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On the 'Rationalities' of European Private Law–Between the Internal Market and Law's Discourse

A Reply to 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political'

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Abstract: *On the basis of the deployment of the idiom of co-production of knowledge and governance, the article I am commenting upon critically argues for overcoming the reification practices and for the 're-politicisation' of the European private law field. I note and discuss a dialectical tension between, on the one hand, the explanation based on 'reification' as the process of co-production of knowledge and governance which de-politicises and, on the other hand, the description of institutional settings themselves as instigating and producing reification—between theory and practice, ideology and discourse.*

I Introduction—Internal Market 'Rationality'

'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market As the Object of the Political' (hereafter IMR) aims at elucidating the 'rationalities' of European Private Law.[1]

Bartl claims that this requires revisiting the foundations of private law at the same time that the role of science and technology in legal discourse is problematised. IMR suggests that doing so allows us to realise that European private law has been vastly transformed by the reification of a very specific 'internal market rationality'(572). Bartl claims that clear evidence of this can be found in an 'emergence of "isles" of uncontested knowledge in EU policy and law making processes', something that has resulted in the substitution of political debate on politically salient matters by what is claimed to be technical knowledge. Bartl considers that this process of reification of internal market rationality has been rendered possible by an *a priori* of cognitive and normative features (573), which the author locates in a broader context of institutional design 'oriented toward the technocratic execution of uncontroversial goals' (574), as opposed to solely ideology (596). IMR considers that the patterns of juridification (575) related to neo-liberalism (577) constitute the most

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[1] This is an invited reply to the article: M. Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political', (2015) 21 *European Law Journal*, 572–598; On rationalities in relation to European private law see already C. Joerges, 'The Europeanisation of Private Law as a Rationalisation Process and as a Contest of Disciplines – an Analysis of the Directive on Unfair Terms in Consumer Contract', (1995) 3 *European Review of Private Law*, 175–191. more recently, R. Michaels, 'Islands and the Ocean: The Two Rationalities of European Private Law', in R. Brownsword, H. Micklitz, L. Niglia and S. Weatherill (eds.), *The Foundations Of European Private Law* (Hart, 2011), at 139–158. For a critical account of 'rationalites' see L. Niglia, *The Struggle for European Private Law. A Critique of Codification* (Hart, 2015).

obvious concretisation of the reification phenomenon. IMR calls for the overcoming of the reification of the 'internal market rationality' through the 're-politicisation' of the European private law field.

It seems to me that IMR is characterised by a dialectical tension between, on the one hand, the explanation of the process of reification, based as it is on the claim that the co-production of knowledge and governance unavoidably de-politicises European private law and, on the other hand, the thesis according to which European institutional settings themselves instigate and produce reification. This implies a parallel dialectics between theory and practice, and between ideology and discourse. Below I discuss the three facets of the tension.

II Methodological Challenges

Even a summary history of European Private Law and of European Private Law scholarship suffices to conclude that IMR confirms acquired knowledge on one key feature of that history.

Several critical reconstructions of European private law have explored its market-oriented rationality, from the various perspectives of the social school of private law, comparative law or legal history. The article makes a virtue out of its concise engagement with this pre-existing literature. Its value lies with the offering of a perspective that renders possible to criticise the 'market-oriented' character of European private law from a very different vantage point than the ones usually employed by legal scholars, i.e., the idiom proper of science-and-technology studies. This cannot but be regarded as a contribution to the methodological tools with which European private law may be studied; in particular, due to Bartl's introducing one more ground for transcending, if you wish, the 'orthodoxy' of the field—whether legal-dogmatic or cosmopolitan positivist private law scholarship.[2]

There is however, arguably, a clear and present risk implicit in the choice of the reification perspective of market rationality as the means to decode the complex dynamics of the European private law field. This risk is that of subsuming developments into the chosen theoretical schemata even when they would require wider and more nuanced theoretical frameworks for them to be fully or at least better explained. This dynamics seems to me to be at work in the article not once, but at least twice.

Firstly, the 'micro-level' reconstruction of the Unfair Terms Directive is based on the (not unusual and, in fact, commonplace) assumption that the said directive actually adds to the level of protection of consumers. The fact of the matter, however, is that the Unfair Terms Directive has resulted in a major legislative inroad in the protectionist regimes of national contract laws, with severe disrupting effects on the pre-existing national systems.[3] It is this commonplace assumption that explains the subsequent comparison of the Unfair Terms Directive with the Consumer Rights Directive. Barlt claims that the latter, contrary to the former, would be aimed at promoting the procedural rights of consumers so as to enable 'market access'. What at first sight seems a stark contrast (between consumer protection and market-enabling rationalities) turns out to be something very different. On

[2] To the extent that cosmopolitanism and positivism can be considered to be complementary, as opposed to exclusionary perspectives, cf. e.g. N. Walker, *Intimations of Global Law* (Cambridge University Press, 2015).On 'orthodoxy, in European private law see L. Niglia, 'Taking Comparative Law Seriously – Europe's Private Law and the Poverty of the Orthodoxy', (2006) 54 *American Journal of Comparative Law*, 401–428.

