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Schools of Thought in European Private Law

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I. Introduction

The expression 'European private law' is relatively new and has various meanings according to the scholarship that has appeared in recent decades. The expression concerns the contributions of scholars from different legal and cultural backgrounds. The concept cannot be analysed according to the paradigms to which legal scholars used to be accustomed, because EU private law is not domestic law or supranational law; rather, it is both together and something more.[1] In the words of one author: 'When we speak of European private law we use a highly evocative term, because it refers to Europe that is a myth, a geographical expression, an economic and social idea, and finally a political expression.'[2]

Currently, the European private law field of study – that is, studies in EU private law traditionally supporting and consolidating the integration of the internal market – is in difficulties.[3] The EU seems to have lost law as a vector of dynamism and cohesion. This should result in the worrying question for scholars today about the future of private law in Europe. More generally, the process of European integration has undoubtedly encountered many other difficulties. What is striking about recent events (specifically Brexit and the rise of nationalism), however, is a general distrust in the positive force of law as a vehicle of integration.[4]

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[1] We think, for example, of the Directive on the manufacturer's liability for damage caused by product defects to users and consumers (85/374 EEC): it was issued by the Community bodies, implemented within the framework of the state regulations of the member countries of the Union, has given rise to a series of case law applications, introduced new terms, codified a principle – objective responsibility of the manufacturer – and led to the approximation of the provisions that in the individual orders already regulated the matter. The case is commented on by G Alpa, 'Il diritto privato europeo' [2019] *Federalismi* 1, 3.

[2] Alpa (ibid).

[3] J Habermas, *The Crisis of the European Union. A Response* (Cambridge, Polity, 2012).

[4] L Azoulai, '"Integration through Law" and Us' (2016) 14 *ICON* 449.

The legal form is no longer seen as the means to achieve a new spirit of pacification, cooperation and solidarity in Europe. EU private law is perceived as the vehicle of economic forces and government apparatuses at the origin of processes of restructuring national societies and their remaining welfare states. At this juncture, two authors have urged reconsideration of the EU's legal and political construction.[5] We note that the challenge is twofold: it is both substantive and methodological. The former concerns the scope of EU private law and its meaning; the latter concerns how to approach it. Although these issues are closely related, this chapter focuses on the latter.

In light of the foregoing discussion, we believe that legal scholarship should drive the future of private law in Europe.[6] Consequently, in what follows, we attempt to take stock of and analyse the current confusion, an exercise we deem necessary in these troubled times.[7] This will not be enough to resolve the issue, which is far too complicated, but we hope to furnish some preliminary insights into the approaches that have emerged in EU private law scholarship. First, we describe the main schools of thought, or intellectual traditions, in European private law, ie groups of scholars who share an opinion or a similar outlook on European private law. Secondly, we argue that such schools may be classified into classical and modern because of a shift of paradigm in understanding the relationship between private law and EU integration. The classical schools expressly admitted the subordination of private law to the construction of EU integration, while the modern schools have not followed the same path while searching for the foundations of private law in Europe.

For the purposes of this chapter, a school of thought is 'a community of expertise which considers itself a comparatively self-contained, teachable and knowable domain', while the act of 'disciplining' is the enforcement of circumscribed, usually conservative, views of such discipline.[8]

On this basis, we deal with the merits of a polyphonic engagement between the main theories that have been propounded to address the present challenges. We argue that if EU private law scholarship is to become a more productive and inclusive academic field, it should open itself up to critical self-reflection, which – surprisingly – is almost non-existent in the field,[9] and overcome the

[5] C Joerges and C Kreuder-Sonnen, 'European Studies and the European Crisis: Legal and Political Science between Critique and Complacency' (2017) 23 *European Law Journal* 118.

[6] R van Caenegem, *Judges, Legislators & Professors: Chapters in European Legal History* (Cambridge, Cambridge University Press, 1987).

[7] R van Gestel, HW Micklitz and EL Rubin (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge, Cambridge University Press, 2017). H Schepel, 'Law, Lawyers and Legal Integration' (2004) 4(17) *EUSA Review* 1.

[8] I Manners, 'Normative Power Europe: A Transdisciplinary Approach to European Studies' in C Rumford (ed), *Handbook of European Studies* (New York, Sage, 2009).

[9] A notable exception is C Jorges and C Kreuder-Sonnen, 'Europe and European Studies in Crisis, Inter-disciplinary and Intra-disciplinary Schisms in Legal and Political Science' (2016) Berlin Social Science Centre Discussion Paper No 109. The authors conclude their contribution by saying: 'We are confident that contestation and critique will generate new ideas and perspectives for a European future beyond the present emergency politics.'

confusion of the present. Accordingly, the chapter benefits from a dialogue conducted between a researcher studying law and economics and its current developments and a researcher in comparative private law, in order to identify the main schools of thought from classical to modern and their role in the future evolutionary path of European private law.[10]

II. Classical Schools of Thought

A. Integration through Private Law Scholarship

The 'Integration through Law' school has been one of the most influential narratives of European integration.[11] In *Integration Through Law: Europe and the American Federal Experience*, the authors stressed that 'integration is fundamentally a political process' and law is 'but one of the many instruments' harnessed to achieve the objectives of integration, while 'law has a vital role to play in the process'.[12] Accordingly, the European Community has often been presented as

> a juristic idea; the written constitution as a sacred text; the professional commentary as a legal truth; the case law as the inevitable working out of the correct implications of the constitutional text; and the constitutional court as the disembodied voice of right reason and constitutional theology.[13]

The traditional role of a court of law is to interpret law already in effect, but the European Court of Justice (now the CJEU) has declared itself to be a 'new legal order of international law'.[14] In this respect, we underline that legal scholars have always been fascinated by the role played by the CJEU in dealing with national legal traditions (and specifically private law issues) in a more express or implicit way.[15] It has been stressed that the above-mentioned project viewed law as both an object and an agent of integration: while law is a product of the polity, the polity is

[10] R Zimmermann, 'Civil Code and Civil Law: The "Europeanization" of Private Law within the European Community and the Re-emergence of a European Legal Science' (1994–1995) 1 *Columbia Journal of European Law* 63.

[11] M Cappelletti, M Seccombe and J Weiler, 'A General Introduction' in M Cappelletti, M Seccombe, J Weiler (eds), *Integration through Law: Europe and the American Federal Experience* (Brussels, De Gruyter, 1985) 3–15 (describing the project as aimed at examining 'how law can be used to promote … economic integration').

[12] Cappelletti et al, *Integration through Law* (ibid).

[13] M Shapiro, 'Comparative Law and Comparative Politics' (1980) 53 *Southern California Law Review* 537.

[14] A Stone Sweet, *The Judicial Construction of Europe* (Oxford, Oxford University Press, 2014). See also JH Weiler, 'Community, Member States and European Integration: Is the Law Relevant?' (1982) 21 *Journal of Common Market Studies* 56.

[15] F Nicola, 'National Legal Traditions at Work in the Jurisprudence of the Court of Justice of the European Union' (2016) 64 *American Journal of Comparative Law* 865.

also to some extent a creature of the law.[16] This mutual conditioning of legal structure and political process explains the project for integration of and through law in the European Union. On the one hand, this school of thought has capitalised on the instrumental role of (statutory) law in integrating modern societies characterised by a complex differentiation of functional spheres of social reproduction (politics, economics, culture, etc). On the other hand, it has imbued European legal integration with a broader normative vision of 'convergence' that should lead to the emergence of a common European identity.

Unfortunately, the instrumental role of statutory law has been perceived as an appendage to EU economic forces and governmental mechanisms that undermine the social structures of the Member States, producing social commodification and cultural standardisation. The question of integration has now to be defined as a process that is legally structured not only by alleged homogeneity, equality and inclusion, but also by increased forms of heterogeneity, inequality and exclusion.[17]

Private law has indubitably played a significant role on the political agenda of this school and, particularly, in establishing and removing the barriers to the internal market of the EU.

