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The Notion of Europeanization and the Significance of Transnational Private Lawmaking

Introduction

Rudolf von Jhering, . . . called it humiliating and undignified. What was it that aroused his scorn? 'Legal science,' he said, 'has been degraded to the status of a national jurisprudence, the boundaries of our scientific endeavors have become identical with the political borders.' If this was true in the middle of the nineteenth century, it is even more true today. German lawyers apply the BGB, while French lawyers use the Code Civil. 'On parle du droit civil! Je ne connais pas un droit civil, je ne connais que le code civil,' a Frenchman once said rather acidly, and on the eve of the enactment of the BGB, the front page of the *Deutsche Juristenzeitung* was graced by a large heading 'Ein Volk. Ein Reich. Ein Recht.' (One People. One Empire. One Law).¹

This extract, from an article by Reinhard Zimmermann in 1995, provides a useful starting point from which to launch the discussion on Europeanization and its significance for contract law. On reading the paragraph one might be forgiven for drawing the conclusion that law, and more particularly private law, is of purely national concern. Legal science has been 'particularized' and it is state territorial boundaries that now define the parameters of its study.

¹ R. Zimmermann, 'Civil Code and Civil Law: The "Europeanization" of Private Law Within the European Community and the Re-emergence of a European Legal Science' (1994/95) 1 *Columbia Journal of European Law* 63, 65.

The assertion that private law is nationally oriented is certainly a claim traditionally made, and routinely accepted. For a long time, private lawyers have not been overly troubled by the reduction of their science to solely national application. And, until more recently, there has been good reason for this. As will be examined in this chapter, the development of private law has been closely associated with the rise of the modern nation state² and perceived as an expression of national identity.

However, such a local understanding of private law is becoming increasingly difficult, if not now impossible, to maintain. Whilst there may still be meaning in the notion of French contract law, Italian property law or the Spanish law of delict, the geopolitical, and with it the legal, landscape has been subject to much transformation. The stage of enquiry for law must now be broadened so that it extends from the national to the European and then further to the global. The penetration of national legal systems from European and internationally derived norms and the increase in transnational networks of private regulation render a state-based account of private law reductionist.

This book, whilst being cognizant of the global context in which contract law operates, is concerned more particularly with exploring the European framework within which it is embedded. And it is the European Union legal order which has had the most profound implications for national structures of contract law, forcing legal science to rise from its national shackles and stand squarely on the European stage. Jhering, no doubt, would be relieved. Yet, this is not to suggest that the contemporary landscape can be too closely aligned with a legal era over which Jhering and his contemporaries might fondly reminisce. The pre-nineteenth century period, prior to the emergence of the great continental codes of France and Germany and in which a pan-European *ius commune* could be said to have existed, exhibits striking contrasts from the Europe of today. It is the evolution of private law towards a *post*, rather than *pre*-national period which is at the heart of Europeanization and which is of interest in the following chapters.

Unpacking the concept of ‘Europeanization’

Alongside the other *-ization* of our modern age—globalization—Europeanization has become a popular scholarly preoccupation and

² As the discussion below will reveal, the relationship between the state and its private law has been particularly significant for the civilian legal systems.

seems set to remain high on the list of intellectual fashions. The sphere of private law has played a large part in this trend, the 'Europeanization of private law' spawning a whole host of academic journals,³ university courses, university chairs, text and casebooks.⁴ It has also been the subject of a bewildering amount of academic and practitioner conferences. Indeed, commentary on the subject has 'become so voluminous that it seems impossible to follow in all its detail'.⁵

Yet, despite the popularity of the subject, the concept of Europeanization suffers from a lack of definitional care. As one commentator remarks, '[w]hilst many use the term ... few writers have sought to define its precise meaning'.⁶ In much the same way that the notion of globalization has suffered from the various, often conflicting, assumptions made about its true meaning and its consequences,⁷ in much of the discourse concerning Europeanization there are a number of under-analysed assumptions about the processes that are really at play. Europeanization is a term that clearly suggests a process of transformation but specification of what is changing, by what mechanism(s) and to what extent requires further elaboration.⁸ Since 'Europeanization' takes centre stage in this study, an essential preliminary task is to unpack the ways in which the term is often understood.⁹ Such an exercise not only provides analytical completeness but also allows us to assess whether the term can be deployed in a way that is more sensitive to the environment which it attempts to describe. Importantly, by exploring

³ See, eg, *The European Review of Private Law*; *The European Review of Contract Law*; *Zeitschrift für Europäisches Privatrecht (ZEuP)*; *Europa e diritto privato* and the *Revue Des Contrats*, which has a special section devoted to European and comparative law.

⁴ The *Ius Commune Casebooks for the Common Law of Europe* are one such example. A full overview of the concept, aims and research methods of this project of casebooks, as well as details of the book titles, can be accessed from the project's own website address: <<http://www.casebooks.eu>>.

⁵ T. Wilhelmsson, 'The ethical pluralism of late modern Europe and codification of European contract law' in J. Smits (ed), *The Need for a European Contract Law* (Groningen: Europa Law Publishing, 2005) 123.

⁶ K. Featherstone, 'Introduction: In The Name of "Europe"' in K. Featherstone and C. Radaelli (eds), *The Politics of Europeanization* (Oxford: Oxford University Press, 2003) 12.

⁷ Twining writes sceptically of the 'loose and possibly rhetorical label of "globalisation"', W. Twining, *Globalisation and Legal Theory* (London: Butterworths, 2000) 2.

⁸ See K. A. Armstrong, *Governing Social Inclusion: Europeanization through Policy Coordination* (Oxford: Oxford University Press, 2010) 4.

⁹ 'A first step towards understanding Europeanization is to separate the different phenomena referred to by the term', J. Olsen, 'The Many Faces of Europeanization' (2002) 40 *Journal of Common Market Studies* 921, 923.

the notion of Europeanization we will uncover the post-national¹⁰ complexities at its core. This in turn will pave the way for a more reflective debate on the implications that such an understanding will have for the future design of contract law.

The following section examines the three¹¹ different perspectives from which the notion of *Europeanization of contract law* is often approached.

- Europeanization as the development of a contract law at the European level. From this perspective, Europeanization implies a *de-territorialization* of contract law and, concomitantly, its *transnational* (re)construction.
- Europeanization as the ‘entrance’ of European-derived rules, principles and policies into national contract law systems. From this perspective, the notion signifies the transformations to domestic contract law when exposed to European law.
- Europeanization as synonymous with harmonization.

Of course, there is much overlap between each of these perspectives, but they will be artificially separated for the purposes of full examination. It is to this analysis that we now turn.

Europeanization as the creation of a European contract law

Studied from this first heading, a definition of the Europeanization of contract law can be proposed as the emergence and development of contract law by European Union¹² institutions and actors with a governance

¹⁰ ‘Post-national’ is another popular, perhaps over-used, term. As Nico Krisch points out, although the term ‘post-national’ had been in use some time before Habermas made it prominent in the 1990s, Habermas, and others, gave it a broad meaning, denoting a more general decoupling of political processes from the state. The state becomes just one of a number of different actors amongst many, N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010) 5. This is the sense in which it is used in subsequent pages.

¹¹ Börzel depicts Europeanization as a *two-way* process, combining a ‘bottom-up’ and ‘top-down’ dimension and conceptually links the two by focusing on the ways in which Member State governments both shape European policy outcomes and adapt to them. The two dimensions broadly overlap with our first and second categories respectively, T. Börzel, ‘Pace-Setting, Foot-Dragging, and Fence-Sitting: Member State Responses to Europeanization’ (2002) 40 *Journal of Common Market Studies* 193, 193.

¹² Following the successful ratification of the Treaty of Lisbon in December 2009, the three-pillar structure of the European Union, as established by the Maastricht Treaty, has now been abolished. Yet, it should be noted that prior to this Treaty reform it is within the European *Community* pillar that European contract law has been developed. Although mindful of the historical division between Community and Union, this book will employ the term European Union throughout.

competence and capacity.¹³ The development of contract law under the auspices of the EU has become the European topic *du jour* and has attracted a great deal of interest from scholars, stakeholders and political institutions alike. As one might imagine, the subject has proved rather controversial. Since a central concern of this book will be to critically examine the EU's contract law programme, full discussion of the debates and controversies that surround the European development of contract law will not be rehearsed in these introductory pages but will instead be reserved for discussion in later chapters.

