

RESEARCH ARTICLE

# From Multiple Legal Cultures to One Legal Culture? Thinking About Culture, Tradition and Identity in European Private Law Development

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This paper begins by briefly outlining private law's evolution alongside the emergence of the Nation States; it then aims to set out the mutual influence of these concepts on national culture, tradition and identity in order to highlight the significance of the political, economic and legal as well as social and cultural contexts in which the processes of integration and Europeanisation occur. Against this background, the scope for European private law to emerge as a plural, multi-level construct and a dynamic endeavour is recognised. Building on this analysis of the significance of the diversity and commonality of cultures, traditions and identities in national private law development, institutionalised at the Union level in the principle of *unitas in diversitate*, the paper explores the need for a single, common European notion of culture, tradition or identity. This examination is undertaken with reference to an example, namely the evolution of the concept of consumer, from its national foundations to its engagement in Union legislation and CJEU jurisprudence. Drawing conclusions as to the need for such a common, European concept, the paper advances a plea for the recognition of a shift in the perspective of legal development, to one which acknowledges the dynamic evolution of private law within a pluralist, multi-level regulatory construct.

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**Keywords:** European law; Private law; Consumer law; Nation States; Legal culture and identity

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## I. Introduction

The paper firstly outlines the emergence of the Nation State and highlights its existence at the core of private law development. Thereafter, it explores the intertwining roles of the State in law-making processes and law in state-making, making reference to codification as the long-dominant mechanism of private law development. This outline underpins the analysis of the mutual influence of the concepts of State, culture and tradition to contemporary private law development and, in particular, the Europeanisation of private law.

## II. The Circularity of State-Making and the Development of Private Law: Recalling the Significance of Culture, Tradition and Identity

### A. *The Nation State at the Core of Private Law Development*

In respect of private law in particular, it is pertinent to begin with the *ius commune*. This body of law – emerging from the evolution of legal thought of the late 11<sup>th</sup> and early 12<sup>th</sup> centuries, following the rediscovery of the *Corpus Juris Civilis* – continues to influence our thinking about its contemporary development. Bologna, boasting the first university,<sup>1</sup> reigned as the centre of 'transnational' legal education;<sup>2</sup> lawyers from diverse geographic areas came to study there and contributed to knowledge sharing (particularly of legal reasoning skills, in the styles of the Glossators and Commentators), and facilitated its dissemination as they returned

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<sup>1</sup> Merryman, *The Civil Law Tradition* (2nd edn, Stanford University Press 1985) 9.

<sup>2</sup> Peter G Stein, *Roman Law in European History* (CUP 2005) 53–54.

to their native legal orders.<sup>3</sup> The authority attached to this education and the body of law that emerged (of common legal language and style of thought), together with its influence across much of Europe, provided the foundations for the *ius commune's* development.<sup>4</sup> This reading of the historical significance of the *ius commune* continues to generate support for the a new common body of law particularly at the European level<sup>5</sup> and moreover, underpins assertions that 'law beyond the state' is really nothing new but reflects existing phenomena including, *e.g.* the *lex mercatoria*.

The Nation State may be understood as a relatively recent (and arguably, relatively short-lived)<sup>6</sup> phenomenon, having only emerged in the 18<sup>th</sup> and 19<sup>th</sup> centuries; indeed, 'proto-states' (including city and multi-ethnic states) existed prior. The emergence of the state-nation from the city-state followed the demise of the Holy Roman Empire and the practical application of Roman law. Yet, Roman law remained significant, having been 'received' in certain legal orders (predominantly civil) via the *ius commune*, mixing with local laws, including canon and feudal law. As Merryman notes, in some cases this process of reception was 'formal', such that Roman law norms became a binding part of domestic law as a whole, while in others, it was informal and its influence was realised per its 'intellectual superiority', predominantly via education.<sup>7</sup>

Thereafter, nationalistic tendencies led to the creation of territorial borders shaping what was to emerge as the Nation State. This process occurred in different ways in different geographical areas, linked to the degree of unification, nationalism and so forth. Local law already existed within these spaces, and its entrenchment as part of national law within territorial confines, contributed to the Nation State's establishment. The Nation State, a two-fold concept – coinciding, its geopolitical dimension is reflected in the territorially-defined notion of State, and its cultural or ethnic<sup>8</sup> dimension in the notion of nation<sup>9</sup> – came to signify a jurisdiction delineated by national borders within the territory of which the State, by virtue of the notion of sovereignty, has the authority to exercise exclusive control over the engagement and enforcement of power. A circular reasoning exists to explain these processes, particularly for private law, concerning private law's 'state-making' role<sup>10</sup> and state instrumentalism.<sup>11</sup>

This can be further explored with reference to codification. Alongside the emergence of the Nation State, the 19<sup>th</sup> century saw the emergence of the majority of the codification movements across parts of the continent and a wave of successful endeavours in certain European legal orders.<sup>12</sup> The foundations of codification differed and continue to diverge across the national systems. In France, these efforts were founded in the advancement of the Nation State, alongside its body of private law. The 1804 *Code civil* therefore constituted not only an important dimension of Napoleon's state-making process, but also operated to entrench the relationship between the State and private law<sup>13</sup> via the promotion of private activities supported by private law principles (*e.g.* individual freedom and private property). In Germany, even if we consider the Prussian ALR as 'predating' the State, the codification process must be considered as a special case, as its civil code, the *BGB*, was drafted several decades after unification.<sup>14</sup>

<sup>3</sup> Stein (n 2) 53–54; Merryman (n 1) 9.

<sup>4</sup> Merryman (n 1) 9.

<sup>5</sup> Reinhard Zimmerman, 'Savigny's Legacy: Legal History, Comparative Law and the Emergence of a European Legal Science' (1996) 112 LQR 576.

<sup>6</sup> In the EU context, the focus of this paper, the Union regime has been described as a 'post-national constellation' (originally expressed by Jürgen Habermas, *Die postnationale Konstellation und die Zukunft der Demokratie* (Grin Verlag 2003)), existing in a 'post-democratic era', Jürgen Habermas, 'Europe's Post-Democratic Era', *The Guardian*, (London, 10 November 2011) <<http://www.guardian.co.uk/commentisfree/2011/nov/10/jurgen-habermas-europe-post-democratic>> accessed 19 September 2014.

<sup>7</sup> Merryman (n 1) 9.

<sup>8</sup> In reality, these terms should not be mixed; for the purposes of brevity, the distinctions are not explored.

<sup>9</sup> Jayantha Dhanapala, 'Globalization and the Nation State' (University of Colorado at Boulder, Colorado, 7 March 2001) <[http://www.un.org/disarmament/HomePage/HR/docs/2001/2001Apr07\\_Colorado.pdf](http://www.un.org/disarmament/HomePage/HR/docs/2001/2001Apr07_Colorado.pdf)> accessed: 14 April 2012.

<sup>10</sup> See Caruso who refers to 'State-making' (development of post-national institutions) and state-making (re the nation state); Daniela Caruso, 'Private Law and State-Making in the Age of Globalisation' (2006) 39 NYU.J.Int.Law.Pol. 1.

<sup>11</sup> Ralf Michaels and Nils Jansen, 'Private Law Beyond the State? Europeanization, Globalization, Privatization' (2006) 54 AJCL 843; furthermore, states could utilise law to satisfy their goals (the determination of which also shaped private law): Thomas Wilhelmsson, 'Varieties of Welfarism in Contract Law' (2004) 10 ELJ 712.

<sup>12</sup> Of course, the 19th century cannot be said to be the birth moment of codification; indeed, the Prussian ALR was enacted at the end of the 18th century, in 1794 – so the codification movement is older.

<sup>13</sup> James Gordley, 'Myths of the French Civil Code' (1994) 42 AJCL 459.

<sup>14</sup> Christian Joerges, 'The Science of Private Law and the Nation State' in Francis Snyder (ed), *The Europeanisation of Law – The Legal Effects of European Integration* (Hart 2000) 47–82, 47–48.

Delving deeper into private law development, the emergence of the unified Nation State and the entrenchment of national law brought to the fore the significance of coherence and systemisation in law, one amongst many of the objectives of codification (and also, of the common law). Just as the foundations of codification diverged across the States, so too did the bases of coherence. Indeed, the significance of unity and coherence in the German legal system derived from the dominance of Pandectism, which embraced 'the ethics of autonomy with which Kant endowed the renaissance legal science around 1800';<sup>15</sup> this derived not only from codification processes itself but from the 19<sup>th</sup> century evolution of German legal scholarship, of which the *BGB* formed part.

Similarly, codification's impact has been broad. It has facilitated the categorisation of disputes, generating and promoting the dissemination of legal knowledge and ultimately engendering greater predictability and certainty in dispute resolution.<sup>16</sup> The push towards coherence was facilitated by the characterisation of the codes' rules – particularly those of a private law nature – as apolitical and technical. This point can be clarified; it is not to argue that private law is entirely apolitical. Private law, as, it could be argued, all law, is inherently political; its drafting, interpretation and application often require political choices. Rather, this statement builds on the understanding of Savigny, to highlight the idea that private law existed prior to the 'intervention of the state'. Thus, it could be distinguished from public law, and as a result, what is political. This understanding has also been engaged to reinforce the idea of a public-private divide. The notion of technicality derives from the characterisation of conflicts of laws, not as 'conflicts among sovereigns' but as 'technical questions of applicability'.<sup>17</sup> The application of these rules, particularly private conflict rules, was similarly conceived as technical. However it becomes increasingly unclear that private law norms can satisfactorily be characterised as such, a consideration explored further below.<sup>18</sup>

Moreover, codification has also had the effect of indirectly emphasising existing divergences (in substance and procedure), within and between national legal systems. As the emergence of the 'era of codification' occurred contemporaneously to that of the Nation State, the strength of the civil code throughout the 20<sup>th</sup> century has provided the key basis for the maintenance of these divergences within the confines of each State and moreover, for the different conceptualisations and applications of (private) law at the national level. Furthermore, while it was initially anticipated that the civil code would provide a coherent, systematised and comprehensive account of the law,<sup>19</sup> applicable within each State and contributing to its identification, it is questionable whether this prospect has been realised in light of their operation and refinement.<sup>20</sup> Yet, this concern underpins legal development generally: our understanding of the aspirations and outcomes of codification depends on the significance attributed to the *potentially* unrestrained, 'exaggerated and unrealistic expectations'<sup>21</sup> of the postmodern context.<sup>22</sup>

## ***B. The Nation State and its Culture, Tradition and Identity in Private Law Development***

Having introduced the circularity that characterises the connection between state-making and private law development, it is pertinent to introduce the significance of national culture, tradition and identity to both processes. Different attributes of general culture, legal culture, as a localised understanding, tradition and identity have been invoked in state-building processes. These concepts are necessarily inter-related and arguably circular; identity derives from the shared culture within the Nation State while

<sup>15</sup> Franz Wieacker, *A History of Private Law in Europe with Particular Reference to Germany* (T Weir trans., Clarendon Press 1995) 341–349 and 484.

<sup>16</sup> Caruso highlights, that via this reference to 'organising categories... codification allowed the incipient state to perform an allegedly essential function of government'; Caruso (n 10) 25.

<sup>17</sup> For an explanation in greater detail, see R Michaels, 'Post-Critical Private International Law : From Politics to Technique' in Horatia M Watt and Diego PF Arroyo (eds), *Private International Law and Global Governance* (OUP 2014) 54–67, 61.

<sup>18</sup> Concerns were initially advanced over a decade ago; Study Group, 'Social Justice in European Contract Law: a Manifesto' (2004) 10 *ELJ* 653.

<sup>19</sup> The idea that national legislation is authoritative '*rationae imperii*', '*quod principi placuit, legis habet vigorem*' (Ulpian, D.1.4.1, pr.); Robert Alexy and others, *Begriff und Geltung des Rechts* (Karl 2002) 142 *et seq.*

<sup>20</sup> See arguments cited within Reinhard Zimmermann, 'Codification: History and Present Significance of an Idea' (1995) 3 *ERPL* 95, 103–105. Zimmermann, referring to Eastern European codification, highlights the continuing relevance of codification, appertaining to the understanding of law's 'systematic whole'.

