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Lessons from constitutional theory

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DOI

[10.1515/ercl-2012-0326](https://doi.org/10.1515/ercl-2012-0326)

Publication date

2012

Document Version

Final published version

Published in

European Review of Contract Law

[Link to publication](#)

Citation for published version (APA):

Mak, C. (2012). Europe-building through private law: Lessons from constitutional theory. *European Review of Contract Law*, 8(3), 326-341. <https://doi.org/10.1515/ercl-2012-0326>

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Articles

Europe-building through private law. Lessons from constitutional theory

CHANTAL MAK*

Abstract: Questioning the link between private law and the nation-state that is implied by nationalist perceptions of the law, this paper seeks to find support for a transnational (Europeanist, constitutional-patriotist or cosmopolitan) view on private law in constitutional theory. Normative theories of constitutionalism have a bearing on questions of European private law insofar as private legal relationships are affected by the division of legal competences and the deliberation of values in the EU's legal order. It is submitted that of three types of normative constitutional theories (constitutionalism, systemic pluralism and constitutional pluralism) a constitutional-pluralist version can provide the best framework for supporting a European private law that overcomes nationalist objections. In this context, particular attention is paid to the clarification of the relationship between the recently proposed Common European Sales Law (CESL) and national regimes of sales law. It is suggested that a constitutional-pluralist model can accommodate suborders of private law so as to relate them to the imagination of a legal-political community on the level of the EU (Euronationalist view) or to a political community based on universal values that transcend the nation-state (constitutional-patriotist view or cosmopolitan view). A conceptual connection between the fields of European private law and constitutional law is then found in fundamental rights, which define the allocation of value choices among judicial, political and market processes. Given this nature of rights, the EU Charter of Fundamental Rights may guide the articulation of principles underlying the CESL and can facilitate an institutional dialogue aimed at resolving conflicts between different orders of private law in Europe.

Résumé: En questionnant le lien entre le droit privé et l'État-Nation impliqué dans les conceptions nationalistes du droit, cet article cherche à trouver des arguments pour une vue transnationale (européenne, constitutionnelle-patriote ou cosmopolite) du droit privé dans la théorie constitutionnelle. Les théories normatives du constitutionnalisme ont un rapport avec les questions de droit privé européen, dans la mesure où les relations juridiques privées sont affectées par la division des compétences juridiques et le choix des valeurs dans l'ordre juridique de l'UE. Il est soutenu que, des trois types de théories constitutionnelles normatives (constitutionnalisme, pluralisme systémique et pluralisme constitutionnel), une version constitutionnelle-pluraliste peut fournir le meilleur cadre pour fonder un droit privé européen qui dépasse les objections nationalistes. Dans ce contexte, une attention particulière est portée à la clarification des relations entre le récent projet de règlement européen sur la vente et les régimes nationaux de droit de la vente. Il est suggéré qu'un modèle constitutionnel-pluraliste peut recevoir des sous-ordres de droit privé de façon à les rattacher à l'imagination d'une communauté juridico-politique au niveau de l'UE (vision euro-nationaliste) ou à une communauté politique basée sur des valeurs universelles qui transcendent l'État-Nation (vision

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constitutionnelle-patriote ou vision cosmopolite). Une connexion conceptuelle entre les champs du droit privé européen et du droit constitutionnel est ainsi trouvée dans les droits fondamentaux, qui définissent l'allocation de choix de valeurs parmi les processus judiciaires, politiques et marchands. Étant donnée cette nature des droits, la charte des droits fondamentaux de l'UE peut guider l'articulation des principes sous-jacents au projet de règlement européen sur la vente et peut faciliter un dialogue institutionnel destiné à résoudre les conflits entre les différents ordres de droit privé en Europe.

Zusammenfassung: Dieses Papier wendet sich gegen die Grundannahme, dass Privatrecht zwingend mit dem Nationalstaat verbunden sei, und betont vielmehr die transnationale (Europäisch ausgerichtete, verfassungspatriotische oder kosmopolitische) Sicht, namentlich in der Theorie des Konstitutionalismus. Normative Theorien des Konstitutionalismus sind insofern wichtig für das Privatrecht, als privatrechtliche Beziehungen von der Aufteilung der Kompetenzen betroffen sind und ebenso von einem Diskurs über Werte im EU-Rechtssystem. Als These wird vorgeschlagen, dass drei Arten von normativen Konstitutionalistentheorien herausragen – Konstitutionismus, systematischer Pluralismus und konstitutioneller Pluralismus – und dass unter diesen drei der konstitutionelle Pluralismus am besten geeignet ist, die Hindernisse zu überwinden, die sich aus einer (allzu)nationalstaatlichen Perspektive gegenüber einem Europäischen Privatrecht ergeben. In diesem Zusammenhang wird vor allem auf die Beziehung zwischen dem jüngsten Vorschlag für ein Gemeinsames Europäisches Kaufrecht (GEK, CESL) und den nationalen Kaufrechten eingegangen. Die Argumentation geht dahin, dass ein konstitutionell-pluralistisches Modell Subsysteme des Rechts in einer Weise arrangiert, die es erlaubt den Gedanken von einer rechtlich-politischen Gemeinschaft in der EU mit Leben zu füllen (europäisch-nationalistische Sicht) oder gar denjenigen von einer politischem Gemeinschaft, die gänzlich den Nationalstaat übersteigt (konstitutioneller Pluralismus oder kosmopolitische Sicht). Ein funktionales Band wird dann zwischen dem Europäischen Privatrecht und Verfassungsrecht in den Grundrechten erkannt und diskutiert, da diese das jeweilige Gewicht von Grundwerten in rechtlichen, politischen und marktlichen Prozessen festlegen. Auf Grund dieser Bedeutung der Grundwerte muss die EU Grundrechte Charta auch den Prozess, der dem GEK zugrunde liegt, leiten, desgleichen einen institutionalisierten Dialog zu der Frage, wie sich die verschiedenen Subsysteme in einem Europäischen Privatrecht zueinander verhalten.

