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BOOK REVIEW

Legal Pluralism in European Contract Law

by Vanessa Mak. Oxford: Oxford University Press, 2020, 288 pp (£80.00 hardback). ISBN: 978-0-19-885448-7.

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Living in the age of the so-called fourth (ie digital) industrial revolution,[1] we find ourselves increasingly making use of the internet's 'platform economy' to sell and buy goods, as well as provide and use services. The platform economy is thus called because it operates through the selling, buying, and sharing activities of private individuals, rather than businesses as in conventional consumer settings (although businesses provide the very platforms on which transactions take place). Due to its dynamics, when using it we inevitably expose ourselves to transactional mechanisms that might offer little, if any, legal protection. A recent decision by the UK Supreme Court and the position taken on the subject by the Tribunal of Milan's Prosecutors are testament to the significance of the socio-political and juridical challenges that the establishment and spreading of the platform economy pose for current and future generations. In a much-awaited judgment, the Supreme Court ruled that Uber drivers are fully-fledged employees.[2] Similarly, delivery riders also qualify as employees according to the Tribunal of Milan's Prosecutors.[3]

Vanessa Mak's new book, *Legal Pluralism in European Contract Law* (hereinafter, *LPECL*),[4] makes a valuable contribution to the scholarly debate on the place and role that European private law should and can have in this context. Mak is a leading European contract law scholar whose highly impactful works on the subject have over the years set the stage for new scholarly debates, particularly regarding pluralist regulatory dynamics. *LPECL* represents a major intellectual step in this direction: it offers much-needed reflections on a pivotal theme for our times, efficiently combining descriptive analysis with original and critical (ie normative) input that will assist scholars, practitioners, and operators in navigating through the juridical complexities of the platform economy.

LPECL is divided into ten chapters (including the Introduction), some of which (ie Chapters 2, 4 and 5) are based on previously published material which has been revised for the purposes of the book. The discussion proceeds in a pleasant and structured manner, with all chapters containing helpful concluding remarks and coherently speaking to one another. Mak states her research question clearly: 'how can the values of EU law, which are reflected in contract laws at the national and EU level, be safeguarded when lawmaking shifts from public regulation to private regulation beyond the state?'[5] *LPECL* aims at answering this crucial question 'by developing a theory of lawmaking in European private law that can accommodate the shift from state-centred lawmaking to co-existence of sources of

[1] K Schwab *The Fourth Industrial Revolution* (London: Penguin, 2017).

[2] *Uber BV and others (Appellants) v Aslam and others (Respondents)* [2021] UKSC 5 On appeal from [2018] EWCA Civ 2748, press summary available at https://www.supremecourt.uk/press-summary/uksc-2019-0029.html.

[3] My translation. For further information, see https://milano.repubblica.it/cronaca/2021/02/24/news/rider_uber_aperta_-procuratore_di_milano_aperta_indagine_fiscale-288999387/.

[4] V Mak *Legal Pluralism in European Contract Law* (Oxford: Oxford University Press, 2020).

[5] Ibid, p 3. See also ibid, pp 11, 21.

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norms beyond the state without a formal hierarchy'.[6] In pursuing this delicate objective, Mak moves beyond a whole series of views which while supporting the current pluralisation of regulatory sources and dynamics, 'have not completely shrugged off the ordering imposed by state-centred perspectives on lawmaking'.[7] Mak's is, in other words, a 'strong legal pluralist'[8] stance which places European Union (EU) private law and its 'common objectives and values'[9] at the centre of the regulatory agenda while also preserving and promoting legal plurality. Mak's legal pluralism is strong, or 'radical'[10] because it 'holds that norms can co-exist without a formal hierarchy',[11] thereby challenging our post-Westphalian normative mind-set and consciousness.[12] Overall, *LPECL* offers us a clear and timely 'instrumental-normative'[13] framework for the development of pluralist jurisprudence within the study and practice of private (ie contract) law. Accordingly, the book can be said to have reached its mark, setting itself apart from comparable works on the interplay between private law and legal pluralism.