In other words, the rationality of EU private law, focused as it is on the integration of the internal market, can be regarded as primarily instrumentalist. Consequently, private law was initially conceived as an instrument with which to achieve the policy objectives of the EU. These objectives were primarily related to the integration of the internal market, and the framework within which the discipline was perceived was, therefore, one of pragmatic and purposive rulemaking based on statutory law (ie regulations, directives). In particular, one author has demonstrated that private, as opposed to public, law played a central part in European integration.[18]

While the idea remains valid, the context has dramatically changed in Europe. The dichotomy between EU and domestic legal cultures in private law created by the market-driven EU private law has significantly contributed to the failures now apparent. An example is the key role assigned to the discipline of consumer contract law that, evidently, is important for the establishment and functioning of the internal market in the EU.[19] After the adoption of various consumer law measures, the EU decided to conduct a profound review of the consumer *acquis*, and proposed major reforms. Initially, the EU's activities were based on a minimum harmonisation approach which allowed Member States to adopt more protective rules. In the past decade, activities have revealed the change in the EU's

[16] D Augenstein, *"Integration through Law" Revisited. The Making of the European Polity* (Farnham, Ashgate, 2012).

[17] Jorges and Kreuder-Sonnen (n 9).

[18] D Caruso, 'The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration' (1997) 3 *European Law Journal* 3.

[19] S Weatherill, *EU Consumer Law and Policy* (Cheltenham, Edward Elgar Publishing, 2005).

approaches, since measures have been based on a full harmonisation approach, removing Member States' freedom to rule by favouring more protection rules in the areas covered by those measures.[20]

Indeed, the notion of 'integration through law' has proved to be an extremely powerful concept providing a group of scholars, civil servants from the Community institutions and CJEU judges with 'a flattering self-image and a *raison d'ĕtre* expressed in three little words'.[21]

B. Market-Driven Private Law Scholarship

Private law has indubitably had a significant role on the political agenda of the school of thought of Cappelletti and others and, particularly, in establishing and removing the barriers to the internal market of the EU.[22]

For example, legal scholars have noted that France reacted fiercely to the Product Liability Directive[23] with what can be called national resistance. The transformation of this directive into a full harmonisation measure occurred through the CJEU's interpretation in a number of infringement proceedings. In France, in particular, resistance was raised by two actors on the legal scene: the legislator and legal scholars.[24] The example shows that EU private law has been 'applied' as an instrument with which to achieve the policy objectives of the EU. These objectives primarily concern integration of the internal market, and the framework within which the discipline has been perceived is therefore one of pragmatic and purposive rulemaking. This approach implies that EU private law has had a limited doctrinal autonomy and is focused on specific sectors of the market according to EU policy goals.

C. The Enchantment with Full Harmonisation and Codification

Our contention here is that EU private law scholarship has focused on the goal of European integration and, for this reason, has supported EU institutions in a process of 'Europeanisation by imposition' grounded on harmonised rules

[20] M Loos, 'Full Harmonisation as a Regulatory Concept and its Consequences for the National Legal Orders: The Example of the Consumer Rights Directive' (2010) Centre for the Study of European Contract Law Working Paper Series No 3.

[21] R Byberg, 'The History of the Integration through Law Project: Creating the Academic Expression of a Constitutional Legal Vision for Europe' (2017) 18 *German Law Journal* 1531.

[22] Caruso (n 18).

[23] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L210/29.

[24] Caruso (n 18).

(ie regulations, directives) and/or a codified EU private law. One author has argued that, on the contrary, there was a tension between the objectives of the original integration through law-project and its reliance on a positivist conception of law.[25]

Nevertheless, the turn to positivism occurred, and it took place either in piecemeal fashion, by way of harmonising directives, or in the comprehensive style of a supranational civil code.

On the one hand, it is well known that the harmonisation of private law had the objective of establishing an equivalent or even uniform set of rules in private law, with the effect of 'approximating', ie bringing closer together, the heterogeneous legal systems in the EU. One way to approximate national laws is to set minimum standards (minimum harmonisation), thus enabling Member States to maintain or introduce more stringent measures of protection above the limit. Another approach is that of maximum harmonisation, which gives no room for manoeuvre to Member States, since the measure fixes an upper limit.[26] The terminology is confused, since terms such as 'complete, total or full harmonisation' are also used. For example, legal scholars usually indicate the Unfair Commercial Practices Directive as an example of full harmonisation containing more hardcore measures of maximum harmonisation providing expressly for uniform rules.[27]

On the other hand, legal scholars then focused on the codification of EU private law to absolve a prominent 'state-making function' for the EU. This view was grounded on the role that codification played in eighteenth- and nineteenth-century continental Europe. Napoleon's imperial vision relied on both military victories and the success of his codification.[28] Like France, many other European nations linked the definition of a coherent body of private law to state unity, constitutional breakthroughs and national identity.[29] In contrast, we agree with the scholarship noting that

> private law codification is not as indispensable to continental legal culture as standard legal histories would have us believe. Law was modernizing roughly at the same time, and in the same way, in Western countries that did not codify private law, including the common law world and Scandinavia.[30]

Unfortunately, mainstream legal scholarship has mainly relied on the imposition of positive law and full harmonisation of domestic private law. Moreover, it

[25] C MacAmhlaigh, 'Concepts of Law in Integration through Law' in Augenstein (n 16) 69.

[26] G Howell, 'European Consumer Law – The Minimal and Maximal Harmonization Debate and Pro Independent Consumer Law Competence' in S Grundmann and J Stuyck (eds), *An Academic Green Paper on EU Contract Law* (The Hague, Kluwer Law International 2002) 73–80.

[27] H Collins, 'Harmonization by Example: European Laws against Unfair Commercial Practices' (2010) 73 *MLR* 89. The authors claimed (118) that this directive represented a 'much more aggressive approach to harmonization'.

[28] J Gordley, 'Myths of the French Civil Code' (1994) 42 *American Journal of Comparative Law* 459.

[29] Caruso (n 18).

[30] H Pihlajamäki, 'Private Law Codification, Modernization and Nationalism: A View from Critical Legal History' (2015) 2 *Critical Analysis of Law* 135.

has embraced the myth of developing a civil code to support the making of the EU. Indeed, such a descriptive and normative approach was very successful for decades, with few exceptions (see sub-section IIID), until its recent failure.[31] There is no need to stress that Legrand was among the first leading academics in the field to maintain that merely drafting uniform rules does not result in uniform law.[32] Law is, after all, much more than just formally uniformed rules: the meaning of a particular rule in a particular cultural and national context can only be established after studying that context. This context differs among the various cultures. According to Legrand, the contexts were also irreconcilable in the case of civil law and English law.[33] He put forward other arguments as well: the whole idea of a European codification is arrogant in his view, because it imposes on common lawyers the supposedly superior worldview of continental lawyers. They each offer different accounts of reality and those preaching codification of private law consider the Anglo-American reality as being without merit.

Legrand noted that the project of a European Civil Code was primarily in the interests of the development of the internal market. Furthermore, he also stressed that the suggestion that Europe would return to the golden age of the *Ius Commune* was misleading, because English law was never part of it.

