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The Making of Transnational Contract Law

GRAF-PETER CALLIESS*

ABSTRACT

The definition and creation of contract law is entrenched in a common understanding of the strong role of the modern state in the administration of justice. This article argues that this understanding is currently subject to a fundamental transformation as a result of the increasing demand for legal certainty in cross-border transactions. Traditional concepts of private international law, mainly the law of conflicts and multilateral treaty harmonization, have proven unable to keep pace with globalization, allowing private actors to step in and gain a dominant position in providing legal services to international commerce. The resulting privatization of lawmaking leads to concerns regarding the legitimacy of transnational contract law. This paper suggests using the concepts of “rough consensus” and “running code” to reconceptualize the ideas of democratic lawmaking under the rule of law in order to adapt them to the reality of transnational lawmaking.

“We reject: kings, presidents and voting.
We believe in: rough consensus and running code.”

—DAVID CLARK¹

“The final word always rests with state law;
whatever it fails to authorize has no prospect of
recognition—especially within a democratic state.”

—CHRISTIAN VON BAR²

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1. DAVID D. CLARK, *A CLOUDY CRYSTAL BALL: VISIONS OF THE FUTURE* 19 (1992).

2. CHRISTIAN VON BAR & PETER MANKOWSKI, *INTERNATIONALES PRIVATRECHT BAND I: ALLGEMEINE LEHREN* 81 (2d ed. 2003) (translated by Graf-Peter Calliess).

As a matter of fact, lawyers from all jurisdictions know what contract law is and how it is made. Although not explicable in a definite theory and despite differences regarding the relative weight of legislation compared to judicial lawmaking, this knowledge is entrenched in a common understanding of the strong role of the modern state in the administration of justice. In this article I argue that this common sense currently is subject to a fundamental transformation. As globalization has led to a shift in the legal needs of contract law consumers, the demand for legal certainty in cross-border transactions has increased. Section I explores this transition. Section II discusses how traditional concepts of private international law, mainly the law of conflicts and multilateral treaty harmonization, have proven unable to keep pace, allowing private actors to step in and gain a dominant position in providing legal services to international commerce. The resulting privatization of lawmaking leads to concerns regarding the legitimacy of transnational contract law. The new forms of lawmaking that can be observed in the transnational legal arena cannot be realigned with the traditional concepts of legitimacy of the constitutional state, nor is it appropriate to fall back on the even more out-dated concepts of natural or customary law. Rather it is necessary to reconceptualize the ideas of democratic lawmaking under the rule of law in order to adapt them to the reality of transnational lawmaking. In section III, I suggest that the concepts of “rough consensus” and “running code” are potential candidates in this endeavor.

I. CONTRACT LAW AND GLOBALIZATION

Commerce, defined as the marketing of goods and services, is dependent on a tremendously complex set of institutions, a very basic one being the enforcement of contractual commitments as a means for the voluntary exchange of property rights. The latter comprises not only substantive norms, i.e., contract law in a narrow sense, but procedural arrangements for dispute resolution and enforcement as well.³ Since the welfare of modern Western societies is based on economic growth, there is a public interest in fostering commerce by providing efficient institutions for contract enforcement, at least in the market economies of Organization for Economic Cooperation and Development (OECD) countries. This was one reason why rising nation states in the late eighteenth and nineteenth centuries

3. See generally Gillian K. Hadfield, *The Many Legal Institutions that Support Contractual Commitments*, in HANDBOOK OF NEW INSTITUTIONAL ECONOMICS 175 (Claude Menard & Mary M. Shirley eds., 2005) (discussing various enforcement mechanisms available to support contractual commitments).

modernized their legal systems by providing reliable public legal services with regard to dispute resolution and enforcement, and, in Continental Europe, by enacting codifications of substantive commercial and procedural law.⁴

However, public interest in a flourishing economy does not necessarily imply that the state takes over the sole responsibility for the provision of legal certainty in the three dimensions of legislating, adjudicating, and enforcing. Institutions that support contractual commitments may also be provided by means of private ordering⁵ or private law making.⁶ Generally speaking, private ordering takes place “in the shadow of law,”⁷ i.e. private and public governance mechanisms work as supplements which are mutually dependent and reinforce each other. The relative weight of public and private ordering in the governance of contractual relations is subject to variations in time and space, a fact that is reflected in the eye-catching title *The Rise and Fall of Freedom of Contract*, for example.⁸

