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Social Justice in European Contract Law: a Manifesto

*Study Group on Social Justice in European Private Law**

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I Contract Law and the Future of Europe

The private law of contract is not the most obvious place to look for fundamental controversies about the future of the European Union. It does not directly concern such high-profile issues as the creation of a Constitution or federal control over economic and fiscal policy. The absence of significant political and media interest in the fate of the private law of contract should not, however, lead us to underestimate its potential importance to the future of the European Union. In many respects what happens to the law of contract will be a defining moment in the history of Europe. Agreement on common rules among the Nation States will symbolise more clearly than any Treaty or Constitution the emergence of a post-national form of governance. More concretely, the content of those common rules will represent vital decisions about the values on which the market order in Europe will be founded. Why is the private law of contract so significant in these respects? And why has its significance escaped much attention?

* The following, though unable to participate in the composition of this Manifesto, have asked to be associated with its contents: Guido Alpa (Rome), Marisaria Maugeri and Mario Barcellona (Catania). Duncan Kennedy (Harvard), and Gunther Teubner (Frankfurt). This manifesto was prepared at meetings in Amsterdam (September, 2003), London (January, 2004) and Paris (March, 2004), and completed over the Internet in May 2004. The *rapporteur* was Hugh Collins.

Private law concerns social and economic relations between citizens. It provides the basic rules governing economic transactions, business organisation, property rights, compensation for wrongs, and other kinds of associations between citizens. At the heart of private law are the rules governing contracts. The private law of contract perhaps has the reputation of being arcane, legalistic, and more or less irrelevant in modern societies. There is more than a grain of truth in that point of view. Most national legal systems in Europe established general principles or codes to govern contracts in the nineteenth or early twentieth centuries. These rules were, in turn, mostly derived from earlier laws, customs, and intellectual discussions of principles, which could often be traced back to Roman times. These systems of private law of contract are usually expressed in laconic, abstract principles, replete with technical legal concepts. The principles seem to present a formal, logical, rational, apolitical system for resolving contractual disputes. The legal doctrines avoid any explicit elaboration or derivation from ideas of political economy or morality. Nevertheless, the authors of those codes and principles—legislators, judges, law professors—most certainly appreciated the long-term political significance of these private law systems of contract law.

Nationalism provided fuel for their efforts. A uniform system of private law throughout the claimed national territory expressed a united national identity. In particular, the enactment of a Code proclaimed a common culture, a single language through which to express that culture, and a national identity to distinguish one people from another.

And the principles of law, though articulated in technical legal concepts, described a vision of a market society, a set of values that established the basic principles of social justice. In this vision, the general law of contract conferred on individuals a much greater discretion than in former social orders to construct their own social and economic relations through binding contracts. Although the national legal systems differed in many respects, their private laws invariably warmly embraced ideas of freedom of contract, private autonomy, and *laissez faire*. Private law expressed a view of the justice of a market society: *qui dit contratuel, dit juste*. But this was a view that predominantly expressed the values of European societies in the nineteenth century. The legislative debates surrounding particular provisions of the codes, and the judicial disagreements on the evolution of principles were generally about whether any limits at all should be placed on freedom of contract, not about whether that ideal should form the core idea of the legal system.

Of course, since those seminal moments, the law has not stood still. Codes have been revised, legislation introduced, judicial exceptions and elaborations created, and large swathes of types of contracts such as employment, consumer purchases, and tenancy, have received extensive special treatment. Freedom of contract or private autonomy no longer holds such a paramount position in national private law systems. A modern concern to strike a balance between private autonomy and fairness now characterises the heart of discussions about the appropriate principles of contract law. The evolution of the law continues through the productive dialogue between legislature, courts, and doctrinal writers. Yet, as in the nineteenth century, private law still performs its role as a national statement of the basic principles of justice and social ordering in a market society. Special regulation of particular types of contracts acquires its meaning and the determination of its province by differentiating itself from the ever-present, presupposed, underlying general principles of private law. Modern legislation has influenced the basic scheme of justice upheld by private law, but also relies upon private law to give it coherence and effectiveness. Gradual changes in this basic scheme of justice

never pass unnoticed or uncontested. Each invasion of private autonomy is questioned; every limit on freedom of contract is politically controversial.

Indeed, the private law of contract is currently becoming more significant owing to its crucial role in neo-liberal political thought. If governments seek to reduce the role of the State, to encourage market solutions to problems of securing social welfare, and to use the discipline of market competition to improve the efficiency of the supply of public goods, contracts become both an instrument of trade and an instrument of politics. The rules governing these transactions, which are based in private law, therefore become a key regulatory instrument of modern governments. As far as direct public provision of goods and services through the agencies of the Welfare State is dismantled and replaced by contractual relations—for education, health, utilities, pensions, communications—contract law supplies the rules that govern how citizens obtain the satisfaction of their basic needs. The content of those rules becomes of even greater political significance, because they express the central principles of contemporary ideals of social justice.

Given this awareness of the political significance of private law, both with respect to its construction of national identity and in its role of creating the foundational values for the market order, it is surprising that proposals to harmonise or unify private law in Europe have sparked little debate. The technical character of private law may discourage such a debate. But this technical character should not lead to the misapprehension that the issues posed by the construction of a European law of contract are merely technocratic, to be solved in pragmatic ways by experts. On the contrary, as an expression of cultural identity and a scheme of social justice for a market order, a unified system of private law poses profound, political questions about the future of the European Union.

A *The Technocratic Approach*

Yet, a technocratic approach towards the agenda of harmonising European private law has so far predominated in discussions about the future of the European Union. The issues raised have been presented by the Commission as merely concerned with the completion of the Internal Market. Although other groups involved in these discussions, such as the European Parliament and legal scholars, may well appreciate that broader questions about European identity and social justice are at stake, as a practical matter the political process seems likely to be driven by the narrower technocratic agenda of the Commission—unless that agenda is vigorously challenged.

It is, of course, true that proposals to harmonise private law, particularly the law of contract, are connected to the aim of the completion of the Internal Market. A harmonised or uniform body of legal principles and rules governing contracts, particularly those involving cross-border trade, is likely to help to achieve a more competitive Single Market in Europe. For this purpose, as well as proposing ever more ambitious harmonising Directives, the Commission has also presented an *Action Plan*,¹ with a view to taking a more strategic approach towards harmonisation of European contract law. We should doubt, however, whether the needs of the Internal Market programme could really support proposals for uniform private law on their own.

¹ European Commission, *A More Coherent European Contract Law: An Action Plan* (Brussels, 12.2.2003) COM(2003) 68 final.

