 901 (March 14, 2002).

²⁹ Halley, “What Is Family Law?,” May 8, 2013, p. 210.

³⁰ Deakin, Simon. “The Changing Concept of “Employer” in Labour Law” (2001) 30 *Indust.L.J.* 72.

³¹ Kennedy, Duncan. “The Three Globalizations of Law and Legal Thought”, p. 38.

The core idea that emanated from the social however was the idea of interdependence. As noted, it drew from urbanization, industrialization, organizational society and the globalization of markets³² in formulating a critique of the will theory for being individualist and ill-equipped to deal with the new social condition. It was argued that the idea of interdependence could not be satisfied by the will theory and the imperialism of contract law that had, until this point, legally speaking, supported the market. The web and woof market structure therefore was in a state of failure – it was struggling to produce appropriate results given the new, modern conditions of interdependence. The search therefore was well underway for new regulatory techniques that would eventually lead to a shift from adjudication - in avoidance of the highly criticized abusive deduction that characterized the first globalization - to administration:

After a brief flirtation with the judge...the hero figures of the social current became, in principal, the legislators who drafted the multiplicity of special laws that constituted the new order, along with the administrator who produced and enforced the detailed regulations that put legislative regimes into effect³³

This new approach had significant effects. The contract law field was socialized by way of administrative law and input from the developing nation state. This can be illustrated by shifts in the regulation of workplace accidents and legislative attempts to recognize and correct the inadequacy of leaving employment relations solely to strict, classical contract law. To be more precise, the origins of legislative attempts in this field stemmed from the industrial revolution and the socialization of employment relations pioneered by the very active Marxist and socialist movement that pushed for social protection for workers in Germany. Although the socialists in the end were oppressed, key features of the left's agenda were cleverly adopted including Employers' Liability Law in 1871³⁴ and Workers' Accident Insurance in 1884. This new path to socialization eventually swept through Europe - albeit at different rates - and took a firm grip in the industrialization processes that were already underway, altering employment relations to a degree that could not even have been perceived during the first globalization in terms of the master/servant relationship.

The advance of workplace accidents legislation lucidly illustrates the social bridging mechanism between the increasing complexities of, on the one hand, modern business, and, on the other, the development of the nation state. The measured acceptance that the modern industrial society required social protection gradually spread and in 1880 the British Prime Minister William Gladstone pushed through the Employers' Liability Act. His attempts were furthered in 1897 with the passing of the Workmen's Compensation Act that essentially considered the already developed German model by establishing a 'no-fault' doctrine of compensation and extended the scope of compensation to accidents occurring connected to railways, mining and quarrying, factory work and laundry work. Prior to the passing of the 1880 Act - i.e. the law as it was according to a more classical conception of employment relations - a workman injured by an accident while engaged in employment activities could base his legal action for damages against his master only in cases where the master knowingly employed an incompetent servant or in cases where the master prohibited plant or machinery in the knowledge that it was unsafe and dangerous. Therefore, the legal situation of injured employees was quite limited, formalistic and narrow in terms of its approach to the protection of injured parties and the assumption of risk doctrine. Recognition, however, of the shortcomings of this situation, for instance, the results of the Doctrine of Common Employment according to which a workman could not recover compensation for any injuries caused by a fellow servant, led to the passing of the

³² Ibid.

³³ Ibid. p. 43

³⁴ For an overview, see Timothy G.W. and Jochen S., Incentives that Saved Lives: Government Regulation of Accident Insurance Associations in Germany, 1884-1914 (August 9, 2012). *Yale University Economic Growth Center Discussion Paper* No. 1013; Yale Economics Department Working Paper No. 104.

Employers' Liability Act 1880. This act extended the scope of protection for employees in recognition of the increase of workplace accidents inevitably caused by increased industrial activities and the mechanization of production by rendering employers liable for damages caused in certain situations.

In sum, what we can note from this illustration is the change in approach to what was once a simple construction of a master/servant relationship: during the globalization of classical legal thought it was strictly private, based on will and characterized by a *laissez faire* ideology. The social crisis however, especially in terms of the emergence of workplace disputes as a result of industrialization, reformulated not only the linguistic approach to the actors, equating the master with the capitalist employer and the servant with organized labour, but it also reformulated the governance of this relationship by way of statutory and administrative innovations.³⁵ This fresh approach gradually led to a metamorphosis of the master/servant relationship to the birth of a thoroughly modern field of law leading to what would become known as labour law.³⁶

A further illustration can be provided by the law governing medical accidents which not only turned the regulation of the medical profession on its head but also assisted in instigating a complete reform of tort law in terms of the private relationships between medical practitioners and their patients. Prior to the nationalisation of health care systems, the doctor patient relationship was a contractual one in which the patient sought help and assistance from the medical professional. Health care systems in Europe were largely mosaics of private, municipal and charity schemes³⁷ with doctors retaining their professional autonomy³⁸ and consequently liability for any harm caused. This containment of the doctor/patient relationship within a contractual sphere did not give rise to many medical negligence claims. Indeed, just over one hundred years ago it was stated in the case of *Farquar v Murray*³⁹ that the action before the court was particularly unusual, the judge stating: “*it is an action of damages against a medical man. In my somewhat long experience I cannot remember having seen a similar case before*”.⁴⁰

However, the nationalisation of health care, which occurred post World War II, or thereabouts, in most European countries brought major alterations to the landscape of health care and its delivery. The private, contractual relationship that existed between the doctor and the patient was infiltrated by a third party: the state. As a result of this, the principle of collective responsibility permeated the delivery of health care and a shift in responsibility resulted. For example, the establishment of the *National Health Service* (NHS) in 1948 in the UK was based on the principle of equality with the state assuming the obligation to provide free health care to the entire population.⁴¹ This in turn led to a shift in liability for medical accidents as the doctor/patient relationship was catapulted from the private sphere to the public assuming a necessary shift in terms of regulation and adjudication.

In summary, what we can deduce here is that the rise of social legislation explicitly contradicted the classical, *laissez faire* ideology that the private relationships were restricted to the will of the parties. In noting the fermentation of the social in terms of the master/servant relationship, we can discern that contract law was progressing rapidly and embracing social aspirations influenced, for example, by social insurance against industrialist accidents as a compulsory element of the wage bargain, the rise

³⁵ Halley, “What Is Family Law?,” May 8, 2013 p. 201

³⁶ Ibid. p. 203

³⁷ Lo Scalzo, A., Donatini, A., Orzella, L., Cicchetti, A., Profili, S., & Maresso, A. *Italy: Health system review. Health Systems in Transition*, (2009) p. 13.

³⁸ In fact, this was one of the major hurdles to the nationalization of health care in the UK and France in that doctors were fearful of giving up their professional autonomy.

³⁹ *Farquar v Murray*, 3F, 859-64, cited in HURWITZ, B. “Learning from primary care malpractice: past, present and future”, *Qual Saf Health Care*, 2004; 13; 90-91.

⁴⁰ Ibid.

⁴¹ Health Care systems in transition: UK p. 5.

of the labour union as an involuntary association, and the recognition by the state of collective interests. This, in effect, justified “jettisoning individualist and formalist notions”⁴² and paved the way for inroads linking the once strictly private nature of relationships with considerations pertaining to group rights, social rights, social justice, social welfare and a regulatory sphere somewhat alternative to the free market that monopolized legal thinking during the first globalization.

Optimizing subservience of conflicting interests

The third globalization of legal thought embraced two contradictory trends by maintaining “the social, but now without the rationalist assumption that social interests would eventually be correctly subserved by the emergence of legal rules that would optimally adjust them: they were now politicized as conflicting social interests, and the best that law could do would be to balance them in the least bad way that lawmakers could ascertain”.⁴³

The characteristics of neo-formalism are that it, as a legal consciousness, centres on an increased importance weighted on human and democratic rights, the rule of law, and pragmatism as the legal ideal.⁴⁴ This third globalization, what Kennedy refers to as the contemporary period, is more concerned with recognising and managing difference.⁴⁵ In his own words:

Between 1945 and 2000, one trend was to think about legal technique, in the aftermath of the critiques of CLT and the social, as the pragmatic balancing of conflicting considerations in administering the system created by the social jurists. At the same time, there was a seemingly contrary trend to envisage law as the guarantor of human and property rights and of intergovernmental order through the gradual extension of the rule of law, understood as judicial supremacy⁴⁶

In terms of rights, this period sees a shift from individual rights and property rights that characterized the first globalization, and from group rights and social rights that marked the globalization of the social consciousness to an increased focus on human rights in terms of policy analysis, policy making and, more importantly for our scope here, adjudication. Inherently linked is the transformation in terms of the notion of equality. As discernible from the preceding discussion, classical legal thought was more focused on personal freedom and the systemization of law leaving little room for notions of equality, which, in turn, was very formalistic. This evolved however with the rise of social law and a more socially orientated view of justice underpinned the equality ideal. In this third globalization, what we witness is the rise of equality based on anti-discrimination, born from the original EU Treaty and its prohibition of discrimination based on nationality, growing into a more extensive body of non-discrimination legislation covering not only nationality but additionally sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.⁴⁷ Importantly, not only has anti-discrimination provided a supranational basis for the development of a new approach to equality, it has

⁴² Kennedy, “The Three Globalizations of Law and Legal Thought”, p. 42

⁴³ Halley, “What Is Family Law?,” May 8, 2013. p. 263.