<sup>21</sup> *ibid* 109–110.

<sup>22</sup> This notion of 'potentially unrestrained' becomes relevant if we engage what is often conceived as an overarching understanding that codification should be all encompassing.

'nationhood, especially as conceived by the nationalists of early-nineteenth-century Europe, was explicitly cultural'.<sup>23</sup>

This interdependence has been highlighted in divergent political, socio-economic and cultural contexts across the national systems.<sup>24</sup> In terms of legal development, Montesquieu understood law as the product of the spirit of the people, the cultural and political environment,<sup>25</sup> while Savigny highlighted the significance of the *Volksgeist*.<sup>26</sup> Characteristics identifiable as common within the delineated space of the Nation State were invoked as dimensions of national culture. These dimensions were then engaged, refined and concretised through codification (the civil code itself having 'cultural status')<sup>27</sup> or through practice (in the English courts), consolidating the identity and power of the nation, thereby lending legitimacy and promoting coherence in the identifiable, bounded space.<sup>28</sup>

This circularity begs a number of questions, to which the paper returns in the discussion of European culture and identity below. For Hardt and Negri, identity is constructed from the grouping together of people on the basis of race or class; divergences between groups existing within a particular space, *i.e.* the territory of the Nation State, are eliminated and the identity created is *deemed to be* 'representative' of the whole as 'a hegemonic group, race or class'.<sup>29</sup> This identity, attributed to a particular Nation State, distinguishes 'us' from 'them', allowing for boundaries to be drawn and, on its reproduction across national spaces, for distinct national identities. This understanding of identity, as it is conceived with regard to otherness (that is, as the opposite of same), is necessarily defined in terms of what constitutes the self, which within the context of the State, reflects the collective unit as opposed to the individual.

Thus, identity derives from shared culture, while being in itself a cultural product. This begs a primary fundamental question of structure: what are the component parts of shared culture? Arendt identifies shared culture as that 'which makes it bearable to live with other people, strangers forever, in the same world, and makes it possible for them to live with us'.<sup>30</sup> For Arendt, while it is necessary to have more than mere knowledge of the 'other' and more than 'direct experience', the exact criteria remain unclear.<sup>31</sup> It seems that there is a need for active engagement; as Eaglesham has noted, '[p]eople who belong to the same place, profession or generation do not thereby form a culture; they do so only when they begin to share...'.<sup>32</sup> The second question is contextual and temporal: when is a shared culture recognised as such? Arguably, that which is shared is only identifiable in context and at a certain period in time. That is to say, what ties people together is not all-encompassing or perpetual. Indeed, as Habermas has asserted '[o]ld loyalties fade, new loyalties develop, traditions change and nations, like all other comparable referents, are not natural givens either'.<sup>33</sup>

The emergence of an identity deriving from national culture can be tied to the evolution of the concept of the consumer, a key concept of both national and European private law. Indeed, it is the identification of a party as a consumer that gives rise to the application of consumer protection norms. Thus, the concept, which emerged initially within the context of the Nation State<sup>34</sup> and as such, encompasses determinations of national and local preference, is an operative one. The consumer identity came to reflect a conceptualisation embedded within and shaped by general and consumer culture and distinct to each national system. As such, the scope for its transfer beyond the Nation State, *i.e.* to the European level for the purposes of private law development, necessarily brings to the fore the legal and cultural as well as the economic, political and social diversities across the Member States. The analysis of the foundations and evolution of the identity of

<sup>23</sup> Michael Herzfeld, *Cultural Intimacy: Social Poetics in the Nation-State* (2nd edn, Routledge 2005) 75.

<sup>24</sup> Helge Dedek, 'Law as Culture/Rights as Culture: Some Historical Thoughts on the 'Western' Legal Tradition', Paper Presented at Conference on European Legal Culture, University of Oxford, (16 December 2011) (on file with author).

<sup>25</sup> Charles de Secondat, Baron de Montesquieu, *De l'esprit des lois*, Livre IX, Chapitre VI, (Barrillot 1750).

<sup>26</sup> Friedrich Carl von Savigny, 'Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft' in Hans Hattenhauer (ed), *Thibaut und Savigny: Ihre programmatischen Schriften* (F Vahlen 1973) 95 *et seq.*

<sup>27</sup> Merryman (n 1) 31–32.

<sup>28</sup> Dennis Patterson and others, 'Statecraft, the Market State and the Development of European Legal Culture' EUI Working Paper 2010/10, 4.

<sup>29</sup> Michael Hardt and Antonio Negri, *Empire* (HUP 2000) 103–104.

<sup>30</sup> Hannah Arendt, 'Understanding and Politics (The Difficulties in Understanding)' in Hannah Arendt, *Essays in Understanding, 1930–1954: Formation, Exile and Totalitarianism* (Schocken Books 1994) 307–327.

<sup>31</sup> Paul S Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (CUP 2012) 144.

<sup>32</sup> Terry Eagleton, *The Idea of Culture* (Blackwell 2000) 37.

<sup>33</sup> Habermas, 'Europe's Post-Democratic Era' (n 6).

<sup>34</sup> Michelle Everson, 'Legal Constructions of the Consumer' in F. Trentmann (ed), *The Making of the Consumer: Knowledge, Power and Identity in the Modern World* (Berg 2006) 99–121.

the consumer in the cultures and traditions of the Nation State allows for the foregoing discussion to be concretised.

Within many national systems, the liberal conception of both the State and market, alongside the limited appreciation of law's role in society, provided little leeway for the recognition of divergent standards of protection for contracting parties. The role of law and its influence on society can be considered first, via two broad, while not necessary representative, views on this relationship. The first, elaborating on scholarship from Durkheim to Luhmann,<sup>35</sup> posits that law plays a key role in resolving problems associated with complexity in society; while society is deemed to be 'without centre or apex',<sup>36</sup> the State's role in society remains 'historically embedded and contingent'. Thus law provides a framework, established at the level of society and reflecting its changes, on the basis of which behaviour is shaped, relevant to the context in which individuals are acting.<sup>37</sup> The second approach reflects a cynicism as regards such an understanding of law, considering that it operates in the background of society, without playing a prominent role in the organisation or living of life.<sup>38</sup>

As a result of a degree, though not necessarily entire, adherence to the latter understanding, particular contracting parties were not deemed to require specific protection, providing no basis for the characterisation of an individual as a 'consumer'. The shift in paradigm from status to contract<sup>39</sup> entrenched this understanding in contract law. Moreover, the strict adherence to the ideal of contractual equality, enshrined in contract's formal understanding (contrasted with its later materialisation),<sup>40</sup> provided little foundation for the categorisation of contracting parties into different groups that might have to be treated differently should a dispute arise. Inherent in this understanding is the conceptualisation of private law as a technical, apolitical body of law with little or no social function. As contract's materialisation emerged, mechanisms for the protection of contracting parties also evolved in the national legal orders, notwithstanding that now consumer protection is often understood as predominantly European; against this background, nationally-embedded consumer cultures, and thus potentially identities, emerged existing alongside 'notions of national citizenship', within and across the national markets, reflecting the similarities and differences therein. Indeed, it was understood that 'national regulation and law would dictate the mode of national production, the extent and character of goods and services on offer within that market, as well as the terms and conditions under which such goods and services might or might not be purchased'.<sup>41</sup>

Thus, due to its emergence in context, the formal conceptualisation of consumer might differ across national legal systems; moreover, empirical research indicates that 'national cultural variation'<sup>42</sup> impacts consumer culture generally, and consumer behaviour, including responses to information<sup>43</sup> and

<sup>35</sup> That is, in terms of the concept of functional differentiation: the demand for law from the social, Émile Durkheim, *The Division of Labor in Society* (WD Halls trans., Free Press 1984); 'What is, then, the practical cause of the genesis of law? It is, replies the author, the need to guarantee the conditions of existence of society': Émile Durkheim, 'La science positive de la morale en Allemagne', (1887) 24 *Extrait de la Revue Philosophique*, 33–142; 275–284 (English translation, 'Jurists?' (1986) 15 *Economy and Society* 346, 348–349); Niklas Luhmann, *Die Gesellschaft der Gesellschaft* (Suhrkamp Verlag 1997).

<sup>36</sup> Niklas Luhmann, *Political Theory in the Welfare State* (J Bednarz Jr trans., de Gruyter 1990).

<sup>37</sup> Niklas Luhmann, *A Sociological Theory of Law* (Routledge 1985) 105; Peer Zumbansen, 'Transnational Comparative Theory and Practice', Osgoode Hall Working Paper 1–2012, 12.

<sup>38</sup> In the context of business contract relations, see Stewart Macauley, 'Non-Contractual Relations in Business' (1963) 28 *Am.Soc.Rev.* 55.

<sup>39</sup> Henry S Maine, 'From Status to Contract' in *Ancient Law* (Murray 1861).

<sup>40</sup> Materialisation is understood broadly to reflect the drafting of norms for a particular purpose. Its trends were discussed in Weber's analysis of legal systems Max Weber, *Economic and Sociology, Vol.II* (G Roth and C Wittig edn, Berkeley Press 1969); notwithstanding, the development of the discourse, between the formalists, promoting the maintenance of the autonomy of law, in respect of political and social concerns, and those promoting an understanding of law, incorporating concerns as to social justice arising in modern society, really came to the fore with critical legal scholarship.

<sup>41</sup> Michelle Everson, 'Legal Constructions of the Consumer' in Frank Trentmann (ed), *The Making of the Consumer: Knowledge, Power and Identity in the Modern World* (Berg 2006) 99–121, 107.

<sup>42</sup> Often in cross-cultural analysis, Hofstede's dimensions of national culture are employed: a) power distance (the manner in which inequality is dealt with); b) uncertainty avoidance (how uncertainty is dealt with); c) individualism and collectivism (the individual/collective relationship); d) masculinity and femininity and e) long-term versus short-term orientation: Geert Hofstede, *Culture's Consequences: Comparing Values, Behaviours, Institutions and Organizations Across Nations* (2nd edn, Sage Publications 2001). It has also been recognised that this framework for analysis might be useful in the European context: Marieke de Mooij, *Consumer Behaviour and Culture: Consequences for Global Marketing and Advertising* (Sage Publications 2004) 36.

<sup>43</sup> The CJEU has referred to the definition of the consumer per 'social, cultural and linguistic factors'. Wilhelmsson has argued for greater consideration of the cultural in particular: Thomas Wilhelmsson, 'The European Average Consumer – a Legal Fiction?' in Thomas Wilhelmsson et al (eds), *Private Law and the Many Cultures of Europe* (Kluwer 2007) 243–268.

communications, ability to trust and exercise of rationality in decision-making processes.<sup>44</sup> In this light, the notion that ‘... the consumer role model of a particular legal system can be seen as a mirror of this society’s vision of its market and social system’<sup>45</sup> comes to the fore. As this identity is engaged and refined at both the national and European levels, its foundations and the factors shaping it in both contexts, are relevant.

This understanding complements the outline above, pertaining to private law’s foundations in the Nation State, and its emergence alongside the construction of national culture, tradition and identity. It suggests that legal development is not merely legal but also social, economic, political and cultural and that as this is true at the national level, it is also true beyond the State.<sup>46</sup> Moreover, as European integration and the Europeanisation of private law is advanced within a multi-level, pluralist construct, it must be understood that legal institutions operate within a context defined within and beyond the territorial boundaries of the State. Both reflections suggest a need to engage the ‘deeply political, sociological and cultural dimensions of law’<sup>47</sup> embedded within the Member States and Union regime as Europeanisation continues, increasingly in areas previously falling predominantly within the jurisdiction of the national legal order.

