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From the European civil code to revision of the Community acquis: Just how legitimate is Europe?

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FROM THE EUROPEAN CIVIL CODE TO REVISION OF THE COMMUNITY ACQUIS: JUST HOW LEGITIMATE IS EUROPE?

Yves LEQUETTE

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ABSTRACT

"In 2010 a body of rules on contract law in the European Union will have to be adopted", that body of rules being but the vanguard of a future European Civil Code. That was the message delivered up to French jurists by Christian von Bar, just eight years ago now, from the Grand chambre of the Cour de cassation, by way of notice to them that they should prepare to store away the French People's Code civil along with any other outdated theatrical props. In voicing that opinion, the speaker was for that matter merely responding to the call of the Community authorities and of the European Parliament in particular.

What had all the appearance of a diktat encountered a wave of protest in France. It was pointed out both that "a Civil Code is not a community instrument" and that the Community authorities have no jurisdiction to infringe on codes that are an important piece of each country's history, culture and identity. We shall not go back over the familiar terms of this debate here. Let it be recalled simply that the resistance was strong enough for the Community authorities to beat a retreat, including on the contract law front. After examining its conscience, performing their "auto-critique" as Bénédicte Fauvarque-Cosson put it, the Commission marked its preference for drawing up a common reference framework, a sort of "tool kit" containing in its drawers the definition of the key concepts and the statement of the fundamental principles of contract law. Thus, faced with the scepticism and even the hostility prompted by their initiatives, the Community authorities seemed to take the point that they had no competence, no legitimacy even, to intervene in what is the core of each legal system, its civil law.

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1. C. von Bar, 'Vers un code civil européen ?', (2002) 33 *Les Annonces de la Seine*, (3 juin).

that matter merely responding to the call of the Community authorities and of the European Parliament in particular[2].

What had all the appearance of a *diktat* encountered a wave of protest in France. It was pointed out both that 'a Civil Code is not a community instrument'[3] and that the Community authorities have no jurisdiction to infringe on codes that are an important piece of each country's history, culture and identity[4]. We shall not go back over the familiar terms of this debate here[5]. Let it be recalled simply that the resistance was strong enough for the Community authorities to beat a retreat, including on the contract law front. After examining its conscience, performing their 'auto-critique' as Bénédicte Fauvarque-Cosson put it[6], the Commission marked its preference for drawing up a common reference framework, a sort of 'tool kit' containing in its drawers the definition of the key concepts and the statement of the fundamental principles of contract law[7]. Thus, faced with the scepticism and even the hostility prompted by their initiatives, the Community authorities seemed to take the point that they had no competence, no legitimacy even, to intervene in what is the core of each legal system, its civil law.

All would be going for the best in this year 2010, initially programmed by Mr Christian von Bar as that for the adoption of a European code of contracts if the actual steps taken by the Community authorities did not raise queries about the motives guiding them. The publication of the current framework directive[8] does lead one to wonder whether, under the cover of a seemingly harmless procedure, the revision of the *acquis* for consumer protection[9], the Community authorities have not once again set about subverting national systems of civil law. One way to attempt to answer this question is to describe the current undertaking and then reflect on what it reveals to us about European construction. Description then reflection; those will therefore be the two stages of what we have to say.

1. DESCRIPTION

Reading the grounds for and objectives of the proposal of the framework directive, it is hard to find a more gaily coloured picture: 'The Review [of the Consumer Acquis] was launched in 2004 with the objective to simplify and complete the existing regulatory framework. The overarching aim of the Review is to achieve a real business-to-consumer internal market striking the right balance between a high level of consumer protection and the competitiveness of enterprises, while ensuring respect of the principle of subsidiarity'. In other words the project is very much part of the programme outlined by former article 95 of the Treaty Establishing the European Community, which with the entry into force of the Treaty

2. Resolution of the European Parliament of 26 May 1989 on action to bring into line the private law of the Member States, OJ 1989, C 158/400; Resolution of 6 May 1994 on the harmonization of certain sectors of the private law of the Member States, OJ 1994, C 205/518; Resolution of 15 November 2001 on the approximation of the civil and commercial law of the Member States (COM (2001) 398 – C5-0471/2001 – 2001/2187 (COS)).

