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The Making of European Private Law: Why, How, What, Who

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European Law: From 'Market' to 'Citizenship'*

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I. United in diversity

We are experiencing times of crisis, in which there is a risk that the spirit characterising the early days of the construction of Europe, supporting its development albeit with difficulties and uncertainties, can go astray. In order not to lose that spirit and see how to apply it to the present and future of the European Union (EU), it may be useful to indicate – though in a schematic way – a prospective view, through which to look at the matter of how to further the objective of a broader and deeper legal integration at European level, with regard to private law field and, therefore, to citizens' affairs, in particular.

Never, perhaps, as in this moment, an overall reflection on this matter will be appropriate, starting with the main issue at stake.

Indeed, the national character that each member state's legal system presents, sometimes with lit nationalistic colours, comes out from elements that, more or less rooted in a basic humus, give shape to what comparative lawyers call *legal traditions;* that is, a historic-cultural substratum, not without its own

* This contribution is a postscript to the Conference on "The Making of European Private Law: Why, How, What, Who" (Rome, 9-11 May 2012). Being engaged in the organisation of the Conference, I preferred to abstain from presenting a paper of mine. But I have been inspired by participation in its proceedings. Also because of my commitment to the field of studies on European private law. Starting with a similar Conference, that I organised many years ago *(Il diritto privato europeo: problemi e prospettive,* Macerata, 8-10 June 1989, whose proceedings have been published, under that title, in 1993, by Giuffrè, Milan). Followed by some works of mine on the same topic (such as: the article *Du marché à la citoyenneté: à la récherche d'un droit privè européen et de sa base juridique,* in "Revue International de Droit Comparé", 2004, 291; the book *Comparazione giuridica e diritto europeo,* Giuffrè, Milan, 2005; and other writings, many of them appeared in the journal "La cittadinanza europea", edited by the "Centro Altiero Spinelli" and published by FrancoAngeli, Milan). I thought it appropriate, therefore, to add some further reflections, concerning the question of 'how to' qualify and justify nature, meanings and scope of European (private) law, in today EU context. The contribution here presented is mainly based on the previous works just mentioned, and aims to go through a systemic reading of the Lisbon Treaty, as regards the Union and its functioning. Its rather discursive approach, focused on speculative issues of general character, has suggested, for the sake of brevity, to write a text without an apparatus of footnotes.

ideological consistency, at the basis of national laws, specially in private law matters.

In this sense, it is worth recalling the provision on the creation of an "area of freedom, security and justice". As stated by the Treaty on the functioning of the European Union (TFEU), such important and quite ambitious policy objective is singled out in terms of a double conditionality: on the one hand, the respect for "fundamental rights"; on the other, the respect for the "different legal systems and traditions of the Member States" (Art, 67, 1).

Not to mentioned, on this point, the still greater commitment of the EU to "respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional", thus solemnised by the so called 'national identity clause' in the Union's Treaty (TEU, Art. 4,2). To the extent to which this clause could be also invoked to cover private law sector or, at least, some private law issues, as matters of legal traditions to be preserved in terms of national (or even local) identities (included, of course, national civil codes and, in some countries, also civil codes or other sets of laws applied to autonomous regions).

All that makes clear what is the problem that challenges the European integration process, such as identified by the EU motto: "United in diversity". A problem that, in legal matters, and specially in private law matters, will mean, shortly speaking, the transition from the 'territorial' regime of national laws, towards a 'spatial' dimension of a supra-national, as well as trans-national law, at European level.

To be sure, one may also address such problem in other, more simplified (and, perhaps, simplistic) terms, pointing at the dichotomy between 'federal/state' law, or else, highlighting the tension between centralising/decentralising forces. But, apart from the ambivalent use of the term 'federalism', to indicate both centralised and decentralised forms of government, it seems preferable to insist on the originality as well as the complexity of the political and legal structure *(sui generis)* of the EU experience. Though acknowledging, also, its 'quasi-federal' nature, in the sense of a constitutional ordering of the relations between the Union and its Member States, settled on a balance between EU law, on the one side, and independent national state legal systems and traditions, on the other. A balance, furthermore, which is held in the hands not only of European institutions (including European judicial authorities), but also of national Parliaments and constitutional (or supreme) courts.

However, what matters, is that such originality and complexity must be taken into consideration. First, to foresee difficulties and risks inherent in an integration process, likely to culminate in unifying effects, being (perceived as) detrimental to national (law) identity, and related socio-political and professional interests. Thus causing resistance, if not dissent and, however, some concern about the scope and appropriateness, in terms of the respect of the principles of subsidiarity and proportionality, apart from the usefulness and efficiency/efficacy of the projected measures. Second, to indicate better policy

choices, to be pursued in order to avoid similar consequences, and make that process more balanced, also ensuring its more effective implementation.