There are, however, situations where private ordering substitutes for public contract law. In “[c]ircumstances where state law is ‘very costly, slow, unreliable, corrupt, weak, or simply absent,’” (lawlessness), parties simply have no choice but to employ private ordering to support otherwise problematic exchanges.⁹ Different private governance mechanisms, namely social norms, alternative dispute resolution, and social sanctions, may be bundled into effective private regimes or private legal systems in order to allow parties to transact.¹⁰ This happens not only in the absence of state support, for instance in less developed countries or transfor-

4. For a discussion on the process of the nationalization of commercial law, see A. CLAIRE CUTLER, *PRIVATE POWER AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY* 141–179 (2003) (Cambridge Studies in Int’l Relations, Series No. 90, 2003); JAMES OLDHAM, *ENGLISH COMMON LAW IN THE AGE OF MANSFIELD* 79–106 (2004); FRANZ WIEACKER, *A HISTORY OF PRIVATE LAW IN EUROPE: WITH PARTICULAR REFERENCE TO GERMANY* 363–70 (Tony Weir trans., 1995).

5. E.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 126–132 (1991); ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000); Barak D. Richman, *Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering*, 104 COLUM. L. REV. 2328, 2338–48 (2004).

6. E.g., David V. Snyder, *Private Lawmaking*, 64 OHIO ST. L.J. 371 (2003).

7. AVINASH K. DIXIT, *LAWLESSNESS AND ECONOMICS: ALTERNATIVE MODES OF GOVERNANCE* 10 (2004); Oliver E. Williamson, *The Economics of Governance*, 95 AM. ECON. REV. (PAPERS & PROC.) 1, 14 (2005).

8. P. S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979). For a detailed analysis of this concept, see Peer Zumbansen, *The Law of Society: Governance Through Contract*, 14 IND. J. GLOBAL LEGAL STUD. 191 (2007).

9. DIXIT, *supra* note 7, at 3.

10. See generally Amitai Aviram, *A Paradox of Spontaneous Formation: The Evolution of Private Legal Systems*, 22 YALE L. & POL’Y REV. 1 (2004); Lisa Bernstein, *Private Commercial Law in the*

mation states, but occasionally also in order to opt out of a public legal system which is perceived as inefficient.¹¹

The situation is quite similar when it comes to cross-border commerce. When compared to domestic commercial transactions, public contract enforcement institutions are quite weak because additional uncertainties arise with regard to questions such as which court has jurisdiction, which national contract law that court shall apply, and whether a resulting judgment will be enforced in another nation state. Moreover, national courts are said to be ill-equipped with regard to expertise, language capabilities, costs, and length of procedure, a reason why international commercial arbitration has successfully established a dominant position on the market for cross-border dispute resolution.¹²

In fact, many scholars contend that one can observe the evolution of a global private regime for international commerce,¹³ i.e. a New Law Merchant.¹⁴ Contested as this thesis may be,¹⁵ recent findings of empirical research on the institutional organization of cross-border commerce suggest that economic globalization has led to a fundamental transformation of commercial law with regard to the relative weight of public law and private ordering: “private governance on the transnational plane becomes much more comprehensive, systematic and ubiquitous.”¹⁶ In the following, I will focus on the investigation of only one aspect of the introduced problem. It concerns the making of substantive transnational contract law that emerges beyond both nation states and the multilateralism of international law.

Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions, 99 MICH. L. REV. 1724, 1725 (2001); Gillian K. Hadfield, *Privatizing Commercial Law*, REG., Spring 2001, at 40.

11. E.g., Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 135, 151 (1992).

12. See Bruce L. Benson, *To Arbitrate or To Litigate: That Is the Question*, 8 EUR. J.L. & ECON. 91, 91–93 (1999).

13. E.g., Gunther Teubner, *Global Private Regimes: Neo-Spontaneous Law and Dual Constitution of Autonomous Sectors?*, in PUBLIC GOVERNANCE IN THE AGE OF GLOBALIZATION 71, 72–75 (Karl-Heinz Ladeur ed., 2004)

14. Klaus Peter Berger, *The New Law Merchant and the Global Market Place—A 21st Century View of Transnational Commercial Law*, in THE PRACTICE OF TRANSNATIONAL LAW 1, 19–22 (Klaus Peter Berger ed., 2001).

