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# Law Making in the European Union: On Globalization and Contract Law in Divergent Legal Cultures

*Jan M. Smits*\*

## I. INTRODUCTION

One of the most salient problems of law making in a global world is how to deal with diverging national legal cultures. Ever since the emergence of the nation-state, law making has primarily been a task for the national legislatures and courts. They “make” law for relatively homogeneous societies that are usually characterized by a common language and culture. This law can be enforced by the State. As a result of increasing globalization, this classic picture is now rapidly changing.<sup>1</sup> If the law is to retain its role of regulating society (be it no longer a national, but a global one), we have to find new ways of making law and enforcing this law. In doing so, several fundamental questions have to be answered. One is whether law makers should really aim for one uniform (private) law—as in the nation-state—or rather allow diversity of jurisdictions. Another is—even if there is a need to harmonize the law—whether this uniformity is at all possible in view of diverging legal cultures.

This article offers an account of how to deal with these questions. This account is not a general and a theoretical one, but one that is based on the experience of the European Union (“EU”) in the field of contract law. European contract law is thus used as paradigmatic of globalization and private law as a whole. There is every reason to do so: the European Union has wide experience with making law for diverging jurisdictions. In addition to this, contract law can be considered one of the most important vehicles for globalization as it facilitates economic transactions. Therefore, the European debate about contract law may be viewed as a microcosm of global developments.

The next section is devoted to an overview of the present situation in European contract law. Parts III and IV address two main questions in the debate about harmonization of contract law:

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1. Thomas Friedman, *THE WORLD IS FLAT* (2005); Noreena Hertz, *THE SILENT TAKEOVER: GLOBAL CAPITALISM AND THE DEATH OF DEMOCRACY* (2001); William Twining, *GLOBALISATION AND LEGAL THEORY* (2000).

whether there is a real need for harmonization and whether harmonization is at all possible. Part V tries to identify the most effective way of dealing with diverse jurisdictions within the European Union and suggests that use of an optional code may be the most viable option. Finally, Part VI offers some more general thoughts about globalization and private law.

## II. CONTRACT LAW IN THE EUROPEAN UNION AND FOR THE EUROPEAN UNION

Contract law in Europe is characterized by its diversity. Within the European Union, there are at least four different types of contract law regimes.<sup>2</sup> First, every Member State has its own national contract law, which implies that there are now twenty-seven such jurisdictions within the European Union. In addition to these national regimes, there is a set of rules on contract law of European origin. This set consists of a rapidly increasing amount of directives issued by the European Union. Third, there is the international regime created by the Convention on the International Sale of Goods (“CISG”). Even though this regime is not specifically European, it does play an important role within the European Union. Finally, there are—within several countries—regional variations of the national model or even (like in the United Kingdom) several fully-fledged legal systems in coexistence. These four types of regimes are explored below.

### A. *Contract Law in the European Union: National Jurisdictions*

The twenty-seven Member States of the European Union all have their own contract law regime. This implies that each national legislator is competent to draft contract law rules and that each country has its own national courts to deal with contract cases. There is at present no highest European authority to provide binding contract law rules outside of the (rather limited) competence of the European Union. This implies that, of all the political, economic, and monetary unions in the world,<sup>3</sup> the European Union is the most diverse as to the law. Although in the United States, contract law is not a matter for the federal

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2. See Jan M. Smits, *Diversity of Contract Law and the European Internal Market*, in *THE NEED FOR A EUROPEAN CONTRACT LAW: EMPIRICAL AND LEGAL PERSPECTIVES* 153–86 (Jan M. Smits ed., 2005).

3. The most important economic union outside of Europe is the North American Free Trade Agreement (“NAFTA”), formed between the United States, Canada, and Mexico.

government, one cannot say that American contract law is diverse. In fact, the regimes on sale of goods and commercial transactions are very comparable, not only because of the example set by the Uniform Commercial Code ("UCC"), now adopted in almost all American states,<sup>4</sup> but also because of the presence of one American legal education, one language, and all those other elements that make a legal culture.<sup>5</sup>

It is possible to distinguish several groups of private law jurisdictions within the European Union on the basis of their common history, their sources of law, and their predominant mode of legal thought.<sup>6</sup> The first group consists of the common law systems of England and Ireland with their emphasis on judge-made law and the central authority of the English House of Lords and the Irish Supreme Court respectively. The common law system of Cyprus (Cyprus was a British colony until 1960) also belongs to this group. The second group consists of the traditional civil law countries, characterized not only by a central role for a national civil code,<sup>7</sup> but also by a highest court whose decisions are in practice often just as important as the code provisions. Among these countries, one can distinguish between those that have a code that is to a greater or lesser extent based on the Code Napoleon (France, Belgium, Luxemburg, Spain, Portugal, Italy, and Malta) and those that have a code based on the German model (Germany, Austria,<sup>8</sup> Greece, and the Netherlands). A third group consists of the Scandinavian Member States (Denmark, Sweden, and Finland). They are not only characterized by a common legal history but also by the existence of several common statutes. Among these are a statute on the sale of movables and a common contract law act.<sup>9</sup> Finally, there is the large group of countries that have entered the European Union in 2004 and 2007 and that often have a new or at least recently revised civil code (Poland, the Czech Republic, Slovakia, Hungary, Estonia, Lithuania, Latvia, Slovenia, Romania,

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4. On the UCC, for example, see J.J. White & R.S. Summers, UNIFORM COMMERCIAL CODE (2000).

