Comparato, Guido and Condon, R. (2019) The general transformations of Private Law since Léon Duguit. Autonomy, responsibility and sovereignty in European Private Law. In: de Almeida, L. and Cantero Gammito, M. and Djurovic, M. and Purnhagen, K.P. (eds.) The Transformation of Economic Law: Essays in Honour of Hans-W. Micklitz. London, UK: Hart Publishing. ISBN 9781509932580.

The General Transformations of Private Law since Léon Duguit.

Autonomy, Responsibility and Sovereignty in European Private Law

Guido Comparato [1] ***and Rónán Condon*** [2]

Abstract: This contribution compares the transformations taking place in European private law in recent years to the transformations first described one century ago in French legal scholarship confronted with the interpretation of the French Code Civil in a deeply changed social context. That scholarship, epitomised by personalities like Léon Duguit, challenged the dominant legal formalism, with its emphasis on the subjective right, insisting instead that private law and the state perform social functions. Duguit's legal functionalism remains a useful lens through which to examine contemporary transformations of private law and the state in an EU context. In fact, contemporary law is characterised by new economic, technological, and societal processes which produce an increased level of complexity linked to new 'transformations' of private law. This contribution thus highlights the characteristics of those transformations separated by a century of legal evolution attempting to trace them in the specific area of European private law. A considerable difference between 'then' and 'now' is that those processes of transformation that Duguit noted now take place beyond a territorial defined state in the context of market-building in a supranational arena. This leads to a greater, and unimagined, blurring if not bypassing of the public-private divide. Duguit's 'legal theory without sovereignty' well describes these developments but is now under pressure from renewed idealisms.

Introduction

It is a common theme of legal scholarship that the law, both private and public, is in a continuous process of transformation.[3] Focusing on legal evolution in the European context, in particular, it has been suggested a decade ago that private law is experiencing a

[1] Lecturer in Law at Birkbeck College, University of London. Email: G.Comparato@bbk.ac.uk.

[2] Assistant Professor in Law at Dublin City University. Email: Ronan.Condon@dcu.ie.

[3] The word 'transformation' is deliberately chosen. For discussion of analogous notions such as 'legal change' and 'evolution', see A. Watson, ‚Comparative Law and Legal Change' (1978) 37(2) *The Cambridge Law Journal* 313-336; S. Worthington, A. Robertson, G. Virgo (ed) *Revolution and Evolution in Private Law* (Hart Publishing, 2018).

transformation from autonomy to functionalism in competition and regulation.[4] The imprints of that development can be found in several arenas, as will also be highlighted in the next pages of this contribution. Claims that contemporary law and society is undergoing deep and structural change is, of course, commonplace. What is more difficult is to make sense of these changes within a convincing analytical framework. When examining contemporary changes, one can look back to look forward. Looking back, then, the French legal scholar Léon Duguit sketched a plausible account of changes of private law and the state since the French *Code Civil*'s (hereinafter 'Code Civil') inauguration. He attempted to apply the lens of social science to law in an effort to explain the evolution of private law and the state in *belle époque* France and beyond. Our question is what can we still learn from Duguit's social and functional approach to law in the EU context? And, indeed, what if anything has changed? Before this can be done, however, it will be necessary to retrace Duguit's criticism of the *Code Civil* and its purported metaphysics.

I. Context: The *Code Civil* at 100

By the early 1900s, the *Code Civil* had entered its second century. Napoleon's enduring triumph was a product of Enlightenment rationalism and natural law. A bailiwick against the worse excesses of the *ancien régime*, it carved out a sphere of non-domination for the sovereign individual. If the *ancien régime* had revivified *imperium* in public law, the *Code* now revived the Roman concept of *dominium* in a recrudescent private sphere.[5] Thus, the sovereign individual whose political rights had been declared luminously in the *Declaration de droit de l'homme et du citoyen* (the Declaration of the Rights of Man and the Citizen) only a few years earlier found, in the *Code*, his civil rights from property, family, to contract and tort expatiated in some 2,881 articles. These rights were conceived at base as absolute, subjective rights. That is, rights that exclude the state from the private sphere of market and family. Thus, in the words of the *Code Civil* property rights may be exercised '*de la manière la plus absolue*'[6] and contracts are acts of the will, private legislation that cannot be easily altered once freely entered: '*les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites…*'[7] Not only was the state ringfenced, but the authority of the old

[4] H.-W. Micklitz, ‚The Visible Hand of European Regulatory Private Law—The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation' (2009) 28(1) *Yearbook of European Law* 3-59.

[5] L. Duguit, *Les transformations générales du droit privé depuis le Code Napoléon* (Paris, Librairie Félix Alcan, 1912) 120.

[6] Code Civil, Article 554. 'Ownership is the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way prohibited by statutes or regulations.'

[7] Code Civil, (n 6), Article 1134. Agreements lawfully entered into take the place of the law for those who have made them.' Many Code Civil articles are devoted to the circumstances in which consent is vitiated, namely, duress, fraud and mistake.

corporations or guilds were sapped. By excluding the state and corporation from large fields of social activity, the great productive energy of society is unleashed as probably the most notable moment in that long historical process which was later characterized as a move from status to contract.[8]

But if the subjective right is a *sine qua non* for the emergence of a private law society, by the early-1900s the mood music had changed.[9] A century of industrialization bequeathed mass labour movements, mass accidents, mass politics, vertically integrated firms, and the gradual centralization of power in an increasingly bureaucratized state. By the early 1900s, the time was right to reassess legal and social change since the *Code*. Against this background, in a series of lectures given at the University of Buenos Aires in Argentina in 1911, Léon Duguit discussed the 'general transformations of private law' which took place since the *Code Napoléon*.[10] In his lectures, Duguit's primary contribution is methodological. He develops a coherent legal sociology, which he applies to private law. His starting-point is that in classical legal scholarship the individual, and indeed the state, is given a '*volonté*' – whether individual will or the '*volonté commune*'.[11] By founding public and private law on the subjective right it places individual and state apart from society. But neither conception, Duguit argues, is in step with '*la realité*'. Duguit's commonest refrain is that the state and the individual are *a priori* and metaphysical concepts projected on to law and society. He wishes instead to develop a scientific theory shorn of preconceptions, using legal cases and legislation as social facts to illustrate his counterpoint: that out of the individualism of Enlightenment Europe a social law is emerging.

By focusing on cases and legislation – constructing his theory bottom-up – the *a priorism* and metaphysics of natural law is replaced by an *a posteriori* and social scientific method.[12] With Comte and the *philosophes* he disparages, he views society as progressing in phases; with Durkheim, he views law through the lens of social solidarity.[13] The *Code Civil* is an epochal moment, to be sure, but to grasp contemporary law and society one should not elevate it to a totem. Social facts (*les faits*) vary with the effluxion of time. In Duguit's words, '*dans la réalité des choses, il y a une transformation continuelle et perpétuelle des idées et des institutions*',[14] and while the text of the *Code Civil* may not have changed, its meaning and

[8] H. Sumner Maine, *Ancient Law: Its Connection with the Early History of Society, and Its Relation to Modern Ideas* (London, John Murray, 1861).