I Introduction

The European Commission's recent proposal for a Regulation on a Common European Sales Law (CESL)¹ is meant to offer businesses and consumers a new option for facilitating their cross-border transactions. It 'foresees a comprehensive set of uniform contract law rules covering the whole life-cycle of a contract, which would form part of the national law of each Member State as a 'second regime' of contract law.² Within the scope of cross-border sales law, the introduction of this optional instrument will thus give contracting parties in the EU the following alternatives: either their contract will be governed by

1 'Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law', COM(2011) 635 final.

2 Communication 'A Common European Sales Law to Facilitate Cross-Border Transactions in the Single Market', COM(2011) 636 final, 7.

the law of one of the Member States (in accordance with the rules of the Rome I Regulation), or, if they opt into the CESL, their contract will be partly governed by the CESL and partly by the law applicable to the topics outside of this instrument's scope. For a private actor who concludes cross-border contracts on a regular basis, the advantage of using the optional CESL would be found in its 'common European' nature: if a private actor does not use the optional instrument in any of its cross-border contracts, it will continue to have to deal with the plurality of legal systems of the EU Member States; if it does opt into the CESL in all its cross-border contracts, it will only have to deal with one set of rules for the topics falling within the scope of this instrument. Still, in the latter case, the contractor will have to take into account the particular features of the national law within which the 'second regime' is chosen for the matters falling outside the CESL's scope.³

National resistance against earlier measures of EU law affecting private legal relationships raises the question of how the CESL, if it is eventually adopted, will be received in the European private legal order. The puzzle is the following: let us assume that each regime of sales law in the EU is regarded as representing a certain legal community that is organised according to its own principles. Principles here are understood as guiding the interpretation of a legal framework within which private parties may pursue their interests, eg through the terms of sales contracts. As such, they determine the rules that solve private legal disputes.⁴ German sales law may to some extent endorse different legal principles than French or English law, but as long as a contract stays within one regime, the fact that other regimes may offer different solutions to private legal problems does not pose problems. From a procedural point of view, the coherence of such national regimes of private law is secured by the fact that a highest court will have the final authority to decide on conflicting interpretations of legal principles. EU measures, however, by their nature may upset such national communities of principle: a Directive inserting specific provisions in national laws on sales contracts can irritate existing conceptions of principles of private law, while there may be a lack of guidance as to how to deal with conflicting (interpretations of) principles.⁵ This can cause resistance against 'Europeanisation of

3 CESL, n 1 above, recital 37.

4 On the role of principles in European private law, see M.W. Hesselink, 'If You Don't Like Our Principles We Have Others. On Core Values and Underlying Principles in European Private Law: A Critical Discussion of the New "Principles" Section in the Draft Common Frame of Reference', in R. Brownsword, H.-W. Micklitz, L. Niglia and S. Weatherill (eds), *Foundations of European Private Law* (Oxford: Hart Publishing, 2011) 59–71; M.W. Hesselink, 'The General Principles of Civil Law: Their Nature, Roles and Legitimacy', in D. Leczykiewicz and S. Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Oxford: Hart Publishing, forthcoming), also available on <http://ssrn.com/abstract=1932146>.

5 G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends

private law' on the national level.⁶ The proposed CESL adds a new element to this dilemma of dealing with the integration of EU measures in national private laws, since, rather than providing specific rules for specific problems (eg time-share, unfair terms, package travel, consumer sales), it aspires to offer a more comprehensive instrument for cross-border sales contracts. It may thus in itself be understood as reflecting a certain (sub)order of principles of private law. Moreover, it cannot avoid interacting with national sales law regimes, since it will be a second regime under the national law that is applicable to a cross-border sales contract and will leave certain matters to the first regime governing the contract. Now, the question is how the multi-level system of European private law should deal with conflicts between principles of private law deriving from the different suborders it is composed of. In particular, in the context of the debate on 'nationalism and private law', it may be asked whether it is possible to conceive of a model in which national resistance against EU influence on principles of private law can be overcome. An important additional aspect of this dilemma concerns the value choices that are made in a political community, such as the nation-state. While principles define the internal organisation of a legal order, an external assessment of a system of private law regards the policy choices that are implied by the adoption of rules of private law.⁷ If private law is considered to be embedded in a national political community, then a proposal for overcoming this nationalist view will have to address both the possibility of finding a hierarchy of principles of private law in the EU's multi-level system (internal perspective) and the extent to which policy choices, related to the deliberation of values, are integrated in private law on the different levels of the EU legal order (external perspective).