A broader and deeper European legal integration, instead of being taken in itself, as absolute good, that is, as compulsory, imposed by forceful interests, rather than as compelling fate, aimed at bridging differences that hinder the common interest, can more conveniently be assumed, at least here, as point of reference, from which to observe and towards which to direct a set of issues, suitable to identify, in the whole, the problematic aspects involved in the making of European private law.

So as to get out of difficulties in which the discourse about the idea of 'more Europe' in legal matters still tends to stay aground. Such as those caused by common places or misunderstandings. With the addition, sometimes, of a load of rhetoric, in terms either of European idealistic emphasis or, on the contrary, of stubborn defense of national and local specificities.

Indeed, to deal with a theme of such magnitude, one needs to be aware of the complexity of its implications, avoiding to reduce it simply to a confrontation between positions more or less favorable, on the one hand, or more or less skeptical, on the other. In order to focus attention on aspects of scenario, rather than on specific issues, and try to get a picture, as much as possible, of synthesis.

II. Integration through market: limits and the need for a more comprehensive approach

The harmonisation and uniformity of law at European level is an issue, above all, of balance between different trends: more specifically, among the reasons for the 'free market', on the one hand, and on the other, the defense of values, generally referring to social and cultural aspects, not only related to 'national identities' (as such subject to compliance by the Union), but also to a European society model in its whole, such as designed by Art. 2 of the (Lisbon) Union Treaty, stating that:

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

At this point it is timely therefore to reflect on the fact that the objective of harmonised/standardised legal rules, as being a goal functionally linked to ensuring a greater competitive freedom of the market, in addition to better conditions of certainty through uniformity – if not unity – of the law, in the field specially of contract law, obviously carries with it a given model of European legal integration. Precisely, a 'free market' model.

This model is mainly characterised by the emergence of socio-professional strata, on the side of both producers, traders and consumers of goods and services, quite competitive, let's say so, and however enough dynamic to become able and ready, if not to integrate themselves in a true European community of peoples, at least to overcome difficulties connected with national barriers (including linguistic ones), and to fully benefit of the European internal market area.

In the light and in view of such policy objective, the TFEU, in its Title VII, entitled "Common rules on competition, taxation and approximation of laws", confers the power to European institutions to: "adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market" (Art. 114).

The real difficulty with such model of legal integration, centred around the internal market, established as an "area without internal frontiers", in which is ensured the "free movement of goods, persons, services and capital" (TFEU, Art. 26, 2), is precisely its focus on market actors and marked activities, committed to a primarily economic-oriented integration process.

This means that approximation of domestic laws will be justified by the simple and apparently neutral goal of abolishing 'legal barriers', across Member States, that hinder market freedoms and the full implementation of the so-called 'single market'.

We leave here aside the inner contradiction of such approach, in that it confuses the market freedoms, understood as economic facts, with freedoms legally understood as individual rights, that is, as rights of the person.

It suffices to observe that the approach thus based on such economic premise, to let the establishment and functioning of the market be more efficient, seems to have exhausted its compelling force, in the present and – one hopes – future stage of Union development, towards an "ever closer union among the peoples of Europe": that is, by transcending the original purely economic integration project, in the direction of a more structured and constitutionally based political community.

In other words: if legal diversity among Member States should be aptly reduced, leading to a more Europeanised (or, if preferred, 'federalised') private law or, vice versa, if 'legal traditions', to which the Union also has to pay attention, should be valued in the context of a principle-oriented European common law, based on the respect of fundamental rights, each of these paths will be chosen, diverging in the method but converging in the end, it clearly requires a shift of paradigm (model) in the integration process.

In turn, this implies to argue about not so much the technical issue of the 'legal basis', for the making of European private law, but much more about the political and legal issue of the 'legitimacy basis' of such achievement, with an aim to attain a full-scale and far-reaching legal integration at European level.

This brings up, of course, a set of problems, about methods, contents, and instruments, that cannot be here dealt with in details of any kind.

We will concentrate, instead, on the frame of reference, with regard to treaty provisions and leading judicial pronouncements that may help to understand the dynamics of influences and interaction between Union's law and national laws. In the sense of looking at the former as 'European law', containing rules and principles of general value, capable of integrating national laws, for the purpose of their approximation and uniformity.

III. Beyond the market: the European citizenship paradigm

In the search for a more comprehensive approach to legal integration, beyond the market, it may be appropriate to take into account that the harmonisation of the laws of Member States is an objective targeted also under Title V, TFEU, entitled "Area of freedom, security and justice", by Art. 81, conferring powers to the Union to: "develop judicial cooperation in civil matters having cross-border implications"; and again envisaging, for this purpose, "the adoption of measures for the approximation of the laws and regulations of the Member States".