⁴⁴ Kennedy, “The Three Globalizations of Law and Legal Thought”, p. 63.

⁴⁵ Ibid. p. 65.

⁴⁶ Ibid. p. 22.

⁴⁷ Charter of Fundamental Rights Article 21: 1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. 2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

in fact been acknowledged as a field of law in its own right⁴⁸ paving the way for an legal framework based on equality in consideration of social realities.

The fundamental basis then in terms of balancing and managing difference emanates as rights. Rights cut across the previous division between the social and classical legal thought because they possess the potential to give rise to more satisfactory solutions when juxtaposed with earlier outcomes pertaining to the classical period and even the social. For example, we can rely on our market rights before the CJEU to undermine or reduce the scope of social regulation - think here of the Sunday Trading case or the general critique of CJEU as undermining national social policy.⁴⁹ This rights discourse opens the door to individual empowerment via access and means of rights' enforcement. They have the potential to give voice to people who previously would not exist in Classical legal thought. Through this discourse therefore, a path has been etched out paving the way for social inclusion and "access justice"⁵⁰ which, arguable even goes beyond neo-formalism.

What we can note from this development is the simultaneous advance of both collective and individual rights. We can take the example here of the right to personal autonomy (with no concurrent recognition of unequal bargaining power) that was deemed so imperative during Classical Legal Thought. The significant shift and recognition of the need for a more rights based approach to autonomy is exemplified through the "The Unfair Contract Terms Directive"⁵¹ which introduces a notion of good faith when it comes to the conclusion and execution of consumer contracts in Europe.⁵² The goal is to prevent significant imbalances when it comes to the rights and obligations of consumers on the one hand and sellers and suppliers on the other hand. It outlines a list of examples of specific terms that may be regarded as unfair and are therefore considered non-binding for consumers. This approach therefore recognizes a situation whereby parties to contractual relationships do not always come to the 'bargaining table' as equals and in a sense one party's inability to exercise 'correct autonomy' gives rise to the need for certain protective measures. In terms of our discourse here, this right to personal autonomy, in consideration of rights in conjunction of protection of weaker parties, is considerably debilitated.⁵³

It is important to state from the outset, and as we will see this becomes a fundamental element in terms of the advancement of a European identity, that this third globalization is founded on an identity-based notion of rights. Consider rights for women and as illustrated, for consumers and other 'vulnerable' groups. This relates to our discourse in terms of the reconstruction of the path to asserting one's rights. For example, during the first globalization we can safely say that the path to be followed was one based on a formalistic consensus of wills – full stop. The social, in making some moves towards the integration of social justice made room for collective considerations and utilitarian approaches to the settlement of disputes – the advancement of good faith. During the third globalization however, we see an identity-based notion of rights i.e. I am a woman and a consumer and therefore I possess certain rights, not I possess rights per se. This differs from the Social in that it reintegrates it into the legal system by way of arguments focused on constitutional rights and balancing policy and identity. What

⁴⁸ Schiek, Dagmar. "From European Union non-discrimination towards multidimensional equality law for Europe", in Schiek, Dagmar. & Chege, Victoria. *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law* (Routledge, 2009) p. 3.

⁴⁹ Micklitz, *The Politics of Judicial Co-Operation in the EU*.

⁵⁰ Micklitz, *The Many Concepts of Social Justice in European Private Law*.

⁵¹ Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts

⁵² This will be dealt with further in part IV below. For now, suffice to highlight the recent case law of the CJEU on the Unfair Contract Terms Directive and its protectionist stance when it comes to interpreting the reach of procedural autonomy of the Member States when it comes to, for example, foreclosure proceedings. See Case C-169/14 and C-34/13. For a concise overview, see Negra, FD, The uncertain development of the case law on consumer protection in mortgage enforcement proceedings: Sanchez Mrcillo and Kusionova, *Common Market Law Review* 52: 1-24, 2015.

⁵³ Teubner, G. "Substantive and Reflexive Elements in Modern Law", (1983) *17 Law and Society Review* 239-285.

are political disputes are portrayed as legal disputes about the scope of ones rights all the while taking the Social into account due to their sensitivity towards potentially disadvantaged groups.

The development of anti-discrimination and its interpretation by the CJEU has played a pivotal role in this sense in that a new forum has been developed within which national laws can be reinterpreted according to both primary and secondary EU law. The rights discourse provided access to a different path to justice. The Court, via the fundamental freedoms enshrined in the treaty was forced to use its market based toolbox to resolve the peripheral contract cases arising as a result of the internal market. In fact, according to Kennedy:

The European Court of Justice is neo-formalist in its interpretation of the canonical “freedoms” of movement of goods and persons in a “single market” in part, as is widely recognized, in order to drape its legislative power in the cloak of legal necessity⁵⁴

It is argued here that this ‘*interpretation*’ is being conducted via the ‘*necessary*’ application of anti-discrimination and more recently fundamental rights in consideration of the fluid structure of the EU that permits one to go beyond the competences debate⁵⁵ in delineating the impact of such judicial reasoning. The basis for this stems from the general neo-formalistic language assumed when the Court is confronted with many new contractual issues that are coming before it.

It is argued therefore that equal treatment, initially with a strong economic bias, is the foundation upon which European identity is built.

Beyond neo-formalism: the identity building project

We have argued thus far that the third globalization is founded on an identity-based notion of rights. Here, we arrive at the theoretical crux of the hypothesis of this contribution. To what extent are we going beyond neo-formalism when we talk of constructing a European identity? Even more pertinent, to what extent is this ‘identity’ we talk of being constructed on the basis of pure private law? Before looking to the case law concerning contract law, it is necessary to develop the elements forwarded here as the essential ingredients of European identity given that it is argued that it has been carved out via an extension of the scope of anti-discrimination, the recognition of fundamental rights and the creation of EU citizenship.

Originally, the idea behind the European Economic Community revolved around establishing an internal market according to which legally relevant principles would enjoy mutual recognition and regulatory barriers would be demolished so as to provide an optimal forum within which the goals of a properly functioning market could be achieved.⁵⁶ On the surface, these economic aspirations remain the parole espoused by Europe and its institutions, which, it may be argued camouflages its reasoning with the language of economic freedoms. However, on close examination of the treaties and case law, we can discern a certain deflection from the formal economic requirements. Much evidence of the Union’s shift in this direction can be provided here.

⁵⁴ Kennedy. p. 69

⁵⁵ This point is made by G. Comandè in “The Fifth European Union Freedom: Aggregating Citizenship...around Private Law” Hans-W. Micklitz, *The Constitutionalization of European Private Law* (Oxford University Press, 2014) in presenting his idea that “a plurality of agents, institutions and legal dynamics is relentlessly aggregating a European Citizenship”.

⁵⁶ Collins, H. *The European Civil Code: The Way Forward*, (Cambridge University Press, 2008) p. 22.

Equal treatment

The Union's strife for and development of equal treatment has led to a significant body of anti-discrimination law in Europe. Even more pertinent for our purposes are the interesting case law developments, particularly in the field of private law.⁵⁷ As suggested by Collins⁵⁸, the extensiveness of social regulation at the EU level in the field of, for example, employment law now tends to overshadow its private law origins i.e. contract law. In fact, anti-discrimination and the constitutionalisation of equal treatment at the EU level have elevated these legal relationships to an inconceivable level from the perspective of classical legal thought.⁵⁹ This process began when the ECJ developed its innovatory concept of direct effect permitting the enforcement of individual rights enshrined in the treaties in national courts. This position was confirmed in terms of equal pay in *Defrenne v SABENA*⁶⁰ effectively altering the concept of contractual autonomy shifting the contours of private law which would eventually develop into a field of law not only subject to the *Defrenne* logic but which would also be subject to the unwritten, hotly debated general principles of EU law which include the principle of equal treatment and respect for fundamental rights. Juxtaposing this neo-formalist position of the Court with the original scope of the Treaties informatively exemplifies the extent to which the aspirations of the EU have developed:

...it must be concluded that the economic aim pursued by Article 119 of the Treaty, namely the elimination of distortions of competition between undertakings established in different Member States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental right.⁶¹

Suffice it to say that via the development from equal pay to a genuine concept of equal treatment expressed via the general principles and fundamental rights, significant steps have been taken by the Court altering the dynamics of private law and reintegrating the social via a balancing rights.⁶²

Fundamental rights: “nonsense upon stilts”?