Notwithstanding the above, the enchantment of certain legal scholars with full harmonisation and then the codification of private law has flourished until recently.[34] Specialised academic journals have been launched and many tomes on 'European' tort and contract law have appeared; courses and modules are offered throughout the continent and the UK; chairs and graduate schools are dedicated to the subject; and a variety of lavishly funded transnational research projects have produced libraries full of works: the *Ius Commune* school has identified common principles through a series of casebooks and the 'Trento' Group has gradually distinguished the common core of European private law.[35] In addition, it is well known in academia that the 'Lando Commission' has produced its 'Principles of European Contract Law' and the Study Group on a European Civil Code has worked away on its draft articles and comparative studies.[36]

[31] C Von Bar, 'From Principles to Codification: Prospects for European Private Law' (2002) 8 *Columbia Journal of European Law* 379, 385.

[32] P Legrand, 'European Legal Systems Are Not Converging' (1996) 45 *International and Comparative Law Quarterly* 52; P Legrand, 'Against a European Civil Code' (1997) 60 *MLR* 45. See also BS Markesinis (ed), *Gradual Convergence: Foreign Ideas, Foreign Influence and English Law on the Eve of the 21st Century* (Oxford, Oxford University Press, 1994).

[33] Legrand, 'Against a European Civil Code' (ibid). It is very interesting to read Legrand now.

[34] R Brownsword, HW Micklitz, S Weatherill and L Niglia (eds), *The Foundations of European Private Law* (Oxford, Hart Publishing, 2011).

[35] H Beale, B Fauvarque-Cosson, J Rutgers and S Vogenauer, *Cases, Materials and Text on Contract Law* (Oxford, Hart Publishing, 2019); DJ Gerber, 'The Common Core of European Private Law: The Project and Its Books' (2004) 52 *American Journal of Comparative Law* 995.

[36] For an overview, see P Sirena and Y Adar, 'Principles vs Rules in European Contract Law: From the PECL to the CESL, and Beyond' (2013) 9 *European Review of Contract Law* 1; O Lando, H Beale, A Prüm, E Clive and R Zimmermann, *The Principles of European Contract Law* (Alphen aan den Rijn, Kluwer 2019). For critical observations, see MW Hesselink, 'The Politics of a European Civil Code' (2004) 10 *European Law Journal* 675.

On this basis, the project of establishing European private law has also re-energised comparative law as an academic discipline and has given research funding, international recognition and renewed prestige to an elite of European scholars. Some of this work has certainly been driven by intellectual curiosity and a thirst for knowledge. Nevertheless, a large part of the success of this scholarship has been undeniably rooted in the political and financial support for the endeavour of European institutions to harmonise national private laws.[37] On the contrary, comparative law should have prevented the underestimation of cultural differences and dealt with the complexity of a private law having supranational and national sources.[38]

Accordingly, the chapter argues that current criticism may offer an opportunity to debunk the narratives of EU integration with a view to overcoming the monophony of the functionalist doctrine in our discipline.[39] First, we claim that EU private law scholarship has tended to passively accept the conceptual subordination of research and studies in the field to the process of integration and specifically market integration.[40] Secondly, we note that many scholars have induced the study of private law to focus on institutions, policy-making processes and the EU's normative agenda. Finally, this scholarship has also endorsed the idea of codifying EU private law as the result of a turn to legal positivism that is subject to criticism.

The results are there for all to see. In fact, it is the disintegration, not the integration, of law which seems to be the dominant motive behind contemporary politics in Europe.[41] We refer, in particular, to the fact that the European Commission's proposals were made in a political climate of rising nationalism.[42]

This is, for example, the case of the Proposal for a Regulation on a Common European Sales Law (CESL), which contained rules applicable to cross-border transactions for the sale of goods, for the supply of digital contents and for related services. Clearly, it would have introduced into each Member State an optional common European law governing cross-border contracts for the sale of goods and digital content.[43] We agree with Cygan, who noted that 'the CESL provides a solution to a problem that does not really exist' and proposes that the Commission

[37] MW Hesselink, *The New European Private Law* (Alphen aan den Rijn, Kluwer 2002). See also M Van Hoecke and F Ost (eds), *The Harmonisation of European Private Law* (Oxford, Hart Publishing, 2000).

[38] Cappelletti et al, *Integration through Law* (n 11). The authors focused their work on a comparison with the US federal system of law.

[39] In music, monophony is the simplest of musical textures, consisting of a melody (or 'tune'), typically sung by a single singer or played by a single instrument player (eg a flute player) without accompanying harmony or chords.

[40] J Weiler, 'Epilogue' in Augenstein (n 16) 178.

[41] D Kennedy, 'Thoughts on Coherence, Social Values, and National Tradition in Private Law' in MW Hesselink (ed), *The Politics of a European Civil Code* (Alphen aan den Rijn, Kluwer 2006) 9.

[42] G Comparato, *Nationalism and Private Law in Europe* (Oxford, Hart Publishing, 2014).

[43] Commission, 'Proposal for a Regulation on a Common European Sales Law' COM (2011) 635 final.

prioritise the modernisation of the legislation on enforcement, which was considered part of the review of Regulation No 2006/2004 on consumer protection cooperation.[44] The withdrawal of the CESL in 2014 marked the end of the heyday of the endeavour to harmonise European private law after decades of enthusiasm, which included other Commission-backed proposals such as the Principles of European Contract Law (PECL) and the Draft Common Frame of Reference (DCFR). Although the withdrawal of the CESL in December 2014 suggested that there would be a period of inaction in the field of EU consumer and contract law, there were indications that there would be a new initiative in the context of one of the EU Commission's priority areas: the Digital Single Market.[45]

In early May 2015, the EU Commission published its Digital Single Market Strategy, which contained a set of proposed actions. Surprisingly, in the proposals of December 2015, the EU Commission followed the approach that had failed with the CESL and the Consumer Rights Directive.[46] Then, after several years of uncertainty, in 2019 the EU adopted directives on the sale of goods (Directive 2019/771) and distance sale of content and services (Directive 2019/770).[47]

In our view, the Commission's argument is unlikely to convince the opposition because it still focuses exclusively on the internal market. The reason is that it fails to address the main unanswered question about the division of competences between the EU and the Member States in private law matters. To be clear, there are sectors of private law that – probably – do not require full or minimum harmonisation at the European level. Until recently, saying this was tantamount to heresy.

Indeed, for too long a time, any criticism of EU proposals in the field was dismissed as the outcome of a kind of critical legal studies exercise. According to some scholars, criticism was the result of 'an age of rising nationalism' and 'ignorance, myopia or fear of the foreign and the new'.[48] For example, according to a scholar, the process of 'Europeanisation' should 'finally' step away from 'the obfuscatory shadow of the Volksgeist'.[49] In other words, if the French prefer their Civil Code to a European equivalent, they are defending a 'pre-modern artefact', while their reaction to a possible European civil code could be compared to the American reaction to Pearl Harbour in 1940.[50] In particular, some scholars also argued that France's reluctance to adopt a European Civil Code could be seen as

[44] A Cygan, 'Introduction: EU Consumer and Contract Law at a Crossroads?' in C Twigg-Flesner, *Research Handbook on EU Consumer and Contract Law* (Cheltenham, Edward Elgar Publishing, 2016).

[45] Commission, 'A Digital Single Market Strategy for Europe' (Communication) COM (2015) 0192 final. See also Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods [2019] OJ L136/28.

[46] Directive 2011/83/EU of the European Parliament and of the Council on consumer rights [2011] OJ L304/64.

[47] Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L136/1.

[48] Kennedy (n 41).

[49] Comparato (n 42).