But, the development of a European contract law has resonance at another level, one that falls outside the particular institutional structures of the EU but which, at the same time, feeds into the EU's contract law programme. European contract lawmaking at the EU level of governance is complemented by other, more informal (or softer) processes that also play an important part in the Europeanization of contract law, within the sense of the meaning expressed within this sub-section. Most significant in these processes is the development of a European private law scholarship, a hugely important evolution in the legal landscape and a crucial ingredient in the de-territorialization of contract law. From the abundant body of scholarship, the concept of European private law materializes as a 'legal term of art' and an established discipline.¹⁴ Whilst the precise contours of the discipline may not be yet determined¹⁵ or may remain controversial,¹⁶ legal knowledge has started to be uprooted from the national legal system and a pan-European intellectual network has truly evolved.¹⁷ It is not an

¹³ This is what Olsen defines as institution-building at the European level of governance, J. Olsen, n 9 above, at 923. See also K. A. Armstrong, n 8 above, at 4.

¹⁴ A. Wijffels, 'A New Software-Package for an Outdated Operating System' in M. van Hoecke and F. Ost (eds), *The Harmonisation of European Private Law* (Oxford and Portland, Oregon: Hart Publishing, 2000) 102.

¹⁵ As the title of one academic article puts it; 'Europäisches Privatrecht – aber was ist es?' W. Brauner, (1993) 15 ZNR 225 (cited in A. Wijffels, *ibid.* 102).

¹⁶ An unambiguous definition for 'private law' is problematic at the national level, so it is not difficult to understand why determining the parameters of European private law proves elusive. For different definitions of private law within Germany and the USA see the illuminating discussion in R. Michaels and N. Jansen, 'Private Law Beyond the State? Europeanization, Globalization, Privatization' (2006) 54 *American Journal of Comparative Law* 843, 846–53. The notion of private law will be discussed in more detail below.

¹⁷ For the transformations that such a pan-European outlook to private law has brought to national private law thinking see M. Hesselink, *The New European Private Law: Essays on the Future of Private Law in Europe* (The Hague: Kluwer Law International, 2002) 46–9.

overstatement to assert that we are witnessing a Europeanization of private legal scholarship.¹⁸

Academic cooperation has become a key feature of the development of European private law and there now exists a myriad of academic networks. Much of the academic activity has organized itself into specific intellectual groupings with identifiable research objectives and unique agendas for each. Some of these dovetail neatly into the EU's programme of contract law and will be discussed in Chapter 4 below. Here it will be seen that academic activity does not rest solely in intellectual waters, but has channelled its scholastic efforts into very practical domains. Quasi-lawmaking aspirations can be discerned in a number of these groups, most particularly the Lando Group and the Study Group on a European Civil Code,¹⁹ both of which explicitly connect their scholarly work to the political and legal goal of the development of a European Civil Code.

The role of the academic as a 'lawmaker', even in the loose sense of this term, sits rather uncomfortably in some European jurisdictions, particularly the English and French legal systems where traditionally the academic has a far less dominant position in legal development than in other jurisdictions, such as Germany.²⁰ Chapter 4 will explore in more detail the contentious aspect of the academic as 'lawmaker', but one may be left to ponder on the ways in which the traditional role that the academic plays across the different jurisdictions in Europe may contribute to the configuration of the European private law project. For example, lurking within the strand of European private law discourse that is strongly favourable towards the

¹⁸ See R. Zimmermann, 'Europeanization of Private law' in M. Reimann and R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2007).

¹⁹ These groups are discussed in Ch 4 below.

²⁰ In Germany, the academic has traditionally had a very prominent position in lawmaking. This might be significant in shaping how academics perceive their role in matters relating to the European development of private law. Eg, the German academic's influence at the drafting stage of many early contract law Directives can clearly be felt in the structure and content of the rules. This being said, however, care must be taken not to over-generalize. In France, eg, the academic's role is certainly not negligible. One only has to look at the important role performed in law reform to see that it is often the scholar who drafts proposals, which are then presented to Parliament at a later stage. The academic's status in France can be contrasted with that in England where it is the Law Commission, a governmental body, who performs such a role of reform. As Hugh Beale relates, 'professionals' would never allow the scholar to play such a pivotal role in law reform, H. Beale, 'La Réforme du Droit Français et le "Droit Européen des Contrats": Perspective de la Law Commission Anglaise' (2006) 1 *RDC* 135. See also the view of Chief Judge DG Jacobs (Federal Appeals Court in New York), 'When Rendering Decisions, Judges are Finding Law Reviews Irrelevant' (*New York Times*, 19 March 2007).

development of a European contract law may lie aspirations of pre-eminence in lawmaking at a European level where it has been denied at the national.

More generally, the inevitable cooperation and cross-fertilization between a number of research institutions, all of which seem committed to the same goal—a common private law in Europe—creates synergetic effects. Such effects assist in the gradual construction of ‘carefully crafted building blocs of a larger edifice’²¹—the groundwork for a truly European private law. The development of this remarkable body of research emphasizes the ‘softer’, more organic approach to the Europeanization of private law.²² Whilst the principles, or sets of ‘model rules’, that result from these academic exercises can in no way be denoted as law in the formal (or ‘hard’) sense, nevertheless, they are invaluable in instilling the notion that a common European private law can thrive and that legal knowledge can be independent from national legal systems. Moreover, the existence and substantive quality of this body of soft law makes it an ideal tool for the development of a European private law education and an important element for the ongoing debate on the creation of a pan-European private law. Often appearing in casebooks or textbooks of European private law,²³ the soft law principles encourage a slow unifying of European legal culture within legal schools and literature.²⁴

For some, this truly European legal research is the triumph of private law’s Roman heritage and a revival of a pre-1800 *ius commune* where ‘a common European legal culture, centred around a legal scholarship and legal practice that were informed by the same sources, did

²¹ M. Reimann, ‘The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century’ (2000) 50 *American Journal of Comparative Law* 671, 695.

²² This softer approach has been viewed as evidence of a shift away from formalism towards substance in the new European private law, M. Hesselink, n 17 above. The notion of soft law is a very general term and has been used to describe a variety of processes. A core common thread is that, whilst there might be normative content, soft law processes are not formally binding. For further discussion on soft law in relation to EU integration, see D. Trubek, P. Cottrell and M. Nance, ‘“Soft Law”, “Hard Law” and EU Integration’ in G. de Búrca and J. Scott (eds), *Law and New Governance in the EU and the US* (Oxford and Portland, Oregon: Hart Publishing, 2006). For discussion that has particular relevance to European contract law, see Ch 6 below.

²³ Eg, the *Ius Commune Casebook on Contract Law* (H. Beale, B. Fauvarque-Cosson, J. Rutgers, D. Tallon and S. Vogenauer (eds), *Cases, Materials and Text on Contract Law* (Oxford: Hart Publishing, 2010)) positions the Principles of European Contract Law (the set of European contract law principles drafted by the Lando Group) prominently within each subject heading.

²⁴ D. Clark, ‘Nothing New in 2000? Comparative Law in 1900 and Today’ (2000/2001) 75 *Tulane Law Review* 871, 908.

once exist'.²⁵ The continental bias of this statement aside (English law has never really been a participant in this 'common' European legal culture) there have indeed been many observers who perceive that we are witnessing a *re-Europeanization* of private law, or a *Novum Ius Commune Europaeum*.²⁶ The thrust of this book, however, is that contemporary processes of Europeanization are of a vastly different proportion and kind than anything that has taken place before.²⁷ The novel European environment in which a European contract law is developing can only be superficially likened to the medieval climate in which the European *ius commune* flourished. If one is to understand the Europeanization of contract law in the twenty-first century, traditional paradigms must be forsaken. Instead, a conceptual reorientation and refashioning of the orthodox framework for understanding is required.

One largely positive repercussion of Europeanization, in the sense discussed here, is the opportunity it gives to haul the discipline of comparative law out of the sterile scholastic waters in which it had been submerged since the early twentieth century. The Europeanization of private law has provided the discipline with the chance to assert itself in the Academy. Comparative law has been beset with ontological difficulties since the time of the Paris Congress of 1900, an event widely considered as the 'birth hour' of modern comparative law²⁸ in the sense that it was the starting point of methodological and scientific comparative law proper.²⁹ Since then, debates have abounded over comparative law's justification and status as a discipline in its own right. At times it has been categorized as simply a

²⁵ R. Zimmermann, 'Roman Law and the Harmonisation of Private Law in Europe' in A. Hartkamp et al (eds), *Towards a European Civil Code* (The Hague: Kluwer Law International, 2004) 24.

²⁶ N. Roos, 'NICE Dreams and Realities of European Private Law' in M. van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Oxford and Portland, Oregon: Hart Publishing, 2004).