5. On the term "legal culture," see discussion *infra* Part VI.

6. Cf. Konrad Zweigert & Hein Kötz, AN INTRODUCTION TO COMPARATIVE LAW 68 (Tony Weir trans., 1998).

7. Cf. Reinhard Zimmermann, *The Civil Law in European Codes*, in THE CIVILIAN TRADITION AND SCOTS LAW: ABERDEEN QUINCENTENARY ESSAYS 259 (David L. Carey Miller & Reinhard Zimmermann eds., 1997).

8. Austria has a special position as its AGB of 1811 is, like the French Civil Code, a natural law code.

9. Cf. Zweigert & Kötz, *supra* note 6, at 280.

and Bulgaria).<sup>10</sup> The way in which these new or revised codes are applied and interpreted by the courts of these countries cannot be compared to the way in which this is done in the traditional civil law countries. Generally speaking, the mode of interpretation is much more literal.

Diversity among these twenty-seven contract law regimes does not mean that it is impossible to draft principles that these legal systems have in common. A well-known set of such principles is formed by the Principles of European Contract Law ("PECL").<sup>11</sup> They do not, however, represent the individual national contract law regimes. One can only say that they try to provide a common structure (a common denominator) to Europe's legal systems, leaving out essential details as to substance and the divergent ways of dealing with this substance by the courts.<sup>12</sup> Despite a common history among most of the legal systems mentioned (most of them are to a greater or lesser extent based on the Roman law of the *ius commune*),<sup>13</sup> these systems have developed separately over the last 200 years. To look at this as a mere historical accident, or as something one could get rid of easily, does not do justice to the vigor of the differences or to the difficulties in overcoming this diversity.

### B. Contract Law for the European Union: Directives

In addition to the national contract law regimes, the European Union has until now issued twelve directives in the field of contract law.<sup>14</sup> This so-called *acquis* provides several types of rules that are all based on the internal market provision of the EC Treaty (Article 95): the justification for European intervention is that the subjects covered by the directives are of such importance

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10. Cf. Norbert Reich, *Transformation of Contract Law and Civil Justice in New EU Member Countries*, in RIGA GRADUATE SCHOOL OF LAW WORKING PAPERS 21 (2004).

11. PRINCIPLES OF EUROPEAN CONTRACT LAW PARTS I AND II (Ole Lando & Hugh Beale eds., 2000); PRINCIPLES OF EUROPEAN CONTRACT LAW PART III (Ole Lando et al. eds., 2003).

12. For a critique of the European principles approach, see Jan M. Smits, *The Future of European Contract Law: On Diversity and the Temptation of Elegance*, in TOWARDS A EUROPEAN IUS COMMUNE IN LEGAL EDUCATION AND RESEARCH 239 (Michael Faure, Jan Smits & Hildegard Schneider eds., 2002).

13. See, e.g., Reinhard Zimmermann, *Roman Law and the Harmonisation of Private Law in Europe*, in TOWARDS A EUROPEAN CIVIL CODE 21 (Arthur Hartkamp et al. eds., 2004).

14. See EUROPEAN PRIVATE LAW (Jan M. Smits et al. eds., 2006); FUNDAMENTAL TEXTS ON EUROPEAN PRIVATE LAW (O. Radley-Gardner et al. eds., 2003).

that divergences in national legislation of the Member States distort the internal market. Thus, the formation of some contracts is governed by rules on formalities,<sup>15</sup> representation,<sup>16</sup> the time of formation,<sup>17</sup> evidence of a declaration,<sup>18</sup> and information to be provided to the consumer before and after the conclusion of the contract.<sup>19</sup> The content of the contract is partly determined by European provisions on interpretation,<sup>20</sup> unfair terms,<sup>21</sup> and general conditions.<sup>22</sup> Most European rules, however, refer to performance of the contract: the European Union provides rules on conformity in consumer sales,<sup>23</sup> remedies of the consumer in the case of non-performance,<sup>24</sup> commercial guarantees *vis-à-vis* the consumer,<sup>25</sup> time of performance, and the interest due in cases of breach of contract.<sup>26</sup>

The *acquis* is usually not met with enthusiasm. It was characterized as being fragmentary, arbitrary, inconsistent, and ineffective.<sup>27</sup>

It is fragmentary because it only covers certain topics, a "Brussels brick here and there."<sup>28</sup> For example, in the field of contract law, only some specific contracts are covered, and of these

15. See Council Directive 2002/47, art. 3, 2002 O.J. (L 168) 43 (EU); Council Directive 2000/31, art. 9, § 1, 2000 O.J. (L 178) 1 (EU); Council Directive 1994/47, art. 4, 1994 O.J. (L 280) 83 (EU); Council Directive 1990/314, art. 4, § 2, 1990 O.J. (L 158) 59 (EC); Council Directive 1987/102, art. 4, 1987 O.J. (L 42) 48 (EC).