It seems plausible that, if the expected material benefits of an enlarged competitive market are to be shared by all citizens of the EU, any significant barriers to trade presented by diversity in national legal systems will need to be overcome. That argument may justify measures of harmonisation in respect of some aspects of national legal systems. But the needs of the Internal Market cannot support the broader agenda of the harmonisation of all of the law of contract, let alone all of private law. On the contrary, it seems much more likely that the self-regulatory capacity of market actors will be able to solve the majority of problems related to cross-border trade. Through their contractual arrangements, including choice of law clauses, traders can avoid most potential barriers to cross-border commerce. In general, it is only national mandatory laws, which cannot be derogated from by private agreement, which may pose a significant legal barrier to trade. Other instances of national diversity in private law may generate transaction costs and psychological barriers to market expansion, but these effects are no different from other kinds of barriers, such as linguistic diversity and transport costs, which deter cross-border trade. The project of harmonisation of European private law clearly goes far beyond the needs of business to help to facilitate a competitive Internal Market in Europe. Harmonisation is not just a technical solution to a problem of 'negative harmonisation', that is the removal of subtle impediments to cross-border trade. On the contrary, the technocratic agenda ignores, and even worse, conceals, the profound questions that need to be addressed when promoting the goal of harmonisation of private law.

B The Real Issues

The real issues raised by proposals for the harmonisation of contract law in Europe are similar to those posed by the construction of private law systems in the nineteenth century. A common system of European contract law signifies an aspiration towards a shared European identity. It marks a commitment to an ever-closer union of peoples, of cultures, and of values. It is designed to bind citizens of Europe to a shared identity. The harmonisation of contract law represents a significant step towards the construction of such an identity.

The unification of contract law in Europe also poses profound questions about the values that should underpin the market order. Just as the nineteenth-century civil codes and the common law contained a scheme of basic values about the appropriate standards for governing economic and social relations between citizens, so too a European law of contract will enact a scheme of social justice. A unified law will similarly have to strike a balance between, on the one hand, the weight attached to individual private autonomy as expressed in the idea of freedom of contract, and on the other hand, principles which respect other equally important demands for social solidarity, which prohibit individuals from taking advantage of superior economic strength or from ignoring the claims of justified reliance upon others. In striking this balance, any system of contract law expresses a set of values, which strives to be coherent, and which is regarded as fundamental to the political morality of each country. European contract law cannot avoid such political judgements.

Yet there are important differences between the project of harmonising European law and the tasks addressed by those who constructed national private law systems. The harmonisation of law at European level involves both the demolition of national legal systems and the construction of a new legal order. The creation of European private law nests into the broader evolution of Europe towards the construction of a political

entity. Initiatives with respect to private law fit into the increasing emancipation of the European Union from a limited focus on an Internal Market towards becoming a political entity with its own constitution. In many respects such a constitution already exists, for the Treaties on which the European Union is based include the fundamental principles of a shared system of values. In particular, Article 6 TEU declares that the Union is founded on principles of liberty, democracy, respect for the fundamental rights of the European Convention for the Protection of Human Rights and Fundamental Freedoms and of the constitutional traditions of Member States, the rule of law, and respect for the national identities of its Member States. The unification of private law should be perceived as fitting into this complex, political evolution of the construction of a European polity, based upon shared values expressed in basic laws and constitutional documents, which at the same time respects the diversity of national and regional cultural traditions.

This new European polity cannot be merely a larger version of the preceding settlements of fundamental values established in Nation States. The European Union is envisaged not as a single state, but as a union of disparate states, cultures, and traditions. Its laws must encourage a union based on shared values, but at the same time respect diversity. It is an intrinsic part of European identity that we celebrate and nurture pluralism in culture, language, and philosophy.

Simultaneously, the European Union must craft new governance techniques that prove effective, efficient, and, most important of all, democratically accountable in the context of multi-level regulation and considerable diversity in national legal systems. The traditional methods used by Nation States in fixing those settlements of fundamental values in private law through the enactment of Codes and respect for the evolution of judicial precedents must be adapted, or even completely revised, in order to develop a workable union of shared values in the multi-level governance structures of the European Union.

From the preceding observations, two important conclusions may be drawn:

- proposals for the construction of a European contract law are not merely (or even primarily) concerned with a technical problem of reducing obstacles to cross-border trade in the Internal Market; rather, they aim towards the political goal of the construction of a union of shared fundamental values concerning the social and economic relations between citizens;
- the governance system of the multi-level pluralistic European Union requires new methods for the construction of this union of shared fundamental values (which includes respect for cultural diversity) as represented in the law of contract and the remainder of private law.

These two points serve as the critical starting-points for this Manifesto. Acceptance of these conclusions compels us to challenge the current agenda for European contract law.

C Social Justice and Regulatory Legitimacy

Acknowledgement of those critical starting-points itself suggests a new and ambitious agenda for the study of European contract law. They invite, first, an enquiry into whether it is possible to construct a union of shared fundamental values (which also respect diversity) that can lay the foundations for the basic principles of contract law

in Europe. We might call this scheme a conception of *social justice* in Europe. Second, those conclusions demand reflection on regulatory techniques, not merely in the sense of the creation of a governance system that is effective and efficient, but more broadly one that enjoys legitimacy in a multi-level pluralistic polity. We might describe this aspect of the agenda as the search for *regulatory legitimacy* and effectiveness. These two parts of the agenda must, however, function together, if the goal of a European contract law is to be achieved: *social justice* must be combined with *regulatory legitimacy*.

This Manifesto explores that challenging agenda of social justice and regulatory legitimacy in European Contract Law. In so doing, it argues that existing initiatives have failed adequately to address this agenda. As a consequence, they have also failed to consider sufficiently the appropriate methods for helping to construct a European contract law. The narrowness of focus combined with the inadequacy of methodology in current initiatives pose a threat to the successful achievement of a suitable set of fundamental principles that could serve as a legitimate basis for the governance of social and economic relations between the citizens of Europe. Or perhaps, if these initiatives continue in their current orientation, they may result in the creation of a European contract law that ignores the demands of social justice and regulatory legitimacy, thereby adding to scepticism about the value of European unity and its multi-level governance structure. This Manifesto is therefore both a plea for reconsideration of the current trajectory towards harmonisation of European contract law, and an exploration of the appropriate way forward, which satisfies the twin objectives of social justice and regulatory legitimacy.

In a short tract, we can only hope to explore in a preliminary way these profound issues. Furthermore, as an unrepresentative group of scholars interested in contract law and concerned about the future of Europe, we would not presume to be able to provide final answers to any of these questions. Rather, this Manifesto is a call for the introduction of a more representative and accountable process for addressing these issues. This process requires the assistance of legal scholars and other professionals to expose the errors of the current technocratic approach, to reveal more clearly what is at stake, and to help to realise proposals for enacting a scheme of social justice in European contract law in a concrete effective manner, but the central issues identified above must ultimately be resolved through a political process. Unless a more democratic and accountable process is initiated, there is a clear danger that these fundamental issues will never be openly addressed, and a serious risk that powerful interest groups will be able to manipulate the technocratic process behind the scenes in order to secure their interests at the expense of the welfare of ordinary citizens. Our ultimate aim, therefore, in proposing this Manifesto, is to help to empower citizens of Europe, so that they, and not powerful business interests or legal and political élites, can choose, in an informed manner, the nature of social justice in Europe.