²⁷ Moreover, as Collins notes (H. Collins, *The European Civil Code: The Way Forward* (Cambridge: Cambridge University Press, 2008) 150–1), the notion that there was once a common European law needs to be qualified since it was more a common philosophical enquiry based on Roman texts rather than a common set of practically applicable laws. In this way, it is 'far-fetched' to think that the modern processes of Europeanization are simply the revival of an ancient uniformity.

²⁸ M. Reimann, n 21 above, at 671; W. W. Hug, 'The History of Comparative Law' (1931–32) 45 *Harvard Law Review* 1027; C. Donahue, 'Comparative Law before the Code Napoléon' in M. Reimann and R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006).

²⁹ E. Öricü, 'Methodology of Comparative Law' in J. Smits (ed), *Elgar Encyclopedia of Comparative Law* (Cheltenham: Edward Elgar, 2006) 442.

methodology.³⁰ All of this had left it at the periphery of mainstream scholarship. Attempts to bolster its status from within its own ranks have at times been cogently made³¹ but, even today, there remains a legacy of its lack of self-confidence and struggle to define its position to the external world.³² In this way, the practical project of EU contract law bestows on comparative law a *raison d'être* and a central preoccupation in the modern world. European private law throws comparative law a much-needed lifeline.³³

Returning to the more general theme of the creation of a contract law at the European level, it should be emphasized how this additional, European, level has huge practical significance. The European contract law that emerges, whatever its final purpose, form or substantive content, creates a supplementary layer of contractual norms to that already occupied by the national, international and privately regulated³⁴ realms of contract law. This raises vital issues concerning the nature of the interplay between these various layers of contract law and the optimal ways to manage the intricately webbed regulatory framework that ensues. The complex arrangements between the EU contractual norms and, in particular, those norms that are created at the national level, will be examined throughout this book. As we will see when we turn to our third definition of Europeanization below, it is this pluralist nature of contract law within Europe, and

³⁰ Gutteridge illustrates this point nicely (H. C. Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (Cambridge: Cambridge University Press, 1946) 1: "Comparative Law" denotes a method of study and research and not a distinct branch or department of law'.

³¹ O. Kahn-Freund, 'Comparative Law as an Academic Subject' (1966) 82 *Law Quarterly Review* 41; B. Markesinis, 'Comparative Law—A Subject in Search of an Audience' (1990) 53 *Modern Law Review* 1.

³² See the provocatively entitled article by M. Siems, 'The End of Comparative Law' (2007) 2 *Journal of Comparative Law* 133.

³³ The engagement, and perhaps one might even deem it usurpation, of the harmonization project by comparative law might suggest that the discipline has had new life breathed into it. Yet, whilst harmonization should have been the catalyst for re-thinking the discipline, owing to the epistemological complexities involved, some commentators contend that, unfortunately, comparative law has remained in an underdeveloped state; see M. Reimann, n 21 above, at 694. One might conclude that the harmonization project has obfuscated just how little the discipline has evolved since the time of the Paris Convention. See also G. Samuel, 'English Private Law in the Context of the Codes' in M. van Hoecke and F. Ost (eds), *The Harmonisation of European Private Law* (Oxford: Hart Publishing, 2000) 47. For a recent account of the relationship between comparative law and European private law see J. Smits, 'European private law and the comparative method' in C. Twigg-Flesner, *European Union Private Law* (Cambridge: Cambridge University Press, 2010).

³⁴ By this is meant the *Lex Mercatoria* which will be discussed later in this chapter and beyond.

the interaction and tension between each level that goes right to the heart of the notion of Europeanization as contended herein.

But there is also great conceptual significance in the development of contract law norms at the European level. This is because the practice implies the emergence of a transnational private law, thereby highlighting the corollary notion of the de-nationalization, or de-territorialization of private law. And, the development of a de-territorialized private law, that is to say, a private law that is not harnessed to the nation state mechanisms of lawmaking, forces us to confront what appears to be a 'state-less' private law and to rethink what seems to be an inextricable relationship between law and the state. From this perspective therefore, the Europeanization of contract law seems to suggest a fundamental transformation in the role of the state, recalibrating the relationship between the state and its private law.³⁵ It is little wonder that it is a topic that is 'fashionable, important and widely discussed'.³⁶ The conceptual challenges that transnational private lawmaking brings to the study of Europeanization are worthy of more detailed discussion. A section will therefore be dedicated to exploring this theme below. Before turning to this, however, two further dimensions of Europeanization need to be examined.

Europeanization as the transformation of national legal systems

The second perspective from which the notion of Europeanization can be approached relates to the transformations undergone within national legal systems owing to their exposure to and interaction with the processes of Europeanization depicted above. Whilst the opening remarks to this chapter emphasized the national significance of private law, private law's close associations with the state are evolving dramatically. One obvious reason for this can be attributed to contemporary developments in the political landscape—namely the creation of the European Union legal order—which have wrought changes upon national legal structures.³⁷ Rules created at the

³⁵ More generally, the notion of transnational law is theoretically challenging since it 'breaks the frames' (G. Teubner, 'Breaking Frames: The Global Interplay of Legal and Social Systems' (1997) 45 *American Journal of Comparative Law* 149) of the traditional national-international dichotomy that has inhabited the legal landscape for so long.

³⁶ N. Jansen and R. Michaels, 'Beyond the State? Rethinking Private Law' (Special Symposium Issue) (2008) 56 *American Journal of Comparative Law* 527, 527.

³⁷ Of course, the dynamics of globalization have important implications for law and legal theory, although fuller discussion is not within the scope of this book. See, amongst many examples, D. B. Goldman, *Globalisation and the Western Legal Tradition: Recurring Patterns of Law and Authority* (Cambridge: Cambridge University Press, 2007); W. Twining, *Global*

European level of governance must be accommodated within the legal systems of the Member States. Europeanization in this sense therefore, implies domestic adaptation to European pressures.

Historically, less attention has been paid to the effect of European law and governance on national legal structures, research instead tending to focus on the processes of political and legal integration at the *European* level, our previous category of analysis. However, with the re-launch of the EU integration process from the mid-1980s onwards and the gradually more intensive interpenetration between the European and domestic levels of governance, such a perspective became ripe for investigation and has now become the most popular way of describing Europeanization.³⁸ At the same time, this shift in analytical focus also reflects a broader movement away from what could now be regarded as an overworked and fruitless debate about whether the EU is a fledgling super-state or an intergovernmental regime. In reality, as will be seen below (Chapter 4), the EU is a more complex and multi-level legal order and represents a new form of political association which has no exact parallels or precedents and whose outcomes are therefore more contingent and uncertain.³⁹ This in turn demands the re-introduction of domestic politics and law into the understanding of European integration and a closer examination of the dynamics between the local and European.⁴⁰

In relation more specifically to contract law, Europeanization brings the EU market-oriented contract law alongside contract law that has been developed according to the particular values and choices of the nation state. The interaction and interplay between these legal orders brings transformations to the national level of contract law.⁴¹ Legal concepts,

Jurisprudence: Understanding Law from a Global Perspective (Cambridge: Cambridge University Press, 2009).

³⁸ J. Buller and A. Gamble, 'Conceptualising Europeanisation' (2002) 17 *Public Policy and Administration* 4, 9. The definition of Europeanization given by Twigg-Flesner in his recent book is typical; '[t]his book deals with the Europeanisation of contract law, that is, the impact of European Union legislation on domestic contract law', C. Twigg-Flesner, *The Europeanisation of Contract Law* (London: Routledge-Cavendish, 2008) xv.

³⁹ J. Buller and A. Gamble, *ibid.* 9.

⁴⁰ C. Radaelli, 'Europeanisation: solution or problem?' (2004) 8 *European Integration online Papers* (EIoP) No 16, 3 available at <<http://eiop.or.at/eiop/pdf/2004-016.pdf>>.

⁴¹ Of course, the interplay between legal orders has transformative effects on the European layer of contract law. European norms and principles (etc) are interpreted through national lenses, thus setting off processes of adaptation. This is an important element of the European harmonization programme and will be developed through the book.

rules, principles, styles and methods of reasoning are infected by the proximity to the European level of governance. And the assumption under which private law systems have traditionally operated—that private law systems (both civilian and common law) were closed from external⁴² interference—is swiftly breaking down.⁴³ We will return in more detail to this interplay between national and European contract law (Chapter 3), in addition to studying the manner in which some national lawyers have responded to the adjustments in national private law structures (Chapter 5).