[9] F Böhm, 'Rule of Law in a Market Economy' in A Peacock & H Willgerodt (eds) *Germany's Social Market Economy: Origin and Evolution* (London, Palgrave McMillan, 1989) 46.

[10] L. Duguit, (n 5).

[11] L. Duguit, *L'État, Le Droit Objectif et la Loi Positive* (Paris, Thorin et Fils, 1901).

[12] It is hard to deny the heavy influence of Durkheim on this point, see E Durkheim, 'Rules for the Observation of Social Facts' in (WD Halls trans) *The Rules of the Sociological Method* (New York; the Free Press, 1982), 60.

[13] *ibid*, Durkheim censured Comte's stadialism. While Duguit shared the idea of social progress with Comte, he did not think that contemporary society is an end-state.

[14] 'In social reality, there is a continual, ongoing transformation of ideas and of institutions.'

scope varies under the pressure of these ineluctable societal forces.[15] The *Code Civil*, then, with all its symbolic value, represented for Duguit an important moment of comparison, a yardstick to measure how legal reality (*la realité*) had changed since 1804 not only in France but in all 'civilized' countries. Leaving aside references to the degrees of 'civilization', particularly widespread at that time, Duguit project far from a paean to the *Code Civil*, describes a newer and more recent transformation which marks a possible rupture with the traditional description of the whole global legal history of that time. Now, it is true that Duguit is not alone in theorizing on the emergence of social law. He is part of a realist school of *avant garde* scholars.[16] What is distinctive in *le transformations du droit privé* is how Duguit systematically retraces the emergence of social law through property, contract and tort tying this transformation to the idea of social interdependence or solidarity.

The greater societal complexity of early 20th century society is given expression in new laws and re-interpretations, which limits the absolute rights of the *Code Civil* with respect to the social function. This has led, first, to a new social law mediating group, as distinct from individual interests, which reflects how society has developed since the *Code*. Each group has a social function to fulfil because greater factual interdependence necessitates new bonds of solidarity. What Duguit recognizes, in essence, is a move from individualism to solidarity or 'socialism'.[17] Duguit issues an explicit and important disclaimer that the term does not coincide with Socialism as a political doctrine. Secondly, Duguit as primarily a public law scholar links the changes affecting private law notions of contract, tort, and property to more general modifications affecting the State itself. Two years later he would go on to publish a new book discussing this time the 'transformations of public law'.[18] In this sense, and following a 'social' approach to legal studies which had already taken root in Germany,[19] Duguit was able not only to identify an evolution in the law but rather to link the profound social and political transformations of his time to the evolution of private law as well, even behind the seeming timelessness of the *Code Civil*.

That critical link between State and private law transformations, which Duguit first recognised, remains extremely prescient today, in particular taking into account tendencies towards functionalization on the one hand and the phenomena of globalization, supranationalism, and transnational network governance on the other hand, which rather appear to be weakening the link between State and law. But appearances may be deceiving because, as it will be shown, transformation does not imply displacement. For these reasons, the rest of this contribution will attempt to re-read Duguit's transformations and relate them

[15] Duguit (n 10) 4-5.

[16] See, O. von Gierke, *Die soziale Aufgabe des Privatrechts* (Berlin, Springer, 1889).

[17] The difference with Durkheim, of course, is that Durkheim claimed that law functions as an agent of solidarity. However, how it achieves this depends on the structure of social relations more broadly. Duguit instead argues for evolution. For a comparison of Durkheim and Duguit, see See R Cotterrell, *Emile Durkheim. Law in a moral domain* (Edinburgh University Press, 1999), 39.

[18] L. Duguit, *Les transformations du droit public* (Paris, Armand Colin, 1913).

[19] See O. von Gierke, *Die soziale Aufgabe des Privatrechts* (Berlin, Springer, 1889).

to the more recent transformations taking place in our current European society, 100 years after that move was first described. Before focusing squarely on contemporary European private law, in homage to Duguit's method, we will retrace twentieth-century law as our yardstick – like Duguit, looking back to look forward.

II. The Birth of the Social: Private Law and *La Fonction Sociale*

Léon Duguit was a professor in Public law at the University of Bordeaux in the same period in which Émile Durkheim lectured on social sciences at the same university and laid the foundations of sociology as an autonomous science. Leaving aside some differences between their approaches,[20] it is perhaps unsurprising that the two professors shared some common beliefs concerning the relationship between law and society. More precisely, Durkheim in social science and Duguit in legal science contested the universality of the law – and in particular of the *Code Civil* – rather suggesting that the law depended on society and evolved with it. Most importantly, Durkheim and Duguit share a common supposition that social facts such as the law must be explained in terms of their contribution to social integration. This requires setting aside *a priori* natural law concepts. A second shared supposition is that the more complex the society, the more *private* law is the means through which social solidarity is achieved. By examining the transformation of private law as *datum*, then, a window is opened onto the contemporary form social solidarity or interdependence takes.

The way concepts such as property, contract, tort, state and so on have evolved in legal practice then enables the social scientist to draw broader conclusions about societal integration. In *bel époque* France, where the universal ideals of Enlightenment and an authoritative view of sovereignty had already been merged within the framework of the *Code civil*, the legal repercussions of the sociological approach were likely to be received with suspicion or even hostility among traditional lawyers. Unperturbed, Duguit in *Transformations du droit privé*, declared that the *Déclaration des droits de l'homme et du citoyen* of 1789 and the *Code Napoléon* the main principles on which those texts were based, national sovereignty and the natural right of the individual, were in fact 'already dead'.[21] Duguit arrived at his conclusion by examining social facts, namely the evolution of case-law and legislation from the *Code* onwards.

Thus, in his sixth lecture on propriety he documented a long list of limitations to the right of property, otherwise traditionally construed as 'absolute', which were continuously posed by the state whenever a public interest in intervening on private ownership emerged.[22] One of

[20] See R. Cotterrell (n 16) 39.

[21] L. Duguit, *Law in the Modern State* (New York, B.W. Huebsch, 1919) XLI.

[22] M.C. Mirow, ‚The Social-Obligation Norm of Property: Duguit, Hayem, and Others' (2010) 22 *Florida Journal of International Law* 191-226 suggests that much of Duguit's approach and analysis of the idea of

his main examples is *la loi du 28 juillet 1885*, and also *la loi du 15 juin 1905*. These laws allowed the state to install telephone technical infrastructure on private land without indemnity unless damage is caused. Such laws reflect how the formerly absolute right to property is increasingly qualified by the need to reconcile individual and group interests in society. Critical infrastructure in the social interest cannot be compromised by antiquated notions of property as exclusive right. The idea of a 'social function' of propriety would later on become a common theme in legal scholarship particularly in the aftermath of World War II, up to the point that the term was recognised even in constitutional charters, as notably the Italian Constitution of 1946-48, as well as, following a particular development which will be discussed in the next pages, in the European Union.