16. See Council Directive 2000/31, art. 9, § 1, 2000 O.J. (L 178) 1 (EU).

17. See *id.*, art. 11.

18. See Council Directive 1999/93, art. 5, 1999 O.J. (L 13) 12 (EU).

19. See Council Directive 2002/65, arts. 3–5, 2002 O.J. (L 271) 16 (EU); Council Directive 2000/31, arts. 5–6, 10, 2000 O.J. (L 178) 1 (EU); Council Directive 1997/7, arts. 4–5, 1997 O.J. (L 144) 19 (EU); Council Directive 1994/47, art. 3, 1994 O.J. (L 280) 83 (EU); Council Directive 1990/314, arts. 3–4, 1990 O.J. (L 158) 59 (EC).

20. See Council Directive 1993/13, art. 5, 1993 O.J. (L 095) 29 (EC).

21. See *id.*

22. See Council Directive 2000/31, art. 10, § 3, 2000 O.J. (L 178) 1 (EU).

23. See Council Directive 1999/44, arts. 2–3, 5, 1999 O.J. (L 171) 12 (EU); Council Directive 1990/314, art. 5, § 2, 1990 O.J. (L 158) 59 (EU).

24. See Council Directive 2002/65, art. 6, 2002 O.J. (L 271) 16 (EU); Council Directive 1999/44, art. 3, 1999 O.J. (L 171) 12 (EU); Council Directive 1997/7, art. 6, 1997 O.J. (L 144) 19 (EU); Council Directive 1994/47, art. 5, 1994 O.J. (L 280) 83 (EU); Council Directive 1990/314, arts. 4–5, 1990 O.J. (L 158) 59 (EC); Council Directive 1985/577, art. 5, 1985 O.J. (L 372) 31 (EC).

25. See Council Directive 1999/44, art. 6, 1999 O.J. (L 171) 12 (EU).

26. See Council Directive 2000/35, art. 3, 2000 O.J. (L 200) 35 (EU).

27. See Jan M. Smits, *European Private Law: A Plea for a Spontaneous Legal Order*, in *EUROPEAN INTEGRATION AND LAW* 55 (2006).

28. Olivier Remien, *Über den Stil des Europäischen Privatrechts*, 60 *RABELSZEITSCHRIFT* 8 (1996).

contracts only specific aspects are addressed. This is troublesome for Continental lawyers as their ideal of a comprehensive and consistent civil code is being disrupted by law of European origin.

The *acquis* is also quite arbitrary in the sense that it remains unclear why some types of contracts are being covered and others are not. Why is it that package travel and consumer sales are addressed, but not the regular insurance contract? If the European legislator believes in harmonization to remedy defects in the functioning of the common market, much more still needs to be addressed.

The *acquis* is also inconsistent because oftentimes periods for revocation differ without good reason (seven calendar days in the case of door to door sales, seven working days for distance contracts, ten calendar days for timeshares, and fourteen calendar days for distance marketing of financial services).

Finally, the *acquis* is not very effective. Almost all directives in the field of private law aim at minimum harmonization, meaning that Member States can establish more stringent provisions to protect consumers. The effect of this is that companies are still being confronted with divergent legislation and may still be deterred from doing business elsewhere. Thus, minimum harmonization may not be suited to create the desired level playing field for European business. It is important to notice this because minimum harmonization has long been the way the European Union dealt with law making for diverse jurisdictions: set a minimum level and allow those countries that want to go above this level to do so.

These problems led the European Commission to start a debate about the future of European contract law.<sup>29</sup> It is likely that this debate will lead to a so-called "common frame of reference" ("CFR") in the field of contract law. The most important part of this CFR will consist of model rules of contract law, drawing on the present *acquis* and the "best solutions" found in the Member States' legal orders. This CFR will serve as a "toolbox" for the European legislator: where it finds this appropriate, it can make use of the CFR to draft directives or review the existing *acquis*.<sup>30</sup> In addition to this, the European Court of Justice ("ECJ") and national courts could use the CFR as a source of inspiration.

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29. *Communication on European Contract Law*, COM (2001), Nov. 7, 2001; *Communication on a More Coherent Contract Law—An Action Plan*, COM (2003), Dec. 2, 2003; *Communication on European Contract Law and the Revision of the Acquis: The Way Forward*, COM (2004), Nov. 10, 2004 [hereinafter *The Way Forward*].

30. *The Way Forward*, *supra* note 29, at 3, 14.

C. *The Vienna Convention on the International Sale of Goods*  
("CISG")

In addition to the national and European systems of contract law, there is the international regime created by the Convention on the International Sale of Goods of 1980. Of the twenty-seven European Member States, twenty-two are party to the CISG. Its field of application is restricted to the international sale of movable goods between professional parties. In such a case, the CISG applies *unless* the parties have opted out of it. This seems to suggest that the CISG is an important regime in practice, but there are several reasons why this suggestion is false.