Europeanization as harmonization

In much the same way that globalization is often somewhat lazily reduced to ‘universality’,⁴⁴ so Europeanization is often equated with the notion of harmonization. When utilized in this way, the concept of Europeanization encompasses both of the processes outlined above, but goes further in predicting the final shape and outcome of such processes. Causal properties are in this way attributed to the notion of Europeanization. In other words, and in relation more specifically to contract law, the contract law of Member States is seen to adapt in response to European influence in such a way that each legal system undergoes similar patterns of transformation and they begin to converge.

Much of the ‘blame’ (if we can call it that) for the predominance of the harmonization agenda can be attributed to the EU programme of contract law. In accordance with the principle of attributed competences (see Chapter 2 below), EU policymaking, contract law included, is only valid if it can be demonstrated that the appropriate powers, or competences to act, exist. It will be seen that the EU lacks any *explicit* competences to act in contract law.⁴⁵ Instead, the harmonizing provisions of the EU Treaty, themselves

⁴² ‘External’ meaning non-private law (eg constitutional or public) as well as non-national (eg international or regional) materials. In relation to this latter point, it should be noted that private law adaptations occur through proximity to other ‘layers’ of contract law such as the international and *Lex Mercatoria*. These additional sources of contract law will be examined in Ch 5 below.

⁴³ See H. Collins, ‘Governance Implications for the European Union of the Changing Character of Private Law’ in F. Cafaggi and H. Muir-Watt (eds), *Making European Private Law: Governance Design* (Cheltenham: Edward Elgar Publishing, 2008) 279.

⁴⁴ See the discussion in the introductory chapter to W. Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (Cambridge: Cambridge University Press, 2006).

⁴⁵ The Lisbon Treaty did not improve contract law’s constitutional status in this respect, see L. Miller, ‘European Contract Law after Lisbon’ in D. Ashiagbor, N. Countouris and I. Lianos (eds), *The EU after Lisbon* (Cambridge: Cambridge University Press, forthcoming 2011).

based on internal market goals, have been hijacked as a basis for contract law activity. Thus, measures in European contract law march to the beat of an internal market drum. However, whilst it might be claimed that contract law harmonization is normatively attractive for the internal market, as we will later see, the issue of whether common contract law rules facilitate market making is a contested one. And it has largely foreclosed debate on alternative and/or complementary goals that might orientate the EU activities. For example, the programme is eerily silent on fundamental issues such as whether the development of a European contract law might have political or symbolic significance.⁴⁶

And the discourse of harmonization has other implications, all of which have had a decisive impact on the shaping of European contract law. First, it has implied a shift from the local (national) towards a central (European) level of governance. We therefore find a *centralizing* rationale underpinning the European contract law programme. As we will see, the further the programme has progressed the more this centralizing rationale has taken hold. In this respect, the shift in harmonizing technique from minimum to maximum and the move from *consumer* contract law into *general* contract law will be examined.⁴⁷

A further implication of this drive for harmonization is that the design of European contract law becomes principally a *legislative* one. The assumption is that the drafting of common (binding) rules at the European level of governance can harmonize national contractual practices across the EU. Even where a non-legislative instrument emerges (such as the DCFR) it is typically viewed as a temporary, transitional stage before a 'superior' binding instrument (the CFR) is enacted.⁴⁸ In addition, this 'top-down' legislative strategy is buttressed by a hierarchical mode of governance that presupposes that the doctrine of the supremacy of EU law will be sufficient as a governance mechanism. Some of the newer forms of governance that have been embraced in other policy areas⁴⁹ are markedly underdeveloped in European contract

⁴⁶ Hugh Collins, eg, argues that the construction of a European Civil Code will form the basis for a transnational civil society, see n 27 above. This theme will be picked up at various points in the book.

⁴⁷ A counterpoint to this tendency is the Optional Instrument, discussed in detail in Ch 4. This instrument, if it is to finally appear, would express a *decentralizing* gravitational pull.

⁴⁸ The Draft Common Frame of Reference (DCFR) and the Common Frame of Reference (CFR) will be examined in later chapters.

⁴⁹ Such as, eg, environmental policy, see M. Lee, 'Law and Governance of Water Protection Policy' in J. Scott (ed), *Environmental Protection: European Law and Governance* (Oxford: Oxford University Press, 2009); J. Scott, 'REACH: Combining Harmonization and Dynamism in the Regulation of Chemicals' in J. Scott (ed), *ibid*.

law. Private law's lack of enthusiasm over 'new' governance is disappointing for, as we will see, it offers a range of tools that may be more fitting for a multi-level legal order such as the EU. Moreover, if, as this book contends, diversity and pluralism are unavoidable features of European contract law, then private law would do well to engage more directly with key components of the 'new' governance discourse. Newer forms of governance may be better suited to 'managing' this diversity and offer alternatives where traditional mechanisms of harmonization are found to be unsuitable.

As the themes of this book unfold, the deficiencies of this harmonization discourse are revealed and a more radical framework for understanding Europeanization explored. It will be contended that the notion of Europeanization involves far more complex processes than the construction and top-down imposition of European harmonizing rules. The multi-layered architecture of the *sui generis*⁵⁰ European legal order is characterized by an intricate interplay between the various levels of governance at which contract law in Europe operates. One-dimensional narratives that fail adequately to capture this plural and diverse landscape must be resisted. Instead, the contract law programme must be constructed far more closely around the post-national reality and a more sensitive, pluralist framework designed. Through its focus on *process* not outcomes and *coordination* as a central strategy for the governance of European contract law it is hoped that a more reflective debate on the future design of European contract law will be stimulated.

The challenges of transnational lawmaking

Before embarking on the central part of the analysis, one should pause to reflect on the significance of the development of private law outside of the state. As the introductory remarks to this chapter revealed, private law has been very closely associated with national boundaries and national lawmaking institutions. This would suggest that the transnational development of private law is a factor, if not of concern, at the very least of conceptual interest. In much the same way as the rise of the 'new' *Lex Mercatoria*⁵¹ has

⁵⁰ As held in *C-26/62 Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1. The nature of this unique legal order will be explored in Ch 5.

⁵¹ *Lex Mercatoria* can be loosely described as the body of commercial 'law' (its status as law is hotly contested) created outside of, and independently from the state by trading practices of the commercial community. It will be discussed in more detail in Ch 5.

fostered intense discussion as to the legitimacy and validity of lawmaking practices which are independent from the state,⁵² within the debate on European contract law one can detect traces of concern at the development of private law rules outside of traditional state mechanisms. Indeed, the transnational development of private law not only forces one to rethink and inevitably re-conceptualize private law's relationship with the state, but also challenges the classical notion of private law itself. Ironically, it is precisely because Europeanization moves us 'beyond the state' that we are more than ever forced to confront the nature of private law and its relationship to the state.⁵³

The nature of private law

A good starting point for reflecting on the significance of transnational contract law is to examine more closely the notion of 'private law'.⁵⁴ The following discussion introduces the theme by reminding the reader of the assumptions hitherto made in classical theory about the nature of private law.

Throughout European legal systems (and indeed in all Western legal systems) private law is said to encompass irrefutable categories of law; the law of obligations (contractual and non-contractual), the law of property and the law of persons (including family law). Identifying these core categories however is just the beginning of the enquiry into the definition of private law. A full set of criteria needs to be formulated. A helpful, albeit rather simplistic, framework can be found in a recent piece of work by Michaels and Jansen in which the traditional criteria associated with private law are enumerated.⁵⁵ Although the criteria interweave with each other, each will be taken in turn.

- Private law is depicted as involving private, as opposed to public interests. Since Roman times, private law has been defined in a way that strikes an

⁵² Eg, G. Teubner, 'Global Bukowina, Legal Pluralism in the World Society' in G. Teubner (ed), *Global Law Without a State* (Aldershot: Dartmouth, 1996); H. J. Mertens, 'Lex Mercatoria: A Self-applying System Beyond National Law?' in G. Teubner (ed), *ibid*.

⁵³ This observation has been also made in relation to globalization, R. Michaels and N. Jansen, n 16 above.

⁵⁴ For a recent collection of essays that examines the nature of private law see A. Robertson and T. Hang Wu (eds), *The Goals of Private Law* (Oxford and Portland, Oregon: Hart Publishing, 2009).