While the idea of 'social function' has been most discussed with regard to property, the same principle also applies to other areas of private law, including contract and torts. With regard to contracts, and more broadly *l'acte juridique*, the autonomy of the individual is recognized and safeguarded by the law only insofar as the 'goal' pursued by the individual is deemed worthy of protection by the legal system. It is not even sufficient that the goal is lawful, what is now required is that the pursued goal is one of '*solidarité sociale*', a goal having '*une valeur sociale*'.[23] Duguit's analysis goes further, in fact, by focusing on the empirical reality of the market of that time, in which technology and automatization were creating new forms of contracting. Thus, he describes phenomena like the 'contracts of adhesion' and 'collective contracts' with the latter manifest both in 'concession de service public' and 'collective labour contract'.[24] In those cases, Duguit claims that it is hard to apply the traditional category of 'contract' as based on private autonomy without subterfuge. Instead, Duguit refers to these contract forms as '*convention-loi*', a hybrid between agreement and legislation. Similar developments had already troubled Durkheim, who noted that '*tout n'est pas contractuel dans le contrat*',[25] mentioning immediately afterwards – this time in possibly more conservative terms – that the only arrangements to be called contracts are those which have been freely agreed upon by the parties. A few years later, the private law scholar Emmanuel Lévy[26] would go one step further by noticing that in fact '*tous les contrats ont quelque chose de collectif*'.[27]

It is describing these new forms of 'contracts' (*les faits*), as termed by traditional scholarship, that Duguit was able to draw a parallel between the evolution of the State and of private law: '*de même que disparaît l'autonomie de l'individu, de même disparaît la souveraineté de*

property's social function was based on the approach developed by Henri Hayem in his 1910 doctoral thesis at the University of Dijon, *Essai sur le droit de propriété et ses limites* (Paris, Rousseau, 1910).

[23] L. Duguit, (n 5), 96.

[24] ibid, 127.

[25] É. Durkheim, *De la division du travail social. Étude sur l'organisation des sociétés supérieures* (Paris, Félix Alcan, 1893) 230.

[26] On Lévy's sociology of law, see C. Didry, 'Emmanuel Lévy et le contrat, la sociologie dans le droit des obligations' (2004) 56-57(1) *Droit et société* 151-164.

[27] E. Lévy, *La vision socialiste du droit* (Paris, Marcel Giard, 1926) 99.

l'État'.[28] The concession of public service contract illuminates the that the very role of the State was changing. By examining legal practice, as opposed to scholarly exegesis on the subjective right, it became clear that the state had transformed from the night watchman of the nineteenth century. The old-school liberalism with its abstract notion of *imperium* appeared inaccurate. Newer regulatory objectives demanded a more interventionist state, which was better described in functional than sovereigntist terms.[29] New elements such as most notably technological advancements and new social expectations created by them ('[t]he time is not far distant when every house will demand electric light', [30] says Duguit), create a new need for the State to be actively involved in the provision of those services. In this respect, the main ideas of Duguit are expressed in his writings dealing more specifically with the transformations of *public* law, later translated in English by Frida and Harold Laski.[31]

The radical idea of Duguit is that a conceptualization of the State should do away with the notion of sovereignty. That concept appeared misplaced for a plurality of social and legal reasons. On the one hand, the pretense of making sovereignty reside in the nation appeared doubtful looking at the geopolitical reality; on the other hand, sovereignty is based on a notion of *imperium*, which does not appear to reflect the way in which the State concretely operated in society. In fact, the State will have, as it was beginning to do from the end of the nineteenth century and more obviously at the start of the twentieth, to provide individuals basic services like postal services, public light, transport, instruction. In this context, the State mostly has to 'organise' society rather than simply 'defending' it: 'the ruling class to-day must not only abstain from certain things, but must perform other things'.[32] To do that, the State might also require new forms of interaction with contracts. The idea of 'public service' should thus be the new basis of modern public law.[33]

If the transformation of contract and property is linked very closely to the changing role or function of state, tort law takes on a greatly enhanced position *vis-à-vis* these more established bodies of law. It will be recalled that while the *Code Civil* devotes 853 articles directly to property and contract, tort law (delict) is given short treatment in four articles:[34] articles 1382-86. The core idea of classical tort law is that it is only those harms caused by

---

[28] L. Duguit, (n 5), 136. 'At the same time that individual autonomy disappears, so too does state sovereignty'

[29] Elsewhere Duguit rails against the metaphysics of state sovereignty, which for Duguit personifies the state and obscures the social fact that state power is a relationship of domination in which sovereigntist rhetoric obfuscates the relationship of submission to superior force, see L Duguit (n 11), 9-10. 'Qu'on appelle Etat un groupement humain, fixé sur un territoire déterminé, ou les plus forts imposent leur volonté aux plus faibles, nous les voulons bien. Qu'on appelle souveraineté politique ce pouvoir des plus forts sur les plus faibles : nous y donnons les mains. Aller au-delà, c'est entrer dans l'hypothèse.' He continues, the state is 'une affirmation métaphysique, point de réalité.' (26)

[30] L. Duguit, (n 20), 47.

[31] Ibid.

[32] Ibid., 29

[33] Ibid., 44

[34] Directly, because other articles deal with intangible property.

another's subjective fault that give rise to non-contractual liability.[35] This is set out succinctly in Article 1382: '*Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer*'.[36] As Duguit argues, this concept of delict is consistent with the general commitments in the *Code Civil*: it is concerned with subjective fault or, in other words, the acting individual in the world who, deliberately or through his imprudence, harms another individual. Unless the harms that befall an individual can be imputed to the acts of another, then the loss lies where it falls as a consequence of *fortuna* or a lack of self-help.[37] However, tort law is not immune from the transformation of state and society. What social function, then, does tort law fulfil? For Duguit, the key conceptual move is from individual, subjective '*imputabilité*' to managing objective, social '*risque*'. [38] Classical, interpersonal law has not entirely disappeared, to be sure, but it has been supplemented by principles that aim to allocate the costs of accidents between individuals and groups.[39]

The most telling manifestation of this shift is from individual fault to strict liability for incidental accidents of industrialization.[40] Duguit takes the *loi du 9 avril 1898* (workplace accidents) as illustrating a deeper point. This law, very similar to those implemented throughout the industrialised West, effectively indemnified workers for workplace accidents by obliging employers to compensate them without proof of fault. The deeper point is that the drift of modern law is towards making those who introduce a risk liable for the accidents that are caused when these risks materialize in harm.[41] While society as a whole benefits from group activity, the members of these groups benefit more directly from their activities: '*Si celui-ci en a le bénéfice immédiate, il est juste qu'il supporte le risque que fait courir aux individus et aux autres groupes la mise en œuvre de cette activité*.'[42] Today, we refer to this as strict enterprise liability. Duguit's primary focus was on the idea that the groups that cause accidents are also those that benefit from these activities and his concept is of social justice

[35] Subjective here means as a result of personal acts; it does not imply that the standard of care is based on the tortfeasor's state of mind.

[36] Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it.