3. G. Cornu, 'Un Code civil n'est pas un instrument communautaire' (2002) *D.*, 351.

4. See for example P. Malinvaud, 'Réponse – hors délai – à la Commission européenne : à propos d'un code européen des contrats', (2002) *D.*, 2542; J. Huet, 'Nous faut-il un « euro » droit civil ?', (2002) *JCP*, I.110; V. Heuzé, 'A propos d'une initative européenne en matière de droit des contrats', (2002) *JCP* I.152; Y. Lequette, 'Quelques remarques à propos du projet de code civil européen de M. von Bar' (2002) *D.*, 2202; 'Vers un code civil européen ?' (2003) *Pouvoirs*, 107, *Le Code civil*, 97. These studies and others can be found in B. Fauvarque-Cosson and D. Mazeaud (eds) *Pensée juridique française et harmonisation européenne du droit* (Société de legislation comparée, 2003).

5. A debate that C. von Bar would plainly have preferred to elude: 'For a long time [...] there was and there still is a surge of papers discussing the matter abstractly, that is, that concern themselves with the question of whether it is necessary, possible, or desirable to create a European civil code [...]. Such a general discussion is surely called for; however it cannot lead far' ('Le groupe d'études sur un code civil européen' (2001) *RIDC*, 127).

6. B. Fauvarque-Cosson, 'Codification et droit privé européen', *Études à la mémoire du Professeur Bruno Oppetit* (2009), p. 183: 'In Europe, the auto-critique the European Commission went through in its action plan of 12 February 2003 entitled "a more coherent European contract law", presents surprising similarities with Bruno Oppetit's lively criticism of Community law, back in 1990'.

7. Communication of 11 October 2004, 'European contract law and the revision of the acquis: the way forward' (COM (2004) 651).

8. See Directive of the European Parliament and of the Council on Consumer Rights of 8 October 2008.

9. On this question see B. Fauvarque-Cosson (ed), *Livre vert sur le droit europeéen de la consommation, réponses françaises* (2007); see also G. Paisant, 'La révision de l'acquis communautaire en matière de protection des consommateurs. A propos du Livre vert du 8 févr. 2007' (2007) *JCP* I.152.

of Lisbon became article 114 of the Treaty on the Functioning of the European Union (TFEU), namely the 'establishment and functioning of the internal market', calling for a high level of consumer protection. But that is the outward appearance of things. We shall see there is some distortion between the stated objectives and the outcomes to which adoption of the directive should lead. Designed the way it is, it can be expected that the directive will ensure neither a high level of consumer protection nor that European enterprises are better armed vis à vis their foreign competitors. On the contrary its entry into force can be expected to be a step backward on these two points. So, after showing the stated objectives to be false, we shall seek out what might really be guiding the Community endeavours.

1.1. Trompe l'œil objectives

At first glance the assertion that the projected directive would not provide consumers with a high level of protection may be surprising. Does the text not merge four existing directives by defining consumer rights in contractual matters[10], so as to make them more coherent, which it seems should benefit consumers? But there is a major difference with the previous system: whereas the initial directives aimed at *minimal* harmonization, the current project is out to achieve *full* harmonization[11]. It ensues from this first of all that states are prohibited from maintaining or adopting provisions for consumer protection that depart from the current draft framework directive, should those provisions afford more protection than the directive. It further ensues that consumers will no longer have recourse to the more protective proposal of their own civil codes. As both hypotheses have been amply illustrated by commentators[12], we shall confine ourselves to two examples. Under the current article L.121-26 of France's Consumer Code, when people are canvassed at home, the canvasser cannot require any payment from the consumer during the cooling-off period. The rule is designed so that consumers are entirely free to withdraw their agreement. That rule shall disappear as and when the directive is adopted. Under article 1648 of France's Civil Code the buyer who finds a latent defect has two years as from the discovery of the defect to act; such discovery may occur long after the sale. Once the directive is adopted, the same purchaser will only be able to act within two years of the sale; and even then the purchaser will have to advise the professional of the existence of the defect within two months of discovering it, on pain of forfeiting the right to redress against the professional[13, 14]. A singular step backwards for a text that purports to ensure a high level of protection for consumers, since consumers will be protected less than professional buyers, who retain the right to rely on the provisions of the Civil Code.