⁵⁵ R. Michaels and N. Jansen, n 16 above, at 846–51.

opposition to public law; private law is all that is not public law, or vice versa.⁵⁶

- Private law is concerned with corrective, rather than distributive, justice.⁵⁷ Although there remains much disagreement over what ‘corrective justice’ signifies it is generally accepted that it involves transactions between individuals. The public/private divide is again affirmed, for it is commonly held that corrective and distributive justice are ‘categorically’ or ‘conceptually’ distinct,⁵⁸ with public law relating to the latter.
- Private law involves relations between private parties, whereas public law concerns relations that include the state in its role of sovereign (rather than market citizen).
- This next distinction is said to generalize the previous; private law is not concerned with relations of subordination and domination by the state (a vertical relation) but is instead characterized by horizontal relations of equality.
- Private law is equated with private ordering. Since private ordering concerns the distribution of goods, services and capital through contracts, contract and property are the core elements of private law.
- Private law concerns norms created by private parties rather than norms created by the state.
- For continental jurisdictions, private law is also to be distinguished from public law since it is dealt with in ordinary courts, whereas public law matters go to special courts.⁵⁹

The amalgamation of all the above criteria can be said to constitute the *classical* theory of private law. It will be seen how such an understanding of private law ignores some of the profound changes that have transformed the nature of private law and which have eaten away at some of the traditional assumptions

⁵⁶ The distinction between public and private law was well formulated by Roman lawyers. In the third century A.D., Ulpian defined private law as the law that concerns private, as opposed to public interests, Dig. 1.1.1. (Ulpian); Inst. 1.1.4 (Ulpian). However, this distinction was neither factually nor conceptually clearly drawn. The reasons for this are suggested in N. Jansen and R. Michaels, ‘Private Law and the State’ (2007) 71 *Rabels Zeitschrift Fuer Auslaendisches Und Internationales Privatrecht* 345, 363. Later, in medieval times, the distinction between public and private law broke down (H. P. Glenn, ‘The National Legal Tradition’ <<http://www.ejcl.org/113/article113-1.pdf>>) to be restored again in modern times.

⁵⁷ For a detailed discussion on these two forms of justice and the relationship between them, see P. Cane, ‘The Anatomy of Private Law Theory’ (2005) 25 *Oxford Journal of Legal Studies* 203, 214–17.

⁵⁸ P. Cane, *ibid.* 215.

⁵⁹ For the history of this, see N. Jansen and R. Michaels, *n* 56 above, at 388–90.

under which the theory has operated. But caution should be urged, since the propositions seem rather under worked in many places. For example, one might wonder how comfortable a fit insolvency law is within the private law category if private law involves corrective, rather than distributive justice. And, if private law is said to be only concerned with norms created by private parties, there are additional categorization difficulties when one turns to tort law. Moreover, it is rather simplistic to understand private law as governing horizontal equal relations between individuals when it is clear that often, within supposedly equal private relationships, strong elements of domination are present.

Nevertheless, regardless of these deficiencies, one can draw from this private law description a key element for our discussion. This relates to the notion that private law is autonomous from public law, one of the central threads in classical theory. As already noted, this public/private separation has its roots reaching back into Roman times and, as might be expected from this heritage, has been more fiercely guarded in continental systems. For example, in France, the division has been deeply embedded, not solely in jurisdictional arrangements, but also in legal education and culture, meaning that the distinction has been a mutually self-reinforcing one.⁶⁰ In contrast, the English common law has for long been bedevilled by Dicey's observations on this matter. Dicey was of the opinion that such a distinction automatically implies a dual court structure, ultimately applying different rules to public officials than ordinary citizens. A public/private distinction would thus violate the principles of equality before the law. However, the influence of this 'Diceyan negative comparative law'⁶¹ has lessened in more recent decades and, from the time that both judges and jurists in England started to accept the distinction,⁶² the division has become far more marked.⁶³

⁶⁰ J.-B. Auby and M. Freedland, 'General Introduction' in M. Freedland and J.-B. Auby (eds), *The Public Law/Private Law Divide: Une entente assez cordiale* (Oxford and Portland, Oregon: Hart Publishing, 2006) 3. This book subjects the public/private divide to critical examination and demonstrates that even in continental jurisdictions the idea of a clear dividing line between the two domains has lost support. See also P. Verbruggen, 'The Public-Private Divide in Community Law: Exchanges across the Divide' in S. Gschwandtner, V. Kosta, H. Schebesta and P. Verbruggen, *The Impact of the Internal Market of Private Law of Member Countries* EUI Working Paper 2009/22.

⁶¹ M. Freedland, 'The Evolving Approach to the Public/Private Distinction in English law' in M. Freedland and J.-B. Auby (eds), *ibid.* 95.

⁶² M. Freedland, *ibid.* Freedland however is careful to document the non-linear, complex and unresolved path of this evolution.

⁶³ However, the common law position remains somewhat contested. For some, the common law operates, and should remain, as a unity. Dawn Oliver, eg, remarks that the divide might be convenient for educational reasons, but it is difficult to sustain in practice, D. Oliver, *Common*

One consequence of this categorization is that classical private law isolates itself within a discourse that prevents entry of notions such as the ‘common good’ of a constituency⁶⁴ or ‘welfarist’ (social and economic) considerations. Private law rules apply to horizontal relations between equal citizens and the adjudication of disputes between litigants (who are deemed equal citizens) involves consideration of individual rights and obligations as allotted between them by the contract. As already remarked, we are concerned with corrective justice. As such, within this sphere there is no room for recourse to the wider public policy concerns that the vertical, public law arena must embrace.⁶⁵ Public law, on the other hand, belongs to the sphere that involves vertical relations between the individual and the state and, rather than being a concern of corrective justice between equal citizens, involves distributive aims and wider policy concerns.⁶⁶

The question that now needs to be addressed is whether and, if so, in what way, transnational private lawmaking challenges this separation between public and private law.

The public/private divide: fitting for a post-national constellation?

It will be seen that, owing to the competence-driven nature of the Union’s powers, European Union law is functionalist and policy orientated. Chapter 2 will explore how the instrumental goal that drives EU contract law is the facilitation of the internal market. So, even when regulating in those areas typically perceived in national discourse as being within the ‘private law’ sphere, the objective of the European Union is to further competition and trade and create optimal conditions so that participation in the market can

Values and the Public-Private Divide (London: Butterworths, 1999) 14. Karl Klare goes further to state that ‘there is no public-private distinction’, K. Klare, ‘The Public-Private Distinction in Labour Law’ (1982) 130 *University of Pennsylvania Law Review* 1358, 1361 (cited in Oliver *ibid.* 248). Other commentators bemoan what they see as a public/private law distinction in the common law as a worrisome legal transplant and advocate that the transplant be reconsidered, see J.W.F Allison, *A Continental Distinction in the Common Law* (Oxford: Clarendon Press, 1996) Ch 2.

⁶⁴ D. Caruso, ‘Private Law and State Making in the Age of Globalisation’ (2006–2007) 39 *NYU J Int’l L & Pol* 1, 11.

⁶⁵ Adjudicatory practices in private law are therefore perceived as orderly and predictable.

⁶⁶ P. Cane (n 57 above) deconstructs the public/private dichotomy suggesting in particular that resting such categorization on the distinction between corrective and distributive justice deserves more analytical attention. This is something to be welcomed.

be extended to all.⁶⁷ Unlike the orthodox understanding of national private law therefore, EU private law is not aimed exclusively at the balancing of individual litigants' interests. European private law is guided by political, social, economic and other regulatory aims and is replete with mandatory, paternalistic and distributive provisions.⁶⁸

EU regulation therefore cuts across the pre-EU categorization of public and private categories.⁶⁹ In this respect, EU private lawmaking raises interesting definitional issues and, if taken to its logical conclusion, the notion of 'European private law' could be viewed from the classical perspective as oxymoronic. Transnational 'private' law, in the sense of EU internal market oriented lawmaking, can never be defined as 'private'—in other words, as a reflection of non-public (non-political) values. Moreover, and at least according to ordoliberal theory, European integration constitutionalizes transnational private law society;⁷⁰ the market integrative, policy-driven European private law, which has supremacy over national law, might even be defined as *constitutional* law.

Private law development by the European Union thereby unsettles orthodox understandings of the 'private' and the 'public'. In turn this should compel us to question the extent to which such concepts remain fitting for the post-national constellation. Interestingly enough, and

⁶⁷ It should be emphasized that, apart from the competition law provisions, the EU has no *explicit* competences in private law, even subsequent to the Lisbon Treaty amendments (see Ch 2). This has tended to reinforce the impression that a public/private law divide is present at the EU level. However, whilst, historically, the focus of EU law was on vertical relations between state and citizen, this is no longer the reality since the EU is now intimately connected with private law. This makes the dividing line between 'public' and 'private' more ambiguous. For further discussion see N. Reich, 'The Public/Private Divide in European Law' in F. Cafaggi and H.-W. Micklitz (eds), *European Private Law after the Common Frame of Reference* (Cheltenham: Edward Elgar Publishing, 2010).

