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Lecture notes on the introduction to private/civil law

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Gábor Péter Palásti (PhD, LL.M., dr.jur.) is a scholar from Hungary where he has been teaching and researching law at various law faculties since 1997. He has been affiliated with RGSL since 2007 as visiting lecturer. His main areas of interest are different parts of substantive private law, international commercial law and private international law. Over the years Dr. Palásti has been affiliated with a number of international organizations in different projects, such as the WIPO (Geneva), UNIDROIT (Rome), BIICL (London), IPR Verlag (Munich), University of Tokyo (Japan), Civic Education Project (VA, USA), NCPJ (VA, USA), etc. As author of over 50 law journal articles and book chapters, and speaker on about 25 different conferences and round tables, his works have been published or presented in more than 10 countries in Europe and Asia.

This present paper is the result of his experiences with RGSL students on the LL.B. in Law and Business program, and serves as the general introduction to all specific private-law based courses on this program

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FOREWORD

This present issue of *Riga Research Studies* contains the notes of the first lecture of the first *private law / civil law* course in the Law and Business BA program at the Riga Graduate School of Law. Whether this is the course in *Comparative Contract Law*, or *Comparative Personal, Family and Business Law*, or *Comparative Property Law*, or some other private law course, may vary from year to year. The main purpose of this paper is to serve as *study material* for first year BA students. It is tailored to the needs of the average first module BA student: an open-minded and interested 19-year-old freshly out of secondary school education, whose legal knowledge and thinking is yet to be developed. The main consideration was to keep this writing clear and simple; legal statements and conclusions are illustrated with easy to understand examples. The pedagogical objectives behind this paper clearly prevail over scientific and jurisprudential considerations, although the system of classification and characterization of private law that this paper suggests may be subject to jurisprudential discussion, just like any other system of categorization. As a general rule, this paper is overtly summational. With its objective in mind, it cannot be anything but summational.

The author decided to write this paper because there is no general introduction to private law in the BA in Law and Business curriculum before specific private law courses commence. Also, no paper has been available that would be tailored to the needs of the target group on this subject. Note, however, that this paper is not about the (codified) general part (common provisions) of private law. It is simply a general introduction to the most important conceptual characteristics of private law.

As lecture notes, this paper lacks references and citations; also, no footnotes are used. In a number of countries, lecture notes, as a specific form of legal publication, intentionally omit such references. The very particular purpose of lecture notes does not allow them. As is the case with most of its very general statements, such as that law can be divided into public and private, the amount of references to sources, even if only to the most well-known ones, would most probably by far exceed the length of the study itself. Since the main purpose of this paper is to help understanding and be used as preparation material for the course for the average first-module BA student, it would be pointless and most probably disturbing to

flood it out with countless references, citations, footnote-explanations about the different views that writers and commentators have taken on one or another specific subject over the centuries.

We hope that this paper will serve as a roadmap to the private law courses yet to come, and that students will find as much joy in reading and understanding it as the Author found when writing it.

Gábor Palásti, 2010, Riga, Latvia

LECTURE NOTES ON THE INTRODUCTION TO PRIVATE/CIVIL LAW

The courses Comparative Personal, Family and Inheritance Law, Comparative Contract Law, Comparative Property Law, Intellectual Property Law, and partly Banking and Securities Law focus on questions that fall under the notion of private law/civil law. Thereby, it is first necessary to briefly outline the major characteristics of private/civil law and place our subject matter within the system of private/civil law. This is what the first lecture will be about.

A preliminary remark must be made that the attempts to structure law in the way presented below and identify a separate body of *civil law* is shared in most *civil law* jurisdictions originating in continental Europe. However, these may not be reflected so much in the legal thinking of *common law* jurisdictions. Nevertheless, on the one hand the choice of our subject matter – personal, family and inheritance law – displays the characteristics of the civil law concept. On the other hand, common law thinking often comes to the same conclusions as civil law, even if through different lines of thought. It is, however, not the objective of this course to deal in detail with the underlying differences between common law and civil law, such as the source of law (judge-made law versus codified legislation); or the importance of the differences between public and private law rules within the same branch or field of law (whereas in common law the rules of both public and private law nature may mix within the same branch or legal field while civil law places a higher importance on the separation of these two kinds of norms in its structure of categorization), etc. These issues are to be discussed within other courses, such as legal history and comparative law. However, a short discussion of the civil law and common traditions through their *sources of law* will appear in the chapter explaining legal sources.

In this present lecture we will use the terms *private law* and *civil law* interchangeably, to conform students to both terms. Roughly speaking, civil law is the name of private law in civil law jurisdictions.

1 THE PRIVATE LAW – PUBLIC LAW DICHOTOMY

Since Roman law there has existed an understanding regarding the structure of the body of legal norms, in that legal relations between actors (so-called legal subjects) can mainly be of two kinds. One involves equality between the players: legal subjects are free to enter into the legal relations of their choice, and they have the power to mutually influence the contents of their relation: their rights and obligations. Eventually this happens when persons enter into legal relations with each other as private parties, within their private capacities.

> ***Example I.1***
>
> When Janis and Inga decide, that Janis will buy Inga's watch, they both have the option to decide whether or not Janis will buy and Inga will sell the watch – that is to say, whether to make the contract for the sale of Inga's watch. The same is true of the question of what the major conditions of the deal should be – price, time and place of performance, supplementing services such as whether or not Inga will provide Janis with extra batteries, etc. All these issues are decided by the parties mutually and either of the two parties can at any time say "no" to what the other party proposes. The same is true of other kinds of private relations, e.g. whether or not they will want to start dating each other and later on be married to each other.

Another, quite different set of cases is one in which this equality between the parties does not exist. In those cases one of the parties is subordinated to the other. One of the parties can compel the other to enter into a legal relationship with it and dictate the terms. For example, when Janis has to pay taxes to the tax authority of his country, he can not say "no, I do not want to pay taxes, i.e. I do not want to enter into a tax paying relationship with you". He cannot alter the terms of the relationship with the tax authorities either: he can not say "oh, I am willing to pay taxes, but less – or at a later time – than required". Or, if Janis suddenly were to kill someone and the police were to arrest him, then the prosecution to charge and finally the court to sentence him, he can not tell the police, the prosecutor or the court "leave me alone, I do not want to enter into a legal relationship with you". In both examples, the nature of the legal relationships – tax law, criminal law and criminal procedural law – is such that the legal subjects are not free to decide whether or not to enter into a legal relationship (pay taxes, be investigated, charged and sentenced) and to influence its content. It is easy to discover that in these examples the representatives of "the other side" – the tax authority officer, the policeman, the prosecutor, the judge – did not act in their private capacities like Inga when selling her watch to Janis. They acted in a capacity to represent the *interests of the public* rather than of the private individual. To the tax authority officer as a private person it

is likely not to matter whether Janis pays taxes or not; however, to the public interest of the community (the state) whom he represents, it is important that legal subjects pay their due taxes. The policeman may personally not care if Janis killed someone – perhaps for so long as it was nobody the policeman personally knew – but to the wider society it is of primary importance that killers be caught, brought to justice and punished. Thereby, in all these situations it is a *public interest* that overwrites the equality and freedom of the other party enjoyed in private relations. It is not difficult to recognize that the public interest that prevails over the autonomy of the private individual is represented *by the state*.

In legal relations where the parties act freely, they act *in their own private interests* as *private individuals* or in another word as *civilians*. Thereby, this area of law is named *private law* or *civil law*. In cases where one of the parties lacks this freedom whereas the other has a compelling power to bind the other party, it is usually for the interests of the public. Thereby, this area of law is named *public law*. Private or civil law covers such cases as company law, where relations are between private individuals who want to associate for a common business purpose and set up a company of their own to pursue a profit-making activity; contract law where equals are making deals between themselves; family law, where private individuals get together for the purposes of establishing a family through marriage, having children and taking care of and raising their children; copyright law, where one individual creates a piece in the literary, artistic or scientific domain for the use and enjoyment of all others in society, etc. Public law covers such areas as public international law, constitutional law, the law of public administration, criminal law, all procedural laws such as criminal procedure and civil procedure, financial law and tax law, etc. The course *Comparative administrative and constitutional law*, which students have had by the time they encounter their first private law courses, was a good example of public law fields.

Note that the dichotomy of private and public law does not cover the entire legal system, albeit it fairly well covers the overwhelming majority of legal relations. For example the branch of *private international law* (*conflict of laws*) deals with situations in which the subjects of the legal relationship are not the state and subordinated legal subjects such as taxpayers, criminal offenders, etc., as in public law, or private persons acting in theoretically equal positions such as in private law, but *legal systems* between which a choice has to be made because the case is factually connected to more than one legal system. (See more later.)

There is much discussion nowadays about *consumer protection* and how consumer contracts are not made between equals, but rather between a consumer who is in a *weaker position* and a trader who is in a *strong bargaining position* towards the consumer; and how consumer contracts are not between persons of equal capacities and opportunities. Nevertheless, the structure of a consumer relationship is the same as of any private law relationship, even if the bargaining power of one of the parties exceeds the bargaining power of the other.

Example I.2

When Janis goes to the local shop to buy a kilo of bread, he may not start bargaining over its price at the cashier desk and say that he will not give 30 Santims for it, only 15 at best. He will most probably be laughed at and sent away. The terms of the contract are mostly dictated upon the consumer (Janis) by the trader. Nevertheless, Janis still has the option to say "no" and enjoys the autonomy to decide whether or not to enter into a legal relationship. He may go to another store, or bake his own bread at home from flour in one of these bread baking machines for home use, or buy rice or potato instead, etc. Note that this discretion – not to enter into the legal relationship at all – is *missing* from public law relationships.

Thereby, even if consumers are in a weaker position towards the trader, consumer contracts remain private law/civil law instruments, primarily falling in the field of contract law.

It also needs to be clarified that the state, too, has roles in private/civil law, at least *in two different senses*. Firstly, the state acts as *legislator*: it provides the necessary legal framework for private relations by compulsory (cogent) and non-compulsory (dispositive) norms. In the latter case the parties may freely change the rules applicable to their relationship, so that the provisions offered by the lawmaker are simply options. For example in contract law many provisions in the law apply just in case the parties did not provide for a different setting in their contract. The same is true of marriage contracts in family law or contracts over personal maintenance and inheritance in inheritance law. The reason is that when concluding a contract the parties are often unable to foresee specific possibilities about which they may provide (which fall under their so-called freedom of contract), and these cases are automatically covered by the provisions of the law. As another example, the same is true in company law: often the legislator provides examples of how the founding documentation or internal laws of a company can regulate certain matters, from which the founders of the company are nevertheless free to deviate. In civil law the compulsory nature of each norm has to be examined separately.

The fact that the state acts as lawmaker and has the power to regulate the private relationships of legal subjects even with compulsory norms *does not change the fact* that the legal relationship is theoretically between persons of equal capacity. In this sense the legislator is *not part* of the legal relationship. The legal relationship remains between the private parties: the marriage is between wife and husband and not between the married couple and the state, even though the state provided the normative rules of marriage. A sale of goods contract is between the seller and buyer, even though the state has the power to regulate specific contracts, etc.

Secondly, the state, through its organs, may *become a party* to some private law relationships. For example a ministry of the government may need to purchase office furniture for its offices and thus make a contract for the sale of goods. Or the state may inherit if some individual names it as beneficiary or in cases where there is no beneficiary or heir to an estate. Or the state, through the improper actions of its organs, may cause damage to private individuals and thus be financially liable in a non-contractual liability (tort) case. In all these situations the state acts in a capacity *not different from that of any private individual* (natural person, private company, other legal persons). To all these cases the body of private/civil law applies but as if the legal relationship were between regular private entities. However, since it is the same state acting in private relations that otherwise has all regular state powers (such as to legislate, enforce its legislation and to adjudicate), the law has to specifically safeguard that *the state does not abuse its powers* in private law situations. For example that the state does not pass laws in its legislative capacity, that in all government purchases the buyer (the state organ) can determine the price unilaterally, and then, in a private capacity a ministry is knocking on the door of a furniture shop to "purchase" furniture for free because with reference to the laws allowing it to do so, it determines the price at "0". The body of laws that is aimed at preventing the state from abusing its state powers in private relations is of a *public law nature* and applies to the state and its organs; an example of these laws is regulation of public procurement.

From the different aims and nature of public and private/civil law it also follows that the *structure and nature of available legal consequences / sanctions / remedies* differs considerably. The sanctions of public law are enforced against the individual towards *the state* and usually serve the purpose of *prevention and punishment*. Examples are fines or penalties that will need

to be paid to state authorities, or (forced) public work or imprisonment that need to be served under the command of state entities. The sanctions of private/civil law are enforced towards *the other private party* (the injured private party) and primarily serve the purpose of *doing justice to the injured party* (restoring the financial balance between the two parties) rather than prevention or punishment.

Most sanctions in private/civil law are of a *pecuniary / monetary nature* in which case the party in breach of the law has to pay some amount of money to the injured party and not to the state. These private law / civil law categories of sanctions include

1) Restitution (*in integrum restitutio*), in which case the original state of matters has to be restored as if the breach had not taken place, so that the party in breach has to pay the amount that the injured party would have if the breach had not taken place.
2) Another category is when a party is in some specific breach of an obligation and the value of that obligation can be determined: e.g. the contractual price or a share in an estate was refused to be paid at all; or less was paid; or the party is in late payment, etc. In this case sanctions may not go beyond what would be due under the specific instrument (e.g. contract or estate).
3) A third category is returning enrichment, in which case the party in breach has to return the profit that it gained from the breach, even if that amount would not have been due to the other party (note that this sanction does serve preventive purposes as well.)
4) The "queen" of all private/civil law sanctions is damages: the amount that has to be paid if damage is caused to the other party, including not just the actual damage that occurred but lost profit and all costs in relation to the damage, too. (Note that contemporary legal developments in common law jurisdictions seem to put some emphasis on punishment and prevention in private law, too, within the form of *punitive damages* as well, which are in excess of actual damage, lost profit and costs.) The English word "damage" applies to the value of the loss suffered while the word "damages" refers to the amount of compensation to be paid.
5) Another sanction is that when none of the above works, unjust enrichment may still need to be paid.
6) Finally, all these payments may be accompanied by a rate of interest.

The law specifically sets forth the application of all these categories of remedy: it describes the situation in which one or another kind of remedy is available and the conditions upon which the remedies may be awarded to the injured party.

Example I.3

Imagine that a travel agency obtains an "illegal copy" of specific database software designed for travel agencies. The term "illegal copy" here refers to the fact that it was obtained without the permission of the company bearing copyrights over the software and no copyright fee was paid. Imagine that the software company that licenses the use of its programs detects this program on the travel agency's server. The amount that would be due under copyright law is the copyright fee that was unpaid (category no. 2 above). Since that fee would have been due upon purchasing the copy of the software, interest has to be paid from that date.

If complete restitution (category no. 1 above) is applicable, the software company has to be placed in a situation as if it had received the copyright fee on time. Imagine that the software company purchases from all the copyright fees it receives stocks in the same corporation. From these stocks it has earned a profit of 7% on its investment in the period between when the copyright fee would have been due and when it was finally paid. In this case this 7% extra of the copyright fee has to be paid because if the copyright fee had been paid on time, the software company would have earned an extra 7% by investing it in stocks. Thereby, in a restitution case this 7% has to be paid as well. Note that this item also falls under the category of damages as lost profit. On the other hand, this 7% was not due under copyright law, thereby it does not fall under the category of due payments. At the same token, the copyright fee in itself does not fall under the category of damages, because it is not a head of damage but rather non-payment of a copyright fee.

If the software company had any costs in relation to the damage suffered (e.g. it had to hire the services of a third company to detect software theft), that is due under damages (as costs affiliated in connection with damage) but not under the restitution theory, since the company would have hired the company detecting theft of its software anyway, irrespective of the illegal use of software by the travel agency.

Finally, imagine that the travel agency could release one of its secretaries because the database software rendered her employment needless: it could do everything that the secretary had to. If returning enrichment is also due to the injured party, the software company can also claim the salary of the secretary thus spared by the travel agency (minus the licensing fee of the software itself), because by releasing the secretary the travel agency realized a profit. The profit earned by the travel agency by releasing the secretary is neither a copyright fee nor damage on the side of the software company. Thereby it is only payable if the law specifically entitles return of enrichment in addition to either restitution or damages.

Note that the above are the major categories of private/civil law pecuniary sanctions / remedies; the laws of specific countries may contain additional categories or may not know every one of those described above.

In most Western jurisdictions, quite seldom private / civil law may prescribe that a sanction may be of a non-pecuniary nature: this is called remedies *in kind*. In these situations it is not payment of a sum that is claimed but rather that the other party should specifically

do something or give up doing something. One such example is divorce in family law, when some specific aspects of a divorce order – such as physical separation of the couple – cannot be performed through financial means. Another example is that the court may rule that the unlawful possessor of some movable property should serve the object on the lawful owner; or that an unlawful possessor of a real estate should vacate the land or house. Or that a trespasser should stop trespassing on the land of another. Or that an item of ancillary property of the estate of a deceased person be served in kind to the heir rather than transferring its value in the form of money. Or that someone who publicly made some defamatory remark about another, and thus negatively affected their reputation in the public eye, should publicly apologize or withdraw the remark. Nevertheless, even if these sanctions are not followed voluntarily, the ultimate means of enforcing them are, more often than not, of a pecuniary nature. It is very rare nowadays that law enforcement in civil law really means that an officer will compel a private individual to comply with an order in kind personally. Rather, in case of ultimate non-compliance pecuniary sanctions are usually enforced. Rare exceptions may be separation orders in family law or vacating orders for real property.

Historically, however, personal performance of civil law sanctions did prevail in ancient, medieval and even in early industrial societies. In these cases a wrongdoer causing harm had to personally serve the injured party until the value of the services compensated the loss. Or a party in debt in a contract was ordered to personally serve the creditor to cover their debt. These forms of in-kind sanctions actually were often forms of personal in-debt slavery. The fact that they do not prevail nowadays is at least as much due to the influence of human rights on civil law as the improvement of the general financial conditions of society.

Most often public law and private law touch upon different aspects of *the same policy considerations* and *same fact patterns*. Remedies in public and in civil law serve different purposes in the same case. Thereby, they can be applied cumulatively.

Example I.4

If a driver drives when drunk and causes an accident in which a pedestrian is injured, under criminal law the state will punish the driver: he may have to go to prison. The primary objectives of the driver's imprisonment are punishment and prevention (specific prevention of the driver: while he is in prison he cannot commit the same crime again; and his imprisonment may make him think twice if he wants to drink before driving in the future; general protection of society: others may learn from the

example of the driver and may think twice before drinking and driving). Another public law sanction may be that in administrative law his driving license may be temporarily or permanently withdrawn. This sanction serves the same purposes as above. However, the situation of the injured party is little affected by these remedies. At best he may feel emotionally relieved that the driver had to go to prison, but it does not mend his personal position. He may still have to pay for medical treatment, he may be out of a job, he may suffer physical and emotional stress, he may have to cancel commitments he had made earlier, etc. All these interests will be protected by and the loss compensated by private/civil law remedies. Damages will be paid to the injured pedestrian and not to the state and he will have the chance to add all the loss and negative consequences suffered as a result of the accident when calculating his damages claim.

THE BASIC STRUCTURE OF PRIVATE/CIVIL LAW

Private/civil law can well be systemized, focusing on the possible *subject matters* of different civil law relations. Tracing back to the analytical works of jurists in the ancient Roman Empire and later further sophisticated by German legal schools of thought, it has been realized that the separate fields of civil law relations can be grouped in different categories. These categories help to deal with the massive amount of rules that would otherwise look like a jungle of provisions difficult to handle. The structure of private/civil law presented below applies more or less to the law of every continental civil law country. Even if common law jurisdictions look at these attempts of categorization somewhat differently, the same fields, categories and sub-categories can be identified in those legal systems as well.

1.1 General part

Usually, just as in most other branches and fields of law, civil law has a general part and a specific part. The general part contains rules which are common for every specific category. These rules are shared by all possible private law relations. You are likely to find a part called *General part* or *Common provisions* in most civil codes or in most literary works discussing jurisprudence, usually at the beginning of the code or jurisprudential work. For example the principle of *good faith* or the prohibition of *abusive use of rights* equally applies in the law of persons as in contract law, in property law or in inheritance law. These are commonly shared values for the entire body of civil law, even though it may be possible that for specific situations specific details on these commonly shared values are found in the specific chapters of one or more categories.

For instance, protection of good faith is usually looked at as a general rule in private/civil law. In all civil law relations, the parties (legal subjects) are required to act in good faith when dealing with each other. In some legal systems this is further supplemented with other principles, such as the duty to cooperate, in others it is not – but the requirement that the parties must exercise their rights in good faith is a common rule for all civil law relationships.

Example II.1.1

Imagine that during negotiations for a contract one of the contracting parties already knows that it will *not* conclude the contract with the other party, yet it behaves as if the other party still had the chance to be contracted. It may have several reasons to do so: for example it wants to keep the other party busy in the negotiations so that the other party will be likely to concentrate on the current negotiations and in the meantime it is likely to miss out a chance for another contract with a third person in which the wrongfully negotiating party is interested as a competitor. This situation is clearly against the general principle of good faith, which is a common rule for civil law. Yet the law on contracts may contain further specific rules on the situation, giving it a name – the situation is often called wrongful negotiations – and supplying further rules about how to handle it.

Example II.1.2

Situations similar to the above example can be found in other categories of civil law, too. Imagine, for example, that a young lover is enthusiastically trying to deepen relations with his chosen one. He is hopeful that he will soon marry his chosen girl and he is providing one lavish gift after the other to the girl. The girl is accepting these gifts and she knows that the purpose of these gifts is that the giver wants to marry her. With her behavior she fully encourages her lover, yet she is pretty firm that she will never marry this man, not even a kiss, nothing. She keeps her desperate lover in the false belief that he can be successful, only to keep the generous and valuable presents for herself. In other words: she is not acting in accordance with the general principle of good faith when she accepts the gifts although she knows that she will never want to marry the poor guy. Family law may nevertheless contain additional specific rules on returning engagement gifts, which are specific only to family law.

In both examples above, the same standard – the standard of good faith – was breached. The standard is common for all private law situations because it is possible to breach good faith in all civil law situations. Other rules are, however, specific only for one or another category of private/civil law. For example, the rules on child maintenance are specific to family law only, and there is nothing that would even remotely resemble child maintenance in intellectual property law or in inheritance law. Or the copyright rule that an author is granted the right to have his name identified with his work without time constraints (Shakespeare remains the writer of Romeo and Juliet forever) triggers nothing similar in non-contractual liability law or family law or company law. Those rules that are specific only to one or another type of legal relation are contained in the *special part* of civil law. Eventually, the amount of special rules compared to provisions of the general part is overwhelming.

Some specific fields within private law have their own general part, which contain provisions applicable throughout the specific provisions of that field of law only. For instance contract law has an extensive general part that contains rules that apply to every

single specific contract that follows. Other areas of private law, such as intellectual property law or inheritance law, do not have their own general part.

The general part of private/civil law is not taught in the LL.B. program in any individual class (even this lecture is not about the general part of private law but rather a general introduction to private law). The general part of specific fields within private law is discussed within the course that relates to that specific part of private law. For example, the course *Comparative Contract Law* will address general contract law issues.

1.2 Special part

The special part contains a set of categories that are regulated differently from each other. From the overall category of law through the separation of public and private/civil law the chain of categorization from the overall to the very specific is basically endless, down to the different fields by subject matter within civil law, down to the regulation of specific instruments and then exceptions from these instruments At the end of the line are the individual norms distinguished from one another. Needless to say, the purpose of setting up any kind of system within the jungle of thousands of individual norms is to help orientation within the body of provisions. The system below is based upon traditional classification attempts of private law that distinguishes subject-matter categories of private law mostly *in one level depth* (property law, inheritance law, family law, labor law); sometimes going down the classification chain *in two levels* (intellectual property law and law of obligations) and goes down to a *third level of categorization* only in connection with one area (personal law). This contemporary system of categorization can be looked at as the skeleton of private/civil law. For our purposes, we identify seven basic categories within private/civil law which have, by today, gained independent recognition (the law of persons; property law; intellectual property law; the law of obligations; inheritance law; family law; labor law). As you will find, some of these categories will be divided into further sub-categories. Note that the classification attempts that have been made throughout history, either in the codes themselves or in jurisprudence, seldom agree with each other in every single aspect. Thereby, you may easily find other solutions for categorization. For instance, in the cradle of civil law classification, the old Roman law system described by *Gaius*, only three basic categories are recognized (*personae* = law of persons; *res* = law of things (mostly: property);

actions = common to both, such as inheritance or the law of obligations). Early civil codes like the French or Austrian followed this system of classification. Other codes enhanced this narrowly tailored system: e.g. the basic structure of the German and Swiss civil codes identifies four subject matters in its main titles: law of obligations; law of real things (mostly: property); family law; inheritance. Other codes extend to other areas of law, such as private international law (conflict of laws), that we see to be out of the scope of private/civil law, yet there is some clear connection to it. The reasons why there are many different models of classification are many. Sometimes a specific social phenomenon was as yet absent at the time of codification. For example Gaius, in his time, could not think about the classification of industrial property law (a sub-category of intellectual property), because the technical conditions of mass industrial production were not yet in existence. Another reason is that the subject matter of an area of law was split between existing categories. For example the Napoleonic Civil Code did not identify family law as such, but rather treated questions of marital status (marriage, divorce) in its part on persons and treated property-related issues such as matrimonial property under property law. While an overall comparison of characterization (classification) models of private law would go far beyond the objectives of this introductory lecture, we have attempted to set up an up-to-date, coherent system that would cover and separately identify all major legal fields that have been regulated as private law in most contemporary Western legal systems.

The **law of persons (personal law)** focuses on the *general legal recognition* of persons. In most contemporary legal systems persons are divided into two: *natural persons* are human beings, private individuals. *Legal persons* are artificial creations by natural persons (and other legal persons) for the purpose of pursuing some specific activity, such as different company forms (e.g. stock corporation, limited liability company, partnership, etc.) for pursuing profitable business relationship, or political parties for pursuing political activity, or associations or other like forms to pursue civil activity. Legal persons are sometimes also considered to include, and sometimes not to include, artificial creations without recognized legal personality, e.g. a spontaneous group of same-hobby followers, or branches or organizational units of recognized legal persons, e.g. a department or institution of some legal person.

By today, *company law* (in the U.S.: the law of corporations) has pretty much grown to be an independent area of law, with its own legislative acts and/or codes and rules. The same applies, to some extent, to non-profit legal persons. Private/civil laws differ from country to country as to how much non-profit legal persons are covered by private/civil law and how much they fall under the scope of a civil code or whether they have created their own legal instruments. Generally, those non-profit organizations that may primarily be in the service of public and political purposes, such as political parties, are considered to be governed by constitutional law and public administrative law. Those forms which fall closer to traditional private/civil law purposes, such as foundations, are usually covered by private/civil law. Some forms, such as associations, are equally open to be utilized for both public and private purposes, and their categorization differs from country to country, or they are partly covered by private/civil and partly by public law. The course *Comparative personal, family and inheritance law* will focus upon natural persons. Company law will be the subject matter of another course: *Comparative Company Law*; the law of non-profit organizations is not covered in-depth in this program.

Questions relating to the personal law of natural persons relate to the general legal capacity of natural persons (whether one can have rights and obligations *in general* in civil law just by existing as a human being) and to the capacity to act (whether one can exercise one's own rights in one's own name and on one's own behalf, or whether restrictions apply, e.g. due to age, insanity or other like factors). The time-factor of general legal capacity (commencement and end) and its major characteristics are also covered by this area of law.

Personal law also covers those rights of a private/civil law nature that stem from simply existing as a human being (without additional qualifying factors): these are called personality rights or (in common law jurisdictions) privacy rights. The scope of the course *Comparative Personal, Family and Inheritance Law* will, however, not extend to personality/privacy rights issues in the LL.B. program.

Property law is the traditional area of law that regulates issues in connection with ownership of things. It includes such issues as the categorization of "things" as objects in law (e.g. movable or immovable, tangible or intangible, etc.), the property rights of full ownership and restricted forms (e.g. possession, enjoyment); the commencement and end of

property rights, etc. All these questions will be touched upon in the course *Comparative Property Law*.

Property law issues in connection with nationalization and expropriation and other forms of forced changes in property due to compelling state interests (such as confiscation) are usually considered to be either on the borderline between private/civil law and public law, or are considered to fall entirely within public law (constitutional law, public administrative law, financial law, criminal law and criminal procedure, etc.). Property law issues in connection with protection of foreign investment in the hosting country against nationalization or expropriation; and against risks such as civil wars or riots are, however, usually considered to be covered by *international economic/trade law*.

Property rights can often be disposed of in the form of a contract: e.g. a contract of sale deals with ownership rights and usually physical possession of some goods. These means of providing for changes in property rights are, however, regulated by contract law and not property law. Other private/civil law changes in property may be covered in other fields of private/civil law: e.g. the effects of marriage and divorce on property are covered by family law; change in ownership due to the death of the owner is covered by inheritance law. Some forms of change of property remain within property law, such as *adverse possession*.

Intellectual property law deals with the rights and obligations relating to intellectual creations of the human mind (like literary works, poems, novels, or works in the industrial domain like inventions) in connection with their utilization or practical realization. It has two sub-categories: *copyright law* and *industrial property law*. Copyright law (sometimes also called *authors' rights*) protects works in the *literary, artistic and scientific domain*: poems, novels, dramatic works, songs, paintings, sculptures, PhD dissertations, handbooks, etc. It contains a set of rules about whether or not a creation of the human mind is protectable under copyright, about how to establish authorship, and about the rights of different actors in respect of the work. These actors are the author, other users who add to the product such as performers, publishers, producers, etc., and finally users who use the end-product, e.g. retailers of copies of the work or the general public. *Industrial property* answers similar questions in connection with creations that are mostly for industrial/commercial use. Some of these forms are widely known such as patentable *inventions* or *trademarks*. Others are rather specific, such as the *topography of microelectronic semi-conductors* (microchips). Some general

differences between copyright law and industrial property law are that copyright protects the form in which some intellectual content was expressed against unlicensed copying (hence the origin of the word: copyright was originally nothing more than literally the right to copy) and disposal of copies; whilst industrial property law protects against unlicensed reproduction/realizing of the contents of the protected procedure or product. Another important example is that copyright protection does not need registration (it is available from the time the work was created) while industrial property rights need registration.

Example II.2.1

Imagine that an engineer developed some specific spare part for an automobile engine of specific types of cars. The invention that he developed was registered as a patent. The engineer later published the most important features of his invention in a professional magazine for the car industry. If another magazine republishes the article in one of its own volumes without authorization of the author or original publisher, that will be an *infringement of copyright*, because unauthorized copying of a work in the scientific domain took place. However, the patent itself (the industrial property right) remains unaffected. However, if another car manufacturer simply takes the magazine article, and from that the engineers of that manufacturer develop and then without authorization use the same solutions in their cars as found in the article, that will infringe *industrial property rights* over the *patented invention*, because the procedure (or the product itself) contained in the patent was reproduced without licensing.

Earlier it was believed that intellectual property law is a *sub-category of property law* (hence the name: intellectual *property* law), since the author/inventor, etc. have property-like rights over their creations. Others thought that it was a *sub-category of personal law*, since some rights of owner resembled personality rights, such as the right to be recognized as author of the work. Historically speaking, the cradle of intellectual property law (i.e. XVII-th century England) was *public law*, since after the invention of printing, also of several industrial inventions, duplicating intellectual creations (printing machines) and some related important industrial activities were a royal monopoly, so that licensing questions arose as royal concessions granted to private enterprises. By today intellectual property law has pretty much been recognized as an *independent field of law* within private/civil law.