II The Technocratic Agenda for European Contract Law

The first step in our argument is to expose the errors and weaknesses of the current agenda in Europe for the development of European contract law. We focus on the work of the Commission, because it has the power to initiate legislation and other programmes. But we should note briefly the contributions to this agenda of other actors. The European Parliament has twice resolved that systematic work should begin on the unification of private law in Europe, and has pressed for the extension of this pro-

gramme to all aspects of private law, not merely contract law. At the same time, independent groups of legal scholars have been working on the construction of various schemes of model principles for the regulation of contract law in general or some aspects of contract law. And now work is beginning on other aspects of private law. But the dominant influence on the agenda for European contract law has come from the Commission.

A The Commission's Action Plan

In its publication, *A More Coherent European Contract Law: An Action Plan*,² the Commission recounts its role hitherto in the construction of contract law in Europe. It has succeeded in having a raft of Directives dealing with what are called sector-specific proposals approved by the Council of Ministers. Many of these Directives address pressing problems in the development of a single market. For example, the advent of a market through the Internet, a communications technology that ignores national boundaries, has required the development of measures for regulating e-commerce to facilitate such transactions, but also to provide safeguards for consumers. But these legislative initiatives have extended well beyond technical problems in cross-border trade in particular sectors. For example, in relation to ordinary consumer purchases of goods, Directives set minimum standards with respect to the quality and safety of goods, the remedies available to disappointed consumers, and controls over the fairness of the terms of standard form contracts used by businesses in their dealings with consumers. Through such measures, which apply to every consumer transaction, whether or not it has a cross-border dimension, the Commission and Council have already laid the foundations for some basic principles of the private law of contract. In other words, the Directives have already begun to formulate principles of fairness in transactions, which seek to balance respect for private autonomy against the concern to protect weaker parties and to ensure social justice. And these principles do not apply merely to narrow economic sectors, but affect some of the most common kinds of transactions.

The *Action Plan* proposes that this legislative agenda should continue, but the Commission also accepts the criticism that this regulation has some unsatisfactory consequences. It is hard, for instance, to achieve through general statements of principles in Directives the uniform application of Community law in each Member State. Important concepts or phrases in the Directives are often not defined with clarity, which renders their interpretation and application uncertain. The Directives themselves do not contain consistent principles, which can sometimes cause difficulties when two or more Directives apply to the same problem. Most of the Directives hitherto have also merely set minimum standards, so that national rules can be preserved in so far as they do not detract from the European standards. As a consequence, the Directives do not eliminate differences between national private law systems, and therefore do not necessarily remove such barriers to trade.

Having described the problems to be addressed in this way, the *Action Plan* proposes three principal solutions. In the first place, the quality of the existing Directives can be improved, by removing inconsistencies, simplifying and clarifying the standards, and updating the legislation to deal with developments which were not foreseen at the time of its adoption. Second, problems of differing or uncertain interpretation of Directives

² Brussels, 12.2.2003 COM(2003) 68 final.

could be resolved by the construction of a *common frame of reference*. This proposed document would provide settled meanings for concepts and principles used in European contract law. For example, the common frame of reference might define what is meant by a 'contract', or 'breach of contract', or 'compensation for damage'. These concepts and definitions could then be used both in the creation of new Directives and for the purpose of ensuring the consistent interpretation of existing Directives. The third strand in the *Action Plan* is to promote the creation and adoption of standardised contracts that could be used by all traders in the same economic sector throughout Europe. The Commission hopes to bring together business organisations operating in the same sector and other stakeholders, so that they might agree upon common standard terms and conditions of contracts, which would be used in all such transactions concluded in Europe. As a fourth, rather more tentative proposal, the Commission also indicates that it will continue to investigate the desirability of creating an 'optional instrument', which would amount to a code of contract law, particularly adapted to cross-border contracts, that parties could use as the applicable law in place of any national legal system.

B The Integration Agenda

The brief description of the *Action Plan* above highlights its main proposals, but it does not really reveal the underlying reasoning. Part of the justification for the *Action Plan* is certainly the worthwhile and uncontroversial objective to improve existing regulation. No one will object to more transparency and consistency in the law. But the principal justification for further action in the field of contract presented in the *Action Plan* concerns Internal Market considerations. The problem, as conceived by the Commission, remains the one that it must try to reduce barriers to trade. Harmonisation of contract law, to the extent that it is proposed, has this purpose of breaking down barriers to trade across borders. Significantly, no other substantial purpose is mentioned by the Commission. Instead, the Commission rebuts at considerable length the arguments of those who doubt that the diversity in the national laws of contract presents a significant obstacle to trade. It emphasises the potential increase in legal costs in doing business across borders—for example, standard form contracts will have to be adjusted by businesses to suit each national market and its legal regime. It also emphasises the psychological deterrent to consumers and small businesses of cross-border trade arising from uncertainty about the content of the applicable law. No doubt these kinds of barriers may exist, even if they are sometimes exaggerated. What is clear is that it will always prove hard to measure and quantify any deleterious effects of diversity in contract laws. It is for the purpose of reducing these barriers to cross-border trade, however trivial or serious they may be in fact, that the Commission proposes its agenda in the *Action Plan*.

This conception of the agenda for European contract law fits into the broader role of the Commission with respect to the completion of the Internal Market. The central European Treaty provisions insist upon the vital freedoms for an open competitive market to operate. European regulation of the market can be justified, but primarily on the ground of removing obstacles to commerce (negative integration) and of tackling market failures such as lack of competition (positive integration). It is expected that this régime for a free market will help to generate wealth, which will benefit most citizens of the European Union. What is missing from this European régime for governing markets is, of course, a vision of distributive justice or fairness in contracts. As

traditionally understood, the function of the European Community is to promote a free market, not to ensure that this market is corrected in the light of distributive aims. Accordingly, the European Community lacks a clear general mandate to pursue a scheme of fairness or distributive justice in its regulation of trade.

This lack of competence creates a crucial difference between European Community law and national contract law systems. National legislatures have always felt empowered to adjust and amend national private law in the light of changing social and political values concerned with fairness and distributive justice. As a result, the institutions of the EC are trying to regulate markets in ways that go to the heart of questions about private law, but at the same time they have limited powers to regulate these issues, because, as a legal matter, they have only limited competence (Internal Market, consumer protection, and so on), and as a practical matter, they are only likely to achieve legislative measures, if such measures can be presented as market facilitation (i.e. negative integration by removing barriers to trade).