### **III. The Europeanisation of Private Law in a Pluralist, Multi-Level Space: A Plea for An Evolving Paradigm of Legal Development**

This section elaborates on the normative and conceptual space within which national and European private laws evolve. In particular, it sets out the foundations of the pluralist perspective and unpins the understanding of European private law as a multi-level construct. While the existence of pluralism is an empirical determination, it has normative effects, shaping the structure of the relevant regime and its interaction with others. Particularly, related to the multi-level characterisation, it advances that authority is not centralised in a single source but is found in diverse spaces. The concept of multi-level governance derives from the recognition – initially within the social sciences<sup>48</sup> – that policy planning and governance often occurs at different levels within the same given space. Consequently, states usually cannot establish or promote their own policy simply per their sovereign state authority but must rather engage in cooperative efforts. This requires the coordination of the actors engaged, including legislatures, courts, agencies, regulators, civil society bodies, scholars and increasingly, private individuals. Building on this outline, this section introduces the shifting conceptualisations of private law, a result of its Europeanisation.

#### ***A. The Foundations and Challenges of the Pluralist, Multi-Level Perspective of Europeanisation***

Legal pluralism broadly reflects the existence of more than one normative regime within a territorially-defined space;<sup>49</sup> the scope for different degrees of plurality derives from the rejection of a strict dichotomy of centralism and pluralism.<sup>50</sup> It can be identified in the multiplicity of local and regional normative orders in a given space, as well as, in the course of the last three centuries, in the interaction between ‘Western’ and ‘indigenous’ normative systems, and particularly, in colonial and post-colonial spaces. The imposition of the external (colonising) system on the existing (indigenous) ‘legal’ system generated interactions and interdependences, which in many contexts, continue to this day. Empirically, plurality

<sup>44</sup> Thomas Wilhelmsson, ‘Harmonizing Unfair Commercial Practices Law: The Cultural and Social Dimensions’ (2006) 44 *Os.Hall.L.J.* 461. Wilhelmsson also references Michael Solomon, Gary Bamossy and Soren Askegaard (eds), *Consumer Behaviour, A European Perspective* (Prentice Hall 1999), noting also the global perspective.

<sup>45</sup> Brigitta Lurger, ‘Old and New Insights for the Protection of Consumers in European Private Law in the Wake of the Global Economic Crisis’ in Roger Brownsword and others (eds), *The Foundations of European Private Law* (Hart 2011) 89–113, 106.

<sup>46</sup> The discussion in international constitutionalism concerning the continuing significance of the state, its characters and constituent parts, is relevant but cannot be considered in depth.

<sup>47</sup> Peer Zumbansen, ‘The Future of Legal Theory’ (2010) 6 *CLPE Research Paper Series* 3, 8.

<sup>48</sup> Devised by Gary Marks, ‘Structural Policy in the European Community’ in Alberta Sbragia (ed), *Euro-politics, Institutions and Policy-making in the ‘New’ European Community* (The Brookings Institution 1992) 191–225; Gary Marks, ‘Structural Policy and Multi-level Governance in the EC’ in Alan Cafurny and Glenda Rosenthal (eds), *The State of the European Community: The Maastricht Debate and Beyond* (Lynne Rienner Publications 1993) 391–411.

<sup>49</sup> Margaret Davies, ‘Legal Pluralism’ in Peter Cane and Herbert M. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010) 805–827, 805.

<sup>50</sup> Arguably reflected in an understanding of state versus non-state: Boaventura de Sousa Santos, *Toward a New Legal Common Sense* (2nd edn, Butterworths 2002) 156.

is identifiable within the European space, reflected in multiple legal orders, cultures and traditions,<sup>51</sup> sources of law (whether national, supranational, transnational, public, private or a combination thereof), dispute resolution bodies<sup>52</sup> and actors.<sup>53</sup> It is often considered that, in light of these historical interactions, the absence of plurality reflects a 'myth, an ideal, a claim, an illusion';<sup>54</sup> on this basis, pluralism can arguably be utilised as a characteristic of any context in which there are multiple normative regimes.<sup>55</sup>

The challenges in conceptualising the European space as pluralist are various.<sup>56</sup> One danger is reflected in the argument that the 'pluralism of Europe and its cultures have become a shield to protect nationalistic thinking',<sup>57</sup> as opposed to facilitating the decline of political or legal nationalism.<sup>58</sup> A second difficulty derives from the strict adherence to a positivist appreciation of legal development and of the role of state-based institutions in law making, application and enforcement. Yet, increasingly, it becomes clear that law does emerge beyond the State, including via self-regulation, co-regulation, the development of codes of conduct, and the standardisation of contracts, coming to the fore against the background of the declining role of the State.<sup>59</sup> Normative sources are identifiable at the national and European levels, as well as in 'private global norm-production',<sup>60</sup> including: 'non-legislative codification'<sup>61</sup> (legal rules, values and principles drafted by academics and other bodies acting 'in pursuit of what they perceive as the common good');<sup>62</sup> the 'old' and 'new' *lex mercatoria* (supplemented by the *lex laboris* and *lex sportiva*); and the self-and co-regulatory standards of international organisations and multi-national corporations<sup>63</sup> (e.g. the WTO, World Bank and the IMF<sup>64</sup>). While the State retains its significance in the EU context,<sup>65</sup> these dimensions of legal development must be understood to define an emerging global plurality (of which the European is part).<sup>66</sup>

Of course, legal pluralism is by no means unproblematic; not only does it putatively generate concerns of fragmentation and incoherence, but also, the development of a plausible theory for the organisation of legal pluralism has been slow to emerge.<sup>67</sup> Fragmentation comes to the fore time and again across legal spheres

<sup>51</sup> Gunther Teubner, 'Global Bukowina: Legal Pluralism in the World Society' in Gunther Teubner (ed), *Global Law Without a State* (Dartmouth 1997) 3–28.

<sup>52</sup> de Sousa Santos (n 50) 200 *et seq.*

<sup>53</sup> Roderick A McDonald and David Sandomierski, 'Against Nomopolies' (2006) 57 *North.Ireland.Leg.Q.* 610, 614.

<sup>54</sup> John Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism* 1, 4.

<sup>55</sup> Sally E Merry, 'Legal Pluralism' (1988) 22 *Law and Society Review* 869, 873–874; Merry distinguishes the different contexts in which legal pluralism arises, referencing the challenges and different scholarly foundations. Thus, pluralism might also arise within national – and it is submitted – postnational contexts. The national contexts typically explored include Australia, New Zealand and Canada.

<sup>56</sup> Brian Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 *Syd.Law.Rev.* 375, 377–386, examining legal pluralism in medieval Europe and in respect of colonisation.

<sup>57</sup> Patterson and others (n 28) 1.

<sup>58</sup> In the context of the economic crisis, in particular, increasing nationalist tendencies can be identified, not only in law but elsewhere. For example, consider the surge of Euroscepticism in the UK in recent months, and in those countries affected directly by austerity measures imposed in respect of the effect of the crisis, particularly in Greece.

<sup>59</sup> 'Already at first glance, it becomes clear that many examples of a 'global law without a state' do not in fact contain a flat-out rejection of state-based official law': Graf-Peter Calliess and Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Hart 2010) 19 (footnotes omitted).

<sup>60</sup> For the use of this term, see Gunther Teubner, 'Breaking Frames: The Global Interplay of Legal and Social Systems' (1997) 45 *AJCL* 149, 157.

<sup>61</sup> Nils Jansen, *The Making of Legal Authority: Non-Legislative Codifications in Historical and Comparative Perspective* (OUP 2010) 7, instead of applying the term 'private actor' to describe, eg, academics.

<sup>62</sup> For example, of UNDRIT, the Lando Commission, and the *Acquis* Group (Acquis Group (eds), *Contract I: Pre-Contractual Obligations, Conclusion of Contract, Unfair Terms* (Sellier 2007); Acquis Group (eds), *Contract II: General Provisions, Delivery of Goods, Package Travel and Payment Services* (Sellier 2009).

<sup>63</sup> See Fabrizio Cafaggi, 'Private Regulation in European Private Law' EUI Working Paper RSCAS 2009/31; Fabrizio Cafaggi, 'Private Law-Making and European Integration: Where Do They Meet, When Do They Conflict?' in Dawn Oliver, Tony Prosser and Richard Rawlings (eds), *The Regulatory State* (OUP 2010) 201–228.

<sup>64</sup> Anne-Marie Slaughter, 'International Law in a World of Liberal States' (1995) 6 *EJIL* 503, 518.

<sup>65</sup> The embers of the state's dominance thus continue to burn much more brightly than those of the code. Globalisation and the apparent decline of the Westphalian state model, as well as the surge in respect for pluralism and diversity, has of course stifled these vestiges.

<sup>66</sup> While this consideration extends beyond this paper, it is worth noting that it might reflect Joerges' assertion that European integration 'can be understood and re-constructed as a response to the failures of the Weberian nation state'; Christian Joerges, 'Unity in Diversity as Europe's Vocation and Conflicts Law as Europe's Constitutional Form' (2010) LSE 'Europe in Question' Series, LEQS, 2010/28, 6.

<sup>67</sup> Berman (n 31).

since the publication of Koskenniemi's ILC Report in 2006.<sup>68</sup> Yet fragmentation and incoherence are necessarily correlative of private law and Europeanisation in general; their promotion has been a concern since the 19<sup>th</sup> century codification efforts, which aimed to generate nationally-defined, autonomous legal systems. Its significance has re-emerged following EU law's largely piecemeal 'incursions into the classical territory of private law', leading to the 'disintegration' of the latter,<sup>69</sup> which, governed by hierarchy and unity, order and coherence, have been undermined.<sup>70</sup> This putative fragmentation reflects one justification for more recent European legislative action, including the Consumer Rights Directive (hereinafter CRD); however, the promotion of coherence and certainty<sup>71</sup> is rarely explicitly stated as the predominant concern, which rather continues to be market facilitation.<sup>72</sup> Private law has thus been described as 'a fragmented regulatory framework across the Community which causes significant compliance costs for businesses wishing to trade cross-border'<sup>73</sup> that cannot be managed via orthodox mechanisms of conflict resolution (that is, private international law rules).<sup>74</sup>

The desire to avoid conflict potentially deriving from the interdependence of legal orders is reflected in the principle of primacy of Union law, and its precedence over national law. Moreover, conform interpretation, developed in relation to the conformity of specific legal rules between national and Union law in *Marleasing*<sup>75</sup> and extended in later case law to cover the entire system, initially aimed to promote consistency in relation to the (then) first pillar of EU law and was subsequently extended to the third pillar.<sup>76</sup> It requires that the national judge consider the entire legal system so as to ensure her interpretation is compatible with Union law: the obligation of 'conform' interpretation is no longer seen as an application of the principle of primacy, but has been gradually transformed into a holistic principle of 'consistent' (or 'harmonious') interpretation of the whole legal order at all levels;<sup>77</sup> and secondly, that the emphasis is no longer – or no longer merely – on the 'hierarchy' of legal norms, or legal orders but rather on consistency between levels of regulation'.<sup>78</sup> This understanding of the doctrine engages the acceptance of pluralism – and constitutional pluralism<sup>79</sup> in particular – as well as the multi-level nature of private law.

Both of these perspectives reflect the notion that the connection between normativity and the State is not a necessary one<sup>80</sup>, underpinning the idea that '[t]he overlapping spheres of competence among the supranational, national and subnational levels of governance, produce plural sites of norm creation, operation and

<sup>68</sup> In 2005, Koskenniemi set out his normative concerns with the notion of global legal pluralism, and in particular, increasing fragmentation in Martti Koskenniemi, 'Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought' (Harvard University, Keynote Speech, 05 March 2005) <[http://www.helsinki.fi/eci/Publications/Koskenniemi/MKPluralism-Harvard-05d\[1\].pdf](http://www.helsinki.fi/eci/Publications/Koskenniemi/MKPluralism-Harvard-05d[1].pdf)> accessed 14 April 2012; see also, Martti Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (2006) UN.A/CN.4/L.682.

<sup>69</sup> Wieacker (n 15) 434–438.

<sup>70</sup> The impact of fragmentation will also diverge across the Member States; *prima facie*, if coherence and systemisation is more important in civil law countries, based on the almost-complete private codifications where gaps filled by the relevant (generally legislative) authorities, arguably they will be more affected than the common law systems by the fragmentation engendered by the Europeanisation of private law.

<sup>71</sup> CRD, 2011/83/EU, Recitals 6 and 7.