Mak makes a solid case for endorsing strong legal pluralism in European contract law. By 'strong legal pluralism', she refers to those regulatory dynamics by which 'norms [are] created outside the framework of state lawmaking … [and which] can also be regarded as "law", or in any event as rules that have a law-life effect on societies or individuals'.[14] According to Mak, 'normatively, strong legal pluralism is appealing, as it promotes a framework for lawmaking in which multiple viewpoints and values can be takin into account'.[15] Worth noticing is the multi- and inter-disciplinary route Mak pursues to support and contextualise her argument. Consider, for instance, Chapter 2, which 'analyses the theoretical foundations of lawmaking in European private law and shows that they are traced to transnational and constitutional pluralist principles'.[16] There, Mak draws from 'constitutional and international public law'[17] theory of legal pluralism to identify 'two principles'[18] (ie 'public autonomy' and 'toleration'[19]) which 'may also be regarded as fundamental to a pluralist perspective on contract law'.[20] This is a sound move which proves that cross-fertilisation in legal pluralist scholarship is indeed a beneficial exercise.

Noticeably, Mak considers some limitations of her theory[21] and engages with a range of possible objections to her claims. Regarding the latter, in Chapter 3 Mak concedes that because of the purpose they originally were meant to serve, 'private law rules at the EU level'[22] might be seen as leaning more towards economic interests and endorsing the 'market rationality'[23] advocated by the 'ordoliberal ideology'[24] at the expenses of such values as 'environmental and consumer protection',[25] and

[6]Ibid, p 5. See also ibid, p 231.
[7]Ibid, p 9. See also ibid, p 232 ff.
[8]See eg ibid, pp 11, 14, 16, Ch 2.
[9]Ibid, p 51.
[10]Ibid, p 11.
[11]Ibid, p 11.
[12]See eg F Schauer 'Institutions and the concept of law: a reply to Ronald Dworkin (with some help from Neil MacCormick)' in M Del Mar and Z Bankowski (eds) *Law as an Institutional Normative Order* (Aldershot: Ashgate, 2009) pp 35–44, 43: 'the central feature of modern legality [is] its institutional status'.
[13]Mak (n 4) pp 11, 16, Ch 3, pp 153, 189, 200, 208.
[14]Ibid, p 94.
[15]Ibid, p 95.
[16]Ibid, p 11.
[17]Ibid, p 35.
[18]Ibid. See also ibid, pp 39–45, 60–64.
[19]Ibid, p 35.
[20]Ibid, p 35.
[21]For other examples, see ibid, p 234 ff.
[22]Ibid, p 49.
[23]Ibid, p 49.
[24]Ibid, p 75. See also ibid, p 79.
[25]Ibid, p 48.

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'democratic politics'.[26] However, she also notes that this is far from clear, and that 'further investigation'[27] is required. Having embarked upon such analysis concerning the substantive characters of such rules, Chapter 4 concludes that while 'EU consumer contract law is still mainly concerned with the economic rights of EU citizens, … it contains openings for the [pluralist] pursuit of social rights and policies'[28] – or in a word, 'justice'.[29] This theme also informs Chapter 5, which concludes Mak's crafting of a 'theoretical framework for a strong legal pluralist theory'.[30] The chapter effectively 'assesses some of the leading theories of [European] legal pluralism'[31] with the aim of determining whether, with the appropriate adjustments, they can accommodate the pluralist approach the author advocates. This is one of *LPECL*'s key chapters for two reasons. First, it carefully navigates through the nuances of the main theories comprising the (exceedingly crowded) field of legal pluralism. This exercise not only offers a precious summary of the scholarly landscape on the subject. It also, and relatedly, enables the reader to get a better sense of Mak's overall argument. Secondly, the chapter shows that, theoretically, there is in fact room for a strong pluralist conception of contract lawmaking in Europe. In this sense, Chapter 5 acts like a threshold within Mak's analysis, beyond which the author can consistently focus on the more practical aspects of the normative landscape she envisages.