15. See, for example, the analysis of Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State*, 14 IND. J. GLOBAL LEGAL STUD. 447 (2007) and Peer Zumbansen, *Piercing the Legal Veil: Commercial Arbitration and Transnational Law*, 8 EUR. L.J. 400 (2002).

16. Graf-Peter Calliess et al., *Transformations of Commercial Law: New Forms of Legal Certainty for Globalized Exchange Processes?*, in TRANSFORMING THE GOLDEN-AGE NATION STATE 83, 100 (Stephan Leibfried et al. eds., 2007).

II. THE SUFFERINGS OF PRIVATE INTERNATIONAL LAW

If one conceives private international law as one component of a global economic constitution that provides a regulatory framework for the facilitation of cross-border commerce,¹⁷ it can be said that it has meandered for more than 200 years and could easily mislead the legal layperson to the following judgment: “private international law is the cause of a problem, for which it regards itself as solution.”¹⁸

A. *The Nationalization of Contract Law*

According to the Continental European model and its concept of the constitutional state, it is taken for granted that private law—like all law—is only conceivable as democratically legitimate parliamentary law. The Anglo-American common law system recognizes that legislation takes priority over adjudication (*supremacy of parliament*). After more than two centuries of increasingly interventionist private law legislation and adjudication, it is hard to avoid a perception that does not take the state’s claim of the monopoly on legitimate lawmaking as part of the nation state’s deep grammar. As a matter of self-immunization, the state subjects all forms of non-state law to different methods of degradation, namely incorporation, delegation, and deference.¹⁹

During the nineteenth century, the notion that all law is state law in combination with the heyday of the national idea entailed the nationalization of commercial law.²⁰ While private law was deformed and modernized by means of reception and incorporation of the medieval *lex mercatoria* and the English law merchant, nineteenth century codification of commercial law—at least in Germany—aimed also at legal unification. Yet, at times the fact remained unnoted that domestic legal unity came paradoxically at the price of external legal divergence. For only the demise of the tradition of a common (uniform) private law (*ius commune*) made it necessary to create a law of conflicts, which as a conse-

17. Manfred E. Streit & Antje Mangels, *Privatautonomes Recht und grenzüberschreitende Transaktionen*, 47 ORDO 73, 76 (1996).

18. Dieter Schmidtchen, *Lex Mercatoria und die Evolution des Rechts*, in *VEREINHEITLICHUNG UND DIVERSITÄT DES ZIVILRECHTS IN TRANSNATIONALEN WIRTSCHAFTSRÄUMEN* 1, 9 (Claus Ott & Hans-Bernd Schäfer eds., 2002) (translated by Graf-Peter Calliess).

19. Ralf Michaels, *The Re-state-ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism*, 51 WAYNE L. REV. 1209, 1228–37 (2005).

20. See VON BAR & MANKOWSKI, *supra* note 2, at 18–20. For more information on the nationalization of commercial law, see sources cited *supra* note 4.

quence of legal positivism, could for its part not be conceived as a universal concept. Contrary to the prima facie meaning of “private international law,” each nation state developed its own conflict rules.

B. The Multilateralism of International Law

Already in the second half of the nineteenth century, a countermotion to the described nationalization of commercial law emerged. Its proponents suggested establishing a world private law by means of multilateral treaty harmonization under international law.²¹ However, more than 100 years of experience have shown that this strategy is hardly successful; its failure can be ascribed to the punctual orientation, procedures of multilateral negotiations, and intricate ratification of international treaties, which do not serve the efficient discussion of issues in contract law.²² From the Hague Conference on Private International Law (1893) to UNIDROIT (1926) to UNCITRAL (1966), the competent international organizations have produced practically no viable results: for example, the U.N. Convention on Contracts for the International Sale of Goods of 1980 (CISG) remained piecemeal²³ and the recent Hague negotiations on a global Judgments Convention failed miserably.²⁴ Overall, the current take on private law unification under international law is a disillusioned or even critical one.²⁵

C. Soft Law and Private Codification

The unification of private law through soft law is a promising alternative concept.²⁶ That is, international expert commissions develop abstract principles and

21. VON BAR & MANKOWSKI, *supra* note 2, at 20-32.

22. See Herbert Kronke, UNIDROIT 75th Anniversary Congress on Worldwide Harmonisation of Private Law and Regional Economic Integration: Hypotheses, Certainties and Open Questions, 8 UNIFORM L. REV. 10, 26 (2003).