In 1791, Jeremy Bentham, in reference to the French Human Rights Declaration of 1789 commented that natural, imprescriptible rights were simply nonsense upon stilts. Today, however, as we will see, references to natural rights inherent to the person, from which the principles of human dignity and equality derive, have advanced a discourse that would seem to have arguably won out the nonsensical approach.⁶³

⁵⁷ Among some of the most interesting cases concerning non discrimination, please see Case C-144/04, *Werner Mangold v Rüdiger Helm*; Case C-555/07 *Seda Kucukdeveci v Swedex*; Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*; Case C-164/07 *James Wood v Fonds de garantie des victimes des actes de terrorisme et d'autres infractions*; Case C-148/02 *Carlos Garcia Avello v État belge*; Case C-353/06 *Stefan Grunkin and Dorothee Regina Paul v Leonhard Matthias Grunkin-Paul and Standesamt Stadt Niebüll*; Case C-267/06 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*. See also Eriksson, A., “European Court of Justice: Broadening the Scope of European Non Discrimination Law”, 7, *International Journal of Constitutional Law*, 2009.

⁵⁸ Collins, Hugh. “Justifications and Techniques of Legal Regulation of the Employment Relation”, in Collins, H., Davies, P., & Rideout, R. (eds), *Legal Regulation of the Employment Relation* (2000) 2, p. 7.

⁵⁹ Bell, Mark. “Constitutionalization and EU Employment Law” in Micklitz, H.W. *The Constitutionalization of European Private Law*.

⁶⁰ C-149/77 - *Defrenne v Sabena*

⁶¹ Case 50/96 *Deutsche Telekom AG v Lilli Schröder*

⁶² The Schmidberger case acts as an example here. This line of case law will be developed in more detail below.

⁶³ It must, however, be pointed out that reference to Bentham is used here by way of provoking a discourse on the true nature of fundamental rights and how they are perceived. In fact, Bentham's “nonsense” was hyperbolic, his actual point being more subtle in that he aimed to demonstrate that behind rights discourse lay policy choices. In other words, rights discourse acts as a cloak for policy driven decisions. He pointed to the indeterminable nature of rights, for example, how

It is often argued that the CJEU only pays lip service to fundamental rights protection in its jurisprudence owing to difficulties inherent in such an application in the field of private law.⁶⁴ A counter argument, however, is that a notable change has occurred since specific reference to fundamental rights has increasingly become more pronounced in balancing economic rights with fundamental rights.⁶⁵

The *International Handelgesellschaft*⁶⁶ case was the first pronouncement by the ECJ that specifically recognised the importance of fundamental rights in the internal market⁶⁷:

Although Community regulations are not German national laws, but legal rules pertaining to the Community, they must respect the elementary, fundamental rights guaranteed by the German Constitution and the essential structural principles of national law.

The Court went on to state that:

...respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.

It is clear from the judgment then that the Court was already mindful of and attempting to assimilate the common constitutional principles of the Member States. This agenda was pursued in subsequent case law leading to not only a recognition of the importance of fundamental rights but rather to a situation according to which fundamental rights were actually balanced against market freedoms. A few important, oft-cited cases can be mentioned here by way of illustration.

First, we refer to the well-known *Schmidberger v Austria*⁶⁸ judgment. In that case, Austria argued that the temporary closure of roads between Austria and Italy, effectively hampering free movement guaranteed by the EC treaty, was justified on the basis of freedom of expression and assembly given that the road was blocked so as to allow an environmental demonstration to take place. The Court therefore was forced to juxtapose internal market considerations with fundamental rights. The Court reasoned, on the basis of “*settled case-law*”, that:

...fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect [...].⁶⁹

(Contd.) _____

does one in any straightforward way reconcile freedom of expression and freedom of religion? Today, balancing and proportionality are advanced as a reasonable methodology.

⁶⁴ In terms of the difficulties of applying a fundamental rights based logic see Collins H., “On the (In)compatibility of Human Rights Discourse and Private Law”, LSE Law, Society and Economy Working Papers 7/2012; Smits, J.M. “Private Law and Fundamental Rights: A Sceptical View” in Barkhuysen, T. and Lindenbergh, S. (eds.), *Constitutionalisation of Private Law* (Brill, 2006).

⁶⁵ In this regard, see Safjan M., “The Horizontal Effect of Fundamental Rights in Private Law—On Actors, Vectors, and Factors of Influence”, in Purnhagen K., & Rott P. (eds), *Varieties of European Economic Law and Regulation, Liber Amicorum for Hans Micklitz*, (Springer International Publishing, 2014) where he examines the radiating effect of fundamental rights on private law according to various jurisdictions including the national and European setting.

⁶⁶ *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 11-70

⁶⁷ We can also make reference here to *Stauder v City of Ulm*. For an historical account of the development of human rights and their role in the EU see Douglas-Scott, *Constitutional Law of the European Union*, (Longman, 2002) Chapter 13.

⁶⁸ *Schmidberger v Austria*, Case C-112/00.

⁶⁹ Paragraph 71.

Two points can be noted here. First, we can identify, from the language used in the court's reasoning, the shift we have already made reference to – be it rhetorical or not - in terms of market versus social reasoning. Secondly, the Court directly refers to the case law of the European Court of Human Rights in its attempt to ground the application of fundamental rights by drawing inspiration from common constitutional provisions and international treaties. One might consider the real consequences of this advance i.e. the instigation of a rights-based logic to be applied by a court that has its origins in the interpretation of legal issues related to the proper functioning of an internal market, which goes well beyond what was initially conceived in 1951 by the Treaty of Paris. However, we might also argue that the fundamental rights-based approach necessarily remains bound to the logic and language of the market oriented economic freedoms given the very basis of the EU legal order.

With the wheels in motion, the *Omega*⁷⁰ case followed and firmly substantiated the direction the Court was prepared to take. The case concerned a German prohibition on the importation of laser guns that involved players targeting each other – a ‘play at killing’ game. It was argued that the encouragement of fictitious violence for entertainment purposes amounted to violation of human dignity, a key principle of the German Constitution. The ECJ in the case accepted the German government's prohibition furthering, at least in this case, a priority of fundamental rights over community law.⁷¹ The Court made reference to its judgment in *Schmidberger* confirming that the protection of fundamental rights justifies, in principle, a restriction upon fundamental freedoms. In balancing the fundamental rights approach with economic, internal market considerations, the Court made reference to the opinion of the Advocate General that “*the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law*” going beyond, a merely market rights based approach. In other words, it would seem that what the Court did, at least in this example, was not replace no rights with some rights, but rather to supplement economic rights, with social and dignitary ones.

This is even more evident when it comes to the Charter of Fundamental Rights. The original treaties did not contain any reference to the protection of human rights as it was thought that the creation of an internal market would not require recourse to a body of human rights provisions. However, on recognition that encouraging the free movement of persons, goods and services essentially led to more than an efficient functioning of the market, the Court increasingly decided cases with human and fundamental rights aspects. In an effort to render effective a more rights-based approach and in order to substantiate EU citizenship, the EU Charter of Fundamental Rights was proclaimed in 2000, the content of which reflects greatly the European Convention on Human Rights and more generally protection afforded to nationals of Member States by the various Constitutions of the Member States. The Charter, originally a declaration of compliance with human rights became a legally binding document in 2009 when the Lisbon Treaty entered into force.

In the years before the Charter became legally binding, there was some confusion as to the purpose, scope and effect of the instrument. For some time, the Court and Advocates General made specific reference to the European Convention on Human Rights and the general principles of EU law as sources of fundamental rights protection in the EU. The Charter, however, even though it remained non-binding at this point, provided the CJEU with an additional instrument, a toolbox of rights that could be considered and utilised by the Court as readymade general principles. In effect, as we will see from the pre-Lisbon case law examples, the Charter was used an instrument for identifying fundamental rights as general principles of Community law. As set out in *Parliament v. Council*:

“the principal aim of the Charter, as is apparent from its preamble, is to reaffirm ‘rights as they result, in particular, from the constitutional traditions and international obligations common to the

⁷⁰ *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, C-36/02.

⁷¹ We can make reference here also to the *Schmidberger* case in which the protection of the freedom of assembly and expression justified a derogation from free movement of goods.

Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court ... and of the European Court of Human Rights.”⁷²

This is particularly notable in reference to cases concerning anti-discrimination and illustrates pointedly what we mean here when we refer to going beyond neo-formalism and rather reaching towards the European identity we speak of here. We can make reference to the well-known *Mangold*⁷³ judgment and the subsequent *Küçükdeveci*⁷⁴ case in which it was made clear by the Court that:

“Article 6(1) TEU provides that the Charter of Fundamental Rights of the European Union is to have the same legal value as the Treaties. Under Article 21(1) of the charter, ‘[a]ny discrimination based on [...] age [...] shall be prohibited’.”⁷⁵

These two cases, although not very forceful in their use of the Charter (in fact *Mangold* made no reference to it at all) did however bring to light the inspirational character that the Court granted to the Charter coupled with the general principles by anticipating direct horizontal effect to the general principles.⁷⁶ This step anticipated the post-Lisbon characteristic that the Charter⁷⁷ was to assume i.e. that of having the same legal value of the treaties.

EU citizenship

EU Citizenship adds a new layer in our attempt to reveal the effects of the third globalization on private law and the construction of a European identity. The case law in this direction implies a connection to the EU, one which was perhaps inconceivable when the internal market was established, by way of attempting to create a social sphere within which the EU can extend its powers of regulation.

The introduction of EU citizenship by the Maastricht Treaty in 1992 was considered by many as merely a symbolic move by the Union and one that would not confer many substantive rights on its addressees.⁷⁸ This widely held belief stemmed from the fact that the Treaty itself made citizenship of the Union depend on nationality of a Member State stating that “Citizenship of the Union shall complement and not replace national citizenship”. Therefore the benefits of Union citizenship from the very beginning were always to be enjoyed as dependent on individual legal systems and nationality of Member States. This restrictive view was also supported by the fact that free movement and residence rights had already been extended beyond economic connotations by secondary law as noted above.⁷⁹

The notion of citizenship, however, has to some extent paved the way for the emergence of the ‘European Social’ and in fact, has permitted the European institutions to take on a role which national states shied away from during the second globalization. The Treaty of Maastricht lessened the

⁷² *Parliament v. Council*, Case C-540/03 at para. 38.

⁷³ *Werner Mangold v Rüdiger Helm*, Case C-144/04.

⁷⁴ *Seda Kucukdeveci v Swedex*, Case C-555/07

⁷⁵ *Ibid.* at paragraph 22

⁷⁶ The Court did so based on the *Defrenne* doctrine.

⁷⁷ For a discussion on the role fundamental rights play in relation to questions concerning European identity see Sajjan M., “Between Mangold and Omega: Fundamental Rights versus Constitutional Identity”, (2012) 3 *Il diritto dell'Unione europea* 442-449.

⁷⁸ With this said, the Treaty did specifically confer some substantive rights on those eligible for Union citizenship, such as the right to vote in Parliament elections, the right to petition and the right to a reply in the language of a request.

⁷⁹ Council Directive 93/96/EEC of the Council of 29 October 1993 on the right of residence for students and Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity.

economic connotations that had provided for the foundational ethos of the Union. Article 17 of the TEU (now Article 20 of the Treaty on the Functioning of the European Union) states:

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.
2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties.

And Article 18.1 (now Article 21.1 of the TFEU) provided:

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

These provisions at first sight may not seem so far-reaching especially considering that the rights to move and reside had already been extended to non-economic actors through secondary law. Therefore, the innovation of European Citizenship did not immediately herald major practical consequences. However, the Court has since repeatedly pronounced that Union Citizenship is intended to be the *fundamental status*⁸⁰ of nationals of the Member States. What does this mean in terms of European identity? A look to the case law certainly reveals that in horizontal relations, EU citizenship has aided an integrationist approach promoting a dialogue between citizens and the Court.

The case of *Martinez Sala*⁸¹ was heralded as the first significant pronouncement concerning EU citizenship. It concerned a Spanish woman who was resident in Germany who was unemployed and claiming child benefit allowance. An issue arose in relation to the German authority's refusal to grant the benefit based on the fact that she did not possess a valid residence permit at the time of the claim. Essentially, the Court held the residence requirement to be a limiting condition. In reliance on Article 17 and 18 of the EC Treaty and on the principle of non-discrimination based on nationality contained in Article 12 of the same, the Court held that nationals of a Member State could rely on their European citizenship for protection against discrimination on grounds of nationality by another Member State.

This case is significant for our purposes since, by including the situation of Mrs. Martinez Sala within the scope of application of the EC Treaty, the ECJ enlarged that scope in two respects. First, the simple fact that Mrs. Sala was a Union citizen lawfully residing in another Member State was enough for her to fall under the scope of application of the EC Treaty. Secondly, the ECJ ruled that a benefit previously granted only to workers should also be granted to non-economically active persons in the EU. We note also from this case the first steps of the Court in assuming tentative responsibility concerning the allocation of welfare benefits⁸² to migrating families in Europe.

⁸⁰ Emphasis added.

⁸¹ *Martinez Sala v Freistaat Bayern* Case C-85/96.

⁸² The Trojani case is another important case in the area of granting welfare benefits and in developing the relationship between non-discrimination and European Citizenship in the realm of social security benefits. The case concerned a French national who was lawfully residing at a Salvation Army hostel in Belgium. While residing there, he undertook various jobs amounting to approximately 30 hours per week in return for his board, lodging and an allowance of 25 euro per week. He applied for the Belgian minimex subsistence allowance which was granted to those with inadequate resources. This allowance however was refused on the basis that Mr. Trojani was not of Belgian nationality nor was he a worker as defined by Council Regulation 1612/68. The ECJ however, in following the reasoning in *Martinez Sala*, was of the opinion that he was exercising his right under Article 18(1) EC Treaty and therefore came within the scope of the citizenship provisions. As a result, the Court held that as a citizen of the EU Mr. Trojani could rely on Article 12 of the EC Treaty to claim the minimex benefit.

It is important to note, however, that there was a certain degree of reluctance on the part of the Court, exemplified by the *Konstantinidis*⁸³, *Boukhalfa*⁸⁴ and *Shingara*⁸⁵ cases, to use the citizenship logic to grant benefits to European citizens. Indeed, for some time the Court largely reverted to economic reasoning even though the Advocates General in these cases specifically relied on the citizenship provisions. The Court in all three cases refused to follow this logic and based its judgments on economic considerations, clinging to the pre-Maastricht economic ethos of the Union.

The *Grzelczyk*⁸⁶ case signified a significant stepping stone in the evolution of EU citizenship and we note from it the development of a general principle in the Court's jurisprudence, i.e. that discrimination on ground of nationality will not be permitted against EU citizens who have exercised their free movement rights. The applicant in the case was a French national who had studied in Belgium for three years and who had also worked there so as to sustain himself financially. In his final year, Mr. Grzelczyk ceased to work so as to concentrate on his studies and therefore applied for the *minimex* allowance. Similar to the previous case, he was refused the allowance based on the fact that he did not fulfil the conditions set out in Belgian law, i.e. in order to claim the allowance one must either be of Belgian nationality or a worker. The question referred to the Court centred on whether or not the refusal was contrary to the EC Treaty provisions on citizenship in combination with the prohibition of discrimination on grounds of nationality. The Court essentially held that Articles 12 and 18 EC precluded preconditions such as those in the case at hand. The importance of the decision for our purposes lies in the fact that it recognized expressly that EU citizenship permits nationals of other Member States lawfully residing in the host Member State to access social benefits.

*Bidar*⁸⁷ is another important development in area of citizenship, particularly in relation to student's rights. Essentially, this case concerned the application of a student of French nationality for a maintenance loan in the UK. Mr. Bidar's application was refused on the ground that he was not settled in the UK: settled meaning that he would have had to be living in the UK for four years for purposes other than full-time education. The question referred to the Court was whether a student applying for a student loan in the UK could invoke the principle of non-discrimination on grounds of nationality laid down in Article 12 EC Treaty. In response to this question, the ECJ held that a student, being a resident in a host Member State, could rely on the right of equal treatment contained in Article 12 EC Treaty. The Court stressed that a change in a student's financial position cannot automatically adversely affect his/her right of residence. In consideration of this, the Court held that it would be unlawful to deny a French citizen access to student loans. The Court did however note that a Member State could legitimately impose certain conditions on the success of the application such as integration into the host Member State therefore implying a minimum residence period.

In the *D'Hoop*⁸⁸ case, the Court had to consider the case of a return migrant. Ms. D'Hoop was a Belgian national who, after completing her baccalaureate in France, returned to Belgium to continue her studies. On completion of these studies, she requested a tide over allowance which was available in Belgium for students in the process of entering the labour market for the first time. The Belgian national employment office refused the allowance on the basis that Ms. D'Hoop had completed her secondary education in France. This decision was appealed by the applicant to the *Tribunal du Travail de Liege* which referred a question to the ECJ. Specifically, the court requested a judgment on whether

⁸³ In this case the court refused to follow the Opinion of AG Jacobs that migrants should always be protected by fundamental rights as general principles of Community law. *Konstantinidis v Stadt Altensteig und Landratsamt Calw Ordnungsamt* Case C-168/91.