Example II.2.2

Imagine that a famous contemporary writer publishes his most recent romantic thriller, a copy of which you, as a great fan of thrillers, purchase in the local bookstore. Rights over your copy of the book fall under traditional property law. That is, if you accidentally leave your book on a public bus, you can have a claim to that copy against the public transportation company (or whoever finds it) under property law. However, just by purchasing a copy of the book, nobody would think that you

> also purchased the right to make further copies at home on a photocopier and sell them on the market; or approach a film studio that you have an offer for them to have this book put on screen; or replace the original author's name for your own name as writer, claiming that by purchasing a copy you in fact bought the right to be identified as author. All these questions would come under intellectual property law – copyright law – and not property law (or personal law for that matter).

Intellectual property law will be covered in detail by the course *Intellectual Property Law*.

The law of obligations covers fact patterns where legal obligations are created only between persons relative to that specific fact pattern (usually two); whereas in other fields of private law, subject to some exceptions, legal relations are between one entitled person and the whole world. For example, in property law the property rights of the owner need to be respected by everyone else. These latter types of legal relations are often called *absolute* because the right owner's position is absolute: it has to be respected by everyone else. In contrast, the law of obligations contains rules that are *relative*: usually between two (or more) specified people. The two main grounds for a law of obligations relationship are *contractual* and *non-contractual liability* (in common law: tort). A contract binds just those who are party to it, and apart from some specific exceptions, they are of nobody else's concern. Non-contractual liability relationship arises when someone causes harm to someone else and liability (financial liability) has to be established. For example, when a car hits a pedestrian causing them harm, questions arise like whether or not the car driver is liable for the accident, and to what extent the driver should pay damages to the pedestrian. This fact pattern is also relative only to those involved: the driver and the pedestrian. Legal obligations have been created by the accident only between these two, and unlike in absolute legal relations, others are neither entitled nor obligated in this situation.

Loss or damage is often caused by a *wrongdoing*, such as, in most cases, hitting someone with a car. The traditional notion of wrongdoing is understood as:

a) a wrongdoing by someone for which the person is *liable*;

b) which *caused loss, damage, harm or injury* to someone else;

c) in which the loss, damage, harm or injury is the *result* of the wrongdoing; and

c) for which the wrongdoer has to *compensate* the injured party financially.

The traditional term of wrongdoing is often called *delict*, after the term's Latin origin. However, more than just contract and delict, financial liability in a legal relationship relative only to certain persons may arise from other fact patterns, too.

Example II.2.3

Imagine that Liga receives an amount of money in her bank account by mistake from someone she does not even know. By some technical mistake, or the mistake of either the sender or the employee of the bank, one figure within the 24 digits of the original recipient's bank account number was mistyped, and the mistyped bank account number displayed Liga's account. Even upon moral considerations, anyone would feel that Liga should return the amount transferred by mistake. She should not be allowed to keep the money thus received. Yet in this relative relationship which exists between Liga and the sender of the money, there was *no contract*: Liga and the sender did not even know each other. There was *no wrongdoing* on Liga's side either: she did not do anything to get the money, it just, all of a sudden, appeared in her account. Thus, this case is neither contract nor delict.

The above example is often called *quasi-delict*, a situation in which no wrongdoing took place, yet other than that, the fact pattern behaves like a delict: Liga is obligated to give the money back. Quasi-delict is in fact a *sub-category* of the law of non-contractual obligations.

Thus, one way to describe the basic structure of the law of obligations is this:

Contract law	**The law of non-contractual obligations**	
	Delict	Quasi delict

The size difference between Delict and Quasi-delict refers to the fact that in practice the law of delicts has gained by far more importance than quasi-delict.

Some categories of non-contractual behavior that cause harm to someone may take both forms: delict and/or quasi delict. Such is the case of the broad category of *product liability*: the liability of manufacturers, producers etc. over injury caused by their product to third persons (persons other than those the manufacturer, producer, etc. is in a contractual relationship with).

The line between contractual and non-contractual obligations is also not uniformly the same in most jurisdictions: some categories are difficult to classify. For example the case of *wrongful negotiations* in the situation in *Example I.2.1* is sometimes characterized (categorized) as part of contract law, because negotiations took place in the course of contract formation, even if ultimately no contract was made. In other countries, wrongful negotiations are part of the law of quasi delict, since the fact that in these cases no contract exists excludes it from the scope of contract law.

The term "non-contractual obligations" is only one choice to name this area of law. Yet it seems that this is the choice that the European legislator prefers over other names (see the so-called Rome II Regulation: Regulation (Ec) No 864/2007 of the European Parliament

and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)). Common law traditionally calls the law of delict *tort law*, offering a somewhat different structure of this body of law than civil law legal systems. Others prefer to call the law of non-contractual obligations *liability law* or the *law of damages*. Note however, that these names may sometimes be misleading: as to liability law, financial liability exists under other branches of law, too, such as in financial law; and as to the law of damages, damages claims also arise in contract law and sometimes in other areas of law, e.g. labor law.

Since the course on *Comparative Contract Law* is offered as the first mandatory private/civil law course, more on this subject is discussed in that course. However, non-contractual liability (tort law) is not covered in the LL.B. (B.A.) program.

Inheritance law or **the law of succession** primarily deals with the question of passing of property and other related rights due to the death of the original owner. The two main areas of inheritance law are *intestate succession*, in which case the (US) decedent (UK: deceased) did not make provisions about the passing their property in the event of their death, and the *law of wills*. Intestate succession law primarily draws up a legal order of inheritance between the surviving relatives after the deceased/decedent, and contains some additional correctional provisions.

The law of wills deals with questions such as testamentary capacity (the capacity to provide for the event of death), formal and substantive conditions of wills, the status of changing circumstances after making a will (e.g. when there is either a change in the property disposed of in the will, or in the persons in connection with the estate of the decedent/deceased); revocation of wills; interpretation of wills, etc. It also contains correctional measures to restrict the autonomy of the testator in protecting the interests of others, e.g. to prevent the exclusion of some important relatives (e.g. a surviving spouse or children) from inheritance, or unreasonable conditions in the will.

Death itself may lead to changes in property other than just what is considered to be inheritance. For example, death may give rise to payment of a sum by an insurance company under a life insurance contract. These cases (so-called non-probate transfers) are only partly covered by inheritance law.

Succession cases are often closely connected with other fields of private law: the result of inheritance is a change in ownership, which connects it to property law. Some

instruments recognized and dealt with by in inheritance law come from contract law, e.g. a contract about inheriting in exchange for personal maintenance, or a gift given by the decedent/deceased while alive to someone (an *inter vivos gift*) are given specific importance in inheritance law. Nevertheless, issues arising out of death quite notably distinguish this area of private law from other fields.

Inheritance law will be covered by the elective *Comparative Personal, Family and Inheritance Law* in detail.

Family law deals with questions relating to the private law dimension of family and like relationships. In particular, specific issues of marriage – marriage conditions, rights and obligations within marriage, marital (matrimonial) property rights, maintenance, termination of marriage (divorce) – are considered. A specific chapter of family law deals with the rights of children within the family. Also, family law covers issues relating to private relationships that seek similar recognition as families do: cohabitation, life partnership, and the legal recognition of same-sex relationships.

Earlier in history, the main body of family law used to fall partly under personal law (personal status, marriage) partly under property law (marital/matrimonial property). However, since the XIXth century, when German legal thinkers started to group norms relating to family and marriage together, the independent character of family law has started to be recognized. Today family law is a changing body of law that has, although it has kept its overwhelmingly private law character, incorporated public law provisions as well, such as those relating to the legal treatment of domestic violence, the enforcement of children's rights, state supervision of guardianship within the family, etc.

Family law will be covered by the elective *Comparative Personal*, *Family and Inheritance Law* in detail.

Labor law is a relatively new area of law compared to traditional private/civil law fields. The categorization of labor/employment relations within private/civil law is not as widely recognized as those of the previous legal fields. Some aspects of an employment relationship are undeniably *private* in character, since the relationship between a private employer and employee usually rests on an *employment contract*, which has grown out of the private law notion of contract law. Nevertheless, the role of the state in employment relations is much more than just being the legislator for labor relations, while sometimes the state can act as employer (see, e.g. civil servants). Illustrations of public law regulations in

labor law are many. For example, through its unemployment agencies the state itself is active in employment relations. Again, through its system of state subsidies or tax exemptions, the state encourages specific labor relations over others, or employment in one sector over others. Moreover, through its system of labor supervision it monitors employers to make sure that employee rights are protected (for safety, social security and other like reasons). Additionally, through its fiscal system the state burdens both employers and employees from payments made within the employment relationship. Besides, the state provides for specific social security services such as pensions, the contents of which are linked to employment relations in a variety of ways. Finally, the state interacts in protecting labor rights such as the right to strike, provision for holidays and resting time for employers, etc. More than any other area of private law, labor law is the one which is the most complex in its nature and incorporates both private law and public law features.

Labor law does not form part of the LL.B. program.

I. General part: issues commonly covering every segment of private/civil law.
II. Special part: issues by categories, depending on the subject matter of the legal relation. The list of issues in these categories is by way of example only.

Personal law (law of persons)			**Property law**	**Intellectual property ("IP") law**		**Law of obligations**		**Inheritance law/Succession**	**Family law**	**Labor law**
Natural persons (human beings) Issues: legal capacity of natural persons; personality (privacy) rights and remedies	***Legal persons and other artificial persons without legal personality***		Issues: classification of things (e.g. real or personal property). Rights and obligations of owners and other proprietors (e.g. possessors). Forms of acquisition of property. Commencement and end of property rights. Public law aspects: nationalization, expropriation and other forms of deprivation of ownership and property rights because of compelling state interests.	*Copyright law* Issues: protection of authors in respect of original literary, artistic and scientific works. Rights of authors in respect of their works *vis-à-vis* users (performers, publishers, producers, simple end-users, etc.) and rights of users *vis-à-vis* each other and the author.	*Industrial property law* Issues: rights of creators of a variety of intellectual works for commercial and industrial use. E.g.: patents, trademarks, appellations of origin, topography of microelectronic semi-conductors, etc. Rights and obligations of creators and of all interested parties regarding different forms of utilization of the protected work.	*Contracts* Issues: formation, performance and termination of contracts, rights and obligations of the contracting parties. Liability and remedies for defects in performance of the contract. Specific regulation of a variety of specific contracts.	*Non-contractual obligations (tort law)* Issues: liability for illegally causing harm or damage to someone. Determining the level of care, causality, the amount of damages to pay and other possible remedies, excuses for causing damage, etc.	Issues: the passing of property and other rights upon death, either under a will or under intestacy law. A brief discussion of non-probate passing of property and of estate administration.	Issues: rights, obligations and legal implications in connection with the family: marriage, divorce, marital property, maintenance, child support. Legal recognition of other forms of relationship: life partnership, cohabitation, etc.	Issues: rights and obligations of employee and employer; e.g. working conditions, pay, holidays, commencement and termination of employment, etc. Strong public law aspects for state employees working under command (e.g. civil servants, members of armed forces, etc.) Also: public law issues affecting society at large, e.g. regulation of strikes.
	Business entities (companies, corporations of various kinds). Issues: establishing, managing, functioning and dissolving business entities. This area of law has, by today, individualized itself from the law of persons and is called Company Law or the Law of Corporations/Corporate Law.	*Non-profit organizations* (e.g. civil and other non-profit associations; foundations; political parties, etc.) Issues: establishing, managing, functioning and dissolving non-profit organizations.								

Not all of these categories of law serve a business function. Eventually, personal law of natural persons and of non-profit organizations, non-contractual liability law, inheritance law and family law do not serve business. It is, for example, not possible to get married or inherit on a professional profit-making basis, even if huge sums of money may be involved in any matrimonial relationship or estate. The rules of family law or inheritance cannot be applied in a profit-making business fashion, even if from time to time extreme cases emerge in which young people – of both sexes – may turn out to be marrying elderly parties with the intention of surviving them and getting rich from their estate. The rules of these fields of law do not serve business objectives but, rather, important *social purposes*.

The main legal instrument of conducting business is, however, *contract*. Contract law can also perform non-business purposes. *Company law* creates the preconditions for conducting business; thereby it is *entirely at the service of business*. *Intellectual property law* also strongly serves business purposes, albeit some aspects of activities governed by IP law, such as artistic creation, are not necessarily linked with business purposes. Traditional property law serves *much broader social interests* than just conducting business, although it is possible to utilize the regulation of company law *entirely* for business purposes, e.g. real estate agencies.

Besides the above categorization, both practice and jurisprudence have developed other categories of the law. The terms *commercial law* or *trade law* or *business law* deserve special attention. Although some smaller differences exist between these categories, they nevertheless come from the same idea. They group together those areas of law that are *relevant for conducting a professional profit-seeking activity*. A commercial lawyer or business lawyer would most often handle *all aspects of law* that his / her client presents in a business capacity, be it of a public or private law nature. Aside from business related fields of civil law outlined in the previous paragraph, business law covers public law aspects of conducting business, such as *competition law* (state supervision of business competition in order to safeguard that competition remains fair and free of distortions), *financial law* (esp. tax law), *public administrative law* to the extent business activity is administered by the state, etc.

Note that models for systemizing private/civil law based upon *other criteria* than subject matter also exist; see, for example, the above discussion – after the table – on how some parts of the law are at the service of business whilst others serve little if any business

function. Yet another aspect of categorization is one which focuses on the legal source: whereas everything that is in a separate civil code is considered to be traditional private/civil law (e.g. personal law of natural persons; traditional property law; law of obligations; inheritance) while other parts of law codified in separate law sources (codes) form separate fields of law (e.g. company law where there is a separate companies code; family law where there is a separate family law code; labor law with labor codes, etc.). Other models of categorization are based upon the nature of the legal relationship from the point of view of being *absolute* or *relative* (discussed above). Nevertheless, the model presented above is probably the most useful in giving orientation in what is the special part of private/civil law today.

1.3 Sources of private law

Three different systems call for independent recognition in connection with the sources of private law. By today, the line between these three systems can not be sharply drawn.

In *civil law countries* the *major sources* of private law are *civil codes*. In these countries the underlying idea is that it is possible, through legislation, to enact a single-piece code that covers all (or as many as possible) fields of private law. Living examples of the civil law model are the 1804 French Civil Code (earlier called the *Code of Napoleon*), the Austrian Civil Code of 1812 (*Allgemeines bürgerliches Gesetzbuch*: AGBG), the German Civil Code (*Bürgerliches Gesetzbuch*: BGB) of 1900 or the Swiss Civil Code of 1904 (*Zivilgesetzbuch* - ZGB). (For historical perspectives from the Code of Hammurabi through the Roman Corpus Juris Civilis or a list of religious codes regulating private law relations such as the Canons of the Apostles, the Qur'an and Sunnah or the Indian Law of Manu, also for early industrial age codifications, you are kindly referred to your studies in Legal History.) The civil law concept has been most prominent in continental European countries (other countries following the Napoleonic model included Italy, the Benelux countries, Spain, Portugal, Greece, etc.). The only area traditionally unaffected by the civil law movement in Europe was Scandinavia. However, especially through influence in colonial times, in a number of Latin-American, African and Asian countries the civil codes of the colonizing nations were enacted or adopted. In other non-European countries, the civil law codification movement was followed voluntarily. By today civil codes apply in such countries outside of Europe as Turkey, Japan,

Taiwan, South Korea, the Philippines, Thailand, Indonesia and a variety of Latin-American and Sounth-American countries. Civil law traditions sometimes appear as islands in common law oceans: e.g. in the U.S.A., Lousiana follows the civil law method; as does Scotland within the United Kingdom. In Canada civil law is most prominent in Quebec.

However, even these countries differ somewhat as to whether some specific (usually newer) fields are regulated within the civil code or separately. For example labor law or intellectual property law are often contained in separate pieces of legislation; and family law may sometimes be regulated at least partly outside the scope of civil codes. The reasons are that sometimes these fields of private law emerged much later after the original codification of civil law and are often contained in international conventions, such as the basic corpus of intellectual property law. With other areas, such as labor law or family law, the public law features often called for legislation outside of the scope of civil law.

Although the main sources of (civil) law are civil codes that systematically address as many legal issues in connection with the regulated subjects as could possibly be foreseen by the legislator, and although there is no system of precedent, even in civil law countries judges play some role in developing the law itself. Firstly, as an exception from the lack of precedents in civil law countries, some higher courts do have the power to decide on important interpretational questions that courts are obliged to follow in future cases. The magnitude of these compulsory decisions is, however, usually insignificant compared to judge-made law in common law jurisdictions. Court decisions that are mandatory for ("binding on") courts in future cases are said to have *binding authority*. The second option for judges to develop the legal system in civil law jurisdictions and thereby to be identified as sources of law is through establishing a *non-binding uniform judicial practice* in interpreting and / or applying certain provisions of codified law. Although in civil law countries as a general rule court decisions do not have binding authority for future cases, courts nevertheless tend to pay attention to past judgments in connection with interpreting / applying the same provisions. Thereby, a lawyer may successfully rely upon and cite to the past courtroom practice of the same provision in a given case, because judges tend to prefer harmony in their judicial decisions, even though past decisions are not formally binding for future cases. This phenomenon is wrapped up in the term that court decisions have *persuasive authority*, because even though they do not bind the courts, they do persuade the

judge to interpret or apply the law in a similar fashion as in previous cases. Even very tight and extremely precise codes need judicial interpretation, usually because there may be cases that the legislator did not think of when passing the code, or because the more a certain subject is overregulated, the higher the chances are that the law will contain some contradictions or ambiguities that need interpretation and clarification by the judge.

Finally, sometimes *jurisprudence* itself, legal literature, scholarly writings and academic opinion are considered to constitute a very specific source of law when either interpretation or gap-filling in connection with codified law is needed. For example in Germany it may easily happen that the theoretical academic opinion of a well-known scholar or passages from a widely recognized commentary will be decisive in a given case before a court, even though jurisprudence formally does not have legislative powers. Jurisprudence also helps to systemize and understand codified law – this is especially true in connection with civil law.

Quite the opposite of the civil law system are *common law jurisdictions*. Sources of law – and of private law, too – were primarily precedents, whereas court decisions had binding authority for future cases. (For the historical reasons for common law to have developed in the way it did, you are kindly referred back to your studies in Legal History.) Since common law originated from England, former British Empire countries usually follow the common law tradition: Ireland, the United States (excl. Louisiana), Australia, New Zealand, South Africa, Canada (except French-speaking Quebec), India, Pakistan, Malaysia, Singapore, Sri Lanka, Ghana, Cameroon and Hong Kong.

By today, in all common law countries the rate of statutory law compared to judge-made law has significantly increased. In fact, statutory law slightly takes the place of judge-made law. Nevertheless, lawmaking through legislation in common law countries is quite different from law-making in civil law countries. In private law this means that while in civil law countries a general and systematic civil code is aimed at covering private law as widely as possible, in common law countries separate acts or codes exist in connection with the different fragments of private law. What is wrapped up in a civil law country in a single civil code is often contained in a number of acts in common law countries, all covering specific segments of their designated subject matter. As an example, while the major body of family law in Germany and France is to be found in their respective civil codes, in England relevant

acts include the Matrimonial Causes Act, the Divorce Reform Act, the Matrimonial and Family Proceedings Act, the Married Women's Property Act, the Children Act, the Guardianship of Minors Act, and some specific aspects of family law would be covered by such less obvious pieces of legislation as the Rent Act, the Housing Act or the Administration of Estates Act. All these questions would, in a civil law country, be resolved under the same civil code.

Another typical feature of common law legislation is that it is less sensitive to jurisprudential categories. For example private law matters of inheritance law are usually governed in the same civil code in civil law countries where all other *private* law matters are governed. However, such issues as court procedure or other public law aspects are usually outside of the scope of civil codes. As a counter-example, the federal-level non-compulsory code of inheritance in the United States is called the Uniform Probate Code. This code is not part of any overall civil code, because there is none. On the other hand however, it provides a complex coverage of inheritance, dealing not only with private law aspects of inheritance but also with such public aspects as procedure (probate and administration of estates) or apportionment of estate taxes.

The role of jurisprudence is quite different in common law countries than in civil law countries. Originally, the work of jurisprudence was done by judges: the sophistication of legal arguments in case law often resembles the style of continental legal writers. As a result, you are likely to find less traditional jurisprudence in common law countries than in civil law, and even what exists is less considered with the same value in courtrooms than their civil law counterparts.

The third group of legal systems is considered to form a *hybrid* or *complex* group, something in between civil law and common law. Often the legal system of Communist countries (the so-called Socialist legal systems) and even their Post-Communist versions display elements of both basic systems. Traditionally the codification movement was strong in a number of Post-Communist countries (especially in Central and Central-East Europe) before Communist rule was introduced, and civil codes existed. However, Communist rule through its centralized lawmaking technique often relied on authoritative decrees rather than complex codes. Also, the importance of private law relations was clearly inferior to state and collective relations, which rendered civil codes practically inferior compared to other

sources of law. Finally, hardcore social and communist values often quashed the market-oriented values of civil codes. As a result, even if civil codes existed in a number of Communist/Socialist countries, the most important rules were often contained in decrees and other sources of law. After the fall of Communism, the codification movement has slowly started to gain some impetus in most of these countries. The situation by today usually is that while there may be a civil code in most of these countries, entire fields (e.g. family law) or specific questions are regulated separately. The *coverage of civil codes* is clearly narrower than in traditional civil law countries. On the other hand, the *importance of judge-made law* does not exceed that of civil law countries. The *importance of jurisprudence* remains somewhere halfway between its low reputation in common law countries and its distinct recognition in civil law countries. Because universities were the basis of "independent thinking" during the Communist era, no formal importance whatsoever was attached to jurisprudential works. Also, since Communist parties wanted to secure loyal academic staff, loyalty was often a more important selection criterion than professionalism. This was especially the case in civil law after the Communist concepts of private relations were introduced and most university chairs and academy departments re-organized in almost all Communist countries. As a result, both the professional sophistication and the availability of in-depth academic opinion in most of these countries remain below the level of jurisprudence in traditional civil law countries. Jurisprudence in these countries is yet to claim the recognition that has been achieved in traditional civil law jurisdictions.

So far we have discussed domestic sources of private law. However, the international sources of private law also need to be touched upon. As a general rule, it can be said that the more traditional a private law field is, the less likely the success of international unification is. Such traditional areas as personal law, property law, contract law, the law of non-contractual obligations (tort law), inheritance or family law have always remained primarily within the competence of national legislators, because it is difficult to make the necessary compromise between centuries old national solutions on the international scene. Either in *European Law* or in *Comparative Contract Law* you will learn about the European struggles to unify just the *general principles* of contract law. Exceptions to this main rule are *international aspects* of business, in which economic interests were stronger than national resistance to compromise, and there have been some very well working international conventions. E.g. a

convention exists in the field of contracts for the international sale of goods (the United Nations Convention on Contracts for the International Sale of Goods, in short: the *CISG*, or the *Vienna Sales Convention*), albeit it leaves purely domestic sale of goods unaffected.

The only field of significant international legislation in private law was where there had hardly been considerable traditional lawmaking before. This is the area of intellectual property law, which, with a little exaggeration, started off as "international" from the beginning. In the mid XIX century, especially when international uses of intellectual creations called for legislation, work commenced immediately on the international level. The amount of national intellectual property legislation that had existed before was insignificant and often did not offer a solution to the problems that arose by then. The 1883 Paris Convention on industrial property and the 1886 Berne Convention in the field of copyright were the first two major sources within intellectual property, and they were immediately international: in the laws of most countries, there was nothing significant that they would have replaced. The reason is that when technology facilitated mass duplication and reproduction of intellectual creations, the need arose to tackle these issues on the international scene at the same time when it arose within domestic contexts. With the help of technological developments, the uses of most intellectual creations swept through borders: sheet music, graphic designs of industrial works, printed reproductions of images, translations of literary works all spread from one country to the other quite easily, often without compensation for the original author or inventor. Thereby, legislative work could be commenced internationally. The same is true of other issues in relation with recent technology: regulation of a variety of private law relations that required technical development and which was important in international relations could commence on the international level, even outside of IP (e.g. railroad transport, carriage by road and by air, etc.)

1.4 Relationship with other branches and fields of law

In real life the legal problems of a specific fact pattern *seldom present themselves as clearly focused* on any one specific category of law as jurisprudence draws the line between the different branches and fields of law. For example in an inheritance case, besides private law questions of succession, inheritance taxes need to be dealt with; civil procedural law may

govern the procedural aspects of the procedure before the notary public or probate court or any other such entity connected with probate. Public administrative law may govern specific questions requiring the assistance of public administration, such as recording the change of ownership of the real estate of the deceased in the real estate registry. It may become necessary to determine the country whose law applies to the case, if a foreign/international element occurs in the fact pattern, such as assets of the deceased abroad, or beneficiaries or heirs residing in another country. All these aspects fall outside the scope of private/civil law and require knowledge of other branches and fields of law. Yet in the practical setting in which they arise to the client in reality, they are all connected with his/her "inheritance case".

It is therefore useful to shortly explain and sum up how other branches and fields of law are in connection with civil law fact patterns.

International law (public international law) is relevant to the extent that some of the subject matters within our subject are governed by international sources of law: international conventions or treaties, international customs (customary international law), international usages, etc. Dealing primarily with relations between states (also international organizations), international law provides the form and structures in which traditional civil law questions may become relevant. The content of an international legal instrument may well be traditionally private. As an example, states may agree (as they eventually did) that an international convention should be concluded for transactions involving contracts for the international sale of goods: that is, when for example a Mexican seller sells products to a Latvian buyer (see: The United Nations Convention on Contracts for the International Sale of Goods). International law provides the form of an internationally harmonized set of rules; it contains rules on how an international convention can be adopted; its incorporation into and its place within national law and within the hierarchy of legal norms, etc. The contents of the convention, however, overwhelmingly belong to contract law. Also, there may be conventions relevant for family law (we will discuss these in family law). Other conventions may prohibit certain acts, breach of which may lead to a non-contractual liability (tort) claim. Yet another body of international law relates to protection of foreign investments, which, *inter alia*, tackles the issue of nationalization of foreign investments within the hosting country – and soon we are discussing property law issues. Other conventions define basic human rights, and prescribe that the signatory states must provide for equality or

universality of general legal capacity of natural persons – and we soon arrive at personal law within private / civil law. Other international conventions relate to protection of creators and authors of literary, artistic and scientific works, and we are soon discussing copyright law, etc.

Those international sources of law that are in connection with international business activity (overwhelmingly contract law; also intellectual property and property law – foreign investment) are dealt with by lawyers under the terms *international business / commercial / trade law* (albeit the coverage of international business / commercial / trade law is greater than just these sources of international law). These issues will, however, be dealt with at length in other courses.

Some parts of traditional international law (such as law on diplomacy, or humanitarian law or international criminal law) are largely irrelevant to our subject matter.

European law itself is relevant to private / civil law relations in at least *two dimensions*. Firstly, European law may itself contain specific private / civil law provisions that directly regulate private law matters. At this stage, however, the body of traditional private / civil law legislation is diminishing compared to traditional public law content. Examples may relate to directives in intellectual property law; or ongoing efforts to harmonize general contract law; or specific aspects of the right of establishment within company law. The other dimension in which European law interacts with private law matters is that it regulates several important aspects of the state-private individual relationship if it is in connection with the free movement of goods, services, persons or capital within the European Union. As an example, the provisions relating to a sale of goods transaction from one Member State to another are provided by contract law; however, European law regulates the public law conditions within which the transaction can be carried out: e.g., are there inspections at the border, should customs, duties or other charges be paid; should specific administrative permissions relating to the products (e.g. from sanitary considerations) be obtained? This directly affects such private law issues in the contract itself as the price, the time, place and method of performance, etc.

Or, while a marriage itself is considered to be entirely a private law issue, in reality the prospects of a marriage between nationals of different countries wishing to settle in the same EU Member State are very much predetermined by regulation of the free movement of

persons. EU level legal instruments cover the conditions and obstacles a state may set up if foreign nationals wish to stay, settle, be employed, retire, receive social care, avail themselves of educational facilities, etc. on its territory.

Questions of European law will be covered in separate courses at length.

Constitutional law is relevant to private / civil law to the extent that the basic principles of some of the most important civil law rights originate in the constitution. Also, constitutional law sets the framework for legislation, including private law legislation.

Public administrative law (the law of public administration) contains public law rules that govern the functioning of public administration, from general issues of public administration down to the very specifics of each kind of office or government service or institution within the body of public administration. Very often a civil law case will have several aspects that lead to public administrative law. For example, ownership of real property requires, in most parts of the world, registration by a public authority in a register maintained by the government. Rules of the land register are contained in public administrative law. Another example is that in some countries the registry of industrial property rights is maintained by the state (in other countries this is done by private organizations). As to family law, the public registry of marriage is also governed by public administrative law; and public authorities that supervise the rights of children or persons under guardianship are also governed by public administrative law.

At any instance when some public authority intervenes in a civil law case, the procedure, rights and obligations of that authority (and of the private clients that appear before the public authority) are regulated by public administrative law. More on this subject, however, is dealt with by the course *Comparative Constitutional and Administrative Law*.

Financial law is relevant mostly for its provisions on taxation – this field of financial law is called *tax law*. Often transactions in civil law involve the exchange of valuables which appears as *income* on the side of one of the parties. The state has the authority to tax this income. For example sale of real estate, or distribution of an inheritance, or receiving copyright fees or industrial property licensing fees all involve questions of taxation. The same exchange of valuables may appear as *expenses* on the other side, which may reduce the income of the other party in return. Forms and types of taxes and other duties – e.g. customs if goods arrive from abroad in an international sale of goods contract – are regulated by financial law.

The functioning of the revenue service or taxation authority, the rights and obligations of the revenue service and the client before it, also the procedure itself is governed by public administrative law. International aspects of taxation are governed by *international tax law*.

Private international law (PIL) deals with aspects of any private law fact pattern that contains some *internationality / foreign element*. Questions of PIL arise from the fact that not all cases are entirely domestic. It may be possible that a foreign national wants to conclude a contract and his / her legal capacity, which is a necessary precondition of concluding the contract, is in question. Should it be decided by the laws of his / her nationality or by the laws of the country in which the contract is to be concluded; or by some other law, i.e. by the one in which she / he has habitual residence? Another example may relate not to a question of capacity but a question of contract conclusion or performance. Imagine that a Latvian businessman concludes a contract with a Swedish business entity about some joint investment in Russia. The contract is signed in Estonia during a business fair. What law would decide such questions whether or not the contract needs to be signed by witnesses or an attorney or not; or the level of care during performance; or the time and method of performance; etc. Would it be the law of Latvia, Sweden, Russia or Estonia? Also: if a legal controversy arises, should the plaintiff turn to a court in Latvia, Sweden, Russia, Estonia or in some other country? Or think of another example: a Latvian immigrant to the United States dies and leaves his European holiday home located on the French Riviera to his Latvian relatives. In which country should questions of inheritance be decided, and the inheritance law of which country should apply?

Questions of PIL can be divided into two. One part of these questions relates to *procedural aspects*: courts and other kinds of forum (arbitral tribunal, notary public, etc.) *of which country* can proceed in the given case? This is called the issue of *international jurisdiction* (or shortly: jurisdiction): which country has jurisdiction over the case? Procedural questions also relate to recognition and enforcement of foreign judgments: if the court of another country had the right to proceed, can the judgment be recognized and enforced abroad?

These procedural questions (jurisdiction, recognition and enforcement) are also called *International Civil Procedural Law*, and since within the European Union these questions have

been resolved by a number of legal instruments, within the EU this body of law is called *European Civil Procedural Law* (European Civil Procedure).

The second group of PIL questions relates to issues of determining the country whose law applies to the case. Briefly this is the question of *applicable law*. Since in these cases the different laws of the different countries contain different (conflicting) solutions, this area of law is often called *conflict of laws*.

A separate course on private international law in the LL.B. program offers in-depth insight to the subject.

Some other categories of law usually represent a mixture of different branches and areas of law, some of which come from private / civil law, others from other areas of law. For example *Agricultural law* relates to questions of agriculture and rural development, and covers such public law issues as agricultural subsidies or registration questions within agriculture (such as land or agricultural products), but also covers private law issues such as specific contracts frequently used within agriculture, or property law.