⁶⁸ More recently, it has been recognized that private law in Europe must recognize fundamental rights and constitutional values. Eg, amongst a growing literature, G. Brüggemeier, A. Colombi Ciacchi and G. Comandé (eds), *Fundamental Rights and Private Law in the European Union* Vol 2 (Cambridge: Cambridge University Press, 2009).

⁶⁹ C. Joerges, 'The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective' (1997) 3 *European Law Journal* 378, 394. For this reason, the Draft Common Frame of Reference's exclusion of 'rights and obligations of a public nature' (I.-I:101(2)) from the scope of its application is 'fundamentally flawed' since it seeks to replicate the national public/private law divide which, as we have just seen, is meaningless in the EU context, see discussion on this point by S. Whittaker, 'The Draft Common Frame of Reference: An Assessment' Report commissioned by the UK Ministry of Justice (November 2008) 69–71.

⁷⁰ C. Joerges, 'European Challenges to Private Law: On False Dichotomies, True Conflicts and the Need for a Constitutional Perspective' (1998) 18 *Legal Studies* 146, 147.

somewhat disingenuously perhaps, the public/private law divide seems to have been resurrected by the European Commission, perhaps in an attempt to give political opacity to its contract law project. Private law's apolitical legacy with its supposedly neutral trappings is manipulated in an attempt to present its harmonization ambitions as a simply technical exercise, lacking in any political significance. We will see that in order to facilitate this approach the EU rhetoric in contract law is decidedly muted. Yet, since a European private law is necessarily internal market oriented, and therefore policy-driven, this private law language and identity seem rather ill-suited. Nevertheless, it will be seen to have remarkable endurance.

Furthermore, transnational private law could also be viewed as affecting the *reasoning* under which private law operates within national systems. This observation links to the introductory discussion above on the domestic transformations ensuing from European lawmaking. The operation of the EU legal order means that rules created at the European level of governance need to be incorporated within domestic legal systems. Insofar as contract law rules are concerned, the regulatory, internal market flavoured norms must sit within private law frameworks that, as we have just observed, have been constructed by means of a logic that traditionally denies the presence of a public interest element.

One of the central tenets in Western contract law discourse is that there are two radically separate techniques of governance, the distinction often articulated as that between regulation and private law.⁷¹ The latter is associated with the formal legal rationality of nineteenth-century states and the former with the rise of the Welfare State and its drive to secure protective interventions as a bulwark against the neutrality of private law. In this respect, regulation is perceived as being concerned with social goals deemed necessary to protect the weak and needy. The particularistic and instrumental nature of regulation contrasts with the features of private law. As discussed, private law is traditionally understood as a pre-political system of support for private ordering in civil society.⁷² It is associated with a legal rationality that creates a neutral framework for ensuring formal equality amongst individuals and protecting established individual rights.⁷³ From this account, features of European contract law can be recognized in

⁷¹ H. Collins, 'The Alchemy of Deriving General Principles of Contract Law from European Legislation: In Search of the Philosopher's Stone' (2006) 2 *European Review of Contract Law* 213, 216.

⁷² H. Collins, *Regulating Contracts* (Oxford: Oxford University Press, 1999) 57.

⁷³ H. Collins, n 71 above, at 216.

the regulatory technique of governance. European contract law is instrumental, its lodestar being the internal market goals of the Treaty. It is not based on an account of the formal equality of individuals but seeks to redress market imbalance through protection, principally, of the consumer. These regulatory features distinguish European contract law from the private law systems of the nation state⁷⁴ and mean that reasoning in national private law has to be adjusted as far as possible to achieve European regulatory goals, which in practice means the inclusion of consequentialist or instrumental reasoning as the dominant guide in private law.⁷⁵ This creates an additional element of complexity to accompany the technical difficulties encountered through the assimilation of European contract law into domestic systems, as demonstrated in Chapter 3 below.

But one should be wary of attributing Europeanization, or transnational private law, as the sole factor for the transformations in private law. The changing nature of private law needs to be contextualized and a whole range of other factors must also be taken into account. For it could be said that European private lawmaking simply accelerates a process already begun. Under this line of reasoning there would be nothing particularly innovative, or conceptually significant, about transnational private lawmaking. For example, it is unarguable that this classical theory of private law has been subject to a number of assaults and the notion that private law does not involve public interests has been trenchantly challenged. From the time of the American Realists in the early twentieth century, and then within Critical Legal Theory,⁷⁶ the public law values inherent in private law have been exposed.⁷⁷ For example, in the 1920s and 1930s the Realist

⁷⁴ The distinction can be seen in EU measures such as the Unfair Commercial Practices Directive (2005/29/EC) where Article 3(2) states that the 'Directive is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract' thereby assuming that it is national contract law which will establish the general background rules relating to the contract and EU regulation which will deal with any unfair practices related to the same transaction. The two spheres of law are supposedly mutually exclusive. For criticism of this see L. Miller, 'After the Unfair Contract Terms Directive: Recent European Directives and English Law' (2007) 3 *European Review of Contract Law* 88. As we will see below, some authors, notably Hugh Collins, contend that the state's private law discourse has been permeated so deeply by the regulatory logic of governance that the contrast between regulation and private law is no longer tenable, H. Collins, n 72 above.

⁷⁵ H. Collins, n 72 above, at 53.

⁷⁶ Cane observes that the debunking of the public/private law divide is one of the most consistent themes of critical legal theory, P. Cane, n 57 above, at 212.

⁷⁷ The account here does not linger on the quite marked distinctions between US and European law. In this respect, it should be noted that the public/private divide has been a more

interpretation of contractual governance sought to reveal the falsity in the apolitical conception of contract—the individualist liberal narrative of rational individuals consenting to mutually beneficial exchanges—as well as to underline the ideology behind private law that has been obfuscated in classical theory. This critique, spearheaded by legal, economic and social theorists such as Karl Llewellyn,⁷⁸ Robert Hale⁷⁹ and Morris Cohen,⁸⁰ underlines how the seemingly private arena of private law is in fact shaped by public policy and by societal concerns such as enforcing a certain kind of distributive justice.⁸¹ '[T]he law of contract may be viewed as a subsidiary branch of public law'⁸² which collapses the distinction between private and public law.⁸³

The legal realists therefore dismissed the traditional view of contract and property as private rights that the state must accept and enforce as it finds them, and exposed these rights as public powers vested in rightsholders to engage the state's help in enforcing their interests. Apolitical private law started to be seen (at least by realists and critical legal theorists) as political public law.⁸⁴

The influence of this scholarship is clearly felt on this side of the Atlantic, and the discourse has permeated deeply into European works.⁸⁵ After all, the ability to acquire bona fide the property of a third party, or the question

persistent feature in European (continental) systems than in the US. Even in times of legal formalism, the distinction between public and private law was of less normative significance in the US than on the European continent. J. H. Merryman, 'The Public Law-Private Law Distinction in European and American Law' (1963) 17 *Journal of Public Law* 3.

⁷⁸ K. Llewellyn, 'What Price Contract?—An Essay in Perspective' (1993) 40 *Yale Law Journal* 704.

⁷⁹ R. L. Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) 38 *Political Science Quarterly* 470.

⁸⁰ M. R. Cohen, 'The Basis of Contract' (1932) 46 *Harvard Law Review* 553.

⁸¹ Eg. M. R. Cohen, *ibid.* 584.

⁸² M. R. Cohen, n 80 above, at 591.

⁸³ M. R. Cohen, 'Property and Sovereignty' (1927) 13 *Cornell Law Quarterly* 8, 10–11.

⁸⁴ D. Kennedy, 'The Stages of the Decline of the Public/Private Distinction' (1982) 130 *University of Pennsylvania Law Review* 1349. Although, for an influential contrary position see E.J. Weinrib, *The Idea of Private Law* (Cambridge, Mass: Harvard University Press, 1995) where private law is considered as having its own immanent logic and cannot be understood as having external values. For Weinrib, 'private law is—and can be nothing but—the legal manifestation of independently justifiable goals', *ibid.* 6. Curiously, and as Cutler points out, whilst the public/private law divide was facing criticism nationally, international law largely escaped attack and the domain of private international law remained isolated from public international law issues. A. C. Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge: Cambridge University Press, 2003).