[50] Weatherill (n 19) 211, quoting Ralf Micheals.

evidence of a 'crypto nationalistic' discourse, containing hidden Europhobic rhetoric and resting on 'sentimental and irrational argumentation'.[51] Lastly, one author was also right to argue for a 'democratic contract law', insisting that legal experts should not exclusively create rules of contract law, but must participate in an inclusive democratic debate.[52]

One may easily note that very few academics have had the courage to recognise the limitations of the previous analysis by seriously challenging the 'market integration functionalism doctrine'.[53] Our main point here is the following: the logic of private law is not necessarily the logic of market integration, and academic analysis has failed to advance the autonomy and self-standing of our discipline. There are some notable exceptions, however; for example, when two authors note that 'Europe is in troubled waters. What does the unfortunate state of the European Union (EU) reveal about the state of the scholarly study of the integration project?' In this regard, they conclude that 'legal scholarship is in short supply of normatively convincing theoretical paradigms'.[54]

D. Early Critical Thinkers

In such a context, early critical voices that attempted to theorise EU private law differently (ie a private law with a certain distance from the EU's political agenda, not necessarily subordinated to the needs of the internal market and formally imposed from above) and advocated another European trajectory have gone unheard in discussions over the past decades of scholarship and analysis.

In the words of one author:

> Cinderellas have always tended to flock to court balls, whether or not pleased with the prince's looks or intentions. Private law departments throughout the Union are the home of Cinderellas of an intellectual type, whose esoteric expertise in either legal history or comparative law is rather tangential to mainstream legal education. Having long been accorded only marginal positions in the conventional hierarchy of law schools, they now welcome opportunities for change.[55]

Indeed, mainstream scholarship has broadly, though often implicitly, accepted the premise that Europeanisation is a one-way process for national private laws. While scholars have considered themselves to be 'pluralists', this self-reading only makes sense within a narrow conception of the scope (ie the subordination to a political agenda) and the methodologies (ie full harmonisation by imposition)

[51] Weatherill (n 19) 211 ff, quoting Ruth Sefton-Green.

[52] MW Hesselink, 'Democratic Contract Law' (2014) 11 *European Review of Contract Law* 81. See also JM Smits, 'Democracy and (European) Private Law: A Functional Approach' (2010) 2 *European Journal of Legal Studies* 26.

[53] Jorges and Kreuder-Sonnen (n 9).

[54] ibid.

[55] Caruso (n 18) 23.

for sectors of domestic private laws. By contrast, scholars working from a critical perspective adopt a variety of standpoints, such as arguments grounded on very different opinions concerning pluralism (Rasmussen),[56] national cultural defence (Legrand) and criticism against the market-driven nature of EU private law and the consequent lack of any social dimension (Joerges and others).

This criticism focuses on the sovereignty of national law, its 'integrity' and 'coherence'; and it considers that the changes brought about by European law jeopardise 'essential' elements of national identity and social justice. The criticism of which we speak raises a question of another kind: how can we prevent a normative strategy designed to promote cohesion and emancipation on a continental level from eventually producing division and alienation?

The birth of this current of thought came late in the history of integration, and Hjalte Rasmussen was undoubtedly its precursor. The book entitled *Law and Policy in the European Court of Justice*, published in 1986, was the first to clearly describe the signs of activism by the European Court of Justice (now the CJEU), a factor in delegitimisation of the European project.[57] This earned Rasmussen the recognition of his peers, but also a form of banishment. The scope of this criticism, however, remained limited since it was content to focus on interpretation of the law by the court. Nevertheless, at the time it was formulated, this criticism went against the grain. Indeed, the dynamic interpretation of the law by the CJEU at that time reflected a commitment on behalf of European governments to integration. Since they could expect long-term benefits for their economies and nationals from the creation of the European Single Market, they gracefully accepted that court interpretations might conflict, in some cases, with their interests. This dialectic has now ceased to flourish. In the context of a broader integration into non-market domains (European citizenship is the best example), the teleology of integration no longer enjoys a consensus. This explains why Rasmussen's criticism moved on from the university to resurface in political speeches.

Criticism developed by authors such as Joerges and Everson, to name but two, is not restricted to an attack against the interpretations of the CJEU. Their critiques have an otherwise profound meaning.[58] Such criticism concerns the consequences of the law on integration for the cohesion of national societies and the structuring of populations in the EU. According to Joerges and Everson, EU law, rather than fully fledged EU citizens, produces 'de-socialized market citizens'.[59]

[56] L Azoulai, 'Solitude, désœuvrement et conscience critique. Les ressorts d'une recomposition des études juridiques européennes' (2015) 4(50) *Politique européenne* 82.

[57] H Rasmussen, *Law and Policy in the European Court of Justice* (Leiden, Martinus Nijhoff Publishers, 1986).

[58] M Everson and C Joerges, 'Reconfiguring the Politics–Law Relationship in the Integration Project through Conflicts–Law Constitutionalism; (2012) 18 *European Law Journal* 644.

[59] More recently, the concern for a social justice deficit of the EU appears in F de Witte, 'Transnational Solidarity and the Mediation of Conflicts in Europe' (2012) 18 *European Law Journal* 694; A Sangiovanni, 'Solidarity in the European Union' (2013) 33 *Oxford Journal of Legal Studies* 1. See generally D Kochenov, G de Búrca and A T Williams, *Europe's Justice Deficit?* (Oxford, Hart Publishing, 2015).

While different, all these critical views start by noting that, since its beginnings, the study of EU private law has had a dominant set of discursive, intellectual and academic practices, which they seek to challenge. The message is that the law of the EU is unable to live up to the ideals (prosperity, justice and freedom) that it has set for itself. Early criticism was based on affirmation of the legitimacy of the integration project and its right, and argued that the right of the Union is to serve legitimate interests, building new collective solidarities and desires for individual emancipation. The problem is that EU law had not been properly able to pursue these interests in recent decades.[60] This is true for political and institutional reasons, but also for a deeper-lying one. What is lacking in this construct can be put simply: it is a theory of justice. It is quite clear that European institutions have had the opportunity to develop arguments on the fairness of the objectives of the European Treaties and the consequences of their interpretation. Nevertheless, the criticism made is that these are theoretically incomplete arguments. The CJEU and the Commission and Council need to develop clearer and stronger criteria for justice in order to regulate the interpretation of European private law.[61] Modern schools of thought tend now to stress that the project of 'integration through private law' has not been able to prevent subordination, inequality and alienation becoming an integral part of the process. This situation points to a need for an analytical critique.[62]

III. Modern Schools of Thought

We point out that modern schools of thought are different from classical schools because they are not openly subordinated to the integration narratives.[63] We provide some examples in the following sub-sections by focusing on pluralism theories and economic and justice traditions in private law scholarship.

A. EU Private Law and Constitutional Values

We note that many legal scholars have addressed the task of identifying the role that EU constitutional values play, or should play, in the field of European private law.[64]

[60] Everson and Joerges (n 58).

[61] Kochenov et al (n 59).

[62] Azoulai, '"Integration through Law" and us' (n 4).

[63] Besides the traditional actors, new ones have emerged, such as the European Law Institute (ELI), an independent organisation set up in 2011 that aims to enhance the quality of the European legal integration process.

[64] S Tridimas, *The General Principles of EU Law* (Oxford, Oxford University Press, 2017); MW Hesselink, 'Private Law and the European Constitutionalisation of Values' (2016) Amsterdam Law School Research Paper No 2016-26; S Grundmann (ed), *Private Law and EU Constitutional Values* (The Hague, Kluwer Law International 2008).