RGSL RESEARCH PAPERS

NO. 5

Lecture notes on the introduction to private/civil law

GÁBOR PÉTER PALÁSTI

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Riga Graduate School of Law

Established in 1998, the Riga Graduate School of Law (RGSL) has emerged as a leading legal education and research institute in the Baltic region. RGSL offers numerous study programmes in the area of International and European Law at bachelor and master's level and is in the process of establishing a doctoral programme. The School enjoys the support of important international donors and cooperates closely with the University of Latvia, which is the major shareholder. In addition to its growing resident faculty, RGSL also benefits from the cooperation with a large number of eminent scholars and practitioners based elsewhere in Europe an overseas. The School is located in the A*rt Nouveau* district of Riga and hosts an outstanding law library.

A primary objective of RGSL is to contribute to the development of Latvia and the wider region by educating new generations of motivated and highly skilled young scholars and professionals capable of facilitating the on-going process of European integration. Research and education in the area of international and European law are integral to the realisation of this objective.

The present series of Research Papers documents the broad range of innovative scholarly work undertaken by RGSL academic staff, students, guest lecturers and visiting scholars.

About the author:

Gábor Péter Palásti (PhD, LL.M., dr.jur.) is a scholar from Hungary where he has been teaching and researching law at various law faculties since 1997. He has been affiliated with RGSL since 2007 as visiting lecturer. His main areas of interest are different parts of substantive private law, international commercial law and private international law. Over the years Dr. Palásti has been affiliated with a number of international organizations in different projects, such as the WIPO (Geneva), UNIDROIT (Rome), BIICL (London), IPR Verlag (Munich), University of Tokyo (Japan), Civic Education Project (VA, USA), NCPJ (VA, USA), etc. As author of over 50 law journal articles and book chapters, and speaker on about 25 different conferences and round tables, his works have been published or presented in more than 10 countries in Europe and Asia.

This present paper is the result of his experiences with RGSL students on the LL.B. in Law and Business program, and serves as the general introduction to all specific private-law based courses on this program

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FOREWORD

This present issue of *Riga Research Studies* contains the notes of the first lecture of the first *private law / civil law* course in the Law and Business BA program at the Riga Graduate School of Law. Whether this is the course in *Comparative Contract Law*, or *Comparative Personal, Family and Business Law*, or *Comparative Property Law*, or some other private law course, may vary from year to year. The main purpose of this paper is to serve as *study material* for first year BA students. It is tailored to the needs of the average first module BA student: an open-minded and interested 19-year-old freshly out of secondary school education, whose legal knowledge and thinking is yet to be developed. The main consideration was to keep this writing clear and simple; legal statements and conclusions are illustrated with easy to understand examples. The pedagogical objectives behind this paper clearly prevail over scientific and jurisprudential considerations, although the system of classification and characterization of private law that this paper suggests may be subject to jurisprudential discussion, just like any other system of categorization. As a general rule, this paper is overtly summational. With its objective in mind, it cannot be anything but summational.

The author decided to write this paper because there is no general introduction to private law in the BA in Law and Business curriculum before specific private law courses commence. Also, no paper has been available that would be tailored to the needs of the target group on this subject. Note, however, that this paper is not about the (codified) general part (common provisions) of private law. It is simply a general introduction to the most important conceptual characteristics of private law.

As lecture notes, this paper lacks references and citations; also, no footnotes are used. In a number of countries, lecture notes, as a specific form of legal publication, intentionally omit such references. The very particular purpose of lecture notes does not allow them. As is the case with most of its very general statements, such as that law can be divided into public and private, the amount of references to sources, even if only to the most well-known ones, would most probably by far exceed the length of the study itself. Since the main purpose of this paper is to help understanding and be used as preparation material for the course for the average first-module BA student, it would be pointless and most probably disturbing to

flood it out with countless references, citations, footnote-explanations about the different views that writers and commentators have taken on one or another specific subject over the centuries.

We hope that this paper will serve as a roadmap to the private law courses yet to come, and that students will find as much joy in reading and understanding it as the Author found when writing it.

Gábor Palásti, 2010, Riga, Latvia

LECTURE NOTES ON THE INTRODUCTION TO PRIVATE/CIVIL LAW

The courses Comparative Personal, Family and Inheritance Law, Comparative Contract Law, Comparative Property Law, Intellectual Property Law, and partly Banking and Securities Law focus on questions that fall under the notion of private law/civil law. Thereby, it is first necessary to briefly outline the major characteristics of private/civil law and place our subject matter within the system of private/civil law. This is what the first lecture will be about.

A preliminary remark must be made that the attempts to structure law in the way presented below and identify a separate body of *civil law* is shared in most *civil law* jurisdictions originating in continental Europe. However, these may not be reflected so much in the legal thinking of *common law* jurisdictions. Nevertheless, on the one hand the choice of our subject matter – personal, family and inheritance law – displays the characteristics of the civil law concept. On the other hand, common law thinking often comes to the same conclusions as civil law, even if through different lines of thought. It is, however, not the objective of this course to deal in detail with the underlying differences between common law and civil law, such as the source of law (judge-made law versus codified legislation); or the importance of the differences between public and private law rules within the same branch or field of law (whereas in common law the rules of both public and private law nature may mix within the same branch or legal field while civil law places a higher importance on the separation of these two kinds of norms in its structure of categorization), etc. These issues are to be discussed within other courses, such as legal history and comparative law. However, a short discussion of the civil law and common traditions through their *sources of law* will appear in the chapter explaining legal sources.

In this present lecture we will use the terms *private law* and *civil law* interchangeably, to conform students to both terms. Roughly speaking, civil law is the name of private law in civil law jurisdictions.

1 THE PRIVATE LAW – PUBLIC LAW DICHOTOMY

Since Roman law there has existed an understanding regarding the structure of the body of legal norms, in that legal relations between actors (so-called legal subjects) can mainly be of two kinds. One involves equality between the players: legal subjects are free to enter into the legal relations of their choice, and they have the power to mutually influence the contents of their relation: their rights and obligations. Eventually this happens when persons enter into legal relations with each other as private parties, within their private capacities.

> ***Example I.1***
>
> When Janis and Inga decide, that Janis will buy Inga's watch, they both have the option to decide whether or not Janis will buy and Inga will sell the watch – that is to say, whether to make the contract for the sale of Inga's watch. The same is true of the question of what the major conditions of the deal should be – price, time and place of performance, supplementing services such as whether or not Inga will provide Janis with extra batteries, etc. All these issues are decided by the parties mutually and either of the two parties can at any time say "no" to what the other party proposes. The same is true of other kinds of private relations, e.g. whether or not they will want to start dating each other and later on be married to each other.

Another, quite different set of cases is one in which this equality between the parties does not exist. In those cases one of the parties is subordinated to the other. One of the parties can compel the other to enter into a legal relationship with it and dictate the terms. For example, when Janis has to pay taxes to the tax authority of his country, he can not say "no, I do not want to pay taxes, i.e. I do not want to enter into a tax paying relationship with you". He cannot alter the terms of the relationship with the tax authorities either: he can not say "oh, I am willing to pay taxes, but less – or at a later time – than required". Or, if Janis suddenly were to kill someone and the police were to arrest him, then the prosecution to charge and finally the court to sentence him, he can not tell the police, the prosecutor or the court "leave me alone, I do not want to enter into a legal relationship with you". In both examples, the nature of the legal relationships – tax law, criminal law and criminal procedural law – is such that the legal subjects are not free to decide whether or not to enter into a legal relationship (pay taxes, be investigated, charged and sentenced) and to influence its content. It is easy to discover that in these examples the representatives of "the other side" – the tax authority officer, the policeman, the prosecutor, the judge – did not act in their private capacities like Inga when selling her watch to Janis. They acted in a capacity to represent the *interests of the public* rather than of the private individual. To the tax authority officer as a private person it

is likely not to matter whether Janis pays taxes or not; however, to the public interest of the community (the state) whom he represents, it is important that legal subjects pay their due taxes. The policeman may personally not care if Janis killed someone – perhaps for so long as it was nobody the policeman personally knew – but to the wider society it is of primary importance that killers be caught, brought to justice and punished. Thereby, in all these situations it is a *public interest* that overwrites the equality and freedom of the other party enjoyed in private relations. It is not difficult to recognize that the public interest that prevails over the autonomy of the private individual is represented *by the state*.

In legal relations where the parties act freely, they act *in their own private interests* as *private individuals* or in another word as *civilians*. Thereby, this area of law is named *private law* or *civil law*. In cases where one of the parties lacks this freedom whereas the other has a compelling power to bind the other party, it is usually for the interests of the public. Thereby, this area of law is named *public law*. Private or civil law covers such cases as company law, where relations are between private individuals who want to associate for a common business purpose and set up a company of their own to pursue a profit-making activity; contract law where equals are making deals between themselves; family law, where private individuals get together for the purposes of establishing a family through marriage, having children and taking care of and raising their children; copyright law, where one individual creates a piece in the literary, artistic or scientific domain for the use and enjoyment of all others in society, etc. Public law covers such areas as public international law, constitutional law, the law of public administration, criminal law, all procedural laws such as criminal procedure and civil procedure, financial law and tax law, etc. The course *Comparative administrative and constitutional law*, which students have had by the time they encounter their first private law courses, was a good example of public law fields.

Note that the dichotomy of private and public law does not cover the entire legal system, albeit it fairly well covers the overwhelming majority of legal relations. For example the branch of *private international law* (*conflict of laws*) deals with situations in which the subjects of the legal relationship are not the state and subordinated legal subjects such as taxpayers, criminal offenders, etc., as in public law, or private persons acting in theoretically equal positions such as in private law, but *legal systems* between which a choice has to be made because the case is factually connected to more than one legal system. (See more later.)

There is much discussion nowadays about *consumer protection* and how consumer contracts are not made between equals, but rather between a consumer who is in a *weaker position* and a trader who is in a *strong bargaining position* towards the consumer; and how consumer contracts are not between persons of equal capacities and opportunities. Nevertheless, the structure of a consumer relationship is the same as of any private law relationship, even if the bargaining power of one of the parties exceeds the bargaining power of the other.

Example I.2

When Janis goes to the local shop to buy a kilo of bread, he may not start bargaining over its price at the cashier desk and say that he will not give 30 Santims for it, only 15 at best. He will most probably be laughed at and sent away. The terms of the contract are mostly dictated upon the consumer (Janis) by the trader. Nevertheless, Janis still has the option to say "no" and enjoys the autonomy to decide whether or not to enter into a legal relationship. He may go to another store, or bake his own bread at home from flour in one of these bread baking machines for home use, or buy rice or potato instead, etc. Note that this discretion – not to enter into the legal relationship at all – is *missing* from public law relationships.

Thereby, even if consumers are in a weaker position towards the trader, consumer contracts remain private law/civil law instruments, primarily falling in the field of contract law.

It also needs to be clarified that the state, too, has roles in private/civil law, at least *in two different senses*. Firstly, the state acts as *legislator*: it provides the necessary legal framework for private relations by compulsory (cogent) and non-compulsory (dispositive) norms. In the latter case the parties may freely change the rules applicable to their relationship, so that the provisions offered by the lawmaker are simply options. For example in contract law many provisions in the law apply just in case the parties did not provide for a different setting in their contract. The same is true of marriage contracts in family law or contracts over personal maintenance and inheritance in inheritance law. The reason is that when concluding a contract the parties are often unable to foresee specific possibilities about which they may provide (which fall under their so-called freedom of contract), and these cases are automatically covered by the provisions of the law. As another example, the same is true in company law: often the legislator provides examples of how the founding documentation or internal laws of a company can regulate certain matters, from which the founders of the company are nevertheless free to deviate. In civil law the compulsory nature of each norm has to be examined separately.

The fact that the state acts as lawmaker and has the power to regulate the private relationships of legal subjects even with compulsory norms *does not change the fact* that the legal relationship is theoretically between persons of equal capacity. In this sense the legislator is *not part* of the legal relationship. The legal relationship remains between the private parties: the marriage is between wife and husband and not between the married couple and the state, even though the state provided the normative rules of marriage. A sale of goods contract is between the seller and buyer, even though the state has the power to regulate specific contracts, etc.

Secondly, the state, through its organs, may *become a party* to some private law relationships. For example a ministry of the government may need to purchase office furniture for its offices and thus make a contract for the sale of goods. Or the state may inherit if some individual names it as beneficiary or in cases where there is no beneficiary or heir to an estate. Or the state, through the improper actions of its organs, may cause damage to private individuals and thus be financially liable in a non-contractual liability (tort) case. In all these situations the state acts in a capacity *not different from that of any private individual* (natural person, private company, other legal persons). To all these cases the body of private/civil law applies but as if the legal relationship were between regular private entities. However, since it is the same state acting in private relations that otherwise has all regular state powers (such as to legislate, enforce its legislation and to adjudicate), the law has to specifically safeguard that *the state does not abuse its powers* in private law situations. For example that the state does not pass laws in its legislative capacity, that in all government purchases the buyer (the state organ) can determine the price unilaterally, and then, in a private capacity a ministry is knocking on the door of a furniture shop to "purchase" furniture for free because with reference to the laws allowing it to do so, it determines the price at "0". The body of laws that is aimed at preventing the state from abusing its state powers in private relations is of a *public law nature* and applies to the state and its organs; an example of these laws is regulation of public procurement.

From the different aims and nature of public and private/civil law it also follows that the *structure and nature of available legal consequences / sanctions / remedies* differs considerably. The sanctions of public law are enforced against the individual towards *the state* and usually serve the purpose of *prevention and punishment*. Examples are fines or penalties that will need

to be paid to state authorities, or (forced) public work or imprisonment that need to be served under the command of state entities. The sanctions of private/civil law are enforced towards *the other private party* (the injured private party) and primarily serve the purpose of *doing justice to the injured party* (restoring the financial balance between the two parties) rather than prevention or punishment.

Most sanctions in private/civil law are of a *pecuniary / monetary nature* in which case the party in breach of the law has to pay some amount of money to the injured party and not to the state. These private law / civil law categories of sanctions include

1) Restitution (*in integrum restitutio*), in which case the original state of matters has to be restored as if the breach had not taken place, so that the party in breach has to pay the amount that the injured party would have if the breach had not taken place.
2) Another category is when a party is in some specific breach of an obligation and the value of that obligation can be determined: e.g. the contractual price or a share in an estate was refused to be paid at all; or less was paid; or the party is in late payment, etc. In this case sanctions may not go beyond what would be due under the specific instrument (e.g. contract or estate).
3) A third category is returning enrichment, in which case the party in breach has to return the profit that it gained from the breach, even if that amount would not have been due to the other party (note that this sanction does serve preventive purposes as well.)
4) The "queen" of all private/civil law sanctions is damages: the amount that has to be paid if damage is caused to the other party, including not just the actual damage that occurred but lost profit and all costs in relation to the damage, too. (Note that contemporary legal developments in common law jurisdictions seem to put some emphasis on punishment and prevention in private law, too, within the form of *punitive damages* as well, which are in excess of actual damage, lost profit and costs.) The English word "damage" applies to the value of the loss suffered while the word "damages" refers to the amount of compensation to be paid.
5) Another sanction is that when none of the above works, unjust enrichment may still need to be paid.
6) Finally, all these payments may be accompanied by a rate of interest.

The law specifically sets forth the application of all these categories of remedy: it describes the situation in which one or another kind of remedy is available and the conditions upon which the remedies may be awarded to the injured party.

Example I.3

Imagine that a travel agency obtains an "illegal copy" of specific database software designed for travel agencies. The term "illegal copy" here refers to the fact that it was obtained without the permission of the company bearing copyrights over the software and no copyright fee was paid. Imagine that the software company that licenses the use of its programs detects this program on the travel agency's server. The amount that would be due under copyright law is the copyright fee that was unpaid (category no. 2 above). Since that fee would have been due upon purchasing the copy of the software, interest has to be paid from that date.

If complete restitution (category no. 1 above) is applicable, the software company has to be placed in a situation as if it had received the copyright fee on time. Imagine that the software company purchases from all the copyright fees it receives stocks in the same corporation. From these stocks it has earned a profit of 7% on its investment in the period between when the copyright fee would have been due and when it was finally paid. In this case this 7% extra of the copyright fee has to be paid because if the copyright fee had been paid on time, the software company would have earned an extra 7% by investing it in stocks. Thereby, in a restitution case this 7% has to be paid as well. Note that this item also falls under the category of damages as lost profit. On the other hand, this 7% was not due under copyright law, thereby it does not fall under the category of due payments. At the same token, the copyright fee in itself does not fall under the category of damages, because it is not a head of damage but rather non-payment of a copyright fee.

If the software company had any costs in relation to the damage suffered (e.g. it had to hire the services of a third company to detect software theft), that is due under damages (as costs affiliated in connection with damage) but not under the restitution theory, since the company would have hired the company detecting theft of its software anyway, irrespective of the illegal use of software by the travel agency.

Finally, imagine that the travel agency could release one of its secretaries because the database software rendered her employment needless: it could do everything that the secretary had to. If returning enrichment is also due to the injured party, the software company can also claim the salary of the secretary thus spared by the travel agency (minus the licensing fee of the software itself), because by releasing the secretary the travel agency realized a profit. The profit earned by the travel agency by releasing the secretary is neither a copyright fee nor damage on the side of the software company. Thereby it is only payable if the law specifically entitles return of enrichment in addition to either restitution or damages.

Note that the above are the major categories of private/civil law pecuniary sanctions / remedies; the laws of specific countries may contain additional categories or may not know every one of those described above.

In most Western jurisdictions, quite seldom private / civil law may prescribe that a sanction may be of a non-pecuniary nature: this is called remedies *in kind*. In these situations it is not payment of a sum that is claimed but rather that the other party should specifically

do something or give up doing something. One such example is divorce in family law, when some specific aspects of a divorce order – such as physical separation of the couple – cannot be performed through financial means. Another example is that the court may rule that the unlawful possessor of some movable property should serve the object on the lawful owner; or that an unlawful possessor of a real estate should vacate the land or house. Or that a trespasser should stop trespassing on the land of another. Or that an item of ancillary property of the estate of a deceased person be served in kind to the heir rather than transferring its value in the form of money. Or that someone who publicly made some defamatory remark about another, and thus negatively affected their reputation in the public eye, should publicly apologize or withdraw the remark. Nevertheless, even if these sanctions are not followed voluntarily, the ultimate means of enforcing them are, more often than not, of a pecuniary nature. It is very rare nowadays that law enforcement in civil law really means that an officer will compel a private individual to comply with an order in kind personally. Rather, in case of ultimate non-compliance pecuniary sanctions are usually enforced. Rare exceptions may be separation orders in family law or vacating orders for real property.

Historically, however, personal performance of civil law sanctions did prevail in ancient, medieval and even in early industrial societies. In these cases a wrongdoer causing harm had to personally serve the injured party until the value of the services compensated the loss. Or a party in debt in a contract was ordered to personally serve the creditor to cover their debt. These forms of in-kind sanctions actually were often forms of personal in-debt slavery. The fact that they do not prevail nowadays is at least as much due to the influence of human rights on civil law as the improvement of the general financial conditions of society.

Most often public law and private law touch upon different aspects of *the same policy considerations* and *same fact patterns*. Remedies in public and in civil law serve different purposes in the same case. Thereby, they can be applied cumulatively.

Example I.4

If a driver drives when drunk and causes an accident in which a pedestrian is injured, under criminal law the state will punish the driver: he may have to go to prison. The primary objectives of the driver's imprisonment are punishment and prevention (specific prevention of the driver: while he is in prison he cannot commit the same crime again; and his imprisonment may make him think twice if he wants to drink before driving in the future; general protection of society: others may learn from the

example of the driver and may think twice before drinking and driving). Another public law sanction may be that in administrative law his driving license may be temporarily or permanently withdrawn. This sanction serves the same purposes as above. However, the situation of the injured party is little affected by these remedies. At best he may feel emotionally relieved that the driver had to go to prison, but it does not mend his personal position. He may still have to pay for medical treatment, he may be out of a job, he may suffer physical and emotional stress, he may have to cancel commitments he had made earlier, etc. All these interests will be protected by and the loss compensated by private/civil law remedies. Damages will be paid to the injured pedestrian and not to the state and he will have the chance to add all the loss and negative consequences suffered as a result of the accident when calculating his damages claim.

THE BASIC STRUCTURE OF PRIVATE/CIVIL LAW

Private/civil law can well be systemized, focusing on the possible *subject matters* of different civil law relations. Tracing back to the analytical works of jurists in the ancient Roman Empire and later further sophisticated by German legal schools of thought, it has been realized that the separate fields of civil law relations can be grouped in different categories. These categories help to deal with the massive amount of rules that would otherwise look like a jungle of provisions difficult to handle. The structure of private/civil law presented below applies more or less to the law of every continental civil law country. Even if common law jurisdictions look at these attempts of categorization somewhat differently, the same fields, categories and sub-categories can be identified in those legal systems as well.

1.1 General part

Usually, just as in most other branches and fields of law, civil law has a general part and a specific part. The general part contains rules which are common for every specific category. These rules are shared by all possible private law relations. You are likely to find a part called *General part* or *Common provisions* in most civil codes or in most literary works discussing jurisprudence, usually at the beginning of the code or jurisprudential work. For example the principle of *good faith* or the prohibition of *abusive use of rights* equally applies in the law of persons as in contract law, in property law or in inheritance law. These are commonly shared values for the entire body of civil law, even though it may be possible that for specific situations specific details on these commonly shared values are found in the specific chapters of one or more categories.

For instance, protection of good faith is usually looked at as a general rule in private/civil law. In all civil law relations, the parties (legal subjects) are required to act in good faith when dealing with each other. In some legal systems this is further supplemented with other principles, such as the duty to cooperate, in others it is not – but the requirement that the parties must exercise their rights in good faith is a common rule for all civil law relationships.

Example II.1.1

Imagine that during negotiations for a contract one of the contracting parties already knows that it will *not* conclude the contract with the other party, yet it behaves as if the other party still had the chance to be contracted. It may have several reasons to do so: for example it wants to keep the other party busy in the negotiations so that the other party will be likely to concentrate on the current negotiations and in the meantime it is likely to miss out a chance for another contract with a third person in which the wrongfully negotiating party is interested as a competitor. This situation is clearly against the general principle of good faith, which is a common rule for civil law. Yet the law on contracts may contain further specific rules on the situation, giving it a name – the situation is often called wrongful negotiations – and supplying further rules about how to handle it.

Example II.1.2

Situations similar to the above example can be found in other categories of civil law, too. Imagine, for example, that a young lover is enthusiastically trying to deepen relations with his chosen one. He is hopeful that he will soon marry his chosen girl and he is providing one lavish gift after the other to the girl. The girl is accepting these gifts and she knows that the purpose of these gifts is that the giver wants to marry her. With her behavior she fully encourages her lover, yet she is pretty firm that she will never marry this man, not even a kiss, nothing. She keeps her desperate lover in the false belief that he can be successful, only to keep the generous and valuable presents for herself. In other words: she is not acting in accordance with the general principle of good faith when she accepts the gifts although she knows that she will never want to marry the poor guy. Family law may nevertheless contain additional specific rules on returning engagement gifts, which are specific only to family law.

In both examples above, the same standard – the standard of good faith – was breached. The standard is common for all private law situations because it is possible to breach good faith in all civil law situations. Other rules are, however, specific only for one or another category of private/civil law. For example, the rules on child maintenance are specific to family law only, and there is nothing that would even remotely resemble child maintenance in intellectual property law or in inheritance law. Or the copyright rule that an author is granted the right to have his name identified with his work without time constraints (Shakespeare remains the writer of Romeo and Juliet forever) triggers nothing similar in non-contractual liability law or family law or company law. Those rules that are specific only to one or another type of legal relation are contained in the *special part* of civil law. Eventually, the amount of special rules compared to provisions of the general part is overwhelming.

Some specific fields within private law have their own general part, which contain provisions applicable throughout the specific provisions of that field of law only. For instance contract law has an extensive general part that contains rules that apply to every

single specific contract that follows. Other areas of private law, such as intellectual property law or inheritance law, do not have their own general part.

The general part of private/civil law is not taught in the LL.B. program in any individual class (even this lecture is not about the general part of private law but rather a general introduction to private law). The general part of specific fields within private law is discussed within the course that relates to that specific part of private law. For example, the course *Comparative Contract Law* will address general contract law issues.

1.2 Special part

The special part contains a set of categories that are regulated differently from each other. From the overall category of law through the separation of public and private/civil law the chain of categorization from the overall to the very specific is basically endless, down to the different fields by subject matter within civil law, down to the regulation of specific instruments and then exceptions from these instruments At the end of the line are the individual norms distinguished from one another. Needless to say, the purpose of setting up any kind of system within the jungle of thousands of individual norms is to help orientation within the body of provisions. The system below is based upon traditional classification attempts of private law that distinguishes subject-matter categories of private law mostly *in one level depth* (property law, inheritance law, family law, labor law); sometimes going down the classification chain *in two levels* (intellectual property law and law of obligations) and goes down to a *third level of categorization* only in connection with one area (personal law). This contemporary system of categorization can be looked at as the skeleton of private/civil law. For our purposes, we identify seven basic categories within private/civil law which have, by today, gained independent recognition (the law of persons; property law; intellectual property law; the law of obligations; inheritance law; family law; labor law). As you will find, some of these categories will be divided into further sub-categories. Note that the classification attempts that have been made throughout history, either in the codes themselves or in jurisprudence, seldom agree with each other in every single aspect. Thereby, you may easily find other solutions for categorization. For instance, in the cradle of civil law classification, the old Roman law system described by *Gaius*, only three basic categories are recognized (*personae* = law of persons; *res* = law of things (mostly: property);

actions = common to both, such as inheritance or the law of obligations). Early civil codes like the French or Austrian followed this system of classification. Other codes enhanced this narrowly tailored system: e.g. the basic structure of the German and Swiss civil codes identifies four subject matters in its main titles: law of obligations; law of real things (mostly: property); family law; inheritance. Other codes extend to other areas of law, such as private international law (conflict of laws), that we see to be out of the scope of private/civil law, yet there is some clear connection to it. The reasons why there are many different models of classification are many. Sometimes a specific social phenomenon was as yet absent at the time of codification. For example Gaius, in his time, could not think about the classification of industrial property law (a sub-category of intellectual property), because the technical conditions of mass industrial production were not yet in existence. Another reason is that the subject matter of an area of law was split between existing categories. For example the Napoleonic Civil Code did not identify family law as such, but rather treated questions of marital status (marriage, divorce) in its part on persons and treated property-related issues such as matrimonial property under property law. While an overall comparison of characterization (classification) models of private law would go far beyond the objectives of this introductory lecture, we have attempted to set up an up-to-date, coherent system that would cover and separately identify all major legal fields that have been regulated as private law in most contemporary Western legal systems.

The **law of persons (personal law)** focuses on the *general legal recognition* of persons. In most contemporary legal systems persons are divided into two: *natural persons* are human beings, private individuals. *Legal persons* are artificial creations by natural persons (and other legal persons) for the purpose of pursuing some specific activity, such as different company forms (e.g. stock corporation, limited liability company, partnership, etc.) for pursuing profitable business relationship, or political parties for pursuing political activity, or associations or other like forms to pursue civil activity. Legal persons are sometimes also considered to include, and sometimes not to include, artificial creations without recognized legal personality, e.g. a spontaneous group of same-hobby followers, or branches or organizational units of recognized legal persons, e.g. a department or institution of some legal person.

By today, *company law* (in the U.S.: the law of corporations) has pretty much grown to be an independent area of law, with its own legislative acts and/or codes and rules. The same applies, to some extent, to non-profit legal persons. Private/civil laws differ from country to country as to how much non-profit legal persons are covered by private/civil law and how much they fall under the scope of a civil code or whether they have created their own legal instruments. Generally, those non-profit organizations that may primarily be in the service of public and political purposes, such as political parties, are considered to be governed by constitutional law and public administrative law. Those forms which fall closer to traditional private/civil law purposes, such as foundations, are usually covered by private/civil law. Some forms, such as associations, are equally open to be utilized for both public and private purposes, and their categorization differs from country to country, or they are partly covered by private/civil and partly by public law. The course *Comparative personal, family and inheritance law* will focus upon natural persons. Company law will be the subject matter of another course: *Comparative Company Law*; the law of non-profit organizations is not covered in-depth in this program.

Questions relating to the personal law of natural persons relate to the general legal capacity of natural persons (whether one can have rights and obligations *in general* in civil law just by existing as a human being) and to the capacity to act (whether one can exercise one's own rights in one's own name and on one's own behalf, or whether restrictions apply, e.g. due to age, insanity or other like factors). The time-factor of general legal capacity (commencement and end) and its major characteristics are also covered by this area of law.

Personal law also covers those rights of a private/civil law nature that stem from simply existing as a human being (without additional qualifying factors): these are called personality rights or (in common law jurisdictions) privacy rights. The scope of the course *Comparative Personal, Family and Inheritance Law* will, however, not extend to personality/privacy rights issues in the LL.B. program.

Property law is the traditional area of law that regulates issues in connection with ownership of things. It includes such issues as the categorization of "things" as objects in law (e.g. movable or immovable, tangible or intangible, etc.), the property rights of full ownership and restricted forms (e.g. possession, enjoyment); the commencement and end of

property rights, etc. All these questions will be touched upon in the course *Comparative Property Law*.

Property law issues in connection with nationalization and expropriation and other forms of forced changes in property due to compelling state interests (such as confiscation) are usually considered to be either on the borderline between private/civil law and public law, or are considered to fall entirely within public law (constitutional law, public administrative law, financial law, criminal law and criminal procedure, etc.). Property law issues in connection with protection of foreign investment in the hosting country against nationalization or expropriation; and against risks such as civil wars or riots are, however, usually considered to be covered by *international economic/trade law*.

Property rights can often be disposed of in the form of a contract: e.g. a contract of sale deals with ownership rights and usually physical possession of some goods. These means of providing for changes in property rights are, however, regulated by contract law and not property law. Other private/civil law changes in property may be covered in other fields of private/civil law: e.g. the effects of marriage and divorce on property are covered by family law; change in ownership due to the death of the owner is covered by inheritance law. Some forms of change of property remain within property law, such as *adverse possession*.

Intellectual property law deals with the rights and obligations relating to intellectual creations of the human mind (like literary works, poems, novels, or works in the industrial domain like inventions) in connection with their utilization or practical realization. It has two sub-categories: *copyright law* and *industrial property law*. Copyright law (sometimes also called *authors' rights*) protects works in the *literary, artistic and scientific domain*: poems, novels, dramatic works, songs, paintings, sculptures, PhD dissertations, handbooks, etc. It contains a set of rules about whether or not a creation of the human mind is protectable under copyright, about how to establish authorship, and about the rights of different actors in respect of the work. These actors are the author, other users who add to the product such as performers, publishers, producers, etc., and finally users who use the end-product, e.g. retailers of copies of the work or the general public. *Industrial property* answers similar questions in connection with creations that are mostly for industrial/commercial use. Some of these forms are widely known such as patentable *inventions* or *trademarks*. Others are rather specific, such as the *topography of microelectronic semi-conductors* (microchips). Some general

differences between copyright law and industrial property law are that copyright protects the form in which some intellectual content was expressed against unlicensed copying (hence the origin of the word: copyright was originally nothing more than literally the right to copy) and disposal of copies; whilst industrial property law protects against unlicensed reproduction/realizing of the contents of the protected procedure or product. Another important example is that copyright protection does not need registration (it is available from the time the work was created) while industrial property rights need registration.