As one might expect, the first step to be taken towards such real life-oriented type of analysis is the defining of one of *LPECL*'s main protagonists – the platform economy itself. As Mak indicates, the latter 'denotes the market within which goods and services are exchanged between individuals, or "peers"', rather than businesses. As such, it 'make[s] use of otherwise neglected resources … that would otherwise be wasted'. Accordingly, in the platform, or sharing, economy, '[t]he line between consumers and producers … becomes blurred, resulting in the emergence of "prosumers"'.[32] Plainly, this is definition might seem too generic. The platform economy can be further qualified, depending on the chosen analytical angle. The sheer volume of socio-political, socio-economic and even philosophical literature on the subject is testament to the topic's malleability. Yet, the definition employed by Mak fits her analytical purposes well, allowing her to discuss a wealth of very relevant regulatory instruments, from public and private regulation, to codes of conduct and soft law mechanisms through which the platform economy operates and which point to the 'shift from public to private governance in consumer markets'[33] it signals. Two pivotal case studies are also discussed, ie AirBnB and Amazon. The picture that emerges from this discussion is an interesting one: on the one hand, operators' need to secure trust between users has prompted developments where '[c]onsumers become active participants in the regulatory process that defines the applicable rights';[34] on the other, 'private regulation … provide[s] users with similar kinds of protection as found in EU consumer law',[35] particularly in relation to transparency (a keynotion when it comes to building and preserving trust).[36] Yet more needs to be done, Mak observes, especially on the 'monitoring'[37] side, as 'platforms are not driven by the same motives or responsibilities as legislators or regulators, for example with regard to protecting the individual or collective interests of consumers'.[38] Considering the EU's long-standing political interests in providing little regulation for the platform economy,[39] it is hard to disagree with these remarks.

[26]Ibid, p 49.
[27]Ibid, p 49.
[28]Ibid, p 92.
[29]Ibid, p 49.
[30]Ibid, p 14.
[31]Ibid, p 96.
[32]Ibid, p 127. See also ibid, p 1.
[33]Ibid, p 229.
[34]Ibid, p 129.
[35]Ibid, p 154. See further ibid, Ch 9.
[36]Ibid, p 154 ff.
[37]Ibid, p 154.
[38]Ibid, p 154.
[39]Ibid, p 135.

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Finally, it is exactly this general regulatory shortage that leads Mak to examine, in Chapter 9, 'which instruments are available for ensuring that the objectives and values of EU law are safeguarded'.[40] Building on what previous chapters revealed,[41] Mak concludes that all current 'strategies for managing [legal] pluralism' (ie standardisation, optional instruments such as the Common European Sales Law, and alternative dispute resolution mechanisms) 'help ensure that minimum values of EU law are being observed and complied with'.[42] The finding is undoubtedly compelling, especially when combined with the analysis on all those forms of co-regulation which are, more often than not, 'required to achieve certain policy goals'[43] concerning the safeguarding of 'collective interests or fundamental rights'.[44]

This review has merely scratched the surface of Mak's rich analysis and compelling arguments. There is much to be learned from *LPECL*, which is sure to become a major point of reference for future reflections on the interplay between legal pluralism and contract law. I recommend it not only to contract (and consumer) law scholars and practitioners but also to socio-political and socio-economic thinkers working on issues of European regulation and integration, broadly understood.

[40]Ibid, p 16.

[41]Namely, 'that lawmaking by private actors in the platform economy does not lead per se to lower levels of consumer protection but that certain risks are [nonetheless] present': ibid, p 203.

[42]Ibid, p 208.

[43]Ibid, p 221.

[44]Ibid, p 230.

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