23. See, e.g., Franco Ferrari, 'Forum Shopping' Despite International Uniform Contract Law Conventions, 51 INT'L & COMP. L.Q. 689 (2002).

24. For a discussion on the failure of the global Judgments Convention, see Graf-Peter Callies, *Value-added Norms, Local Litigation, and Global Enforcement: Why the Brussels-Philosophy Failed in the Hague*, 5 GERMAN L.J. (SPECIAL ISSUE) 1489 (2004).

25. See, e.g., Herbert Kronke, *Methodical Freedom and Organizational Constraints in the Development of Transnational Commercial Law*, 51 LOY. L. REV. 287, 296-97 (2005); Erin Ann O'Hara, *Economics, Public Choice, and the Perennial Conflict of Laws*, 90 GEO. L.J. 941, 948-50 (2002).

26. See generally Ulrich Drobnig, *Vereinheitlichung von Zivilrecht durch soft law: neuere Erfahrungen und Einsichten*, in AUFBRUCH NACH EUROPA: 75 JAHRE MAX-PLANCK-INSTITUT FÜR PRIVATRECHT

rules of a particular legal area. Such committees can become active within international organizations and on private initiative. In the first case, the commissions formally negotiate on behalf of the member states of the relevant international organizations, with the aim not of concluding an international treaty but of fleshing out a nonbinding text that is recommended to the Member States for national implementation. This eases consensus-building as it allows every state to abstain from implementation or to alter a proposed stipulation in individual cases. The 1985 UNCITRAL Model Law on International Commercial Arbitration is regarded as a particularly successful example; it has been implemented by fifty states and was used by numerous countries as the standard for the reform of their national arbitration laws.²⁷

Private codifications, however, are developed without a formal mandate for legislation, so participants do not perceive themselves as state representatives; they argue according to their expertise and own interests. Founded on functional legal comparison, these formally non-binding results are conceived as the expression of universally valid legal principles, which constitute the common core of different national systems of private law. During the 1990s, two codifications of private law, the UNIDROIT Principles of International Commercial Contracts and the Lando Commission's Principles of European Contract Law, emerged in the domain of contract law. Both codifications not only attempt to function as model laws but also propose, as a formulation of general legal principles, to be available both to contractual parties by means of choice of law and to courts in their interpretation of contracts and state private law.²⁸

D. Transnational Law and Lex Mercatoria

These catalogs of principles, therefore, are conceived as components of the *lex mercatoria*, the renaissance of which has been the subject of a lively debate since the 1960s. In 1956, Philip Jessup defined transnational law as "all law which regulates

745 (Jürgen Basedow et al. eds., 2001) (discussing new issues arising from the standardization of civil law through "soft law").

27. Pieter Sanders, *UNCITRAL's Model Law on International and Commercial Arbitration: Present Situation and Future*, 21 *ARB. INT'L* 443, 443 (2005).

28. Ole Lando, *Salient Features of the Principles of European Contract Law: A Comparison with the UCC*, 13 *PACE INT'L L. REV.* 339, 340–42 (2001). See generally Michael Joachim Bonell, *Do We Need a Global Commercial Code?*, 106 *DICK. L. REV.* 87 (2001) (discussing the type of code needed to unify international trade law and what its relationship with general contract law should be).

actions or events that transcend national frontiers.”²⁹ Overcoming the traditional distinctions between national and international as well as public and private law, his aim was to establish a jurisprudence encompassing the law of cross-border social and especially economic phenomena more comprehensively than international law did, as the latter was seen as increasingly irrelevant and static in the Cold War era.³⁰

Whereas this approach diverted attention away from legal sources toward the increasing transnationality of legal matters, almost at the same time Goldman and Schmitthoff, two European law professors, developed a particular non-state interpretation of the term “transnational law.” Both held the dream that a global contract law could be established by reviving the *lex mercatoria* within the jurisdiction of international commercial arbitration.³¹ Here, transnational (commercial) law constitutes a third category of law beyond the traditional dichotomy of national and international law.³² The New Law Merchant is conceived as an autonomous legal system beyond the nation state, which is based on general legal principles, i.e. the common core of national legal systems as explored by functional legal comparison (e.g., the UNIDROIT principles), and on trade customs of international merchants as expressed in standardized contract terms (e.g., the Incoterms or model contract forms of the ICC).³³ Their application, interpretation, and development remain with international commercial arbitration.³⁴

III. THE LEGITIMATION OF TRANSNATIONAL PRIVATE LAW

There is a heated debate about the existence and legal validity of transnational contract law; with regard to the New Law Merchant there is especially the issue of its democratic legitimacy.³⁵ This has also become relevant for the recent

29. PHILIP C. JESSUP, *TRANSNATIONAL LAW* 2 (1956).

30. Anne-Marie Slaughter, *Breaking Out: The Proliferation of Actors in the International System*, in *GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY* 12, 20 (Yves Dezalay & Bryant G. Garth eds., 2002).