It is worth mentioning, moreover, that such 'approximation measures' shall be adopted, "particularly when necessary for the proper functioning of the internal market", to ensure a wide range of aims, such as: the mutual recognition and enforcement of judgments and of decisions in extrajudicial cases; the cross-border service of judicial and extrajudicial documents; cooperation in the taking of evidence; effective access to justice; the elimination of obstacles to the proper functioning of civil proceedings; the development of alternative methods of dispute settlement; support for the training of the judiciary and judicial staff. Including also the 'compatibility' of conflict of laws rules: with possible relevant substantive law implications, of course. A wide range of aims that, in the whole, affect the 'proper functioning' of justice (rather than of the market): in the interest therefore of any person who may be involved and, by sure, not of traders/consumers, only.

We know that the Union exists, among other things, to fulfill a series of main policy objectives, listed by the EU Treaty, Art. 3, in a priority order and, however, in a order of logical implications, whereby:

1. The Union's aim is to promote peace, *its values and the well-being of its peoples.*
2. The Union shall offer *its citizens* an area of *freedom, security and justice* without internal frontiers (…)
3. The Union shall establish an *internal market* (emphasis added, obviously)

Looking at this map of – 'What is for' – European integration, a couple of (may be) naive (but not senseless) questions could be here asked.

What is the relationship between the 'freedom, security and justice' area and the 'internal market' area? Or to put it otherwise: is the former wider enough to include the latter? In any case. Why the 'approximation of the laws of the Member States' should proceed starting from the tail, so to say, of the 'market', and not from the head of the Union's values, and of its citizens? With an apparent illogical reversal of the sequence established in the Treaty.

To give an answer, one should not forget, furthermore, the statement made by EU Treaty (at Art. 13):

> 1. The Union shall have an institutional framework which shall aim to promote *its values,* advance *its objectives,* serve *its interests,* those of *its citizens* and those of the Member States, and ensure the *consistency,* effectiveness and continuity of *its policies and actions* (emphasis added again).

Indeed, if it is true, apparently, that the Union stands for promoting its values, advancing its objectives, serving its interests, and those of its citizens, together with those of the Member States, in a common area, without internal frontiers, bounded by those same values, objectives and interests to be fulfilled, one may wonder why, the same persons who, as producers, traders and consumers of goods/services, live in that same area, should be addressed by Union legislation in their specific, as well as purely occasional, status of producers/traders/consumers (i.e., markets entities), and in their vest of national citizens, only, and not as Union's citizens, too.

This brings us to the question on what is/could be the 'legal basis' for the approximation of Member States' laws, that is, for furthering the legal integration process at European level, and making it wider and deeper – namely, more articulated and systematic – in the field specially of private law.

Textual references to TFEU, Art. 81 and Art. 114, respectively, both carry, either alternatively or cumulatively, the most ready available answer to that question. Of course, their alternative use will imply the interpretative choice of differentiating the internal market area from the freedom, security and justice area. What seems to sound somewhat contradictory, if not paradoxical (in the sense already alluded to, with regard to Art. 81, above).

On the contrary, their cumulative use will imply that the former and latter are just one and the same area, from a legal point of view, although with a variety of different policy objectives, such as: the single market; security matters concerning the Union's external borders; or else, judicial cooperation aimed at creating an area of justice at European level (European judicial space).

In the whole, what appears to be the decisive point, is not the issue of the legal basis, as such, taken in the abstract, in a purely technical form that makes it a sort of fake problem. But the contextual positioning and global understanding of this issue, in its normative meaningful connections with the aims and main policy objectives of the Union.

To this regard, the legal basis issue should be also looked at from the (political) point of view of the consistency, effectiveness and continuity of the Union policies and actions, as stated in the Treaty (quoted above).

It is clearly the logic of the conferral principle, that competences and powers are attributed to European institutions, including the European Court of Justice (ECJ), for the pursuit – recalling, once again, the above quoted Art. 13, TEU – of the Union values, objectives and interests, concerning *its citizens,* and the Member States alike.

When thinking of the uniform interpretation and application of EU law in all Member States, one should not lose sight of the fact that what is really at stake, with EU law rules, their interpretation and application, is precisely the equality of European citizens.

It would not make much sense that uniformity of law, at European level, obtained through ECJ interpretation of EU law rules based, say, on Art. 114, will affect the market area only, and not the area of freedom, security and justice, purposively offered by the Union to all its citizens. Thus implying that a rule or principle, established on the basis of the internal market, may take a more general legal effect in terms of Union's citizenship.

Indeed, the essential gist of the ECJ case law focusing on the concept of Union's citizenship, may be seen in the 'autonomous' character of this new concept, still developing, between the limits of its being additional to national citizenship and the potentialities, with both theoretical and practical implications, of its being a broader and far-reaching support to further integration, beyond the market.