[37] See, F. Ewald, *L'Etat Providence* (Paris, Grasset, 1986).

[38] L. Duguit, (n 5) 139.

[39] Very perceptive on this point: Albert A. Ehrenzweig, 'Negligence without Fault' (1966) 54 *California Law Review* 1422, focusing on transformations within tort law, as distinct from supplemental legislation.

[40] This transformation rests on viewing accidents as incidental, and statistically regular occurrences that can be controlled, rather than the unfortunate hand of providence. Duguit's sociological predecessor is Comte; in statistics, Quetelet – see F Ewald (n 35), and (S Utz trans) 'The Return of Descartes Malicious Daemon: An Outline of the Philosophy of Precaution' in T Baker & J Simon (eds*) Embracing Risk: The Changing Culture of Insurance and Responsibility* (Chicago, Univerisity of Chicago Press, 2002) 273.

[41] The doctrine of vicarious liability, or in French law *faute d'autrui*, is another clear example of this trend. For a comparative analysis, see P Giliker Vicarious Liability in Tort: A Comparative Perspective (Cambridge, CUP, 2010).

[42] L. Duguit, (n 5) 140. 'It is just that those who benefit directly from group [activity] should shoulder the risk that may harm other individuals and groups.'

for risk creation by groups. Consistent with his critique of *imperium*, the state in this view is also a group and liability should be placed at its door as much as that of enterprises. Neither 'metaphysical' concepts of *dominium* or *imperium* should obscure the fact that group activities generate social risks, which following his idea of interdependence should be assumed by the risk creator.[43]

His group-based theory is cogent if one focuses on the defendants of a tort action as placeholders for manufacturers, employers, the state, all of which now have social *duties* to fulfil. Duguit's contribution is remarkably prescient because, together with contemporaries such as Saleilles and Josserand, he notes that tort law in the 20th century became a form of social or regulatory law.[44] While it is true that enterprise strict liability never fully or unambiguously displaced individual fault, it created a second track of 'organizational liability'. Duguit's blindspot, as we noted, is that if tort law is about dividing managing risks, between those groups who create risk and those who suffer their consequences, he underestimates that responsibility for causation (social justice) is not necessarily the only or, indeed, most effective way to divide risk. In other words, the 'socialisation du droit' does not flow only towards strict liability.[45] This 'blindspot' a consequence of his method, which attempts to explain all law as attempts to achieve social integration. His second prescient observation is that state sovereignty is *a priori* and metaphysical concept and it should not exclude the development of tort law principles where its activities result in harm to individuals. These observations helped concretise a distinct state liability law in France and beyond. Once again, like his researches on property and contract, Duguit envisions an emerging organizational form of liability founded on social solidarity, which does not distinguish between state or private actors. All are submitted to the need of rules for social interdependence.

Thus, by tracing changes to property, contract and tort (*les faits*) Duguit is able to note the changing role and function of state and society. Both the emergence of public services as the new goal of the State and the social function in the area of private law are both manifestation of the same basic truth: law is a manifestation of social solidarity and it is based on social interdependence[46] rather than individualism. For that reason, the system encapsulated in the *Code Civil*, regardless of its persistent black-letter rules, is no longer a reflection of the reality of the law, as it stands, or its underlying ethic of social justice.

[43] Ibid., 139.

[44] D. Green, 'Tort Law Public Law in Disguise' (1960) 38(1) *Texas Law Review* 251

[45] L. Duguit, (n 5) 139.

[46] Ibid., 26

III. The turn of the twenty-first century: Law and Society Above and Beyond the State

The twentieth century belonged to the social, but does the twenty-first? Duncan Kennedy suggests that, after the second globalisation of legal thought consisting in the success of 'the social', the law has more recently steered away from that phase, introducing a new era, or a third globalization of legal thought, whose contours appear less clearly defined as the one of the preceding phases.[47] If that is true and the 'social' is disappearing - most manifest in the alleged crisis of the welfare state, which represented the clearest recognition of the rationality of the social -[48] is the analysis of Duguit still of any use to conceptualize a very different historical period characterized by a redefinition of legal thought and the eclipse of the State by functional transnational networks? How much of the ideas of interdependence and social function still play a role in particular in the current European law scenario?

One should start from the fundamental contribution of Duguit regarding the recognition of the link between private law and the State – as the law depends on society and the State represents the organized form of society. If Duguit noted that 'we have witnessed in the last half of the nineteenth century an immense economic change',[49] equally important changes took place in the twentieth, of again a technological, economic and in consequence societal nature. This has led to the emergence of newer goals which are pursued by public institutions. On closer inspection, this trend does not contradict Duguit's intuition. The French professor recognized that it was impossible to ultimately create a list of legitimate ends for the State to pursue: that would depend on the political and social needs of a particular moment, so that it would be perfectly acceptable that overtime a new society would develop newer ends. Claiming the contrary would negate the whole idea of legal transformation and absolutize certain public law principles, running against the whole starting point of the social dependence of the law. And, indeed, running against Duguit's scientific method. Private law in that view will always be open to the pursuit of further public policy objectives, as its internal rationality, now just like at Duguit's time, cannot be described as entirely self-contained and fully autonomous.

To be sure, the debate between autonomists and instrumentalists is still very much alive, and while it is generally conceded that private autonomy does not exist in a vacuum, some public policy objectives might be deemed to be legitimate as functionalizations of private autonomy

[47] D. Kennedy, 'Three Globalizations of Law and Legal Thought: 1850–2000' in D.M. Trubek (ed), *The New Law and Economic Development. A Critical Appraisal* (Cambridge University Press, 2006) 19-73.

[48] M. Camdessus, 'Worldwide Crisis in the Welfare State: What next in the context of Globalization?' Address by the Managing Director of the International Monetary Fund at a seminar organized by Observatoire Chrétien des Réalités Economiques Paris, France, October 15, 1998.

[49] L. Duguit, (n 20) XLII.

while others might not.[50] Without delving into those debates, it can only be mentioned in this place that as new state policies develop, these interventions might be coloured by various ideological considerations, depending on the direction in which the State will want to steer individual behavior. Thus, the use of terms like 'the social', 'socialisation', or even 'socialism' should not mislead us, as Duguit himself had warned us: the State might pursue objectives which are not 'socialist' at all in political terms but still based on the idea that one should pursue a 'social function'. A clear example of this possibility appeared few years after Duguit: fascism admitted the functionalization of individual conduct up to the suppression of freedom for overarching public reasons. In light of this, the preoccupation of Duguit of highlighting that 'socialism' did not refer to the political notion becomes particularly relevant, as the social does not coincide with the welfarist.