31. For an analysis of this argument, see Zumbansen, *supra* note 15.

32. KLAUS PETER BERGER, *THE CREEPING CODIFICATION OF THE LEX MERCATORIA* 40–43 (1999).

33. Alejandro M. Garro, *Rule-Setting by Private Organisations, Standardisation of Contracts and the Harmonisation of International Sales Law*, in *FOUNDATIONS AND PERSPECTIVES OF INTERNATIONAL TRADE LAW* 310, 310–17 (Ian Fletcher et al. eds., 2001).

34. See generally Yves Derains, *Transnational Law in ICC Arbitration*, in *THE PRACTICE OF TRANSNATIONAL LAW*, *supra* note 14, at 43 (discussing the application of transnational law in ICC arbitration).

35. For a very instructive overview, see Zumbansen, *supra* note 15.

contract law project of the European Commission.³⁶ Is transnational contract law hence illegitimate? This can only be answered by a comparison with traditional state-made contract law.

A. *The Legitimation of State Private Law*

“The final word always rests with state law; whatever it fails to authorize has no prospect of recognition—especially within a democratic state.”³⁷ Typical for the debate about transnational private law, its arguments become somewhat opaque under close inspection, as the democratic legitimacy of state private law is highly overestimated. On the one hand, and despite some positive developments after the fall of the iron curtain, more than half of the world’s population still lives in illiberal or semi-liberal states where private law can hardly be seen as democratically legitimated.³⁸ On the other hand, in liberal states the bulk of private law is at best democratically legitimized in a formal manner. Common law is judge-made law and applied, as long as parliament does not legislate in individual cases, due to legislative refrain from intervention. On a similarly fictitious basis, the (further) validity of the pre-constitutional German Civil Code (BGB of 1896) was justified under the German Constitution (Basic Law of 1949) after World War II. Yet, the Continental European codifications were prepared by experts from ministerial bureaucracies as well as academia and their substance was not discussed by parliament at all; at best, they were amended in individual cases in order to protect particular interests (e.g., those of beekeepers in section 964 BGB). This also applies to the Act to Modernize the Law of Obligations, which in 2001 was pushed through German Parliament in a disgraceful proceeding without any debate due to the expiring term for the implementation of the European Directive on certain aspects of the sale of consumer goods.³⁹

With the reference to European Community (EC) legislation, we touch upon

36. *Communication from the Commission to the European Parliament and the Council, European Contract Law and the Revision of the Acquis: The Way Forward*, COM (2004) 651 final (Oct. 11, 2004) [hereinafter *The Way Forward*]. For a critique of the contract law project with regard to its democratic legitimacy, see Gert Brüggemeier et al., Study Group on Soc. Justice in Eur. Private Law, *Social Justice in European Contract Law: A Manifesto*, 10 EUR. L.J. (SPECIAL ISSUE) 653 (2004).

37. VON BAR & MANKOWSKI, *supra* note 2, at 81.

38. Adrian Karatnycky, *Liberty's Expansion in a Turbulent World: Thirty Years of the Survey of Freedom*, in *FREEDOM IN THE WORLD: THE ANNUAL SURVEY OF POLITICAL RIGHTS AND CIVIL LIBERTIES* 2003, at 7 (Adrian Karatnycky, et al. eds., 2003).