To start from the *Martínez Sala* case (1998), the first one to outline the prospect of such development. In that case, according to the conclusions of Advocate General (Antonio La Pergola), pointing at the novelty of the Maastricht Treaty provision (Art. 8), compared to free movements rights as established with regard to internal market, such as defined already by the Single Act (1986) as an area without frontiers, was argued that:

> "Citizenship of the Union comes through the fiat of the primary norm, being conferred directly on the individual, who is henceforth formally recognised as a subject of law (…). Let us say that it is the *fundamental legal status guaranteed to the citizen of every Member State*" (n. 18: emphasis added).

To arrive at most recent developments, specially in the *Ruiz Zambrano* case (2011). A case in which the principle, repeatedly expressed by the ECJ, of the direct derivation of the Union's citizenship from Union primary law, has found a further strengthening by the statement that the substantial content of European citizenship, in terms of (fundamental) rights of the person, cannot be deprived through measures taken by Member States.

Thus implying that the law at the Union level and the law at national (state) level should concur together, as concentric circles, of territorial and spatial

extension, respectively, where citizens, both national and European, are the common axis.

Beyond the market, therefore, citizenship seems to become a new and overall paradigm of European legal integration.

Outrageous as it may be, it is time to lift the fig leaf covering the relationship between producers/traders (B2B) and between producers/traders and consumers (B2C), to discover that underneath there is always a relationship between people, who are not only nationals of different Members States, but European citizens, too.

IV. European law: what is about?

To argue furthermore the point about a new and more comprehensive paradigm of legal integration, it is worth pausing here on the notion itself of 'European law'.

In a synthetic way, such expression may be articulated in two distinct, but concurring notions, of overall importance for the development of the legal integration process. One retrospective, that is historically based, though still suggestive as a source of inspiration. The other one prospective, that is projecting on the present and future of the European polity.

To begin, one may talk of European law, having in mind European civilisation, meaning a historical background, where took shape a European legal tradition. Although articulated in a plurality and diversity of local (national) scenarios, this tradition knew, throughout the Middle Ages and up to the modern times, significant aspects of convergence.

Without going into unnecessary details, it may be sufficient to recall the framework within which the dynamics of legal pluralism, flourishing along all those times, were governed in terms of common rules and principles that characterised the experience of the European *ius commune.*

Such experience, of a great cultural and spiritual unity of legal wisdom (so defined by Francesco Calasso, in his masterly introduction to *ius commune* [*Introduzione al diritto comune,*1951]), spread throughout Europe (England included), giving rise to a legal system model that (as shown by Gino Gorla in his path-breaking essays on comparative law and European common law [*Diritto comparato e diritto comune europeo,* 1981]) was institutionally 'open', in the sense of its being in communication, from the side of its lawyers and in respect to its law sources, with other jurisdictions and their respective lawyers.

To this effect, it was essentially marked, in the practice of law, by a transnational legal culture, according to which rules and principles were recognised and applied, within state legal order, on the basis of the concordance or convergence with other jurisdictions, situated in the orbit of a European area of free movement, so to speak, of legal opinions and judicial precedents – not to say of lawyers themselves – at higher courts' level. Of course, not as a matter of a

simple discretionary choice, but in terms of professional methods (and related duties), on the basis of conventionally agreed European legal authorities, forming the common or most prevalent opinion *(communis* or *magis communis opinio),* in cases, for instance, in which the law was silent or its interpretation doubtful *(casus omissus* or *dubius),* with an aim to search for common solutions.

Examples are to be found in a bulk of professional (forensic) literature, made of collections of judicial decisions *(decisiones)* and legal opinions *(consilia),* where it becomes evident the use, here again, in the practice of law, of such methods, essentially based on legal comparison. According to testimony of jurists of the XVI-XVII centuries (like the Catalan Joan Pere Fontanella, 1575-1649), this transnational legal scenario of *ius commune,* lasting until the advent of national (civil) codes on the Continent, saw already a significant quarrel, arising between lawyers who were inclined to stay secluded in their own territorial law, therefore called 'illiberal' *(illiberales),* and those, called by contrast 'liberal' lawyers *(liberales),* who were open to communicate with courts/lawyers of other (foreign) jurisdictions, making recourse to their decisions/opinions, in the search for common legal rules and principles, freely circulating across a transnational community of law.

This makes it a phenomenon of a still alive interest in our times, when thinking of the evidences and claims in favour of dialogue between courts at European level, and of the growing body of legal literature, though mainly of a scholarly nature, based on a similar transnational spirit.

To pass, however, to present times, European law has become an expression that is increasingly referred, in common usage, to the law of the European Union (former European Community). Obviously charcterised by its novelty, with regard to its sources and objects, this law, specially in the case of private law matters, is however inserted in the lexical and conceptual contexts of the law(s) of European origin, in the other meaning mentioned just before.