We can detect the impact of this narrow agenda on the emerging body of European consumer-protection legislation. Although Europe has made a significant contribution to the improvement of consumer protection standards, especially in those countries where national legislative protection was rather low, the agenda of market integration colours and potentially weakens all the measures emanating from Europe. In practice, the Commission usually presents consumer protection measures not so much as laws designed to help weaker parties but as measures for market correction, that is, to prevent distortions in competition. The elimination of distortions, such as the supply of misleading information, certainly contributes to consumer protection. But is the goal of consumer protection adequately served by measures designed to help the confident consumer make her purchases by providing accurate and timely information? Sources of inequality other than informational asymmetries between contracting parties tend to be excluded from consideration. Furthermore, there seems to be a growing, though naïve and empirically doubtful, confidence in the belief that better information and cooling-off periods will prevent unfairness to consumers from occurring in practice. The market integration agenda is now so dominant in the field of consumer protection that it seems likely to warrant new European legislation that actually diminishes levels of consumer protection in some Member States. The strategy of minimum harmonisation, which sets minimum standards but permits higher standards to persist in national legal systems, does not necessarily eliminate barriers to trade caused by diversity in national laws. The obvious solution is for the Commission to press for maximum harmonisation or uniform law. Maximum harmonisation indirectly threatens current protections for weaker parties to contracts, whether they might be consumers, tenants, employees, small businesses, and others with weak bargaining power, because there is a risk that superior levels of protection in some Member States will have to be dismantled. This agenda of market integration, therefore, taken to its logical conclusion, tends to serve the interests of business exclusively by pursuing uniform rules for the single market and excluding local measures, supported by democratic processes, which tend to give superior protection to those vulnerable to exploitation in the marketplace.

Similarly, acting within its competence, the Commission's emphasis in its *Action Plan* and other proposals is to devise initiatives that will promote a competitive free market within Europe. This narrow focus excludes consideration of those other dimensions addressed by national private law systems involving concerns for fairness, solidarity, equality, and other basic values that contribute to social cohesion. The *Action Plan* for the future of European contract law sets an agenda concerned with vindicating the free

market, and never even mentions broader issues concerning social justice and European identity. The *Action Plan* is presented as a series of technical measures to deal with some technical problems, namely subtle barriers to trade caused by diversity in national private law systems. It is almost completely silent about the important political choices to be made with respect to social justice and European identity. These are issues that the Commission does not want to raise, because they will reveal that the agenda of European Contract law concerns political questions, which stray far beyond the details of measures concerned with negative integration.

C *The Common Frame of Reference*

At the centre of the proposals put forward in the *Action Plan* is the idea of a *common frame of reference*. Views differ about the exact meaning and content of this proposal. In some respects the Commission presents the *common frame of reference* as merely an aid to interpretation of existing Directives. But the idea clearly embraces a more ambitious agenda, for the Commission suggests that a *common frame of reference* is necessary to bring coherence to European regulation of markets. Even further, the Commission suggests that the *common frame of reference* could become an instrument towards achieving a higher degree of convergence between national contract laws. So, in one breath, the *common frame of reference* is presented as little more than a legal dictionary of terms used in European law, and in the next breath, the *common frame of reference* is merely another name for a comprehensive code of contract law, which will secure coherence and harmonisation. The Commission leaves the idea open to these differing interpretations, perhaps deliberately, for if it announced that it was proposing a European code of contract law, its agenda might attract unwanted political attention.

Leaving aside these ambiguities in the proposal, what is clear is how the Commission proposes that the content of the *common frame of reference* should be determined. The Commission informs us that the details will be constructed on the basis of research and input from economic operators. In other words, scholarly research can provide suggested formulations for the concepts, principles, and rules of the *common frame of reference*. These suggestions will then be examined by business interests and other organised pressure groups, and, if acceptable, will provide the basis for a coherent European contract law. In short, the *common frame of reference* will be fixed by a legal élite in combination with powerful business interests and other effective pressure groups. The process will be technocratic, subject to influence from powerful economic forces.

Obviously, there is no hint here of any kind of democratic process, no opportunity for the citizens of Europe to have their say on the formulation of the basic principles of the legal regulation of the market. There is not even the suggestion of some kind of Convention or extended discussion among political élites, as has been the case with the proposed Constitution. The Commission states that it intends to consult widely with stakeholders, in order to ensure that any legislation meets their needs. But consultation about needs is not the same as providing the opportunity for democratic deliberation, or for a parliamentary process at both national and European levels, in which the citizens or their elected representatives actually decide the principles, rather than merely have the opportunity to comment on them. In any case, the issue is not so much about needs, for that reflects the assumption that the problems to be addressed concern merely negative integration and the requirement of business to have barriers to trade dismantled. From the point of view of negative integration, it does not matter what legal rules

apply, provided that they are uniform, transparent, and effective. Of course, one should not deny that those 'needs' of the Internal Market have to be satisfied as far as possible. From the point of view of social justice, however, it matters a great deal whether consumers receive adequate protection against defective products and services, whether employees have to submit to exploitative terms and condition, and whether large organisations can take advantage of their greater expertise and information to secure harsh bargains against consumers and small businesses. The *common frame of reference* cannot avoid making judgements about these kinds of fundamental values, and how they should be balanced, not on the basis of needs, but on the basis of a conception of fairness or social justice.

Just as the *common frame of reference* cannot avoid making such judgements, nor can the scholarly research that the Commission proposes should provide the draft formulations for the document eschew political evaluations. No amount of scientific inquiry will reveal some hidden unified set of laws that are common to the Nation States and based upon a consensus of political values. On the contrary, what is revealed by comparative studies is that national legal systems have made divergent political decisions with respect to the question of how basic values should be reconciled. It may be possible to mask these differences by proposing general abstract principles, such as the ideas that the parties to contracts should act in good faith or reasonably, from which few will dissent. But in their application, such abstract principles are susceptible to widely differing interpretations. Agreement on such general abstract principles merely defers problems of harmonisation, and does not solve them. The choice between more detailed rules is not a purely scientific exercise. Some rules may well be preferable on pragmatic grounds, such as their clarity and widespread acceptance in national legal systems. But scholarly research quickly exposes beneath the rules more fundamental disagreements about how best to reconcile values and interests, and about the proper role of government and the limits of discretion granted to private individuals. Legal scholars, like other citizens, can participate in debates about these political issues, but it should not be supposed that their expertise gives them any privileged insight into how the political questions should ultimately be resolved. On the contrary, legal scholars should frankly admit that many of the more interesting experiments in national contract law in the twentieth century were the product of democratic legislatures, and that the expertise that is required for the creation of European contract law needs to be able to embrace democratic legislative processes and interventions, and to use them as a source of knowledge about technique and the assimilation of competing policy goals.

