

Contents

<i>Preface</i>	v
<i>Summary Contents</i>	vii
<i>List of Contributors</i>	xv
Prologue – Of Pluralism and European Private Law <i>Leone Niglia</i>	1
PART ONE THE NEW PARADIGM: PLURALISM BETWEEN PRIVATE LAW AND CONSTITUTIONALISM	
Overview of Part One – The New Paradigm: Pluralism Between Private Law and Constitutionalism <i>Leone Niglia</i>	9
1 The Double Life of Pluralism in Europe <i>Leone Niglia</i>	13
I. Pluralism and Constitutional Law	14
II. Pluralism and Private Law	16
III. New Developments in Constitutional Pluralism and the Possibility of a Post-Formalist Framework for Analysis	19
A. Of formalism	20
B. The possibility of a post-formalist epistemic framework	22
i. The post-formalist path in constitutional law	23
ii. The post-formalist path in the private law discourse	25
IV. A Non-Conclusion – A New Beginning	27
2 Monistic Ideology versus Pluralistic Reality – Towards a Normative Design for European Private Law <i>Hans-W Micklitz</i>	29
I. A Short Narrative on Two Grand Projects and the Consequences of Their Failure	29
II. Traditional Nation State Private Law versus Modern European, Market State Private Law	33
A. EU competence as a conflict over the design of European private law	35
B. The 2001 Communication translated into the struggle over the design of European private law	36
C. The innovative character of European regulatory private law	38
III. The Multiplicity of Private Law Regimes in the EU	41
A. Conflict and resistance	42
B. Intrusion and substitution	45
C. Hybridisation	47
D. Convergence	49
IV. The Current State of Affairs and Some Tentative Conclusions	50

x *Contents*

3	The Poverty of Global Constitutionalism	<i>Massimo La Torre</i>	53
	I.	Happy Ever After?	53
	II.	Global or Supranational Constitutionalism	56
	III.	The Emergence of Global Constitutional Law	59
	IV.	European Constitutionalism	63
PART TWO COMPARATIVE AND HISTORICAL PERSPECTIVES			
	Overview of Part Two – Comparative and Historical Perspectives		
	<i>Leone Niglia</i>		69
4	Pluralism and Private Law in the Union	<i>Norbert Reich</i>	73
	I.	The Different Aspects of ‘Pluralism’ of Private Law in the Union	73
		A. Vertical dimension	74
		B. Diagonal dimension	75
		C. Horizontal dimension	78
	II.	Non-Discrimination as a ‘General Principle’ of EU Law	79
	III.	Non-Discrimination in Private Law Relations: Pluralism of or Conflict with Autonomy?	80
	IV.	Citizenship and Non-Discrimination to Implement Autonomy	83
	V.	A Recent Controversy: Unisex Tariffs in Insurance and Conflicts with Private Autonomy	86
		A. A ‘monist’ reading of the non-discrimination principle by the ECJ?	86
		B. A possible critique of the judgment: too much ‘equal treatment’, too little autonomy left?	90
	VI.	Non-Discrimination of Access to and Treatment in Services of General Economic Interest and in Network Services: Limited Autonomy	91
	VII.	Conclusion: A ‘Pluralist Concept’ of Autonomy Coexisting with ‘Equal Treatment’	93
5	European Contract Law Through and Beyond Pluralism – the Case of an Optional Instrument	<i>Bénédicte Fauvarque-Cosson</i>	95
	I.	Introduction	95
	II.	Towards an Optional Instrument in European Contract Law	98
		A. The Expert Group	99
		B. The consultation launched by the Green Paper and its results	100
	III.	An Innovative Approach	101
		A. The insertion of the optional instrument in the European legal context	102
		i. Consistency with EU law	102