In this context, inspiration may be drawn from European constitutional theory. The private law debate mirrors the constitutional debate concerning the question whether to transpose the nation-state model of constitutionalism to the European level or to conceptualise the EU constitutional order in a more pluralist way.⁸ To cite the extremes,⁹ should the EU push towards a

Up in New Differences', (1998) *Modern Law Review* 11–32. See further section 3 below.

6 See G. Comparato's contribution to this issue of the *European Review of Contract Law*.

7 D. Kennedy, 'The Political Stakes in "Merely Technical" Issues of Contract Law' (2002) *European Review of Private Law* 7–28; Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: a Manifesto' (2004) *European Law Journal* 653–674.

8 N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2011); A. von Bogdandy, 'Founding Principles', in A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law*, revised second edition (Oxford/Munich: Hart Publishing/Beck, 2009) 11, 13–14.

9 Compare the European Commission's 'Green Paper on Policy Options for Progress Towards a European Contract Law for Consumers and Businesses', COM(2010) 348 final.

European Civil Code or should the multi-level system of private law in the EU be characterised by heterarchy of principles and values? While trying to avoid repeating the debate on (the unsuccessful projects of) a European Constitution and a European Civil Code,¹⁰ the following sections will explore the possible place of private law in European constitutional theories in order to find support for a normative view of European private law that overcomes national resistance against the further Europeanisation of national private laws, either by taking a Euronationalist position or by pursuing a constitutional-patriotist or cosmopolitan transnational private law (section II). For this purpose, it is necessary to clarify the implications of the debate on European constitutionalism for the development of the field of European private law (section III). It will be submitted that a key role is played by fundamental rights here, since these rights have a place in European constitutional law as well as an increasing impact on the adjudication of questions of private law in Europe. They may thus serve as a conceptual bridge that connects the two fields and facilitates the communication between them. On this basis, they may contribute to the architecture and development of a European private legal order that goes beyond the traditional placement of private law in a nation-state setting (section IV). Fundamental rights argument can support a form of Euronationalism or even a non-nationalist, constitutional-patriotist or cosmopolitan European private law (section V).

II Nationalism in European private law

Nationalism can be understood as the political principle according to which the political and the national unit should be congruent.¹¹ Therefore, if private law is considered to be located within a political unit, such as a State, then from a nationalist perspective it is supposed to have a strong link to the national unit, the community within the State. In other words, from a nationalist point of view, private law would in this case be part of the organisation of the nation-state. In Europe, furthermore, it seems that a true 'European private law' could

¹⁰ In relation to the project of a European Civil Code, see H.-W. Micklitz, 'Failure or Ideological Preconceptions – Thoughts on Two Grand Projects: The European Constitution and the European Civil Code', in K. Tuori and S. Suvari (eds), *The Many Constitutions of Europe* (Farnham: Ashgate, 2010) 109–139.

¹¹ E. Gellner, *Nations and Nationalism* (Oxford: Blackwell Publishing, 1983) 1; J. Leerssen, *National Thought in Europe. A Cultural History* (Amsterdam: Amsterdam University Press, 2006); B. Anderson, *Imagined Communities. Reflections on the Origin and Spread of Nationalism*, rev edition (London: Verso, 2006), who defines a 'nation' as an 'imagined political community'; G. Comparato, *Nationalism and Private Law in Europe* (forthcoming) ch I.2.

then only be imagined in terms of there being a direct correspondence of the EU as a political institution (the political unit) to a ‘European community’ of peoples (the national unit) – a ‘Euro-nation’,¹² so to speak.¹³

If, on the other hand, the view is taken that the political and national units do not necessarily have to coincide, private law does not have to be related to both at the same time. Private law could then be considered to have a place in a political unit that only partly overlaps with a nation. It would not be directly linked to the nation-state and could thus form part of a transnational political unit, even if this unit only partly covers a nation, or encompasses several nations.¹⁴ The European polity could thus be conceived as being of a non-national nature, in the sense that it would not be defined by nationhood. ‘European private law’ could bind a plurality of States, irrespective of there being a single community or polity (ie a national unit coinciding with the State polity) supporting this body of law. From this perspective, it would, for instance, be possible to design a transnational private law of a constitutional-patriotist¹⁵ or cosmopolitan nature.¹⁶

Today’s reality of European private law cannot be neatly fitted within either of these two ideal models, the Euronationalist one or the non-nationalist one. The CJEU’s case law referring to general principles in matters of a private legal nature may serve as an illustration. In recent years, the Court has recognised ‘general principles of civil law’, such as freedom of contract,¹⁷ a principle that parties cannot withdraw from a contract after all obligations under the contract have been performed,¹⁸ and principles of good faith and unjust enrich-

12 This term does not specify the nature of the European Union, viz whether it is comparable to a State or should rather be seen as an international organisation. On this question, see for instance B. de Witte, ‘The European Union as an international legal experiment’, in G. De Búrca and J. Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge: Cambridge University Press, 2012) 19–56.