<sup>72</sup> As the Social Justice Study Group has recognised, the European Commission generally advances consumer protection norms that have the aim of protecting weaker parties but which also aim to facilitate the operation of the market, via market correction. See Study Group (n 18) 661.

<sup>73</sup> European Commission, 'Proposal for a Directive on Consumer Rights' COM(2008) 614, 2.

<sup>74</sup> Fabrizio Cafaggi, 'Introduction' in Fabrizio Cafaggi (ed), *The Institutional Framework of European Private Law* (OUP 2006) 6. Other means of conflict resolution would include, eg, the open method of coordination as a means of governance; Walter van Gerven, 'Bringing (Private) Laws Closer to Each Other at the European Level' in Fabrizio Cafaggi (ed), *The Institutional Framework of European Private Law* (OUP 2009) 37–78, 60. Pluralism as empirical fact is further reflected in the scope for conflicts, of a vertical and horizontal nature; such conflicts are deemed to be a result of the absence of hierarchy in the legal orders, arising as a result of the multiplicity of legal sources and of the claims of dispute resolution bodies to decide and regulate.

<sup>75</sup> C-106/89 *Marleasing* [1990] ECR I-4135.

<sup>76</sup> C-105/03 *Pupino* [2005] ECR I-5285.

<sup>77</sup> Initially developed in relation to conformity of specific legal rules between national and Union law in *Marleasing* (n 75) and Joined Cases C-397–401/01 *Pfeiffer* [2004] ECR I-8835, Judgement, para 116, as well potentially with ECtHR jurisprudence, as the CJEU recognised in C-399/11 *Melloni* nyr, Judgement, para 50.

<sup>78</sup> Walter van Gerven, 'Private Law in a Federal Perspective' in Roger Brownsword and others (eds), *The Foundations of European Private Law* (Hart 2011) 337–351, 345–346.

<sup>79</sup> Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 MLR 317; Miguel P Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' (2007) 1 EJLS.

<sup>80</sup> It should be noted that this statement does not engage the significant discussions of legitimacy and authority, which extend far beyond the scope of this paper.

enforcement, resulting in what has been described as an entity of “interlocking normative spheres” where no particular one is privileged’.<sup>81</sup> While calling into question the reference to the State as the only or predominant focus point of authority and legitimacy,<sup>82</sup> this perspective nevertheless allows for the Member States to endure as the ‘masters of the Treaties’. Moreover, it promotes the interdependence of legal orders as a normative value, whereby they are conceived not as ‘mutually exclusive but intertwined, with no legal system being especially privileged’.<sup>83</sup>

### **B. Shifting Conceptualisations of Private Law in a Pluralist, Multi-Level Construct**

It has been noted that private law was initially conceptualised as predominantly technical and largely politically neutral, an understanding reinforced in the civil codes and common law, which attributed great significance to individual freedom and private autonomy and little to the law’s role in society. Nevertheless, mechanisms existed – including national constitutions – that aimed to protect and guarantee the individual fundamental rights, predominantly against the State.<sup>84</sup> With the emergence of EU law and international law of direct effect, the source of the States’ obligation to protect their citizens from each other shifted, initially via EHCR jurisprudence.<sup>85</sup>

This shift and its effect on the conceptualisation of private law is reflected in Caruso’s statement:

In a purely intranational, self-referential setting, legal actors usually perceive their municipal private law as an ideologically neutral set of adjudicatory rules and principles... On an international stage, by contrast, a State’s control over its private law is laden with ideological significance and tied historically to the very notion of sovereignty.<sup>86</sup>

The EU legislature, engaging private law as predominantly technical, initially assumed that the construction of a *ius commune*, in ‘European civil code’ form, would facilitate the emergence of a uniform (and as it seems now, mistakenly, unified) European private law.<sup>87</sup> This deduction has become highly dubious, not least because it affords little opportunity for understanding private law in its entirety (that is, its political, social, and cultural, as well as legal and economic dimensions).<sup>88</sup> Indeed, for this, amongst other reasons, the Union institutions have shifted their focus from codification in recent decades, particularly towards targeted maximum harmonisation.<sup>89</sup> The recognition that neither codification nor

<sup>81</sup> Lucinda Miller, *The Emergence of EU Contract Law: Exploring Europeanization* (OUP 2011) 155, citing Neil MacCormick, ‘Democracy, Subsidiarity and Citizenship in the European Commonwealth’ (1997) 16 *Law and Philosophy* 331.

<sup>82</sup> To avoid becoming embroiled in broader constitutional discourses that extend beyond this paper, European law is understood to be authoritative and have normative force, notwithstanding that it does not exist or operate within specific territorial boundaries, tied to a central power.

<sup>83</sup> Daniel Augenstein, ‘Identifying the European Union: Legal Integration and European Communities’ in Daniel Augenstein (ed), *Integration Through Law’ Revisited: The Making of the European Polity* (Ashgate 2012) 99–112, 108.

<sup>84</sup> Private autonomy needs to be limited in respect of fundamental rights, including, predominantly, those that formally fell within constitutionally-protected considerations. This understanding can allow for a connection to be drawn within consumer law to the extent that an analogy might be drawn between the parties traditionally protected by the constitution (the weak citizens, in respect of the stronger state) and those protected by consumer law (the weak consumer, in respect of the stronger seller/supplier).

<sup>85</sup> For example, Art.8, right to privacy: *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22.

<sup>86</sup> Daniela Caruso, ‘The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration’ (1997) 3 *ELJ* 3, 5.

<sup>87</sup> The focus on codification as a means of achieving unification is seen in European Parliament, ‘Resolution of the European Parliament’ OJ 1981 C 158/400. For many years, there was a dominant focus, in terms of legislative options, on codification. There has been a marked shift in the approach of both the Parliament and the Commission. In particular, this can be seen in light of the Commission’s adoption of Option Four of the 2010 Green Paper (European Commission, ‘Green Paper from the Commission on Policy Options for Progress Towards a European Contract Law for Consumers and Businesses of 1.07.2010’, COM(2010) 348 final), from one based on the codification of private law rules, to an emerging European private law based on the one hand, on the continual construction of the *acquis*, and on the other, on the notion of “optionality” as it exists in the Proposal for a Common European Sales Law (‘Proposal on a Common European Sales Law’, COM(2011) 635 final). It should be noted that this proposal was withdrawn in December 2014, with the aim of adopting a modified proposal dealing with online sales.

<sup>88</sup> Cafaggi, ‘Private Law-Making and European Integration’ (n 63) especially 205. The notion that law operating within a multi-level, pluralist context and the scope for the engagement of comparative analysis therein – for these purposes – cannot be understood comprehensively in the context of a discourse in which law is conceived within the boundaries of the state resonates in the discourse on the emergence of ‘new’ legal orders (including the *lex mercatoria*, regimes of self-regulation, ICANN and so on).

<sup>89</sup> The shifts in the Commission from minimum to maximum to targeted maximum harmonisation should be considered: European Commission, ‘Green Paper on the Review of the Consumer Acquis’ COM(2006) 744 and European Commission, ‘Proposal for a Directive on Consumer Rights’, COM(2008) 614 final. Minimum harmonisation establishes a minimum level of protection with which the Member States must comply, without precluding the introduction of more restrictive norms at the national

harmonisation necessarily leads to unity, aligns with private law's constitutionalisation, regulation and materialisation.

As it emerged initially from the Union regime, private law was conceived as predominantly functional, utilised for market facilitation purposes. Yet even as private law has opened itself up to values, a lack of clarity surrounds these processes, particularly relating to EU law. Across the Member States, different understandings of justice developed, from 'different conceptions of the social or welfare state, the different attitudes towards social ideals and, in turn, the degree of distrust regarding state intervention'.<sup>90</sup> As Micklitz notes, initially attempts were made to identify and coordinate national social policy programmes, highlighting the implementation of what were, and still remain, divergent national conceptions of social justice and the significance of the values underpinning to the emerging European regime.<sup>91</sup> However, as EU law's focus came to fall predominantly on the internal market, policy conflicts became less frequent in private law than in other areas, as the Member States largely accepted the need for shared (at least, in terms of economic) policy for the purposes of market construction. Private law's market-advancing characteristics remain relevant, particularly as they dissolve the links between the State and law and facilitate the 'transnational' market.<sup>92</sup> Furthermore, given the focus on 'EU [consumer] law [as] market behaviour law',<sup>93</sup> that is, as fundamentally instrumental,<sup>94</sup> little significance has been attributed to the emergence of a new, or distinct, value order in European private law.<sup>95</sup>

Yet, EU law's advancement beyond the Union's economic heart into areas traditionally regulated by the Nation State is reflected in the inroads made by private law into anti-discrimination, regulated markets, product and food safety, as well as consumer protection, consequently rendering it less technical, in terms of its application, outlined above, and increasingly regulatory. This is identifiable in the CJEU's interpretation of Union law, and particularly its construction of an 'Area of Freedom, Security and Justice' post-Lisbon.<sup>96</sup> Developing beyond its original market focus, private law 'opens itself up' to values via its socialisation.<sup>97</sup> Yet, as Kennedy notes, the notion of 'social' continues to lack 'proper system and conceptual clarity' in terms of its application and use.<sup>98</sup> The market also remains the focus; as Collins asserts, 'private law has become a synthesis that combines both its traditional concerns about corrective justice between individuals and instrumental concerns about steering markets towards distributive justice'.<sup>99</sup>

The characterisation of European private law as a multi-level structure is significant. Its problems also tend to be conceptualised functionally, and consequently, they cut across the national, European, international and transnational orders. Yet the EU continues to lack an enforcement body and thus, must rely on the 'local'

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level. Maximum harmonisation essentially removes the discretion of the Member States and expands that of the Union. Legislation of a maximum nature purports to establish a set of rules uniformly applicable across the Member States; there exists no freedom for divergent norms of either a more or less stringent standard, such that the Member States cannot avoid the reach of European legislation. Targeted maximum harmonisation involves the identification of the key areas in which barriers to trade have arisen consequent to minimum harmonisation and the imposition of fully harmonised norms and standards of protection therein.

<sup>90</sup> Hannes Rösler, 'The Transformation of Contractual Justice: A Historical and Comparative Account of the Impact of Consumption' in Hans-Wolfgang Micklitz (ed), *The Many Concepts of Social Justice in European Private Law* (Edward Elgar 2011) 327–358.

<sup>91</sup> Hans-Wolfgang Micklitz, 'Judicial Activism of the European Court of Justice and the Development of the European Social Model in Anti-Discrimination and Consumer Law' EUI Working Paper 2009/19, 8.

<sup>92</sup> Christian Joerges and Christoph Schmid, 'Towards Proceduralization of Private Law in the European Multi-Level System' in Arthur Hartkamp and others (eds), *Towards a European Civil Code* (4th edn, Kluwer 2011) 277–309, 288. This is discussed further below in relation to the notion of 'market culture'.

<sup>93</sup> Jac GI Rinkes, 'European Consumer Law: Making Sense' in Christian Twigg-Flesner and others (eds), *The Yearbook of Consumer Law 2008* (Ashgate 2007) 3–18, 3: 'The question, however, is whether consumer law is market behaviour law, or law for the benefit of the consumer?'

<sup>94</sup> Christoph Schmid, 'The Instrumentalist Conception of the *Acquis Communautaire* in Consumer Law and its Implications on a European Contract Law Code' (2005) 1 ERCL 211.

<sup>95</sup> Hans-Wolfgang Micklitz, 'European Private Regulatory Law: A Plea for New Thinking' 15 *et seq* (on file with author).

<sup>96</sup> Paul Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform* (OUP 2011), and in particular, Chapter 5 on competences, 155–192.

<sup>97</sup> Matthias Kumm, 'Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalisation of Private Law' (2006) 7 GLJ 341.

<sup>98</sup> Duncan Kennedy, 'Thoughts on Coherence, Social Values and National Tradition in Private Law' in Martijn Hesselink (ed), *The Politics of a European Civil Code* (Kluwer 2006) 9–31, 9.