Example II.2.1

Imagine that an engineer developed some specific spare part for an automobile engine of specific types of cars. The invention that he developed was registered as a patent. The engineer later published the most important features of his invention in a professional magazine for the car industry. If another magazine republishes the article in one of its own volumes without authorization of the author or original publisher, that will be an *infringement of copyright*, because unauthorized copying of a work in the scientific domain took place. However, the patent itself (the industrial property right) remains unaffected. However, if another car manufacturer simply takes the magazine article, and from that the engineers of that manufacturer develop and then without authorization use the same solutions in their cars as found in the article, that will infringe *industrial property rights* over the *patented invention*, because the procedure (or the product itself) contained in the patent was reproduced without licensing.

Earlier it was believed that intellectual property law is a *sub-category of property law* (hence the name: intellectual *property* law), since the author/inventor, etc. have property-like rights over their creations. Others thought that it was a *sub-category of personal law*, since some rights of owner resembled personality rights, such as the right to be recognized as author of the work. Historically speaking, the cradle of intellectual property law (i.e. XVII-th century England) was *public law*, since after the invention of printing, also of several industrial inventions, duplicating intellectual creations (printing machines) and some related important industrial activities were a royal monopoly, so that licensing questions arose as royal concessions granted to private enterprises. By today intellectual property law has pretty much been recognized as an *independent field of law* within private/civil law.

Example II.2.2

Imagine that a famous contemporary writer publishes his most recent romantic thriller, a copy of which you, as a great fan of thrillers, purchase in the local bookstore. Rights over your copy of the book fall under traditional property law. That is, if you accidentally leave your book on a public bus, you can have a claim to that copy against the public transportation company (or whoever finds it) under property law. However, just by purchasing a copy of the book, nobody would think that you

> also purchased the right to make further copies at home on a photocopier and sell them on the market; or approach a film studio that you have an offer for them to have this book put on screen; or replace the original author's name for your own name as writer, claiming that by purchasing a copy you in fact bought the right to be identified as author. All these questions would come under intellectual property law – copyright law – and not property law (or personal law for that matter).

Intellectual property law will be covered in detail by the course *Intellectual Property Law*.

The law of obligations covers fact patterns where legal obligations are created only between persons relative to that specific fact pattern (usually two); whereas in other fields of private law, subject to some exceptions, legal relations are between one entitled person and the whole world. For example, in property law the property rights of the owner need to be respected by everyone else. These latter types of legal relations are often called *absolute* because the right owner's position is absolute: it has to be respected by everyone else. In contrast, the law of obligations contains rules that are *relative*: usually between two (or more) specified people. The two main grounds for a law of obligations relationship are *contractual* and *non-contractual liability* (in common law: tort). A contract binds just those who are party to it, and apart from some specific exceptions, they are of nobody else's concern. Non-contractual liability relationship arises when someone causes harm to someone else and liability (financial liability) has to be established. For example, when a car hits a pedestrian causing them harm, questions arise like whether or not the car driver is liable for the accident, and to what extent the driver should pay damages to the pedestrian. This fact pattern is also relative only to those involved: the driver and the pedestrian. Legal obligations have been created by the accident only between these two, and unlike in absolute legal relations, others are neither entitled nor obligated in this situation.

Loss or damage is often caused by a *wrongdoing*, such as, in most cases, hitting someone with a car. The traditional notion of wrongdoing is understood as:

a) a wrongdoing by someone for which the person is *liable*;

b) which *caused loss, damage, harm or injury* to someone else;

c) in which the loss, damage, harm or injury is the *result* of the wrongdoing; and

c) for which the wrongdoer has to *compensate* the injured party financially.

The traditional term of wrongdoing is often called *delict*, after the term's Latin origin. However, more than just contract and delict, financial liability in a legal relationship relative only to certain persons may arise from other fact patterns, too.

Example II.2.3

Imagine that Liga receives an amount of money in her bank account by mistake from someone she does not even know. By some technical mistake, or the mistake of either the sender or the employee of the bank, one figure within the 24 digits of the original recipient's bank account number was mistyped, and the mistyped bank account number displayed Liga's account. Even upon moral considerations, anyone would feel that Liga should return the amount transferred by mistake. She should not be allowed to keep the money thus received. Yet in this relative relationship which exists between Liga and the sender of the money, there was *no contract*: Liga and the sender did not even know each other. There was *no wrongdoing* on Liga's side either: she did not do anything to get the money, it just, all of a sudden, appeared in her account. Thus, this case is neither contract nor delict.

The above example is often called *quasi-delict*, a situation in which no wrongdoing took place, yet other than that, the fact pattern behaves like a delict: Liga is obligated to give the money back. Quasi-delict is in fact a *sub-category* of the law of non-contractual obligations.

Thus, one way to describe the basic structure of the law of obligations is this:

Contract law	**The law of non-contractual obligations**	
	Delict	Quasi delict

The size difference between Delict and Quasi-delict refers to the fact that in practice the law of delicts has gained by far more importance than quasi-delict.

Some categories of non-contractual behavior that cause harm to someone may take both forms: delict and/or quasi delict. Such is the case of the broad category of *product liability*: the liability of manufacturers, producers etc. over injury caused by their product to third persons (persons other than those the manufacturer, producer, etc. is in a contractual relationship with).

The line between contractual and non-contractual obligations is also not uniformly the same in most jurisdictions: some categories are difficult to classify. For example the case of *wrongful negotiations* in the situation in *Example I.2.1* is sometimes characterized (categorized) as part of contract law, because negotiations took place in the course of contract formation, even if ultimately no contract was made. In other countries, wrongful negotiations are part of the law of quasi delict, since the fact that in these cases no contract exists excludes it from the scope of contract law.

The term "non-contractual obligations" is only one choice to name this area of law. Yet it seems that this is the choice that the European legislator prefers over other names (see the so-called Rome II Regulation: Regulation (Ec) No 864/2007 of the European Parliament

and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)). Common law traditionally calls the law of delict *tort law*, offering a somewhat different structure of this body of law than civil law legal systems. Others prefer to call the law of non-contractual obligations *liability law* or the *law of damages*. Note however, that these names may sometimes be misleading: as to liability law, financial liability exists under other branches of law, too, such as in financial law; and as to the law of damages, damages claims also arise in contract law and sometimes in other areas of law, e.g. labor law.

Since the course on *Comparative Contract Law* is offered as the first mandatory private/civil law course, more on this subject is discussed in that course. However, non-contractual liability (tort law) is not covered in the LL.B. (B.A.) program.

Inheritance law or **the law of succession** primarily deals with the question of passing of property and other related rights due to the death of the original owner. The two main areas of inheritance law are *intestate succession*, in which case the (US) decedent (UK: deceased) did not make provisions about the passing their property in the event of their death, and the *law of wills*. Intestate succession law primarily draws up a legal order of inheritance between the surviving relatives after the deceased/decedent, and contains some additional correctional provisions.

The law of wills deals with questions such as testamentary capacity (the capacity to provide for the event of death), formal and substantive conditions of wills, the status of changing circumstances after making a will (e.g. when there is either a change in the property disposed of in the will, or in the persons in connection with the estate of the decedent/deceased); revocation of wills; interpretation of wills, etc. It also contains correctional measures to restrict the autonomy of the testator in protecting the interests of others, e.g. to prevent the exclusion of some important relatives (e.g. a surviving spouse or children) from inheritance, or unreasonable conditions in the will.

Death itself may lead to changes in property other than just what is considered to be inheritance. For example, death may give rise to payment of a sum by an insurance company under a life insurance contract. These cases (so-called non-probate transfers) are only partly covered by inheritance law.

Succession cases are often closely connected with other fields of private law: the result of inheritance is a change in ownership, which connects it to property law. Some

instruments recognized and dealt with by in inheritance law come from contract law, e.g. a contract about inheriting in exchange for personal maintenance, or a gift given by the decedent/deceased while alive to someone (an *inter vivos gift*) are given specific importance in inheritance law. Nevertheless, issues arising out of death quite notably distinguish this area of private law from other fields.

Inheritance law will be covered by the elective *Comparative Personal, Family and Inheritance Law* in detail.

Family law deals with questions relating to the private law dimension of family and like relationships. In particular, specific issues of marriage – marriage conditions, rights and obligations within marriage, marital (matrimonial) property rights, maintenance, termination of marriage (divorce) – are considered. A specific chapter of family law deals with the rights of children within the family. Also, family law covers issues relating to private relationships that seek similar recognition as families do: cohabitation, life partnership, and the legal recognition of same-sex relationships.

Earlier in history, the main body of family law used to fall partly under personal law (personal status, marriage) partly under property law (marital/matrimonial property). However, since the XIXth century, when German legal thinkers started to group norms relating to family and marriage together, the independent character of family law has started to be recognized. Today family law is a changing body of law that has, although it has kept its overwhelmingly private law character, incorporated public law provisions as well, such as those relating to the legal treatment of domestic violence, the enforcement of children's rights, state supervision of guardianship within the family, etc.

Family law will be covered by the elective *Comparative Personal*, *Family and Inheritance Law* in detail.

Labor law is a relatively new area of law compared to traditional private/civil law fields. The categorization of labor/employment relations within private/civil law is not as widely recognized as those of the previous legal fields. Some aspects of an employment relationship are undeniably *private* in character, since the relationship between a private employer and employee usually rests on an *employment contract*, which has grown out of the private law notion of contract law. Nevertheless, the role of the state in employment relations is much more than just being the legislator for labor relations, while sometimes the state can act as employer (see, e.g. civil servants). Illustrations of public law regulations in

labor law are many. For example, through its unemployment agencies the state itself is active in employment relations. Again, through its system of state subsidies or tax exemptions, the state encourages specific labor relations over others, or employment in one sector over others. Moreover, through its system of labor supervision it monitors employers to make sure that employee rights are protected (for safety, social security and other like reasons). Additionally, through its fiscal system the state burdens both employers and employees from payments made within the employment relationship. Besides, the state provides for specific social security services such as pensions, the contents of which are linked to employment relations in a variety of ways. Finally, the state interacts in protecting labor rights such as the right to strike, provision for holidays and resting time for employers, etc. More than any other area of private law, labor law is the one which is the most complex in its nature and incorporates both private law and public law features.

Labor law does not form part of the LL.B. program.

I. General part: issues commonly covering every segment of private/civil law.
II. Special part: issues by categories, depending on the subject matter of the legal relation. The list of issues in these categories is by way of example only.

Personal law (law of persons)			**Property law**	**Intellectual property ("IP") law**		**Law of obligations**		**Inheritance law/Succession**	**Family law**	**Labor law**
Natural persons (human beings) Issues: legal capacity of natural persons; personality (privacy) rights and remedies	***Legal persons and other artificial persons without legal personality***		Issues: classification of things (e.g. real or personal property). Rights and obligations of owners and other proprietors (e.g. possessors). Forms of acquisition of property. Commencement and end of property rights. Public law aspects: nationalization, expropriation and other forms of deprivation of ownership and property rights because of compelling state interests.	*Copyright law* Issues: protection of authors in respect of original literary, artistic and scientific works. Rights of authors in respect of their works *vis-à-vis* users (performers, publishers, producers, simple end-users, etc.) and rights of users *vis-à-vis* each other and the author.	*Industrial property law* Issues: rights of creators of a variety of intellectual works for commercial and industrial use. E.g.: patents, trademarks, appellations of origin, topography of microelectronic semi-conductors, etc. Rights and obligations of creators and of all interested parties regarding different forms of utilization of the protected work.	*Contracts* Issues: formation, performance and termination of contracts, rights and obligations of the contracting parties. Liability and remedies for defects in performance of the contract. Specific regulation of a variety of specific contracts.	*Non-contractual obligations (tort law)* Issues: liability for illegally causing harm or damage to someone. Determining the level of care, causality, the amount of damages to pay and other possible remedies, excuses for causing damage, etc.	Issues: the passing of property and other rights upon death, either under a will or under intestacy law. A brief discussion of non-probate passing of property and of estate administration.	Issues: rights, obligations and legal implications in connection with the family: marriage, divorce, marital property, maintenance, child support. Legal recognition of other forms of relationship: life partnership, cohabitation, etc.	Issues: rights and obligations of employee and employer; e.g. working conditions, pay, holidays, commencement and termination of employment, etc. Strong public law aspects for state employees working under command (e.g. civil servants, members of armed forces, etc.) Also: public law issues affecting society at large, e.g. regulation of strikes.
	Business entities (companies, corporations of various kinds). Issues: establishing, managing, functioning and dissolving business entities. This area of law has, by today, individualized itself from the law of persons and is called Company Law or the Law of Corporations/Corporate Law.	*Non-profit organizations* (e.g. civil and other non-profit associations; foundations; political parties, etc.) Issues: establishing, managing, functioning and dissolving non-profit organizations.								

Not all of these categories of law serve a business function. Eventually, personal law of natural persons and of non-profit organizations, non-contractual liability law, inheritance law and family law do not serve business. It is, for example, not possible to get married or inherit on a professional profit-making basis, even if huge sums of money may be involved in any matrimonial relationship or estate. The rules of family law or inheritance cannot be applied in a profit-making business fashion, even if from time to time extreme cases emerge in which young people – of both sexes – may turn out to be marrying elderly parties with the intention of surviving them and getting rich from their estate. The rules of these fields of law do not serve business objectives but, rather, important *social purposes*.

The main legal instrument of conducting business is, however, *contract*. Contract law can also perform non-business purposes. *Company law* creates the preconditions for conducting business; thereby it is *entirely at the service of business*. *Intellectual property law* also strongly serves business purposes, albeit some aspects of activities governed by IP law, such as artistic creation, are not necessarily linked with business purposes. Traditional property law serves *much broader social interests* than just conducting business, although it is possible to utilize the regulation of company law *entirely* for business purposes, e.g. real estate agencies.

Besides the above categorization, both practice and jurisprudence have developed other categories of the law. The terms *commercial law* or *trade law* or *business law* deserve special attention. Although some smaller differences exist between these categories, they nevertheless come from the same idea. They group together those areas of law that are *relevant for conducting a professional profit-seeking activity*. A commercial lawyer or business lawyer would most often handle *all aspects of law* that his / her client presents in a business capacity, be it of a public or private law nature. Aside from business related fields of civil law outlined in the previous paragraph, business law covers public law aspects of conducting business, such as *competition law* (state supervision of business competition in order to safeguard that competition remains fair and free of distortions), *financial law* (esp. tax law), *public administrative law* to the extent business activity is administered by the state, etc.

Note that models for systemizing private/civil law based upon *other criteria* than subject matter also exist; see, for example, the above discussion – after the table – on how some parts of the law are at the service of business whilst others serve little if any business

function. Yet another aspect of categorization is one which focuses on the legal source: whereas everything that is in a separate civil code is considered to be traditional private/civil law (e.g. personal law of natural persons; traditional property law; law of obligations; inheritance) while other parts of law codified in separate law sources (codes) form separate fields of law (e.g. company law where there is a separate companies code; family law where there is a separate family law code; labor law with labor codes, etc.). Other models of categorization are based upon the nature of the legal relationship from the point of view of being *absolute* or *relative* (discussed above). Nevertheless, the model presented above is probably the most useful in giving orientation in what is the special part of private/civil law today.

1.3 Sources of private law

Three different systems call for independent recognition in connection with the sources of private law. By today, the line between these three systems can not be sharply drawn.

In *civil law countries* the *major sources* of private law are *civil codes*. In these countries the underlying idea is that it is possible, through legislation, to enact a single-piece code that covers all (or as many as possible) fields of private law. Living examples of the civil law model are the 1804 French Civil Code (earlier called the *Code of Napoleon*), the Austrian Civil Code of 1812 (*Allgemeines bürgerliches Gesetzbuch*: AGBG), the German Civil Code (*Bürgerliches Gesetzbuch*: BGB) of 1900 or the Swiss Civil Code of 1904 (*Zivilgesetzbuch* - ZGB). (For historical perspectives from the Code of Hammurabi through the Roman Corpus Juris Civilis or a list of religious codes regulating private law relations such as the Canons of the Apostles, the Qur'an and Sunnah or the Indian Law of Manu, also for early industrial age codifications, you are kindly referred to your studies in Legal History.) The civil law concept has been most prominent in continental European countries (other countries following the Napoleonic model included Italy, the Benelux countries, Spain, Portugal, Greece, etc.). The only area traditionally unaffected by the civil law movement in Europe was Scandinavia. However, especially through influence in colonial times, in a number of Latin-American, African and Asian countries the civil codes of the colonizing nations were enacted or adopted. In other non-European countries, the civil law codification movement was followed voluntarily. By today civil codes apply in such countries outside of Europe as Turkey, Japan,

Taiwan, South Korea, the Philippines, Thailand, Indonesia and a variety of Latin-American and Sounth-American countries. Civil law traditions sometimes appear as islands in common law oceans: e.g. in the U.S.A., Lousiana follows the civil law method; as does Scotland within the United Kingdom. In Canada civil law is most prominent in Quebec.

However, even these countries differ somewhat as to whether some specific (usually newer) fields are regulated within the civil code or separately. For example labor law or intellectual property law are often contained in separate pieces of legislation; and family law may sometimes be regulated at least partly outside the scope of civil codes. The reasons are that sometimes these fields of private law emerged much later after the original codification of civil law and are often contained in international conventions, such as the basic corpus of intellectual property law. With other areas, such as labor law or family law, the public law features often called for legislation outside of the scope of civil law.

Although the main sources of (civil) law are civil codes that systematically address as many legal issues in connection with the regulated subjects as could possibly be foreseen by the legislator, and although there is no system of precedent, even in civil law countries judges play some role in developing the law itself. Firstly, as an exception from the lack of precedents in civil law countries, some higher courts do have the power to decide on important interpretational questions that courts are obliged to follow in future cases. The magnitude of these compulsory decisions is, however, usually insignificant compared to judge-made law in common law jurisdictions. Court decisions that are mandatory for ("binding on") courts in future cases are said to have *binding authority*. The second option for judges to develop the legal system in civil law jurisdictions and thereby to be identified as sources of law is through establishing a *non-binding uniform judicial practice* in interpreting and / or applying certain provisions of codified law. Although in civil law countries as a general rule court decisions do not have binding authority for future cases, courts nevertheless tend to pay attention to past judgments in connection with interpreting / applying the same provisions. Thereby, a lawyer may successfully rely upon and cite to the past courtroom practice of the same provision in a given case, because judges tend to prefer harmony in their judicial decisions, even though past decisions are not formally binding for future cases. This phenomenon is wrapped up in the term that court decisions have *persuasive authority*, because even though they do not bind the courts, they do persuade the

judge to interpret or apply the law in a similar fashion as in previous cases. Even very tight and extremely precise codes need judicial interpretation, usually because there may be cases that the legislator did not think of when passing the code, or because the more a certain subject is overregulated, the higher the chances are that the law will contain some contradictions or ambiguities that need interpretation and clarification by the judge.

Finally, sometimes *jurisprudence* itself, legal literature, scholarly writings and academic opinion are considered to constitute a very specific source of law when either interpretation or gap-filling in connection with codified law is needed. For example in Germany it may easily happen that the theoretical academic opinion of a well-known scholar or passages from a widely recognized commentary will be decisive in a given case before a court, even though jurisprudence formally does not have legislative powers. Jurisprudence also helps to systemize and understand codified law – this is especially true in connection with civil law.

Quite the opposite of the civil law system are *common law jurisdictions*. Sources of law – and of private law, too – were primarily precedents, whereas court decisions had binding authority for future cases. (For the historical reasons for common law to have developed in the way it did, you are kindly referred back to your studies in Legal History.) Since common law originated from England, former British Empire countries usually follow the common law tradition: Ireland, the United States (excl. Louisiana), Australia, New Zealand, South Africa, Canada (except French-speaking Quebec), India, Pakistan, Malaysia, Singapore, Sri Lanka, Ghana, Cameroon and Hong Kong.

By today, in all common law countries the rate of statutory law compared to judge-made law has significantly increased. In fact, statutory law slightly takes the place of judge-made law. Nevertheless, lawmaking through legislation in common law countries is quite different from law-making in civil law countries. In private law this means that while in civil law countries a general and systematic civil code is aimed at covering private law as widely as possible, in common law countries separate acts or codes exist in connection with the different fragments of private law. What is wrapped up in a civil law country in a single civil code is often contained in a number of acts in common law countries, all covering specific segments of their designated subject matter. As an example, while the major body of family law in Germany and France is to be found in their respective civil codes, in England relevant

acts include the Matrimonial Causes Act, the Divorce Reform Act, the Matrimonial and Family Proceedings Act, the Married Women's Property Act, the Children Act, the Guardianship of Minors Act, and some specific aspects of family law would be covered by such less obvious pieces of legislation as the Rent Act, the Housing Act or the Administration of Estates Act. All these questions would, in a civil law country, be resolved under the same civil code.

Another typical feature of common law legislation is that it is less sensitive to jurisprudential categories. For example private law matters of inheritance law are usually governed in the same civil code in civil law countries where all other *private* law matters are governed. However, such issues as court procedure or other public law aspects are usually outside of the scope of civil codes. As a counter-example, the federal-level non-compulsory code of inheritance in the United States is called the Uniform Probate Code. This code is not part of any overall civil code, because there is none. On the other hand however, it provides a complex coverage of inheritance, dealing not only with private law aspects of inheritance but also with such public aspects as procedure (probate and administration of estates) or apportionment of estate taxes.

The role of jurisprudence is quite different in common law countries than in civil law countries. Originally, the work of jurisprudence was done by judges: the sophistication of legal arguments in case law often resembles the style of continental legal writers. As a result, you are likely to find less traditional jurisprudence in common law countries than in civil law, and even what exists is less considered with the same value in courtrooms than their civil law counterparts.

The third group of legal systems is considered to form a *hybrid* or *complex* group, something in between civil law and common law. Often the legal system of Communist countries (the so-called Socialist legal systems) and even their Post-Communist versions display elements of both basic systems. Traditionally the codification movement was strong in a number of Post-Communist countries (especially in Central and Central-East Europe) before Communist rule was introduced, and civil codes existed. However, Communist rule through its centralized lawmaking technique often relied on authoritative decrees rather than complex codes. Also, the importance of private law relations was clearly inferior to state and collective relations, which rendered civil codes practically inferior compared to other

sources of law. Finally, hardcore social and communist values often quashed the market-oriented values of civil codes. As a result, even if civil codes existed in a number of Communist/Socialist countries, the most important rules were often contained in decrees and other sources of law. After the fall of Communism, the codification movement has slowly started to gain some impetus in most of these countries. The situation by today usually is that while there may be a civil code in most of these countries, entire fields (e.g. family law) or specific questions are regulated separately. The *coverage of civil codes* is clearly narrower than in traditional civil law countries. On the other hand, the *importance of judge-made law* does not exceed that of civil law countries. The *importance of jurisprudence* remains somewhere halfway between its low reputation in common law countries and its distinct recognition in civil law countries. Because universities were the basis of "independent thinking" during the Communist era, no formal importance whatsoever was attached to jurisprudential works. Also, since Communist parties wanted to secure loyal academic staff, loyalty was often a more important selection criterion than professionalism. This was especially the case in civil law after the Communist concepts of private relations were introduced and most university chairs and academy departments re-organized in almost all Communist countries. As a result, both the professional sophistication and the availability of in-depth academic opinion in most of these countries remain below the level of jurisprudence in traditional civil law countries. Jurisprudence in these countries is yet to claim the recognition that has been achieved in traditional civil law jurisdictions.

So far we have discussed domestic sources of private law. However, the international sources of private law also need to be touched upon. As a general rule, it can be said that the more traditional a private law field is, the less likely the success of international unification is. Such traditional areas as personal law, property law, contract law, the law of non-contractual obligations (tort law), inheritance or family law have always remained primarily within the competence of national legislators, because it is difficult to make the necessary compromise between centuries old national solutions on the international scene. Either in *European Law* or in *Comparative Contract Law* you will learn about the European struggles to unify just the *general principles* of contract law. Exceptions to this main rule are *international aspects* of business, in which economic interests were stronger than national resistance to compromise, and there have been some very well working international conventions. E.g. a

convention exists in the field of contracts for the international sale of goods (the United Nations Convention on Contracts for the International Sale of Goods, in short: the *CISG*, or the *Vienna Sales Convention*), albeit it leaves purely domestic sale of goods unaffected.

The only field of significant international legislation in private law was where there had hardly been considerable traditional lawmaking before. This is the area of intellectual property law, which, with a little exaggeration, started off as "international" from the beginning. In the mid XIX century, especially when international uses of intellectual creations called for legislation, work commenced immediately on the international level. The amount of national intellectual property legislation that had existed before was insignificant and often did not offer a solution to the problems that arose by then. The 1883 Paris Convention on industrial property and the 1886 Berne Convention in the field of copyright were the first two major sources within intellectual property, and they were immediately international: in the laws of most countries, there was nothing significant that they would have replaced. The reason is that when technology facilitated mass duplication and reproduction of intellectual creations, the need arose to tackle these issues on the international scene at the same time when it arose within domestic contexts. With the help of technological developments, the uses of most intellectual creations swept through borders: sheet music, graphic designs of industrial works, printed reproductions of images, translations of literary works all spread from one country to the other quite easily, often without compensation for the original author or inventor. Thereby, legislative work could be commenced internationally. The same is true of other issues in relation with recent technology: regulation of a variety of private law relations that required technical development and which was important in international relations could commence on the international level, even outside of IP (e.g. railroad transport, carriage by road and by air, etc.)

1.4 Relationship with other branches and fields of law

In real life the legal problems of a specific fact pattern *seldom present themselves as clearly focused* on any one specific category of law as jurisprudence draws the line between the different branches and fields of law. For example in an inheritance case, besides private law questions of succession, inheritance taxes need to be dealt with; civil procedural law may

govern the procedural aspects of the procedure before the notary public or probate court or any other such entity connected with probate. Public administrative law may govern specific questions requiring the assistance of public administration, such as recording the change of ownership of the real estate of the deceased in the real estate registry. It may become necessary to determine the country whose law applies to the case, if a foreign/international element occurs in the fact pattern, such as assets of the deceased abroad, or beneficiaries or heirs residing in another country. All these aspects fall outside the scope of private/civil law and require knowledge of other branches and fields of law. Yet in the practical setting in which they arise to the client in reality, they are all connected with his/her "inheritance case".

It is therefore useful to shortly explain and sum up how other branches and fields of law are in connection with civil law fact patterns.

International law (public international law) is relevant to the extent that some of the subject matters within our subject are governed by international sources of law: international conventions or treaties, international customs (customary international law), international usages, etc. Dealing primarily with relations between states (also international organizations), international law provides the form and structures in which traditional civil law questions may become relevant. The content of an international legal instrument may well be traditionally private. As an example, states may agree (as they eventually did) that an international convention should be concluded for transactions involving contracts for the international sale of goods: that is, when for example a Mexican seller sells products to a Latvian buyer (see: The United Nations Convention on Contracts for the International Sale of Goods). International law provides the form of an internationally harmonized set of rules; it contains rules on how an international convention can be adopted; its incorporation into and its place within national law and within the hierarchy of legal norms, etc. The contents of the convention, however, overwhelmingly belong to contract law. Also, there may be conventions relevant for family law (we will discuss these in family law). Other conventions may prohibit certain acts, breach of which may lead to a non-contractual liability (tort) claim. Yet another body of international law relates to protection of foreign investments, which, *inter alia*, tackles the issue of nationalization of foreign investments within the hosting country – and soon we are discussing property law issues. Other conventions define basic human rights, and prescribe that the signatory states must provide for equality or

universality of general legal capacity of natural persons – and we soon arrive at personal law within private / civil law. Other international conventions relate to protection of creators and authors of literary, artistic and scientific works, and we are soon discussing copyright law, etc.

Those international sources of law that are in connection with international business activity (overwhelmingly contract law; also intellectual property and property law – foreign investment) are dealt with by lawyers under the terms *international business / commercial / trade law* (albeit the coverage of international business / commercial / trade law is greater than just these sources of international law). These issues will, however, be dealt with at length in other courses.

Some parts of traditional international law (such as law on diplomacy, or humanitarian law or international criminal law) are largely irrelevant to our subject matter.

European law itself is relevant to private / civil law relations in at least *two dimensions*. Firstly, European law may itself contain specific private / civil law provisions that directly regulate private law matters. At this stage, however, the body of traditional private / civil law legislation is diminishing compared to traditional public law content. Examples may relate to directives in intellectual property law; or ongoing efforts to harmonize general contract law; or specific aspects of the right of establishment within company law. The other dimension in which European law interacts with private law matters is that it regulates several important aspects of the state-private individual relationship if it is in connection with the free movement of goods, services, persons or capital within the European Union. As an example, the provisions relating to a sale of goods transaction from one Member State to another are provided by contract law; however, European law regulates the public law conditions within which the transaction can be carried out: e.g., are there inspections at the border, should customs, duties or other charges be paid; should specific administrative permissions relating to the products (e.g. from sanitary considerations) be obtained? This directly affects such private law issues in the contract itself as the price, the time, place and method of performance, etc.

Or, while a marriage itself is considered to be entirely a private law issue, in reality the prospects of a marriage between nationals of different countries wishing to settle in the same EU Member State are very much predetermined by regulation of the free movement of

persons. EU level legal instruments cover the conditions and obstacles a state may set up if foreign nationals wish to stay, settle, be employed, retire, receive social care, avail themselves of educational facilities, etc. on its territory.

Questions of European law will be covered in separate courses at length.

Constitutional law is relevant to private / civil law to the extent that the basic principles of some of the most important civil law rights originate in the constitution. Also, constitutional law sets the framework for legislation, including private law legislation.

Public administrative law (the law of public administration) contains public law rules that govern the functioning of public administration, from general issues of public administration down to the very specifics of each kind of office or government service or institution within the body of public administration. Very often a civil law case will have several aspects that lead to public administrative law. For example, ownership of real property requires, in most parts of the world, registration by a public authority in a register maintained by the government. Rules of the land register are contained in public administrative law. Another example is that in some countries the registry of industrial property rights is maintained by the state (in other countries this is done by private organizations). As to family law, the public registry of marriage is also governed by public administrative law; and public authorities that supervise the rights of children or persons under guardianship are also governed by public administrative law.

At any instance when some public authority intervenes in a civil law case, the procedure, rights and obligations of that authority (and of the private clients that appear before the public authority) are regulated by public administrative law. More on this subject, however, is dealt with by the course *Comparative Constitutional and Administrative Law*.

Financial law is relevant mostly for its provisions on taxation – this field of financial law is called *tax law*. Often transactions in civil law involve the exchange of valuables which appears as *income* on the side of one of the parties. The state has the authority to tax this income. For example sale of real estate, or distribution of an inheritance, or receiving copyright fees or industrial property licensing fees all involve questions of taxation. The same exchange of valuables may appear as *expenses* on the other side, which may reduce the income of the other party in return. Forms and types of taxes and other duties – e.g. customs if goods arrive from abroad in an international sale of goods contract – are regulated by financial law.

The functioning of the revenue service or taxation authority, the rights and obligations of the revenue service and the client before it, also the procedure itself is governed by public administrative law. International aspects of taxation are governed by *international tax law*.

Private international law (PIL) deals with aspects of any private law fact pattern that contains some *internationality / foreign element*. Questions of PIL arise from the fact that not all cases are entirely domestic. It may be possible that a foreign national wants to conclude a contract and his / her legal capacity, which is a necessary precondition of concluding the contract, is in question. Should it be decided by the laws of his / her nationality or by the laws of the country in which the contract is to be concluded; or by some other law, i.e. by the one in which she / he has habitual residence? Another example may relate not to a question of capacity but a question of contract conclusion or performance. Imagine that a Latvian businessman concludes a contract with a Swedish business entity about some joint investment in Russia. The contract is signed in Estonia during a business fair. What law would decide such questions whether or not the contract needs to be signed by witnesses or an attorney or not; or the level of care during performance; or the time and method of performance; etc. Would it be the law of Latvia, Sweden, Russia or Estonia? Also: if a legal controversy arises, should the plaintiff turn to a court in Latvia, Sweden, Russia, Estonia or in some other country? Or think of another example: a Latvian immigrant to the United States dies and leaves his European holiday home located on the French Riviera to his Latvian relatives. In which country should questions of inheritance be decided, and the inheritance law of which country should apply?