⁸⁵ Eg. D. Caruso, 'The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration' (1997) 3 *European Law Journal* 3; M. Hesselink (ed), *The Politics of a European Civil Code* (The Hague: Kluwer Law International, 2006).

of how to design the legal form of business enterprises, have always been guided by the *public* interest in a flourishing market.⁸⁶ Differences between the two spheres of law are far less sharp and far more complex and multi-dimensional than classical legal theory would have one believe. It is now commonplace to depict private law as having public policy goals and to examine the place of instrumentalist thinking in private law scholarship.⁸⁷

Furthermore, attributing the transformation of national private law to solely EU transnational lawmaking could be considered as somewhat misleading since it omits to incorporate the rather important ramifications flowing from trans-border business activities—a concept already referred to in this chapter as the *Lex Mercatoria*. We will return to this concept later in this chapter and again in Chapter 5. In brief, it relates to the body of rules that are formed by and which regulate the increasingly prevalent networks of business actors often operating across territorial borders. These trade practices produce an additional layer of contractual norms that fall outwith the reach of state regulation⁸⁸ and which must operate alongside other sources of contract law, namely the national, European and international. Later chapters will explore the complexities that are generated by the subsequent plural sources of contract law. In addition, the analysis will also suggest that there are opportunities to be grasped from a landscape of pluralism. But, for our purposes here, two central elements should be highlighted. First, *Lex Mercatoria* can be identified as an additional factor responsible for blurring the boundary between public and private law. As transnational business practices increase in frequency and merchant autonomy asserts itself with greater authority, then political authority is reconfigured. One consequence of this is the decline of the public/private distinction.⁸⁹

Secondly, it should also be noted that this business community generates a huge amount of law, a large proportion of which is adjudicated outside the

⁸⁶ N. Jansen and R. Michaels, n 56 above, at 351.

⁸⁷ See the set of debates about the nature of private law in A. Robertson and T. Hang Wu (eds), n 54 above.

⁸⁸ The debate relating to whether *Lex Mercatoria* is beyond the reach of the state is far more complex than this brief account reveals. Since ultimate enforcement of the 'law' of this business community rests with the state (through application of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards) there is much debate as to whether in fact it is a self-sustaining 'system' of law. Whilst of great interest, this debate lies outside the scope of this book. See, H-J. Mertens, n 52 above.

⁸⁹ For a fascinating and detailed analysis of the role of *Lex Mercatoria*'s impact on the public/private law divide see A. C. Cutler, n 84 above, esp 182–3.

national judicial institutions. The choice of arbitration tribunals as the preferred adjudicative fora has a significant impact on the development of national law, most particularly the common law. Since proceedings remain confidential, and are therefore not published, the usual organic development of the common law is greatly stunted in the sphere of commercial private law since litigation less frequently reaches the national courts. As a result, large areas of commercial law become cut off from the 'living law'. The detrimental impact on national law has been insufficiently documented and has largely gone ignored, yet it is submitted here that these transnational private lawmaking practices have, and will have, huge significance for the operation and evolution of private law, particularly within the common law jurisdiction.

The private law sphere has also been susceptible to other attacks, this time from internal sources. Whereas EU private lawmaking was perceived as having degenerative effects on national private law reasoning (and we will see further examples of this below) one could cogently argue that the private law field has also been 'contaminated' by state instrumentalism. Regulatory statutes that parachute 'welfarist' concerns into its sphere⁹⁰ have been relevant factors that have changed the character of private law. This means, as Collins observes, that '[f]ormer sharp contrasts drawn between private law and regulation no longer describe accurately the legal reasoning process involved in private law. Private law has become a hybrid of reasoning that seeks to combine both the rights-oriented reasoning of private law with the policy-oriented, instrumental character of regulation'.⁹¹ Thus, there has been an evolution in legal reasoning within national legal systems that allows policy-oriented thinking to enter private law adjudicative processes.⁹²

With all this in mind, the tendency to attribute sole causal blame on the European Union's lawmaking practices for the transformations to domestic private law should be attenuated. It could even be claimed that the clash between so-called private and regulatory law through Europeanization processes may encourage wider debate about the precise nature and role of private law in contemporary times. Private law theory will only be

⁹⁰ For a critique of this from the common law (US) perspective, see G. Calabresi, *A Common Law for the Age of Statutes* (Cambridge, Mass: Harvard University Press, 1982).

⁹¹ H. Collins, n 43 above, at 276.

⁹² As Collins observes, judges are expected to consider the consequences of their decisions in the light of social welfare and economic efficiency. This 'hybrid' private law vindicates established individual rights as well as promoting social and economic goals, H. Collins, n 43 above, at 277.

convincing if it can work out a way to capture the porous nature of legal orders and the implications that these non-national private law influences will have for traditional understandings of private law.

Private law and the state

A further assumption under which private law has traditionally operated is that the state and private law are intimately and inextricably connected. We will see how this relationship has been conceptualized as a particularly close one, particularly insofar as the European civilian systems are concerned where private law's validity has been traditionally viewed as resting on the state.⁹³ In the light of this observation, *prima facie* the Europeanization of private law, or the transnational development of private law, appears to reflect a hugely significant evolution on the private law stage. This in turn, raises a variety of conceptual issues relating to private law's independence⁹⁴ from the state. The following discussion will examine the nature of the relationship between private law and the state, and assess the extent to which transnational lawmaking renders fragile such linkage.

Private law and the state have been said to be intimately associated with each other ever since the continental European legislators appeared on the scene in the eighteenth and nineteenth centuries.⁹⁵ From this time, private law has proved a valuable tool for asserting the state's sovereignty and for reinforcing national identity. Of course, Montesquieu and Savigny had already entrenched the connection between law and the nation. In Montesquieu's *De L'Esprit des Lois* (1748), law was seen to be the product of a specific legal culture and deeply inseparable from its particular geography and political environment. Savigny, for his part, proclaimed that law

⁹³ The assumption has been that whilst the *substance* of private law is a matter of corrective justice and guides relations between individuals, law's (including private law's) *validity* depends on the state. Thus, the state is represented as a *neutral authority* which is disinterested in bringing external (public) interest concerns into private law but which is dominant over private law in the sense of the monopolization of its creation and administration. The state therefore emerges as a neutral sovereign that balances the conflicting relationships between individuals in their purely private disputes, N. Jansen and R. Michaels, n 56 above.

⁹⁴ Although, the idea of 'independence' has been depicted as a rather ambiguous notion, see N. Jansen and R. Michaels, n 56 above, at 371.

⁹⁵ Even before the appearance of the modern nation state, attempts to publicly control and administer private law can be observed. The development of Roman law is particularly revealing since it provides a history of increasing public domination over private law long before the rise of the modern state, see Jansen and Michaels, n 56 above, at 357.

was embedded in national culture, which he understood as the *Volksgeist* (or spirit) of the people. From both of these perspectives therefore, the linkages between the state and private law had been accentuated. But this idea took a more active form during the period of the continental codifications. During the Enlightenment era, the drafting of civil codes was perceived as a natural exercise to undertake since the practice reflected the principles of rationality and systematization, principles that lay at the heart of this period in time. But the resulting codes also proved ideal instruments for continental leaders to extend their powers into private law since the code was a manifestation of the power of the legislator and of the state's power to shape and control the law.⁹⁶ It was the legislator that was to be at the helm of lawmaking, and the legislator that ultimately determined the legal rights of its subjects. Other legal actors, notably the judiciary, were sidestepped⁹⁷ as the code professed to contain a coherent, systematic and pre-determined set of principles that could be logically applied to any variety of factual situations.⁹⁸ In short, the code spoke of the power of the state in civil matters, thereby entrenching the state's position in relation to its private law.⁹⁹

A code was also a mechanism for nurturing and consolidating national identity, further strengthening the nexus between the state and its private law. This one legal instrument provided the state with a coherent body of law, governing private law relationships within defined geographical borders; features which defined the modern European state. Underlying the enactment of the codes was the aspiration of a common culture, a single language through which to express that culture and a national identity to distinguish one people from another.¹⁰⁰

The account outlined so far emphasizes how the concept of a European private law is likely to raise a whole variety of conceptual, systematic and political questions about the possibilities of private law existing independently from the state. Transnational private law seems to run counter to, or at least challenge, the assertions hitherto made of the connections between

⁹⁶ N. Jansen and R. Michaels, n 56 above, at 378.

⁹⁷ In France, the *Code civil* provided a governmental bulwark to protect from the excesses of a corrupt judiciary.

⁹⁸ The code was to be *applied*, rather than *interpreted*, by the judge. As Montesquieu pithily and infamously put it, 'le juge est la bouche de la loi'.