The second aspect in which the thought of Duguit is both actual and outdated resides in the role of the State in the economy. Describing the current tendencies of his time, Duguit predicted a growing involvement of the State in the regulation of private affairs. In his view, the state would become more and more involved in the provision of public services. In that regard, more recent trends showed that in fact the state has, up to a certain extent, withdrawn from the direct provision of those services. In the third wave described by Kennedy, the State has started relying more strongly on the market itself as the means through which social goals may be achieved. Services such as transport, education, energy, to name just a few, have in more recent years been outsourced to the market by privatization and liberalization. This has happened against the background of rising new economic ideals highlighting the importance of free markets as well as processes of transnationalisation of the economy, which seem to suggest an overall shift from 'government' to 'governance'.[51] Various attempts have been made in the literature to reconceptualize the role of private law in this changed 'after-Welfare State' context, in which the fading of the State let the question arise as to who should in practice functionalize private law.[52] Even if this development would appear to prove Duguit's prediction wrong, on a closer look this does not appear to be the case.

In the first place, the current trends of transnationalisation and globalization confirm the loss of centrality of the notion of sovereignty as intended to be a prerogative of the nation and thus of the revolutionary nation-State. The current global scenario proves the increasing problems with a conception of statehood which makes the law coincide with the imposition of a State embodying a sovereign nation. Two tendencies appear relevant in that respect: supranationalism, as the development of institutions like the European Union which produce an increasing amount of law and regulation impacting private relations; and transnationalism,

[50] The extent to which private law is closed in its own rationality or can pursue some further objectives is still debated, see the 'middle ground position' advocated by H. Dagan, 'The Limited Autonomy of Private Law' and the comment to it by G. Teubner, 'State Policies in Private Law? A Comment on Hanoch Dagan', both in (2008) 56(3) *The American Journal of Comparative Law* 809-834 and 835-844.

[51] J.N. Rosenau and E.-O. Czempiel (eds), *Governance Without Government: Order and Change in World Politics* (Cambridge University Press, 1992).

[52] See P. Zumbansen, 'Law After the Welfare State: Formalism, Functionalism and the Ironic Turn of Reflexive Law' (2008) 56 *American Journal of Comparative Law* 769-808.

as the norms produced by non-State actors beyond traditional systems of national law making. Both developments pose a threat to an exclusively national conception of sovereignty as the one referred to by classical conceptions of public law, which indeed reveal to be ill-placed to make sense of the rules produced in those venues, sometimes hardly definable as 'law' despite their occasionally considerable prescriptive significance. While this breaks the link between State and private law, it does not so with the more fundamental one between law and society, even if poses a challenge to it.

Alternative conceptualizations have been proposed, overcoming the public/private distinction and suggesting 'polycontexturality' as the relevant approach.[53] At all events, this does not contradict the transformation described one century ago, as the starting point of those analyses was in fact not the State *per se* but rather society. For Durkheim, in fact, the political society is 'the complex group of which the state is the highest organ',[54] which does not mean that the State is the only form of social organization capable of exerting power or possibly functionalizing individual behaviors.[55] It is furthermore worth noting that these developments have not led to the extinction or an obsolescence of the concept of the State. Rather than disappearing, economists and political scientists alike rather point out to a redefinition of its role. In that sense, Stiglitz has spoken of how globalization impacted on the economic role of the State,[56] while a new strain of research has emphasized the importance of State support in the development of even the most innovative technological industries.[57] In short, neither the state nor private law have disappeared; they have instead transformed.

In the second place, those developments had impacted directly on the 'social function' of private law. The retreat of the state from the provision of public services has coincided with an increase of the supervision and regulation of the private actors who provide those services in the market – regardless of their organization in the form of a nation-State or not. The societal expectation in the provision of services has not disappeared and might have on the contrary rather augmented, but those demands might have to be satisfied by non-state actors. The development went much beyond what Duguit introduced: in his view, the main functionalization took place in the realm of property law, while the most relevant developments in the area of contract consisted with contracts of adhesion and collective contract. We now clearly witness a functionalization of private autonomy as well, while analogous developments take place in tort law. A few examples drawn from the European supranational experience will clarify this point.

---

[53] G. Teubner, 'After Privatisation? The Many Autonomies of Private Law' (1998) 51 *Current Legal Problems* 393.

[54] E. Durkheim, *Professional Ethics and Civic Morals* (London, Routledge, 1957) 48.

[55] R. Cotterrell, (n 16) 154.

[56] J. Stiglitz, 'Globalization and the economic role of the state' (2003) 12 *Industrial and Corporate Change* 3-26.

[57] M. Mazzucato, *The Enterpreneurial State. Debunking Public vs. Private Sector Myths* (Anthem Press, 2013).

IV. Functionalisation of contract law

Private law has historically been employed as a nation-building and a market-building tool. The unification of law through the recognition of some basic principles allowed for the construction of nationally unified markets and later industrialization, while it also served the symbolic need of unity necessary to the creation of the State.[58] Relatively more recently, attempts have been made to create private law codes at a supranational level.[59] While the Euronationalist attempt to propose the symbolic value of private law unification at the European level has revealed to be an unfortunate attempt which has produced more resistance and hostility than acceptance, the function of market-building has been definitely more successful. The recognition of the four fundamental freedoms at the level of the Treaties had the immediate effect of extending party autonomy across European national borders, allowing private individuals and companies to more easily engage in contractual relations with other subjects in other European countries.[60] As this result was initially reached through the market freedoms, later on the process of creeping constitutionalisation of EU law created new umbrella principles allegedly encompassing freedom of contract. Art 16 of the Charter of Fundamental Rights of the EU in particular acknowledges a 'freedom to conduct a business' which was soon tested by scholarship and the CJEU as the possible constitutional anchorage for the protection of freedom of contract. This was made explicitly clear in 2013 in the case of *Sky Österreich* case when the CJEU stated that the freedom 'covers the freedom to exercise an economic or commercial activity, the freedom of contract and free competition'.[61] All this would point in the direction of an increased reliance on freedom of contract and thus a return to the autonomy of the will of the individuals, back to a liberal individualistic conception of freedom of contract removed from the 'social' discourses of the 1900s. That is undoubtedly an aspect of the process of constitutionalisation of private autonomy, which has already led to criticism in the literature with specific regard to its repercussions in the area of labour law and must not be underestimated.[62]

At the same time, nonetheless, the process of constitutionalisation leads to further consequences. The first aspect, obviously, is the need to balance constitutional rights, so that

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

[59] Communication from the Commission to the European Parliament and the Council, A more coherent European Contract Law. An action plan COM(2003) 68 final.

[60] P.-C. Müller-Graff, 'Basic Freedoms – Extending Party Autonomy across Borders' in S. Grundmann, W. Kerber, S. Weatherill (eds), *Party Autonomy and the role of Information in the Internal Market* (Berlin, Walter de Gruyter, 2001) 133- 150.

[61] *Sky Österreich GmbH v. Österreichischer Rundfunk*, Case C-283/11, para. 42

[62] G. Davies, 'Freedom of Contract and the Horizontal Effect of Free Movement Law', in D. Leczykiewicz and S. Weatherill (eds) *The Involvement of EU Law in Private Law Relationships* (Oxford, Hart Publishing, 2012) 53-69.

freedom of contract will have to be interpreted also in light of other principles, possibly of a welfarist nature such as most notably the case of the right of housing.[63] More fundamentally, that balancing exercise is the demonstration that the constitutionalisation means that freedom of contract will also have to be construed in light of the other goals pursued in the EU. This aspect becomes clear looking at the evolution of the concept in the case law of the CJEU. If *Sky Österreich* expressed the principle in the clearest terms in 2013, in fact the constitutionalisation, or rather marketization, of autonomy, goes back to an older time. The case of *Nold* in 1974 is revealing. The case originated from the complaint of a German coal dealer that a decision of the European institutions restricting its economic freedom was infringing on freedoms safeguarded by the German Constitution, including personal freedom (Art 2) and right to private property (Art. 14).