How can this oddity be accounted for? The answer is straightforward enough: in a system of full harmonization, reference to consumer protection is there only as window dressing for these texts in an attempt to 'sell them to public opinion'[15]. In truth, the 'prime objective' of these texts is, as they emphasize

10. Directive 85/577/EEC on contracts negotiated away from business premises; Directive 93/13/EEC on unfair terms in consumer contracts; Directive 97/7/EC on distance contracts; and Directive 1999/44/EC on consumer sales and guarantees.
11. See article 4 of the Proposal for a Directive of the European Parliament and of the Council on Consumer Rights: 'Member States may not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection'. On this approach see J. Porta, 'La réalisation du droit communautaire, essai sur le gouvernement juridique de la diversité', PhD thesis, (University of Paris 10, 2007) pp. 321 ff, no 390 ff.
12. See especially S. Whittaker, 'Clauses abusives et garanties des consommateurs : la proposition de directive relative aux droits des consommateurs et la portée de l'« harmonisation complète »', (2009) *D*., 1152; J. Rochfeld, 'La communautarisation des sources du droit – De l'harmonisation maximale', (2009) *RDC*, 11 ff; 'L'état des lieux des discussions relatives à la proposition de directive-cadre sur les droits des consommateurs du 8 oct. 2008' (2009) *RDC*, 981 ff.; C. Aubert de Vincelles, 'Naissance d'un droit commun communautaire de la consommation' (2009) *RDC*, 578 ff; J.-S. Bergé, 'La correlation « droit européen » et « droit des contrats » (à propos de la transposition de la directive relative aux droits des consommateurs' (2009) *RDC*, 697 ff.
13. G. Paisant, 'Proposition de directive relative aux droits des consmmateurs, avantage pour les consommateurs ou faveur pour les professionnels ?' (2009) *JCP*, I.118, no 22; Whittaker, 'Clauses abusives', 1156; Bergé, 'La correlation', 701.
14. On the difficulty in attuning the provisions on unfair clauses in the draft framework directive with the mandatory provisions of national laws, see Whittaker, 'Clauses abusives', 1153 ff.
15. See J.-S. Borghetti, note (2009) D. 1734; see also 'La responsabilité du fait des produits, étude de droit comparé', PhD thesis (University Paris 1, 2004). Consumers are no longer protected for themselves, as the weaker parties, but because they embody the demand function. The key notion is then consumer 'confidence', which is not contemplated for itself but so

themselves, 'the establishment and functioning of an internal market', so as to promote cross-border trade, which would presuppose the unification of systems of law. We come back here to an idea dear to the Community instances—an idea that is always asserted and never proven—by which a single market ought to correspond to a unified system of law. We shall not take up this familiar discussion here[16]. At most, we shall emphasize with certain commentators, that we must 'seek somewhere other than in the divergences in legislation the reasons for the reluctance to engage in cross-border trade. […] To the extent that consumers are generally unaware of the laws protecting them in their own countries, it is not their ignorance of foreign law that might dissuade them from engaging in cross-border transactions'[17]. In truth, the full harmony sought by the Commission 'was conceived in the interest of professionals to facilitate their business practices'[18]. But in adopting this logic, it still remains to be ascertained which professionals really benefit from such unification. To this end, we need to recall what the concept of internal market really covers nowadays, which presupposes a brief historical refresher.

It is widely known that the name 'internal market' superseded the name 'common market' with the adoption of the Single European Act. Far from being purely formal, this name change covered a major transformation in its referent. In the beginning, the purpose of the fathers of Europe was to create economic 'solidarities', which were expected to entail others. To that end it had been planned to set up a sort of customs union: the removal of barriers between states went along with the introduction of a common external tariff. In other words, the European Economic Community was based on a double principle: free exchange within and a common tariff without, which was termed *Community preference*. When the Single European Act was adopted, the common market was replaced by the internal market, which brought about a twofold change: for one thing, the common external tariff was removed and with it went what was called Community preference; for another thing, Europeans undertook to complete the unification of their internal market by uniformizing standards of all kinds governing economic life, including rules for consumer protection. In other words, there must no longer be any customs borders on the outside nor any borders of any sort on the inside. The undertaking is, if one stops to think about it, a curious one since it amounts to adding an extra storey to the Community building, while destroying the foundations built in the 1950s and 1960s. The internal market has thus become a part of the world market in which operators from around the world, including those from countries outside Europe, may come and deal freely since any let or hindrance is to be removed. Now, assuming the effects that the Community authorities ascribe to the unity or diversity of legislations are founded, it does seem that such a situation is more beneficial to operators from outside Europe than to European operators. This policy provides operators from elsewhere with a quite exceptional field of action, without the countries they come from offering as much to European enterprises. European firms run up against legislation that differs from one country to another and must bear the ensuing costs. Better still, enterprises from outside Europe enjoy this big internal market without having had to bear any of the charges of constructing it, whereas that construction translates for Europe's various peoples, because of the uniformization measures imposed on them, into sizeable constraints and costs, as they must change their ways of life. The project for a framework directive on consumer protection is but one of many illustrations. Were it