13 Comparato, n 11 above, ch V.

14 Krisch speaks of the ‘multiplication and contestation of polities within the state setting’; N. Krisch, ‘The case for pluralism in postnational law’, in De Búrca and Weiler, n 12 above, 245, 251–254.

15 J. Habermas, ‘Staatsbürgerschaft und nationale Identität’, in *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Frankfurt am Main: Suhrkamp Verlag, 1992) 632, 649–651; J.W. Müller, *Constitutional Patriotism* (Princeton, NJ: Princeton University Press, 2007), who stresses the post-nationalist, rather than post-national, nature of constitutional patriotism.

16 Eg following M. Nussbaum, *Creating Capabilities* (Cambridge, MA: Belknap Press, 2011). See further H. Collins’s contribution to this issue.

17 Case 277/05, *Société thermale d’Eugénie les Bains v Ministère de l’Économie, des Finances et de l’Industrie* [2007] ECR I-06415 (CJEU).

18 Case 412/06, *Annelore Hamilton v Volksbank Filder* [2008] ECR I-2383 (CJEU). Heselink (forthcoming), n 4 above, 5, rightly points out that a similar principle does not seem to exist in the laws of any of the EU Member States.

ment.¹⁹ As has been observed by, among others, Steven Weatherill, the acknowledgement of such general principles is not unproblematic, insofar as the Court does not specify its relation to more nuanced conceptions and applications of equivalent concepts on the national level.²⁰ The unclear status of the ‘general principles of civil law’, thus, indicates that they could at this moment at most provide a very weak basis for a Euronation founded in a common European legal culture. Moreover, in a more general sense, the reception of EU general principles in national legal orders confirms that national courts, even when they adopt a ‘Europe-friendly approach’, still take care to emphasise the particular principles underlying the national legal system when determining the place of European ones.²¹ Private law, thus, retains a link to the nation-state model.

Looking at European private law from the ideal models of Euronationalism and non-nationalist law, still, it becomes clear that views on the place and future of the field of European private law engage ideas on the division of competences, the representation of citizens, and the deliberation about values and principles in the EU. The design of a structure of European private law may be said to have a place in the architecture of the European legal order, in particular where conflicting principles need to be reconciled. Principles of private law may be understood to demarcate the legal framework within which private actors are free to pursue their views on the values that should govern the community of which they are part (ie their ideas of the ‘common good’).²² Will it be possible to conceive of a European political ‘community of values’, which citizens can feel they belong to and which will be reflected in a legal ‘community of principles’? Or could a non-national, ie constitutional-patriotist or cosmopolitan, European private law be strived for?

III Private law and European constitutionalism

Constitutional models of the EU legal order may provide inspiration for the conceptualisation of the interaction between (optional) orders of private law in a transnational setting.²³ In the first place, they can relax tensions between

19 Case 489/07 *Messner v Firma Stefan Krüger* [2009] ECR I-7315 (CJEU).

20 S. Weatherill, ‘The “Principles of Civil Law” as a Basis for Interpreting the Legislative *Acquis*’ (case note on *Hamilton and Messner*) (2010) *European Review of Contract Law* 74–85.

21 Eg BVerfG 6 July 2010, 2 BvR 2661/06, *Honeywell* para 49–57.

22 Hesselink (2011), n 4 above, 60–61.

23 Of course, the translation of models from one sphere to the other can be problematic. N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010) 35–38, rightly points out the difficulties of transposing domestic constitutional models to the transnational level. See also J.W. Müller, ‘A European Constitutional Patriotism? The Case Restated’ (2008) *European Law Journal*

different suborders of private law (eg French law and the CESL, as first and second regimes governing a sales contract). They can do so by defining a common point of reference for the handling of conflicting principles within the overall order (European private law) – this would be an internal, principle-based perspective on European private law. In the second place, they can help design a framework for the allocation of value choices between the judicial and the political processes (eg through the recognition of fundamental rights) that allows for the democratic deliberation of what values should govern European private law (eg autonomy and solidarity) – this would be an external, value-based perspective. These two strands of thought will now be elaborated in general terms to define key elements of normative theories of European private law that transcend the nation-state (eg pursuing Euronationalism, constitutional patriotism or cosmopolitanism).

First, can a point of reference be defined for the handling of principles in European private law? From the perspective of European constitutional theory, it seems that at least three different answers may be given to this question, corresponding to three different types of ideas of the EU's constitutional order.²⁴ The answers are: 'yes', 'no' and 'at some level'. The corresponding theories are, respectively: constitutionalism, radical or systemic pluralism, and constitutional pluralism.²⁵ Constitutionalism, generally understood, seeks a common (hierarchical) framework 'to define both the substantive principles of the overall order and the relations between its different parts'.²⁶ It would seem that such 'substantive principles of the overall order' should be respected in all areas of the legal order, including the field of private law.²⁷ Following this logic, yes, indeed, national regimes of private law should be aligned with European principles, such as the ones underlying the CESL. Radical pluralism, on the other hand, endorses heterarchy 'by an interaction of different suborders that is not subject to common legal rules but takes a more, open,

549–555. Although it should be kept in mind that similar reservations may be made to a translation of constitutionalism to private law theory, the focus in the present discourse lies on finding meaningful general insights in constitutional theory rather than fully elaborating the imperfections in the process of translation.