It is, by now, a consolidated body of law (known as Union *acquis),* not only of legislative origin, but also made to a large and significant extent by ECJ judges, in the interplay with national judges, through preliminary ruling cases.

With the transition from the Community to the Union, and to a Union committed to offer to 'its citizens' an area of freedom, security and justice, without internal frontiers, that makes a pair with – and seems also to include – the internal market, as seen before, EU law has taken on a more articulated set of meanings – in its ranging as synonym of European law – that affect, respectively: the 'constitutional' value of EU primary law; the nature of 'principled' law, that is common to Member States laws, integrating them in terms of legal uniformity; and, the 'multi-level' articulation of the European legal order, including national and local laws.

1. Community law and European law

We can start with a terminological and conceptual premise, on the way of understanding the relationship between 'Community law' and 'European law'.

Indeed, the latter, in the sense of Union's law (with potential 'federal' scope, it may be here recalled, though in absence of a federal state), is a term destined not only to replace the former, made obsolete by the Lisbon Treaty, with the abolition of the European Community, but much more to represent, compared to Community law, a conceptual leap forward the overcoming of the 'functionalist' stage of the economic integration of Europe, through market factors. Towards a 'constitutional' stage of normative integration, through (fundamental) rights, in which are prevailing, beyond the market, features including the following principles and objectives (all of them clearly spelt out or implied in the treaties): *a)* centrality of the person, *b)* European model of society open and inclusive; *c)* area of freedom, security and justice; *d)* European judicial area, as 'genuine area of justice', where to assert individual rights throughout the Union.

This transition takes place along the evolutionary line that, by the first Union Treaty, signed at Maastricht, 1992 (but in many ways anticipated by the Single Act, 1986, and, before it, by the so-called 'Altiero Spinelli project' of Union's Treaty, adopted by European Parliament, in 1984), has re-directed the integration process towards an "ever closer union among the peoples of Europe" (as stated in Art. 1 of the Treaty, and since then reiterated in each subsequent version of it).

This change of horizon has found legal stance in the ECJ case law, with the repeated affirmation of the principle of the Union's citizenship as 'fundamental status' of all nationals, that is, of every person (being a national of Member State): irrespective – compared to the previous idea of the so-called 'market citizenship', within the range of Community law – of one's involvement in economic activities or transactions, and even of one's involvement in cross-border situations. A principle thus legally enshrined, with a force quite beyond its pure symbolic or programmatic value, that will affect Member States' laws, for the creation of an area of freedom, security and justice, intended to complete and absorb the same area without internal frontiers of the single market. With an aim therefore to establish a wider area, in which we find at home, so to say, not only those who carry out a business or a profession, or are occupied as workers, or else are acting as consumers, but common European (co-)citizens, never again 'foreigners'.

With all this in mind, one may therefore think, quite reasonably, to consider the principle of citizenship as the basis of EU law, in the sense of European law. So as to acknowledge or, if preferred, to evoke its vast potentialities of a systemic and effective nature, in addition to the parallel principle of the prohibition of discrimination on grounds of nationality (TFEU, Art. 18), in the context of the relationship between EU legal order and Member States' legal orders, seen as being 'internal' to the Union.

2. European law and 'uniform law' scenarios

Such evocation suggests a further definition of the term 'European law' as law 'common' to all national legal systems.

Here again, the terminological and conceptual issue of the relationship between 'Community law' and 'European law' allow us to better clarify the point.

To put it in the manner of Winston Churchill, when saying that "America and England are two nations divided by a common language" (but the dictum has indeed many fathers), it may be said that Community law and European law are two expressions divided by a common reference to Europe, due to the diversity of meanings that this reference takes on in both expressions.

The problem of the relationship between 'Community law' and 'European law', assuming that we are not in the presence of a simple hendiadys, it is immediately apparent, in the negative, from the fact that, while the definition of the concept of Community law looks quite plane, the same cannot be said of 'European law', even though the two expressions can be used in a equivalent manner; provided, however, to acknowledge the multiplicity of areas of relevance that give 'European law' a broader meaning, capable of including the former, but not vice versa.

The argument or, if you prefer, the hypothesis on which I would like to draw attention is that, in the case of 'European law', we are – compared to 'Community law' – in the presence of a displacement of the point of view, that ends up in a semantic transfer. Whereby European law becomes a kind of 'meta-law' (similarly to expressions such as 'transnational law' or 'global law', of current usage), that affects the notion of 'law' within the EU context, having nature of law 'common' to domestic laws of Member States, and value in its extra-territorial and extra-state projection (so-called 'post-national' law).

The quality gap between 'Community law' and 'European law' may refer to a different approach to the problem of 'uniform law'; as a problem that, in our days, has taken up a far greater importance, than in past times.