First, the CISG is often excluded by the parties. This is the case in many general conditions set by branch organizations, such as the Federation of Oils, Seeds, and Fats ("FOSFA") and the Grain and Feed Trade Association ("GAFTA"). A survey<sup>31</sup> among some large Dutch companies showed that most of them exclude the applicability of the CISG in their general conditions as well. Smaller Dutch companies often do not exclude the CISG, unless legal advice was sought by one of the companies involved. It is likely that other European countries show similar results. One of the reasons for opting out of the CISG is that it contains many open-ended concepts that still leave room for varying interpretations. Other reasons seem to be that the content of the CISG is often unknown to the parties, and they do not find it worthwhile to put time and money into getting to know this content.<sup>32</sup> There is apparently no need to make use of it as national legal systems already fulfill the parties' needs.

Second, even if the CISG is applicable, this does not mean that the whole relationship between the parties is governed by it. On the contrary: in many respects, national law (applicable in accordance with the rules of private international law) remains of importance. This is not only true for certain rules of national mandatory contract law (see, for example, Article 4 of the CISG on validity), but also for rules on securities and other topics not related to contract law as such. This does not enhance the willingness of parties to make use of the CISG as they need to rely on some national system anyway.

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31. R.I.V.F. Bertrams, ENIGE ASPECTEN VAN HET WEENS KOOPVERDRAG 72 (1995).

32. *Id.* at 76-77.



*D. Divergence Within One Country*

Finally, there is still a different type of diversity. It is the phenomenon of *institutionalized* diversity within one country. This regional diversity can take very different forms. Here, the focus is on the two most important examples of regional diversity.

The first example is Spain. In Spain, several autonomous regions have the power to enact their own legislation in some areas of private law.<sup>33</sup> The regional government of Catalonia has taken the greatest steps in enacting a separate system of law. Since 1975, Catalonia enacted thirty different statutes in the field of civil law, building on the Catalan law as it existed before General Franco abolished the autonomy of Catalonia in 1938. Thus, Catalonia has, in addition to the Spanish Civil Code of 1888, its own Code of Succession (1991) and its own Family Code (1998). It is also envisaged to draft a complete Catalan civil code in the near future. With respect to contract law, however, the regions' competence to draft their own rules is debated. Article 149 of the Spanish Constitution grants the State competence to draft rules relating to "the bases of contractual obligations." The rather broad interpretation of this provision by the Spanish Constitutional Court (indeed leaving only limited competence for the regions in the field of contract law) is criticized in legal doctrine.<sup>34</sup>

The second example of regional diversity concerns the United Kingdom. Here, regional diversity takes a very different form. While in Spain there are separate regional systems alongside a general Spanish law, in the United Kingdom there is no uniform national law. Instead, there are separate coexisting systems. These three systems are English law (not only applicable in England, but also in Wales), Scots law, and Northern-Irish law. In the debate on the harmonization of private law in Europe, it is Scots law in particular that has attracted a lot of attention. Scots law, as a mixed legal system, is said to offer an example for the future development of private law in Europe:<sup>35</sup> if there is to be some

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33. See generally F. Badosa Coll, ". . . *Quae ad Ius Catalanicum Pertinet*": *The Civil Law of Catalonia, Ius Commune and the Legal Tradition*, in REGIONAL PRIVATE LAWS AND CODIFICATION IN EUROPE 136 (Hector L. MacQueen et al. eds., 2003).

34. See S. Espiau Espiau, *Unification of the European Law of Obligations and Codification of Catalan Civil Law*, in REGIONAL PRIVATE LAWS AND CODIFICATION IN EUROPE, *supra* note 33, at 180.

35. Hector L. MacQueen, SCOTS LAW AND THE ROAD TO THE NEW IUS COMMUNE (2000); THE CONTRIBUTION OF MIXED LEGAL SYSTEMS TO EUROPEAN PRIVATE LAW (Jan M. Smits ed., 2001). For a critical view, see Robin Evans-Jones, *Receptions of Law, Mixed Legal Systems and the Myth of*

uniform system, it will necessarily be a mix of civil law and common law.

### *E. Legal Diversity and Globalization*

The legal diversity of the European Union is paradigmatic for the challenge that we face in an age of globalization. In the European debate about harmonization of contract law, two key questions have to be answered. The first is whether there is any real need for harmonization. The second is whether harmonization of law is at all possible in view of the sometimes widely divergent national views of how to regulate society. Both questions are also important at a global level. Without a firm view of the need for and the feasibility of uniform law, law makers cannot function properly. In the next two sections, these two questions will be discussed.

### III. THE NEED FOR HARMONIZATION: NO CLEAR ANSWER

The European *acquis* that was discussed in Part II above is based on Articles 94 and 95 of the EC Treaty.<sup>36</sup> These provisions refer to the general purpose of establishing a European common and internal market. The justification for European action thus lies in the fact that differences in national legislation may distort the functioning of the European economy. Most directives also have a goal of protecting consumers. However, the primary motive is not idealism *vis-à-vis* the “weak” consumer. Instead, the primary motive is the avoidance of the distortion of competition. The reasoning then goes like this: where the national legislation of Member States in a certain field (like consumer sale) is divergent:

[T]he laws of Member States relating to the terms of contract between the seller of goods or supplier of services, on the one hand, and the consumer of them, on the other hand, show many disparities, with the result that the national markets for the sale of goods and services to consumers differ from each other and that distortions of competition may arise amongst the sellers and suppliers,

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*the Genius of Scots Private Law*, 114 L.Q. REV. 228 (1998), and Jacques Du Plessis, *Comparative Law and the Study of Mixed Legal Systems*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 477 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

36. *Consolidated Version of the Treaty Establishing the European Community*, 2002 O.J. (C 325) 33, 64.

notably<sup>37</sup> when they sell and supply in other Member States.