There are moments, perhaps surprisingly, when the Commission, in its presentation of the proposal for a *common frame of reference* in the *Action Plan*, reveals its awareness that its proposal has far deeper implications than its ostensible purpose to solve some technical problems in European law. It remarks, for instance, that in the *common frame of reference* 'contractual freedom should be the guiding principle; restrictions should only be foreseen where this could be justified with good reasons'.³ The Commission seems also to assume that this guiding principle is already embodied in existing European law. That interpretation of the current position may or may not be correct, but implicitly it forecloses the vital question of whether that dominating adherence to freedom of contract should govern policy choices. Why should the principle of

³ Brussels, 12.2.2003 COM(2003) 68 final, para 62.

freedom of contract have such a privileged position, so that proposals for constraint must satisfy the heavy burden of proof that they can be justified with good reasons? Why not reverse the burden, so that those who wish to deregulate market transactions should have the burden of explaining the potential advantages to be gained by the parties to these transactions from the absence of mandatory rules? These are indeed the deeper questions raised by the agenda for constructing a European contract law, but they are not questions ever raised in the Commission's agenda set by the *Action Plan*. By its fleeting reference to such questions, the Commission implicitly acknowledges that they are present, but clearly it has no desire to initiate any debate about them.

D A Tragic Trajectory

As so often in the history of the European Union, we seem to have become entangled with this technocratic agenda more by accident than choice. The Commission, quite properly, addresses issues within the framework of its own competence and the powers of the European Community. It is extremely doubtful that the European Treaty confers powers on European institutions to enact a European law of contract, once this project is understood as setting an agenda that necessarily goes beyond measures of integration of the single market. Thus, to progress any further with any rapidity, the agenda has had to be confined to an examination of technical problems, and more fundamental political questions have had to be suppressed. But there is a real danger that, by ignoring these political issues, we will end up with a lop-sided European contract law: one that furthers market integration, but is inadequate to secure social justice.

III The Social Justice Agenda for European Contract Law

The social justice agenda for European contract law requires first, and foremost, the initiation of a political process. That process requires as much democratic participation as possible in a European context. Political parties need to present their competing visions of the basic principles of social justice in the European market order. They need to address fundamental questions, such as how far should private ordering be permitted to regulate social and economic relations, and how far should the law shape and control these relations.

In addressing those questions through political dialogue with a view to the creation of a new European market order, four central themes should constantly recur.

- First, at bottom, there is the issue of fairness or social justice. The chosen market order has to embrace and protect a distributive pattern of outcomes that ensures fair treatment for every European citizen, and guarantees that the rules of the market system do not permit exploitation and social exclusion.
- Second, this scheme of distributive justice must align itself with the basic constitutional principles that establish and protect the rights of citizens. The market order does not merely shape the distribution of material wealth, but also has ramifications for the ability of citizens to enjoy and benefit from their acknowledged civil liberties and social and economic rights. The rules of European contract law that govern the fundamentals of the market order need to fit into a coherent pattern with those acknowledged fundamental rights.

- Third, these principles of social justice must acquire their legitimacy both through the process by which they are selected and how they are maintained. As these principles evolve through further legislation, judicial decision, and other modes of norm creation, the process has to secure legitimacy for its outcomes through democratic participation and dialogue.
- Fourth, these principles of social justice must discover a way to reconcile the ambition of creating an ever closer union of the peoples of Europe based upon common values with the need to respect their diversity and differences.

A Fairness

At the heart of the social justice agenda beats the concern about the distributive effects of the market order. The rules of contract law shape the distribution of wealth and power in modern societies. To the extent that nation states reduce their use of the direct re-distributive mechanisms of the welfare state, the distributive effects of the market become the determining force governing people's life chances. A modern statement of the principles of the private law of contract needs to recognise its increasingly pivotal role in establishing distributive fairness in society.

A conversation about the appropriate principles of social justice for the European Community has been taking place ever since its creation. That conversation has produced treaties, laws, and judicial decisions, all of which reveal partial and incomplete conclusions about how the balance between values and interests should be struck. We can discover some of those provisional conclusions in Directives and judicial decisions on matters directly related to commonplace contracts such as sales to consumers. There we find, for instance, a principle that standard form contracts should not be used by businesses to impose terms that cause a detriment to consumers contrary to a principle of good faith.⁴ Other expressions of principle have been confined to particular kinds of contracts, or particular market sectors. Their importance to the development of principles of fairness in contracts may lie in the possibility of their generalisation to other similar transactions. For example, the principle of good faith is applied to the performance obligations of the parties to a commercial agency.⁵ In those contracts as well, the commercial agent has the right to an equitable indemnity after termination of the contract to represent the loss of earnings through commissions on sales to those customers that the agent had nurtured for the principal. The question is whether these notions of good faith in performance and indemnities on premature termination might be appropriately extended to other types of long-term contracts. Although in many instances the European Community has legislated within a restricted compass, such as consumer and employment contracts, or with regard to a particular market sector, it is important to appreciate that the values expressed in those Directives may provide appropriate guidance for standards of fairness for analogous types of contracts and market sectors. But the relevant dialogue about principles of fairness in contracts can be discovered in political conversations that go far beyond discussions about particular regulations of contracts.

Many of the core provisions of the Treaty of European Union establish a framework for consideration of principles of social justice. Pre-eminent among these principles are

⁴ Directive 93/13.

⁵ Directive 86/653.

no doubt the 'four freedoms' (free movement of goods, services, persons, and capital). But also in Treaty provisions we discover a more detailed framework provided by competition law, which establishes standards for bargaining strategies in the market through its concept of the abuse of dominant power.

In truth, since the principal activity of the European Community has been the construction and regulation of the single market, we can discover sources for principles of social justice for general contract law in most legislative initiatives. Rules about insolvency may indicate how security rights can be fairly constructed to provide adequate protection for creditors whilst preventing oppression of debtors. Environmental law may provide guidance on appropriate safety standards and how to construct multi-dimensional quality standards for products and services. More generally, it is important to align the general principles of social justice that govern the market order with standards designed to protect public goods such as a healthy environment.

Existing European law, the entire *acquis communautaire* including everything from Treaties to soft law and mere Recommendations, provides rich resources for reflection upon how general principles of contract law may ensure fairness in contracts. But attention should not be confined to European Community sources. That would be a mistake, because of the history of the limited competence of European institutions under the Treaty. We need to remember that national private law systems are not inhibited by similar institutional constraints, so that in their evolution of standards of social justice they have explored a wide range of sources of values. Study of national private law systems will no doubt reveal differences in the weight attached to basic principles of fairness in contracts, which in turn reflect cultural and economic differences. This material is unlikely to reveal common standards of fairness, but it can highlight how modern national legal systems have experimented with novel solutions to contemporary issues of justice in contract law. For example, this material can inform discussions about the implications of obligations to negotiate in good faith, to cooperate in performance, to inform the other party about material circumstances surrounding the transaction, and to treat the other party's interests with care. In national private law systems we can discover further innovations, such as protection based upon social needs rather than equal opportunities, or a concern about the distributive consequences of legal rules between groups, such as creditors and debtors, and equally importantly, within such groups. Such principles may provide appropriate material from which to construct the fabric of a modern law of contract that presents an acceptable scheme of social justice.