[3] For this reading, see L. Niglia, *The Transformation of Contract in Europe* (Kluwer Law International, 2003).

closer inspection, the ways in which the Unfair Terms Directive has been implemented and enforced on the ground dilute the alleged stark contrast. There are indeed judicial decisions that undertake reviews of national private laws in light of the market-oriented policy objectives of the Unfair Terms Directive.[4] Yet, there are equally judges (and legislatures) making use of the Directive so as to shelter national laws from the innovative *qua* disruptive character of the Directive. My point is not to settle once and for all the issue regarding an allegedly 'right' construction of the meaning of the Directive, but, much more modestly, to show that an understanding of the Directive and of its implementation and enforcement in national jurisdictions needs more than a once and for all resort to higher rationalities such as 'reification'. From this vantage point, the acknowledgement of the 'crucial importance' of 'resistance patterns' in IMR goes towards balancing its theory about 'reification'.

Secondly, one notes a similar methodological danger at the 'macro-level' of analysis, in particular, in IMR's reconstruction of the patterns of 'resistance' *vis-à-vis* the marketisation of private law through Europeanisation. Bartl argues that 'resistance' from judges and scholars has been 'of crucial importance for weakening the transformative pressures and slowing down the makeover of private law'. Having assumed that, the author adds that such 'resistance' 'has remained unavoidably piecemeal, unorganised, and hardly sufficient to respond adequately to the new 'rules of the game'. However, on closer inspection, the history of the 'resistance' to Europeanisation has seen entire legal traditions mobilising resources and, as a result, succeeding in (relatively speaking) sheltering from marketisation a key area of contract law such as the law of unfair terms —so can one really speak of 'piecemeal and unorganised' resistance?[5]

III A Variety of Projects

IMR touches upon both ideological and institutional aspects. Its focus is most particularly on the ideological aspects underlying the 'reification thesis'. The author chooses to discuss extensively certain ideologies, but not the counter-ideologies that disrupt the prevailing modes of thinking and practices. Whilst European private law scholars tend to remain sceptical of ideology in general, those who think otherwise should find it interesting to explore the whole variety of ideological 'projects' at play. IMR claims to reveal a monopoly of one given ideology. It seems to me that more structure is at work here. Consider for example the rejection by the European Parliament of the original Commission's proposal of the Services Directive, a rejection which was not only the result of an ideological clash about the very characterisation of the internal market, but which gave rise to an open ideological contest within the Parliament.[6] Or the 'resistance' mounted in Germany vis-à-vis the Unfair Terms Directive, which was also evidence of a plurality of ideologies as stake (the landmark contribution by Ulmer and Brandner is good evidence of that). It is in debates of the like that one can look for political 'regeneration' of the kind that IMR visibly aspires to. It seems to me that such an aspiration is more likely to be met if one engages with actual patterns of 'resistance' and 'difference', even when their very existence

[4] See *ibid.* For a decision along those lines, see UK Supreme Court, *Office of Fair Trading v. Abbey National*, ruling of 25 November 2009, [2009] UKSC 6.

[5] For what one may call, in replying to IMR, 'organised resistance', see my rendition of the Germanic reaction to the Unfair Terms Directive in terms of both legislative implementation and enforcement in *The Transformation of Contract*, above, n. 3.

[6] See e.g. C. Barnard, 'Unravelling the Services Directive', (2008) 45 *Common Market Law Review*, 323–394.

challenges the strong version of 'a reified internal market rationality'. Ironically, not engaging with such worlds of difference would make it even more difficult to grasp what exactly one may mean by 'political'.

IV Complexities

Bartl assumes the existence of an 'internal market rationality' which is indeed not merely a force shaping the European Private Law field, but the Global Private Law field. The reconstruction of the transformation of the 'normative' framework of European private law in IMR follows this analytical pattern. European private law is portrayed as having undergone a set of major changes—from 'justice' to 'low prices', from 'person' to 'consumer'—resulting from a 'reifying' implementation of the internal market rationality. All this is partially traced back to the way in which the EU institutional structure operates (588). However, as is the case with other global forms of 'law-transnational',[7] there are complex dynamics, forces and tendencies at play. Consequently, the ongoing re-structuring of the European private law field cannot be automatically traced back to the reified traits of market rationalisation. Counter-movements need also be factored in. To return to the issue of 'resistance' and 'counter-resistence': Each episode of 'resistance', even if said to be 'weak' and 'unorganised', contradicts, and places doubts on, the reification thesis in the same way in which 'resistance patterns' manifest themselves in relation to other kinds of 'global' processes of market integration.

V Conclusion—Law's Discourse

The above considerations propose to dissect what has been labelled 'reification'. The arguments I have put forward in this reply aim at raising awareness about the consideration that there is more than just passive adaptation in the European private law field, as revealed by an analysis of institutional aspects (in particular, the way in which relevant Directives are implemented and enforced on the ground). There are forms of what may be labelled creative projection at work that are worth being taken into account in order to capture the actual state of European private law in its fullness. The private law discourse must be seen as an epistemic world which does not stand entirely on its own (in fact, it is very much a law-in-context discourse) but which still produces its own 'knowledge'. A knowledge that is not always and not necessarily instrumental to reification.[8] The internal market rationality with its specific economic, political and sociological traits needs to be considered in relation to the deeper discursive structures of European private law. The argument for political regeneration so central to IMR equally needs to be addressed in the light of this broader framework of analysis.[9] If by 'political' is meant an expression of the standing in the world by clinging on world-views, then in order to capture that 'standing' it seems to me particularly advantageous to explore the complex details of concrete (and sometimes contradictory) law-engagements in their historical situatedness.

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[7] See Walker, above, n. 2.
[8] See Niglia, above, n. 3 and n. 1.
[9] For this reading of 'the political', see L. Niglia, 'The Political Foundations of European Private Law: An Editorial Introduction', in Brownsword, Micklitz, Niglia and Weatherill, above, n. 1, at 177–184.