This different approach can be summarized in the alternative, not necessarily mutually exclusive, but rather complementary, between two possible scenarios for the integration-harmonisation of law at European level.

The first scenario, that may be named 'Law of Europe', corresponds to the current one.

Briefly speaking, is the scenario frequently told as 'Europe from above': that is, where prevails a centralised approach, though tempered by involvement of representatives of stakeholders groups and by other consultative/participatory devices. Basically, it points at the construction of a uniform law at European level, as a product, made by EU institutions, imposed or mediated by them, for its reception in individual national legal systems that are required to conform to it, due to the principle of supremacy (or primacy, as it is also known) of EU law. However, giving rise to a complex phenomenon, resulting from mutual interaction between national laws and Union (Community) law. The difficul-

ties with such approach, on the side of national jurisdictions, may be seen in its top-down effects, compared to a very strong consolidated reality of national laws. A reality, *inter alia,* in which the internal unification of the legal system, specially in the field of private law, is historically relevant as one of the developing modalities of modern nation-states.

On the EU side, it may be observed that, together with a variety and flexibility of available operational tools, ranging from legally binding instruments to soft law measures, this approach presents a rather sectoral and piecemeal character. The well known attempts, originally encouraged by the European Parliament, supported by the European Commission, and (sometimes suspiciously) guarded by the (Union/European) Council, to bring about more comprehensive and ambitious projects (elaborated by groups of scholars and experts), concerning the formation of common set of rules and principles of general scope in private law matters, have not encountered, yet, the required political consensus. Moreover, as evidenced by the most recent case of the Commission's proposal of regulation for a Common European Sales Law (CESL), the debate is still hanging, not so much on the 'feasibility', but much more on the 'opportunity' – in some way linked also to the legitimacy issue – of such codification-type measures.

However, what must not fail here to be noticed, is the impact of the results that through this approach have been accomplished, and that can be summarized, for present purposes, in two key points.

The 'constitutional metamorphosis' of Member States' legal order, from 'national', to 'internal' to the Union; or, to say it otherwise, from a legal order territorially secluded, into a legal order inserted in the space of effectiveness of the EU law.

The 'Europeanisation of lawyers', as a phenomenon that has began as a result of the ever-expanding EU legal order, involving almost every sector of domestic law, and that requires therefore a continuous updating to new professional and cultural habitat, by lawyers, judges, other legal practitioners and public administrators. Taking into account, for example, in the case of public administrators, and judges likewise, the problems associated with state liability for the breach of, or the failure to implement, EU law. Without forgetting, of course, the impact of Union's law on the syllabus of the law faculties and in the field of legal studies by and large.

The second scenario, that may be called 'Europe of Law', evokes experiences, which are rooted in historical models, still providing points of interest, to the extent that they are reflected in a legal tradition common to the European context, as a whole. More precisely, as it has been alluded earlier, this scenario maintains its relevance, in the name of 'communicability' between legal systems and their lawyers, as a typical attribute of a 'European community' of law and lawyers that took shape in the course of modern centuries (XVI–XVIII), on the Continent of Europe, with extensions to England.

3. European law as ius commune

To step further in the matter, with this retrospective suggestion in mind, one may observe that the transition to the constitutional stage of the integration process, where arises the need for a solid foundation for its legitimacy, marks a real change of perspective, from the sectoral dimension of the market, which characterises the notion of Community law, to the wider and inclusive dimension of Union's citizenship.

This new kind of 'stateless' citizenship, being a form of legal subjectivity that completes and integrates the nationality, both in the Union legal order and in the national ones, will be effective on the basis only of a European *ius commune* of constitutional value, that is, with the force of European rule of law, essentially referred to fundamental rights of the Union, in the sense acknowledged by Art. 6 of the Union Treaty (in its last reformed version). Starting with those provided by the Charter of fundamental rights of the EU (Nice's Charter), including moreover the rights and freedoms resulting from the common constitutional traditions of Member States, being also general principles of EU law.

In the light and as reflex of this new paradigm, it must be seen the above alluded metamorphosis of Member States' legal orders that become internal to the Union.

This is confirmed by the sound declaration in the Preamble of the European Charter of fundamental rights, according to which the Union, being founded "on the indivisible, universal values of human dignity, freedom, equality and solidarity", as well as on "the principles of democracy and the rule of law": *"places the individual at the heart of its activities, by establishing the citizenship of the Union* and by creating an *area of freedom, security and justice*" (emphasis added).

These two points of maximum incidence of the EU law over Members States' legal orders make evident the possibility of the formation of a common law at European level.

In the whole, it will be a basic uniform law that, stemming out of common general principles, those already resulting from national legal traditions, together with those arising from the activities of the Union institutions (above all the ECJ case law), comes to weld Union legal order with national ones, in the sense of articulating the mutual influence between European law and national laws.