Therefore, we need to be cautious in the handling of the material available in this expansive view of the *acquis communautaire*. It is true that the Directives and Treaty provisions are replete with values and legal concepts from which one might hope to build a consensus. We need to remember, however, that most of these sources of European law owe their origins to a narrow, functionalist view of the competence of the European Community. Their origins lie in the sharing of national sovereignty for the purpose of market building. Their underlying principles embrace freedom of trade, the protection of a competitive market, and the reduction of market failures. These European laws always presupposed the preservation of national sovereignty with respect to the general principles of private law. It has become evident, of course, that this conceptual boundary cannot any longer be maintained. In its application of European market-building measures, the European Court of Justice has insisted on many occasions that national private law must be modified in order to secure the effective realisation of the goals of European regulation. But there lies the problem. The values and concepts of European law that are now replacing aspects of national private law

tend to embrace a narrow conception of the principles of social justice applicable to a market order. The values of negative integration and competition were never intended to provide an exhaustive scheme of social justice for a market order. They should not be used now as the exclusive determinative foundations for a consensus of values underpinning European contract law.

B Constitutionalisation of Private Law

Beyond those relatively familiar materials relating to the general principles of contract law, the social justice agenda demands that the rules of private law should be integrated into the broader aspirations of Europe to find a lasting constitutional settlement. The future of private law is often neglected in the intense debates over the future European Constitution or the modes of governance in the European Union—and vice versa. The private law scholarly communities rarely enter the neighbouring arenas; and, equally, the constitutional significance of private law is seldom appreciated by public law communities. The constitutional significance of the European Treaties, the European Convention on Human Rights and Fundamental Freedoms of the Council of Europe, and the proposed Constitution for Europe,⁶ have a hitherto unappreciated importance for the Europeanisation process in private law. In these documents we can find general principles, which, though primarily directed towards the relation between state and citizens (public law), also have applications in market relations, especially where the state is seeking to achieve collective welfare goals through regulating markets (e.g. the supply of utilities) in relation to services of general interest. We should recognise that today a regulated market may be expected increasingly to deliver most essential needs of citizens ranging from water and power, to communications, and to access to credit (which itself is often necessary for other goods such as shelter and higher education). It is therefore important to appreciate that the regulation of markets is not only significant for its contribution to material wealth, but also it helps to structure access to basic needs of citizens and supplies them with essential protection of their interests.

From this perspective, principles of social justice in European contract law need to be aligned with the constitutional principles already recognised in Europe. These include not only the individual civil liberties of the European Convention of Human Rights and Fundamental Freedoms, but also the rich set of social and economic rights recognised in the Nice Charter of the Fundamental Rights of the European Union.⁷ In that Charter, a solemn agreement made by all Member States in 2000, the European Union declares itself founded on the indivisible, universal values of human dignity, freedom, equality, and solidarity, and commits itself to the principles of democracy and the rule of law. These principles have an important bearing on the evolution of European contract law, for they set a framework for consideration of the principles to govern the market order. Although freedom is a fundamental value and supports private autonomy in contract law, it must be balanced against other values proclaimed in the Charter such as respect for equality, diversity, social inclusion, access to services of general economic interest, a high level of environmental protection and consumer protection, and fair and just working conditions. For example, the combination of the values of equality, social inclusion, and access to essential services implies that the

⁶ European Convention, *Draft Treaty Establishing a Constitution for Europe*, OJ C 169/1, 18 July 2003.

⁷ OJ C 364/1, 18 December 2000.

regulation of contracts must facilitate opportunities to enter contractual relations in many spheres, remove impediments, and prevent unfairness in the terms of contracts that disadvantage particular groups. Similarly, the Charter prohibits child labour, which suggests that products made using child labour should not be placed on the market or at least that consumers should have the right to rescind purchases of such products. It is wrong to suppose that there is a sharp separation between the public sphere of constitutional rights and the private sphere of market relations. The social justice agenda insists rather that the rules governing markets and contracts need to be aligned and integrated with constitutional principles.

In view of the increasing likelihood of an agreement on the proposed constitution for Europe, we should also recognise that the broad principles of the draft can also provide guidance in the elaboration of a scheme of social justice in contract law. As well as endorsing the central ideas of free and competitive markets, in Article 3 the draft emphasises equally that Europe should develop a social market economy, which aims at social justice, full employment, social progress, a high level of protection, and improvement of the environment. The development of European contract law provides an opportunity to give concrete expression to these central principles of social justice, to which the European Union is committed.

These abstract constitutional principles have already influenced the detailed body of European law, and we can discover in Directives and other more concrete enactments and decisions a rich source for providing these principles with a more determinate meaning. Similarly, these European constitutional principles have of course been drawn from national constitutional traditions, so it would be appropriate in the exploration of this social justice agenda to reflect on how those principles have affected the evolution of private law in national legal systems.

C Legitimacy in Modes of Governance

We have insisted that the project of creating a European contract law is not one that can legitimately be carried out through an exclusively technocratic process. In whatever form it takes, the creation of European contract law is not merely a technical matter for lawyers and officials. It presents two challenges to the tradition of national private law systems. In the first place, to the extent that European law supplants national private law systems, it represents a symbolic move towards a greater European integration of a post-national polity. This move, like other measures of integration, raises questions about its legitimacy in the context of the shared competencies of the Community and the Member States. And second, the introduction of European contract law presents new challenges for techniques of multi-level governance. The issue is how to construct a private law that is a living law in the sense that it evolves and responds to the changing and diverse values and practices to be found in Europe.

The symbolic aspect of European contract law may explain the enthusiastic support which greater harmonisation of private law has attracted in the European Parliament and elsewhere.⁸ For some enthusiasts, the notion of a European code of private law carries with it a symbolic message of a closer unification of Europe. The Commission in its *Action Plan* does not discuss this symbolic aspect of its proposals towards greater

⁸ European Parliament, *Resolution on the Approximation of the Civil and Commercial Law of the Member States*, COM(2001) 398 final, C5-0471/2001, OJ C 140E, 13 June 2002, p. 538.

harmonisation of contract law. It emphasises its incremental approach, and is perhaps concerned not to provoke opposition to measures that may be labelled by opponents as creeping federalism. Nevertheless, the symbolic aspect of the European harmonisation of private law cannot be ignored. Greater harmonisation poses fundamental questions about the future character of the European Union and its unique system of governance. Created as a decisive and successful response to the problem of conflict between nation states in Europe, the European Community is committed to establishing harmony between the peoples of Europe whilst at the same time respecting the diversity of their cultures and traditions. The need to construct this delicate balance between establishing an identity for citizens in Europe and respecting local cultures explains the complexity of the European constitutional arrangements. In the evolution of a harmonised private law system, a similar complex balance between unity and diversity also needs to be struck, if the harmonised laws are to acquire legitimacy. A comprehensive uniform code of private law throughout Europe may be regarded as a disproportionate and illegitimate interference with the diversity of national and local political and legal traditions.