39. Directive 1999/44/EC, 1999 O.J. (L171) 12.

the decisive legitimacy deficit of today's private laws of the EC Member States. With regard to private law, the German legislator possesses practically no leeway because, since the 1980s, private law legislation almost exclusively implemented EC directives. Yet, the German legislator is practically not, and theoretically hardly, involved in the creation of EC legislation; often it does not take advantage of its remaining leeway, as it does not recognize its room for maneuver or is misled about it by interested parties. The German Federal Constitutional Court (Bundesverfassungsgericht) has recently problematized this state of affairs with regard to the European arrest warrant.⁴⁰

EC Directive law itself lacks legitimacy entirely if one applies a minimum standard geared toward a procedure facilitating rational outcomes in the sense of deliberative democracy.⁴¹ One can, for instance, be reminded of the fact that during the debate about the transformation of the European Anti-Discrimination Directives⁴² into German law the entire German government, including the current Minister of Justice, affirmed its incompetence concerning the Directive's content; it was argued that the Directives quasi-accidentally "slipped through" and that responsibility rested with the (meanwhile retired) Minister of Labor Riester, who had agreed unsuspectingly and without consultation.⁴³ That such deep interventions into the foundations of private law can occur within a democratic state in such a manner reduces the democracy argument put forward to absurdity.

40. See generally Simone Mölders, *European Arrest Warrant Act Is Void—The Decision of the German Federal Constitutional Court of 18 July 2005*, 7 GER. L.J. 45 (2006) (discussing the FCC's opinion declaring the European Arrest Warrant Act unconstitutional and void).

41. For more information on deliberative democracy, see JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 287 (William Rehg trans., 1996).

42. Four Directives had to be implemented into German law: Council Directive 2000/43/EC, 2000 O.J. (L 180) 16–22 (implementing the principle of equal treatment between persons irrespective of racial or ethnic origin); Council Directive 2000/78/EC, 2000 O.J. (L 303) 16–22 (establishing a general framework for equal treatment in employment and occupation); Council Directive 2002/73/EC, 2002 O.J. (L 269) 15–20 (amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.); and Council Directive 2004/113/EC, 2004 O.J. (L 373) 37–43 (implementing the principle of equal treatment between men and women in the access to and supply of goods and services).

43. Compare the news coverage in *Der Spiegel* 18/2005. *Bürokratie: Weckruf für Prozesshansel*, SPIEGEL DIGITAL, May 2, 2005, <http://service.spiegel.de/digas/servlet/find/DID=40254095>.

B. *Rough Consensus and Running Code*

If, with regard to the above-mentioned private codifications (e.g., the UNIDROIT Principles), it is argued that their validity resulted from “not *ratione imperii*, yet *imperio rationis*,”⁴⁴ unnecessary worries about expert domination over democratic legislation are fostered.⁴⁵ Regarding the legitimacy of transnational contract law, the reference to reason remains unsatisfactory as the contents of normative texts hardly impinge on their mode of action. “Structures are only real when they are used for linking communicative events; norms, only when they are quoted explicitly or implicitly. . . .”⁴⁶ Catalogs of general legal principles, as soft law, do not spring to life until they are applied in concrete cases and, hence, transformed into respectable hard code. In the legal process the condensation and confirmation of norms coincide.⁴⁷ In its directly legitimizing manner, this transformation process is linked back to the law-seeking citizens, a fact which is traditionally pigeonholed, somewhat imprecisely, as “customary law.” In the nineteenth century, Savigny had qualified the interaction of “peoples’ law” and “lawyers’ law” in the emergence of customary law as follows: “law is first created by customs and popular belief, then by jurisprudence; thus everywhere by quietly working forces, but not by the will of the legislators.”⁴⁸ From a current perspective, however, this wording requires an update in order to touch upon the legitimation mode of transnational contract law referred to in our context.

1. *Internet Governance: The Legitimation of Open Technical Standards*

“We reject: kings, presidents and voting. We believe in: rough consensus and running code.”⁴⁹ In order to safeguard its interoperability as a network of networks, the Internet requires global technical standards, whose development was

44. Ulrich Drobnig, *Ein Vertragsrecht für Europa*, in Festschrift für Ernst Steindorff zum 70. Geburtstag am 13. März 1990, at 1141, 1151 (Jürgen F. Baur, Klaus J. Hopt & Peter K. Mailänder eds., 1990) (referencing Kötz) (translated by author).

45. See, e.g., Gert Brüggemeier et al., *supra* note 36, at 653–55.

46. Niklas Luhmann, *Das Recht der Gesellschaft* 46 (1993).

47. For a much more detailed discussion of this concept, see Graf-Peter Callies, *Reflexive Transnational Law: The Privatisation of Civil Law and the Civilisation of Private Law*, 23 *Zeitschrift für Rechtssoziologie* 185 (2002).