ii.	Coexistence with national legal systems	103
B.	The application of the optional instrument at the international level	104
i.	The choice of the optional instrument: beyond Europe	105
ii.	Relationship between the optional instrument and the 1980 UN Convention on the International Sales of Goods	105
iv.	Conclusion	106
6	Legal Pluralism in Europe: National Laws, European Legislation, and Non-legislative Codifications <i>Nils Jansen</i>	109
I.	An Historical Introduction	109
II.	Formal and Informal Authority in the Law	112
III.	The Present State of European Law	119
A.	Informal authorities	119
B.	Harmonising European private law	121
IV.	Legal Pluralism in European Private Law Today	126
V.	Conclusion	128
PART THREE THEORETICAL PERSPECTIVES		
	Overview of Part Three – Theoretical Perspectives <i>Leone Niglia</i>	133
7	Why We Have No Theory of European Private Law Pluralism <i>Ralf Michaels</i>	139
I.	Introduction	139
II.	Legal Pluralism and Private Law	140
A.	‘Weak’ or juridical legal pluralism	141
B.	‘Strong’ or sociological legal pluralism	142
C.	Critique of legal pluralism	143
III.	A Communitarian Pluralism – Pierre Legrand	144
A.	Pluralism and choice	144
B.	Just and unjust communities	146
C.	‘Antirrhesis’	147
IV.	A Liberal Pluralism – Jan Smits	149
A.	Legal pluralism and choice	150
B.	Mandatory and facilitative rules	151
C.	The marketplace for rules and ideas	152
V.	A Postmodern Pluralism – Wilhelmsson	153
A.	External pluralism and internal coherence	154
B.	Pluralism and systems of law	156
C.	Irritants	157
VI.	Concluding Remarks	158

8	A Radical View of Legal Pluralism	<i>Jan Smits</i>	161
	I.	Introduction	161
	II.	Legal Pluralism: A Matter of Perspective	162
	III.	Legal Pluralism and Private Choice	165
		A. Introduction	165
		B. The pluralism of justice	165
		C. The potential and limits of party choice	168
	IV.	Conclusions	171
9	A Radical View of Pluralism? Comments on Jan Smits	<i>Brigitta Lurger</i>	173
10	The Economics of Harmonising Private Law Through Optional Rules	<i>Fernando Gomez and Juan Jose Ganuza</i>	177
	I.	Introduction	177
	II.	The Optimal Construction of Harmonised European Rules in Private Law	182
	III.	Full Harmonisation, Minimum Harmonisation and Optional Harmonised Rules	185
	IV.	The Implementation of an Optional European Standard: Why Firms Will Opt In	189
	V.	Implications of the Analysis and Conclusions	195
11	How Many Systems of Private Law are there in Europe?		
		<i>Martijn W Hesselink</i>	199
	I.	Multi-Level Lawmaking and the Plurality of Legal Sources	199
	II.	The Value of System	201
		A. Underlying values	201
		B. Valuable practices	203
		C. We need an answer	205
	III.	A Matter of Fact or Concept?	206
		A. An empirical question?	206
		B. An analytical question?	208
		C. The dynamic nature of the EU and the question of finality	209
	IV.	Senses of Belonging	211
		A. The nationalist view	212
		i. Nationalism	212
		ii. European Union	212
		iii. How many systems?	213
		iv. CESL	214
		v. Critics	214
		B. The Europeanist view	215

i. Europeanism	215
ii. European Union	216
iii. How many systems?	216
iv. CESL	217
v. Critics	217
C. The cosmopolitan view	218
i. Cosmopolitanism	218
ii. European Union	219
iii. How many systems?	219
iv. CESL	220
v. Critics	221
D. Multiple identities	222
V. Denial and Unresolved Conflicts	224
A. The dualist view	225
B. The pluralist view	229
C. The unity of law	233
VI. Who Decides?	234
A. Beyond pluralism: a matter of choice	234
B. The DIY legal system	235
C. Shopping for law as political action	236
D. Public deliberation	238
VII. Reconstructing the World of Private Law	239
A. The role of principles	239
i. Private law principles	240
ii. Constitutional principles	241
B. No hierarchy and no single right answers	243
VIII. How Many Systems?	244
12 Pluralism in a New Key – Between Plurality and Normativity	
<i>Leone Niglia</i>	249
I. Introduction	249
II. Universalising Pluralism	250
III. Communitarian Pluralism	252
IV. From Pluralism to Normativity	252
A. Critique	254
B. Illustrations	256
V. A Conclusion	258
Epilogue – Of European Private Law and Pluralism	<i>Leone Niglia</i> 261
<i>Index</i>	265