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that a climate of trust can be put in place thereby promoting economic dynamisms. On this question see J. Rochfeld, 'Du statut du droit contractuel de protection de la partie faible : les interférence du droit des contrats, du droit des marchés et des droits de l'homme', *Mélanges G. Viney* (2008), pp. 835 ff, especially p. 845.

16. On this discussion see Lequette, 'Quelques remarques à propos du projet de code civil européen', at 101.

17. Paisant, 'Proposition de directive relative aux droits des consmmateurs' I.118, no 19; cf. J.-S. Borghetti on the 1985 directive on defective products: 'it is very doubtful that divergences among national laws on civil liability have any real incidence on the state of competition within the European Union', note (2009) *D.*, 1732, no 8.

18. Paisant, 'Proposition de directive relative aux droits des consommateurs' I.118, no 20; cf. J. Rochfeld, 'La communautarisation des sources du droit – De l'harmonisation maximale', (2009) *RDC* 11 ff, especially at 15: 'by leaving states no room for manoeuvre, it prevents them from putting consumer protection before protection of the market; if it comes to a choice, consumer protection will have to yield to market protection'; C. Aubert de Vincelles, 'Naissance d'un droit communautaire commun de la consommation' (2009) *RDC*, 578 ff, especially at 583: 'the creation of the internal market [...] proves ultimately to be the principal objective exceeding the level of protection of consumers'.

to be adopted, operators outside Europe would enjoy access to a geographical area with a unified legislation of more than 400 million consumers thus made 'weaker and more fragile in a globalized world' whereas currently, because of article 6 of the Rome I Regulation, they must abide by the protective legislation of each European state. At the same time, European enterprises will continue to be confronted with the diversity of legislation governing consumer law in each of the states from which these foreign operators hail. In actual fact, one has the feeling that the Community authorities, when they set about deepening the internal market, continue to reason as if the common market still existed whereas it gave way more than twenty years ago to a space that is but a piece of a world market and that is wide open to all however big their appetite. In claiming to harmonize the arena for competition within the European Union, they are further distorting competition between the European Union and the countries outside it to the detriment of the former and the benefit of the latter.

No wonder that the system that it is proposed to put in place harms Europeans twice over. It harms them as *consumers*, at least in some countries including France, since they will only be able to avail themselves of protection that is inferior to what they enjoyed before. And it harms them as producers, as it contributes to putting European enterprises in a situation where they are not on a level playing field with their foreign competitors.

It can be seen, then, that the proposed text goes doubly against its stated ambitions: it lowers the standard of consumer protection and weakens the position of enterprises. Accordingly neither consumer associations nor organizations representing business are calling for such an instrument to be adopted. That's how much the economic objectives the Community authorities wave around are all eyewash. Their choice is a purely ideological one: it is one more step along the road to European integration taken by laying what might well be the foundation stone of a unified civil legislation for Europe.

1.2. The actual objective

At first blush, such an assertion might surprise. Insofar as it is being developed within the fenced-off domain of consumer law, it seems the planned unification must leave the ordinary law of contract and its general principles intact. But to reason like that would be to forget that the text under study has a very broad field of application since it encompasses 'any sales or service contract' entered into between professionals and consumers, that is, the group of contracts that is probably statistically the most numerous. Now, because of the full harmonization approach adopted, such rules are destined to eliminate from within their area of application the civil law rules of the various national states wherever they differ from those of the directive, especially because their implementation authorizes greater protection of consumers. The threat is not to be minimized. Remember that the ECJ has written off such fundamental principles as the principle of complete compensation or the rule that anyone causing injury or damage through negligence or wrongdoing must make it good, because they contradicted the Directive of 25 July 1985, although the directive did leave states some leeway[19]. What would happen when dealing with a directive for full harmonization? Admittedly, in a decision of 4 June 2009[20], the Luxembourg Court seemed to want to restrict the expansive force of full harmonization directives by indicating that while total they could not be exhaustive. Some brilliant minds have grasped this allusion to imagine a redefinition of the existing balance between Community competence and internal competence: 'in a given field of application, the field of influence would no longer need to be considered or such consideration could be minimized'[21]. We are dealing here, to my mind, typically with those fuzzy not to say obscure notions that the Community authorities and particularly the Luxembourg Court are so fond of since they allow