Thus, what is vital is the creation of similar European conditions for the *seller* (or the otherwise professionally acting party). Protection of the consumer is merely a side-effect.

An important question is whether this type of legal harmonization really promotes the development of the European internal market.<sup>38</sup> The question is fundamental because if harmonization does *not* promote the internal market, it should not take place. Practically speaking, the answer is of great importance because, in its Tobacco judgment of 2000, the European Court of Justice held that Article 95 of the EC Treaty does not grant a general power to regulate the internal market.<sup>39</sup> The ECJ held:

[A] measure adopted on the basis of Article 100a [now, as amended, art. 95] of the Treaty must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market. If a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result there from were sufficient to justify the choice of Article 100a [art. 95] as a legal basis, judicial review of compliance with the proper legal basis might be rendered nugatory.<sup>40</sup>

Instead, there must be *actual*—or at least *probable*—obstacles to the functioning of the internal market if Article 95 is to be used as a basis for law making. Further, the elimination of these obstacles must be the purpose of the measure. If these requirements are not met, the directive lacks a legal basis and can be set aside by the ECJ.

To many proponents of harmonization of private law, there is no doubt whatsoever that the existence of more than twenty-seven different legal systems in Europe is an impediment to the functioning of the internal market. Their main example is the case of the businessman from one country who wants to conclude a contract with a party in another country but is hindered from doing

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37. Directive 93/13 on Unfair Terms in Consumer Contracts, Preamble, 1993 O.J. (L 095) 29.

38. Smits, *supra* note 27, at 11.

39. Case C-376/98, Germany v. European Parliament & Council, 2000 E.C.R. I-8419.

40. *Id.* at I-8524.

so because of his deficient knowledge of Dutch law.<sup>41</sup> The European Commission states:

For consumers and small and medium sized enterprises in particular, not knowing other contract law regimes may be a disincentive against undertaking cross-border transactions . . . . Suppliers of goods and services may even therefore regard offering their goods and services to consumers in other countries as economically unviable and refrain from doing so . . . . Moreover, disparate national law rules may lead to higher transaction costs . . . . These higher transaction costs may . . . be a competitive disadvantage, for example in a situation where a foreign supplier is competing with a supplier established in the same country as the potential client.<sup>42</sup>

Even though this may sound like a plausible form of reasoning, it is not wholly satisfactory. In itself, the argument of the proponents of harmonization—that concluding a trans-frontier contract is more costly than concluding a contract in one's own country—is correct. It may be true that contracting parties can usually deal with the diversity of law by choosing the applicable law of the contract, but this does not prevent national mandatory law from being applied to the contract. This poses a problem because national consumer protection laws often contain detailed rules that deviate from general contract law, obliging a party to take advice on law that is unfamiliar to it. Three questions need to be raised: (1) Is this problem faced to the same extent by all parties; (2) What exactly are the costs related to trans-frontier contracting; and (3) Are these costs really caused by differences in law or by other causes?

First, a distinction has to be drawn between different types of companies. Diversity of law seems to be a problem primarily for small and medium sized enterprises ("SMEs"). Larger companies are usually more experienced in international trade and can thus better exploit their bargaining position. In addition to this, larger companies will more often engage in bigger transactions and, in the case of such transactions, it is less burdensome to incur transaction costs. Because larger-sized parties usually dictate their own conditions, regardless of whether their contracting partners

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41. See, e.g., Ole Lando, *Is Codification Needed in Europe?*, 1 EUR. REV. PRIVATE L. 157 (1993).

42. *Communication on European Contract Law*, 2001 O.J. (C 255) 30–32; cf. *Communication on a More Coherent Contract Law—An Action Plan*, 2003 O.J. (C 063) 7–9.

are located in their own country or elsewhere, the costs of trans-frontier contracting are not greater.<sup>43</sup> This is different for small and medium sized companies. They do not usually make contract conditions themselves. They rely on default law instead. If they are uncertain about foreign law, they will refrain from contracting.<sup>44</sup> For SMEs, the cost of taking legal advice is therefore often disproportionate in relation to the value of the transaction.<sup>45</sup> For consumers, a similar argument applies: they will not readily contract across borders if they do not know about foreign law. Their bargaining position is even more restricted because they cannot negotiate about the choice of law of the foreign seller or about other conditions of the contract.

Second, what exactly are the costs that these firms and consumers incur? In theory, these are the costs of obtaining information about what law is applicable, the contents of the applicable law, and the differences with their own law. If we assume that parties currently bear these costs when contracting abroad, then unification of law would indeed reduce these costs. Ideally, unification should then also extend to fields other than just private law. Tax law and procedural law seem to be particularly well fit for unification if one follows this line of reasoning.