Questions of PIL can be divided into two. One part of these questions relates to *procedural aspects*: courts and other kinds of forum (arbitral tribunal, notary public, etc.) *of which country* can proceed in the given case? This is called the issue of *international jurisdiction* (or shortly: jurisdiction): which country has jurisdiction over the case? Procedural questions also relate to recognition and enforcement of foreign judgments: if the court of another country had the right to proceed, can the judgment be recognized and enforced abroad?

These procedural questions (jurisdiction, recognition and enforcement) are also called *International Civil Procedural Law*, and since within the European Union these questions have

been resolved by a number of legal instruments, within the EU this body of law is called *European Civil Procedural Law* (European Civil Procedure).

The second group of PIL questions relates to issues of determining the country whose law applies to the case. Briefly this is the question of *applicable law*. Since in these cases the different laws of the different countries contain different (conflicting) solutions, this area of law is often called *conflict of laws*.

A separate course on private international law in the LL.B. program offers in-depth insight to the subject.

Some other categories of law usually represent a mixture of different branches and areas of law, some of which come from private / civil law, others from other areas of law. For example *Agricultural law* relates to questions of agriculture and rural development, and covers such public law issues as agricultural subsidies or registration questions within agriculture (such as land or agricultural products), but also covers private law issues such as specific contracts frequently used within agriculture, or property law.

UNIVERSITY OF AMSTERDAM

THE GENERAL PRINCIPLES OF CIVIL LAW: THEIR NATURE, ROLES AND LEGITIMACY

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The General Principles of Civil Law: their Nature, Roles and Legitimacy

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The general principles of civil law: their nature, roles and legitimacy

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Introduction

In a number of recent judgements the Court of Justice of the European Union (CJEU) referred to 'the general principles of civil law', 'allgemeine Grundsätze des Zivilrechts' or 'principes généraux du droit civil'. These cases raise a number of questions concerning the nature, role and legitimacy of such principles. Do these principles belong to national law or to EU law? In either case, what can be their role and effects? So far, the Court has referred to them merely in the context of the interpretation of directives. But could they also play other roles, e.g. in gap filling or even in setting aside national law or secondary EU law, notably directives and regulations? In the latter case, could such principles yield direct horizontal effects in the sense that they become the source of rights and obligations between private parties? And how do they relate to the familiar general principles of EU law, such as the equality principle, which have constitutional status?

Depending on the answers to these questions, the general principles of civil law could represent an instance of more or less strong involvement of EU law in private law relationships, the theme of the present conference.[1] I understand this theme as referring not only to direct horizontal effect of EU law in the narrow sense of creating, modifying or extinguishing rights and obligations of private parties,[2] but also to direct effect in the broader sense that individuals can invoke and rely on them in (horizontal) cases against other private parties (i.e. not only through (vertical) claims against the state),[3] and indeed to indirect horizontal effects such as, in particular, the interpretation of national law in conformity with EU law (harmonious interpretation).

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[1] This paper was written for the conference 'The Involvement of EU Law in Private Law Relationships', hosted by the Institute of European and Comparative Law on 28th -29th September 2011 at St Anne's College, Oxford.

[2] A.S. Hartkamp, 'The General Principles of EU Law and Private Law', 75 *RabelsZ* (2011), 241-259, 249 and A.S. Hartkamp, 'The Effect of the EC Treaty in Private Law: On Direct and Indirect Horizontal Effect of Primary Community Law', 18 *ERPL* (2010), 527-548, proposes to reserve the term for this narrow category. The narrow definition fits well with the private law perspective on the sources of right and obligations of private parties.

[3] This broader definition of direct effect is closer to its original international law meaning where the effect is perceived from the perspective of the enforcement of obligations arising under the Treaties. It does not fit well, however, with direct effect of secondary EU law (and of unwritten primary EU law). For a discussion of various definitions of direct effects see e.g. P. Craig & G. De Búrca, *EU Law: Text, Cases and Materials*, 5th ed. (Oxford: OUP, 2011), 181ff.

The Court's discovery of general principles of civil law in recent cases has worried some authors, such as Weatherill, who wrote that he was 'anxious that these rulings seem uncritically ready to absorb search for general principles of civil law as proper task of the EU and, specifically, of its Court.'[4] Others, however, have welcomed this new source of European private law and have encouraged the Court to further pursue this path. Hartkamp, for example, wrote recently that '[i]n the light of the expansion of the private law component of EU law it is likely and desirable that the ECJ will undertake to increase the number of useful rules and principles of civil law.'[5]

Clearly, the desirability of more general principles of civil law very much depends on what they actually are and on what roles they are likely to play. But not only that. A crucial factor is also how they come about. This raises the questions where the Court found these principles, what methods it will use in the future for discovering new ones and to what extent the Court will inform us about its discovery procedure.

It may very well be that the reference by the Court to general principles of civil law in these recent cases was purely accidental and was not meant to introduce a new concept or category in any technical sense. However, even if that were the case it would still worth exploring whether the Court should actually start formulating such general principles of European private law, in addition to the general (or fundamental) principles of EU law, and what the nature and roles of such principles should be.

This paper is organised in the following way. It starts with a brief presentation of the recent cases in which the Court actually referred explicitly to the general principles of civil law. It then proceeds, in a second section, by enquiring into the nature of the concept, discussing in particular what its elements of 'general', 'principles' and 'civil law' might refer to. A third section then continues the analysis by addressing the different functions and effects that general principles of civil law might have. The fourth section discusses how these principles of civil law, and future new ones, could become legitimate private law norms. At the end of the paper some conclusions will be drawn.

The principles

Before we can address any questions concerning the nature, roles and legitimacy of general principles of civil law we need to examine in some detail the cases where the Court of Justice of the European Union recently discovered them. The four clearest instances were *Société thermale d'Eugénie-Les-Bains* (2007), *Hamilton* (2008), *Messner* (2009), and *E. Friz* (2010). I will now introduce these cases briefly, in their order of appearance.

[4] S. Weatherill, 'The "principles of civil law" as a basis for interpreting the legislative *acquis*', 6 *ERCL* (2010), 74-85, 84.
[5] Hartkamp 2011, *op. cit.* note 2, 258.

Société thermale d'Eugénie-Les-Bains

Société thermale d'Eugénie-Les-Bains (2007)[6] was a case relating to the interpretation of a tax law directive.[7] The reference for preliminary ruling was made by the French *Conseil d'État* in the course of proceedings between Société thermale and the Ministry of the Economy, Finance and Industry concerning the application of value added tax (VAT) to deposits collected by Société thermale on the reservation of hotel rooms and retained by it following the cancellation of some of those reservations. The case turned on the nature of deposits in the hotel sector. In that context the question arose whether the payment of a deposit by the client can be regarded as (part of) the consideration for the service provided by the hotelier. The Court of Justice held that this was not the case because the obligations for the client to pay and for the hotelier to provide the accommodation arise directly from the contract, not from the payment of the deposit. The Court justified its decision relying on the notion of general principles of civil law, in the follow consideration:[8]

> In accordance with *the general principles of civil law*, each contracting party is bound to honour the terms of its contract and to perform its obligations thereunder. The obligation to fulfil the contract does not therefore arise from the conclusion, specifically for that purpose, of another agreement. Nor does the obligation of full contractual performance depend on the possibility that otherwise compensation or a penalty for delay may be due, or on the lodging of security or a deposit: that obligation arises from the contract itself.

The issue had arisen in a French dispute and both the French *Code de la consommation* and the *Code Civil* contain relevant provisions concerning deposits which were cited in the proceeding.[9] However, the Court's task was to interpret an EEC directive, not French law. Nevertheless, the resolution of the tax law question whether VAT was due could clearly benefit from received classifications and definitions in the area of private law. And the Court would probably simply have referred to the European Civil Code had there been one. However, in the absence of written European rules of general private law the Court resorted to unwritten principles. Thus, in this case the general principles of civil law function as unwritten background principles for the interpretation of written secondary EU law. In this case the Court merely postulated the existence of the principle without clarifying where it had found it. On the other hand, however, the principle of the binding force of contract is not a very controversial one in Europe.[10]

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[6] Case C-277/05, *Société thermale d'Eugénie-les-Bains* v *Ministère de l'Économie, des Finances et de l'Industrie* [2007] ECR I-06415.

[7] Articles 2(1) and 6(1) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1; 'the Sixth Directive').

[8] Para 24 (emphasis added).

[9] See Art. L 114-1 Code de la consommation and Art. 1590 Code civil.

[10] In Para 25 the Court phrases the same principle as: 'the principle that contracts must be performed'.

Hamilton

In *Hamilton* (2008), the Court had to decide on a reference for a preliminary ruling from the *Oberlandesgericht* of Stuttgart (Germany), relating to the interpretation of the doorstep selling directive.[11] The question was whether the national legislature is entitled to provide, as the German legislator had done, that the right of cancellation laid down in Article 5(1) of that directive may be exercised no later than one month from the time at which the contracting parties have performed in full their obligations under a contract for long-term credit, also where the consumer has been given defective notice concerning the exercise of that right. The Court answered the question in the affirmative. In its reasoning it referred to the general principles of civil law. The Court said:[12]

> Similarly, the provision which governs the exercise of the right of cancellation – namely, Article 5(1) of the doorstep selling directive – provides, inter alia, that "[t]he consumer shall have the right to renounce the effects of his undertaking". The use in that provision of the term "undertaking" indicates, as Volksbank argued at the hearing before the Court, that the right of cancellation may be exercised as long as the consumer is not bound, at the time that the right is exercised, by any undertaking under the cancelled contract.[13] That logic flows from one of *the general principles of civil law*, namely that full performance of a contract results, as a general rule, from discharge of the mutual obligations under the contract or from termination of that contract.[14]

Again, the reference to the general principles of civil law occurs in the context of the interpretation of a directive, this time in the area of consumer law. And here also, like in *Société thermale d'Eugénie-Les-Bains*, the Court could not adduce national (in this case: German) general contract law in order to make a point concerning the interpretation of EU law. Therefore, with a view to an autonomous interpretation of the directive it had to refer to more general or European background rules or principles of contract law. In the absence of a written general European contract law it resorted to unwritten law. However, like in *Société thermale d'Eugénie-Les-Bains,* the Court did not speak of principles 'of EU law', thus suggesting that these

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[11] Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ 1985 L 372, p. 31; 'the doorstep selling directive').

[12] Case C-412/06, *Annelore Hamilton* v *Volksbank Filder eG* [2008] ECR I-02383, Para 24 (emphasis added).

[13] This is obviously a mistranslation. Compare the same sentence in French, the working language of the Court): 'En effet, l'utilisation, à cette disposition, du terme «engagement» indique, ainsi que l'a fait valoir Volksbank lors de l'audience devant la Cour, que le droit de révocation peut être exercé *à moins qu*'il n'existe pour le consommateur, au moment de l'exercice dudit droit, aucun engagement découlant du contrat dénoncé.' (emphasis added)

[14] The term termination is also somewhat misleading here as it suggest (active) termination by one party of the contract (e.g. for non-performance) whereas what is meant here is (also) the mere coming to an end (or: the end) of a contract. Compare, again, the French version: 'Cette logique relève d'un des principes généraux du droit civil, à savoir que l'exécution complète d'un contrat résulte, en règle générale, de la réalisation des prestations mutuelles des parties à ce contrat et de *la fin* de celui-ci.' (emphasis added)

principles might actually belong to (as opposed to: derive from) the laws of the Member States.

Again, there is no attempt at providing any empirical basis (in comparative law) or rational basis (in natural law) for the acknowledgment of a general principle. However, in this case the Court's reasoning from principle (as opposed to the outcome) is not necessarily convincing. On the one hand, in many countries rights and duties can continue to exist even after a contract has come to an end, e.g. it the case of non-competition clauses (which may constitute a 'post-contractual relationship'). On the other hand – and more to the point here -, the mere fact that a contract has been completely performed, and the contractual relationship has come to an end, does not necessarily imply that the contract giving rise to these obligations can no longer be affected. The best example is the avoidance of a contract, e.g. for mistake or fraud, which may very well be retroactive. Similarly, it is entirely conceivable that a withdrawal right could also be exercised, retroactively, even after the contract has come to an end because all obligations that the contract had given rise to have already been performed. Therefore, there exists, in most Member States, no general principle to the effect that a party cannot withdraw from a contract (by terminating, avoiding or cancelling it) once all obligations under the contract law have been performed. Most Member States do contain a general principles of discharge by performance, the principle that the Court seems to be hinting at, but that principle does not suffice to justify the Court's decision.

In his opinion in this case, advocate-general Maduro had also referred to a general principle.[15] His opinion differs from the Court's ruling in a number of relevant respects. First, he speaks explicitly of a 'principle common to the laws of the Member States'. Secondly, he provides some prima facie evidence for its existence by referring to the Lando principles, the Gandolfi code and the Acquis principles.[16] Thirdly, the principle that he quotes does actually exist in most if not all Member States, i.e. the principle of 'the placing of a time-limit on the exercise of a right, most often referred to as "limitation"'. And, finally, he points out that this principle 'might well ultimately appear at Community level in the context of the creation of a common frame of reference for European contract law'.[17]

This is, of course, not the place to discuss the merits of the Court's decision.[18] The point here is rather that the mere postulation of a general principle, without

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[15] See Opinion of Advocate General Poiares Maduro delivered on 21 November 2007, ECR [2008] I-02383, Para 24.

[16] O. Lando, E. Clive, A. Prüm & R. Zimmermann (eds.), *Principles of European Contract Law Part III* (The Hague: Kluwer Law International, 2003), G. Gandolfi (ed.) *Le code européen des contrats* (Milan: Giuffrè, 2004), and *Principles of existing EC Contract Law (Acquis Principles)*, Contract 1, Part 1, Pre-contractual Obligations, Conclusion of Contract, Unfair Terms, Volume I (Munich: Sellier, 2007) respectively.

[17] *Loc. cit.* note 15, Para. 24.

[18] The Consumer Rights Directive will follow AG Maduro's approach, introducing in its Art 10 Para 1 a one year cut-off period running from the end of the initial withdrawal period. See European

providing any (even prima facie) evidence, comparative or other, makes it difficult to assess the merits of the Court's reasoning and makes it hard to predict what new principles we may expect in the future.

Messner

The ruling in *Messner* (2009), a decision on a reference for a preliminary ruling from the *Amtsgericht* Lahr in Germany, concerned the interpretation of the distance selling directive.[19] Pia Messner had bought a second-hand laptop computer via the Internet from Firma Stefan Krüger. After a few months the display became defective. Upon Krüger's refusal to repair the defect free of charge, Ms Messner exercised her right of withdrawal which she still had because she had never received a notice from the seller concerning the existence of that right. Ms Messner sought reimbursement of the price, but Krüger counterclaimed compensation for the use made of the computer by Ms Messner amounting to a sum (based on the average market rental price) somewhat higher than the purchase price. Such a claim for compensation could be successful, in principle, under German law. However, having doubts whether German law as it stood was compatible with the distance selling directive, in particular Article 6 thereof, the Court in the main proceedings referred a question to the Court of Justice for preliminary ruling. In its response, the Court held as follows:[20]

> Regard being had to all of the foregoing, the answer to the question referred is that the provisions of the second sentence of Article 6(1) and Article 6(2) of Directive 97/7 must be interpreted as precluding a provision of national law which provides in general that, in the case of withdrawal by a consumer within the withdrawal period, a seller may claim compensation for the value of the use of the consumer goods acquired under a distance contract. However, those provisions do not prevent the consumer from being required to pay compensation for the use of the goods in the case where he has made use of those goods in a manner incompatible with *the principles of civil law*, such as those of good faith or unjust enrichment, on condition that the purpose of that directive and, in particular, the efficiency and effectiveness of the right of withdrawal are not adversely affected, this being a matter for the national court to determine.

Note that the Court refers to 'the principles of civil law', not the *general* principles of civil law. Note also that in this case it is less clear than in *Société thermale d'Eugénie-Les-Bains* and *Hamilton* that the Court actually means European principles or principles common to the laws of the Member States. It is possible that the Court here merely intends to refer to the principles of civil law of the Member State at hand. Indeed, in this case the Court seems to be trying to find the right balance between, on the one hand, the requirements of the European directive and, on the

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Parliament legislative resolution of 23 June 2011 on the proposal for a directive of the European Parliament and of the Council on consumer rights (COM(2008)0614 – C6-0349/2008 – 2008/0196(COD).

[19] Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ 1997 L 144, p. 19).

[20] Case C-489/07 *Pia Messner* v *Firma Stefan Krüger* [2009] ECR I-07315, Para 26 (emphasis added).

other hand, the fundamental private law principles prevailing in the Member State that has to transpose the directive, in this case Germany. Having said that, this particular Member State is of course not unique in this respect. On the contrary, most Member States contain general principles of good faith and unjust enrichment. Still, these principles are not general European principles given the fact that some Member States (notably the United Kingdom, for English law) do not recognise a general principle of good faith whereas other Member States, although containing a general principle of unjustified enrichment, do not generally require - on account of that latter principle (or another) - compensation for use after unwinding contracts that have already (partially or entirely) been performed.[21]

E. Friz

Finally, in *E. Friz* (2010) a consumer, who had invested a large sum (DEM 384 044) in a real property fund established in the form of a partnership contract that had been concluded during an unsolicited doorstep-selling visit at his home, had cancelled his participation in the partnership after having been a member for more than a decade. According to (judge-made) German law as it stood, in these circumstances, the cancellation would not have a retro-active effect (effect *ex tunc*), in the sense that the consumer would get back his entire investment leaving any existing losses for the remaining partners (who presumably included other consumers as well): the consumer could only claim the value of his interest at the date of his retirement from membership and could therefore get back less than the value of his capital contribution or might even have to participate in the losses of that fund (effect *ex nunc*). In a reference for a preliminary ruling the German *Bundesgerichtshof* asked the Court of Justice whether this rule was compatible with Art 5(2) of the Doorstep selling directive. The Court answered in the affirmative. In its motivation the Court referred to the general principles of civil law. The Court said:[22]

> As the Bundesgerichtshof observed in its decision for reference, that rule is intended to ensure, in accordance with *the general principles of civil law*, a satisfactory balance and a fair division of the risks among the various interested parties.
>
> Specifically, first, such a rule offers the consumer cancelling his membership of a closed-end real property fund established in the form of a partnership the opportunity to recover his holding, while taking on a proportion of the risks inherent to any capital investment of the type at issue in the main proceedings. Secondly, it also enables the other partners or third party creditors, in circumstances such as those of the main proceedings, not to have to bear the financial consequences of the cancellation of that membership, which moreover occurred following the signature of a contract to which they were not party.

[21] See H. Schulte-Nölke, C. Twigg-Flesner & M. Ebers (eds.), *Consumer Law Compendium; The Consumer Acquis and its transposition in the Member States* (Munich: Sellier, 2008), 560-561.
[22] Case C-215/08, *E. Friz GmbH* v *Carsten von der Heyden* [2010] ECR I-00000, Para 48-49 (emphasis added).

This time, the Court is discussing a national rule (with a view to its compatibility with a directive) and argues that the rule is intended to ensure a fair division of risks among the parties, 'in accordance with the general principles of civil law'. It seems that the Court here has national principles in mind, although the phrase does not exclude a more general (or even universal) notion of general principles of civil law. After all, the Court could have referred specifically to 'the German principles of civil law' or to 'the general principles of German civil law'. In any case, any rules existing in other Member State which are similar or based on the same or similar principles of civil law will also be held by the Court to be compatible with the directive. That brings some resemblance of this decision with the *Messner* ruling.

From the Court's judgment we do not get to know what exactly these principles were. The Court refers to an observation by the BGH in its decision for reference,[23] but that observation is not quoted in the Court's own decision. The principles that the BGH had referred to in its decision actually were the 'Grundsätze der fehlerhaften Gesellschaft' (principles of defective partnership), in particular the 'Grundsätze über den fehlerhaften Gesellschaftsbeitritt' (principles of defective accession to a partnership).[24] In her Opinion in this case, advocate general Trstenjak referred to these principles saying that 'It is therefore clear from the principles of that case-law [i.e. national case law - MWH] in relation to a "defective partnership" (*fehlerhafte Gesellschaft*) that exercise of the right of renunciation does not have the effect of restoring the *status quo ante*.'[25] It is very well possible that the Court borrowed its 'principles' formula from its Advocate General. And it is clear that in her opinion the term 'principles' refers to the principles of (unwritten) German law as established in the case-law of the BGH.

Interestingly, in this case the Court goes into the substance of the balancing of interests. It seems to accept the kind of interests that German private law takes into account and also the way in which and the extent to which they are taken into account, even though this leads to a lesser degree than complete protection of the consumer. In other words, the Court accepts (as it had already done in *Schulte*) that effective protection is not the same as maximum protection.[26] And once the Court does not require the maximisation of consumer protection it will inevitably have to address the other private interests at stake and the private law principles that protect these. Thus, the court is forced into private law reasoning and, one way or another, it will develop European private law principles. It is true that the Court will not set the specific private law rules: that will be left to the Member State law makers (legislators and courts) but it does engage in a debate about the underlying principles and, in this case, approves the application of the principles that had been

[23] The reference itself, as published, does not refer to principles. See Reference for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 22 May 2008 *OJ* C 209, 15.8.2008, p. 23.
[24] *Betriebsberater* 2007, @.
[25] Opinion of Advocate General Trstenjak delivered on 8 September 2009, ECR [2010] I-00000, Para 18.
[26] Case C-350/03, *Elisabeth Schulte and Wolfgang Schulte* v *Deutsche Bausparkasse Badenia AG*, ECR [2005] I-09215.

developed by the German supreme civil court. Since the Court of Justice will follow the same reasoning concerning any other Member State having similar private law principles, the Court is effectively developing, in dialogue with the Member State courts, European private law principles. This raises the question whether these principles should be categorised as European in the strict sense of being part of EU law (and if so, which part) or merely in the broader sense of belonging, as background principles, to the developing multi-level system of private law in Europe or to a common European private law space. This brings us to the nature of the general principles of civil law.

Their nature

What does the Court mean when it refers to the general principles of civil law? In this section, I will consider each of the composing elements of the expression separately, i.e. 'general', 'principles' and 'civil law'. Before addressing those four main elements, it is worth pointing out that the Court refers to '*the* (general) principles of civil law'. The use of the determinate article (in all language versions) seems to convey the message that these principles already existed before the Court referred to them. This matches with the idea that the Court discovers such principles rather than inventing them.[27] On the other hand, we should probably not exaggerate the importance of the precise wording of the Court's rulings.

General

In what sense are these principles general? With regard to the subjects or the persons they apply to, or the places where they apply, or a combination of these? I will discuss, in turn, the substantive, personal and territorial scope of the general principles of civil law.

Substantive scope

One possibility is that these principles are general as opposed to specifically relating to certain sectors of civil law, e.g. certain types of contracts. This general/specific distinction would be similar to the familiar distinctions between general and specific private law, and between general and specific contract law.

The harmonisation in the area of private law by the European legislator has been referred to (usually critically) by scholars as being pointillist or piecemeal.[28] The European Commission, approaching the issue from a market-building perspective, speaks of a 'sector-specific' approach.[29] In its 2003 Action Plan on European contract law, for example, the Commission discusses 'the existing approach of sectoral harmonisation of contract law'[30] which it contrasts with possible 'non-

[27] Cf. e.g. K. Lenaerts & J.A. Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' 47 *CMLR* (2010), 1629-1669, 1635.
[28] See e.g. W-H. Roth, 'Transposing "Pointillist" EC Guidelines into Systematic Codes - Problems and Consequences', 10 *ERPL* (2002), 761–776, at 764.
[29] *A More Coherent European Contract Law, an Action Plan*, Brussels, 12.2.2003, COM(2003) 68, no. 55.
[30] *Ibidem*, no. 5.

sector-specific solutions, such as an optional instrument'.[31] The idea is also akin to an expression contained in scope provion of the Consumer Rights Directive in its latest, amended version: 'this Directive shall not affect national general contract law'.[32]

Most of the principles that the Court has referred to so far indeed seem to be general in this sense: the binding force of contract (*Sociéte thermale*), discharge by performance (*Hamilton*), good faith and unjustified enrichment (*Messner*) are principles of general contract law or (even broader) of the general law of obligations. Their scope of application is not limited to contracts for the supply of hotel services (*Sociéte thermale*), or contracts concluded in a doorstep selling situation (*Hamilton*) or via the Internet (*Messner*). However, the substantive scope of the *ex nunc* effect of a withdrawal from a partnership (*E. Friz*) is not general in this respect; it seems to be specific to partnership contracts, or even only to partnerships establishing a closed-end real property fund.[33]

At first sight, the idea of principles of civil law with a broad general scope seems to lead to of massive increase in the scope of EU private law, and a correlative decrease in the space left for the national private law maker. In other words, the discovery of these principles seem to raise justified worries for competence creep. If there is no legal basis for a written European civil code,[34] then surely the Court should not introduce an unwritten one – as principles – through the backdoor. However, this is not necessarily the case at all. With regard to the general principles of EU law, for example, the Court has made clear that they apply only to cases that fall within the scope of European Union law.[35] So, even thought the principle of non-discrimination on grounds of age, as adopted in *Mangold* and *Kücükdeveci*, has direct horizontal effect (in the broad sense indicated above), it does not apply (i.e. has no effect at all) outside the scope of European Union law.[36] There is every reason for the Court to

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[31] *Ibidem*, no. 89.

[32] Art 3 (Scope), Para 5 of the Consumer rights directive in its latest version (European Parliament legislative resolution of 23 June 2011, *loc. cit.* note 18). See also recital 14 (*ibidem*).

[33] Of course, the notion of *ex tunc* effect is general and also the principle (accepted in many countries) that the termination of a contract (as opposed to its annulment) is not-retroactive. However, the question was precisely to what categories (and its related principles) the right of withdrawal should be assimilated.

[34] See e.g. W. van Gerven, 'Coherence of Community and national laws; Is there a legal basis for a European Civil Code?', *ERPL* 1997, pp. 465-469. Contrast J. Basedow, 'Un droit commun des contrats pour le marché commun', *RIDC* 1998, 7.

[35] The same principle applies to the fundamental rights. According to Art 6 (1) TEU the provisions of the Charter do not extend in any way the competences of the Union as defined in the Treaties, and pursuant to Para 2 the accession by the EU to the ECHR will not affect the Union's competences as defined in the Treaties.

[36] Case C-555/07, *Seda Kücükdeveci* v *Swedex GmbH & Co. KG* [2010] ECR I-00000, Para 23. See earlier (less explicitly) Case C 144/04, *Werner Mangold* v *Rüdiger Helm* [2005] ECR I 09981, Para 75. However, the 'scope of the Treaties' which is relevant in this regard is not always easy to determine. See (critical) M. Dougan, 'In Defence of *Mangold*?' in: A. Arnull, C. Barnard, M. Dougan & E. Spaventa (eds.) *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Oxford: Hart Publishing, 2011), 219-243.

adopt the same policy in relation to the general principles of civil law. Indeed, nothing in the cases where the Court has referred to the general principles of civil law, so far, suggests that the Court is extending the scope of EU private law.

Therefore, the general principles of civil law are principles that can apply to many (or even all) existing areas of EU law, but do not create new areas of EU private law. To the extent that these principles are national (or similar to national ones),[37] of course, the scope of these national principles (where they exist) may extend, on the national level, as national principles, beyond the areas of private law that are affected by EU private law.

Personal scope

Another possibility, however, is that the principles are meant to be general in the sense that they apply to all types of parties, not merely consumers. Strictly speaking, this interpretation would be a bit strained because usually business-to-consumer (B2C) law is referred to as 'consumer law', business to business (B2B) law as 'commercial law', and only the private law applicable to all types of relationships - i.e. B2C, B2B and C2C - is usually called 'civil law'. Thus, in combination with 'civil law' the element of 'general' would be redundant (or the other way around).

Having said that, it seems likely that the Court means to refer to principles that do apply not merely to one type of party. An important characteristic of the main category of private law rules with a limited personal scope, i.e. the rules applicable only in relationships between business and consumers, is that they aim at the categorical protection of the latter group. However, even though EU consumer law must aim at a 'high level of consumer protection',[38] it does not follow from this requirement or from the principle of *effet utile* that consumer protection must be absolute, not even that it must be maximised. Other interests and objectives may play a role as well. And such other relevant interests (usually private but sometimes also public) traditionally have been expressed, and balanced, in the general rules and principles of private law.

This seems to be exactly what happened in *Hamilton*, *Messner*, and *E. Friz.*[39] In all three cases, the Court of Justice was evaluating the effectiveness of consumer protection that the Member State (in all three cases Germany) was achieving through its transposition of a consumer protection directive. In all three cases, the interest of consumer protection had been balanced by the Member State against other interests, in particular certain interests of other parties to transactions with consumers. And the Court was limiting its evaluation not simply to the level of consumer protection that was achieved. It also (marginally) evaluated the kind of interest that were allowed to enter the balancing exercise, and thus – to put it more straightforwardly – the kind of interests of other parties that could justify the

[37] On this possibility, see further below.
[38] See Articles 114 (3) TFEU and Article 169 (1) TFEU.
[39] *Société thermale d'Eugénie-Les-Bains* is different in this respect.

limitation of consumer protection. It did so, not on the level of concrete rules, nor by directly balancing the relevant interests, but by reviewing the private law principles that the Member State had applied.

Territorial scope

A third possibility is that these principles are meant to be general (also) in the sense of general for the whole European Union, as opposed to merely (and specifically) national. That idea reminds, of course, of the general principles of EU law (formerly: of Community law), such as, for example, the equality principle, the reliance principle and the principle of effectiveness (*effet utile*).[40] These principles are a well-known and important source of primary EU law, which can also be invoked in disputes between private parties, e.g. concerning contractual relationships, as became clear in the landmark decisions *Mangold* and *Kücükdeveci*.[41] Even though these general principles of EU law often originate in the laws of the Member States, which is reflected in the recurrent expression 'principles common to the laws (or: the constitutional traditions) of the Member States', they have become (also) European Union principles, and are applicable as such, i.e. as (primary) EU law.[42]

On the other hand, it is not certain that the Court means to refer to 'the general principles of civil law' in the analogical sense of general principles of European Union private law. The Court does not mention the EU in its expression, it speaks of 'general principles of civil law', not 'general principles of EU civil law'. Thus, the Court may also regard these principles as being entirely national principles (but, of course, possibly existing in more than one Member State). In all four cases that we saw, the principle that the Court referred to as one of 'the (general) principles of civil law' was recognised as a principle in the Member State where the case was situated. It may very well be that in *Hamilton*, *Messner*, and *E. Friz* the Court was not saying more than that a limitation of consumer protection on the basis of these principles, *where they exist in the national legal system*, is compatible with the directives.[43] On the other hand, in *Société thermale d'Eugénie-Les-Bains* the Court was clearly looking for an autonomous European principle, similar to the autonomous interpretation of private law concepts in the Brussels I and Rome I Regulations:[44] the actual existence of the same principle in the national law of the referring court does not seem to have been a precondition.

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[40] See T. Tridimas, *The General Principles of EU Law*, 2nd ed. (Oxford: OUP, 2006).
[41] *Loc. cit.* note 36.
[42] A second category of general principles of EU law are those which are inherent in the legal order of the EU as it can be derived from the aims and structure of the founding Treaties. See e.g. Tridimas, *op. cit.* note 40, 4; Opinion of Advocate General Trstenjak delivered on 30 June 2009, Case C-101/08, *Audiolux SA e.a.* v *Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others*, ECR [2009] Page I-09823, 69.
[43] There is a parallel here with the *Courage* case, where the Court relied on the unclean hands principle as 'a principle which is recognised in most of the legal systems of the Member States' to conclude that EU law does not preclude a national rule based on that same principle. See further below.
[44] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters *OJ* 2001, L 12, 1-23; Regulation (EC)

Another possibility is that the Court deliberately refrains from locating the general principles of civil categorically (i.e. *en bloc*) and exclusively at the European or the national level. Maybe the Court envisages a more flexible and chameleonic nature for these principles.