19. ECJ 25 April 2002; (2002) *D.*, 2462, note C. Larroumet; (2002) *JCP*, I.177, note G. Viney; (2002) *RTD civ*, 523, obs. P. Jourdain and 868, obs. J. Raynard. 10 Jan. 2006, (2006) *JCP* II.10082, note L. Grynbaum; (2006) *RDC* 835, obs. J.-S. Borghetti. See also T. Riem, 'Produits défectueux : quel avenir pour les droits communs ?' (2007) *D.*, 2749.
20. ECJ 4 June 2009, (2009) *D.*, 1731, note J.-S. Borghetti; (2009) *RDC*, 1448, obs. C. Aubert de Vincelles.
21. J. Rochfeld, 'Les ambiguïtés des directives d'harmonisation totale : la nouvelle répartition des compétences communautaire et interne' (2009) *D.*, 2047, no 11.

them to shape as they like those competences that they have decided to lay hold of. In actual fact, as pointed out by Jean-Sylvestre Bergé, the proposed text 'effects no more and no less than a uniformization of the law of contracts entered into by consumers';[22] it thus drives a wedge into national civil codes since these will only govern contracts exclusively between professionals and contracts exclusively between individuals. The system thus leads to a 'fragmentation' of national legal systems[23], as a first step towards dismantling them. For that matter, this had been foreseen by Carbonnier, clear-sighted as usual, when he pointed out that 'an autopoietic system (norms engendering norms) has been hooked to the side of our civil law system of contract and tort' and we do not know 'how it may be controlled' particularly as the Luxembourg Court intends to exercise a 'surviving right' over articles arising from European directives[24]. The intent pursued is so lightly veiled that discussions are already underway among specialists of these questions as to whether the future European code of contract will be founded principally on the directive from the revision of the Community acquis or the common reference framework[25]. This issue appears, for that matter, in the very title of this Second Franco-German Conference: 'the proposal for a directive on consumer law: from the revision of the Community acquis to the beginnings of a European law of contract'.

It will probably be objected that we are painting too black a picture and that it is quite unfair to ascribe such intentions to the Community authorities. The response is straightforward enough. Were those authorities really looking to raise the level of consumer protection and facilitate cross-border trade rather than to subvert national civil laws, they would be lost for choice as to which means to employ. They would need only to refrain from the full harmonization approach or from any extension of it to national trade since in this area the argument inferred from the internal market is completely inoperative. It would also be possible to use the system of minimum harmonization based on article 153 of the EC Treaty (now article 169 of the TFEU), which is naturally to apply in respect of a text about the rights of consumers and not the rights of professionals.

At the end of this review, three points stand out: adopting the framework directive can be expected to be a step backwards in consumer protection; it will further weaken European firms in their relations with operators outside the EU; and it will be the signal to begin dismantling national civil codes. What reflections does such a state of affairs suggest?

2. REFLECTIONS

We shall develop these reflections in two directions. After examining what the situation reveals about the method used for constructing Europe and about the values driving that construction, we shall address the reactions which that construction prompts.