⁸⁴ *Boukhalfa v BRD* Case C-214/85.

⁸⁵ *Shingara v Radiom*, Case -65 and 111/95

⁸⁶ *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-a-Neuve* Case C-184/99.

⁸⁷ *Bidar v London Borough of Ealing* Case C-209/03.

⁸⁸ *D'Hoop v Office Nationale de l'Emploi* Case C-224/98.

Community law precludes a Member State from refusing to grant the tide-over allowance to one of its nationals since that national completed her secondary education in another Member State. The Court ruled that the Belgian legislation did in fact contravene Article 12 and 18 of the EC Treaty demonstrating once again the strength of these provisions when applied simultaneously and moreover the assumption of a sort of welfarist role by the Court based on the citizenship and non-discrimination provisions.

In fact, the Court has also assumed this role in relation to job seeker's allowance. The *Collins*⁸⁹ case concerned an applicant who had dual Irish and American nationality who moved to the UK with a view to seeking employment there. After one month he applied for jobseeker's allowance which was refused based on the fact that he was not an habitual resident in the UK. The ECJ, however, was of the opinion that the applicant in fact fell within the scope of application of Article 39 EC Treaty as a national of a Member State and therefore was entitled to equal treatment in seeking employment.

Another development in relation to students took place in 2005 when the *Ioannidis*⁹⁰ case was referred to the Court. After completing his secondary education in Greece, Mr. Ioannidis moved to Belgium in 1994 where he undertook studies and obtained a diploma in physiotherapy. After completing a vestibular course in France in 2001 he returned to Belgium and applied for the tide-over allowance. The application was refused. The question referred to the Court was whether it is contrary to Community law to refuse the tide-over allowance to a national of another Member State on the ground that he completed his secondary education in another Member State. In response to this question, the ECJ stated that nationals in another Member State seeking employment indeed fall within the scope of Article 39 EC Treaty and therefore can rely on the prohibition on discrimination.

These early cases paved the way for a construction of a far-reaching concept. In fact, the more recent case law on EU citizenship not only reintegrates 'The Social' at the EU level but it creates a social space within which nationals of Member States – and even third country nationals – can assert their rights against Member States. Take for instance the case of *Zambrano*.⁹¹ The case concerned a Columbian national and his wife who had been refused refugee status in Belgium. The Belgian authorities did however make a refolement order considering the on-going civil war in Columbia. While appeals regarding the refugee determination were ongoing, Mr. Zambrano fathered two children, both gaining Belgian nationality based on a provision of Belgian nationality law which at that time stated that any child born in Belgium who had not reached the age of majority and who would otherwise be stateless will be Belgian. During this time, Mr. Zambrano was also in gainful employment.⁹² On becoming unemployed, the applicant applied to the National Employment Office (ONEM) for an unemployment benefit which was refused based on the fact that he had not accumulated enough worked hours prior to becoming unemployed. This was effectively the result of certain periods of employment being disregarded since he was not a legal resident at the time. However, Mr. Zambrano argued that by virtue of EU law he derived a right of residence (note the peripheral nature of the issue referred) based on the fact of being a parent to EU citizens and that therefore he should have been exempt from the work permit condition.

The legal question then revolved around whether Mr. Zambrano, as a parent of a European Union citizen child, derived a right of residence by virtue of the Treaty on the Functioning of the European Union. If this question were to be answered in the affirmative, then the further question would be whether he can be exempt from having to obtain a work permit.

⁸⁹ *Collins v Secretary of State for Work and Pensions* Case, C-138/02.

⁹⁰ *Office national de l'emploi v Ioannis Ioannidis*, Case C-258/04.

⁹¹ *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM)* Case C-34/09.

⁹² This was later terminated as a result of immigration investigations.

All the Member States that made written submissions and the Commission argued that this was a wholly internal situation which did not come within the scope of application of EU law since the citizen children in this case had never exercised their free movement rights.⁹³ The Court, however, held that the Citizens Directive was not applicable in this case and instead turned to the citizenship provisions for guidance. Although difficult to state with confidence, we can perhaps wonder whether this reliance on the citizenship provisions indicates a desire on behalf of the Court to accommodate the Zambrano family just as was likely in the Carpenter case when the Court, even though Mrs Carpenter's avenue was blocked, shifted the focus onto Mr. Carpenter's economic rights. Regardless of the Court's motives – which we can only attempt to infer - it went on to recognize that EU citizenship is “*intended to be the fundamental status of nationals of the Member States*” citing Article 20(1) of the TFEU. In effect, the Court, in relying on previous case law, held that Article 20 of the TFEU precludes measures that have the effect of depriving citizens of the enjoyment of their substantive rights under EU law. In applying this to the facts of the case at hand, if Mr. Zambrano were to be deported then this would effectively mean that the citizenship rights of the minor children would become ineffective. The Court stated that:

Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, insofar as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.⁹⁴

This is neo-formalism par excellence whereby rights are the medium through which established legal concepts are reconceptualised. The economic goals of the EU essentially require the free movement of goods, services and people which in turn has developed into a social understanding of the internal market as rightly pointed out by Advocate General Sharpston in stating that “*when citizens move, they do so as human beings, not as robots. They fall in love, marry and have families*”.⁹⁵ To this end, the primary law of the EU and its scope of application has had to adjust to provide protection not only for the factors of production migrating in Europe but also for the humanistic aspect that is inherent in the free movement of persons. It is within this realm that *Zambrano* takes a significant step essentially recognising that movement is not a necessary prerequisite to trigger the scope of EU citizenship rules therefore expanding its scope to wholly internal situations.

Although the logic in *Zambrano* was subsequently limited by *McCarthy*⁹⁶ and *Dano*,⁹⁷ the emergence of a *Grundfreiheit ohne Markt*,⁹⁸ a de-economization of the scope of the Union, can clearly be identified. The initial scepticism in relation to the novelty of EU citizenship no longer stands when we look to the actual role the Court is assuming in the allocation of social advantages, which prior to the introduction of EU citizenship were confined to the competence of Member States. The role of social

⁹³ *This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members [defined as a spouse, those in registered partnerships recognised by both Member States; direct descendants under 21 and dependent direct relatives in the ascending link].*

⁹⁴ Paragraph 45

⁹⁵ Opinion of Advocate General Sharpston delivered on 30 September 2010 Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM)* para 128.

⁹⁶ *McCarthy v Secretary of State for the Home Department*, Case C-434/09

⁹⁷ *Dano v Jobcenter Leipzig*, Case C-333/13

⁹⁸ Wollenschlager, F. “A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration”, *European Law Journal*, Vol. 17, No. 1, January 2011, pp. 1-34

engineer assumed by the Court, similar to that assumed by national courts during the second globalization, is clearly delineable in the context of vertical relationships.

How does this relate to the scope of our investigation focusing on purely contractual legal relationships however?

Jurisprudential evolution – the ‘de-privatization’ of contract law

At this juncture, we may well ask how the foregoing relates to the scope of our investigation which focuses on purely contractual legal relationships? Let us recall the hypothesis that peripheral forces, i.e. increased regulation at the EU level, and, even more so, judicial interpretation by the Court of Justice of the European Union, are chipping away at the core of contract law in Member States and consequently are contributing to the European identity-building project. The space that has been created by equal treatment, fundamental rights and EU citizenship fills a vacuum that permits the creation of categories of actors. These actors are in turn permitted to identify with the Union in the assertions of their rights. This is clear from the horizontal relationships identified above.

What role does contract law have to play however? What do we mean by the ‘de-privatization’ of contract law? Simply put, the core of contract law, that is, the elements that make it private, is being amalgamated with regulation and European social aspirations. This, and the interpretation of it by the CJEU, is chipping away at the ingredients that make contract law relations strictly private. Will, the essential characteristic of the first globalization, is being replaced by the integration of politics through law. Let us turn to the case law examples so as to illustrate how the Court, in assuming its role as a social engineer, manages to provide solutions to contractual issues by way of identifying social and societal deficiencies and remedying them.

I am an EU citizen consumer

In July 2007⁹⁹, Mr Aziz, a Moroccan national residing in Spain, concluded with the bank *Catalunyacaixa* a loan agreement to the value of €138,000 secured by a mortgage over his family home. He stopped paying his instalments with effect from June 2008. After having called upon him to pay, without success, the bank initiated enforcement proceedings against him. When Mr Aziz failed to appear, execution was ordered. An auction of his immovable property was arranged, but no bid was made, with the result that, in accordance with the Spanish legislation, ownership of the property was vested in the bank at 50% of its value. On 20 January 2011, Mr Aziz was evicted from his home. Shortly beforehand, he applied for a declaration seeking annulment of a term of the mortgage loan agreement, on the ground that it was unfair and, accordingly, of the mortgage enforcement proceedings.