Leaving partially aside the important constitutional dimension of the dispute and focusing on its private law aspect, the complaint was thus apparently based on an individualist notion of the protection of freedom of contract according to which this should embed the power of an individual to do whatever it pleases. A form of 'negative' freedom to put it in Berlin's famous terms.[64] And yet, the European Court of Justice rejected that interpretation, on the contrary pushing towards a 'positive' notion of freedom of contract which recognizes its functionality to overall social ends and values. The Court stated that 'if rights of ownership are protected by the constitutional laws of all the Member States and if similar guarantees are given in respect of their right freely to choose and practice their trade or profession, the rights thereby guaranteed, far from constituting unfettered prerogatives, must be viewed in the light of the social function of the property and activities protected thereunder'.[65] Thus, already from the 1970s, as economic freedoms are recognized they are also subjected to the limitations imposed, again, by the 'social function' of property. The social function is nonetheless less rooted in notions of social justice and more in a market-building project.

The same reasoning, now covered by references to the freedom to conduct a business, has been employed to advance a variety of relevant aims of the EU. These have ranged from more traditionally 'welfarist' goals such as the protection of the worker,[66] to more recent attempts to regulate the developing information society.[67] In all these instances, the Court of Justice has not taken an *a priori* stance either in support or against freedom of contract but

[63] *Mohamed Aziz v. Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, Case C-145/11; Kušionová v SMART Capital a.s., Case C-34/13.

[64] I. Berlin, 'Two Concepts of Liberty', in I. Berlin, *Four Essays on Liberty* (Oxford University Press, 1969) 118-172.

[65] *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, Case C-4/73, para. 4

[66] *Kingdom of Spain and Republic of Finland v. European Parliament and Council of the European Union*, Joined cases C-184/02 and C-223/02.

[67] *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, 2008 I-00271, Case C-275/06; *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, Case C-70/10; *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV*, Case C-360/10

has rather expanded or restricted it considering its particular social function. In fact, the Court has constantly referred to its new classic formula: 'freedoms are not absolute rights, however, but must be considered in relation to their social function. Consequently, restrictions may be imposed on their exercise provided that the restrictions correspond to objectives of general interest and do not constitute in relation to the aim pursued a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed'.[68] It is in light of these considerations that it has been suggested in legal scholarship that private autonomy in the EU while it is on the one hand recognized it is on the other hand necessarily 'framed'[69] or paradoxically 'regulated'.[70]

The notion of social function of property thus lies at the core of the later development of the European case law functionalizing even private autonomy. It would nonetheless be incorrect to infer the whole evolution of a concept from just the case-law. Quite to the contrary, Duguit showed that the main functionalization was coming from an increase of special statutes outside the code, and at the present day the most evident instrumentalization of private autonomy is operated again by regulation – often including also the activities of independent regulatory agencies – to which the approach of the CJEU has offered legal justification through the above-mentioned decisions. Again, the areas which have been interested by phenomena of liberalization and (only seeming) deregulation offer the clearest examples of that trend. The various directives issued by the EU in the area of private law also present the same aspect when it comes to the autonomy of the individuals: they are in the first place expanding it to the extent that they are meant to build an internal market, but they often do that posing series of conditions to the way in which that freedom has to be exercised.

Instruments through which private behavior can be 'steered' include the imposition of information duties – one of the favourite approaches in large part of EU consumer law – a system of incentives and disincentives, as well as various rules of conduct with more or less bite. Fields which present highest risks coupled with higher social and economic relevance, such as notably in the case of the financial sector, present that aspect particularly clearly. Certainly, there is not only one strategy through which that objective is achieved. Therefore, in the case of consumer credit and mortgage law, we have witnessed a progressive shift from an approach based on the information paradigm to forms of regulation without clearly defined sanctions for non-compliance to, more recently, more defined sanctions. Similarly, the approach of the Markets in Financial Instruments Directive (MiFID, now MiFID II, and Markets in Financial Instruments Regulation or 'MiFIR') meant to impose 'know-your-customer' and 'know-your-product' obligations create a new level of control on the activities that can be performed by private individuals when these involve a considerable level of (systemic) risk.

---

[68] *Spain and Finland v. European Parliament and Council*, C-184/02 and C-223/02, para. 52.

[69] N. Reich, *General Principles of EU Civil Law* (Cambridge; Intersentia, 2014).

[70] G. Comparato and H.-W. Micklitz, 'Regulated Autonomy between Market Freedoms and Fundamental Rights in the Case Law of the CJEU', in U. Bernitz, X. Groussot, F. Schulyok (eds) *General Principles of EU Law and European Private Law* (Alphen aan den Rijn, Kluwer Law International, 2013) 121-53.

The question here is not whether those approaches should be welcomed or not, or if they are sufficiently effective; what is more relevant to point out is that regulation (effective or not, controversial or not) is more incisively affecting private autonomy further confusing the already blurred line between public and private law.

VI. Functionalisation of Tort law

In EU Liability Law, what Duguit refers to as the '*conception traditionnelle*' is inapt. This traditional conception of private law (the individual) as *dominium*, and public law (the state) of *imperium* in public law[71] is gradually being displaced by a law of societal responsibility for third-party harms. This is distinct from 'the social', which was concerned with group-(social) justice in tort law. Instead, the European Union (particularly the Court of Justice of the European Union) is constructing a liability regime - in bits and pieces – that attempts to make society itself responsible for societal risks.[72] This is achieved by expanding the addressees of liability in EU law. Private actors are given public or societal responsibilities (market making and regulation) while public actors are treated as if private actors (no sovereignty, liability without fault). These changes are most obvious in the case-law surrounding the New Approach to Technical Standards, but functionalization of roles (market building and regulation) is a wider phenomenon.

The two-tracks of liability traditionally have been the Product Liability Directive (85/374/EEC) and state liability.[73] The Product Liability Directive is a break-even point, which is on the precipice between the social and the post-social thinking of the internal market project. Duguit would surely have recognized the underlying philosophy of this recital: 'liability without fault on the part of the producer is the sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production.' However, the justification for harmonising liability – the building of an internal market – would have been anathema to him because it is no longer rooted in social justice, but instead instrumentalises the individual to build markets. When these two concerns conflicted, it was the market that won out in cases such as *Commission v France*,[74] *Gonsales Sanchez*[75] and *Skov*.[76] On the other side, state

[71] L. Duguit, (n 5) 120.