2.1. Method and values

When viewed through the prism of revision of the Community acquis, European construction appears as a venture built on ambiguity or even dissimulation. It posts objectives that it knows might win over public opinion—the high level of consumer protection and the competitiveness of European businesses in our case—, where the planned measures lead to quite different consequences. What is the reason for dissimulation of the sort? It is the price to pay so that the Community authorities can circumvent the rules setting out their area of competence. Remember in this respect that the Community authorities have

22. Bergé, 'La correlation « droit européen » et « droit des contrats »', at 700.
23. Aubert de Vincelles, 'Naissance d'un droit commun communautaire de la consommation', at 584.
24. J. Carbonnier, *Droit civil, les biens, les obligations* (Quadrige, 2004), p. 1916.
25. J. Stuck and E. Terryn, 'Le droit européen de la consommation : développements récents', (Nov 2007) 143 *Journ. Trib. dr. eur.*, 257; cf. Bergé, 'La correlation « droit européen » et « droit des contrats »', at 703, 'drawing up European legal projects supposes a very strong correlation between European law and contract law'. On this matter see more generally E. Poillot, 'Droit européen de la consommation et uniformisation du droit des contrats', PhD thesis (University of Paris 1, 2006).

only a jurisdiction based on subject matter such that each of their interventions needs a specific legal basis if it is to be valid[26]. Now as it has quite often been recalled, the European treaties do not contain a single provision authorizing the European Union to unify private law[27]. Be that as it may, the unification will be brought about under cover of the setting up of the internal market and of consumer protection. In other words, since attributions are dependent on objectives, there will be no hesitation to manipulate or even falsify those objectives if need be. In a system where means are entirely subject to ends, the least that can be expected of the authorities implementing it would be that the stated ends be the right ones. In practice, it is often the contrary that happens, such that European construction takes on the form of an 'under-cover approach' using the resources of the law to make moves from which there is no going back. This method is often referred to by pro-Europeans themselves as the 'spiral effect'. The prism provided by the framework directive relative to consumer protection gives a very clear picture of what this term covers: a usurpation of power concealed behind an untruthful slogan. Jean Foyer, General de Gaulle's former Justice Minister in the age of what Jean Carbonnier called the consular republic, preferred to speak of 'successive plucking'[28] to denote this situation. And to develop the metaphor it is a question of stripping the national poultry of their competence, feather by feather. In the early 2000s it seems the Community authorities had planned to rip out the whole clump of feathers corresponding to national civil codes. As the clump put up more resistance than expected, the tried and tested process was resumed: plucking, feather by feather.

Such is the method. What are the values that underpin it? *A priori*, the answer is straightforward: the value at the heart of the European system is the market. Pursuant to the requirements of former article 95 of the Treaty Establishing the European Community, the directive makes it its 'prime objective' even if it prefers to put consumer protection to the fore as it refers to itself as a 'directive on consumer protection'. But as we have seen, the very notion of market has undergone a sort of Copernican revolution with the common market being superseded by the internal market. For Jean Monnet, the nations of Europe had become too small to ensure the prosperity of their population, so that it was better to join them together in a larger market that would offer *protection against the excesses of unregulated world competition* and provide an optimal framework for the development of European industry. Now, it seems that since the Single European Act and even more since the Treaty of Maastricht, the European Union has given up playing the role of protection for which it had been tuned, since it had supposedly become counterproductive in respect of globalization. Pro-Europeans accordingly find themselves caught in a dilemma that will one day have to be escaped and that can be summarized thus: either there is no other way than free trade in a globalized economy and if not Europe, or at least the internal market has become pointless because as the economist Daniel Cohen emphasizes 'the idea that a big market is better than a small one comes apart when the world market offers everyone the largest possible market';[29] or Europe regains its utility by restoring Community preference, but then it would need to break with the free-trade dogma, which it does not appear to be ready to do.

In the immediate term, the internal market, while not ensuring the prosperity of Europeans, plays a role as a very efficient lever for further increasing the power of what once were the Community authorities and are now the European authorities and of further reducing the protection of the weakest. The framework directive provides a startling illustration of this since it is the opportunity for the Community authorities to encroach on the field of national civil law legislation while reducing the level of protection

26. Including since the Treaty of Lisbon, see art. 4 Treaty of the European Union.
27. Bangemann, 'Privatrechtsangleichung in der europaïschen Union' (1994) *ZeuP*, 377-8; L. Schwarz, 'Perspektiven des Angleichung des Privatrechts in der Europäischen Gemeinschaft' (1994) *ZeuP*, 559 and 570.
28. J. Foyer, *France qu'ont-ils fait de ta liberté* (F.-X. de Guibert, 1990), p. 90.
29. D. Cohen, *Richesse du monde, pauvretés des nations* (1997), pp. 154-5. For him, the success of Singapore is enough to invalidate the idea that a large internal market is the necessary condition for growth (p. 97). Better still, political economy provides new arguments against the big blocks because of the 'sometimes daunting heterogeneity of the populations making them up', which necessitate 'sizeable redistributions that are a drain on the budget, harm public finances, and place the burden of the debt and of inflation on the economy' (p. 97).