<sup>99</sup> Hugh Collins, 'Governance Implications for the European Union of the Changing Nature of Private Law' in Fabrizio Cafaggi and Horatia Muir Watt (eds), *Making European Private Law: Governance Design* (Edward Elgar 2008) 269–286, 278–279.

or national counterparts for application and enforcement.<sup>100</sup> As a result, the national courts have gradually been empowered by the CJEU to balance different freedoms and rights,<sup>101</sup> bringing a necessarily political dimension to private law within the national spheres.

Moreover, the constitutionalisation of private law, along with its materialisation and regulation, suggests that private laws can no longer be understood as distinct or 'self-standing legal orders but are rather embedded in a higher legal order, the national constitution, against which the values underpinning private law can be measured',<sup>102</sup> particularly with regard to its core dimensions, reflected in the fundamental rights limitations on private autonomy. Indeed, Collins highlights that private law's 'interlegality or intertextuality' should be explored, calling into question their strictly autonomous nature.<sup>103</sup> Of course, this has practical effects, especially as Amstutz notes, European private law cannot be understood as an entirely autonomous order; while it is *sui generis* in its nature, the EU order – and private law's direct effect on individuals – depends on national legal systems for its effect.<sup>104</sup>

#### IV. Via Unitas in Diversitate to a Europeanised (Legal) Culture?

This section of the paper further analyses the embeddedness explored above, developing the discourse on the reciprocal influences of culture, state-building and legal development, and uncovering the perspective of *unitas in diversitate* in relation to private law's plural, multi-level development. This leads to the analysis, in the final section, of the need for a common European (legal) culture as a precondition to the Europeanisation of private law.

##### A. The Institutionalised Foundations of the Embeddedness of Private Law Development in the Member States: Revisiting Culture, Tradition and Identity in Europeanisation

It is worth noting that two dimensions of culture are identifiable in the Treaty structure. While it provides for the construction of a European cultural policy,<sup>105</sup> it also establishes the foundations for the protection and promotion of the diversities of national cultures and identities via the principle of *unitas in diversitate*. Unity and diversity are competing characteristics of the European space; while the former underpins integration, particularly in terms of the creation of a harmonised body of norms to regulate transactions and facilitate the market, diversity is reflected in the plurality of national cultures, traditions, and identities. *Unitas in diversitate*, the motto of the ill-fated European Constitution,<sup>106</sup> aims to provide the framework for the recognition of these two dimensions of the European space, in line with the dynamics of European integration.

The TEU Preamble provides that the Member States should aim, 'drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy equality and the rule of law [...] to deepen the solidarity between their peoples while respecting their history, their culture and their traditions' in establishing the European Union. This requires that, while furthering integration via the objectives of the Union (per Article 3 TEU, the construction of an international market, an area of freedom security and justice, and an area of Union citizenship, the development of a common security and defence policy and the facilitation of an ever closer Union), the national and Union institutions must nevertheless respect national diversities.

<sup>100</sup> That is to say, as Sassen has advanced with regard to global governance, private law, and European private law, necessitates the local and national levels; it is dependent on them. See Saskia Sassen, 'Globalization or Denationalization?' (2003) 10 *Rev.Int.Pol.Econ.* 1.

<sup>101</sup> Franz Werro (ed), *Droit civil et convention européenne des droits de l'homme* (Schulthess 2006) 135 *et seq.*

<sup>102</sup> Hans-Wolfgang Micklitz (ed), *The Constitutionalization of Private Law* (OUP 2014) 1.

<sup>103</sup> de Sousa Santos (n 50) 436–437.

<sup>104</sup> Marc Amstutz, 'Interlegality in European Private Law: A Question of Method?' in Christian Joerges and Tommi Ralli (eds), *European Constitutionalism Without Private Law: Private Law Without Democracy*, Recon Report No.14 (Arena 2011) 55–69.

<sup>105</sup> Rachel Crauford-Smith, 'Cultural Policy' in Paul Craig and Grainne de Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011) 869–894. Notwithstanding the absence (until the early 1990s) of a European cultural policy, alongside the broad division of competences between the EU and Member States, it has become a matter of increasing significance at both the EU and national levels. The Maastricht Treaty (Art.151(1) EC) initially introduced the notion of a European cultural policy into the Treaty structure.

<sup>106</sup> Art.1-8, Draft European Constitutional Treaty, OJ C 310/1, 16.12.2004. See further, Jen Hendry, 'Unity in Diversity': Questions of (Legal) Culture in the European Union' (2008) 3 *Journal of Comparative Law* 289. Joerges has argued that the notion of *unitas in diversitate* can be maintained by virtue of engagement with the notion of understanding European private law as a type of conflicts law: Joerges (n 66) 1.

Article 2 TEU sets out the values of the Union – ‘respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities’ – characterising them as common across the Member States. Moreover, Article 3 TEU advances that the Union must promote social justice, solidarity and ‘economic, social and territorial cohesion’, per the respect for cultural and linguistic diversity, ‘ensur[ing] that Europe’s cultural heritage is safeguarded and enhanced’. Article 3 thus sets out the cultural as well as economic (the construction of the internal market), political (the promotion of peace and territorial cohesion), social (the promotion of social justice, protection, solidarity and social cohesion) and legal (the area of freedom, security and justice) dimensions of integration.

The Treaties also provide the basis for more overtly positive action on the part of the Union institutions. Thus, Article 4(2) TEU requires the Union respects ‘the equality of Member States before their Treaties as well as their national identities, inherent in their fundamental structures...’, while Article 67(1) TFEU establishes that ‘[t]he Union shall constitute an area of freedom, security and justice, with respect for fundamental rights and the different legal systems and traditions of the Member States’. Article 167 TFEU further highlights that national identities are worthy of protection, and following Article 151 EC, obliges the EU to ‘contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore’.

The significance of culture, tradition, community and identity is identifiable in national jurisprudence on Europeanisation and integration. For example, culture has been explicitly linked to identity in the *BVerfG*’s Lisbon judgement,<sup>107</sup> in which it asserted that national political determinations as to economic, social and cultural standards within the Member States should be respected in the context of integration, in those ‘areas which shape the citizens’ living conditions, in particular the private sphere of their own responsibility and of political and social security, protected by fundamental rights, as well as in respect of political decisions that rely especially on cultural, historical and linguistic perceptions’.<sup>108</sup> The *BVerfG* highlighted that ‘essential areas of formative action’ encompass various cultural dimensions, including language, family and education, and freedoms of opinion, the press, association, and religion. By referring to the protection of the Member States’ constitutional identities per Article 4(2) TEU<sup>109</sup>, the *BVerfG* engaged national culture and identity, invoking Article 79(3) *Grundgesetz*, and delineating its responses to integration’s potential reach,<sup>110</sup> in terms of the supremacy and primacy discourses at the national level.<sup>111</sup>

The objectives of these key provisions appear to overlap: while reference is made to the protection of the diverse, predominantly national, cultures in the communications of the Union institutions, at the same time, that which is common has been advanced via the promotion of the Member States’ ‘common heritage’.<sup>112</sup> Clearly, these considerations are not limited to the development of cultural policy but extend across integration processes, as well as the formation, interpretation and application of EU law; this is clear from Article 167(4) and (5).<sup>113</sup> This suggests that the European project cannot adequately be conceived only as promoting commonality, either via the development of a European cultural policy or via a uniform body of norms, at the expense of the other virtues of the European order, namely, the Member States’ cultures, traditions and identities, deemed to have an inherent value. Rather, what is required is a balancing exercise between safeguarding national diversities and the promotion of the commonality required for integration (whereby the latter arguably leads to the elimination of the former).

<sup>107</sup> Also in the Maastricht decision: *BVerfG* 89, 155; 2 BvR 2134, 2159/92; 12 October 1993.

<sup>108</sup> With reference to the notion of the ‘democratic formative action’, derived from the principle of democracy, encompassed in the rule of law principles, set out in Art.1 and 20 of the Basic Law, to be protected in line with the eternity clause in Art. 79(3), even where constitutional changes are made, eg, in respect of Germany’s membership of the EU; *BVerfG*, 2 BvE 2/08, 30 June 2009, para 249.

<sup>109</sup> *BVerfG*, 2 BvE 2/08, 30 June 2009, paras 240–241.

<sup>110</sup> Hans-Wolfgang Micklitz, ‘German Constitutional Court (*Bundesverfassungsgericht BVerfG*) 2 BvE 2/08, 30.6.2009 – Organstreit Proceedings Between Members of the German Parliament and the Federal Government’ (2011) 7 ERCL 528.

<sup>111</sup> See recently, a particularly interesting article dealing with the cases discussed: Armin von Bogdandy and Stephan Schill, ‘Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty’ (2011) 48 CMLR 1.

<sup>112</sup> Declaration on European Identity, 1973 (12 Bull. EC 118).

<sup>113</sup> Art. 167(4) and (5) TEU, which provide ‘4. The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures...and ‘5....to contribute...the Council.. shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States’.

These seemingly contradictory objectives reflect, according to Hendry, the *unitas in diversitate* paradox.<sup>114</sup> The understanding of how this should be engaged reflects the different ideological underpinnings framing European integration and the Europeanisation of law, one promoting a discretion on the part of the Member States allowing for the preservation of the diversities existing between them, and the other removing this discretion – and thus, much of the scope for the preservation of diversities – via the creation of a body of uniform norms.<sup>115</sup>

### **B. The Consumer Concept at the European Level**

The emergence and evolution of the consumer concept in the national context has been outlined above. It was initially introduced at the European level in Union legislation, and putatively clarified via CJEU jurisprudence and the CRD;<sup>116</sup> engaging the culture and identity discourse, it allows for the reach of Union legislative efforts to be linked to the *unitas in diversitate* principle.

Two interrelated considerations are key: the reach (minimum/maximum/targeted maximum) of European harmonisation efforts and the divergent standards of consumer protection existing across the Member States, shaped fundamentally by different concepts of consumer (as it is the consumer identity that gives rise to protection). Both considerations beg the question of whether a single European conceptualisation is feasible.<sup>117</sup> Shaped by various factors, including the rationales underpinning consumer protection and particularly, the aims of doing justice, the Member States might provide for higher or lower levels of consumer protection via national private law norms. As these rules might constitute national barriers to trade, it falls to the European institutions, having the aim of promoting the internal market, to challenge them. This sets a high threshold for such provisions, which promote consumer protection interests but also potentially undermine trade. As Union legislation has been promulgated, each Member State has faced issues of implementation, concerning the delineation of the relevant legislation. Ultimately therefore, post-implementation, the scope for divergence in national levels of consumer protection is shaped by the reach of Union legislation, which determines not only the modifications required in national law to ensure satisfactory compliance with Union norms,<sup>118</sup> if any, but also the interpretative approach of the CJEU.

The focus here falls on directives as most consumer legislation is promulgated in this form. Two simplifications can be drawn at the outset. A directive of a minimum harmonisation nature affords the Member States discretion to determine the level of protection – and the breadth of the consumer concept – within the national system, providing this satisfies the minimum set out in the directive. Essentially, minimum harmonisation allows Member States to provide for a higher level of protection than envisaged by the Union legislature, thereby maintaining the possibility for divergent levels of protection across the European space. In contrast, a directive providing for maximum harmonisation, strictly understood, removes the latitude permitting the Member States to establish or maintain a more stringent body of protection – or indeed, a broader concept of consumer – than established by the Union legislature. Consequently, it removes the scope for divergence in levels of protection between and across domestic law and the Union regime.

As concerns surrounding the interpretation of Union norms, or the non-compliance of national law with the Union legislation, generally find their way before the CJEU, its interpretative approach is significant. Two related considerations are pertinent: on the one hand, the judicial development of a common, Europeanised<sup>119</sup> notion of consumer, which is absent from Union legislation, and on the other, the recognition of the social, cultural and linguistic dimensions shaping consumer protection in the national legal orders.

<sup>114</sup> See Jen Hendry, *Unitas in Diversitate? On Legal Cultures and the Europeanisation of Law*, PhD Thesis (EUI 2009) 18.