At the time of their creation, and in their subsequent development, the national private law systems were perceived both as practical rules to govern legal relations between citizens and as affirmations of a national identity. Traditional private law systems seem to express the diversity of European national cultures in their principles, language, and modes of reasoning. The legal culture forms part of the national cultural identity in the Member States. Moves towards a European contract law therefore raise issues about how to understand and construct a new identity for citizens in Europe. In relinquishing all or part of their traditional national legal systems, European citizens are being asked not merely to comply with the rules of a competitive market, but also to assimilate a complex identity that combines the solidarity of the citizens of Europe with a continuing respect for diversity in language, culture, and traditions.

In striking this balance between unity and diversity, the processes by which a consensus can be reached and maintained will be vital. The normal procedures for enacting technical market harmonisation rules do not provide a sufficiently inclusive dialogue for the examination and promulgation of fundamental principles of private law. In its *Action Plan*, the Commission perhaps implicitly acknowledges this need to secure a wider process of democratic participation by its proposals for exceptionally broad consultation with interested groups. This consultation process, though welcome, will not in itself prove adequate to the task of securing legitimacy for the harmonisation of private law. What is required instead is a broader scope for democratic participation, through the European Parliament, national legislatures, and perhaps national referenda.

In the course of this democratic dialogue about the content and reach of European private law, the attractiveness of the proposed harmonisation of the laws to the citizens of Europe will turn ultimately on the issue of what values of social justice the proposed European laws embrace. The abandonment of national legal traditions with their familiar standards, processes, and discourses will only become an attractive possibility, if it is believed that the harmonised European laws offer a progression towards better principles of social justice. In this context, social justice will not be regarded merely as a matter of distributive fairness and the protection of weaker parties, but it will also encompass concerns to protect minority cultures and languages that feel threatened by the increasing scope of transnational laws.

These principles of social justice will need to articulate the general statement of values in the proposed constitution for Europe. The key themes in the draft Article 3 that reveal the relevant principles for the private law of contract comprise a 'social market economy', which is 'highly competitive', but also which promotes 'social justice' and the protection of citizens. Many existing European Directives in the field of contract law already embody those ideals, for they set high minimum standards of consumer protection and try to establish fair trading arrangements for small businesses. For that reason, European initiatives in the field of contract law have generally been welcomed by national governments and democratic legislatures. As the European ambition becomes greater, to harmonise ever larger parts of private law, that need to achieve acceptance and legitimacy by embodying attractive and progressive standards of social justice becomes all the more important.

In the evolution of Europe, it is not essential to preserve the separateness of national private law systems for the sake of ensuring respect for cultural diversity or pluralism in itself. What is essential in this area of shared competence between the European Community and Member States is to persuade the citizens of Europe that the established principles of social justice in their national private law systems, which define a complex balance between the values of private autonomy and social solidarity, can be improved by the adoption of a market-wide articulation of principles of social justice. These principles need to comprise a progressive and popular development of those values. At the same time, European citizens will need to be persuaded that the transnational private laws also respect adequately in their implementation the pluralism of local traditions, cultures, and languages. The crucial question is at what level in a multi-level governance system can social justice in all its aspects best be secured. The Commission's case for transnational private law, which is presented merely as technical improvements to competitiveness in markets, will not lead citizens to embrace the project of greater unity in this field. Rather, they need to be persuaded that the transnational private law embraces shared fundamental values—like those shared values regarding the civil liberties and fundamental rights and freedoms of European citizens—which offer a more perfect realisation of a social market ideal.

As well as securing legitimacy by means of the democratic acceptance of the values expressed in a new European contract law, it is important to recognise that legitimacy will also depend upon how the systems of multi-level governance operate under a transnational legal framework. Relatively simple modes of securing and maintaining legitimacy through national legislatures and hierarchical court structures will not be available for the creation and evolution of European private law. Law production in the European Union's multi-level system results from the continuous interaction between semi-autonomous actors comprising legislatures, the judiciary, and non-governmental organisations, at different levels—European, national, and regional. Law making can neither be monopolised nor achieved in isolation by just one branch of government or a single institution. These interdependences are difficult to coordinate; and it is hard to ensure that the variety of institutions function together productively whilst respecting their independent legitimacy. These complexities of the legal system are not without risks for the rule of law. It is extremely difficult to ensure the consistency and coherence of the law within the European system of governance. But adherence to those values is extremely important in order to secure the continuing legitimacy of the European legal order. These problems raise difficulties for European law in the so far relatively narrow fields of the competence of the European Community. The extension of the scope of transnational law to encompass a wide range of private law

issues, such as most disputes arising from market transactions, will only exacerbate these problems, and raise urgent questions about the legitimacy of the legal order.

In thinking about these problems of consistency and coherence, it should be recognised that transnational harmonisation of laws cannot be achieved merely by the enactment of rules alone. European contract law also requires formal and informal processes to achieve consistency in application and effectiveness, which in turn requires coordination between the multi-level actors. Legal education, mutual observation by national court systems, and scholarly syntheses will all play their part in helping to achieve this coordination.

In securing legitimacy for a system of European contract law, it is also important to appreciate that the system will not remain static. It will evolve and adapt in the light of changing conceptions of social justice, revisions to constitutional principles, and innovations in market relations. A legitimate scheme of governance of the market order will require a stable framework, but also mechanisms through which it can respond to legitimate pressures for change. In national legal systems, private law has evolved through a dialogue between the legislature, the courts, and legal scholars—*la doctrine*. It will be difficult to replicate such an effective dialogue at a transnational level owing to the plurality of actors. For example, it will be necessary to ensure that a lively dialogue takes place between the courts at all levels, and not rely on haphazard practice of national courts making references to the European Court of Justice, and the occasional comparisons made between national court decisions.