[72] Risks that do not simply materialise in the harm to concrete individual, but which following Beck, have society-wide consequences if they eventuate in harm. See U. Beck, *Risikogesellschaft. Auf dem Weg in eine andere Moderne* (Frankfurt am Main, Suhrkamp Verlag, 1986).

[73] Council Directive 85/374/EEC, of 25 July 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, 1985 O.J. (L 210) 29, 30 (Product Liability Directive).

[74] C-52/00, *Commission v France* [2002] ECR I-0000.

[75] Case C-183/00, *Gonzalez Sanchez v Medicinia Asturiana SA* [2002] ECR I-3901.

[76] Case C-402/03, *Skov Æg v Bilka Lavprisvarehus A/S and Bilka Lavprisvarehus A/S v Jette Mikkelsen and Michael Due Nielsen* [2006] ECR I-00199. .

liability is a residual remedy that is activated almost exclusively in cases where the state fails to implement EU law, but it has been enlarged in recent years into misapplication of EU law cases.

The interesting theme in state liability cases is that the state is not recognized as sovereign – instead, it is treated like an administrative agency which exercises discretion according to a test of sufficiently serious breach of EU law. These two branches of law are coalescing now in regulated markets for goods where state liability and private liability commingle – and are *supplemented* by a third and fourth route to liability, namely the responsibility of private actors for public functions and the possibility of individual responsibility in EU law.[77] The idea that rights have a social function remains; however, how social solidarity is achieved appears to require addressees of liability to fulfil, simultaneously, several functions – building a market and regulating the risks attendant to the market. In what follows, we will examine the slow emergence of what we refer to as the third route to liability, namely the liability of private actors for failure to fulfil (traditionally) public functions.[78]

The New Approach to Technical Standards is an important testing ground for these claims. The New Approach at a most basic level provides market access in the absence of legislation on product standards. Instead, following the logic of *Cassis de Dijon*, mutual recognition of standards takes its place, which allows for proportionate measures in the name of health and safety.[79] The formulation of standards is largely assigned to private standardization bodies, and compliance and monitoring is assigned to mostly private notification bodies in accordance with a notification procedure.[80] The relevant producer may then select a notification body from a list, which certifies product compliance at the pre-market stage and has some post-market compliance duties. The producer, in essence, contracts for compliance and monitoring with the notification body. Post-market, state regulatory bodies, also have duties to ensure compliance with standards.[81] The notification bodies are, in theory, supervised also by the public authority. The New Approach clearly solves a problem of decisional supranationalism by co-opting private actors into a regulatory framework that mixes private regulation and public supervision, bypassing the need for EU-level legislation,

[77] C-470/03, *A.G.M.-COS.MET Srl v. Suomen valtio, Tarmo Lehtinen* [2007], ECR I-2749, see para. 98 'Union law does not preclude an individual other than a Member State from being held liable, in addition to the Member State itself, for damage caused to individuals by measures which the individual has taken in breach of Union law.'

[78] This theme is not only present in New Approach case-law, but underpins cases such as *Viking* and *Laval*, as Azoulai noted several years ago: L. Azoulai, 'The Court of Justice and the social market economy: The emergence of an ideal and the conditions for its realization' (2008) 45(5) *Common Market Law Review* 1335–1355.

[79] H. Schepel *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets* (Oxford; Hart Publishing, 2005) ch. 2.

[80] For a more detailed, and nuanced, account see M.P. Egan, *Constructing a European Market: Standards, Regulation and Governance* (Oxford, OUP, 2001) ch. 6.

[81] Public bodies may withdraw a product, but only in accordance with a strict procedure that requires notification of the EU Commission.

which would be cumbersome and inefficient. But who's liable if the system breaks down? Can Duguit help us?

One of Duguit's methods was to look to case-law to develop theory. In his methodology, this is *a posteriori* as distinct from *a priori*. When we examine the case-law we find an emerging law on the liability of secondary tortfeasors emerging 'in bits and pieces'. The most recent, relevant case is *Schmitt*.[82] In that case, the relevant question obtained to the liability of a notification body under the (old) Medical Devices Directive (Directive 93/42/EEC).[83] That Directive sets out several pre- and post-market surveillance requirements.[84] It will be recalled that PIP (Poly Implant Prothèse) went bankrupt after it emerged that their managing director had been fraudulently filling silicone implants with low-grade silicone leading to accusations that it harmed women. The company, PIP because insolvent, could not be pursued in national law or per the Product Liability Directive (organizational liability), so the claimants brought class action claims in a number of jurisdictions including France and Germany against *TÜV*, the notification body (secondary tortfeasor).

The relevant legal questions were whether, first, the Medical Devices Directive contemplates the liability of notification bodies and, secondly, whether this gives rise to individual causes of action or 'subjective' rights based on the Directive. The CJEU held that Directive 93/42/EEC did contemplate liability pursuant to the consumer protection dimension of the Directive. The Court noted that there was a general obligation to discharge surveillance powers with due care and diligence or else the obligations under the directive would be 'dead letter'.[85] However, following *Paul*,[86] it did not give rise to a subjective right based on EU law.[87] The Court, further, seems to equate recovery against the notification body and recovery against the state.[88] Thus, from the point of view of consumer protection, a rather unsatisfactory picture emerges: the CJEU held that while notification bodies and the state may be addressees of liability, based on an interpretation of the Directive, EU law creates an

[82] Case C-219/15, *Elisabeth Schmitt v TÜV Rheinland LGA Products GmbH* (2017), ECLI:EU:C:2017:128.

[83] Recently replaced by Regulation 2017/745.

[84] Annex II, sections 3.3, 5.3 & 5.4.

[85] See paras. 44-46.

[86] Case C-222/02, *Peter Paul and Others v Bundesrepublik Deutschland* [2002] ECR I-9425.

[87] A number of scholars have noted, rightly I submit, that applying the *Schutznorm* reasoning in *Paul* outside of financial services is inappropriate: M Tison 'Do not Attack the Watchdog! Banking Supervisor's Liability after Peter Paul' Financial Law Institute Working Paper Series 2005 02.26; N Reich, "Product Liability and Beyond: An Exercise in 'Gap-Filling'" (2016) 24 *European Review of Private Law* 619, 635.

[88] This is more transparent in AG Sharpton's opinion, para. 33 in discussing the limits of liability noting that the Product Liability Directive is not the only avenue for legal recourse in EU law: 'Plainly, however, that directive does not limit the obligations as to product safety to the manufacturer alone. …[it also] imposes a number of duties on Member States.' She further states that notified bodies must also be within the scope of application of the liability rule.

obligation, but national law must provide the corresponding right or cause of action.[89] Nonetheless, the import of such a judgment should not be underestimated – alongside the organizational liability introduced by the Product Liability Directive is an emerging governance or network liability of secondary tortfeasors which does not distinguish formally between private and public actors. In other words, all parties in the regulatory process – whether formally designated public or private have duties under EU law which, *ex hypothesi*, give rise to liability when they are breached. These may be breached on several legal bases – whether based on product liability law ('producer' liability), *qua* individual (*AGM.COS.MET*), *qua* state or *qua* 'private' certifiers fulfilling regulatory functions. This emerging law is taking small steps, to be sure, but it is important to bear in mind the underlying concept. That is, EU law imposes duties on parties not only to open markets, but to regulate them for risks.