of European consumers, who risk, in many hypotheses, being less well treated than professional buyers. But there are many other manifestations of this. We can cite more especially, because the usurpation of competence is as plain as the consequences deduced from it are serious, the *Viking* and *Laval* decisions rendered by the European Court of Justice on 11 and 18 October 2007. The ECJ granted itself the right to intervene in the domain of the right to strike and trade union freedom, which questions were explicitly excluded from the domain of Community social competences, and to subordinate them to the interplay of freedom of establishment and of unrestricted provision of services, that is, to market imperatives.

From a French standpoint we are witnessing an astonishing phenomenon. Having built his presidential electoral campaign on the paradigm of a *France plus juste*, a fairer France, François Mitterrand from March 1983 onwards swapped it, with the choice of budgetary rigour, for the European paradigm[30].

The most tangible result of this today is *an ever more unfair France*. It remains for us to have a brief look at the reactions this prompts.

2.2. Reactions

Politically a situation of the kind is not without causing concern. It can be observed that there is a widening divide between Europe's elites and its peoples. For European elites, there are no other responses to the present dismal reality than ever greater European integration. Just as for the Soviet *nomenklatura*, the future was not bright because there was not enough communism, likewise for the Brussels *nomenklatura* and its clients, the employment figures are worsening in Europe because there is not enough integration. In other words, we must seek in the integrationist ideology the cure for the ills that it has already caused[31].

The attitude of Europe's populations is something else entirely. They display an increasing lack of interest for European construction. From 1979 to 2004 the turn-out rate in France for the European elections dropped by 20 points, to reach 60% of abstentions in 2009. This indifference is changing, for that matter, increasingly into hostility if not towards Europe at least towards European construction as it is being handled today, as shown by the success of the no vote in the 2005 referendum. The reasons for this are plain enough. President Mitterrand had conducted the Maastricht campaign on the theme 'A stronger Europe will protect you better'[32]. Despite that the Maastricht Treaty obtained a 'narrow yes'[33]. Since then the popular and middle classes have been able to judge for themselves and observe that, as far as protection goes, Europe left them increasingly exposed to the appetites of a financial capitalism driven only by greed, as shown by Joseph Stiglitz's latest book[34].

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30. On this change of paradigm see J.-P. Chevènement, *La faute de M. Monnet* (Fayard, 2006); H. Védrine, *Les mondes de François Mitterrand* (Fayard, 1996) p. 286 and 294.

31. Remember that the Lisbon programme, adopted in March 2000, planned to make Europe 'the world's most competitive zone by 2010'. The result has been that it was the zone where the recession hit hardest in 2009. Current events provide an excellent illustration of the calamitous choices made in the name of integrationist ideology. Whereas the difficulties raised by the Greek deficits show it would have been preferable to put in place a common currency and not a single currency, so that the question would have settled itself by the devaluation of the drachma, it is proposed to escape from this situation by putting in place an economic government of the Union, that is, by relentless pursuit of the same policy. On this issue, see A. Cotta, *Sortir de l'euro ou mourir à petit feu* (Plon, 2010).

32. Védrine, *Les mondes de François Mitterrand*, p. 558.

33. Whereas this 'narrow yes' was judged sufficient to move France down the road towards supranational democracy, because, as President Mitterrand put it, 'that was democracy', the refusal those same French voters expressed by a much larger majority was not considered significant by France's political class. Using the divide between the national representatives and the people they are supposed to represent, those representatives, with the approval of the other European governments, went on to ratify the Lisbon Treaty, which is nothing other than the constitutional treaty wearing a false nose. To keep to a strictly legal approach, the episode is interesting in that it is a perfect illustration of the complaint formerly levelled at the members of parliament who voted full constituent powers to Maréchal Pétain on 10 July 1940: the national representatives cannot *alienate* the thing of which they are the *depositary*, for 'only the constitution-maker, and never the constitutional reviewer, can infringe upon the capacity of sovereign state, subject of international law' (O. Beaud, *La puissance de l'État* (1994) p. 454). Politically the interest is no lesser since this situation makes true what was believed to be just a quip from Bertold Brecht—'when the people has lost the confidence of its government, it is easier for the government to dissolve the people and elect another one'.