Indeed, it seems to be one of the main advantages of the normative category of principles, that, in comparison to rules, they are more flexible.[45] Thus, in particular, they could become the ideal tool for further developing the emerging multi-level system of private law in Europe,[46] or a common European private law space.[47] They could contribute to bringing more coherence and convergence to European private law. And for that purpose it is not necessary for them to have a very clearly defined scope of territorial application. Whether they are merely general principles recognized in the laws of the Member States or, in addition, also principles of EU law, is of limited importance especially in their role as principles providing the background against which directives are interpreted (i.e. in practice the main role so far).

However, this view clearly depends on one's general conception of European (private) law and its system(s). There are at least three different ways of looking at European private law: a nationalist, a dualist (or pluralist), and a Europeanist way.[48] In the nationalist perception, the Europeanisation of private law is a process that affects and modifies the national systems of private law of each Member State. In this perception, although most of private law is of domestic origin, today an increasing part is of European extraction. The focus is on how to integrate these 'foreign' elements into the original national system without upsetting it too much. In a dualist view, in contrast, on the territory of each Member State there are two systems: a national and a European one. Both these systems are complementary and interrelated but nevertheless distinct. In other words, each Member State has its own national system of private law, in addition to which they together share a common system of European Union private law. In this perception, the focus is, quite naturally, on tracing the exact borderline between the two systems. (A variant

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No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ 2008, L 177, 6–16.

[45] See further below.

[46] In the same sense A. Metzger, *Extra legem, intra ius: Allgemeine Rechtsgrundsätze im Europäischen Privatrecht* (Tübingen: Mohr Siebeck, 2009). See also J. Basedow, 'The Court of Justice and Private Law: Vacillations, General Principles and the Architecture of the European Judiciary' 18 *ERPL* (2010) 443-474.

[47] Compare Lenaerts & Gutiérrez-Fons, *op. cit*. note 27, 1631, with regard to the general principles of EU law: 'common constitutional space'.

[48] This paragraph draws on M.W. Hesselink 'The Common Frame of Reference as a source of European private law', 83 *Tulane Law Review* 4 (2009), 919-971, 932-936. For a similar distinction, see Julie Dickson, 'Directives in EU Legal Systems: Whose Norms Are They Anyway?', 17 *ELJ* (2011), pp. 190–212, 192, whose a) '27 plus 1' model (or the 'distinct but interacting legal systems' model), b) 'part of member states' legal systems' model, and c) 'one big legal system' model, are roughly similar to what I call, respectively, the a) dualist, b) nationalist, and c) Europeanist perspectives.

is a pluralist view where e.g. international treaties may add additional systems.) In a Europeanist perception, finally, all private law in the European Union forms one single, gradually integrating system. The focus is on the interplay between the different levels of governance and on how the progressive coherence of the whole multi-level system and the gradual convergence of its components can be achieved. On this latter view, an increasing part of European private law is regulated at the EU level, while a considerable part is still regulated at the national level (and a minor part on the global level – think e.g. of the CISG) of one and the same system. These are three different ways of looking at the same phenomenon, i.e. of private law in Europe, neither of which can be said at the outset to be more true (positively) or more right (normatively). It is impossible to discuss the issue in a neutral fashion. Rather, the relative attractiveness of these models depends on one's more general views on the nature, future, and finality of the European Union.[49] Indeed, the issue of how many legal systems there are in Europe is closely related (if not identical) to the vexed question of *Kompetenz-Kompetenz*.[50] In those circumstances, it can only contribute to the clarity of the debate if its participants make their position explicit. This essay is inspired by a moderate Europeanist vision.[51]

A nationalist reading of the cases we saw above would probably lead to the conclusion that the Court is only referring to general principles of national civil law.[52] These principles apply, as national, in the Member States. So, on this view there are no general principles of European Union private law. Indeed, this view matches with the fact that the Court itself does not speak of EU principles. If these principles are merely principles of the Member State at hand, that the Court merely mentions as possibly existing, then they will only apply to the extent that the Member State law actually contains such a principle (or a rule based on it). For example, a seller from a legal system (like English law) that does not contain a good faith principle could not claim compensation for use on this ground (but maybe she could do so on the basis of unjustified enrichment, the other justifying principle accepted by the Court in *Messner*).

From the dualist perspective the question where these principles are located is crucial. If they are principles of national law they cannot be at the same time also principles of EU law and vice versa. Therefore, if the Court was referring to general principles of EU civil law then these principles are *different* from any principles existing at the national level going under the same name. In other words, there will be the various national principles of good faith in each of the Member States (as the case may be) plus one European one with its own autonomous meaning. And each of these principles, the existing national ones and the European one, has its own field of application. The dualist model already leads to great practical difficulties when

[49] See U. Haltern, 'On Finality', in: A. von Bogdandy & J. Bast (eds.), *Principles of European Constitutional Law*, 2nd ed. (Oxford: Hart Publishing, 2010), ch. 6.
[50] See J.H.H. Weiler, *The Constitution of Europe; "Do the New Clothes Have an Emperor?" and Other Essays on European Integration* (Cambridge: Cambridge University Press, 1999), ch. 9.
[51] See further Hesselink, *op. cit.* note 48.
[52] Except maybe in *Société thermale d'Eugénie-Les-Bains.*

limited only to legislation and other concrete written rules. However, when it comes to general principles, which are unwritten, generally abstract, and whose own borderlines are vague, then the exercise of drawing the borderline between national and EU law becomes even more challenging (and hence attractive to doctrinally oriented scholars).

The situation is much easier from the Europeanist point of view (indeed too easy, from the perspective of nationalists and dualists, who will denounce the lack of analytical rigour and legal certainty). If one regards all private law in the European Union as one single, gradually integrating system and strives for the progressive coherence of the whole multi-level system and the gradual convergence of its components, then the idea of general principles does not look like a problem but rather like a welcome solution. From the Europeanist perspective there is no great need to draw formal distinctions between national and European principles. Rather, the focus will be on the substantive convergence of the various versions, Member State and Union, of the *same* principle. And for this purpose the flexible and malleable nature of principles is an advantage. Borderlines are helpful for who wishes to separate but an obstacle for who wishes to unite. The general principles of civil law, as a network of pan-European principles of civil law related, sometimes loosely sometimes more closely, to similar principles at the national (and indeed the global) level could become ideal building blocks or cement (or even foundations) for a developing multi-level system of European (private) law. From this perspective, the language used by the Court of Justice in *Société thermale d'Eugénie-Les-Bains*, *Hamilton*, *Messner*, and *E. Friz* has nothing puzzling or worrying,[53] nor does the role that the Court attributed to these principles in these cases.

Principles

What does the Court mean when it refers to 'principles'? Is its aim to distinguish these from rules? Does the Court mean to take a stance in a famous debate in legal theory? Or is the aim more strategic: to avoid an impression of encroaching upon the task of the legislator?

Principles and rules

There are many different theories concerning the nature of general principles of law. And principles play a central role in some prominent theories of law, notably in Dworkin's idea of 'law as integrity'.[54] Dworkin draws a sharp distinction between principles and rules. According to Dworkin, rules have an all-or-nothing character whereas principles are characterised by a dimension of weight.[55] Principles play an

[53] In *Société thermale d'Eugénie-Les-Bains, Hamilton*, and *E. Friz* the Court refers to 'the general principles of civil law'. However, in *Messner* the Court uses the expression 'the principles of civil law' without the adjective 'general'. From the Europeanist perspective, nothing important turns on this difference in language.

[54] For a full statement of that idea, see R. Dworkin, *Law's Empire* (Cambridge, Massachusetts, Harvard University Press, 1986).

[55] See R. Dworkin, *Taking Rights Seriously* (Cambridge, Massachusetts, Harvard University Press, 1977), ch. 2.

important role in finding the existing right answer to any question of law: when the existing materials do not seem to yield a distinct answer ('hard cases'), courts must try to find a principle that does provide a solution to the case and fits with the relevant legal materials and with the prevailing political morality.[56] In contrast, legal positivists reject the existence of principles: where the law runs out, courts have discretion. However, 'inclusive positivists', like Coleman and probably Hart, accept the existence of principles to the extent that acknowledged sources of law refer to them.[57] For the nature and attributes of principles this seems to imply that whatever a statute or a legal precedent (or anything else that the rule of recognition acknowledges as a source of law) refers to as being a principle, will count, for that reason alone, as a principle, quite apart from its further characteristics.

It does not seem likely that the Court of Justice of the European Union intended to take a stance in this debate: its use of the concept seems to be compatible with both an essentialist and a mere appelationist conception of principles. This does not exclude, of course, the possibility to analyse the Court's rulings in terms of one or more of these theories, and decide in those terms whether these purported principles *really* are principles, quite apart from what the Court says.[58] This may be important, in particular, when it comes to the legitimacy of what the Court is doing: are these principles an exercise in legitimate law making, and what are its limits? That will be the subject of the fourth section of this paper.

On a more descriptive note, for now, the Court seems to use the concept in a very basic, literal sense of starting points, i.e. starting points for reasoning – in this case legal reasoning. What the Court seems to be doing, in particular, is to allow certain types of grounds for limiting consumer rights. As said, European consumer protection law cannot be about the blunt and absolute *maximisation* of consumer protection. In the cases that we have seen here, the Court tells national courts what reasons are acceptable for limiting consumer protection. In *Messner*, for example, the Court is concerned with 'the efficiency and effectiveness of the right of withdrawal'.[59] The directive leaves the determination of the legal consequences, in part, to the Member States. However, this is subject to the principle of effectiveness (a general principle of EU law). The question is then to figure out what is necessary to permit a consumer to make effective use of his right of withdrawal. The Court does not tell in any detail what specific limitations are permitted. It limits itself to evaluating in general terms the reasoning of national law, by acknowledging certain

[56] See further below.
[57] See J. Coleman, *The Practice of principle; In defence of a pragmatist approach to legal theory* (Oxford: OUP, 2001) and H.L.A. Hart, *The Concept of Law*, 2nd ed., (Oxford: Clarendon Press, 1994), 'Postscript'.
[58] For a sophisticated analysis in such terms, see Ch. Mak, 'Hedgehogs in Luxembourg? A Dworkinian Reading of the CJEU's Case Law on Principles of Private Law and a Reply of the Fox', Amsterdam Law School Legal Studies Research Paper No. 2011-24, Centre for the Study of European Contract Law Working Paper No. 2011-10 (forthcoming ERPL - available at SSRN: http://ssrn.com/abstract=1920649).
[59] Paras. 24-29.

principles that can come into play, thus giving guidelines without determining exactly what role these principles should play. The Court says: 'It is in the light of those principles (both the general principles of civil law and the principle of effective protection, it seems - MWH) that the national court must resolve the actual case before it, taking due account of all the elements of that case'.[60] Thus, the general principles also allow the Court to respect the principle of subsidiarity by not going more than necessary into the details of national law. In other words, whereas a dualist view (see above) would require a sharp dividing line between national and EU law, it is precisely the vagueness of principles, that are located somewhere between national and European law, that here allows the Court to interfere no more than necessary with national law. That the Court regards the general principles of civil law as starting points for legal reasoning or as guidelines for dispute resolution is also illustrated by the way in which the Court referred to them in *Hamilton*: 'That logic flows from one of the general principles of civil law', the Court said there.[61] The idea of a logic that flows from principles, in other words of principled reasoning and rational discourse, fits well with the idea of developing a system of private law in Europe that is as coherent as possible across the different levels of law making.

Judges and legislators

Rules are adopted by legislators, while principles are discovered by judges. Therefore, although most of the principles that the Court has formulated so far (binding force of contract, discharge by performance, good faith and unjust enrichment) have the typical characteristics of generality and abstractness that is usually associated with generals principles of law, it is not excluded that the Court used the concept of 'general principles of civil law' also for another reason. Given the fact that the idea of a European Civil Code is controversial, not in the last place because of doubts as to whether there would be a legal basis for it, it would be rather bold for the Court to do what the European legislator is not allowed to do, i.e. to adopt unwritten legal rules that would normally belong in a civil code. Therefore, the Court may have thought it to be more prudent to refer to principles rather than to rules. Such strategic reasons would be very similar to the ones that also made the drafters of the Unidroit principles and the Lando principles opt for the terminology of principles, i.e. their lack of legislative power. I will come back to the separation of powers dimension below when discussing legitimacy.

Civil law

What exactly does the Court mean when it refers to 'the general principles of *civil* law?' Civil as opposed to what? In EU legal language 'civil law' is a familiar term, just like the related terms of 'civil liability', 'civil action', 'civil proceedings', and 'civil-law remedies'. For example, in the words of the Court, the *Courage* case concerned 'certain consequences in civil law' of a breach of art 101 TFEU.[62] Civil law is often

[60] Para 28.
[61] Para 42.
[62] Case C-453/99 *Courage Ltd* v *Crehan* [2001] ECR I-6297, Para 35.

contrasted with administrative, criminal or tax law, [63] just like a 'civil court' is often contrasted with criminal and administrative courts. See in this respect also the Brussels I regulation which is on 'civil and commercial matters'; the Court has developed a rich case law on the (autonomous) interpretation of the concept of 'civil matters' in this context.[64] In the TFEU, in the title concerning the area of freedom, security and justice there is a chapter 3 (consisting of one provision: Art. 81), on 'judicial cooperation in civil matters'.

Traditionally, 'civil law' is usually contrasted with 'commercial law'. However, the use of the term 'civil law' in European law often rather seems to include 'commercial law', sometimes even explicitly. The same seems to be true for the way in which the Court intends its general principles of civil law. There is nothing in the four cases where the Court refers to (general) principles of civil law that excludes commercial cases from their scope of application. Thus, it seems, the Court could just as easily resort to these principles in a case concerning the interpretation of the late payment directive, whose scope is limited to 'commercial transactions'.[65]

In practice, therefore, 'civil law' seems to mean 'private law'. That latter term, in contrast, is much less frequently used by the European authorities.[66] This may explain why the Court refers to civil law. However, nothing fundamental would change (except an increase in precision and clarity), it seems, if the Court changed its terminology and started to refer to 'the general principles of private law'. Indeed, if the principles are understood as principles belonging to the multi-level system of European private law or to a common European private law space then the most appropriate name would be 'general principles of European private law'.[67]

Their roles

What roles do the general principles of civil law play in the cases that we saw? And what further roles might they have?

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[63] See e.g. Case C-195/02, *Commission of the European Communities* v *Kingdom of Spain*, ECR [2004], I-0785, 40: 'legal consequences of a civil, criminal and administrative nature.'

[64] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters *OJ* 2001, L 12/1-23.

[65] Directive 2011/7/EU of 16 February 2011 on combating late payment in commercial transactions (recast). See art. 1 (Subject matter and scope). For a definition, see Art. 2: '"commercial transactions" means transactions between undertakings or between undertakings and public authorities which lead to the delivery of goods or the provision of services for remuneration'.

[66] Sometimes, reference is made to a legal person, contract of employment etc. 'governed by private law' or to 'a private-law association'. And in a recent case concerning the Rome Convention (now Rome I regulation), the CJEU held that '[t]he function of the Convention is to raise the level of legal certainty by fortifying confidence in the stability of legal relationships and the protection of rights acquired *over the whole field of private law*.' (Case C-133/08, *Intercontainer Interfrigo SC (ICF)* v *Balkenende Oosthuizen BV and MIC Operations BV* ECR [2009] I-09687, Para. 23– emphasis added) The TFEU sometimes refers to 'private law'. See e.g. *Art 54 TFEU* and *Art 272 TFEU*.

[67] In the same sense, Basedow *op. cit.*, note 46, 462.

Interpretation, gap filling and correction

For the general principles of EU law it is familiar to distinguish three functions, i.e. interpretation (*secundum legem*), gap filling (*praeter legem*), and correction (*contra legem*).[68] Interestingly, these three functions coincide with the three traditional functions of good faith, a prominent source of unwritten judge-made private law in the civil law tradition. This is not surprising because these three functions simply coincide with the three roles that courts will inevitably have to play when applying abstract rules (i.e. statutes and codes) to concrete cases.[69] Indeed, these were already regarded as the three functions of praetorian (i.e. 'judge-made') law by Papinian,[70] from whom Wieacker borrowed them in order to describe the functions of § 242 BGB, the general good faith clause in the German civil code.[71]

Do the general principles of civil law fulfil the same three interpretative, gap-filling and corrective functions? The four cases where the Court has explicitly referred to general principles of civil law are all instances of the interpretation of EC directives against the background of these principles. Indeed, background rules of general private law seem indispensable, in particular, for the interpretation of EC directives that aim at sector specific consumer protection. As Beale put it, 'a great deal of general contract law that is not explicitly referred to in the acquis is nonetheless essential background to it'.[72]

Arguably, *Messner* could also be regarded as a case of gap filling (the distinction between interpretation and gap-filling being notoriously vague). However, none of them were an instance of correction (or: review). Nor has there been, so far, any attempt by referring national courts to introduce this idea with the Court.[73] This is in contrast with the 'general principles of EU law'. There, the Court made it clear that these principles can set aside provisions of national law in disputes between private parties.[74] Moreover, in *Audiolux* the central question whether there was a general principle of EU law concerning shareholder equality, was discussed because,

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[68] See e.g. Tridimas, *op. cit.* note 40, p. 27ff, Metzger *op. cit.* note 46, Hartkamp 2011, *op. cit.* note 2, 256, and for the interpretative and gap-filling functions, A-G Trstenjak, Opinion in Audiolux *op. cit.* note 42, 68.

[69] See M.W. Hesselink, 'The concept of good faith', in: A.S. Hartkamp, M.W. Hesselink, E.H. Hondius, C. Mak & C.E. du Perron (eds.), *Towards a European civil code, 4th ed.* (Alphen aan den Rijn: Kluwer Law International 2011), 619-649.

[70] D. 1, 1, 7: 'Ius praetorium est, quod praetores introduxerunt adiuvandi vel supplendi vel corrigendi iuris civilis gratia propter utilitatem publicam (...)'.

[71] F. Wieacker, 'Zur Rechtstheoretischen Präzisierung des § 242', in: *Recht und Staat in Geschichte und Gegenwart; Eine Sammlung von Vorträgen und Schriften aus dem Gebiet der gesamten Staatswissenschaft*, 193/194 (Tübingen: Mohr, 1956), 22

[72] H. Beale, 'The European Commission's Common Frame of Reference Project: a progress report', 2 *ERCL* (2006) 303-314, 312.

[73] Indeed, in none of the cases that we saw did the reference for preliminary ruling refer to the general principles of civil law. In contrast, in Case C-101/08 *Audiolux and Others* [2009] ECR I-0000, it was the referring national Court who explicitly asked the question whether the references to the equality of shareholders in a number of EC directives were manifestations of a general principle of Community law.

[74] See *Mangold* and *Kücükdeveci*, *loc. cit.* note 36.

if such a principle did exist, the plaintiffs claimed, it would have been directly horizontally effective and would have set aside the otherwise applicable national Luxemburg law.[75] However, Hartkamp is right in pointing out that there is nothing, in principle, in the nature of general principles of civil law that excludes that they could also play such a corrective role.[76]

Direct effect?

As unwritten secondary law

Could the general principles of civil law have direct effects on relationships between individuals in the (narrow) sense that they would create, modify or annul rights and obligations between them, similar e.g. to art 101 TEU (ex 81 EC) that directly declares void certain agreements that distort competition within the internal market?[77] Keeping in mind the three possible functions of these principles the question then becomes whether acts of private parties, such as contracts (provided of course that they are within the scope of EU law), must be interpreted, supplemented (gap-filling) and reviewed (corrected) in the light of the general principles of civil law.

For the general principles of EU law – in particular the principle of non-discrimination - , Hartkamp has argued that they could produce direct horizontal effects for the reason that 'here as elsewhere there is no good reason to distinguish between written and unwritten primary law'.[78] This reasoning seems to imply that primary EU law and direct horizontal effect are two sides of the same coin. However, the doctrine of direct effect, be it horizontal or vertical, is not limited to primary law. All binding EU law, including secondary legislation, can have direct effect, as long as the relevant provision is sufficiently clear, precise, and unconditional.[79] For example, the regulation on air passengers' rights produces direct horizontal effects, such as a right to compensation, between passengers and airline companies.[80] Nevertheless, Hartkamp is right that in relation to direct horizontal effects there is no good reason to distinguish between written and unwritten EU law. Supremacy and, as the case may be, direct effect of EU law should not depend on whether the relevant EU law is written or unwritten. This leads to the conclusion that whether or not the general principles of civil law, as a category, have the primary law status possessed by the

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[75] *Loc. cit.* note 73, Para 63.
[76] Hartkamp, *op. cit.* note 2, 256. Whether that would be legitimate is a different question, which will be discussed in the next section.
[77] As said, this direct horizontal effect in a narrow sense can be distinguished from direct effect in the broader sense of being directly applicable in disputes between private parties. In other words, the review of contract law is not the same as the review of a contract.
[78] Hartkamp, *op. cit.* note 2, 250.
[79] Cf. Craig/De Búrca, *op. cit.* note 3, 180.
[80] See art. 5, Regulation No 261/2004 of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights. Cf. *Sturgeon*, Joined cases C-402/07 and C-432/07, *Christopher Sturgeon, Gabriel Sturgeon and Alana Sturgeon* v *Condor Flugdienst GmbH* (C-402/07) and *Stefan Böck and Cornelia Lepuschitz* v *Air France SA* (C-432/07), ECR [2009] I-10923, Para 45.

general principles of EU law is not decisive for the question whether they could produce direct horizontal effects. Rather, what seems more relevant is the requirement for direct effect that the legal provision be sufficiently clear, precise, and unconditional. Principles may often be too general to pass this test.

Nevertheless, the recent *NCC Construction Danmark* case, which will be discussed in more detail below, seems to suggest that only principles of primary EU law can have direct effect. This brings us to the question whether the general principles of civil law are (also) (sometimes) principles of primary law.

As unwritten primary EU law

In a number of cases (notably *Viking* and *Laval*) the Court of Justice has accepted direct horizontal effect of market freedoms.[81] Hartkamp points out an important problem with the direct horizontal effect of market freedoms.[82] If a party can invoke her market freedom directly in a private law dispute, e.g. concerning a contract, then the other party, as the law stands now, can only invoke essentially public interests to counter that right.[83] Merely private (and typically merely economic) interests can not be raised to defeat the direct effect of the other party's freedom. Effectively, that could mean a limitation of the private autonomy of individuals, for the sake of market building.

In the past, justified worries have been expressed that EU private law is too much dominated by the internal market and that the effect of the market freedoms might be the 'constitutionalisation' of party autonomy and freedom of contract.[84] Here, howevr, the opposite seems to happen: freedom of contract and party autonomy are defeated by the market freedoms. Whereas traditionally private law disputes have been a matter of balancing the interests of the private parties,[85] incrementally on a case to case basis by courts and on a more abstract level in codifications, the direct horizontal effect allows only for the balancing of exclusively public interests. Hartkamp argues that the exception system should be extended for direct horizontal effect cases.[86]

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[81] Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union* v *Viking Line ABP and OÜ Viking Line Eesti*, ECR [2007], I-10779; Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others* [2007] ECR I-11767

[82] Hartkamp 2010, *op. cit.* note 2.

[83] In *Bosman*, the Court did not seem to see any difficulty: 'There is nothing to preclude individuals from relying on justifications on grounds of public policy, public security or public health. Neither the scope nor the content of those grounds of justification is in any way affected by the public or private nature of the rules in question.' (Case C-415/93 *Bosman* [1995] ECR I-4921, Para 86).

[84] Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: a Manifesto', 16 *European Law Journal* (2004), 653-674.

[85] However, in more recent approaches, especially in law & economics, private law should explicitly (and, according to some, even exclusively) serve public goals such as the maximisation of social welfare.

[86] Hartkamp 2011, *op. cit.* note 2, 548. In the same sense H. Schepel, 'Who's Afraid of the Total Market? On the horizontal application of the free movement provisions in EU Law' (Cambridge: CUP, forthcoming), 611-639, 628.

Maybe the general principles of civil law could provide a solution here. Could not the general principles of civil law contribute to developing a specific justification regime for the horizontal effect of market freedoms? They would bring in the private law interests. And they would do so in a way that does not necessarily have to worry those that fear the constitutionalisation of freedom of contract because in this way private autonomy *and its limits* would enter the equation.[87] In this way all relevant private interests, readily balanced (or still to be balanced, but as principles), could come directly into play. For example, the Court has already refered to both the principle of binding force of contract and its traditional counter principle of good faith.[88]

The result would be, of course, that the general principles of civil (or some of them) would gain the constitutional status of primary law. This could be conceived in two different ways. Either, as a matter of interpretation of the market freedoms, the general principles of civil law (or some of them) would become part of the justification regime for horizontal effect of the market freedoms. Or these principles (or some of them) would independently, as it were, counter-balance these freedoms. In the latter interpretation, it seems, this would be a case of direct horizontal effect of the principles themselves. In the former, they would be absorbed, as it were, by the Treaty provisions on the market freedoms, in a way very similar to private law principles applicable in the context of the private law remedies in competition cases based by the Court on art. 101 TFEU.[89]

The question arises, however, whether it is all worth the effort. If direct horizontal effect is going to be limited, first, to the freedom of establishment and the freedom to provide services (free movement of goods is so far excluded),[90] and then by general principles of civil law, thus creating a differentiation between the justification regimes in vertical and horizontal cases, and if the horizontal effect is going to be limited anyway to cases where the acts of private parties (contracts etc.) have the ability to obstruct free movement (which is rarely the case, because of competition), this may yield very little economic benefit, while coming at a price of greater complexity and legal uncertainty.[91] Therefore (and also for more traditional reasons, such as the division of labour with competition law), several observers

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[87] That risk would exist if freedom of contract was simply elevated to the constitutional status of a general principle of EU law, as was recently proposed by M. Safjan & P. Mikłaszewicz, 'Horizontal effect of the general principles of EU law in the sphere of private law', 18 *ERPL* (2010), 475-486, 484.
[88] Compare art 1134 French Civil Code, Paras 1 and 3 respectively. Cf. C. Jamin, 'Une brève histoire politique des interprétations de l'article 1134 du code civil', 178 *Dalloz* (2002), 901-907
[89] See *Courage*, *loc. cit.* note 62.
[90] See, however, Opinion of Advocate General Poiares Maduro delivered on 23 May 2007, Case C-438/05, ECR [2007], I-10779.
[91] In this sense, H. Schepel *loc. cit.* note 86, 630. In his contribution, G. Davies, 'Freedom of Movement, Horizontal Effect, and freedom of Contract' (conference paper), argues that the law of free movement is almost certainly welfare reducing (at best, there is a deferred welfare gain) and should rather be understood as a project in transformative social engineering, essentially political, seeking to nudge Europeans into changing their domestic preferences for more European ones.

have argued for a retreat from direct horizontal effect of the market freedoms.[92] If, however, the Court persists (or even extends) horizontal effect, then a principled approach, informed by general principles of private law, is to be preferred over a mere balancing of public and private interests. And from the perspective of coherence there seems to be good reason at least to coordinate these principles with private law principles developed , accepted or acknowledged in other areas of EU law such as competition law (*Courage, Manfredi*).

The hierarchy of norms

To the extent that the general principles of civil are (also) part of EU law the question arises where they are located in the hierarchy of norms, (also) on the level of primary ('constitutional') EU law or merely on the level of secondary EU law, or both (or neither)?

Their relationship to the general principles of EU law

The general principles of EU law have played a prominent role in the shaping EU law.[93] These principles, which include important examples such as equality, proportionality, and effectiveness, enjoy 'constitutional' status in the sense that they are unwritten primary law, on the same hierarchical level as the founding Treaties. These principles may also be relevant for private law disputes, as was well illustrated by the *Mangold* case. What is the relationship, if any, between the general principles of EU law and the general principles of civil law? Is there some (potential) overlap between the two categories? Can certain general principles of civil law be recognised as general principles of EU law?

In *Audiolux* the Court said:[94]

> The general principles of Community law have constitutional status while the principle proposed by Audiolux is characterised by a degree of detail requiring legislation to be drafted and enacted at Community level by a measure of secondary Community law. Therefore, the principle proposed by Audiolux cannot be regarded as an independent general principle of Community law.

This reasoning suggests that there is some link between the degree of detail and constitutional status. The more detailed the principle the less likely it is to be a constitutional principle. That makes sense: choices concerning details and exceptions belong to the realm of the ordinary legislator.[95] However, this reasoning,

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[92] For Hartkamp 2010, *op. cit.* note 2, this would be the preferred option.

[93] Different names were used in the past, including 'fundamental principles' etc., but since the entrance into force of the Lisbon Treaty the Court has usually referred to them as 'general principles of EU law'. See e.g. Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH* v *Bundesrepublik Deutschland*, ECR [2010] Page 00000, concerning the principle of effective judicial protection.

[94] See explicitly *Audiolux*, *loc. cit.* note 73, Para 63.

[95] See *ibidem,* Para 62: 'A principle such as that proposed by Audiolux presupposes legislative choices, based on a weighing of the interests at issue and the fixing in advance of precise and detailed rules'.

on its own, would not defeat the candidacy for acquiring constitutional status of, for example, the principles of binding force, good faith and unjustified enrichment since these are very general and broad principles.

What seems to have been decisive, rather, was the fact that Audiolux was trying to achieve some direct effect of the principle. What Audiolux needed was a principles that had direct horizontal effect between the private parties and enjoyed supremacy over the otherwise applicable Luxemburg law, which contained no such principle and only rules of company law favouring its adversary. Indeed, it is far from clear that the Court in a different case concerning, for example, the interpretation of a company law directive could not have accepted the same principle that it rejected as a general principle of EU law, in the shape of a general principle of civil law. Because in the latter type of cases, as we have seen, the way the principle works is not absolute. The Court is not implying in *Messner* et cetera (nor in *Courage*) that these principles are absolute, without exception. On the contrary. Therefore, what the Court actually seems to be saying in *Audiolux* is that the principle that *Audiolux* proposed is not sufficiently clear, precise, and unconditional to have direct horizontal effect.

At first sight it seems self-evident that the principles of the binding force of contract, good faith, and unjust enrichment, even though they are among the most fundamental and general principles of private law are nevertheless not constitutional principles. Indeed, they cannot be found in any of the constitutions of the Member States of the Union. The reason is simply that these principles, as Hartkamp puts it, 'are not sufficiently important for them to be counted as general principles of EU law'.[96] Central as, for example, the principle of good faith may be to private law, there is an obvious (and categorical) difference between this principle and, say, the general principle of equal treatment.

Still, it is not entirely self-evident what exactly constitutional means in the context of the European Union. It has become customary to refer to the primary EU law of the founding treaties as its constitutional framework, i.e. today essentially the TEU, the TFEU and the Charter.[97] In addition, the CJEU has acknowledged, by analogy, unwritten primary law with similar constitutional status.[98] However, as to the substance, it is far from self-evident that certain rules and doctrines belong to the constitutional framework of primary law. Not only does the European constitution look rather economic. Also, it does not even generally guarantee economic freedoms and competition but focuses more specifically on cross-border trade, which seems odd for constitutional liberties. What is true for written law is even more strongly so for unwritten law. In the absence of any previous recognition by the Court it is not self-evident at all what could become one day recognised as a principle of primary

[96] Hartkamp 2011, *op. cit.* note 2, 257.
[97] See art. 1, Para 2: the TFEU and the TEU 'constitute the Treaties on which the Union is founded'.
[98] Cf. F. Jacobs, foreword to Tridimas *op. cit.* note 40, ix, 'Thus the general principles rank alongside the Treaties as primary sources of Community law, prevailing over conflicting legislation.'

EU law. Some guidance could be found maybe in the aims and values of the EU as expressed in the Treaties and the Charter of fundamental right of the EU.[99] But any further or deeper basis is lacking.