48. Friedrich Carl von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* 13 (1814).

49. Clark, *supra* note 1; Joseph Reagle, *Why the Internet Is Good: Community Governance That Works Well* (1998) (working draft), available at <http://cyber.law.harvard.edu/people/reagle/regulation-19990326.html> (quoting David Clark).

carried out by Jon Postel, a California university student, in the 1970s. In order to maintain the quality of standards and to increase the motivation of globally dispersed webmasters for compliance, he developed the Request for Comments (RFC) procedure.⁵⁰ For the solution of a particular problem a team leader is appointed, who posts an RFC on the net. Everyone can digitally participate in the debate; primarily, interested experts from affected groups take part. Generally, standards should be established not by majority decision but through consensus by deliberation. Yet, in order to keep the debate from losing itself in contradicting alternatives or from starting all over again, the team leader can state a rough consensus concerning intermediary or final results.⁵¹ Such an approximate or “rough consensus” has three implications: it indicates a) at the social level, a near unanimity among the participants (i.e., a fairly prevailing opinion), b) at the substantial level, a common denominator (i.e., a common core) and c) at the time level, a moment of temporariness regarding future improvements (i.e., learning aptitude).⁵² Where a team has reached consensus about a new standard, the implementation phase begins, in which running code again holds three meanings: at first, the usability of a new standard is tested among a small group (pilot phase) before it is recommended for global implementation. Thereafter, the Internet community is free to accept or reject the proposal (recognition phase). Only if a standard has achieved broad acceptance so that its noncompliance would jeopardize interoperability, would a webmaster lose her freedom of choice (binding phase).⁵³ In analogy to IT language, the relevant standard then resembles a running code that functions in practice and is widespread. The “rough consensus and running code” procedure was later adopted by the Internet Engineering Task Force (IETF) as well as the World Wide Web Consortium (W3C) and has since been elaborated.⁵⁴

2. *Modern Customary Law as Open Social Standard*

This procedure is not only suitable for technical standards but can also be applied to social and legal norms. In a discourse theoretical view, rough consensus on the side of norm entrepreneurs stands for a deliberative procedure for creating norms that is geared to the scientific quest for truth. Running code refers to the recognition of such norms by consensus of all affected on the demand side and the

50. See Reagle, *supra* note 49.

51. See *id.*

52. See *id.*

53. See *id.*

54. See, e.g., *id.*

implementation of a norm in a regulatory competition that is characterized by network effects.⁵⁵ Both elements can be found in the production of soft law according to international law (UNCITRAL model law) and in the elaboration and application of private codifications (UNIDROIT and Lando Principles). The legal principles and fundamental rules inscribed into private codifications have to be grounded in a wide consensus regarding social, substantial, and time aspects if they strive to become a running code in practice. Expressed in the choice of law of such principles, the contractual parties' assent grounds their trust that these principles represent a broad accord.

In its result, a running code is not different from customary law. Yet, customary law has to start at some point. Rough consensus and running code can be seen as timely interpretations of the production of customary law. With regard to the legitimacy of transnational contract law, they can serve as elements of a theory of a "global civil law society," which replaces the "quietly working forces" of the nineteenth century.⁵⁶ Beyond customary law, which is merely bound to *consuetudo* and *opinio necessitates* and state law, which is constituted in formal legislative proceedings via majority decision, there seems to emerge a new form of legitimate lawmaking—especially for the supra-national and transnational spaces of action and communication.⁵⁷

3. *The Legitimation of the European Contract Law Project*

Once a sensibility for innovative modes of legitimate lawmaking has been developed, traces of the new model can be discovered as well in the European contract law project: request for comments, rough consensus, and running code. With the communication of 2001, the action plan of 2003 and the communication of October 2004⁵⁸ the European Commission has initiated an open and transparent process of discussion, which everyone interested could join by written statement and whose

55. For a discussion on the economic model of competition for social lawmaking, see Amitai Aviram, *A Network Effects Analysis of Private Ordering* (Berkeley Program in Law & Econ., Working Paper No. 80, 2003), available at <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1079&context=blewp>, and Andreas Engert, *Norms, Rationality, and Communication: A Reputation Theory of Social Norms*, 92 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 335 (2006).

56. GRAF-PETER CALLIESS, *GRENZÜBERSCHREITENDE VERBRAUCHERVERTRÄGE* 220 (2006).

57. See generally Calliess, *supra* note 47 (examining the emergence of transnational law and the need to constitutionalize such regimes).