⁹⁹ In relation to France, the *Code civil* was an essential component of Napoleon's state-making agenda, D. Caruso, n 64 above, at 6.

¹⁰⁰ The emergent Eastern European codifications show the modern day relevance of this idea, D. Caruso, n 64 above, at 26.

the state and private law.¹⁰¹ The development of a European contract law forces us to confront what appears to be a 'state-less' private law and to rethink common assumptions about the relationship between law and the state.

However, one should be careful before drawing hasty conclusions about the problematic nature of transnational private law. First, the rather formal account of codification given above, and the one commonly disseminated in scholarship, neglects to include the central role of judges and academics in the development of the law. Legal development has never been fully within the grasp of the legislator. Codes are not static monoliths but, regardless of what constitutional theory might hold, have been subject to the interpretive forces of the judiciary who has been entrusted with the gradual development of the codes to align them with the social and political mores of the time. And a complementary role in lawmaking processes has also been occupied by the jurist¹⁰² by means of the publication of persuasive commentary and case notes, and through expert assistance with legislative texts, prior to parliamentary submission. In this way, private law has retained a significant autonomy from the state, even where codifications have occurred, making the existence of transnational private lawmaking a less troublesome phenomenon than might at first appear.¹⁰³

These observations can be connected with other transformations. We have already mentioned the transnational mentality that has invaded academic practices. This too has given private law a 'liftoff'¹⁰⁴ from its national harnesses. In addition, there is the role of the judge who is increasingly participating in cross-border judicial activities. For example, ever more receptive to comparative law¹⁰⁵ and to opportunities for learning from other jurisdictions, the judge is becoming remarkably open to a cross-jurisdictional

¹⁰¹ Of course, where European private law begins to adopt the rhetoric of codes and codifications (see Ch 4 below) then questions of a more political nature are raised, such as whether there are statal ambitions behind the European private law project.

¹⁰² The relationship between law, as promulgated by the state, and law as understood by the jurist, is described as 'symbiotic' in J. Gordley, 'The State's Private Law and Legal Academia' (2008) 56 *American Journal of Comparative Law* 639. For more on the jurist's role in relation to the development of European private law see Chs 4 and 5 below.

¹⁰³ N. Jansen and R. Michaels, n 56 above, at 394.

¹⁰⁴ This imagery is borrowed from R. Wai, 'Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an era of Globalisation' (2002) 40 *Colombia Journal of Transnational Law* 209.

¹⁰⁵ B. Markesinis and J. Fedtke, 'The Judge as Comparatist' (2005–2006) 80 *Tulane Law Review* 11.

dialogue with courts across the world. In an attempt to resolve legal problems, even where there is no foreign element, judges are borrowing from other courts.¹⁰⁶ In addition, the modern judge is a far more mobile and social individual, sacrificing the intellectual and physical comfort of their own jurisdiction to actively engage in external programmes and cooperate with other courts. These issues are returned to in Chapter 6, but for now it should be noted that the prevalence of these and other forms of judicial interaction is a further dimension in the transnational development of private law. Intellectual barriers are penetrated and common understanding across jurisdictions grows. Private law begins (albeit gradually) to loosen its roots from national soil and the independence of private law from the state emerges as a more common contemporary theme.

Moreover, just as this chapter cannot ignore it, the debate on private law's relationship with the state cannot sidestep the thorny topic of the 'new' *Lex Mercatoria*, or the law merchant. Contemporary times have witnessed the proliferation of the 'privatization' of standard making bodies and private lawmaking arrangements which highlight the significant amount of law that is now being privately made.¹⁰⁷ Accounts of the 'new' *Lex Mercatoria*, whilst fascinating for the theoretical conundrums they pose as to the normative status of the norms that are created,¹⁰⁸ also suggest that the state has lost its power in the private lawmaking realm and that, subsequently, the relationship of the state with private law has altered. The de-territorialization of private law is often depicted as accelerating a phenomenon referred to as 'the retreat of the state'. This suggests that private lawmaking practices have contributed to the dwindling status and unity of the state. But the discourse on *Lex Mercatoria* also emphasizes an historical aspect to the debate on the significance of European private law, for one should be reminded of the medieval roots of the 'new' *Lex Mercatoria*. With its legacy in the trading practices of medieval guilds, the existence of a medieval *Lex Mercatoria* might suggest that there have always

¹⁰⁶ The practice is most commonly referred to as 'transjudicial dialogue', see, eg, A.-M. Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004) esp Ch 2.

¹⁰⁷ See F. Snyder, 'Private Lawmaking' (2003) 64 *Ohio State Law Journal* 371. The prevalence of the law merchant shows how legal theory does not sit comfortably with reality. Private actors are increasingly functioning authoritatively but this is rendered invisible by an ideology that defines the private sphere in apolitical terms, A. C. Cutler, n 84 above.

¹⁰⁸ See, amongst a burgeoning literature on this subject, P. Zumbansen, 'Piercing the Legal Veil: Commercial Arbitration and Transnational Law' (2002) 8 *European Law Journal* 400; H.-J. Mertens, n 52 above.

been systems of private law without the need for a state or, for that matter, of any structures of power and authority.¹⁰⁹ With justification one might therefore wonder whether there is really anything so particularly significant in the relationship between private law and the state.

If one wishes to downplay even further the significance of Europeanization for the relationship between private law and the state, one might add that it is difficult to describe the European Union's lawmaking processes as 'state-less'. The reason for this is that Member States retain significant powers in the development of European private law through their powers in the European Council. All that is adjusted is the level of 'statehood' at which lawmaking takes place—a shift from the national to the supra-national. Lastly, and perhaps most importantly, private law has always been seen as maintaining at least a partial autonomy from the state owing to the development of its own normative rationalist and value system. Thus autonomy does not flow wholly from governmental authority nor from democratic establishment but 'from [private law's] basis in reason and its systematic character'.¹¹⁰

It will have been noticed that so far little attempt has been made to analyse the position of the common law, and its relationship with the state. The connections between the state and private law are far less tightly woven in the common law jurisdiction than in the civilian. Transnational private law activities are therefore expected to be less troublesome to a common lawyer. One might instinctively attribute this to the position or, more accurately, the independence of the judge in the common law. If a system perceives the judiciary as lying *between* the state and the legal system, rather than as being *part of* the state, then this naturally entails limits to the sovereignty of the state.¹¹¹ And of course, it is reasonable to assume that the uncoded nature of the English common law is at least partly responsible for the way that discourse has been structured within this jurisdiction, giving little encouragement to explicitly focus on the state-making functions of private law. One should not forget that, owing to the efforts of Jeremy Bentham, the idea of codification has been flirted with¹¹² and, at

¹⁰⁹ For arguments in support of this see, C. Donahue, 'Private Law Without the State and During its Formation' (2008) 56 *American Journal of Comparative Law* 541.

¹¹⁰ N. Jansen and R. Michaels, n 56 above, at 528.

¹¹¹ N. Jansen and R. Michaels, n 56 above, at 382–3.

¹¹² It was Jeremy Bentham, a common lawyer, who was one of the earliest modern proponents of codification (indeed, 'codification' was a word coined by him) and, although failing to make headway, it was Bentham who attempted to introduce the idea to the common law.

times, discussion has been quite fierce. But the supposedly natural connections between private law and the state, so often voiced in the civil law, did not overrun the debate. In addition, more modern times have witnessed an exponential increase in the amount of legislation produced by the UK Parliament. Yet, this has not been a factor resulting in a tightening of the conceptual associations between English private law and the state either. Perhaps the fact that the validity of the common law is perceived to rest on the 'people' rather than the state (law is to be found, rather than made)¹¹³ can also account for the common law's distinctiveness.

The discussion so far has introduced some of the more conceptual issues that relate to the development of private law outside of the state and what these might suggest both for the notion of private law as well as its relationship with the state. The Europeanization of private law (in all senses used above) has a tendency to generate rather heated responses from those who enter the debate. Sometimes, this might be justified, particularly when it relates to issues concerning the legitimacy and authority of those institutions which create binding norms. But at times, the discourse is populated with under-articulated, knee jerk reactions to what is seen as inappropriate intervention in hallowed private law ground. It is hoped that the preceding observations have helped to clarify some of the more commonly made assumptions about private law, and in turn prepare the ground for a more reflective discussion. The conceptual ground partly paved, let us now turn to a more tangible aspect of Europeanization: the EU's contract law programme.

¹¹³ Although the view that common law judges 'make' rather than simply 'discover' the law is no longer especially controversial, see, eg, F. Schauer, 'Do Cases Make Bad Law?' (2006) 73 *University of Chicago Law Review* 883, 886.