One could imagine, for example, that constitutional status would be granted to those principles that are truly fundamental for human flourishing and progress, i.e. those principles that most contribute to giving individuals real opportunities to live full and creative lives and to be and to do what they want to be. This approach, the capabilities approach to human progress, is much more inclusive than conventional economic indicators like gross domestic product.[100] From such a perspective, it is self-evident that the discrimination of minority shareholders should not be the first candidate to become a constitutional principle. Similarly, the general principles of civil law that we have seen so far, although fundamental to the law of obligations, clearly are not fundamental to society. Their bearing on human flourishing is much weaker, and more indirect, than e.g. the principle of non-discrimination on grounds of age. On the other hand, however, it is not obvious either that the invalidity of cartels that affect cross-border trade between Member States (art. 101 TFEU) or the freedom to move goods from one EU country to another (art 28 TFEU) are more fundamental to human flourishing than the principles that contracts are binding, that unjustified enrichments must be reversed or that no one is bound to a contractual relationship after having fulfilled all their obligations or indeed, the principle according to which all contract contracts have to be performed in accordance with 'a standard of conduct characterised by honesty, loyalty and consideration for the interests of the other party'.[101]

Principles of secondary EU law?

In several areas, EU law refers to general principles that clearly have no constitutional status. Think, for example, of the 'general principles concerning the health and safety of workers',[102] and 'the general principles of food law'.[103] A very interesting case in this respect is *NCC Construction Danmark* which concerned the interpretation of 'the Sixth Directive'[104] and the scope of the principle of fiscal

[99] See Art. 2 TEU.
[100] For a powerful recent statement of this approach see M.C. Nussbaum, *Creating Capabilities; The Human Development Approach* (Cambridge, Massachusetts: Belknap Press, 2011).
[101] The duty of good faith and fair dealing as defined in art. 2(10) Feasibility Study.
[102] See Art. 1, Para 2, Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work: '[This directive] contains general principles concerning the prevention of occupational risks, the protection of safety and health, the elimination of risk and accident factors, the informing, consultation, balanced participation in accordance with national laws and/or practices and training of workers and their representatives'. Cf. Joined cases C-397/01 to C-403/01, *Bernhard Pfeiffer et al.* v *Deutsches Rotes Kreuz, Kreisverband Waldshut eV.* ECR [2004] I-08835, Para 4.
[103] Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (OJ 2002 L 31, p. 1).
[104] The same tax law directive that was central in *Société thermale d'Eugénie-Les-Bains.*

neutrality with regard to turnover taxes.[105] It is worth citing the ruling of the Court in this case *in extenso*:[106]

> First of all, it should be noted that the principle of fiscal neutrality resulting from the provisions of Article 17(2) of the Sixth Directive implies that a taxable person may deduct all the VAT levied on goods and services acquired for the exercise of his taxable activities.
>
> In that regard, it is necessary to add that, according to settled case-law, the principle of fiscal neutrality, and, in particular, the right to deduct, as an integral part of the VAT scheme, is a fundamental principle underlying the common system of VAT established by the relevant Community legislation.
>
> That principle of fiscal neutrality was intended by the Community legislature to reflect, in matters relating to VAT, the general principle of equal treatment.
>
> However, while that latter principle, like the other general principles of Community law, has constitutional status, the principle of fiscal neutrality requires legislation to be drafted and enacted, which requires a measure of secondary Community law (see, by analogy, with regard to the protection of minority shareholders, *Audiolux*).
>
> The principle of fiscal neutrality may, consequently, be the subject, in such a legislative measure, of detailed rules, such as those, implemented in Danish law, resulting from the application of Article 19(1) in conjunction with Article 28(3)(b) of the Sixth Directive, and point 16 of Annex F to that directive, according to which a taxable person carrying out both taxable activities and exempt activities of selling real estate cannot deduct fully the VAT on its general costs.
>
> It is also appropriate to point out that the general principle of equal treatment, of which the principle of fiscal neutrality is a particular expression at the level of secondary Community law and in the specific area of taxation, requires similar situations not to be treated differently unless differentiation is objectively justified. It requires, in particular, that different types of economic operators in comparable situations be treated in the same way in order to avoid any distortion of competition within the internal market, in accordance with the provisions of Article 3(1)(g) EC.

This decision is of interest in the present context for a number of reasons. First, because the principle of fiscal neutrality, although being 'a fundamental principle', is nevertheless not a constitutional principle. This confirms the idea the fundamental character is not decisive for the classification as a constitutional principle. By analogy, for example the principles of the binding force of contract and of good faith, although arguably principles fundamental to private law, are not necessarily also constitutional principles. Secondly, because here the fundamental principle underlies the common system of VAT established by Community legislation and is intended by the legislator, top down as it were. This is in contrast with the more

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[105] Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1) ('the Sixth Directive').

[106] Case C-174/08, *NCC Construction Danmark A/S* v *Skatteministeriet*, ECR [2009] I-10567, Paras 39-46 (references omitted).

bottom-up nature of the general principles of civil law.[107] Thirdly, the Court rejects the constitutional status for this principle for reasons similar to the ones mentioned in *Audiolux* (a judgment from two weeks earlier, by the same chamber (but with a different rapporteur), that the Court explicitly refers to by way of analogy), i.e. that the principle of fiscal neutrality requires legislation to be drafted and enacted, which requires a measure of secondary Community law.[108] Fourthly, and most relevant here, the principle of fiscal neutrality is a particular expression at the level of secondary Community law and in the specific area of taxation of the general principle of equal treatment. This means that there are principles located at the level of secondary EU law, not only at the level of primary EU law. By analogy, the general principles of civil law that we have seen so far could also be located on the secondary level of EU law.

In *NCC Construction Danmark*, like in *Audiolux*, the aim of the plaintiff was for the principle to get around the otherwise applicable national law (either as gap-filling or as correction) and this may have been an important reason for the Court to deny it the constitutional status of a general principle of EU law. If this is true, then the implicit conclusion is that the Court, like Hartkamp (see above), thinks that only general principles of primary law can have such effects. That would mean that general principles of secondary EU law have more limited effects that general principles of primary EU law. For example, it could be that they have no corrective (review) function and/or no direct horizontal effect. However, as we saw above, the corrective function and direct effect are not necessarily limited to primary EU law. Therefore, it remains to be seen what choices the Court will make in this regard.

In any case, the conclusion seems to be justified that the general principles of civil law can (also) be regarded as principles at the level of secondary EU law, as unwritten secondary EU law that is, with at least an interpretative function.

Sovereignty and subsidiarity

What effect does the discovery by the Court of Justice of general principles of civil law have on the autonomy of national private law makers? Are the general principles of civil law a threat to Member State sovereignty in the area of private law?

A reminder on scope

It is important to point out, as a reminder, that whatever effect the principles will have, they will have these only within the scope of EU law. The general principles of civil law cannot become a source – direct or indirect - of rights or obligations outside the scope of EU law.

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[107] See further below.

[108] Incidentally, would not the same analogy (in the opposite direction) suggest that the a principle of equal treatment of shareholders could be recognised as a general principle of secondary EU (company) law?

This means, in the first place, that the principles cannot operate beyond the competences of the EU legislator. Pursuant to the principle of conferral, the Union can act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein; competences not conferred upon the Union in the Treaties remain with the Member States (art 5(2) TEU).[109] Since the discovery and application by the Court of general principles of civil law is an act of the Union, just as much as legislation, this means that these also can never operate beyond the areas in which the EU has competence. In other words, if the EU has no competence to enact a European Civil Code that replaces national law, then also the Court of Justice has no competence to enact an unwritten ECC in the form of principles.

Moreover, this also means that, in the cases of shared competence (which include the areas most relevant for private law such as the internal market and consumer protection), the principles can only apply to subjects in relation to which the European legislator has actually made use of its competence by enacting EU law. Specifically in relation to gap filling this means that the Court can use the principles for filling gaps in existing EC directives but not gaps existing between different directives. So, paraphrasing Michaels' metaphor, no new islands in the ocean nor any land reclamation in between existing islands.[110]

Member-State-friendly interpretation of EU law

A second important point is that in none of the cases that we have seen so far the outcome goes against national principles of private law. In each case the Court refers to general principles of civil that are recognised (also) in the Member State at hand. *Société thermale d'Eugénie-Les-Bains* goes against the autonomy of the national tax law legislator. However, this happens on the basis of principles of private that exist also in France (i.e. the principle of the binding force of contract). Thus, it does not go against the national private law making autonomy. In *Hamilton*, one can even say, the general principles of civil law came to the aid of the national private law legislator. The general principles (in this case, discharge by performance) provided the basis for a limitation to consumer protection that merely national principles could not so easily have justified. Very similarly, in *Messner* the Court allowed a limitation to consumer protection on the basis of general principles (in this case good faith and unjust enrichment). The same applies also in *E. Friz* : the national legislator is allowed to limit consumer protection on the basis of general principles of civil law (in this case the principle of the mere *ex nunc* effect of withdrawal from a partnership) that are (implicitly) approved by the Court of Justice. If anything is limited or tempered, especially in the latter three cases, by the general principles of civil law it is the maximisation of EU consumer protection. Not the Member States should be worried but BEUC and other consumer groups.

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[109] Moreover, the use of Union competences is governed by the principles of subsidiarity and proportionality (Art 5 Para 1 TEU).

[110] R. Michaels, 'Of Islands and the Ocean: The Two Rationalities of European Private Law', in R. Brownsword, H.-W. Micklitz, L. Niglia, S. Weatherill (eds.), The *Foundations of European Private Law* (Oxford: Hart Publishing, 2011).

In a case note on *Hamilton* and *Messner*, Weatherill recently wrote:[111]

> Even if one is prepared to engage in the quest for 'systematisation' of the EU's legislative acquis, the consequence of success in such a quest is unavoidably that limits are placed on national autonomy in the areas touched – incrementally, as a 'patchwork' – by the EU. A more coherent system at EU level may lead to a less coherent system at national level. Such a starkly destructive outcome is not inevitable, but this is where the Court's use of general principles of civil law may lead, and it is one reason why it is troubling.

Even though this observation is generally true – there is an obvious tension between coherence ambitions of the national level and coherence efforts on the European level[112] - in the particular cases under discussion here (and in Weatherill's case note) the net effect of the Court's use of general principles so far seems to be the opposite. For, what could have happened if the Court had not resorted to the general principles? In *Hamilton*, *Messner* and *E Friz* the Court might very well have decided that the principles of civil law at hand, this time in the guise of *national* principle, had to be set aside with a view to achieving effective consumer protection. Thus, the counterfactual probably would be more intrusive for national law and more upsetting for the national system.

The case would be very different if the general principles of civil law at the EU level were used by the Court *against* general principles of civil law existing at the national level. But so far, in all four cases where the court explicitly refers to the (general) principles of civil law these principles work in support of (twin-sister) principles existing at the national level.

Actually, the reasoning in these cases is quite similar to the one adopted by the Court in *Courage*. The difference being, of course, that competition is an area of exclusive competence for the EU (see now art 3 TFEU) whereas consumer protection and internal market are areas of shared competence between the Union and the Member States (Art 4 TFEU). In *Courage*, in a bold move of judicial activism, the Court laid the foundations, to be further developed subsequently in *Manfredi*,[113] for a regime of private enforcement of competition law. After having established, first, that a party to a contract liable to distort competition can obtain relief from the other contracting party, and that Article 85 EC (now 101 TFEU) precludes a rule of national law under which a party to a contract liable to restrict or distort competition is barred from claiming damages for loss caused by performance of that

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[111] S. Weatherill, 'The "principles of civil law" as basis for interpreting the legislative *acquis*', 6 *ERCL* (2010) 74-85, 80.
[112] See, in more detail, M.W. Hesselink, 'The Ideal of Codification and the Dynamics of Europeanisation: The Dutch Experience' 12 *European Law Journal* (2006) 279–305.
[113] Joined cases C-295/04 to C-298/04, *Vincenzo Manfredi* v *Lloyd Adriatico Assicurazioni SpA* (C-295/04), *Antonio Cannito* v *Fondiaria Sai SpA* (C-296/04) and *Nicolò Tricarico* (C-297/04) and *Pasqualina Murgolo* (C-298/04) v *Assitalia SpA*, ECR [2006] I-06619.

contract on the sole ground that the claimant is a party to that contract, the Court then allowed a more limited exception to liability by ruling that Community law does not preclude a rule of national law barring a party to a contract liable to distort competition from relying on his own unlawful actions to obtain damages where it is established that the latter party bears significant responsibility for the distortion of competition. The Court reached this conclusion after having referred to 'a principle which is recognised in most of the legal systems of the Member States'. The Court said:[114]

> Similarly, provided that the principles of equivalence and effectiveness are respected (...), Community law does not preclude national law from denying a party who is found to bear significant responsibility for the distortion of competition the right to obtain damages from the other contracting party. Under a principle which is recognised in most of the legal systems of the Member States and which the Court has applied in the past (...), a litigant should not profit from his own unlawful conduct, where this is proven.

The Court is not imposing on 'unclean hands' or 'nemo auditur' principle, as a European general principle of civil law, on the Member States – even though it could have done so given the fact that competition law is an area of exclusive Union competence -, so Member States that do not have such a principle are not forced to introduce it. Nor is the Court simply leaving the matter to national law. It does something more subtle: it accepts that a Member State that has such a principle, limit the right to damages (and the private enforcement) on the basis of such a national principle, provided that the principles of equivalence and effectiveness (which are two general principles of EU law) are respected. And the reason for accepting this particular exception lies it the fact that it is based on a principle which is recognised in most of the legal systems of the Member States (and which the Court has applied in the past).

So, what is actually happening, so far, is the mirror image of the EU-friendly-interpretation of the national constitution, that the *Bundesverfassungsgericht* says is required by the German Constitution.[115] Here, the Court interprets EU law (in this case directives) in such a way that it is congruent with certain general principles of civil law existing (also) in a Member State.

Chameleonic principles

In *Courage* the Court laid the foundations for the private enforcement of EU competition law, and thus for a new branch of EU private law. Since EU competition law is primary EU law the private enforcement regime is also located on the level of primary EU law. The regime itself was not formulated by the Court in terms of principles, rather as an interpretation of Art. 101 TFEU. However, as we saw, in

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[114] *Courage*, *loc. cit.* note 62, Para 31.

[115] Derived from Article 23 Para 1 and the Preamble of the Basic Law. See *BVerfGE* 123, 267 (*Lissabon*), 225. See also *BVerfG*, 2 BvR 2661/06 of 6.7.2010, 58 (*Honeywell*) and *BVerfG*, 2 BvR 987/10 of 7.9.2011 (Greek bail-out), 109.

Courage the Court held that '[u]nder a principle which is recognised in most of the legal systems of the Member States and which the Court has applied in the past', a litigant should not profit from his own unlawful conduct.[116] This consideration led the Court to the conclusion that Community law does not preclude a rule of national law barring a party to a contract restricting competition from relying on his own unlawful actions to obtain damages in certain cases. It is a separate question to what extent this principle thus becomes (partly) (also) of European law – the answer seems to be in the affirmative since the Court says that it has applied the principle in the past – what else than EU law can the Court apply? -, but to the extent that it is European law it must be of primary law. It must be a (potential/possible) limitation to the private enforcement regime that follows from Art. 101 TFEU on the same level as the general rule of liability following from that article, because otherwise the principle holding the exception would be overruled by the general rule (without the exception). Similarly, as we saw above, if the Court is going to pursue its course of the horizontal effect of market freedoms then inevitably the Court will be developing another branch of European private law. This branch, by definition, will also be located on the level of primary EU law.

It remains to be seen to what extent the Court will choose to co-ordinate these two new branches of European private law with each other and with other areas of European private law,[117] and whether the Court will do so in terms of general principles of civil law or not.[118] If it does, then inevitable the same principle (in terms of substance) will operate at different levels of EU law, primary and secondary, chameleonically changing its status from constitutional to secondary.

In addition, as we saw, the principles may also operate at different levels of governance, national and EU, and maybe even at both levels at the same time. In particular, the general principles of civil law tend to work in support of the same principles (or their twin-sisters) existing at the national level.

This chameleonic and multifunctional nature of the general principles of civil law would fit very well with the idea of European private law as one dynamic, gradually converging multi-system of European private law (or a European private law order) and of Europe as one single private law space, but is much more problematic from other perspectives. This brings us to the legitimacy of the general principles of civil law.

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[116] *Courage*, *loc. cit*. note 62, Para 31 (references omitted).
[117] Think, for example, of the non-contractual liability of the EU. See Article 340, Para 2 TFEU, pursuant to which 'the Union shall, in accordance with *the general principles common to the laws of the Member States*, make good any damage caused by its institutions or by its servants in the performance of their duties' (emphasis added).
[118] On horizontal coherence, see below.

Their legitimacy

What, if anything, makes general principles of civil law a legitimate source of private law in Europe? Or, to put it more explicitly in the terms of the present conference, can the general principles of civil law be a legitimate form of involvement of EU law in private law relationships? This question has a general and a more specific aspect: First, are general principles of civil law a legitimate source of (unwritten) law? Secondly, what makes a particular principle legitimate? How should the Court of Justice (and only she?) go about 'discovering'[119] or 'acknowledging the existence of'[120] new (general) principles of civil law?

To ensure that the law is observed

If it is true that the functions of general principles coincide with the three tasks that courts will inevitably have to fulfil when applying existing abstract rules to new concrete cases,[121] then does not simply the office of the judge in itself already justify that she resort to general principles and, thus, provide legitimacy to all the principles that she finds necessary for fulfilling her tasks? Courts have to interpret, fill gaps and occasionally correct rules. This simply follows from the nature of adjudication.

In a positivist fashion, such institutional legitimation, based on the office of the judge, could simply be based on art 19 TEU. Pursuant to the first paragraph of that article, 'The Court of Justice of the European Union ... shall ensure that in the interpretation and application of the Treaties the law is observed.' This article and its predecessor art 220 EC, is often cited as the justification for the Court's development of the general principles of EU law.[122] The legitimacy of the principles would then derive directly from the legitimacy of the founding Treaties. However, on the other hand these provision do not explicitly refer to general principles. There are provisions in the Treaty that refer to general principles but they have a narrow scope, notably the non-contractual liability of the EU.[123] Thus, the positivist argument could actually be inverted.

Moreover, and more importantly, the tasks of the CJEU could at most justify the general existence and functions of general principles, but not their content: *which* principles should the Court adopt or find and which should it reject? Anything goes? If not, how can the acknowledgment of certain principles, and not others be justified?

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[119] Lenaerts & Gutiérrez-Fons, *op. cit.* note 27, 1635.
[120] Compare *Kücükdeveci, loc. cit.* note 36 (with reference *Mangold*, paragraph 75), Para 34: 'the Court has acknowledged the existence of a principle of non-discrimination on grounds of age which must be regarded as a general principle of European Union law'.
[121] See above.
[122] See e.g. Tridimas, *op. cit.* note 40, 19.
[123] See Art 340 TFEU, cited above, note 116.

Coherence

After earlier signs of its inclination in the opposite direction,[124] the Court of Justice more recently (and sometimes even explicitly) seems to be adopting a more systematic mode of interpretation.[125] This may be part of a development from a instrumental (mainly market building) teleological into a more rights oriented legal order, from objectives to principles, and from interests to rights. How do the general principles of civil law fit into this picture?

Law's integrity

In Dworkin's theory of law, principles are closely related to his right answer thesis and his idea of law's integrity: the legal system as a seamless web providing answers to all questions of law from which Hercules, 'an imaginary judge of superhuman intellectual power and patience who accepts law as integrity',[126] could derive the rights (and obligations) that individuals have.[127] That theory does not necessarily fit well with the post-national condition, multi-level governance and, in particular, the nature of EU law, based on limited and sometimes shared competences, and with legislative instruments like directives which lack direct horizontal but have to be interpreted harmoniously. In this context, it is not clear what exactly it means to take European rights seriously.[128] What the theory does, however, is underscore the close link between principles and coherence. If the general principles of civil law can contribute to making European private law more coherent and, and if this increased coherence does not come at too high a price, e.g. in terms of national sovereignty (an important 'if'), then surely their discovery by the European Court of Justice must be welcomed.

Vertical coherence

As we saw, and will further discuss below, general principles of civil law, because of their flexible and informal nature which allows them to operate on more than one level of governance, could make an important contribution to the coherence and convergence of private law making on the national, European and indeed global level.

For example, sales law in CISG,[129] the consumer sales directive,[130] and in a number of Member States (but not all) is based, at least in part, on similar principles.[131] As

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[124] Notably the *Simone Leitner* case where the Court refused to borrow the definition of 'damage' from the product liability directive for determining the meaning of the same concept in the package travel directive, in spite of the suggestion by its advocate general to do so. See Opinion of AG Tizzano in Case C-168/00, *Simone Leitner v TUI Deutschland GmbH Co. KG*, Paras 29-33.
[125] Explicitly in Case C-348/07, *Turgay Semen* v *Deutsche Tamoil GmbH*, ECR [2009], I-02341, Para 29.
[126] R. Dworkin, *Law's Empire* (1986) 239.
[127] For the latest statement, extending the idea of integrity well beyond the law into a more general theory of value, see R. Dworkin, *Justice for Hedgehogs* (Cambridge, Massachusetts: Belknap Press, 2011).
[128] In the same sense Mak, *op cit.* note 58.
[129] United Nations Convention on contracts for the international sale of goods (1980).
[130] Directive 1999/44/EC on consumer sales and guarantees.

legislative devices they all are very rigid. The revision of the consumer sales directive recently failed (i.e. dropped almost entirely out of the consumer rights directive). And it is also unlikely that countries like the Netherlands or Germany will soon update their re-codification (1992) or law reform (2002) which shaped their sales law after the CISG model. Also, CISG itself – because of its success - will be difficult to change, even though it is already more than three decades old and many gaps and ambiguities have been discovered. In these circumstances, underlying principles can be helpful in assuring the development of sales law and, where possible (see on this below), its convergence. All this can happen without undermining the sovereignty of the democratically elected law maker who can retain the final say. Such a multi-level dialogue in a common European private law space could help in removing unnecessary contractions. Ideally, it could even lead to a reflective equilibrium.[132]

Horizontal coherence

General principles of civil law could contribute not only to the vertical coherence of the multi-level system of private law in Europe, but also to its horizontal coherence. This is probably even more urgent.

The European legislator, with its sector-specific approach, has produced, on the European level, a colourful patchwork of rather incoherent bits and pieces of private law.[133] That is true, not only *within* specific areas of policy, such as consumer law, where e.g. general concepts such as damage and consumer are defined differently, but also among these different areas. The initial aim of the reform of the acquis was to tackle this problem.[134] However, in the course of the Action Plan process the scope of the review became increasingly narrow. From the outset, the exercise had been limited to contract law, despite efforts from scholars to demonstrate that tort and property should be included on account of the coherence objective that was said to be at the basis of the reform,[135] these subject were excluded right from the beginning. Soon the review was further limited to consumer contract law.[136] Then the scope was reduced from eight[137] to only four directives,[138] and further to two

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[131] See S. Grundmann, 'Consumer Law, Commercial Law, Private Law: How can the Sales Directive and the Sales Convention be so Similar?', *EBLR* (2003), 237-257.
[132] Compare J. Rawls, *A Theory of Justice*, revised edition (Belknap Press, Cambridge, Massachusetts, 1999 [1971]). In his theory the equilibrium is between one's principles and one's judgment, and limited to what Rawls calls the basic structure of society. Here the equilibrium could be between the different levels of governance.
[133] Cf. L.A.D. Keus, *Europees privaatrecht - Een bonte lappendeken; Preadviezen, uitgebracht voor de Vereniging voor Burgerlijk Recht en de Nederlandse Vereniging voor Europees Recht* (Lelystad: Vermande, 1993).
[134] See *Action Plan*, *loc. cit.* note 29.
[135] See Ch. von Bar & U. Drobnig (eds.), *The interaction of Contract Law and Tort and Property Law in Europe: a Comparative Study* (Munich: Sellier, 2004).
[136] *First Annual Progress Report on The Common Frame of Reference*, 23.09.2005, COM(2005) 456.
[137] *Green Paper on the Review of the Consumer Acquis*, Brussels, 08.02.2007, COM(2007) 744.
[138] *Proposal for a Directive of the European Parliament and of the Council on consumer rights* (Brussels, 08.10.2008 COM(2008) 614/3).

(and a tiny bit of a third one).[139] Thus, other large chunks of EU private law entirely remain outside the scope of this endeavour to make European private law more coherent. Think only of the private enforcement of competition law: the Commission's white paper did not even refer to the acquis reform that was underway.[140]

Private enforcement of competition law proposals were sparked, of course, by the Court's case law in *Courage* and *Manfredi*. In those cases the Court gave some very broad directives concerning the regime. In *Courage* it allowed the unclean hands defence, as we saw, and in *Manfredi* the Court addressed causation and the amount of damages (expectation damages). However, there was no sign of any attempt at articulation in terms of private law principles. Why expectation damages? Because they are contractual? But they seem to be allowed also in claims against third parties (i.e. other members of the cartel), which is already puzzling per se in the light of the general private law principle of privity of contract.

From the perspective of legitimacy therefore it seems urgent also for the Court to seriously start to address the coherence of its own rulings in the area of private law. In practical terms this means that when it invokes, or implicitly applies, private law principles, it should try to use the same general principle of private law (or 'general principles of civil law'), even when it deals with private law questions in different policy areas of the Union. In other words, the same general private law principles should apply, in principle, to consumer law, passenger's rights, commercial agency, Rome I, Brussels I, Francovich, arts 340 Para 2 TEU (non-contractual liability of the Union), private enforcement of competition law, horizontal effect of market freedoms, to mention only a few examples. And if the Court finds that it should resort to different principles for different areas, it should explain why different general principles should apply to these different subjects.

The point here is not that coherence is the most important value that should trump all law making. Nor that coherence is an umproblematic concept. The argument is rather that it is irrational for EU private law makers to strive for micro-coherence without paying any attention to the broader picture, and that different answers to the same question in different areas, *without any justification*, are arbitrary.

Discourse and dialogue

In reality, a European court that tries to find general principles of civil law does not have to start from scratch. On the contrary, not only at the national level but increasingly also at the European level ('European private law') and indeed the global level ('private law theory') there is a sophisticated body of knowledge about fundamental questions and fundamental principles of private law. Could such expert knowledge provide legitimacy? Would a judgment by the CJEU directly, through its own critical assessment of legal scholarship, or indirectly, via documented opinions

[139] See European Parliament legislative resolution of 23 June 2011, *loc. cit.* note 18.
[140] White Paper on Damages Actions for Breach of the EC antitrust rules COM(2008) 165, 2.4.2008.

of its advocates general, informed by legal scholarship, become more legitimate for that reason alone?

Scholarship can be regarded as a manifestation of society's development and sophistication (division of labour). With regard to legal scholarship, Habermas has pointed out that 'the comparatively high degree of rationality connected with legal institutions distinguish these from quasi-natural institutional orders, for the former incorporate doctrinal knowledge, that is, knowledge that has been articulated and systematized, brought to a scholarly level, and interwoven with a principles morality.'[141] Given this high degree of rationality, Hercules could regard himself as part of an interpretative community of experts.[142] Therefore, it seems, the Court of Justice could benefit from borrowing the findings of legal scholars, and from engaging in a more explicit and reasoned debate with legal scholarship.

Of course, in the Member States there are different traditions concerning the relationship between judges, legislators and professors.[143] And the expectations of each of us will inevitably be influenced by our own national experiences. While a German scholar might expect the Court to follow, in principle, any existing consensus among legal scholars an English legal scholar will accept much more readily the Court's role as a protagonist. Similarly, for me, as a Dutchman, the best way forward seems to be through a prominent role of the advocates general who, assisted by their *Referendars* produce well documented and reasoned opinions which engage in an explicit debate with legal scholarship. The opinions of AG Trstenjak, notably in the *Audiolux* case (but also in several other cases),[144] are exemplary in this respect. The Court then can refer to these, and cherry pick from them, without always having to engage directly into the nuances of the academic debate.

Clearly, the debate concerning principles of law, including general principles of civil law, cannot remain limited to legal experts alone. One reason is that any position in this debate is necessarily informed by a political background understanding of the legal system as a whole and of the place of private law in it. And that political background understanding clearly is not merely a scientific matter to be sorted out among scholars and other legal experts. In the words of Habermas:[145]

> The dispute over the correct paradigmatic understanding of the legal system, a subsystem reflected in the whole of society as one of its parts, is essentially a

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[141] J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: Polity Press, 1996) and 114@. In the German original, J. Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Suhrkamp: 1992), 106-107 and 146: 'ein dogmatisch durchgestaltetes, d.h. artikuliertes, auf wissenschaftliches Niveau gebrachtes und mit einer prinzipiengeleiteten Moral verschränktes Wissenssystem.'
[142] *Ibidem*, 275.
[143] R.C. Van Caeneghem, *Judges, Legislators & Professors; Chapters on European Legal History* (Cambridge: CUP, 1987).
[144] *Loc. cit.* note 42.
[145] *Op. cit.* note 141.

> political dispute. In a constitutional democracy, this dispute concerns all participants, and it must not be conducted only as an esoteric discourse among experts apart from the political arena. In virtue of their prerogatives and, more generally, their professional experience and knowledge, members of the judiciary and legal experts participate in this contest of interpretations in a privileged way; but they cannot use their professional authority to impose one view of the constitution on the rest of us.

What Habermas says here concerning constitutional law applies equally, also in Habermas' own view,[146] to private law.[147] Since a legal order is legitimate to the extent that it secures, at the same time, the private and public autonomy of its citizens it is crucial, also for private law, that the addressees of private law can regard themselves at the same time as its authors.[148]

This does not mean, however, either for public or private law, that only direct democratic input could be the key to legitimate law making. We should not throw out the baby with the bath water. More democracy and a more inclusive deliberative politics does not mean *less* (at least not in an absolute sense) scholarly input. In our complex society expert knowledge is indispensable. What is crucial, however, is that the expert knowledge at the political centre of decision making is informed by public opinions flowing freely also from citizens at the periphery, instead of being imposed upon them from the centre of political and economic power.[149] Therefore, to the extent that legal scholarship provides rational reconstructions of the legal experience of us all, and not merely of a limited section of society sharing homogeneous values and interests, it can contribute to making the discovery of new general principles of civil law more legitimate.

In the cases where the Court has referred to the general principles of civil law, so far, it has done so in a rather apodictic fashion. It is not clear what the origin of these principles was. They were not referred to as principles 'recognised in most of the legal systems of the Member States' (as was the unclean hands principle in *Courage*).[150] Nor were they presented as a reflection of the *communis opinio* prevailing among legal experts. In one case (*Hamilton*), the advocate general had proposed a general principle, which was acknowledged in legal scholarship, but the Court decided the case on the basis of another principle, without explaining way. And in another case (*Messner*), the Court labelled as general, without giving any explanation, a principle (i.e. good faith) which has been one of the most controversial principles in the academic debate on European private law.[151]

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[146] *Op. cit.* note 141, 477-493.
[147] Compare also the idea, expressed by M. Kumm, 'Who is Afraid of the Total Constitution? Constitutional Rights and Principles and the Constitutionalization of Private Law', 7 *German Law Journal* (2006), 341-369, 359, of private law as applied constitutional law.
[148] Habermas *op. cit.* note 141, 492-493.
[149] Habermas, *op. cit.* note 141, 460.
[150] See above.
[151] See below.

Legal scholarship has in common with legal principles they are not necessarily confined within national borders. They are or can easily become transnational. The role of general principles in bringing coherence and convergence in the multi-level system of private law in Europe,[152] can be easily matched by the emerging European legal scholarship. Thus, the general principles of civil law, informed by transnational legal scholarship, could play an important role in the vertical dialogue between law makers at the national, the EU level and the global. European private law principles and scholarship can find each other in a common European legal space.[153]

This also suggests that formal distinctions between different categories of principles, national and European, of primary and of secondary law, should not be exaggerated. Just like the public opinions of Member States should be open towards each other, so also arguments of principle should not be stopped by formal borders. This is not to say that there should be only pan-European principles (just like one single pan-European public opinion is not the solution).[154] The common law traditionally has not recognised a general principle of good faith. Although that fact should not enter some formal calculus of qualified majority voting, it does mean nevertheless that the Court should think twice before claiming it to be a general principle with a pervasive mandatory role.