Such fusion assumes particular importance, precisely from the point of view of individuals that are European citizens, by reference to the idea of creating an area of 'common citizenship', without frontiers (whatever they are or could be: whether customs barriers or regulatory differences). A European law area, for the enjoyment of subjective rights, linked to the fundamental status of European citizenship.

Like the *ius commune* of past centuries, that was also developed on a fertile ground of dialogue between 'liberal' lawyers, who had to confront with the issue of 'natural rights' *(iura naturalia),* pioneers of the modern human rights,

this new *ius commune* appears destined to be developed on the ground of basic principles and values and, by reflection, of individual rights and related duties, affecting both private and public subjects, within the Union as a polity governed under the same rule of law.

This will happen on the condition, of course, that judges (primarily those of higher and constitutional courts) and lawyers (specially practitioners) of the Member States, without staying closed inside their respective jurisdictions, will be able to carry, in a spirit of openness and dialogue, their function, as interpreters and architects of this new European *ius commune,* inspired by the values enlisted in Art. 2, TEU (above quoted), where it is set the 'identity clause' of the Union, based on values common to all Member States.

To summarise

The metamorphosis in progress of national legal order that becomes internal to the Union, obviously claims the idea of a legal order that from 'closed', within its territorial borders, becomes 'open' and thus 'communicating', within the supranational and transnational legal context that stems out from a Europe – not yet, if ever will be (and for a long time still ahead), federated, but – 'united in diversity'.

All this implies that the national/internal legal order, in that it becomes integrated in/by the EU law, becomes part of a European legal system. Where 'European' means, jointly, 'of the Union' and of the 'community' of Member States. In the same manner in which citizenship takes up a double value, as national and European, jointly.

Again, this means that the existence of a European (i.e. common) legal order is (shall be) connected to the affirmation of a rule of law at Union's level, that is, a rule of law of European scope and strength, based on three main pillars, such as stated in Art. 6 of the new EU treaty:

- the Charter of fundamental rights of the EU;
- the European Convention for the Protection of Human Rights and Fundamental Freedoms (together with its interpretation so as established and consolidated in the case law by the European Court of Human Rights: ECHR);
- the "constitutional traditions common to Member States", in regard to rules and principles concerning fundamental rights that "shall constitute general principles of the Union's law" (here also taking into account, of course, the judicial interpretation of higher and constitutional courts).

4. European law as 'principled law' in the 'multi-level' Union's legal order

The transition from a sectoral Community law 'of the market' to a structured European law 'of the citizens' brings out a further specification of (the notion of) European law, being a 'principled law', having constitutional value of a law 'common' to all national laws of Member States, and to their citizens, as European citizens.

In this perspective, instead of considering Union's law as a number 'X' regime, added to national ones, it seems more appropriate to consider it, although in its distinct and autonomous nature, not as separated from – but integrating – national law regimes. Precisely with an aim to promote and assure their convergence, within the sphere of the Union's competences. So to get at a greater integration, in a common European legal framework or, better to say, in a European law order common to its citizens as Union's citizens.

Here again, in a sense much similar to *ius commune* of past centuries, European law, thus understood, shall be conceived not as 'added' to – but 'inclusive' of – national laws.

On closer looking, this reveals another characteristic and dimension of EU law, in the guise of European law. As a 'multi-level' legal system, in which fundamental rights, rules and general principles at European level are positioned (within the competences conferred on the Union) alongside national and local levels, giving shape to a circular process that links the Union's legal order with the interior order of each Member State and, in turn, this latter with all other Member States' legal orders, through Union's law.

That is to say: the national law, being integrated in/by Union's law, ceases to be territorially secluded, to open up to the participation in the Union's legal order. This latter refers, in turn, to the community of national jurisdictions, which, via the Union law, participate in the communication between them.

A multi-level system that shall support and conform a widespread set of connections with national legal orders, no longer 'foreign' to each other, but rather inserted in a common normative space.

In this space, it will develop the dynamic relationship, of which are parts, on the one hand, the European law, in the guise of EU law and, likewise, of 'principled law' common to all Member States' legal orders and, on the other, these same orders, in the diversity of their 'particular', national/local, laws.

Such a system needs obviously a sufficient degree of flexibility and interpretative adaptability, to maintain its basic unity, in respect of the plurality and diversity of its both territorial and sectoral articulations. For this purpose, it must adopt rules and principles, capable of defining an overall framework.

What can and should be this framework, it is evident from all that has been said so far.

5. European law and Union's citizenship

An overall framework for European legal integration stems out of the semantic jump of horizon, above alluded to, whereby 'Community law' – officially silenced by the deletion of the European Community and its complete replacement with the Union – sheds its skin, so to speak, in the new body of 'European law', founded on its own three inter-connected constitutional pillars, as stated in Art. 6, TEU (quoted earlier).