What the CJEU focuses on is their *function* in an overall, transnational governance architecture of *ex ante* and *ex post* regulation. Duguit would surely have recognized this for what it is: yet another step in the erosion of the public-private divide, and, from a tort law perspective, the socialization of risks. Micklitz might argue that this reflects a concept of societal responsibility, as distinct from social justice, where private actors incur liability for failing to fulfil public functions and public actors are submitted to the discipline of private law remedies on an equal footing with private actors.[90] More broadly, it is yet more evidence of the de-centring of the state in society and the challenges it poses in terms of developing liability rules for heterarchical regulatory networks.

VI. The return of sovereignty?

Duguit's analysis is grounded in a critique of the traditional notion of sovereignty. It is the attenuation of that principle which leads to the above-mentioned developments both in public and in private law, as *de même que disparaît l'autonomie de l'individu, de même disparaît la souveraineté de l'État*'.[91] If these tendencies characterise the so-called second globalisation of legal thought, as described by Kennedy, the same trend of attenuation of sovereignty became more explicit in the third phase of that globalisation, characterised this time by a move towards neoliberalism and transnationalism. In that context, state sovereignty is

[89] See, N. Reich 'Rights without Duties? Reflections of the State Liability Law in the Multilevel Governance System of the Community: Is There a Need for a more Coherent Approach in European Private Law' EUI Working Paper Law 2009/10.

[90] H-W. Micklitz *The Politics of Justice in European Private Law. Social Justice, Access Justice, Societal Justice* (Cambridge; CUP, 2018).

[91] L. Duguit, (n 5) 136.

confronted with new international, supranational, and transnational actors, challenging the state as the sole forum of law-making.

These additional layers of regulatory complexity aggravated the crisis of sovereignty - at least of external sovereignty - which even appeared too compromised with the disasters produced by aggressive forms of nationalism in the twentieth century, so that a 'mutual limitation of sovereignty' appeared as an effective way to ensure peace in Europe.[92] While the global reach of the economic system continues to underline the increased interdependence of countries and private actors at the transnational level, facilitated and intensified by the development of technology, [93] at the theoretical level system theory suggests the irreversibility of increased complexity, becoming the reference point for the conceptualisation of transnational law.

But this state of affairs is currently facing resistance. On the one hand, realist economists and sociologists continue sagaciously emphasising that, even in the transnational context, the State is in fact still the most relevant actor,[94] and that despite the attempts of liberalising the movement of factors of productions - one of the aspects which are suggested as being at the basis of transnationalisation - states in fact still keep a strong and sometimes dramatic control over the circulation of some of those,[95] so that transnational theorists might underestimate how states continue to pursue overt and covert mercantilist policies. On the other hand, international and supranational institutions are contested, as they are continuously challenged by the changing preferences of sovereign states. The EU, with its reliance on a 'pooled sovereignty'[96] and its extensive liberalisation of factors of productions, is in fact also crossed by sovereigntist tendencies, either of a nationalist identitarian or a national democratic inspiration, which question its existence or its current supranational structure, regarded as oppressive either of national identities and therefore as a threat to the 'nation state', or of social conflicts and therefore as a threat to the 'welfare state'.[97] In this intricate political scenario, in which the interconnections of external and internal sovereignty become more

[92] J. Habermas and J. Derrida, 'February 15, or What Binds Europeans Together: A Plea for a Common Foreign Policy, Beginning in the Core of Europe' (2003) 10 *Constellations* 291-297.

[93] On the role of technology, J. Stiglitz, 'Globalization and the economic role of the state' (2003) 12 *Industrial and Corporate Change* 3-26, 3.

[94] R. Gilpin, *Global Political Economy. Understanding the International Economic Order* (Princeton, Princeton University Press, 2001), 15.

[95] A. Borón, *Empire and imperialism. A critical reading of Michael Hardt and Antonio Negri* (London, Zed, 2005) 42.

[96] R.O. Keohane, 'Ironies of Sovereignty: The European Union and the United States' in JHH Weiler, I Begg and J Peterson (ed), *Integration in an Expanding European Union. Reassessing the Fundamentals* (Oxford: Blackwell, 2003) 312. The idea is most recently discussed by B. Fekete, 'The Limits of Sovereignty Pooling: Lessons from Europe', in M. Belov (ed), *Global Constitutionalism and Its Challenges to Westphalian Constitutional Law* (Oxford, Hart, 2018) 133.

[97] A. Somma, *Sovranismi. Stato, popolo e conflitto sociale* (Rome, Derive Approdi, 2018).

visible,[98] is Duguit's view of private law which takes as its starting point a critique of sovereignty still relevant?

Even leaving aside the most evident instances represented by the defeat of the idea of a common European sales law, repercussions for private law are immediate: the question is whether a sovereign state which is pursuing a protectionist policy accept forms of instrumentalisation of private autonomy meant to build an internationally competitive market? Will a domestic court award damages based on the economic considerations of a transnational standardisation body instead of its own criteria of justice possibly rooted in specific social notions of the good? Is national democracy even compatible at all with international economic integration, to the extent that the latter limits the room of manoeuvre of the former?

As Hans Micklitz has pointed out, in any case, there does not appear to be a 'safe way back' to the nineteenth or the twentieth century.[99] Neither does the current sovereigntist tendencies - if there is anything inherently new about the message, considering the uninterrupted relevance of the State in world politics - necessarily point to the imminent reversal of the so-far described transformations of private law. Duguit's critique of sovereignty was not primarily inspired by ideological preferences - even despite the particular historical period in which he wrote - but instead on pragmatic considerations relating to organic solidarity: looking at *la réalité* of his time which had less to do with the position of France in the international context and more with the development of industrialisation and the simple desire of the citizens of having electricity provided in their houses. By those lights, the renewed appeal of nineteenth-century sovereignty cannot coincide with the restatement of nineteenth century law. Society has become too complex – this is Duguit's message – for simple, ideological solutions to societal problems.

There is surely a lesson to be learned for scholars faced with contemporary upheavals brought about by intensified transnationalism in law and economy. For Duguit, and for contemporary scholarship, grounding legal analysis on a pragmatic look at the reality of social facts, with a (post)modern sensitivity to the '*réalité*' that many of those facts are not given but constructed, resounds as a valuable suggestion for resisting the symbolic appeal of renewed, but atavistic, political idealisms. New ways to re-embed the social in a transnational setting are required. In this respect, private law has an important but unrealized role to fulfil.

---

[98] C. Eckes, 'The reflexive relationship between internal and external sovereignty' (2015) 18(1) *Irish Journal of European Law* 33-47.

[99] H.-W. Micklitz, 'The Legal Subject, Social Class and Identity-based Rights' in L. Azoulai *et al* (eds), *Constructing the Person in EU Law. Rights, Roles, Identities* (Oxford, Hart, 2016) 290.