58. Commission of The European Communities, Communication from the Commission to the Council and the European Parliament on European Contract Law, Brussels, 11.07.2001, COM(2001) 398 final; Communication from the Commission to the European Parliament and the Council, A More Coherent European Contract Law, Brussels, 12.2.2003, COM(2003) 68 final; Communication

course and intermediary results are freely accessible through the publication of all documents on the Internet.⁵⁹ The fundamental rules of European contract law shall at first be consolidated in a nonbinding Common Frame of Reference (CFR); the development of its draft was assigned to the Joint Network on European Private Law.⁶⁰ This network of scholars from all European countries works on the basis of the common core approach; hence, it attempts to identify the substantial rough consensus of existing European private law directives (the “*acquis communautaire*”) on the one hand, and the national private laws of Member States through functional legal comparison on the other hand. At the same time, the European Commission established a network of practitioners (CFR-net), which shall be involved in the development of the CFR. Overall, the CFR is developed with the aim of achieving a broad consensus on the basis of a wide participation of governments, industry, and civil society; the involvement of practitioners shall lead to an early recognition of implementation issues (practicability test).⁶¹

Once a rough consensus about the CFR is achieved, it could, as a first step, be published as a (nonbinding) recommendation within the Official Journal of the European Union. Within commercial intercourse, these rules could be applied as chosen law by parties in arbitration proceedings according to the model of the UNIDROIT principles. In the context of the reform of the 1980 Rome Convention on the Law Applicable to Contractual Obligations, the European Commission suggests that contract parties should be allowed to choose particular private codifications by means of choice of law—having in mind the UNIDROIT principles and the CFR.⁶² Thus, the CFR is considered to be developed into a so-called “optional instrument;” it would be available by choice of law so that state courts would apply the CFR as law (recommendation phase). Only if enough practical experience with

from the Commission to the European Parliament and the Council, European Contract Law and the revision of the *acquis*: the way forward, Brussels, 11.10.2004, COM(2004) 651 final.

59. For a compilation of the documents concerning the contract law project, see EUROPA, Consumer Affairs, European Contract Law, http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/index_en.htm (last visited May 11, 2007).

60. The coordinator of the network, which encompasses different research groups, is Hans Schulte-Nölke, Professor at the University of Bielefeld. For details, see Joint Network on European Private Law Home Page, <http://www.copecol.org/> (last visited June 22, 2007).

61. Compare the considerations about a previous “practicability test” for the CFR. *The Way Forward*, *supra* note 36, at ¶ 3.2.2.

62. This is explained in the commentary to Article 3. *Commission Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I)*, at 5, COM (2005) 650 final (Dec. 15, 2005). For a critique of the choice of non-state law, see Peter Mankowski, *Stillschweigende Rechtswahl und wählbares Recht*, in *DAS GRÜNBUCH ZUM INTERNATIONALEN VERTRAGSRECHT* 63 (Stefan Leible ed., 2004).

this instrument is gained, which depends mainly on the acceptance of the CFR by contract parties expressed by their choice of law, could the degree of obligation be raised by a transition from opt-in to opt-out; then the instrument would be applicable like state law even in the absence of a differing choice of law, as is the case with the CISG.⁶³ The triggered increase of precedent available on the interpretation of the CFR by state courts will result in a decrease in opt-outs by contract parties. At the end of the day the CFR may transform into a generally accepted practice by contract parties and their counsels which will be very difficult to avoid even by parties from non-member states of the EC (binding phase).

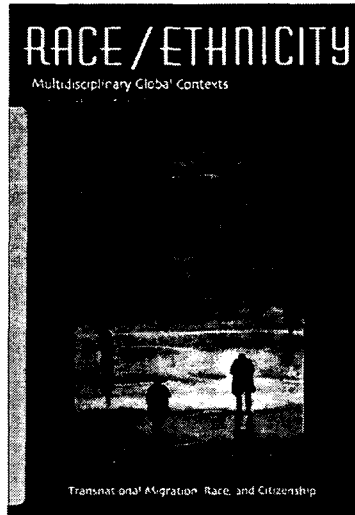
To sum up, the European contract law project resembles both the “rough consensus” and the “running code” method, i.e., the gradual codification and implementation of law dependent on the consent of the addressees of norms.

63. For the definitions of “opt-in” and “opt-out” instruments and an explanation of their relation to legal choice, see *The Way Forward*, *supra* note 36, at 17, ¶ 2. The CISG under this definition is an opt-out-instrument since Art. 6 CISG reads: “The parties may exclude the application of this Convention”

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