Furthermore, the laws and other governance techniques regarding market relations cannot be constructed and revised in isolation from other developments in techniques of European governance. Contractual arrangements are all embedded in, dependent on, and influenced by other kinds of regulatory arrangements. Changes in regulatory policy and innovation in European governance practices hence have an impact on the regulation of contracts and market practices. For example, the technique of encouraging stakeholders to participate in the construction of a European framework of rules to govern their relations has the potential to create a dynamic rule-making process in market relations. As the Commission has suggested in its *Action Plan*, it may be possible to create a framework of rules to govern market transactions in particular sectors by securing agreement between stakeholders such as businesses and consumers on an appropriate standard form contract.⁹ In this example, as a result of its origin in a social dialogue leading to a framework agreement, the standard form contract becomes the effective and legitimate regulatory instrument. But these suggestions for a type of co-regulation or autonomous collective agreement are merely examples of how alternative governance techniques to the traditional civil code might be employed in the development of European Contract Law within the context of a system of multi-level governance.

Certainly, it should not be assumed that the traditional regulatory technique of a civil code will either be practicable, effective, sufficiently responsive to the challenges of multi-level governance, or adequate to meet evolutionary pressures. A European code of contract law may be helpful in securing coherence and transparency in legislation, but these values may be secured by alternative regulatory techniques; and a code has the potential weaknesses of being too static in its expression of values, and too insistent upon uniformity of values, thereby excluding cultural diversity and experimentation.

⁹ *Action Plan*, *op. cit.* note 1 *supra*, paras 81–88.

From a practical point of view, we need also to be suspicious of the fetishism of law assumed by proposals for a European code of contract law. National systems of private law do not encompass the whole normative framework in which market transactions occur. National laws have evolved in conjunction with and in response to differing institutional arrangements governing market transactions and the agents involved in them. The invisible customs and understandings, which form the implicit background in which the social practices of market exchanges are embedded, differ by region and national tradition. The nuances of meaning of the legal rules have to be understood against these implicit understandings that create a platform for the social practice of exchange. How far can it be practicable to try to unify legal systems with respect to their laws about markets when those national laws presuppose diverse embedded social and economic practices? In a system of multi-level governance, the laws must be constructed so that they can adapt to and harmonise in a functional manner with the local institutional arrangements and commercial expectations.

In evaluating the legitimacy of uniform laws it is important to recognise that the risk exists that, in the long run, the elimination of national diversity in contract law will deprive the law of a learning capacity to achieve superior outcomes in terms of efficiency or efficacy. National legal systems provide an experimental crucible in which to conduct the search for better solutions to problems arising in connection with transactions, from which other legal systems can and do learn. At present, Europe benefits considerably from its inherited diversity. In the construction of specific Directives, the Commission and the Council can examine the regulatory techniques, the standards, and the modes of enforcement used in a variety of legal systems, and then propose as legislation what is seen from experience as the most effective package to achieve the objective of the regulation. The harmonisation of private law and common rules about market transactions seems likely to reduce this rich source of experimentation and a valuable seam of innovation. In the pursuit of uniform laws, therefore, Europe must also leave space within its multi-level governance system for variation, experimentation, and innovation.

Those who are keen to promote a uniform law of contract for reasons of economic efficiency may be impatient with these concerns about the practical problems presented by a multi-level system of governance and sceptical about the potential advantages of preserving diversity. They should remember, however, that securing uniformity within a multi-level system is a far more challenging task than securing consistency within a national legal system. The evolution of the law is always path-dependent, building on what has gone before. Where legal systems share common goals, their inherited institutional frameworks may lead them to adopt diverse techniques for achieving those goals. Where legal systems share a common principle, its meaning in concrete situations is likely to diverge in practice. Indeed, even in those areas already harmonised by European Directives, it is far from clear whether the national legal systems have become more uniform or whether the intervention has merely created new divergences between national legal systems. These practical problems of securing harmonisation cannot be ignored, and to the extent that they cannot be overcome, we have argued that they will inevitably raise questions about the legitimacy of the transnational legal order.

Whether or not the evolving systems of multi-level governance in Europe can succeed in succouring the legitimacy of greater harmonisation of private law, the principal problem that needs to be addressed remains the one of promoting and achieving a deeper agreement or consensus on the underlying principles that should govern the market order. Such a consensus around fundamental principles of social justice in the

market order may prove possible to construct through democratic dialogue, but it cannot be assumed to exist already, and even less can this requirement be dispensed with altogether. Although the idea of a European model of the social market has gained some currency, at least in contrast to an American model of capitalism, there remain considerable divergences in views about how the details of this model should be articulated and systematised. Indeed, the existing differences between national systems for providing social welfare and steering market outcomes cast some doubt on the possibility of defining even in abstract terms a convincing interpretation of the European model of the social market. Thus there is a need to build a consensus around the appropriate principles of a social market. Even with such a consensus in principle, we are unlikely to agree upon the elimination institutional and cultural diversity between national legal systems. But like agreement on constitutional fundamentals, a shared vision of social justice in the market order would provide the basis for greater approximation of national laws. Without such a consensus, attempts to impose conformity through law will only achieve harmonisation that is skin deep, and will not be regarded as a legitimate measure of integration by the European Community.

IV Conclusion

The European Union has been inspired by the ideals of peace, prosperity, and justice for the people of Europe. We embrace that ideal of promoting the solidarity of the citizens of Europe. Given the equally important ideal of respecting the diversity of national traditions and cultures, the realisation of those ideals has required complex experiments in forms of multi-level governance. The resulting institutional arrangements have not always proved adequate to this task. But the experiment continues; we can learn from mistakes; and we can chart new routes towards the better achievement of our goals.

This Manifesto argues that in the construction of a European private law system, we need to ensure that the political process is geared towards the achievement of ideals of social justice. It is a mistake to conceive of this project as a simple measure of market building, because private law determines the basic rules governing the social justice of the market order. We need to recognise that the institutional processes suitable for the construction of a single market by means of negative integration are no longer appropriate as the European Union strives to achieve justice for its citizens. In particular, since the market plays an increasingly important role in securing distributive justice for the citizens of Europe, it is vital that its basic regulatory framework—the private law of contract—should embrace a scheme of social justice that secures a widespread acceptance. The elements of such a scheme of social justice may be discovered in the Nice Charter of Fundamental Rights of the European Union, though the concretisation of those abstract principles into rules capable of providing guidance to participants in markets clearly raises many difficult questions about the balance to be struck between competing rights.

The creation of that regulatory framework therefore requires a process that is not merely a technocratic attempt to secure harmonisation or uniformity. The process should rather become a political dialogue through which the conclusions reached about how to reconcile basic values achieve acceptance by mechanisms of democratic accountability. European citizens need to acquire faith and confidence in the new institutional arrangements, so that they embrace them as a legitimate way to achieve social justice. Attempts to conceal important decisions regarding the scheme of social justice

in the market order behind technocratic processes will merely lead to widespread disenchantment with the ideals and the legitimacy of the European Union. We call on the Commission, the Council of Ministers, and the European Parliament to redirect the project, to rethink the scope and direction of the *Action Plan*, and to recognise its responsibility to steer the process of constructing European private law in ways that will secure the legitimacy of its scheme of social justice.