The central idea is that the laws of contract, tort or property have to be designed or developed by the CJEU and national judges in a way that aligns all fields of private law with constitutional traditions of the EU and Member States.[65] This approach requires that, although private law does not have to duplicate constitutional rights exactly, it should not contradict or subvert constitutional rights. In practice, the requirement of alignment means that courts should interpret and develop private law rules and doctrines in a way that ensures that their content conforms to, and is consistent with, the rights that are protected as constitutional values.[66] By contrast, some legal scholars are concerned about theory on the constitutionalisation of private law for various reasons: they underline, for example, the risk that the application of fundamental rights to private law may prove extremely disruptive, lead to uncertainty and foster litigation.[67]

B. Pluralism and EU Private Law Scholarship

The idea of pluralism has gained attention also with respect to the development of EU private law.[68] Here, we are referring to Michaels, who has scrutinised the concepts of legal pluralism used by three of its most prominent proponents: Pierre Legrand, Jan Smits and Thomas Wilhelmsson.[69]

Michaels has attempted to offer a fully fledged criticism of their theories (each of which are among the most fascinating and helpful in the European private law debate). His contribution has mainly addressed the use of ideas of legal pluralism by the above-mentioned authors in the academic discussion about pluralism and EU private law.[70]

More recently, Mak has also reconsidered legal pluralist thinking in private law by examining the concept of 'ordered pluralism', recognising that multiple sources of rules may coexist in EU law. Specifically, her article assesses some of the leading theories of legal pluralism in European private law. It analyses how these theories of pluralism may be ordered and applied by considering what space they give to deliberation between lawmakers at different levels of regulation.

[65] H Micklitz (ed), *Constitutionalization of European Private Law* (Oxford, Oxford University Press, 2014).

[66] Charter of the Fundamental Rights of the European Union [2012] OJ C326/391.

[67] The main objections are indicated by H Collins, 'Private Law, Fundamental Rights, and the Rule of Law', (2018) 121 *West Virginia Law Review* 1, 9.

[68] R Michaels, 'Why We Have No Theory of European Private Law Pluralism' in L Niglia (ed), *Pluralism and European Private Law* (Oxford, Hart Publishing, 2013) 139.

[69] Legrand, 'European Legal Systems' (n 32); T Wilhelmsson et al (eds), *Private Law and the Many Cultures of Europe* (The Hague, Wolters Kluwer International, 2007); JM Smits, 'European Private Law and the Comparative Method' in C Twigg-Flessner (ed), *The Cambridge Companion to European Union Private Law* (Cambridge, Cambridge University Press, 2010) 33–43.

[70] Michaels (n 68).

The author argues in favour of developing a 'strong legal pluralist theory for European private law'.[71]

For the purposes of this chapter, we stress that central to the various concepts of legal pluralism is the issue concerning power relations between the Member States and the EU. While legal scholarship appears confused on this point, the basic question of legal pluralism remains unresolved despite constituting the central node of Europeanisation with respect to private law. To be clear, the questions are the extent to which private law should be harmonised on the European level, the extent to which law should remain within the Member States, and how relations between the European and domestic levels should be organised to overcome the shortcomings of current approaches.

In particular, we note that recent political developments have confirmed the degree of resistance of domestic private laws and cultures to Europeanisation and their ability to contain EU rules so that they do not undermine the coherence of domestic private law systems. Indeed, we hope that it is now clear that private law not only regulates markets, but also takes part in the construction of national identities in the Member States. This connection may not be reduced to an exercise of nationalism.[72] Our point is that this is a simplistic reconstruction of the historical development of Member States' private laws and the role that these laws still have in shaping our identities as jurists.

C. The Law and Economics Perspective

From a different perspective, EU private law scholarship also draws on the economic tradition in approaching the matter. Indeed, the application of empirical methods and the conceptual toolbox of economics to the study of law – commonly known as 'law and economics' – has been praised as one of the most successful interplays between applied economics and the legal field.[73] In its very essence, law and economics considers efficiency to be the main standard of evaluation of legal rules. As such, efficiency is regarded as a constituent part of justice, because 'in a world of scarce resources waste should be regarded as immoral'.[74] Even though the precursors of this school of thought were identified in Europe during the early nineteenth century, it is widely acknowledged that contemporary law and economics dates back to the USA in the 1960s and the seminal works of Ronald Coase, Richard Posner and Guido Calabresi.[75]

[71] V Mak, 'Pluralism in European Private Law' (2018) 20 *Cambridge Yearbook of European Legal Studies* 202.

[72] Comparato (n 42).

[73] E Posner, 'Economic Analysis of Contract Law after Three Decades: Success or Failure?' (2003) 112 *Yale Law Journal* 829; F Parisi, 'Positive, Normative and Functional Schools in Law and Economics' (2004) 18 *European Journal of Law and Economics* 259.

[74] R Posner, *Economic Analysis of Law*, 6th edn (Slough, Aspen Law & Business 2003) 27.

[75] R Coase, 'The Problem of Social Cost' (1972) 3 *Journal of Law and Economics* 1; R Posner, 'A Theory of Negligence' (1972) 1 *Journal of Legal Studies* 29; G Calabresi and D Melamed,

As a result of these contributions, the subject of economics was found to be relevant not only to regulation initiatives (such as antitrust, tax and labour), but also to both positive and normative analysis of the entire private law domain.[76] Accordingly, the methodological breakthrough engendered by this early stage of research enabled insightful applications in the fields of contract, tort and property. It is no surprise that, as far as private law is concerned, modern economic analysis of law has gained ground in transatlantic legal scholarship.[77] From a methodological perspective, the influence of economic analysis in the study of law makes it possible to investigate legal systems as working systems rather than as a coherent body shaped on the basis of systematic internal consistency. This development has implied a striking departure from the old-fashioned Langdellian tradition, as well as from the 'mainstream' continental historical school.[78]

Such a change of approach helps to explain the initial reluctance of European scholarship to accept and implement this new view. Within continental civil law countries, legal scholarship was considered a hermeneutic science used to interpret the law according to principles of the system's internal consistency in terms of language and value judgments.[79] Policy arguments remained outside the scope of the legal endeavour.[80] In fact, one of the main (and controversial) theses put forward by Posner was that common law is inherently better suited than civil law to deploying economic logic since judges are driven by an invisible hand nudging them to shape the law according to efficiency.[81] Since the continental European concept of separation of powers implies that a judge may only 'interpret' the law, policy arguments such as those provided by law and economics fell outside the scope of the legal discipline.[82]

The development of law and economics in continental European scholarship started only in the late 1980s with the seminal works of Mattei, Pardolesi, Schäfer and Ott.[83] In contrast to the USA, law and economics scholarship in Europe

'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 *Harvard Law Review* 1089.

[76] GS Becker and RA Posner, 'The Future of Law and Economics' in F Parisi (ed), *The Oxford Handbook of Law and Economics, Volume 1: Methodology and Concepts* (Oxford, Oxfor d University Press, 2017) 5.

[77] E Posner, 'Economic Analysis of Contract Law' (n 73).

[78] According to the Langdellian tradition, legal research should look at the model of science. Accordingly, it hinges on a close analysis of black-letter texts in order to identify high-level principles and then apply argumentation and interpretative tools to criticise judicial decisions. The historical school argued that the task of jurisprudence is to uncover one nation's customary law and investigate through historical methods its social provenance. See JH Merryman and R Pérez-Perdomo, *The Civil Law Tradition* (Stanford, Stanford University Press, 2018); FC Beiser, *The German Historicist Tradition* (Oxford, Oxford University Press, 2011).

[79] M Gelter and K Grechenig, 'History of Law and Economics' (2014) Preprints of the Max Planck Institute for Research on Collective Goods Bonn No 5.

[80] ibid.

[81] R Posner, 'Utilitarianism, Economics, and Legal Theory' (1980) 8 *Journal of Legal Studies* 103.

[82] TJ Miceli, 'Economic Models of Law' in Parisi, *Oxford Handbook* (n 76) 9.