24 For the moment assuming that rules of private law are of a public legal nature, insofar as they are enacted through legislation; cf D. Curtin and L. Senden, 'Public Accountability of Transnational Private Regulation: Chimera or Reality?' (2011) *Journal of Law and Society* 163–188, 164.

25 It is not aspired to give a full overview of the background to these theories here. This would go beyond the scope of the paper, which has its focus on the framing of value questions in European private law. References in the footnotes indicate sources that deal with the theoretical conception of the EU's constitutional order in more detail.

26 Krisch, n 14 above, 203, with further references.

27 M. Kumm, 'Who is afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (2007) *German Law Journal* 341–370.

political form'.²⁸ It would, therefore, seem to allow the contemporary existence of different sets of principles in different suborders, while denying the possibility of coordinating them in a structural manner.²⁹ Thus, no, in fact, principles recognised on the EU level, such as the ones reflected in the CESL or recognised in the CJEU's case law, would not necessarily have to take precedence over other sets of principles, eg domestic sales laws. Conflicts between suborders would be solved in a more pragmatic way.³⁰ Constitutional pluralism, finally, seeks coherence (like constitutionalism), while at the same time leaving room for diversity (like pluralism).³¹ Typically, it does so by developing normative criteria or meta-principles aimed at securing the values of constitutionalism in a context in which there is no ultimate authoritative source to do so.³² Different suborders may co-exist, but a coherent approach should be taken towards the resolution of conflicts among them. Thus, following this approach, at some level, meta-principles should clarify how contradictory principles may affect matters of European private law.

When focusing on the dynamics of the relationship between different legal orders, eg the national sales law of a Member State and the CESL, the ideas behind normative theories of constitutionalism or constitutional pluralism seem to offer the best chances of overcoming nationalist resistance against the Europeanisation of private law. To the extent that such theoretical frameworks strive for coherence of the overall order, they offer arguments for seeking the final authority on principles of private law either on the level of

²⁸ Krisch, n 14 above, 203–204.

²⁹ Different forms of pluralist theories may be distinguished, in particular 'systemic (or: radical) pluralism' and 'institutional pluralism'; Krisch, n 14 above, 220 *et seq.*, according to whom the main difference concerns the (im)possibility to find an ultimate point of reference for establishing final authority on resolving conflicts between legal orders. In the present analysis, theories of institutional pluralism, which do recognise the possibility to establish such a 'common frame of reference', would seem to fit in a broad definition of constitutional pluralism and, therefore, are understood as falling within that category. Here, 'pluralism' then refers to the most radical form of the theory, systemic pluralism, which assumes that no common legal framework can decide the conflict between two internally coherent systemic units, eg the EU and the domestic level. Compare N. MacCormick, 'Beyond the Sovereign State' (1993) *Modern Law Review* 1–18; M. Avbelj and J. Komárek, 'Four Visions of Constitutional Pluralism', EUI Working Papers Law 2008/21.

³⁰ Krisch, n 12 above, 219.

³¹ See Avbelj and Komárek, n 29 above, for an overview of different theories of constitutional pluralism.

³² Eg N. Walker, 'The Idea of Constitutional Pluralism' (2002) *Modern Law Review* 317–359; M. Poiras Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in N. Walker (ed), *Sovereignty in Action* (Oxford: Hart Publishing, 2003) 501–537; M. Kumm, 'Who is the Final Arbiter of Constitutionality in Europe? Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice' (1999) *Common Market Law Review* 351–386.

the EU (compatible with Euronationalism) or outside of the suborders of which the overall order of European private law is composed (compatible with a constitutional-patriotist or cosmopolitan view). Radical pluralism cannot give such guidance, as it does not offer structural solutions for handling conflicts among suborders of private law. In order to overcome nationalist resistance against EU influences on private law, it thus seems that the field of European private law needs to be ‘constitutionalised’ to some extent.³³

Second, then, principles and values behind rules of private law come into play. While the issue of ultimate authority was of a more general procedural nature, what complicates the regulation of (cross-border) economic and social relations among private actors is the fact that rules of private law are meant to intervene in these relations only insofar as necessary for the functioning of the market and the protection of certain societal values. Restrictions on party autonomy and freedom of contract are the exception rather than the rule. Against this backdrop, the scope of such restrictions is of paramount importance in the design of a legal order that does justice to legal-political views on the distribution of wealth in a society.³⁴ Are rules of private law oriented towards a principle of autonomy of parties, or rather towards a principle of solidarity?³⁵ And to what extent are private actors allowed to pursue their views on the values that should be protected in society and reflected in private law? In this context, EU measures of private law have been criticised for taking a technocratic, market-oriented approach, which is in contrast with national private laws upholding a ‘basic scheme of social justice’.³⁶ The Study Group on Social Justice in European Private Law has convincingly argued that:

‘The abandonment of national legal traditions with their familiar standards, processes, and discourses will only become an attractive possibility, if it is believed that the harmonised European laws offer a progression towards better principles of social justice. In this context, social justice will not be regarded merely as a matter of distributive fairness and the protection of weaker parties, but it will also encompass concerns to protect minority cultures and languages that feel threatened by the increasing scope of transnational laws.’³⁷

33 Cf Social Justice Group, n7 above, 667.

34 Social Justice Group, n7 above; M.W. Hesselink, ‘The Politics of European Contract Law: Who Has an Interest in What Kind of Contract Law in Europe?’, in S. Grundmann and J. Stuyck (eds), *An Academic Green Paper on European Contract Law* (The Hague: Kluwer Law International, 2002) 181–191; Kennedy, n7 above.

35 Hesselink, n34 above; C. Mak, *Fundamental Rights in European Contract Law. A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England* (Alphen a/d Rijn: Kluwer Law International, 2008) 201–206; B. van Zelst, *The Politics of European Sales Law. A Legal-political Inquiry into the Uniform Commercial Code, the Vienna Sales Convention, the Dutch Civil Code and the European Consumer Sales Directive in the Context of the Europeanization of Contract Law* (Alphen a/d Rijn: Kluwer Law International, 2008).

36 Social Justice Group, n7 above, 654; see also Collins’s contribution to this issue.

37 Social Justice Group, n7 above, 669.

In accordance with this view, nationalist resistance against the Europeanisation of private law could be overcome by combining the search for coordinating meta-principles (internal perspective) with the elaboration of a framework within which legal-political interests of stakeholders can be deliberated (external perspective). Further research will have to show if and how Euronationalism, constitutional patriotism, cosmopolitanism or other models can inspire the future development of the field.³⁸ Nevertheless, on the basis of a more descriptive or realistic reading of what is there, in the remaining part of this paper it will be argued that some elements of such a transnational scheme are already present in today's European private law, in particular insofar as legislation and case law on private legal matters refer to fundamental rights.

IV A fundamental rights connection

Euronationalist, constitutional-patriotist and cosmopolitan versions of European private law all seek to overcome nationalist tendencies by looking for a common frame of reference at some level of the EU's complex legal order. This framework should make it possible to, at the least, deliberate what values should be inserted in European private law and, if possible, derive interpretative principles from that deliberative process. It may be submitted that, though a general normative view still seems to be missing, a certain space for deliberation can already be found through a more pragmatic reading of European private law today. In particular, the acknowledgement of fundamental rights in a private legal context creates space for considering value choices and their allocation in political, judicial or market processes.³⁹

References to the EU Charter of Fundamental Rights (EUCFR)⁴⁰ can increasingly often be found in European legislative measures and case law concerning private legal relationships. For example, recital 66 to the Consumer Rights Directive that was adopted in October 2011 states that the Directive 'respects the fundamental rights and observes the principles recognised in particular by the Charter'.⁴¹ Recital 37 to the proposed Regulation on a CESL explicitly states that the Regulation respects the rights laid down in Articles 16 (freedom

38 M.W. Hesselink, 'How Many Systems of Private Law are there in the European Union? Nationalist, Dualist/Pluralist and Europeanist Perspectives', presentation at the Ius Commune conference, Utrecht, 25 November 2011.

39 Mak, n 35 above, 220, following D. Kennedy, *A Critique of Adjudication (fin de siècle)* (Cambridge, MA: Harvard University Press, 1997) 305–308. On comparative institutional analysis, see N.K. Komisar, *Imperfect Alternatives. Choosing Institutions in Law, Economics and Public Policy* (Chicago: University of Chicago Press, 1994).

40 Charter of Fundamental Rights of the European Union, *OJEC* 2000/C 364/01; recital 37 CESL.

41 Consumer Rights Directive, *OJEC* L 304/64, recital 66.

to conduct a business), 38 (consumer protection) and 47 (right to an effective remedy and to a fair trial) of the EUCFR.⁴² The case law of the CJEU, moreover, has protected fundamental rights as general principles of EU law (Article 6 TEU) in various cases having a private legal dimension.⁴³

The importance of such references to fundamental rights may be found in the ability of these rights to connect substantive rules of private law to questions of enforcement and division of competences between the legislature and the judiciary. The judiciary, including courts in civil cases, to some extent has to monitor the compliance of legislation with fundamental values shared in society. It normally does so through the application of principles (of private law) that guide the interpretation of the (private) legal order. The consideration of fundamental rights, however, adds a more explicit legal-political dimension.⁴⁴ The acknowledgement of a right as being a 'fundamental right' indicates that the particular value(s) encompassed by that right require specific judicial scrutiny for their fulfillment. These rights thus highlight instances of institutional choice.⁴⁵ If values are understood as corresponding to social goals, the challenge is to assign these goals to the institutions that are in the best position to realise them. From a theoretical perspective, institutions that can play such a role may be the market process, the political process and the judicial process.⁴⁶ In the context of the EU, these institutions would appear to be the developing internal market, the political actors involved in determining and setting forth EU policy, and the European judiciary, comprising the CJEU and domestic courts. A full understanding of the dynamics of the interaction among these institutions would require a sophisticated analysis of specific social goals in the EU.⁴⁷ For present purposes,⁴⁸ however, it may suffice to observe that the