Spanish legislation lists the grounds, which are very limited, upon which a debtor may object to mortgage enforcement proceedings. Those grounds do not include the existence of an unfair term in

⁹⁹ Case C-415/11. For commentary see Micklitz, Hans: Unfair Contract Terms - Public Interest Litigation Before European Courts, Landmark cases of EU consumer law: in honour of Jules Stuyck (Ed. Intersentia - Cambridge) 2013 p.639-652; Iglesias Sánchez, Sara: Unfair terms in mortgage loans and protection of housing in times of economic crisis: Aziz v. Catalunyacaixa, Common Market Law Review 2014 Vol.51 p.955-974; Las Casas, Antonio ; Maugeri, Maria Rosaria ; Pagliantini, Stefano: Cases: ECJ - Recent trends of the ECJ on consumer protection: Aziz and Constructora Principado, European Review of Contract Law 2014 Vol. 10 p.444-465; Mak, Chantal: On Beauty and Being Fair—The Interaction of National and Supranational Judiciaries in the Development of a European Law on Remedies, Varieties of European Economic Law and Regulation (Ed. Springer - Heidelberg) 2014 p.823-834; Esteban de la Rosa, Fernando: The Treatment of Unfair Terms in the Process of Foreclosure in Spain – Mortgage Enforcement Proceedings in the Aftermath of the ECJ’s “Ruling of the Evicted”, Zeitschrift für europäisches Privatrecht 2015 p.366-388.

the mortgage loan agreement. Thus, that fact can be relied upon only in separate declaratory proceedings which do not have the effect of staying the mortgage enforcement proceedings. In addition, in the Spanish enforcement proceedings, the final vesting of immovable property in a third party – such as a bank – is, in principle, irreversible. Consequently, if the court hearing the declaratory proceedings declares a term of a loan agreement unfair and accordingly annuls the mortgage enforcement proceedings after enforcement has taken place, that judgment can enable that consumer to obtain only *subsequent* protection of a purely compensatory nature, the person evicted being unable to recover ownership of his property.

The *Juzgado de lo Mercantil No 3 de Barcelona* (Commercial Court No 3, Barcelona) before which the case was brought, decided to ask the Court of Justice, first, about the compatibility of Spanish law with the Unfair Terms in Consumer Contracts Directive, since Spanish law makes it extremely difficult for the court to ensure effective protection of the consumer and, second, about the essential characteristics of the concept of ‘unfair term’ within the meaning of that directive.

The Court replied, first, that the Unfair Terms in Consumer Contracts Directive precludes national legislation, such as the Spanish legislation at issue, which does not allow the court hearing the declaratory proceedings – that is, the proceedings seeking a declaration that a term is unfair – to adopt interim measures, in particular, the staying of the enforcement proceedings, where they are necessary to guarantee the full effectiveness of its final decision.

As a preliminary point, the court recalled that, in the absence of harmonisation of the national mechanisms for enforcement, the grounds of opposition allowed in mortgage enforcement proceedings and the powers conferred on the court hearing the declaratory proceedings are a matter for the national legal order of each Member State. However, that legislation may not be any less favourable than that governing similar situations subject to domestic law (principle of equivalence) and it must not make it in practice impossible or excessively difficult to exercise the rights conferred on consumers by EU law (principle of effectiveness).

With regard to the latter principle, the Court considered that the Spanish procedural system impairs the effectiveness of the protection which the directive seeks to achieve. That is so in all cases where enforcement is carried out in respect of the property before the court hearing the declaratory proceedings declares the contractual term on which the mortgage is based unfair and, accordingly, annuls the enforcement proceedings. Since the court hearing the declaratory proceedings is precluded from staying those proceedings, a declaration of invalidity allows the consumer to obtain only subsequent protection of a purely compensatory nature. That compensation is thus incomplete and insufficient, and would not constitute either an adequate or effective means of preventing the continued use of those terms. That applies all the more strongly where, as in this case, the mortgaged property is the family home of the consumer whose rights have been infringed, since that means that consumer protection is limited to the payment of damages. Consumer protection therefore is made redundant when it comes to the possibility of preventing the definitive and irreversible loss of the family home. It would thus be sufficient for sellers or suppliers to initiate mortgage enforcement proceedings in order to deprive consumers of the protection intended by the directive. The Court therefore held that the Spanish legislation does not comply with the principle of effectiveness, in so far as it makes impossible or excessively difficult, in mortgage enforcement proceedings initiated by sellers or suppliers against consumer defendants, to apply the protection which the directive confers on those consumers.

Second, when examining the concept of the unfair terms, the Court stated that the ‘significant imbalance’ arising from such a term must be assessed taking into account the rules which would apply under national law in the absence of an agreement by the parties in that regard. To that end, an assessment of the legal situation of the consumer having regard to the means at his disposal, under national law, to prevent continued use of unfair terms, should also be carried out. In order to determine whether the imbalance arises ‘contrary to the requirement of good faith’, it must be assessed whether

the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations. In light of the analysis forwarded by the Court, it was held that it was for the national court to assess whether the default interest clause inserted in the contract signed by Mr. Aziz was unfair.

This is a clear cut case of social engineering. Not the social engineering referred to above at national level but rather social engineering at the supra-national level (!) Additionally, it constitutes social engineering by the judicial arm of the European Union faced with a case presenting an effect of the Euro Crisis.¹⁰⁰ Therefore, the consequences of the economic crisis are being integrated into and regulated by the Unfair Contract Terms Directive. By regulating the periphery, the core of contract law is shook.¹⁰¹ The will of the parties, autonomy, one of the fundamental pillars of contract law, is replaced by an outcome which serves the individual consumer and grants ‘access justice’¹⁰² via secondary EU legislation.

On a broader scale, as highlighted in academic discourse, the assumption of a more activist role in developing a European identity could play out in three significantly important directions given that the Unfair Contract Terms Directive (the peripheral regulation at EU level) is increasingly being invoked at national level in mortgage enforcement proceedings.¹⁰³ Firstly, the development of a genuine European law by way of paving the way for a genuine European consumer procedural law (access for European citizens to the EU legal order upon identification with their consumer law rights). Secondly, the creation of a European private law safety net for EU citizens in cases where social and societal problems are not properly dealt with at the national level. And, finally, the assumption of the role of social engineer by the Court could act as compensation for the deficits arising as a result of institutional failures.¹⁰⁴

I am an EU citizen worker

We have already noted above that equal treatment has paved the way for access to the resolution of private law disputes at the EU level. Coupled with fundamental rights however, the access rhetoric has strengthened and inroads have been established permitting not only access but also an identification of the EU as a legal order promoting protection that is going beyond the market freedoms. The interaction between equal treatment and fundamental rights therefore, albeit complex and at times camouflaged, has the potential to be far reaching indeed.

As *Küçükdeveci*¹⁰⁵, mentioned above, demonstrates, the Court of Justice considers that the general principle of non-discrimination on grounds of age, expressed in directive 2000/78/106 and in Article 21(1) of the Charter¹⁰⁷, applies to relationships between private parties. The approach taken by the Court however was a cautious one given that the Court did not concede to an autonomous application

¹⁰⁰ See Micklitz, H-W., Mohamad Aziz – sympathetic and activist, but did the Court get it wrong?, in Sodersten, A., and Weiler, J.H.H., (eds), *Where the Court gets it wrong*, forthcoming.

¹⁰¹ Marco Molina, Spanish Law in 2010–2012: The influence of European Union law and the impact of the economic crisis, 6 *Journal of Civil Law Studies* (2013), 410.

¹⁰² Micklitz H-W., *The Many Concepts of Social Justice in European Private Law* (Edward Elgar Publishing, 2011).

¹⁰³ See for example Case C-169/14 and Case C-34/13. For discussion see Negra, FD, The uncertain development of the case law on consumer protection in mortgage enforcement proceedings: Sanchez Mrcillo and Kusionova, *Common Market Law Review* 52: 1-24, 2015.

¹⁰⁴ Micklitz, H-W., Mohamad Aziz – sympathetic and activist, but did the Court get it wrong?, in Sodersten, A., and Weiler, J.H.H., (eds), *Where the Court gets it wrong*, forthcoming.

¹⁰⁵ Judgment of 19 January 2010, C-555/07, *Seda Küçükdeveci v Swedex GmbH & Co. KG* [2010] ECR p. I-365.

¹⁰⁶ Directive of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, p. 16.

