



UvA-DARE (Digital Academic Repository)

[Review of: L. Niglia (2013) Pluralism and European private law]

Mak, C.

Publication date

2014

Document Version

Final published version

Published in

Common Market Law Review

[Link to publication](#)

Citation for published version (APA):

Mak, C. (2014). [Review of: L. Niglia (2013) Pluralism and European private law]. *Common Market Law Review*, 51(2), 717-719.

<http://www.kluwerlawonline.com/document.php?id=COLA2014054>

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

Leone Niglia (Ed.), *Pluralism and European Private Law*. Oxford: Hart Publishing, 2013. 294 pages. ISBN: 9781849463379. GBP 50.

The quest for order in the interpretation and application of legal rules has been a leading motivation of European private law scholarship, in particular since the enactment of the grand codifications in the 19th Century. The language in which questions of order and systematization were phrased in national systems of private law, however, did not fundamentally change from the mid-1980s onwards. This implied that there was a strong emphasis on predominantly monistic views of the law, in which all rules in a domestic legal system were related to certain overarching principles. Accordingly, the implementation of measures of EU law was also elaborated within national legal frameworks, e.g. through the incorporation of Directives in a national Civil Code. A more in-depth consideration of the different inspiration behind EU law and national laws was mostly lacking. While constitutional lawyers were quicker to pick up on the tensions between goals of national and EU law, and to start analysing the plurality of rules and sources of authority in the EU's multi-level legal order, private lawyers only more recently joined the academic debate on how to conceive of law-beyond-borders in a different language, that of pluralism. In the context of this discourse, the book under review presents the outcomes of a conference on the theme of "Pluralism and European Private Law" that was organized by the editor in Exeter in 2011.

In the prologue to the collection of essays, Niglia explains the book's aim to propose "reflection on a path towards awareness and action". This approach calls to mind Mangabeira Unger's agenda for "legal analysis as institutional imagination", which promotes a method of mapping developments in law, combined with a process of criticism aimed at redefining societal ideals and imagining institutional structures for their fulfilment. In a similar vein, Niglia seeks to raise awareness of the plural condition of European private law, understood as the coexistence of territorial (domestic) private law orders with post-territorial, functional orders (European and global). The reconstruction of European private law in pluralist terms could then provide starting points for "incorporating in it, the dimensions of democracy, social ethics, constitutionalism and solidarity" that to some extent have been lost in the market-oriented Europeanization of rules of private law. Pluralism does, thus, not only provide an analytical framework for the description of the *status quo*, but also highlights the normative challenges posed by the endeavour of "reconstituting a law-legitimate beyond the Nation State".

In that sense, it furthermore has links with the Habermasian project of strengthening (the legitimacy of) European union through inclusive deliberation.

The book is organized around three sub-themes. Part One serves to define the “new paradigm” and explain pluralism’s position between private law and constitutionalism. Apart from a chapter by Niglia on the post-formalist path laid down by the pluralist epistemic framework, this part comprises the outline of an innovative normative design for regulatory European private law by Micklitz, and an analysis of the poverty of global constitutionalism by La Torre. Part Two then goes on to place pluralism in a historical and comparative perspective, with contributions by Reich (explaining the vertical, diagonal and horizontal dimensions of pluralism on the basis of the application of the principle of non-discrimination), Fauvarque-Cosson (on the manner in which the proposed optional instrument for European contract law goes through and beyond pluralism) and Jansen (placing formal and informal authorities in European private law in a historical context). Part Three, finally, presents a number of theoretical perspectives on the implications of pluralism for the field of European private law, viz. why we have no theory of European private law pluralism (Michaels), a radical view of legal pluralism (Smits) and comments on this view (by Lurger), the economics of harmonizing private law through optional rules (Gomez and Ganuza), the question of how many systems of private law there are in Europe (Hesselink), and pluralism in a new key between plurality and normativity (Niglia).

The metaphor of language works well to describe pluralism’s importance and attractiveness for the academic debate on European private law. Although authors define pluralism in many different manners, the general concept provides common ground for discussing the societal goals underlying the rules governing private legal relationships in the EU and the manners in which to deal with conflicts and collisions in the institutional setting in which legal rules are applied to realize these goals. The contributions show that a meaningful development of private law in Europe should in any case address the division of competences between States and the EU, the legitimacy of rules created by formal and informal rulemakers, and the authority of national and European courts dealing with conflicts among laws. On these points, the private law debate is concerned with similar issues to that on constitutionalism, i.e. to what extent existing (national) models can be translated to the compound of rules and institutional structure governing legal relationships in the EU’s internal market. Various authors, among whom Smits and Hesselink, however, rightly add that private law has a specific characteristic, namely its inherent emphasis on party autonomy. As such, it is concerned not only with questions of power and authority, but also with the dilemma as to the extent to which private parties are and should be allowed to deviate from the laws set by the legislature. Pluralism provides a grammar, expressed in a conceptual framework, to identify the consequences flowing from the plurality of sources and sites of authority in European private law.

Although the various contributions to the book, thus, serve to bring out into the open the theoretical and practical problems resulting from the interaction of national and EU private laws, it is less clear what normative view(s) the book proposes on European private law pluralism. Again, private law here shares a feature with the literature on constitutionalism and constitutional pluralism, which is regularly criticized for not being outspoken enough on the extent to which it merely sees constitutional pluralism as an analytical model (to explain certain tensions or developments in the field) or also proposes constitutional pluralism as a normative scheme for the further development of the EU legal order. Whereas constitutional lawyers acknowledge and discuss this problem, it is as yet less clear what views private lawyers in Europe take on the matter. Many of the chapters do make explicit the normative challenges posed by the pluralist nature of European private law. Still, a strong view on the desirability of possibly translating pluralism from an analytical model into a normative agenda seems to be missing. Insofar as the book raises awareness of the normative dimension of European private law pluralism, nevertheless, it already goes further than much of the previous literature on the topic.

Finally, it should be noted that the editor has put considerable effort into defining a framework for the various contributions. Collections of essays usually run a certain risk of

conveying disunity rather than a harmonized picture of the theme to which they relate; different perspectives and styles of authors might confuse a reader as to what the overall message of the book is. A work on pluralism may even be more vulnerable to such defects than books on more clearly or uniformly defined themes. By adding a prologue and epilogue, as well as insightful introductory overviews to the three parts of the work, however, Niglia shapes the context within which the individual chapters may be read and understood. He emphasizes the plurality of different conceptions of European private law pluralism, lists the different visions on conflict resolution (or settlement, or accommodation) provided by various authors, indicates how the language of pluralism may serve to facilitate a discourse among disciplines, and stresses the important normative questions posed by legal pluralism in the field of European private law. Although this grammar of pluralism is undoubtedly influenced by the editor's views on the general theme, it serves well to provide a common language within which to redefine and discuss developments in European private law and engage with the variety of views held by different authors in the field.

Chantal Mak
Amsterdam