42 Recital 37 CESL.

43 Eg case 112/00 *Schmidberger v Austria* [2003] ECR I-05659 (CJEU); case 36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-09609 (CJEU); case 438/05 *Viking* [2007] ECR I-10779 (CJEU); case 341/05 *Laval* [2007] ECR I-11767 (CJEU); case 144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981 (CJEU); case 555/07, *Seda Küçükdeveci v Swedex* [2010] ECR I-00365 (CJEU); case 447/09 *Reinhard Prigge and others v Deutsche Lufthansa AG* [2011] ECR nyr (CJEU).

44 Mak, n 35 above, 215–230.

45 Compare Komesar, n 39 above, 43; and N.K. Komesar, *Law's Limits. The Rule of Law and the Supply and Demand of Rights* (Cambridge: Cambridge University Press, 2001) 11–34.

46 Cf Komesar, n 45 above. On the role of legal academics in the development of institutions, see also R. Mangabeira Unger, 'Legal Analysis as Institutional Imagination' (1996) *Modern Law Review* 1–23.

47 As proposed by Komesar, n 45 above, for the US setting. A proposal for the EU can be found in A. Torres Pérez, *Conflicts of Rights in the European Union. A Theory of Supranational Adjudication* (Oxford: Oxford University Press, 2009).

48 Ie understanding the place of fundamental rights in the 'nationalism and European private law' debate.

consideration of fundamental rights argumentation in future private legal disputes governed by the CESL could (and, arguably, should) induce courts to more explicitly address the legal-political and economic dimension of these disputes. The judicial process could, in this way, form part of an institutional framework within which common European values may be defined and further elaborated.

To the extent that values belong to the law-making process, the review of new legislation against the EUCFR provides a starting point for discussing the allocation of value choices. Article 38 EUCFR stipulates that ‘Union policies shall ensure a high level of consumer protection’.⁴⁹ This recognition of consumer protection as a fundamental right in the EU legal order⁵⁰ expresses a connection between two capacities of the individual under EU law, ie being a citizen of the Union and being a consumer in the internal market. A danger of this approach is that it could support a reduction of the conception of European citizenship as referring to ‘confident cross-border shoppers’, insofar as EU legislation aimed at market integration seeks legitimacy in a policy of consumer protection.⁵¹ It is, however, not said that citizenship should necessarily further evolve in that direction, in particular now that the EUCFR embeds consumer protection in the broader set of values that have found legal expression in this document.

The connection between citizenship and consumerism could even be used to create a framework for the elaboration of common values, which could be translated into principles of European private law. In this context, the idea of European citizenship put forward by Habermas is of significance. Habermas submits that the introduction of EU citizenship has given shape to a constellation in which citizens in Europe participate in the constitution of a political community at the EU level in a double capacity, viz as citizens of the Union and as subjects of the Member States.⁵² The legitimacy of Union action could be based on this ‘shared sovereignty’ of constituting subjects, ie citizens in their double capacities.⁵³

Following this idea, and relating it to the recognition of consumer protection as a fundamental right in EU law, it may be argued that the explicit reference to this fundamental right in the recitals to the CESL opens the door to a demo-

49 Cf art 169 TFEU.

50 Note that art 51 EUCFR limits the scope of the Charter to ‘the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law’.

51 Compare M.W. Hesselink, ‘European Contract Law: a Matter of Consumer Protection, Citizenship, or Justice?’ (2007) *European Review of Private Law* 323, 345–346.

52 Habermas, n 15 above, 649–651; J. Habermas, *Zur Verfassung Europas. Ein Essay* (Berlin: Suhrkamp, 2011) 67.

53 Habermas, n 52 above, 73.

cratic deliberation of the common values that this (optional) instrument of European contract law should reflect.⁵⁴ In an ideal model, the deliberative process could function in the following way. If the proposed Regulation is to be adopted in its current form, the legislative process should make sure that it indeed provides a sufficiently high level of consumer protection. In their capacity of EU citizens, individuals whose interests are engaged by the CESL (as consumers or as those running small businesses) should have a say on the extent to which this goal has been achieved in the text of the instrument.⁵⁵ The final legislative product would then form the legal expression of the values these European citizens consider to be of importance in cross-border contracts. Furthermore, the (interpretative) principles of private law underlying the CESL should guide the application of the rules articulating these value choices. In their capacity as consumers, the same individuals will, moreover, affect the successful realisation of the foreseen level of consumer protection in practice, insofar as they opt into the CESL for their cross-border acquisitions. The fundamental right to ‘a high level of consumer protection’ could then be invoked in European procedures (preliminary rulings) concerning the interpretation of the CESL.⁵⁶