[83] U Mattei and R Pardolesi, 'Law and Economics in Civil Law Countries: A Comparative Approach' (1991) 11 *International Review of Law and Economics* 265; H-B Schäfer and OC Lehrbuch, *Der ökonomischen Analyse des Zivilrechts*, 5th edn (Berlin, Springer, 1986).

was more formal (both theoretical and empirical) and was primarily driven by economists – a feature that, to some extent, still persists today.[84] At the same time, non-formal law and economics scholarship kept growing in law faculties thanks to the establishment of research centres: namely, the Max Planck Institute for Research on Collective Goods in Bonn, the Rotterdam Institute of Law and Economics, the Center for European Law and Economics and the Tilburg Institute of Law and Economics. Moreover, several European universities established graduate courses and PhD programmes specifically based on law and economics.[85]

This steady growth culminated with the academic contribution to the codification process of European private law. In fact, the debate on the role of civil law and European integration witnessed a wide use of arguments based on law and economics.[86] Advocates of both sides (harmonisation versus regulatory competition) relied heavily on economic reasoning to sustain their views and, as a result, drove widespread adoption of this school of thought throughout European scholarship.[87] This wide adoption of law and economics arguments proves that this school of thought has been recognised in recent years as a well-established methodology within the realm of European private law.[88]

Somewhat surprisingly, the core arguments against the harmonisation of European private law have been grounded in law and economics as well.[89] For instance, by relying on the empirical findings provided by Eurobarometer surveys, Hubbard questioned the essential premise of the European codification movement by highlighting that, since contract law is not a substantial hindrance to cross-border trade in the internal market, there is no economic need for a European body of private law.[90] Eric Posner stressed that not only would an optional instrument such as the CESL increase transaction costs for market players, but it was also inherently unfit to help foster a common European identity.[91] Two authors

[84] B Depoorter and J Demot, 'The Cross-Atlantic Law and Economics Divide: A Dissent' [2011] *University of Illinois Law Review* 1593.

[85] To mention just a few: the Joint European Doctorate in Law & Economics set by the Universities of Bologna, Haifa, Hamburg and Rotterdam; the IEL 'Institutions, Economics and Law' International PhD Programme established by University of Turin and Collegio Carlo Alberto. Several other universities set up courses focused on law and economics, such as the 'Law and Economics of Corporate Transaction' within the MSc in Law and Finance at the University of Oxford, which focused on the role of 'business lawyers as transaction cost engineers', according to RJ Gilson, 'Value Creation by Business Lawyers: Legal Skills and Asset Pricing' (1984) 94 *Yale Law Journal* 239.

[86] A Marciano and J-M Josselin (eds), *The Economics of Harmonizing European Law* (Cheltenham, Edward Elgar Publishing, 2002).

[87] C Mak, 'Unweaving the CESL: Legal-Economic Reason and Institutional Imagination in European Contract Law' (2013) 50 *CML Rev* 277.

[88] O Ben-Shahar, 'Introduction: A Law and Economics Approach to European Contract Law' (2013) 50 *CML Rev* 3.

[89] L Bernstein, 'An (Un)common Frame of Reference: An American Perspective on the Jurisprudence of the CESL' (2013) 50 *CML Rev* 169.

[90] WJ Hubbard, 'Another Look at the Eurobarometer Surveys' (2013) 50 *CML Rev* 187.

[91] E Posner, 'The Questionable Basis of the Common European Sales Law: The Role of an Optional Instrument in Jurisdictional Competition' (2013) 50 *CML Rev* 261. The author argues that the underpinning rationale of the European legal integration project is strictly political rather than economical.

have argued that the project to harmonise private law risks seriously jeopardising the regulatory competition dynamics between Member States, ultimately leading to a race to the bottom.[92] Whittaker pointed out that the legal uncertainty over the interpretation of the open-ended provisions of harmonised European private law was set to be exacerbated by the different legal cultures of the judges implementing it.[93] This, ironically, could have ended up with non-uniform interpretation and adjudication throughout the internal market. Whittaker also noted that in the USA convergence in commercial and consumer law was achieved by means of convergence rather than top-down authoritarian impositions. He warned of the risk that harmonisation efforts might be twisted by organised interest groups to the detriment of European social interests at large.[94]

This intense debate proves that law and economics has attracted a high level of attention in the European scholarship in recent years and will continue to be the backbone of European private law's analytical methodologies. In this regard, an increasing number of edited books, treatises, specialised journals and textbooks devoted to law and economics have been published in the European arena.[95]

New theories of private law dealing with the economisation of private law are flourishing: from transnational private regulation[96] to contract governance.[97] Indeed, since the seminal works on civil liability, law and economics scholars have stressed the regulatory functions of private law.[98] At the same time, the EU governance has incorporated such changing patterns into its policy strategies aimed at building the internal market.[99] As a result, many commentators maintain that the divergence between American and European law and economics is set to disappear.[100] As recognised by Ben-Shahar, the law and economics methodology 'has taken a stronghold in European legal academia'.[101]

[92] H Eidenmüller, 'What Can Be Wrong with an Option? An Optional Common European Sales Law as a Regulatory Tool' (2013) 50 *CML Rev* 69; S Grundmann, 'Costs and Benefits of an Optional European Sales Law (CESL)' (2013) 50 *CML Rev* 225.

[93] S Whittaker, 'Identifying the Legal Costs of Operation of the Common European Sales Law' (2013) 50 *CML Rev* 85.

[94] S Levmore, 'Harmonization, Preferences, and the Calculus of Consent in Commercial and Other Law' (2013) 50 *CML Rev* 243.

[95] The *European Journal of Law and Economics* was launched under the editorial direction of Jurgen Backhaus and Frank Stephen in 1999. T Ginsburg and N Garoupa, 'Economic Analysis and Comparative Law' in M Bussani and U Mattei (eds), *The Cambridge Companion to Comparative Law* (Cambridge, Cambridge University Press, 2012).

[96] F Cafaggi, 'Transnational Private Regulation. Regulating Private Regulators' in S Cassese (ed), *Research Handbook on Global Administrative Law* (Cheltenham, Edward Elgar Publishing, 2016).

[97] S Grundmann, F Moslein and K Riesenhuber (eds), *Contract Governance: Dimensions in Law and Interdisciplinary Research* (Oxford, Oxford University Press, 2015).

[98] G Calabresi, *The Cost of Accidents* (New Haven, Yale University Press, 1977); S Shavell, 'Liability for Harm versus Regulation of Safety' (1984) 13 *Journal of Legal Studies* 357; S Rose-Ackerman, 'Tort Law in the Regulatory State' in P Schuck (ed), *Tort Law and the Public Interest: Competition, Innovation, and Consumer Welfare* (New York, WW Norton, 1991).

[99] J Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403.

[100] Depoorter and Demot (n 84).

[101] Ben-Shahar (n 88).

Nevertheless, it goes without saying that this methodological school is still more influential on the mainstream legal judicial discourse in the USA than in the European Union.[102] As is known, continental courts and non-specialised lawyers are not accustomed to deploying economic arguments when evaluating the outcomes and effects of rulings.[103] In this regard, failure to deliver a European Civil Law Code or a Common European Sales Law finally leaves law and economics free from the constraints artificially imposed by the mantras and narratives centred on European integration.[104] Legal scholarship is no longer subject to political constraints and can deploy economic analysis of private law by focusing on market failures involving private transactions (such as principle-agent problems, asymmetric information, unequal bargaining power and bounded rationality).[105]

D. The Behavioural and Empirical Analysis

The current discourse concerning law and economics has incorporated many of the insights and critiques brought by psychology, neuroscience and empirical research to the concept of rationality.[106] Indeed, economists and early law and economics scholars grounded their analysis on the rational choice theory, ie the simple premise that a rational player selects actions so as to promote outcomes that satisfy his or her motives, objectives, emotions or sentiments to the best of his or her understanding of the causal relationship between the action taken and the outcome generated. However, empirical and experimental data suggest that, in many instances, individuals behave in ways which systematically conflict with models based on the theory of rational choice.[107]

Therefore, behavioural law and economics relaxes those rational assumptions and builds on the biases and heuristics targeted by cognitive psychology and neuroscience. From this perspective, behavioural insights do not disrupt the

[102] For a critical view on the current relevance of Law and Economics, see U Mattei, 'The Rise and Fall of Law and Economics: An Essay for Judge Guido Calabresi' (2005) 64 *Maryland Law Review* 220.