Will harmonization of law indeed lead to the elimination or reduction of these costs? As long as harmonization is through directives, the answer must be in the negative: after all, directives still allow for major differences between European legal systems. But even in a scenario of complete unification—in which national private law systems are replaced by a truly uniform European private law—it is doubtful whether the costs of trans-frontier contracting would be eradicated. It is, after all, not only the *law* that forms a barrier. One may refer to the well-known work by Macaulay and Weintraub<sup>46</sup> that shows how commercial parties are not usually interested at all in the legal design of their relationship or in the enforcement of contractual remedies. Drafting contracts

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43. See C. Ott & H.-B. Schäfer, *Die Vereinheitlichung des Europäischen Vertragsrechts: Ökonomische Notwendigkeit oder Akademisches Interesse?*, in *VEREINHEITLICHUNG UND DIVERSITÄT DES EUROPÄISCHEN ZIVILRECHTS IN TRANSNATIONALEN WIRTSCHAFTSRÄUMEN* 209 (C. Ott & H.-B. Schäfer eds., 2002).

44. *Id.* at 213.

45. Cf. THE NEED FOR A EUROPEAN CONTRACT LAW: EMPIRICAL AND LEGAL PERSPECTIVES (Jan M. Smits ed., 2005); D. Staudenmayer, *The Commission Communication on European Contract Law: What Future for European Contract Law?*, 10 EUR. REV. PRIVATE L. 255 (2002).

46. Stewart Macaulay, *Non-contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

is usually regarded as too expensive and laborious and does not weigh up against the small amount of cases in which a conflict arises. The importance of contract law should therefore not be overestimated.

This is confirmed by the reactions to the 2001 Communication on European Contract Law. The European Commission asked businesses, practicing lawyers, and consumers if they experienced difficulties through diversity of law. The prevailing reaction of businesses<sup>47</sup> was that the internal market may not function in an optimal way, but this has less to do with differences in private law and more to do with language barriers, cultural differences, distances, national habits, and diversity in the fields of tax law and procedural law.<sup>48</sup> *De facto* barriers are more important than the law. Also, consumers do not find diverging contract law the most important problem. It may be that the confidence of consumers in protection against the seller in the case of trans-frontier contracting is lower (thirty-one percent) than in the case of buying things in their own country (fifty-six percent),<sup>49</sup> but this is—again—primarily the result of differences in language and distance.<sup>50</sup> In my view, the question of whether diversity of law is really a barrier for the internal market can only be answered by extensive empirical research on the effect of unification on trans-frontier trade. Such research is scarce.<sup>51</sup>

All in all, it is difficult to measure the costs of legal diversity: empirical evidence that transaction costs are considerably less if private law is unified simply does not exist. The conclusion is that there is no clear answer to the raised question. One could think of

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47. Cf. *Reactions to the Communication 2001, Addendum to Communication on a More Coherent Contract Law—An Action Plan*, COM (2003) 68 final, 2003 O.J. (C 63) 6.

48. I still find representative the reaction of *Orgalime* (organizing 130,000 companies in the engineering industry): “It will of course always to some extent be easier to trade with companies and persons from your own country. This has, however, more to do with ease of communication, traditions and other factors, which are not dependent on contract law.” See <http://europa.eu.int/comm/consumers> (last visited Mar. 21, 2007).

49. See Europa, DG Health and Consumer Protection, [http://ec.europa.eu/dgs/health\\_consumer/events/event42\\_en.html](http://ec.europa.eu/dgs/health_consumer/events/event42_en.html) (last visited Apr. 4, 2007).

50. See *Explanatory Memorandum to the Proposal for a Directive Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market*, COM (2003), June 18, 2003, at 4.

51. *But see* Stefan Vogenauer & Stephen Weatherill, *The European Community's Competence to Pursue the Harmonisation of Contract Law—An Empirical Contribution to the Debate*, in *THE HARMONISATION OF EUROPEAN CONTRACT LAW 105* (Stefan Vogenauer & Stephen Weatherill eds., 2006).

other reasons in favor of harmonization,<sup>52</sup> but whether the economic argument really holds remains unclear.<sup>53</sup>

#### IV. THE FEASIBILITY OF HARMONIZATION: NO CLEAR ANSWER

Once it is established that there is sufficient reason for the unification of private law—a problematic assumption as illustrated above—another fundamental question is raised: if a European private law is put into place, will this lead to *real* convergence?<sup>54</sup> This is denied by some, including the Canadian scholar Pierre Legrand, who eloquently argues that a European civil code, or any other attempt to unify European private law, is not feasible because of cultural differences among the various European countries and in particular among the civil law and common law traditions.<sup>55</sup>

Legrand takes as a starting point that merely drafting uniform *rules* does not result in uniform *law*. To him, law is much more than just rules: the meaning of a particular rule in a particular cultural and national context can only be established after studying that context. And this context, the legal *mentalité*, differs from one country to another. Legrand claims that these differences are unbridgeable in the case of Continental civil law and English common law. Epistemologically, the common law reasons inductively with an emphasis on facts and related case law, while in the civil law, systematization is of crucial importance. Where the *civilian* tries to rationalize judgments and statutes into a logical system, the Anglo-American lawyer has an aversion to formal rules and makes a conscious choice for driving out and even fighting Continental civil law influence. This choice stems from cultural differences: an English child is already a *common law lawyer in being*, long before he ever knows that he wants to be a lawyer.