Again, one should not be naive. There are risks of the 'framing' of the debate (e.g. by an exclusive focus on one single academic project, as a 'common frame of reference') and agenda setting. Therefore, we should constantly and actively strive for openness, pluralism and diversity of contribution. But it would also be irrational to dismiss out of hand any insights from legal scholarship merely because it came from experts. What is needed is a critical examination of the scholarly knowledge production. And to the extent that this knowledge is biased e.g. by conservatism or captured by special interests it can be set aside, with good reason. What we need is a critical, open and continuous exchange and flow of ideas between the Court and a legal scholarship which is as open as possible and informed, as much as possible, by the stakeholders at the periphery.

Principles and acquis

Should the general principles of civil law be derived (by the Court, assisted by scholars) primarily or even exclusively from the acquis communautaire? At first sight this might seem an attractive idea, especially from the perspectives of the separation of powers and the limited competences of the EU. Should not, also in Europe, the law making powers rest as much as possible with the legislator, especially now that the democratic input from the European Parliament is on the rise? And are not general principles that remain as close as possible to the acquis

[152] See above.
[153] Compare, with regard to the general principles of EU law, Lenaerts & Gutiérrez-Fons, *op. cit*. note 27.
[154] Habermas, *op. cit.* note 141, 373 and J. Habermas, *Europe: The Faltering Project* (Malden, Massachusetts: Polity Press, 2009), 106.

the best guarantee against competence creep and an incremental reduction of national sovereignty?

As we saw above, in another area, i.e. tax law, the Court regards the principle of fiscal neutrality as a principle of secondary EU law, 'a fundamental principle underlying the common system of VAT established by the relevant Community legislation', a principle that 'was intended by the Community legislature to reflect' the general principle of equal treatment. Thus, the principle of fiscal neutrality is a principle underlying the acquis (in the area of VAT law) and its content and nature are determined (at least in part) by the intention of the EU legislator. Should not then, by analogy, the general principles of civil law be principles underlying the common system of civil law established by the relevant EU legislation as intended by the EU legislator? The answer is of course 'no' because there is no general civil law acquis. There is no common system of civil law established by the relevant EU legislation from which legislative intent of the EU legislator concerning general principles of civil law can be derived.

From the perspective of general private law the acquis communautaire is a patchwork, whereas from the perspective of EU policy and legislation, there is common market law and consumer protection law, but no such thing as general private law with regard to which a legislative intent of the EU legislator could be derived. The vast majority of directives – including the latest version of the CRD - are based exclusively on art 114 TFEU and its predecessors. And clearly from the aim of the approximation of laws for the establishment and functioning of the internal market and even from the aim of a high level of consumer protection (Para 3 of Art 114 TFEU) it is not possible to derive any general principles of civil law. Even the idea of general principles of the acquis in the area of private law is a contradictory notion because, as said, the private law acquis is a patchwork. Indeed, the methodology that was adopted for developing 'Acquis Principles' has been criticised (rightly, in my view) exactly for this reason.[155]

Moreover, and most importantly, the Court clearly does not refer to acquis principles in any of the four cases that we saw. It refers to general principles of *civil* law, not to principles of consumer law and not even to general principles underlying the acquis communautaire in the area of private law. That would also have been completely useless: what the Court needed were general principles of private law, not acquis or consumer law principles. So, in this respect the general principles of civil law that the Court refers to in *Société thermale d'Eugénie-Les-Bains*, *Hamilton*, *Messner*, and *E. Friz* are quite different from the principle of fiscal neutrality. Both are principles, the former 'general' and the latter 'fundamental', both seem to be located (in part) on the level of secondary EU law, but the tax law principles essentially are acquis principles whereas the general principles of civil law clearly are not.

[155] See N. Jansen & R. Zimmermann, 'Restating the Acquis Communautaire? A Critical Examination of the Principles of the Existing EC Contract Law', 71 *MLR* (2008), 505-534.

With regard to general principles of EU law, i.e. the fundamental principles that are located on the level of primary law and thus have constitutional status, a distinction is usually made as to their origin between principles deriving from the common traditions of the Member States, on the one hand, and principles deriving from that objectives of the EU, on the other.[156] The former could be referred to as bottom-up (inductive) and the latter as top-down (deductive) principles.[157] A similar distinction could be drawn in relation to principles that are not necessarily located at the level of primary EU law. The principle of fiscal neutrality would clearly be an example of a top-down principle located at the level of secondary EU law, underlying the acquis in the area of VAT law and an expression of the legislative intent of the European legislator. The general principles of civil law, at least the ones that the Court has referred to so far, are examples of bottom-up (inductive) principles that are derived form the common private law traditions of Member States.

This is not to say that principles in the area of private law could only be bottom-up (inductive) principles deriving from common traditions and never top-down principles underlying a certain area of EU legislation. On the contrary, in analogy to principles 'underlying the common system of VAT established by the relevant Community legislation', the Court could develop principles underlying, for example, the protection of consumers against unfair terms. In *Pénzügyi Lízing* the Grand Chamber of the CJEU pointed out, with references to earlier cases (*Océano, Mostaza Claro* and *Asturcom*), that 'according to settled case-law, the system of protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge.'[158] If the unfair terms directive introduced a 'system' and if that system is 'based on' a certain 'idea' (which can easily be assimilated to legislative intent) then it seems entirely possible, and indeed appropriate, for the Court to deduce some underlying principles. However, these would be unfair terms or (depending on its level of generality, consumer protection) principles, not general principles of civil law.

However, one should not draw to sharp a distinction between these two (ideal) types of principles. In a (non formal) comparison of the private laws of the Member States, with a view to distilling bottom-up principles of civil law the acquis should also play a role. Indeed, today's national private law has been shaped to a considerable extent by the acquis, both actively and passively, as it were. Actively, in the sense that Member State laws were modified as a result of EU law, most clearly as a consequences of EC directives. Directives have to be transposed into national

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[156] See above, note 42.
[157] See Lenaerts & Gutiérrez-Fons, *op. cit*. note 27, Metzger *op. cit.* note 46, and, more in general, W. van Gerven, 'Codifying European Private Law: Top Down and Bottom Up', in S. Grundmann and J. Stuyck (eds.), *An Academic Green Paper on European Contract Law* (The Hague: Kluwer Law International, 2002) 405-432.
[158] Case C-137/08, *VB Pénzügyi Lízing Zrt.* v *Ferenc Schneider*, ECR [2010], 00000, Para 46.

law and are binding as to the result to be achieved but they leave to the national authorities the choice of form and methods (art. 288 TFEU). There were rather divergent transposition strategies and some Member States sometimes opted for supererogatory transposition.[159] In Germany, for example, as a result of the *Schuldrechtreform*, on several subjects, what originally was European consumer law became national general private law.[160] Such large scale reforms of national law, which are triggered by EU law, are simply unintelligible without taking into account the relevant directives. Thus, already for this reason alone the acquis has to be taken into account in any serious comparison of national general principles of private law. However, the acquis has also affected national law in the passive sense that what was already done by the European legislator did not have to be done any more by the national legislator. In other words, absent the acquis national private law might have looked quite different. Here the (by definition hypothetical) examples are the reverse of those of the *Schuldrechtreform*: in some Member States what became consumer law, as a result of EC directives, could have been adopted as general private law, applicable in B2C and B2B cases, had the national legislator taken the initiative before the European legislator did. Therefore, national private law to a large extent assumes the existence of the acquis and to the extent that national and EU private law are complementary, national private law is unintelligible without knowing the acquis. Indeed, the Principles of European Contract Law have been criticised for disregarding acquis.[161] Metzger is right that this may explain, in part, why they have had little influence of ECJ's case law.[162] The Draft Common Frame of Reference was an improvement in this respect,[163] although it was rightly criticised for not sufficiently *integrating* acquis and common core, merely juxtaposing them.[164]

Principles and common core

The fact that top-down principles, derived deductively from the acquis and its objectives, cannot do the job that the Court wants the general principles of civil law to do, does not in itself make bottom-up principles, that are derived in an inductive fashion from the laws of the Member States, become legitimate. The mere fact that principles are common to the legal systems of the Member States is, of course, not a sufficient reason for these principles to be legitimate. Even a principle that exists in

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[159] W. van Gerven, 'A Common Law for Europe: The Future Meeting the Past?' *ERPL* (2001) 485-503, 491, uses the term 'spill-over effect'.

[160] See e.g. S. Grundmann, 'Germany and the Schuldrechtsmodernisierung 2002', 1 *ERCL* (2005), 129; R. Zimmermann, 'Contract Law Reform: the German Experience', in: S. Vogenauer & S. Weatherill, *The Harmonisation of European Contract Law, Implications for European Private Laws, Business and Legal Practice* (Oxford: Hart Publishing, 2006), 71–88.

[161] H. Beale & O. Lando (eds.), *Principles of European Contract Law, Parts I and II, Prepared by The Commission on European Contract Law* (The Hague: Kluwer Law International, 2000).

[162] Metzger *op. cit.* note 46.

[163] Ch. von Bar et al (eds.), *Principles, Definitions and Model Rules of European Private Law; Draft Common Frame of Reference (DCFR); Outline Edition* (Munich: Sellier, 2009).

[164] See H. Eidenmüller, F. Faust, H.C. Grigoleit, N. Jansen, G. Wagner and R. Zimmermann, 'The Common Frame of Reference for European Private Law—Policy Choices and Codification Problems', 28 *Oxford J Legal Studies* (2008), 659-708.

all Member States can be unjust or come to be regarded as no longer just, as the historical development of the law, including private law, has shown. Conversely, the absence of the recognition of a principle in all Member States (or even the majority of them) should not always bar the recognition of it by the Court, because that absence itself might be unjust.[165]

The main reason why the common core nature of general principles of civil law can contribute to their legitimacy is that it removes the potentially delegitimising factor of the usurpation of national law making prerogatives (and the erosion of national legal cultures). In the presence of truly general principles, there is a 'no-conflict' situation, to borrow a term from American private international law doctrine, where it becomes immaterial whether a general principle of national law applies or one of EU law since on whatever level of law making the principle is formally located (national, EU or global) it will always point in the same direction. The conflict between national and EU competence dissolves.[166]

The more it can be plausibly shown that a certain rule or principle belongs to the principles common to the laws of the Member States, the less the Court's resorting to such principles undermines (in a substantive sense) the autonomy of national law makers in the area of private law. And vice versa. Indeed, to take an example from the recent case law concerning the general principles of EU law, one of the reasons why the *Mangold* decision has been so controversial is that most observers were surprised by it. Not many were aware, before *Mangold*, that a principle of non-discrimination concerning age existed.

This is equally true for private law. From the perspective of legitimate European private law making it is crucial that the general principles of civil law genuinely represent the common core of private law in Europe. Moreover, especially when this is not self-evident, the common core character of the principle should also be demonstrated by the Court.

In this respect the case law of the Court of Justice, so far, leaves much to be desired. As we saw above, the Court simply postulates the principles without providing any prima facie evidence. That is especially troubling when it comes to principles that clearly are not common core such as, in particular, the principle of good faith. If anything, that principle has traditionally been regarded as a principle that keeps the legal traditions of the Member States divided, the civil law systems endorsing it, the common law systems rejecting it.[167] (Indeed, the good faith principle is a genuine

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[165] In the same sense, with regard to the general principles of EU law, Lenaerts & Gutiérrez-Fons, *op. cit*. note 27.

[166] Faz@[noten hierna hernummeren]

[167] See e.g. Bingham LJ in *Interfoto Picture Library Ltd* v. *Stiletto Visual Programmes Ltd* [1989] QB 433: 'In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. (...) English law has, characteristically, committed itself

principle of *civil* law in this different sense of not being a principle of *common* law.) It is true that the acquis occasionally refers to the standard of good faith, and that to that extent it has become part of the law of all Member States, but this occurs (by definition) in a limited context, in this case notably unfair terms in consumer contracts.[168] On the other hand, however, the PECL, DCFR and the feasibility study for an optional instrument (FS) contain a general good faith duty,[169] albeit with varying intensity and roles, which has led to an lively debate.[170] Therefore, Weatherill is completely right that the Court had something to explain here.[171]

One research project, that has been going on for more than a decade, actually is called the Common Core of European Private Law. This project was inspired by the famous Cornell project.[172] That latter research project, in turn, aimed at establishing general principles of civilised nations in the sense of art 38 (1)(c) of the ICJ's Statute.[173] Although the common core project does not focus on formulating principles (its aim is rather the 'mapping' of existing similarities and differences) it nevertheless has yielded a host of comparative information in the fields of contract, tort and property law, including an entire volume on good faith in European contract law.[174] It should be noted, however, that comparative law does not necessarily lead only to common core findings. On the contrary, it has been shown time and again that legal systems with sometimes literally the same civil code provisions come to very different outcomes.[175] Even the common core project itself has led to many findings of different resolution of the same hypothetical case. For this reason, Kennedy recently referred to it as the '"Contradiction within the Core" project'.[176]

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to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness.'

[168] Art. 3 (1) Directive 93/13/EEC of 21 April 1993 of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 29.

[169] See art. 1:201 PECL, art. III. – 1:103 DCFR and art. 8 Feasibility Study.

[170] See O. Lando, 'Is good faith an over-arching general clause in the Principles of European Contract Law?', in: M. Andenas et al. (eds.), *Liber amicorum Guido Alpa; Private law beyond the national systems* (London: British Institute of International and Comparative Law, 2007), 601-613 and H. Beale, 'General clauses and specific rules in the Principles of European Contract Law: the "Good Faith" clause', in: S. Grundmann & D. Mazeaud (eds.), *General Clauses and Standards in European Contract Law* (The Hague: Kluwer Law International, 2006), 205-218, 218.

[171] Weatherill, *op. cit.* note 4.

[172] See M. Bussani & U. Mattei, 'The Common Core Approach to European Private Law', 3 *Columbia Journal of European Law* (1997/1998) 339.

[173] See R.B. Schlesinger, 'Research on the General Principles of Law Recognized by Civilized Nations', 51 *American Journal of International Law* (1957) 734 and Rudolf B. Schlesinger (ed.), *Formation of contracts; A study of the common core of legal systems* (New York, 1968).

[174] R. Zimmermann & S. Whittaker, *Good Faith in European Contract Law* (Cambridge: CUP, 2000).

[175] See R. Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law', 39 *American Journal of Criminal Law* (1991), 1-34 and 43-401.

[176] D. Kennedy, 'A Transnational Genealogy of Proportionality in Private Law', in: R. Brownsword, H.-W. Micklitz, L. Niglia, S. Weatherill (eds.), The *Foundations of European Private Law* (Oxford: Hart Publishing, 2011), 185- 220, 214.

There is something else to be learned from more than a century of experience in private law comparison, which can be of crucial importance when it comes to the legitimacy of any legal comparison conducted with a view to law making, i.e. the importance of methodological issues. For example, in functional comparison (the dominant method, for obvious reasons, when it comes to applied and pragmatic comparative studies) the way the functional question is formulated is crucial (and heavily normatively charged) because of its framing and agenda setting implications. This does not per se delegitimise the functional method. But it does require an awareness of where the normative issues occur.

Principles and model rules

Do the general principles of civil law become more legitimate when they are based on, or developed in a dialectical relationship to, the principles that have been formulated in several academic projects? In the area of contract law, these projects include the Unidroit principles of international commercial contracts,[177] the Principles of European contract law,[178] and the Principes contractuels communs.[179]

These principles generally are as concrete as the ordinary rules of contract law, as they can be found in the civil codes of the Member States. Indeed, the first provision of the PECL explicitly says that 'These Principles are intended to be applied as general *rules* of contract law in the European Union.'[180] It is not surprising, therefore, that in the follow-up projects, i.e. the Draft Common Frame of reference[181] and the recent Feasibility study[182] which were also drawn up by academics, this time at the request of (and, in the latter case, in collaboration with) the European Commission,[183] there was a terminological shift from principles towards (model) rules. The first version of the DCFR contained, in addition to the model rules, a long list of underlying principles which was reduced, a year later, to four.[184] The feasibility study only states three such general principles: freedom of

[177] UNIDROIT Principles of International Commercial Contracts Rome (Rome: Unidroit, 2010).
[178] *Op. cit.* note 161.
[179] B. Fauvarque-Cosson & D. Mazeaud (eds.) *Principes contractuels communs* (Paris: Société de Législation Comparée, 2008).
[180] Article 1:101 Para 1 PECL (emphasis added).
[181] *Op. cit.* note 163.
[182] Commission Expert Group on European Contract Law*, Feasibility Study for a future instrument in European Contract Law*, 3 May 2011.

[183] See Commission Decision of 26 April 2010 setting up the Expert Group on a Common Frame of Reference in the area of European contract law, 2010/233/EU, *OJ* 27.4.2010, L105/109.
[184] For a critical assessment of this remarkable development, which represents a marked ideological shift towards conservatism, see M.W. Hesselink, 'If you don't like our principles we have others. On core values and underlying principles in European private law: a critical discussion of the new "Principles" section in the draft CFR', in: R. Brownsword, H.-W. Micklitz, L. Niglia, S. Weatherill (eds.), *The Foundations of European Private Law* (Oxford: Hart Publishing, 2011), 59-71.

contract, good faith and fair dealing and informality.[185] The latest version (by the Commission) substitutes informality with co-operation.[186]

As said earlier, it does not seem very useful to draw sharp distinctions between rules and principles. It is more a matter of degree: it seems more appropriate to reserve the term of principles for the more general and abstract norms which often underlie (in the sense that they can explain) sets of more concrete rules.[187] Thus, the question remains whether, with a view to legitimacy, it makes a difference whether the Court of Justice borrows concrete model rules from these academic projects or merely from the few very general and abstract principles that some of these projects have formulated. In practical terms, the Court seems to need not both. Indeed, some of the Court's advocates general tend to assimilate the model rules in the DCFR with the general principles of civil law.[188] On the other hand, most of the general principles of civil law that the Court has discovered so far are actually quite general: the binding force of contract, discharge by performance, good faith and unjustified enrichment.[189] And especially in the context of the interpretation of directives,[190] it is likely that the Court will often need principles of an intermediate level of abstraction. Micklitz has argued that the Court should not resort to the model rules in the DCFR for inspiration:[191] 'The short reference [to the general principles of civil law' - MWH] in *Hamilton* opens up a new horizon of research. What kind of principles are meant here? Certainly not the ones the DCFR is presenting since they do not contain principles but solutions.' In contrast, Basedow has argued that '[w]hat is needed for private law are principles of a lower degree of abstraction and generality' and that the CFR 'contains a large number of principles of medium abstraction which could prove to be highly useful for the interpretation and application of existing Union instruments'.[192]

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[185] Arts 7-9.

[186] Renumbered as Arts 1-3. See 'Contract law, work in progress, version of 19 august 2011' (available at http://ec.europa.eu/justice/contract/index_en.htm).

[187] Compare Habermas, *op. cit.* note 141, 310 ('höherstufige Normen'). Contrast Dworkin, *op. cit.* note 55, ch. 2 and 3, and R. Alexy, *Theorie der Grundrechte* (Frankfurt: Suhrkamp, 1994 [1985]), 77 ('Jede Norm ist entweder eine Regel oder ein Prinzip').

[188] See e.g. opinion AG Maduro, *loc. cit.* note 15. In *Tacconi* AG Geelhoed referred to art 2.15 Unidroit principles when conducting autonomous interpretation of the Brussels Convention (now Brussels I Regulation). See Opinion of AG Geelhoed delivered on 31 January 2002, Case C-334/00, ECR [2002], I-07357.

[189] The exception is the principle of ex nunc effect of the withdrawal from an investment partnership referred to in *E. Friz*.

[190] See above.

[191] H.-W. Micklitz, 'Failure or Ideological Preconceptions—Thoughts on Two Grand Projects: The European Constitution and the European Civil Code', *EUI Working Papers*, LAW 2010/04, p. 20.

[192] Basedow, *loc. cit.* note 2, 464 and 469 respectively. See also K.P. Purnhagen, 'Principles of European Private or Civil Law? A Reminder of The Symbiotic Relationship Between the ECJ and the DCFR in a Pluralistic European Private Law', forthcoming *ELJ* (available at SSRN: http://ssrn.com/abstract=1652039), who advocates a symbiotic relationship between the ECJ and the DCFR.

From the point of view of legitimacy there does not seem to be any reason why it should be more legitimate for the Court to develop more abstract rather than more concrete general principles of civil law. What does seem to raise more important legitimacy issues, however, is the question form which projects the Court should borrow? For all their similarities and substantive continuity there are also differences between these sets of principles and model rules. To which of them should the Court resort for inspiration? Should it consistently limit itself to one text, e.g. the one that has had the financial and political support of the European Commission, granting it a de facto monopoly?[193] Or should it adopt a more pluralistic approach? As long as none of these texts have received any additional legitimacy, in particular democratic legitimacy through the adoption after substantive discussions and amendments) by the Commission, Council and Parliament, as an official legislator's toolbox, there does not seem to be any good reason why the Court should focus its attention primarily (or even exclusively) on only one of these texts. On the contrary, on the one hand, it could find convincing arguments in different texts while, on the other hand, where all texts are in agreement on a certain point this may provide prima facie evidence (but not more than that – think only of the risk of path dependence) of the existence of a general principle of civil law. Only for practical reasons (the presumption of progress) it may be a good idea to start the analysis from the latest version.

Principles and values

Many fundamental principles could also be regarded as underlying values. Does this mean that principles are legitimate simply because of their value? Such a direct legitimation of principles as values is certainly conceivable but it comes at a price. The price is the collapse of the distinction between law and politics. If we derive the legitimacy of principles, as sources of rights and obligations, directly from their societal value, then the question what rights and duties we have comes to depend directly on our common conception of the good life. This leads to a perfectionist notion of the law, which communitarians will be happy with, but which is incompatible with a liberal notion of the rule of law.

It is for this reason that Habermas emphasises the importance of the distinction between principles oriented adjudication and value oriented adjudication.[194] And he criticises the *Bundesverfassungsgericht*,[195] and Alexy who regards principles as

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[193] Critical of this idea, on economic grounds, K. Riesenhuber, 'A Competitive Approach to EU Contract Law', 7 *ERCL* (2011), 115-133.

[194] Habermas, *op. cit.* note 141, 256

[195] See famously the *Lüth* ruling (*BVerfGE* 7, 198; *NJW* 1958, 257): 'Ebenso richtig ist aber, daß das Grundgesetz, das keine wertneutrale Ordnung sein will, in seinem Grundrechtsabschnitt auch eine *objektive Wertordnung* aufgerichtet hat und daß gerade hierin eine prinzipielle Verstärkung der Geltungskraft der Grundrechte zum Ausdruck kommt. Dieses *Wertsystem* das seinen Mittelpunkt in der innerhalb der sozialen Gemeinschaft sich frei entfaltenden menschlichen Persönlichkeit und ihrer Würde findet, muß als verfassungsrechtliche Grundentscheidung für alle Bereiche des Rechts gelten; Gesetzgebung, Verwaltung und Rechtsprechung empfangen von ihm Richtlinien und Impulse. So beeinflußt es selbstverständlich auch das bürgerliche Recht; keine bürgerlichrechtliche Vorschrift

optimizing prescriptions (*Optimierungsgebote*),[196] for failing to respect this distinction, which leads to 'value jurisprudence' (*Wertejudikatur*) and the 'tyranny of values' (*Tyrannei der Werte*).[197] As legal norms, principles are, like moral rules, modelled after obligatory norms of action – and not after attractive goods.[198]

Therefore, the category of principles should be reserved for higher-order and more abstract norms than ordinary rules (although a rigid or categorical distinction in the Dworkinian or Alexian sense seems artificial and unhelpful) and should be distinguished conceptually from values, even though obviously there will often be important substantive overlaps (it would be very surprising if we attributed little value to our principles).

Unlike the general principles of EU law, the general principles of civil law that we have seen so far do not look very much like values. Nevertheless, the issue is relevant for private law as well. Very often, certain values are attributed to private law as their underlying values. Autonomy is often presented as the principal value underlying private law. Others argue that private law is based on both autonomy and solidarity, and that much of the development of private law in the 20th Century can be explained in terms of the tension, balancing, or compromise between these two values. Still others point to equality, be it formal or substantive. And dignity is also often mentioned to explain certain parts of private law. Finally, especially scholars in law & economics regard efficiency as the basic value underlying private law.

Article I.-1:102 DCFR attributes interpretative and gap filling roles to the underlying principles. However, the underlying principles that the DCFR refers to are 'freedom, security, justice and efficiency', which in reality are values rather than principles.[199] Also the Feasibility Study provides for an interpretative and a gap filling role for 'underlying principles'.[200] In contrast to the DCFR, however, the FS does not itself list or codify any underlying principles. This suggests that the FS intends the underlying principles as higher-level norms rather than as values. The FS also contains a section called 'general principles'. However, although these principles are indeed principles, and not mere values, and could also be regarded as 'underlying principles' it does not seem that the principles in the sense of art. 1 FS are meant to be limited to these three. The FS rightly does not list any underlying values nor does it refer to them more generically.

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darf in Widerspruch zu ihm stehen, jede muß in seinem Geiste ausgelegt werden.' (references omitted, emphasis added).

[196] Alexy, *op. cit.* note 186, ch. 3.

[197] C. Schmitt, *Die Tyrannei der Werte*, 3rd ed. (Berlin: Duncker & Homblot, 1960): 'Wer Wert sagt, will geltend machen und durchsetzen.'

[198] Alexy, *loc. cit.* esp. 143 ff, claims that rational argumentation (as opposed to mere subjective decision making) is also possible in relation to the balancing of values.

[199] See Hesselink, *loc. cit.* note 183.

[200] See the first two Paras of Article 1 (Interpretation and development).

Principles and objectives

Having said that, the reality is that the European Union is, at least in part, a teleological and instrumental legal order.[201] It is true that the Court of Justice has held since the 1970s that respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice,[202] that this has been codified in the Maastricht Treaty, and that the Union also recognises the fundamental rights set out in the Charter (Art. 6 TEU).[203] The fact remains that the Union is also characterised – maybe still primarily - by its objectives, general ('[t]he Union's aim is to promote peace, its values and the well-being of its peoples'),[204] and more specific, in particular of course 'the aim of establishing or ensuring the functioning of the internal market' (art 26 TFEU) but also e.g. 'to promote the interests of consumers and to ensure a high level of consumer protection' (Art 169 Para 1 TFEU).[205]

The objective of a high level of consumer protection inevitably leads to teleological reasoning. As a clear example, see *Mostaza Claro* where the Court held as follows:[206]

> '[A]s the aim of the Directive is to strengthen consumer protection, it constitutes, according to Article 3(1)(t) EC, a measure which is essential to the accomplishment of the tasks entrusted to the Community and, in particular, to raising the standard of living and the quality of life in its territory.
>
> The nature and importance of the public interest underlying the protection which the Directive confers on consumers justify, moreover, the national court being required to assess of its own motion whether a contractual term is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier.'

However, as we saw, the objective of a high level of consumer protection cannot solve private law disputes. It provides no answer to the question what rights consumers have.

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[201] See e.g. C.U. Schmid, 'The thesis of the Instrumentalisation of Private Law by the EU in a Nutshell, in C. Joerges & T. Ralli (eds.), *European Constitutionalism without Private Law, Private Law without Democracy*, ARENA Report No 3/11, RECON Report No 14 (Oslo: Arena, 2011), 11-35.
[202] Case 11-70, *Internationale Handelsgesellschaft mbH* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECR [1970], 01125.
[203] The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights (Art. 6 Para 1 TEU). And fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, constitute general principles of the Union's law (Art 6 Para 3 TEU).
[204] Art 3 Para 1 TEU.
[205] The Charter of fundamental right of the EU also provides, in art 38, that 'Union policies shall ensure a high level of consumer protection', suggesting that a high level of consumer protection is a right (under 52(2) Charter), or (more likely, but no less problematic) a principle (under 52(5) Charter) recognised by the EU.
[206] Paras 37-38 (references omitted).

A similar problem we saw in the context of the horizontal effect of market freedoms. Market freedoms attach to individuals but have been given to them (instrumentally) with a view to attaining public objectives (i.e. market building). The instrumental nature of these freedoms naturally leads to a balancing of interests. This explains why Hartkamp, Basedow and others have argued for including private law interests into the balancing exercise.[207] However, Schepel has pointed out how difficult it is to for private interests to compete with – or rather as – public interests to be balanced against market objectives: 'the total market is a scary thing'.[208]

The recent introduction of the category of general principles of civil law seems to represent a potentially important shift in the Court's reasoning in relation to EU private law. It suggests a commitment to reasoning from principle rather than a balancing of (and choosing between) competing interests. Obviously, the difference between reasoning from principles and right, on the one hand, and choosing to promote certain values and interests, should not be reified: it does not exist 'out there'. Nor is it a matter of black and white, rather a question of less or more. But a more principles oriented approach to European private law should certainly be welcomed.

The fact that the European legal order is, in part, purposive does not imply that for that reason any attempt at principled reasoning should be abandoned. On the contrary, any reasoned inroads into the Union's teleology are more than welcome. Private law rules which express a general concern for individuals in a vulnerable position are desirable, indeed indispensible, if we take the private autonomy of individuals seriously. However, the aim of a high level of consumer protection is a rather blunt objective in this context, which can easily go against the substantive autonomy of individuals, including vulnerable persons. Therefore, a shift from a dogmatic attachment to the Treaty objective of a high level of consumer protection, especially when the consumer protection (and thus the citizens) becomes instrumental to the aim of a properly functioning internal market,[209] to a principled private law reasoning that takes the substantive autonomy (in the sense of capabilities) of individuals seriously, should be welcomed as important progress for European private law.

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[207] J. Basedow, 'Mangold, Audiolux und die allgemeine Grundsätze des europäischen Privatrechts', in: S. Grundmann, B. Haar, H. Merkt et al. (eds.), *Unternehmen, Markt und Verantwortung; Festschrift für Klaus J. Hopt zum 70. Geburtstag* (Berlin, New York: De Gruyter, 2010), 27-46, 40, explicitly advocates that the Court resort to *Interessenjurisprudenz*.

[208] Schepel, *loc. cit.* note 86.

[209] The Explanatory Memorandum in Commission's proposal for a consumer rights (!) directive explains, on p. 2, that '[t]he objective of the proposal is to contribute to the better functioning of the business- to-consumer internal market by enhancing consumer confidence in the internal market and reducing business reluctance to trade cross-border.'x

Summary

The references made by the Court of Justice in a number of recent cases to 'the general principles of civil law' may have been accidental, but they may also represent a deliberate first step towards a new European legal category and a new approach towards European private law.

In the case law so far, the principles have played a role exclusively in the context of the interpretation of directives. However, there is nothing in the nature of these principles that precludes further roles and effects. General principles of civil law could belong both to national and to EU law, and both to secondary and primary EU law. They could obtain not only interpretative but also as gap-filling and corrective functions, and not only indirect but also direct effect. Thus, the general principles of civil law could have an impact, in a variety of different ways and with different degrees of intensity, on disputes between private parties. It should be reminded, however, that, whatever their role, they can never operate outside the scope of EU law.

Because of their flexible and chameleonic nature, the general principles of civil law could contribute to horizontal and vertical coherence of the developing system of European private law without imposing, in a top-down manner, new rules on Member States. They could even facilitate a Member-State-friendly interpretation of EU private law.

New general principles of civil law could be the outcome of a transnational dialogue between (and among) national and European lawmakers, informed by an equally transnational legal scholarship. However, it is important that such a European private law space be as open as possible, and be informed by arguments and reasons not merely from legal elites at the political and economic centre but also from ordinary citizens at the periphery.