<sup>115</sup> It should be noted, and as becomes clear from the discussion of maximum and minimum harmonisation, that harmonisation in itself does not necessarily aim to undermine diversity; this rather depends on the reach of Union legislation.

<sup>116</sup> S. 2(1) CRD: 'any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession'.

<sup>117</sup> Wilhelmsson questions to what extent it is appropriate that these notions be 'Europeanised': Wilhelmsson (n 43) 245, and whether, in reality, it might be the case that such differences exist between national notions of (average) consumer that it is useless to make reference to a European notion.

<sup>118</sup> DG for Internal Policies, Policy Department: Citizens' Rights and Constitutional Affairs, 'The Potential Impact of the Consumer Rights Directive on Member States' Contract Law' PE 419.606, 2009, 14.

<sup>119</sup> Wilhelmsson (n 44).

Considering the latter, the engagement of these factors is not simply a matter of the CJEU identifying differences or commonalities in the text of Union legislation or the transposing national rules but rather relates to how it understands these rules to be interpreted and applied. Indeed, Wilhelmsson has considered that the divergent consumer cultures permeating the national orders requires not only recognition of different standards of protection but also a broader and more transparent appreciation of the significance of national 'social, cultural or linguistic factors'<sup>120</sup> at the European level. Moreover, the reach of Union legislation necessarily shapes the latitude of the Advocate General<sup>121</sup> and the Court to engage political, economic, societal and cultural factors in their interpretation of the European consumer concept. Maximum harmonisation directives aim to facilitate uniformity across the national systems. Ostensibly, when implemented, the directive itself should remove (textual) divergences between the national systems and thus, eliminate the need for the CJEU to engage them. Evidently, this does not always happen in practice; moreover, reference only to textual construction is insufficient as the factors shaping levels of national consumer protection extend far beyond the text itself. The aims of maximum harmonisation dictate that the CJEU's interpretative approach operates to undermine these divergences in reality, whether relating to the norm legislated for by the national parliament, or the interpretation rendered by the national court. Ultimately, there is a lack of clarity as to how the CJEU engages these considerations, a concern which has become even more complex in the past decade, as the rationales, manifestations and contexts of the Union institutions have shifted, both in terms of the declining focus on codification, and the reach of harmonisation. This is identifiable, *e.g.* in the CRD, which was initially advanced as a maximum harmonisation directive and enacted as one of 'targeted full harmonisation'.<sup>122</sup>

Returning to the recognition of commonality and diversity, we can consider whether the Court and the AG, in rendering interpretations of concepts which exist both within the national and European regimes, refer to the building blocks underpinning divergent national cultures and traditions from which these concepts have been constructed. The jurisprudence suggests that, in comparison with the Court, the AG will more readily explicitly engage linguistic, cultural and social diversities.<sup>123</sup> Yet, this approach is too simple; implicit reference to the relevance of such factors is identifiable in the Court's interpretation of the consumer *acquis*.<sup>124</sup> Moreover, the CJEU has advanced that even where European legislation provides for maximum harmonisation, there is 'a margin for manoeuvre' which 'authorises [Member States] to maintain or introduce particular rules for specific situations';<sup>125</sup> this arguably facilitates the maintenance of divergences across the national systems, allowing for interpretations of 'consumer', dependent on the nature of the case heard before the national court.<sup>126</sup>

As noted, the broader task is one of balancing the potentially diverse interests of the (consumers of the) Member States (reflected in their models of consumer protection), and market facilitation (and its apparent need for uniformity), while also ensuring that justice is done. That is to say, as consumer protection develops as part of private law beyond the State, it arguably engages different interests and values, than those to which private law within the state has been considered to adhere.<sup>127</sup>

<sup>120</sup> Thomas Wilhelmsson, 'Introduction: Harmonization and National Cultures' in Thomas Wilhelmsson, Elina Paunio and Annika Pohjolainen (eds), *Private Law and the Many Cultures of Europe* (Kluwer 2007) 3–20, 15–16. The 'social, cultural or linguistic factors' as highlighted in C-220/98 *Estée Lauder Cosmetics GmbH & Co OHG v Lancaster Group GmbH* [2000] ECR I-117, Judgement, para 29.

<sup>121</sup> Hereinafter, AG.

<sup>122</sup> Art.4 CRD.

<sup>123</sup> C-315/92 *Verband Sozialer Wettbewerb eV v Clinique Laboratoires and Estée Lauder Cosmetics* [1994] ECR I-317, Opinion of AG Gulmann, para 18.

<sup>124</sup> *Estée Lauder Cosmetics* (n 120), Judgement, para 29: '...in particular, it must be determined whether social, cultural or linguistic factors may justify the term "lifting", used in connection with a firming cream, meaning something different to the German consumer as opposed to consumers in other Member States...'. As noted above, reference is made to the notion in the Unfair Commercial Practices Directive, at Recital 18. Furthermore, the CJEU's scope for engaging in comparative, 'cross-directive' reasoning in which it has aimed to achieve coherence between the various consumer directives, would dictate that this Europeanised approach is soon extended across the Union *acquis*.

<sup>125</sup> C-101/01 *Lindqvist* [2003] ECR I-12971, Judgement, para 98.

<sup>126</sup> Vanessa Mak, 'Standards of Protection: In Search of the "Average Consumer" of EU Law in the Proposal for a Consumer Rights Directive' (2011) 19 *ERPL* 25, 29.

<sup>127</sup> One very explicit and stark statement has been made by Joerges and Schmid who have sought to highlight the complexity of this type of balancing exercise, and who advance that the CRD 'unlike the CFR and all other national private-law instruments... deviate[s] from the classic ethical concept of private law, which pursues justice between parties in the individual case (normally communicative, sometimes also distributive justice) as the highest objective. Instead, the CRD sacrifices justice between the parties in favour of providing European businesses with a basic, but uniform, regulatory framework for market transactions with consumers', Joerges and Schmid (n 94) 277–309, 280. See further below at (n 170).

This issue is therefore evidently broader than consumer law; indeed, it is a constitutional matter. As Schmid understands it, the instrumentalisation of private law<sup>128</sup> dictates that the significance attributed to social justice and ‘the immaterial interests of consumers’ (deriving from the national cultures and traditions),<sup>129</sup> on the one hand, and the promotion of the internal market, on the other, will never be equal, as preference is necessarily attributed to the former as the *effet utile* of European law both via the EU legislature and the CJEU’s ‘one-sided teleological’ approach.<sup>130</sup> Thus, while it might be expected that consumer protection constitutes an ‘overarching interpretative meta-principle’,<sup>131</sup> Schmid rejects the notion that the CJEU ‘pursue[s] a coherent consumer model’. The interpretation of consumer in the CRD, which is largely yet to be seen, will therefore be key.<sup>132</sup> In particular, given the noted lack of consistency and coherence, it remains unclear whether a restrictive interpretation will dictate that divergent national conceptualisations of consumer, providing for greater protection, will necessarily fall foul of the objectives of the European legislature.<sup>133</sup>

This section has provided an outline of *unitas in diversitate*, building on the brief analysis of the evolution of the consumer concept at the national level. *Unitas in diversitate* intends to institutionalise the protection of diversities, serving as a guiding principle for legislative development and judicial interpretation, by promoting, as Hendry explains, unity but avoiding uniformity and diversity, avoiding fragmentation,<sup>134</sup> within Member States in the context of the harmonisation – and potentially, construction of a uniform body of norms – of European law. It provides a basis for the consideration of the reciprocal influences of culture and tradition, the evolution of the Nation State, and the legal development occurring within and beyond these territorial boundaries, in light of the promotion of uniformity for integration purposes via the Europeanisation of law. Against this background, and building on the idea introduced above – as to the recognition of multiple identities and belongings, and that neither the national nor the European consumer constitutes a mere legal concept but is also an identity deriving from culture and tradition – it is advanced that such a perspective need not exclude all reference to the breadths of consumer cultures continuing to exist across the nation states (or indeed beyond). Such a pluralist perspective rather suggests that national conceptualisations of consumer might shape (that is, as opposed to be merely transferred to, confirmed or rejected at the European level) consumer culture in a multilevel construct of protection.

## V. The Development of a European Culture, Tradition or Identity

### A. Is there a Need for a Common European (Legal) Culture as a Prerequisite to the Europeanisation of Law?

Private law development has been inherently tied to the emergence of the State, and thus, to the cultures and traditions that have evolved therein. The recognition of the diversities of the Nation States in the EU context has been introduced above, generating its characteristics of commonality and diversity and shaping its plural nature. This gives rise to the *unitas in diversitate* paradox, where diversity is deemed worthy of protection, and yet also deemed problematic, undermining the effect of harmonisation efforts, considered necessary for the proper functioning of the market.

It is not yet possible to identify a single, common or explicit conceptualisation either of culture, tradition or identity that permeates the European space. Rather, there are various understandings, spilling over from the national levels, relevant to European integration and legal development. This section aims to uncover

<sup>128</sup> Christoph Schmid, ‘The Thesis of the Instrumentalisation of Private Law by the EU in a Nutshell’ in Christian Joerges and Tommi Ralli (eds), *European Constitutionalism Without Private Law: Private Law Without Democracy*, Recon Report No.14 (Arena 2011) 17–36, 26–27.

<sup>129</sup> Lurger (n 45) 107.

<sup>130</sup> Christoph Schmid, ‘The ECJ as a Constitutional and a Private Law Court – A Methodological Comparison’, (2006) 4 ZERP Diskussionspapier, 11–12.

<sup>131</sup> *ibid* 22.

<sup>132</sup> It is submitted that a connection can be drawn between this consideration and Unberath and Johnston’s analysis of the CJEU’s ‘double-headed’ approach: while in cases of negative harmonisation the Court has elucidated its reluctance to allow for national provisions based on standards of consumer protection (which might also constitute a restriction to free movement, and ultimately, free trade), in relation to positive European harmonisation, the CJEU has sought to ensure a wide application: Hannes Unberath and Angus Johnston, ‘The Double-Headed Approach of the ECJ Concerning Consumer Protection’ (2007) 44 CMLR 1237, 1281–1282.

<sup>133</sup> Mak sets out the difficulties that might be faced in national system should any attempt to lower consumer protection become necessary: Mak (n 126) 37–38.

<sup>134</sup> Hendry (n 106).

whether a single (and necessarily common) European (legal) culture should constitute a precondition to European legal development, or whether a pluralist perspective (which might putatively encompass a common or shared culture at the European level) is rather more favourable in light of private law's dynamic evolution and the context of its Europeanisation. The need for the 'bridging' of gaps between national legal cultures and traditions<sup>135</sup> has long been a lingering concern in private law scholarship<sup>136</sup> and would arguably be facilitated by the construction of a European culture. Two possibilities can be advanced. On the one hand, reference might be made to the development of a single European culture, apparently deemed common across the Member States (per the unity that seemingly subsists from the *ius commune*) as a prerequisite to European legal development. On the other hand, the existence of a plurality of legal cultures within and beyond the European sphere<sup>137</sup> (and the scope for maintenance of the diversity to which this gives rise) could be understood in itself as forming part of any emerging European culture, which is then not necessarily single or common but rather constitutive of the multiplicity and diversity of the European space.