¹⁰⁷ It provides that: “Any discrimination based on any ground such as [...] age or sexual orientation shall be prohibited.”

of the Charter between private parties.¹⁰⁸ In addition, according to the established case-law of the Court of Justice, directives may not produce horizontal direct effect.¹⁰⁹ However, in reference to *Mangold*¹¹⁰, the Court clarified, in essence, that as long as a hierarchically lower legal act (in this case Directive 2000/78/EC) gives expression to a hierarchically higher act (in this case the general principle of anti-discrimination of the grounds of age), it may in fact apply between private parties. Consequently, the prohibition of discrimination on grounds of age, stipulated in Article 21(1) of the Charter, can apply between private parties when it is construed in combination with a general principle of law prohibiting discrimination on grounds of age coupled with a relevant directive. Likewise, in *Römer*¹¹¹ the Court of Justice opined that Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation, prohibits, in particular, any discrimination based on sexual orientation provides a general framework only for combating discrimination in the area of employment and occupation where its source is the general principle combating discrimination. In doing so, the Court moved towards an affirmation of the prohibition of discrimination on the grounds of sexual orientation as a general principle of EU law.

However, *Association de médiation sociale (AMS)*¹¹² sheds some doubt on the approach derived from *Mangold* and *Kücükdeveci*. The essential question dealt with by the Court here was whether Article 27 of the Charter, entitled ‘Workers’ right to information and consultation within the undertaking’, providing that workers must, at various levels, be guaranteed information and consultation in cases and under certain conditions as provided for by EU law and national laws and practices¹¹³, can apply directly in the resolution of disputes between private parties.

The conclusion of the Court has been heralded as “*une petite révolution*”¹¹⁴ in that, the Court clarified that at least some fundamental rights granted by the Charter may have horizontal effect in providing that the Charter is a two way street setting down both obligations and duties. In this context, the Court of Justice pointed out that a provision like Article 27 of the Charter shall be distinguished from a provision like Article 21(1) on Non-discrimination highlighting that where

“it is not possible to infer from the wording of Article 27 of the Charter or from the explanatory notes to that article that Article 3(1) of Directive 2002/14, as a directly applicable rule of law, lays down and addresses to the Member States a prohibition on excluding from the calculation of the staff numbers in an undertaking a specific category of employees initially included in the group of persons to be taken into account in that calculation.

¹⁰⁸ This is understandable given that Article 51(1) of the Charter states that ‘The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers’. For commentary, see Schiek, Dagmar: Constitutional Principles and Horizontal Effect: *Kücükdeveci* Revisited, *European Labour Law Journal* 2010 Vol.1 No.3 p.368-379.

¹⁰⁹ See case 152/84 *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] ECR 723, para. 48; Case C-91/92 *Paola Faccini Dori v Recreb Srl*. [1994] ECR I-3325, para. 20; and Joined Cases *Bernhard Pfeiffer (C-397/01)*, *Wilhelm Roith (C-398/01)*, *Albert Süß (C-399/01)*, *Michael Winter (C-400/01)*, *Klaus Nestvogel (C-401/01)*, *Roswitha Zeller (C-402/01)* and *Matthias Döbele (C-403/01) v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* [2004] ECR I-8835, para. 108.

¹¹⁰ Judgment of 22 November 2005, C-144/04, *Werner Mangold v Rüdiger Helm* [2005] ECR p. I-998.

¹¹¹ Judgment of 10 May 2011, C-147/08, *Jürgen Römer v Freie und Hansestadt Hamburg*, in *European Court Reports*, p. I-0000, 2011, para. 59.

¹¹² Judgment of 15 January 2014, C-176/10, *Association de médiation sociale v Union locale des syndicats CGT and Others* [2014] ECR I-0000.

¹¹³ See *AMS*, paras 44, 45.

¹¹⁴ Carpano, Éric: La représentation des travailleurs à l'épreuve de l'article 27 de la Charte des droits fondamentaux de l'Union : précisions sur l'invocabilité horizontale du droit de l'Union, *Revue de droit du travail* 2014 p.312-320: «[...] [L]’arrêt [*Association de médiation sociale*] pourrait comporter une petite révolution en matière de protection des droits fondamentaux en consacrant implicitement, sous certaines conditions, l’effet direct horizontal de la Charte.»

In this connection, the facts of the case may be distinguished from those which gave rise to *Küçükdeveci* in so far as the principle of non-discrimination on grounds of age at issue in that case, laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals an individual right which they may invoke as such.”¹¹⁵

Thus it would seem that where a particular provision of the Charter is ‘sufficient in itself’ then it is directly effective in disputes between private parties. The result then in global terms is that the Charter and the secondary law on equal treatment have the potential, in certain cases, to infiltrate private law relationships.

I am an EU citizen supplier

At this point, we come full circle and return to the case law example used to frame the hypothesis at the beginning of this contribution, i.e. the Supreme Court of Ireland’s request for a preliminary reference in the case of *James Elliott Construction Limited versus Irish Asphalt*.

The respondent, James Elliott Construction Limited, commenced proceedings against Irish Asphalt Limited, concerning the supply of a rock aggregate product, known in Ireland as Clause 804. This is a type of crushed rock aggregate used originally in road building, but also used as high quality infill for building projects. In the case at hand, the material was used for the construction of a Youth Facility in Dublin city. The specifications provided to Elliott Construction provided that the internal floors of the building were to be laid upon 225mm of “well compacted hardcore Clause 804 to DOE [Department of Enterprise] specification”. Irish Asphalt supplied a product designated as Clause 804 hardcore to Elliott Construction between the 2th August 2004 and the 7th December 2004 at a total cost of €25,000 plus VAT.

It was argued that the supply of Clause 804 aggregate to DOE specification essentially meant that the product should comply with the Irish Standard for aggregates, I.S. EN 13242:2002, which implemented European Standard EN 13242:2002.

After completion of the project, cracks began to appear in the floors and walls. The damage was such that the building could not be used. Elliott Construction accepted responsibility and carried out remediation work to the building at a cost of at least €1.55m and sought compensation from Irish Asphalt, contending that the damage was caused by a phenomenon known as ‘pyrite heave’, generated, it was alleged, by the presence of pyrite in the Clause 804 aggregate supplied to Elliott Construction by Irish Asphalt.

It is essential to highlight from the outset that this entire factual scenario is wholly internal to Ireland and no cross border element whatsoever arises. The contract entered into between the defendant and the plaintiff, for the supply by the defendant of rock aggregate product, was concluded in Ireland, between two Irish companies; the building in which the Clause 804 product was used was in Ireland; and the damage was suffered in Ireland. One might then query how exactly this has come before the Court of Justice and what exactly this means in terms of our hypothesis i.e. that by regulating the periphery of contract law the core is necessarily shook. It is argued here that contract law, by way of access to the Court, is riding the wave of the European identity-building project.

It will be very interesting to see how the Court deals with this reference. A few preliminary points can be made here before assessing the potential results of this peripheral regulation on the core.

The origins of the European Standard and the National Standard can be traced to Article 34 TFEU, which provides that quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States. Article 114 TFEU serves as the legal basis for the adoption of Union secondary legislation designed to ensure the establishment and effective functioning of the

¹¹⁵ Paras 46 and 47.

internal market, defined as an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. The Union legislature has long recognised that differences in technical regulations among Member States, and the refusal to recognise each other's technical standards, are liable to represent barriers to the free movement of goods. In order to eliminate such barriers, the Union legislature sought to harmonise basic minimum standards, so that products put on the market in one Member State may circulate freely and be sold throughout the territory of Member States.

Initially, the legislature sought to achieve harmonisation by adopting legislation that contained detailed European technical standards in a range of different fields that replaced existing national ones. However, this approach proved too burdensome and by resolution dated 7 May 1985, the Council established guidelines for a new approach to technical harmonisation and standards¹¹⁶. As Advocate General Trstenjak explained in the *Latchways* case¹¹⁷:

The new approach to the harmonisation of technical rules aimed, on the one hand, to lay down uniform technical rules and standards for products by way of full harmonisation in order to ensure the free movement of goods in relation to those products. On the other hand, the aim was to avoid the need for harmonization measures to be constantly adapted in the light of technical progress and to avoid obstacles to the placing on the market of innovative technical solutions¹¹⁸

Furthermore, as the Advocate General proceeded to explain, in order to reconcile these two main aims, the harmonisation of technical rules is based on a number of fundamental principles: essential requirements to be fulfilled by products; instruction of private standards organisations to draw up technical specifications; publication of the said technical specifications; manufacturers' voluntary application of and compliance with harmonised standards which are not mandatory; and a rebuttable presumption that products complying with the harmonised standards fulfil the essential requirements.