34. J. Stiglitz, *Freefall: America, Free Markets, and the Sinking of the World Economy* (New York: Norton, 2010), published in France as *Le triomphe de la cupidité* (2010).

Faced with the activism of some and the reserve of others, most French jurists adopt a wait and see attitude and avoid asking the fundamental questions now raised by European construction, assuming they have any perception of their existence. Their philosophy is captured in the formula it seems embodies the Olympic ideal 'it is not the winning but the taking part'. Thus, in respect of the framework directive that is of concern to us, a few writers after having expressed their worry or their reservations, emphasized that the essential thing was, as one commentator put it, to adopt the 'policy of the *filled* chair', which of course is only fully effective when the person recommending the policy occupies the said chair. While without effect on the texts adopted, other than condoning them by providing the excuse of a pseudo-scientific debate, this attitude at least has the merit of strengthening the sense of their own existence of those who practice it.

Jurists, to my mind, should take a completely different attitude. In the presence of the behaviour just described, they should tirelessly denounce the usurpation of power underpinning that behaviour and especially, in our domain, the use of the idea of total harmonization, which operates in open violation of the founding treaties[35]. For once, the United States provides us on this issue with a valuable model insofar as, unlike the Luxembourg Court, the US Supreme Court has always strictly enforced the boundaries between the competences of the federation and those of the federated states, with the result that more than two hundred years after the dividing lines were drawn, private law and private international law are still clearly there within the jurisdiction of the federated states. The purpose here is not to defend the 'home ground' of one discipline or another. But as Elisabeth Zoller emphasizes, and we know how familiar she is with the US situation, one must be aware that it is essential to observe the dividing lines in that they signal that the Federation is designed not to govern all of society but to regulate that part of intersocial relations that are of concern to the Union[36], which is a guarantee of its effectiveness. It is precisely the exact opposite that the European Union is up to, in open breach of the founding treaties and of its own motto 'Unity in Diversity'.

Confronted with such a situation, it seems appropriate, in this fiftieth anniversary year of the death of Albert Camus, which most fortunately brings his thought back into the spotlight of the news, to close with a short excerpt from his *Political Writings*. Wondering in a 1945 article published in *Combat* about the reasons why the victorious nation of November 1918 had become the defeated nation of June 1940 he wrote: 'each concession made […] to the easy option entailed another. One concession was no more serious than another, but set end to end they formed an act of cowardice. Two acts of cowardice together made for loss of honour. […] France was living on the worn-out wisdom that explained to the younger generations that life was like that, that you had to know how to make concessions. […] And so, one thing leading to another, the morality of the easy option and of disillusionment spread. […] You always win by appealing to what demands the least effort of people and that is the taste for restfulness. The taste for *honour*, comes only by being terribly demanding with oneself and with others. That is tiring. […] (It requires) the ability to say no'[37].

35. We are a long way from this since when a brave academic, Mr Vincent Heuzé, addressed an open letter to the President of the Republic out of concern about the usurpation of power of the Rome I regulation ('L'Union européenne, la démocratie et l'État de droit : lettre ouverte au Président de la République', (2006) *JCP*, Act. 586.2313), there were 71 professors to congratulate themselves that the Community authorities were thus tearing the Amsterdam Treaty to shreds ('Observations sur la lettre ouverte au Pésident de la République intitulée l'Union européenne, la démocratie et l'État de droit' (2007) *JCP*, Act. 18 13). On this point see V. Heuzé, 'L'honneur des professeurs, explication d'une lettre ouverte sur l'Union européenne, la démocratie et l'État de droit' (2007) *JCP*, I.116; Y. Lequette, 'De Bruxelles à La Haye (Acte II), Réflexions critiques sur la compétence communautaire en matière de droit international privé', *Mélanges H. Gaudemet-Tallon* (2008) pp. 503 ff.

36. E. Zoller, 'Aspects internationaux du droit constitutionnel, contribution à la théorie de la fédération d'État', (2002) 294, *Recueil des Cours de l'Académie de Droit International*, 49 ff, especially at 65.

37. A. Camus, *Actuelles, écrits politiques* (Folio Essais), pp. 48-9, emphasis added.