Culture, as it exists within and beyond the State, might be conceived and constructed in different ways. Two key examples can be set out. Tuori advances a three-level analysis of legal culture: the surface level (legislation and case law), the middle level (methodology and techniques of adjudication) and the deep level (fundamental normative principles of law) at which *Vorverständnis* exists.<sup>138</sup> For Tuori, EU legislation and case law reflects European legal culture existing at the surface and perhaps the middle level,<sup>139</sup> having a 'general role...in legal practices, of the functioning of legal concepts, principles and theories as a filter through which surface-level legal material is cognized and interpreted'.<sup>140</sup> Deeper legal culture derives from institutional interaction and the professional elite of legal practice,<sup>141</sup> that is, through cooperative networks of legal scholars and legal professionals, including lawyers and judges. These interactions – which lead to the sharing of knowledge and experiences<sup>142</sup> – are necessarily influenced by the legal cultural backgrounds of the actors operating in the relevant *fora*. Moreover, for Tuori, these 'epistemic communities', 'transnational' legal communities, or 'third' legal cultures, include international trade,<sup>143</sup> civil society and the legal profession, both at the national and European level, including the CJEU, the ECtHR, the national courts, scholars, private individuals and civil society bodies.<sup>144</sup>

Another approach can be identified from the scholarship of Duncan Kennedy, who has highlighted the significance of the identity and rights discourses across almost the entire breadth of law.<sup>145</sup> In the same vein, it has long been recognised that the people of Europe are 'interested parties' in the construction of an EU legal order; in *Van Gend en Loos*, the CJEU highlighted that the 'Treaty is more than an agreement which

<sup>135</sup> For the purposes of this paper, legal culture is understood as a localised understanding of culture: thus, the connection of legal culture with a particular community can be used in order to forge an understanding of collective identity; Ralf Michaels, 'Legal Culture' in Jürgen Basedow and others (eds), *Max Planck Encyclopedia of European Private Law* (OUP 2012) 1059–1063, 1060.

<sup>136</sup> Reinhard Zimmermann, 'The Present State of European Private Law' (2009) 57 *AJCL* 479. More recently, see the speech of Commissioner Reding at the Opening of the European Law Institute: Commissioner Reding, 'The European Law Institute: Tracing the Path Towards a European Legal Culture', Speech 11/764; Vienna, 17 November 2011.

<sup>137</sup> There is an interesting body of literature on the diversity of legal cultures in relation to the development of international law, and particularly, international criminal law. Indeed, the clash of legal cultures was something, which, while of course not at the forefront of the proceedings at Nuremberg, was particularly relevant. See 'The 'Flick' Case', *Nazi War Crime Trials: Nuremberg Military Tribunal*, The Green Series, Vol.VI, 119 and 'The 'Justice' Case', *Nazi War Crime Trials: Nuremberg Military Tribunal*, The Green Series, Vol.III, 108.

<sup>138</sup> Kaarlo Tuori, 'EC Law: An Independent Legal Order or a Post-Modern Jack-in-the-Box?' in Lars D. Eriksson and Samuli Hurri (eds), *Dialectic of Law and Reality: Readings in Finnish Legal Theory* (Helsinki Faculty of Law 1999) 359–415.

<sup>139</sup> For an elaboration of this view, see Thomas Wilhelmsson, 'Private Law in the EU: Harmonised or Fragmentised Europeanisation?' (2002) 10 *ERPL* 77.

<sup>140</sup> Kaarlo Tuori, 'Towards a Theory of Transnational Law: A Very First Draft' (2010) (on file with the author), 23.

<sup>141</sup> Wilhelmsson, 'Introduction' (n 120), pp. 6–7. See especially, Kaarlo Tuori, 'Legal Culture and General Societal Culture' in Thomas Wilhelmsson and others (eds), *Private Law and the Many Cultures of Europe* (Kluwer 2007) 23–35, 26, on the basis of the notion of law as *Volksrecht* developed by Savigny; Friedrich Carl von Savigny, *System des heutigen römischen Rechts I* (Neudruck der Ausgabe, 1840; Scientia Verlag, 1981); Tuori asserts that the 'fast-moving' nature of legal practice generates a gap between legal culture and general societal culture.

<sup>142</sup> The flagship initiative of the 'innovation union' under Europe 2020 looks to establish 'knowledge alliances'; European Commission, 'Communication, Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth' COM(2010) 2020 final, 03.03.2010 12–13 for a summary.

<sup>143</sup> Francis Snyder, 'Governing Economic Globalisation – Global Legal Pluralism and European Law' (1999) 5 *ELJ* 334.

<sup>144</sup> See Thomas Lundmark, *Charting the Divide Between Common and Civil Law* (OUP 2012) especially Chapter 4 *et seq.*

<sup>145</sup> Duncan Kennedy, 'Three Globalizations of Law and Legal Thought: 1850–2000' in David M. Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (CUP 2006) 19–73, 63.

merely creates mutual obligations between the Contracting States...confirmed by the Preamble to the Treaty which refers not only to governments but to peoples...the nationals of the States brought together in the Community are called upon to'.<sup>146</sup> Individuals enjoy rights as European citizens, expressly through the Treaty and via the obligations imposed on EU institutions, Member States and individuals.<sup>147</sup> Moreover, individuals and groups can organise themselves (or be organised) and construct their own space, culture and identity. This furthers the understanding introduced above pertaining to the mutual influences of the emergence of the Nation States, national cultures, traditions and identities and private law. In the European context, this potential is particularly clear in relation to contract, which distinguishes between workers,<sup>148</sup> consumers, and tenants, amongst others, inherently connected to the local, national or transnational community. In each case, including that of the consumer, it is the identification of the individual, as *e.g.* the consumer, which gives rise to protection via national and Union norms.

### ***B. An Alternative Perspective: A Multiplicity of European Cultures, Traditions and Identities***

The European project is conceived not as a single process but rather as a number of reflexive processes shaped by determinations including 'identity, power, will, order, and becoming'.<sup>149</sup> The difficulties in coherently defining and conceptualising culture and tradition, and furthermore, identity and community, are paramount.<sup>150</sup> With the creation of a community of European States, the idea of a 'whole' European identity, either conflicting with or existing alongside a plurality of – not necessarily national or territorial<sup>151</sup> – identities, has emerged but has been difficult to conceive, particularly following enlargement.

Indeed, the EU itself has been described as an 'unimagined community', a reflection of Benedict Anderson's *Imagined Communities*, the result of an 'inadequately imagined...half revolution'.<sup>152</sup> Allott has argued for the 'public mind of Europe, of a collective consciousness which can process the concepts, the ideals, the values, the purposes, the policies, the priorities, the hopes and fears of the people and peoples of Europe'.<sup>153</sup> On the one hand, the European identity, existing within that community, is itself formed from the multiplicity of identities existing within the Member States, each of which is understood as 'self' and 'other' within the European space. However, the European identity also constitutes a 'self', in itself;<sup>154</sup> thus, not only has the European identity been shaped by the 'other' from within (that is, the diversities existing between the Member States) but also, in the context of globalisation, it increasingly interacts with the external 'other'. Consequently, where European identity is set against this external 'other', it might potentially follow the pattern within the Nation State (or it might not): considering that 'nationality as referent for interpersonal relations and the human alienating effect of us and them are brought back again, simply transferred from their previous intra-Community context to a new inter-Community one'.<sup>155</sup>

If, as considered above, it is the existence of a shared culture in the Nation State context that founds the construction of national identity, these cultures must be understood to belong to modernity, suggesting that national legal cultures and traditions also share commonalities despite apparent divergences. Yet as neither culture nor tradition nor identity is tied solely to the nation, the recognition of the existence of a plurality of cultures and identities within a territorial space removes the precondition of a specific connection between culture (or identity) and State,<sup>156</sup> bringing to the fore the scope for European and transnational conceptualisations. This further suggests that any notion of a European culture, tradition or identity would

<sup>146</sup> C-32/84 *Van Gend en Loos* [1985] ECR I-0779, Judgement, para 12.

<sup>147</sup> *ibid*, para 112.

<sup>148</sup> Case 75/63 *Hoekstra* [1964] ECR 177.

<sup>149</sup> Philip Allott, 'The Concept of European Union' (1999) 2 *Cam.YB.Eur.Leg.Stud.* 31, 49.

<sup>150</sup> There is a body of literature – summarised in Richard Swedberg, 'The Idea of 'Europe' and the Origin of the European Union – A Sociological Approach' (1994) 23 *Zeitschrift für Soziologie* 378 – which looks to the notion of the 'European idea', with its origins in 'a very much more distant past – often stretching as far back as the Middle Ages or even to Antiquity', 378. Analogies can be drawn in this respect with the notion of the development of a common legal culture from the *lex mercatoria*, see Reinhard Zimmermann, 'Derecho Romano y Cultura Europea' (2010) 18 *Revista de Derecho Privado* 5.

<sup>151</sup> At least within Europe, with both the jurisdiction of the Council of Europe, and the EU.

<sup>152</sup> Allott (n 149) 31–32, citing Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso, London; 1991) 224.

<sup>153</sup> Philip Allott, 'The Crisis of European Constitutionalism: Reflections on the Revolution in Europe' (1997) 34 *CMLR* 439, 489.

<sup>154</sup> Allott, 'The Concept of European Union' (n 149) 32.

<sup>155</sup> Joseph H.H. Weiler, 'The Transformation of Europe' in Joseph H.H. Weiler (ed), *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' And Other Essays on European Integration* (CUP 1999) 10–101, 95.

<sup>156</sup> Lawrence Friedman, *The Republic of Choice – Law, Authority and Culture* (HUP 1990) 3–4.

not entirely replace the national affiliation; consequently, personal, group and community affiliations must be distinguished, allowing individuals (or the 'European man' to which Collins refers)<sup>157</sup> to establish and maintain close ties to a number of social constructions.

In the CJEU's jurisprudence,<sup>158</sup> there is recognition of the scope for such multiplicity; for example, the significance of the individual's rights in the cross-border facilitation of the market is set out in two contexts, namely within the Nation State and where the individual is freed from the ties binding him to a nationally-constructed identity.<sup>159</sup> This notion of the 'freeing' of the individual has also been highlighted by Patterson et al., in respect of the development of the 'market state' which, they assert 'allows us also to cope with European pluralism as a main feature of EU law: As the 'market-state' is process-orientated... it is also in principle accessible to all societies which has the consequence of disregarding the concept of the individual as state-national'.<sup>160</sup>

If this suggests that like identities in general, identities within the European context could be conceived of as multiple and plural, depending on perception,<sup>161</sup> whereby European identity both derives from and forms part of a shared European culture, existing alongside the national, it then becomes necessary to consider how a plurality of identities might be organised within the European context. Two approaches can be identified. Sen engages the notion of membership in his work on identity; with reference to the organisation of a plurality of identities, he highlights the need for a hierarchical construction of the divergent conceptions pertaining to each individual.<sup>162</sup> In contrast, and with particular reference to European integration, Bańkowski rejects this vertical, 'Russian Doll-type' interaction of identities, whereby each would exist within the other and rather supports a dynamic, 'horizontal interlocking' where the 'larger' does not necessarily subsume the smaller.<sup>163</sup> This understanding potentially works alongside the European space as multi-level in its nature,<sup>164</sup> refuting the need for a *single common* identity, culture or tradition but instead, multiple, interdependent ones.

Against this background, one key manifestation of culture, arising via the objectives and realisation of European integration processes, has come to the fore, related to the development of the 'market state'. As set out by Patterson et al., the market-state culture of the European space reflects the tension arising between European legislation and Member State sovereignty, and particularly, the significance attached to 'market-state features in EU law',<sup>165</sup> the shift from welfare to market (as embodied in the GATT, and in notions of 'embedded liberalism'), and the increasing interdependence of the markets and States, particularly in light of the Eurozone crisis. The focus in this understanding of culture is not on identity as conceived above but rather on 'whether they function to create and govern markets', using 'market-mechanisms to influence behaviour';<sup>166</sup> that is, '[t]his 'market state' faces a diffuse, interdependent and intertwined larger market that cuts across boundaries and while formally sovereign to establish their welfare systems, those states are in practice required to coordinate entitlements and regulation with other market states'.<sup>167</sup> *Prima facie*, the conceptualisation of European culture as 'market culture' reflects the significance attached to transnationalism and that which exists, decentralised<sup>168</sup> beyond the State. It clearly has links with the objectives inherent in the initial construction of the ECSC, namely the creation of an economic union and a 'pro-trade' culture,<sup>169</sup>

<sup>157</sup> Hugh Collins, 'European Private Law and the Cultural Identity of States' (1995) 3 ERPL 353, 357.

<sup>158</sup> Including those of the consumer, the tenant, the worker and so forth.

<sup>159</sup> Micklitz, in respect of *Viking* and *Laval*, ties this to Durkheim's 'cult of the individual'. Hans-Wolfgang Micklitz, 'Three Questions to the Opponents of the Viking and Laval Judgements' Opinion Paper, Observatoire Social Européen 2012–08. (C-341/05 *Laval v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767 and C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line* [2007] ECR I-10779).