Other scholars confirm Legrand's view. Thus, Mahoney claims that common law systems are less inclined to impose government restrictions on economic and other liberties. Historically, this can be explained by pointing to the development of the common law as a system that *protects* landowners and merchants against the Crown, while, for example, French civil law

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52. Smits, *supra* note 27, at 15.

53. Even if the costs of legal diversity are considerable, they have to be weighed against the costs of creating a uniform law. Also, other arguments against uniform law have to be assessed. See discussion *infra* Part V.

54. Cf. Jan M. Smits, *Convergence of Private Law in Europe: Towards a New Ius Commune?*, in *COMPARATIVE LAW: A HANDBOOK* (forthcoming 2007).

55. Pierre Legrand, *Against a European Civil Code*, 60 *MOD. L. REV.* 44. (1997).

developed as an instrument of State power to *change* existing property rights.<sup>56</sup> This different ideology is still apparent in present day civil and common law. To quote Mahoney:

At an ideological or cultural level, the civil law tradition assumes a larger role for the state, defers more to bureaucratic decisions, and elevates collective over individual rights. It casts the judiciary into an explicitly subordinate role. In the common-law tradition, by contrast, judicial independence is viewed as essential to the protection of individual liberty.<sup>57</sup>

This view has far-reaching consequences for the convergence debate. It implies that any attempt at harmonization of civil law and common law is doomed to failure. However, many European measures are issued: the Englishman will continue to look at it as a *common lawyer* and the Frenchman as a *civilian*. To the former, law is an *ars judicandi*, for the latter a *scientia iuris*. Moreover, in Legrand's view, the whole idea of a European codification is arrogant because it imposes on common lawyers the supposedly superior worldview of civilian legal doctrine. The truth is, Legrand claims, that they each offer fundamentally different accounts of reality. This leads Legrand to conclude that "legal systems . . . have not been converging, are not converging and will not be converging."<sup>58</sup>

Legrand's argument is to be taken seriously. Even though his view has radical implications and was severely attacked as being, *inter alia*, "pessimistic," "destructive," "anti-European," and "esoteric,"<sup>59</sup> no one will deny that superficial similarities among legal systems do not reveal anything about underlying differences in legal culture. This point is well formulated by Esin Örucü:

We can predict . . . that if, for example, codes were moved into the common law, they would soon become glossed by judicial decisions, exceptions would creep in and the general principles therein would lose their significance altogether. Again, if the style of decisions in the common law were inserted into the civilian legal culture, within a short period of time they would get starting shorter and less

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56. Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. LEGAL STUD. 503, 505 (2001).

57. *Id.* at 511.

58. Legrand, *supra* note 55, at 44; Pierre Legrand, *European Legal Systems Are Not Converging*, 45 INT'L & COMP. L.Q. 52, 61-62 (1996).

59. Legrand himself sums up these, and other, qualifications of his own work by others. See Pierre Legrand, *Antivonbar*, 1 J. COMP. L. 13, 37 (2006).



comprehensible; facts would become blurred; reference to past decisions would be replaced by reference to statutory provisions and so on.<sup>60</sup>

This is both a very practical and a highly convincing view on the European convergence process. It makes clear that law and society are closely interrelated and that texts will always be interpreted in the legal culture in which they are applied. There may come a time when this legal culture is entirely European, but this time has not yet come. In this sense, Legrand is right to say that European legal systems "have not been converging" and "are not converging." To hold that they also "will not be converging" is a more problematic statement because this is unpredictable: legal culture can change.

At the same time, Legrand seems to put too much emphasis on the differences between the civil law and common law traditions and between various *national* cultures. Influenced by the thinking of Herder and others, he seems to identify legal culture with *national* legal culture while there can be many other types of culture.<sup>61</sup>

Again, the conclusion is that we are not certain of the effects of creating a uniform law for diverging legal cultures. This points to other than centralist methods towards a common private law for Europe. If one agrees that *imposition* of a uniform text will not lead to uniform *law*, then the next step is to look for methods that allow the element of national legal culture to play a role in deciding whether uniformity is needed or not. Only such *soft* methods of convergence allow us to find out when legal culture stands in the way of unification. After all, the premise is that if unification is not left to the State or to European institutions but to the actors that are directly touched by legal unification, they will decide to what extent they are in need of uniform law. Bottom-up methods of unification make this possible.

The importance of this bottom-up approach is also apparent in other areas affected by globalization. If the effects of creating supposedly uniform law are uncertain, it may be that the existing law is being ruined without putting anything back that works. Gunter Teubner coined the term "legal irritants": a rule of European origin is not so much assimilated into the national legal order but, instead, disorders the national legal system.<sup>62</sup>

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60. Esin Örtücü, *An Exercise on the Internal Logic of Legal Systems*, 7 LEGAL STUD. 310, 317-18 (1987).