Finally, it may be asked whether the broad wording of the rights laid down in the EUCFR permits a consistent consideration of EU private law legislation in terms of common European values. In other words, does the EUCFR sufficiently define the conceptions of ‘consumer protection’, ‘freedom to conduct a business’ and ‘effective remedies’ to be able to make sure that the CESL complies with the common values these rights should aim to safeguard? If not, a formal proclamation of fundamental EU rights would not be able to further guide the substantive harmonisation of matters of private law in Europe.⁵⁷ In reply, seeing the reference to European fundamental rights in the proposed Regulation on a CESL, it may be argued that this instrument could itself provide starting points for the articulation of the principles underlying it.⁵⁸ Its future application could contribute to the bottom-up development of a

54 Since this part of the paper focuses on European common values, the relation to domestic values will be left in the middle for now.

55 It may be asked whether the procedure of art 114 TFEU, the legal basis foreseen for the Regulation on a CESL, provides for adequate democratic legitimacy and how the institutional framework can be improved to enhance legitimacy. See further H.-W. Micklitz and N. Reich, ‘The European Commission’s Proposal for a “Regulation on a Common European Sales Law (CESL)” – Too Broad or not Broad Enough?’ *EUI Working Paper LAW 2012/04*, 4–11.

56 Cf art 4 CESL.

57 C. Mak, ‘The Constitution of a Draft Common Frame of Reference for European Contract Law’ (2008) *European Review of Contract Law* 465–476.

58 Cf S. Rodotà, ‘The Civil Code within the European “Constitutional Process”’, in M.W. Hesselink (ed), *The Politics of a European Civil Code* (Alphen a/d Rijn: Kluwer Law

common conception of the rights ensured by the EUCFR. In this context, in particular, it is to be regretted that no provisions on morality and legality of contracts have been included in the proposal for a CESL, since these could have provided a specific point of reference for the deliberation of value choices that are known to be controversial.⁵⁹ Still, the reference to the EUCFR in recital 37 could inspire a debate on the question if and to what extent a ‘community of values’ exists or can be established in the private law context. Fundamental rights, thus, build a bridge between the regulation of private legal relationships and the definition of the EU’s constitutional order.

V European integration through private law

What implications for the possibilities of ‘Europe-building through private law’ may be drawn from the exploration of normative theories of constitutionalism and private law in the EU context? In summary, the following conclusions result from the analysis presented here:

1. If nationalism explains resistance against European influences on the private laws of the Member States, then overcoming this resistance requires a deconstruction of its basis, ie the principle that the political and the national unit should overlap, implying that private law, as part of the political organisation of a society, should be located on the level of the nation-state. Two ways in which this can be done are by: a) transposing the nationalist model to the EU level, thus aiming at creating a Euro-nation that coincides with a political union, of which European private law is a (constitutive) component (Euronationalism); or b) loosening the link between the nation and the polity, thus making space for a European private law that is not based on nationhood, but rather contributes to the strengthening of solidarity among European citizens through the development of a legal framework that allows for democratic input in the substance of European private law (constitutional patriotism or cosmopolitanism).
2. For such a project of denationalisation of private law to succeed, European private law will have to be ‘constitutionalised’ to some extent, assuming that a radical pluralist normative model for the EU’s multi-level private legal order does not offer structural solutions for handling conflicts among suborders of private law. A constitutionalism-type of normative model for

International, 2006) 115, 118, referring to the role of private law codifications in the constitution of civil societies in the 19th Century.

59 Cf C. Mak, ‘Constitutional Aspects of a European Civil Code’, in A.S. Hartkamp, M.W. Hesselink, E.H. Hondius, C. Mak and C.E. du Perron, *Towards a European Civil Code* (Nijmegen/Alpen a/d Rijn: Ars Aequi Libri/Kluwer Law International, 2011) 333, 348 on the role of art II-7:301 DCFR (contracts infringing fundamental principles).

European private law could serve the purpose of overcoming nationalist resistance to the extent that it would place the ultimate authority to resolve such conflicts on the EU level. However, such a model would be at risk of avoiding a true engagement with nationalism's basic principle (unity of nation and polity): It would indicate the scope within which EU principles of private law prevail over national ones (eg sales contracts governed by the CESL), but would not necessarily overcome national resentment against such Europeanisation, as it could limit itself to leveling differences, rather than seeking to accommodate the diverse principles and values reflected in national private laws. A form of constitutional pluralism, thus, would in principle appear to offer the most useful guidance for defining a model of European private law in which nationalist resistance could be overcome. It would aim at resolving conflicts between suborders of private law in the EU on the basis of principles situated on a meta-level, which could secure respect for these suborders, while at the same time trying to find coherence beyond the nation-state level.

3. Within the existing system of European private law, starting points can be found for further elaborating this theoretical model. In particular, fundamental rights can create space for the deliberation of value choices and the development of principles of private law in European legislation and adjudication. From that perspective, they can be considered to function as constitutive elements of a European private law that transcends the borders of nation-states.