In this visual change, the internal market, properly understood as single market area that shall (have to) be regulated, for its efficient functioning, by one and the same law, gives ground to citizenship, as a concept suitable, instead, to refer to a plurality of complementary areas. To the extent to which it represents a condition of legal subjectivity that, in addition to the national one, completes and enriches the endowment of individual rights, both inside and outside of one's home country, by projecting and strengthening such rights into the European law dimension, common to all nationals, in their capacity of (co-)citizens of the Union.

On the other hand, it must be recalled, here again, the shift to the constitutional dimension, in the present evolutionary stage of the European integration process, in search for a more democratically qualified foundation of the legitimacy of the Union. This is clearly evidenced by Title II of the EU Treaty, whose "Provisions on democratic principles" begin (in Art. 9) precisely with the statement that: "the Union shall observe the principle of the equality of its citizens", followed by the definition of Union's citizenship. In order to reinforce its notion (indeed, to remedy its previous placement, only in the European Community Treaty), by placing it at the base of the democratic life of the Union.

Moreover, the features that characterise, as above mentioned, this transition beyond the economic (market) integration, centered around the universal and indivisible values and rights of the person, all of them refer essentially to the idea of Union's citizenship, as a new paradigm of integration, according to the formula, dictated in the Preamble of the European Charter of Fundamental Rights, that puts the citizens at the heart of the Union's activities.

The idea to base European law on the plural dimension of citizenship, national and European alike, rather than on the single and unifying dimension of the market, can contribute to a better balance between unity and diversity.

At the same time, it will also allow to synthesise trends towards uniformity (centralisation) and those towards the preservation of national peculiarities (decentralisation), according to a model of 'multi-level', i.e. pluralistic, legal order.

A model that clearly recalls, here again, the *ius commune* model, in its relationship of complementarity and subsidiarity with *iura propria* (particular or local laws).

Such a model seems appropriate or, at least, helpful, from a theoretical point of view, to support the complexity of the European integration process, and let it develop, specially in private law matters, beyond the tiny, if not fake, market

logic of the relationship traders/consumers. With a far-reaching aim that shall go to the heart of the Union's project, in keeping the relationship between European law uniformity, on the one hand, and national laws diversity, on the other, fairly and firmly balanced, on the ground of a common citizenship, where this project will (have to) find also its social, political and cultural roots.

V. Conclusion

Conclusive words are hard to catch, when the panorama around appears to be influenced by a widespread sense of dissatisfaction, and even anger, among people, about Europe (as it stands today).

However, it is precisely in times in which the construction of Europe is being challenged, as initially said, that in order to restore the original spirit at the basis of the European project, one shall start rethinking some basic premises. So as to try to offer, not so much conclusions, but much more argumentative paths, additional, if not alternative, to those more conventionally explored.

It is what I tried here to do, by reflecting on the potentialities stemming out of the paradigmatic – rather than purely symbolic – value of Union's citizenship, as a core principle that can set up a more systemic legal basis, fit to cope with multifarious socio-economic and cultural implications of European integration, in respect particularly to private law, by and large.

Indeed, on the assumption of a legal pluralism that is back again from past times, when it was the rule, a pluralism of legal sources and therefore of correspondent normative levels, in national societies that become increasingly pluralistic, in their articulation and composition, the scenario that is nowadays looming on the horizon, seems to be affected by a lack of coherence and unity, within both the national and Union law. Facing such elements of fragmentation and dispersion, an answer can be offered at the level of common rules, through a convergence, within a shared framework of values and principles that find strength in the citizenship of the Union, as a citizenship common to all nationals of Member States. So to speak: a 'citizenship of all the nationalities'.

This paradigm of integration through citizens' rights (and related duties), will give shape to a body of European common law, in the multiplicity of meanings explained previously: founded on its own basis of constitutional legitimacy, and thus becoming the main structural component of a law of Europe, united in diversity.

In a political and legal community, like EU, having the nature of a supranational and trans-national – as well as multi-cultural – entity, citizenship may therefore help to develop a true notion of 'European law', as the result of a genuine community of values, with an aim to find points of balance between what is universal and particular, common and specific, European and local (and/or 'minoritarian').

To be sure, at the condition of the effective implementation of a European model of open and inclusive society, respectful of the values and principles that underpin the European rule of law, as a counterweight to political power (legislative and governmental), and to any other, whatever, forceful power.

The challenge of achieving the objectives of the European Union, such as proclaimed in the Treaties, within a broader and deeper socio-political and economic integration, in order to bring ahead an ever closer union of the peoples of Europe, is a challenge that affects in particular the role of lawyers, professionals and scholars alike. A genuine and, possibly, ingenious awareness of such role, may contribute to map and develop the route towards an effective community of law that, to be so, must also be a real community of citizens, at European level.