[103] C Jolls, 'Bounded Rationality, Behavioral Economics, and the Law' in Parisi, *Oxford Handbook* (n 76) 3.

[104] M Faure, 'Harmonisation of Private Law in Europe' in J Klick (ed), *The Law and Economics of Federalism* (Cheltenham, Edward Elgar Publishing, 2017) 30–54; F Gomez and J Ganuza, 'How to Build European Private Law: An Economic Analysis of the Lawmaking and Harmonization Dimensions in European Private Law' (2012) 33 *European Journal of Law and Economics* 481; R Van den Bergh, 'Towards a European Private Law: To Harmonise or Not to Harmonise, That Is the Question' in H-B Schäfer and HJ Lwowski (eds), *Konsequenzen wirtschaftsrechtlicher Normen. Ökonomische Analyse des Rechts* (Deutscher Universitätsverlag, 2002); F Parisi, 'Harmonization of European Private Law: An Economic Analysis' (2007) Minnesota Legal Studies Research Paper No 41.

[105] F Cafaggi, 'From a Status to a Transaction-Based Approach? Institutional Design in European Contract Law' (2013) 50 *CML Rev* 311.

[106] E Zamir and D Teichman, *Behavioral Law and Economics* (Oxford, Oxford University Press, 2018).

[107] TS Ulen, 'The Importance of Behavioral Law' in E Zamir and D Teichman (eds), *The Oxford Handbook of Behavioral Economics and the Law* (New York, Oxford University Press, 2014).

methodology of law and economics. Rather, by recognising that welfare maximisation is still a valid goal from a normative perspective, it complements it by fine-tuning the economics model of rational players according to the bounded rationality paradigm. More specifically, legal rules should be evaluated and designed by considering potential biases affecting individuals' behaviour.[108]

A growing body of legal literature, therefore, has started to shed light on this area by making use of empirical evidence such as field data, experimental data and laboratory experiments that demonstrate how human conduct occurs under legally relevant circumstances.[109] Consumer protection is likely to be one of the legal fields most impacted upon by these findings: regulatory remedies would have to be shaped by taking due consideration of consumers' (bounded) rationality. In this respect, product governance in retail banking has delivered better results than mandatory disclosure rules. The pro-competitive data sharing regimes introduced by the Competition and Market Authority in the UK are in the same vein.[110] According to this empirical methodology, legal scholarship should focus on market-based remedies (primarily competition and reputation) and legal measures (primarily disclosure and mandatory regulations) to tackle the issues afflicting consumer contracts.[111]

In many respects, even if empirical behavioural studies are still in their infancy, the years to come will see extensive interactions between legal theory and empirical social analysis.[112] It should come as no surprise, therefore, that legal scholars,

[108] D Pi, F Parisi and B Luppi, 'Biasing, Debiasing, and the Law' in Zamir and Teichman, *Oxford Handbook of Behavioral Economics and the Law* (ibid).

[109] CR. Sunstein, C Jolls and RH Thaler, 'A Behavioral Approach to Law and Economics' (1998) 50 *Stanford Law Review* 1471; CR Sunstein, *Behavioral Law & Economics* (Cambridge, Cambridge University Press, 1998); G Gigerenzer and C Engel (eds), *Heuristics and the Law* (Cambridge, MA, MIT Press 2010); C Engel, 'The Multiple Uses of Experimental Evidence in Legal Scholarship' (2010) 166 *Journal of Institutional and Theoretical Economics* 199; EV Towfigh and N Petersen, *Economic Methods for Lawyers* (Cheltenham, Edward Elgar Publishing, 2017).

[110] The product governance requirements provide that firms which manufacture, design and distribute financial instruments act in the best interests of consumers at all stages of the product's development and distribution life cycle. This mechanism is enshrined in Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instrument [2014] OJL173/349 (MiFID II). For an overview of pro-competitive data sharing regimes, see O Borgogno and G Colangelo, 'Consumer Inertia and Competition-Sensitive Data Governance: The Case of Open Banking' (3 January 2020), a revised version of which is forthcoming in *Journal of European Consumer and Market Law*, https://ssrn.com/abstract=3513514, http://dx.doi.org/10.2139/ssrn.3513514; O Borgogno and G Colangelo, 'Data, Innovation and Transatlantic Competition in Finance: The Case of the Access to Account Rule' (2020) 31 *EBLR* 5.

[111] Moreover, such an approach seems perfectly suited to going hand in hand with the emerging application of experimentalist governance to law making in European private law. According to V Mak, 'Who Does What in European Private Law – and How Is It Done? An Experimentalist Perspective' (2017) Tilburg Private Law Working Paper Series No 5, experimentalism can be understood as a 'a set of practices involving open participation by a variety of entities (public or private), lack of formal hierarchy within governance arrangements, and extensive deliberation throughout the process of decision making and implementation'. Against this background, law and economics can provide a common and workable toolkit to scholars and policy makers to engage withing current private law debates.

[112] C Engel, 'Behavioral Law and Economics: Empirical Methods' in Zamir and Teichman, *Oxford Handbook of Behavioral Economics and the Law* (n 107); TS Ulen, 'The Importance of Behavioral Law' in Zamir and Teichman (ibid).

as Becker predicted, are going to acquire the rudiments and basics of econometric and empirical methods so as to update private law consistently with the most recent behavioural and economic findings.[113]

E. Justice and EU Private Law Scholarship

The call for a 'theory of justice' broadly refers to the development of clearly articulated foundational principles adjusted to the different contexts in which EU law intervenes (ie the national, transnational and supranational contexts). Depending on the diagnosis and context of the critique, this approach develops as political theory, theory of values or social justice theory for the EU.

In particular, with regard to EU contract law, in 2004 a group of academics issued a manifesto exploring the challenging agenda of social justice and regulatory legitimacy in European contract law.[114] The authors argued that existing initiatives had failed to address this agenda adequately. As a consequence, they claimed, EU institutions had failed to sufficiently consider the appropriate methods with which to help construct a European contract law. The narrowness of focus combined with the inadequacy of methodology in current initiatives posed a threat to the successful achievement of a suitable set of fundamental principles that could serve as a legitimate basis for the governance of social and economic relations among the citizens of Europe. Or perhaps, if these initiatives continued in their current orientation, they might result in the creation of a European contract law that ignored the demands of social justice and regulatory legitimacy, thereby increasing scepticism in regard to the value of European unity and its multilevel governance structure. The document was therefore both a plea for reconsideration of the current trajectory towards harmonisation of European contract law and an exploration of an appropriate way forward which fulfilled the twin objectives of social justice and regulatory legitimacy.

More recently, Micklitz has also highlighted the differences among the Member States' concepts of social justice, which have developed historically, and the distinct European concept of access justice.[115] Contrary to the emerging critique of Europe's justice deficit in the aftermath of the euro crisis, Micklitz argues that developing beneath the larger picture of the monetary union is a more positive and more promising European concept of justice. European access justice is thinner than national social justice, but access justice is a distinct conception of justice.[116]

[113] Becker and Posner (n 76) 3.

[114] U Mattei, 'Social Justice in European Contract Law A Manifesto' (2004) 10 *European Law Journal* 653.

[115] H-W Micklitz (ed), *The Many Concepts of Social Justice* (Cheltenham, Edward Elgar Publishing, 2011).

[116] H-W Micklitz (ed), *The Politics of Justice in European Private Law. Social Justice, Access Justice, Societal Justice* (Cambridge, Cambridge University Press, 2018).