However, in the case that the bold arguments of Irish Asphalt are accepted, more specifically that the Unilever¹¹⁹ and CIA¹²⁰ decisions are accepted as providing a legal basis for the interpretation of the Technical Standards Directive in disputes between private parties, a great shift will result at the national level. To be more precise, it is a well-accepted principle, that liability in contract for a defective product may arise independent of fault. It is accordingly no defence in contract to show that a product was manufactured with care and indeed in accordance with existing best practice if the product subsequently proves defective and dangerous. It was also always possible to demonstrate in a product liability claim or a claim for negligent manufacture, that even if samples taken on supply passed scrutiny the product actually delivered was defective. Now however, if Irish Asphalt is correct, the effect of the adoption of a standard is that if a product is produced in accordance with the standard then it is presumed fit for purpose, and indeed that presumption could only be rebutted with difficulty, if at all, by proof by tests at the time of manufacture and supply that the product did not in fact meet

¹¹⁶ The private standards organisations which may be instructed to draw up technical specifications are the CEN, the European Committee for Electrotechnical Standardisation ("CENELEC") and the European Telecommunications Standards Institute ("ETSI").⁹

¹¹⁷ Case C-185/08 -*Latchways and Eurosafe Solutions*.

¹¹⁸ Para. 57.

¹¹⁹ Case C-443/98 *Unilever Italia SpA v. Central Food SpA*. This dispute was an entirely private law and contractual matter rather than one of enforcement of a national regulation. The Court however pointed out that even though a directive cannot impose obligations on an individual and cannot therefore be relied on as such against an individual, that principle cannot apply in cases where a Member State does not comply with an article of the directive. Therefore, in this case, there was a plain breach of the provisions of the Directive.

¹²⁰ Case C-194/94 *CIA Security International v. Signalson SA & Securitel SPRL*. This case concerned enforcement of a national standard adopted in breach of the explicit requirements of the Technical Standards Directive (Article 4.2 of the Directive). More specifically, the requirements referred to publication and notification of standards.

the standard. All claims, whether contractual, tortious or statutory would be reduced to the question whether the product complied with the standard, as assessed by the tests approved, and at the time of supply.

What does this mean? To put it simply, by regulating the periphery i.e. technical standards, the core can not only be shook, but in fact it can be fundamentally altered. Of course, this depends on whether the Court accepts that it is competent to rule on this particular issue.

Conclusions

The genealogical approach taken here has assisted us to uncover distinct historical ideas and theoretical underpinnings that have influenced the development of the founding principles of contract law and their interpretation before the courts. The langue of the first globalization, Classical Legal Thought, meant that contract law was venerated as the legal space in which to maximise space for the will of the parties. Contract law was universal and essentially characterised by a profound preference for individualism and a *laissez faire* ideology. Contract law was constructed on the basis of the will of the parties with facilitative rules being provided by the system leading to formal equality for the parties on the basis of procedural fairness. It eventually marched towards accommodating capitalism and the rise in global trade assisted by its grounding principle of fulfilling will and aiding an individualist, liberal approach to the market.

The Social represents the shift from economic development as the overall goal to the idea of interdependence; from the individualism that characterized Classical Legal Thought to an increased demand for group rights and collective concerns; from formal equality to social justice. We noted the shift from contract as the web and woof of life in terms of regulation to more social aspirations that emanated from the construction of societal spaces and the interaction between the state, the economy and the private sphere considering the new approach to collective concerns, values, interests and purposes. In fact, the socialization of contract law during this second globalization had unprecedented effects: consider the development of the master/servant relationship into one of employment law. In other words, a ‘law *versus* politics’ approach was assumed with an increase use of law to meet social ends. During this period, private law in general, and contract law in particular, was overlain with an increased awareness of social obligations and the idea of social protection.

During the third globalization, we note a further change in the legal grammar in an attempt to integrate ‘*politics through law*’ via rights discourse, the emergence of identity rights and the use of law to meet a variety of ends including distributive and social functions. In more concrete terms, the development of the a body of equal treatment law according to the European legal order has given rise to solutions considered more satisfactory as opposed to the purely private or the purely social solutions that were adopted during the earlier globalizations.

This focus on equal treatment at the EU level not only provided the first stepping stone for access to the EU legal order for citizens of the Union but it paved the way for the carving of the European identity-building via the Court we have noted here. In its early days, the goal of the equal pay provisions contained in the primary law was to reintroduce women into the market place prompted by the preoccupations of the French that their already established equal pay laws would place them at a competitive disadvantage. It developed at warp-speed however and today, we note the extensive character of anti-discrimination law at the European level and its expansive reach in many directions. Through primary law and the gradual adoption of secondary legislation in the field, the Court was provided with space and much leeway in terms of developing what was already considered a worthy field of law¹²¹ and broadening the access path¹²² in terms of issues that could be referred via the

¹²¹ This points to issues of legitimacy of which we cannot deal with here. Suffice to say that via equality aspirations, based on the economic constitution, the court was in some way legitimized in its march towards, what would eventually

preliminary reference procedure.¹²³ The Court was given the leeway to define its mandate, establish a “new legal order” and develop a constitutional doctrine¹²⁴ - a clear shift from the original economic based equal pay and non-discrimination based on nationality provisions. In fact, we have outlined a shift from the classical conception of the EEC in establishing an internal market focused on engaging workers so as to facilitate the market, to a more socially based EU (albeit still economically motivated in striving to achieve the “most efficient market economy”) engaging different actors in exchange for protection¹²⁵, to a recodification of this ‘European social’ in the direction of individual rights with a stronger focus on fundamental rights and interdependency. It is precisely here where we can pinpoint how the European legal order goes beyond the neo-formalist language in terms of European identity building.

This is illustrated here via the interaction of equal treatment, fundamental rights and EU citizenship. This melting pot of rights is allowing nationals of the Member States to identify with the Union. And the Court is playing an essential role in engineering social and societal issues that national courts, the European Commission and the Parliament are failing to manage. This is clear from the case law identified above on the Unfair Contract Terms Directive.

In going beyond neo-formalism, the essential ingredients, equal treatment, fundamental rights and EU citizenship, provide a space where rights can be claimed and developed in a self-standing nature towards the creation of a European society and identity building project. This can be connected back to the broad impetus of this research based on the fact that the nation state is undergoing a transformation.¹²⁶ The evolving nature of the European transnational legal order in providing a forum within which both citizens and private actors can avail of increased opportunities to participate in the changing economic and political environment is significant.

(Contd.)

become a general principle of equality. On legitimacy, see Bartl M., *Legitimacy and European private law*, PhD Thesis, defended at the European University Institute, Florence, 2012; Scharpf, Fritz W., *Legitimate Diversity: The New Challenge of European Integration*, in Börzel, Tanja, A./Cichowski, Rachel A. (eds.): *The State of the European Union*, Vol. 6, Oxford, 2003, 79-104; Scharpf, Fritz W., *Legitimacy in the Multilevel European Polity*, in: *European Political Science Review* 1/2, 2009, 173-204; Scharpf, Fritz W., *The Asymmetry of European Integration, or why the EU cannot be a social market economy*, in *Socio-Economic Review* (2010) 8/2, 211-250.

¹²² G Tridimas & T Tridimas, “National Courts and the European Court of Justice: A Public Choice analysis of the Preliminary reference Procedure”, *International Review of Law and Economics*, 24, (2004) 125-145; Bobek M., “Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice through the Eyes of National Courts” in Maurice Adams, Johan Meeusen, Gert Straetmans and Henri de Waele (eds), *Judging Europe’s Judges: The Legitimacy of the Case Law of the European Court of Justice Examined* (Oxford, Hart, 2013).

¹²³ In fact, according to the Court itself “...is essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all States of the Community” (Case C-166/73 *Rheinmuhlen*).

¹²⁴ Tridimas, “Knocking on Heaven’s Door: Fragmentation, Efficiency and Defiance in the Preliminary reference Procedure”, *Common Market Law Review*, 40: 9.50, 2003; G Tridimas & T Tridimas, “National Courts and the European Court of Justice: A Public Choice analysis of the Preliminary reference Procedure”, *International Review of Law and Economics*, 24, (2004) 125-145.

¹²⁵ Take, for instance, consumer participation in the market in exchange for consumer protection.

¹²⁶ We can think here about the effects of globalization on the nation state, the effects of international agreements and the establishment of international institutions, such as the World Trade Organization, but more specifically for our purposes we focus attention on the influence of the European legal order on the individual nation states as constitutive members. See Slaughter, A.M., “Global Government Networks, Global Information Agencies, and Disaggregated Democracy”, *Harvard Law School, Public Law Working Paper No. 18.*; Slaughter, A.M., *A New World Order* (Princeton University Press, 2009); Fischer-Lescano A., & Teubner G., “Regime-Collision: The Vain Search for Legal Unity in the Fragmentation of Global Law”, *25 Mich. J. Int’l L.* 999 (2004); Sassen S., *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press, 2006).



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