<sup>160</sup> Patterson and others (n 28) 16.

<sup>161</sup> It has been asserted that culture is formed on the basis of what is perceived – 'the identity... of any culture is thus aspectual rather than essential', such that identity, therefrom deriving can be plural: James Tully, *Strange Multiplicity – Constitutionalism in an Age of Diversity* (CUP 1995) 10.

<sup>162</sup> Armatya Sen, *Identity and Violence: The Illusion of Destiny* (WW Norton & Co 2006) 18 *et seq.*

<sup>163</sup> Zenon Bańkowski, 'The Journey of the European Ideal' in Andrew Morton and Jim Francis (eds), *A Europe of Neighbours? Religious Social Thought and the Reshaping of a Pluralist Europe* (The University of Edinburgh, 1999) 149–172, 167.

<sup>164</sup> Collins, 'European Private Law and the Cultural Identity of States' (n 161) 358–359; it is not clear that what is for Europe (predominantly, the market) can necessarily be disentangled from what is for the local – it cannot be said that the market is for the European while the social is for the local, nor can it be said that culture can be concerned only with the non-economic; this is too simplistic.

<sup>165</sup> Patterson and others (n 28) 1.

<sup>166</sup> *ibid* 2–3.

<sup>167</sup> *ibid* 3.

<sup>168</sup> *ibid* 18.

<sup>169</sup> As is clear also from the jurisprudence of the CJEU, including C-8/74 *Dassonville* [1974] ECR 837.

the fundamental 'commonality' shared by the relevant Nation States being the development of the common market. The problem with this is that other considerations encompassing the social, cultural, political and legal dimensions of integration must now be engaged in order to reflect its whole, at least beyond the State; that is to say, the discourse actually requires that we not only engage the critique advanced against private law as being too market-focused but that we also consider the scope for a shifting concept of justice, from national to European private law.<sup>170</sup>

This consideration derives particularly from the notion that the significance of the State in private law development also shapes its conceptualisation, which shifts as Europeanisation, encompassing its constitutionalisation, regulation and materialisation, advances. Thus, as explored above, the nineteenth century development of private law within certain Nation States was deemed to be largely abstracted from public law; yet, this did not necessarily mean that private law was also necessarily understood to be abstracted from society.<sup>171</sup> This abstractedness has fallen away from private law development in recent years. Over the course of the 20<sup>th</sup> and beginning of the 21<sup>st</sup> century, private law norms have come to represent 'local society', shaping behaviour and shaped itself by the social, cultural, political as well as economic values.<sup>172</sup> In particular, reference can be made to the potentially diverse understandings of social justice, which necessarily influence national as well as European private law.<sup>173</sup> As Collins has asserted, private law as 'the constitution of civil society... often displays the bright colours and markings of a national flag: an affirmation of national identity, solidarity, and civility'.<sup>174</sup> Indeed, society reflects identities, cultures and traditions at different levels, including the local, national and international. As such, the replacement of a plurality of localities with a single, common Europeanised conceptualisation, particularly one based predominantly on economic concerns, potentially negates the values maintained and advanced via this diversity. Thus, in light of the putative dominance of a market-orientated approach to legal development, Sefton-Green has endeavoured to highlight that private law should not only be concerned with those interests which underpin the facilitation of the internal market, but must also engage social and moral considerations, as 'both a vehicle for our values and a means of implementing economic arrangements'.<sup>175</sup>

This part has aimed to briefly emphasise that culture and its component parts are evidently pertinent to Europeanisation and integration, and take a breadth of forms, existing within and beyond the State. Yet there continues to be a lack of clarity as to whether a single, common Europeanised understanding of culture, tradition or identity necessarily constitutes a prerequisite to the Europeanisation of law particularly where it is conceived as a pluralist, multi-level construct. Rather, it is suggested that pluralism, necessarily characterising the European space, can be engaged not as a hurdle to legal development but as a key characteristic thereof. Thus, a strict adherence to the identification of a single perspective is rejected in favour of a pluralist one, which is understood to 'facilitate[...] analysis of both interdependence with other systems and the self-identity of a particular system'.<sup>176</sup>

## VI. Conclusion

In the 1980s, it was famously remarked that the EU could not be conceived either as a State or an international organisation,<sup>177</sup> neither as a federation nor a regime.<sup>178</sup> This ambiguity continues to exist, especially in light of failed attempts at federalisation and as attempts at fiscal union continue to falter. Indeed, European integration and the Europeanisation of private law together constitute a 'transformative process',<sup>179</sup>

<sup>170</sup> This discussion is much too broad to enter into here but for a more detailed discussion, see Hans-Wolfgang Micklitz and Yane Svetiev (eds), *A Self-Sufficient European Private Law: A Viable Concept?* EUI Working Paper 2012/26, and therein, Hans-Wolfgang Micklitz, 'A Self-Sufficient European Private Law: A Viable Concept?', 1–21, and especially 10, and Jan Smits, 'Self-Sufficiency of European (Regulatory) Private Law: A Discussion Paper', 77–82 and especially 77.

<sup>171</sup> As has been set out above, Savigny, while highlighting the significance of private law, being distinguished from the state and thus from public law, private law was still necessarily tied to society, in terms of the *Volksgeist*, or nation.

<sup>172</sup> Nancy Fraser, *Qu'est-ce que la justice sociale?* (E. Ferrarese trans., La Découverte 2005).

<sup>173</sup> Study Group, 'Social Justice' (n 18).

<sup>174</sup> Hugh Collins, 'Cosmopolitanism and Transnational Private Law' (2012) 8 ERCL 311, 312.

<sup>175</sup> Ruth Sefton-Green, 'Social Justice and European Identity in European Contract Law' (2006) ERCL 275, 285.

<sup>176</sup> Davies (n 49) 814.

<sup>177</sup> Neil MacCormick, *Constructing Legal Systems: 'European Union' in Legal Theory* (Springer 1997); Weiler (n 155).

<sup>178</sup> William Wallace, 'Less Than a Federation. More Than a Regime: The Community as a Political System' in Helen Wallace and William Wallace (eds), *Policy-Making in the European Community* (OUP 1983), 403–436.

<sup>179</sup> Miller (n 81) 3.

or rather, sets of processes, occurring within an increasingly globalised space.<sup>180</sup> These dynamic processes, therefore, continuously challenge any staticism that has seemingly been concretised at either the national or European level. These discussions are fundamental to the context in which these processes occur, concerning in particular, the notion of culture.

This paper initially set out the relationship between the emergence of the State, alongside its culture and tradition, and private law development. Thereafter, it aimed to uncover the meaning of *unitas in diversitate* and examine the dimensions relevant to the Europeanisation of private law. In light of the Treaty provisions, this analysis has allowed for the exploration of what Hendry has deemed the paradox of *unitas in diversitate*, that is, the promotion of respect for and protection of diversities on the one hand, and the promotion of that which is common (and which potentially leads to unification) on the other. In light of the reach of Union private law harmonisation, the analysis aims to illustrate – with specific reference to the example of the concept of the consumer – the ideological underpinnings of these approaches.

The European space has been advanced as one within which a plurality of cultures and traditions (and thus, identities) exist, and within which these can be established as 'self' and interact with the 'other', increasingly within a globalised space.<sup>181</sup> The understanding advanced in light of the analysis undertaken suggests that neither culture nor identity requires, as a prerequisite for its formation, a connection with the State. It similarly suggests that, given the interactions arising, both within and beyond the European space, neither culture nor identity should be understood as single but rather as multiple. This is the first consideration that calls into question the need for a distinct, common European identity or culture.

Thus, instead of aiming to identify a single European concept of culture, which permeates the national, Union and potentially international levels of regulation, it has rather been suggested that the plurality of cultures and identities should be engaged as a defining characteristic of European legal development as opposed to a hurdle. The pluralist perspective is understood to underpin the scope for the private law development within a multi-level structure; its foundations are reflected empirically in the multiplicity of orders, cultures and traditions, sources of law, dispute resolution bodies and legal actors that exist within the European space. It has been recognised that as a perspective of legal development, pluralism is not unproblematic; rather, it reflects and promotes vertical and horizontal conflicts of different characterisations, and gives rise to concerns of fragmentation arising from a lack of coherence, both of which are deemed to be particularly problematic beyond the Nation State given the absence of a grounded framework lending a degree of systemisation to governance.

On the one hand, it has been acknowledged that a plurality of conceptualisations of culture and identity exist in the national contexts, underpinning which are diverse values, which – it has increasingly come to be recognised – shape private law development at the national and Union levels. Moreover, it is suggested that the conceptualisation of culture which seems to be taking the lead at the European level, *i.e.* the notion of market culture, is not satisfactory to engage private law in its entirety. This broad appreciation of the European space characterises the context in which the shifting conceptualisations of private law are explored. It is submitted that the focus, which until recently has been significant, on the promotion of uniformity (and thus commonality) via the harmonisation, and previously codification, of legal norms undermines a pluralist perspective and also the potential to appreciate the dynamic nature and shifting conceptualisations of private law.

These preliminary conclusions do not suggest that the building blocks of a European (legal) culture cannot be identified; nor do they suggest that there exists no scope for them to emerge and be refined. Rather, these conclusions are engaged and advanced to support the argument that there does not exist a basis upon which a single legal culture or identity must be advanced as a prerequisite of legal development, to the exclusion of the others existing within the European space. Indeed, it is possible that, in light of the future evolution of private law, and Union law more broadly, a common culture might indeed emerge at the European level.

Private law has clearly developed beyond its role in simply regulating private relationships and in facilitating the functioning of the internal market; it has rather begun to 'open itself up' to values and interests

<sup>180</sup> Hanne Peterson and others (eds), *Paradoxes of European Legal Integration* (Ashgate 2008) 4, making reference to four paradoxes of European integration namely, constitutionalisation and democratisation, institution-building and market-making, language as a source of legal understanding and misunderstanding and exceptionalism and normalisation.

<sup>181</sup> In respect of the significance of boundaries, reference can be made to Lindahl, who conceives of a legal regime as one necessarily defined by its borders but in respect of which there is a 'permeability', such that what is excluded is necessarily also included; Hans Lindahl, 'A-Legality – Postnationalism and the Question of Legal Boundaries' (2010) 73 MLR 30, 55.

including those of a social, cultural and political nature.<sup>182</sup> Notwithstanding, as it emerges at the European level via Union legislation, and its interpretation in the CJEU and application in the national courts, private law also continues to exist and develop within the Member States via the national legislature and national courts, giving rise to the significance of the multi-level interdependency of the relations between legal orders. This calls for a perspective of legal development, which allows for law beyond the State to be characterised as that which is 'neither national nor international nor public nor private at the same time as being both national and international, as well as public and private'.<sup>183</sup>

### **Competing Interests**

The author declares that they have no competing interests.

### **Acknowledgement**

The author would like to acknowledge and thank The Leverhulme Trust, which has provided funding for the postdoctoral position.

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<sup>182</sup> This is not to say that private law was entirely closed previously; rather, it is to suggest that the reconceptualisations of analytical frameworks that derive from Europeanisation (and also transnationalisation) of private law call for the breaking down of barriers that have previously been (artificially) constructed and permeated in respect of the relationship with private law with, for example, public law, society and social values.

<sup>183</sup> Craig Scott, 'Transnational Law' as Proto-Concept: Three Conceptions' (2009) GLJ 859, 870 and 873. Indeed, perhaps as 'a methodological lens' allowing for the analysis of legal institutions and legal development in a multi-level space, Peer Zumbansen, 'Transnational Legal Pluralism' (2010) 1 Transnational Legal Theory 141, 150.

**How to cite this article:** Stephanie Law, 'From Multiple Legal Cultures to One Legal Culture? Thinking About Culture, Tradition and Identity in European Private Law Development' (2015) 31(81) *Utrecht Journal of International and European Law* 68, DOI: <http://dx.doi.org/10.5334/ujiel.dg>

**Submitted:** 29 April 2015 **Accepted:** 24 June 2015 **Published:** 14 August 2015

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