IV. The Paradigm Shift: The End of a Noble Narrative

In this chapter, we have provided an early-stage overview of the main schools of thought that have emerged to date in the realm of European private law. Furthermore, we have warned about the risk that a debate excessively biased by political goals could exclude theories and approaches diverging from the discipline of orthodoxy.[117] Two authors have noted how far European scholars have not kept enough professional distance from their object of research.[118] This is because classical schools of thought have accepted the instrumentalisation of EU private law to the goal of EU integration and its subordination to the rationales of the internal market. Modern schools are attempting to theorise private law independently of the paradigm of integration through law, and we think that such an effort is necessary after Brexit and the most recent developments. The classical approach has resulted in a lack of scholarly criticism of EU projects for law codification and a sort of wishful thinking about the impact of EU-driven regulations and directives on the everyday practice of the law in domestic courts and national legal professions.

Accordingly, we believe that the future of private law in Europe depends on a new private law scholarship that is detached from the integration paradigm and the market-driven rationale. In this regard, we note that, for example, both Zimmermann[119] and Joerges[120] have repeatedly called for a new legal science breaking down the barriers between any combination of private law doctrine, comparative law, EU law, legal history and international private law. As Jürgen Basedow approvingly notes: 'legal scholars transcend the traditional limits of the analysis of legal development and try to shape the future European law themselves'.[121]

Here, we have gone further by trying to imagine the form that EU private law scholarship should assume while benefiting from the freedom resulting from the collapse of the integration paradigm depicted above. In particular, we are in favour of directing the study of private law away from legal positivism and towards methodology, away from legal rules and towards principles and shared values.

[117] Brownsword et al (n 34).

[118] R van Gestel and H-W Micklitz, 'Revitalizing Doctrinal Legal Research in Europe: What About Methodology?' (January 2011) EUI Working Paper LAW No 2011/05, https://ssrn.com/abstract=1824237, http://dx.doi.org/10.2139/ssrn.1824237.

[119] R Zimmermann, 'The "Europeanization" of Private Law within the European Community and the Re-emergence of a European Legal Science' (1995) 1 *Columbia Journal of European Law* 63; R Zimmermann, 'Savigny's Legacy: Legal History, Comparative Law and the Emergence of a European Legal Science' (1996) 112 *LQR* 576.

[120] C Joerges, 'The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline' (2004) 14 *Duke Journal of Comparative and International Law* 149.

[121] J Basedow, 'The Renascence of Uniform Law: European Contract Law and Its Components' (1998) 18 *Legal Studies* 121.

In particular, two authors have noted that 'what is desperately needed is more reflection on methodology and theory building in European legal scholarship'.[122] Legal scholarship in the field should adopt the opposite perspective with respect to the processes of full harmonisation of statutory law in the Member States. On the contrary, the discipline may benefit by focusing on the coexistence of the different cultures, ideas and approaches to the study of private law that have been developed by legal scholars in recent decades. National laws do not constitute an obstacle to the harmonisation and uniformity of EU private law to the extent that legal science, as a cognitive activity, has no boundaries. Indeed, this argument clearly draws on European history.[123]

Thus, we put forward the idea that EU scholarship in this field of law primarily consists of theories and approaches – for example, pluralism, justice, efficiency – that are different from those of the past, when the integration and harmonisation rationales drove research. The paradigm shift from classical schools and modern schools mainly consists in the end of the (noble) integration narrative briefly mentioned in the first sections. Put differently, the driving force of EU private law scholarship is the diversity of perspectives and the sharing of ideas, tools and methodologies. Furthermore, rapidly emerging in the field are new perspectives that may be understood in terms of modern (or post-modern) schools of thought. To provide an example, we cite the recent technological turn of private law scholars in the EU: they increasingly examine the impact of technological change and disruptive innovation in the field with a specific focus on big data and personalisation (ie granularity theory).[124] EU private law is characterised by the heterogeneity of the actors (eg consumers, retail investors). While special rules exist for certain subgroups of actors, the members of these legal categories still exhibit marked differences in behaviour, degrees of rationality, vulnerability and economic endowment. This new scholarship draws on behavioural economics and big data analytics to develop a comprehensive framework for the personalisation of EU private law through different regulatory tools such as disclosures, nudges and mandates. In brief, these authors argue that, by harnessing big data techniques, laws can be tailored to individual characteristics of addressees.[125]

Having noted the above, our purpose in this chapter has not been to definitively address one theory among the many that have been briefly mentioned, but rather to point out the various perspectives of the past and the present that many wrongly believe are bound to decline because of Brexit and the rise of nationalism.

[122] van Gestel and Micklitz (n 118).

[123] T Wallinga, 'The Common History of European Legal Scholarship' (2011) 4 *Erasmus Law Review* 3.

[124] C Busch and A De Franceschi, 'Granular Legal Norms: Big Data and the Personalization of Private Law' in V Mak, E Tjin Tai and A Berlee (eds), *Research Handbook on Data Science and Law* (Cheltenham, Edward Elgar Publishing, 2018).

[125] P Hacker, 'Personalizing EU Private Law. From Disclosures to Nudges and Mandates' (2017) 25 *European Review of Private Law* 651.

In the same vein, it is also important to underline that, unlike in the past, we have not pursued a sole understanding of the goals and tools of private law as an instrument to advance the EU political agenda. It is also important that this chapter has not opposed the economic and justice perspectives on private law theory because both are important for the future of this field of law.

V. Conclusion

We have argued in this chapter that scholars have the responsibility to rise to the challenge. The latest developments in the EU, together with the processes of pluralisation, differentiation and trans-nationalisation of the past 20 years, have arguably challenged the centrality of law to European integration. However, these developments also furnish opportunities to gain new understandings of private law triggered by European integration.

Thus, the chapter has tracked the reassertion of legal scholarship as an autonomous source of European private law. First, we hope that studies in the field of law will benefit from the recently achieved freedom from the narratives of EU market integration and mainly from the enchantment with full harmonisation and codification. We stress that this change of paradigm also represents the end of the noble narrative of integration through (private) law. EU private law scholarship can no longer rely on the traditional assumption that law is the natural cement that holds the Member States, their citizens, and social and legal structures together. Secondly, the past tendency in EU scholarship has been to view every critical voice as a Eurosceptic threat. This is no longer the case, and we now enjoy the benefit of freedom and diversity in scholarship. Thirdly, the various theories briefly examined in this chapter can now follow a path which is not bound to the precarious routes of European integration and stick to their arguments in a rigorous and consistent way.

Our answer to the main research question of the conference is as follows: the future of private law in Europe should be based on a legal scholarship more diverse and robust than both of the economic and justice traditions mentioned above. In particular, we stress that EU private law scholarship consists of the various views, approaches and methods from a wide variety of theoretical perspectives that our chapter has explored in order to analyse and reconstruct the classical and modern schools of thought in the field. Instead of basing our scholarship on classical approaches, we suggest that we should take courage and develop our methodological approaches to private law in Europe.[126] Finally, if legal scholarship is to become

[126] The concept may be better understood with respect to the experiences of third countries: see M Cremona and H-W Micklitz, *Private Law in the External Relations of the EU* (Oxford, Oxford University Press, 2012).

the engine of EU private law, it must leave behind the market integration narrative which characterised scholarly debates in the classical period and embrace a plurality of methodologies and theories.[127] We think that a field of study that is diverse, productive, inclusive, robust and engaged would be able to make a greater contribution to the debate regarding a healthier EU private law and provide a firm foundation for further exploration of private law theories.

[127] S Grundmann, H Micklitz and M Renner, *New Private Law Theory. A Pluralist Approach* (Cambridge, Cambridge University Press, 2021).