61. See discussion *infra* Part VI.

62. Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences*, 61 MOD. L. REV. 11, 12 (1998).

## V. TAKING THESE DOUBTS SERIOUSLY: THE BENEFITS OF AN OPTIONAL CODE

It was shown above that there are two fundamental doubts when dealing with contract law in a globalizing society. First, it is not clear whether there is a true need for a uniform contract law. Second, there is equal uncertainty about the effect of imposing a uniform text in diverging legal cultures. These two doubts should be taken seriously by allowing a bottom-up approach to harmonization. In making law for a territory where there is uncertainty about the need for and the possibility of harmonization, it should be left to the interested parties to decide if they prefer a uniform law to their national law. The way to put this into practice in the field of contract law is by making an optional contract code. Such an optional code would consist of a set of contract law rules that becomes applicable when the contracting parties opt-in. Both the European Commission and the European Parliament have expressed support for introducing such a “28th legal system” for the European Union.<sup>63</sup> The obvious benefit of making such a code is that it allows harmonization from the bottom up: once such an optional code is put into place, one can see whether parties will choose it or not. In this way, creating an optional system is an experimental way of establishing the need for uniform law: if legal culture prohibits the choice of a law other than one’s own, it will show automatically.

This is not the place to elaborate too much on the exact ambit of such an optional code.<sup>64</sup> Its success will depend on its contents, legitimacy, and applicability. In this respect, there are many variations to consider. Thus, the code could contain general rules for all contracts (after the model of the Principles of European Contract Law), but could also be limited to commercial or consumer contracts or even to the contract of sale; it could contain only default law or also mandatory law; it could contain a high level of protection for weaker parties, but also be designed to serve commercial parties of equal bargaining power; it could apply only to trans-frontier contracts, but also to purely national contracts; it

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(“Legal irritants cannot be domesticated; they are not transformed from something alien into something familiar . . .”).

63. *The Way Forward*, *supra* note 29; *European Parliament Resolution on the Communication from the Commission to the European Parliament and the Council—A More Coherent European Contract Law—An Action Plan 2004* O.J. (C 076E) 95.

64. Smits, *supra* note 27, at 55–98.

could deal with contract law alone, but also deal with other fields of private law; it could be put in a regulation or in a recommendation; it could be democratically legitimized by national parliaments, or it could be the work of academics alone. It is the right combination of these factors that determines whether a successful competition of the optional code with national jurisdictions will take place.

By introducing an optional code for the European Union, a strong argument in favor of legal diversity is given pride of place. It is the argument that was originally put forward by Charles Tiebout.<sup>65</sup> Tiebout describes the needs of firms and consumers in terms of differing preferences. If there is diversity of law, it means that legal systems can compete with each other to satisfy these preferences: consumers and firms can choose the legal system that, in their view, protects their interests best, provided they can leave a jurisdiction that they do not like ("vote with their feet"). Introducing uniform law would reduce this exit opportunity and lead to fewer preferences being satisfied.<sup>66</sup>

It is important to see that, in this view, diversity of law is not seen as a coincidence but as a reflection of diverging preferences. For example, the role of good faith is different in England than in Italy because of, perhaps unconscious, diverging views on what is just. Often this argument is related to Von Savigny, who emphasized the "Organic link" between the law and the people.<sup>67</sup> But one need not endorse this Historical School perspective to admit that it is wrong to impose one uniform preference on everyone: those for whom the law exists should primarily—within the limits set by mandatory law—decide which rules serve their interests best.

This competition among legal systems can contribute to harmonization of law in two different ways. First, if everyone could go to the jurisdiction he or she prefers, then practically there is only one law being applied. But it is likely that long before this exit process is finished, something else will happen. This is the second way in which regulatory competition contributes to uniform law: if too many people are likely to leave, national governments are stimulated to make their jurisdiction more attractive by offering the same (or even a more attractive) law as the other country. This

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65. See generally Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

66. Another argument in favor of legal diversity is that it allows for experimentation. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (states as experimenting laboratories).

67. F.C. Von Savigny, *VOM BERUF UNSERER ZEIT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT* 78 (1814).

is also one of the main objections<sup>68</sup> to allowing full competition of legal systems: it may lead to the famous “race to the bottom,” a level of law that is the lowest of all the jurisdictions among which the competition takes place. Yet, as often as this fear for “social dumping” is expressed, there is little empirical evidence there to support it.<sup>69</sup> More importantly, full competition among legal systems does not seem desirable either: it is precisely the purpose of minimum harmonization to allow the “race” only to take place within certain restrictions. Sometimes, the law has to be mandatory if it is to offer protection to weaker parties.

As long as this minimum level is guaranteed, regulatory competition provides an important method of convergence because the need for unification is primarily determined by legal practice itself and is not imposed from above. The question of what form this competition should take remains unanswered. Two issues should be taken into account when evaluating this question.

First, it should be clear that competition does not necessarily imply that citizens or firms really move *physically* from one jurisdiction to another. It is also possible for them to choose another legal system while physically staying in their country of origin. In the field of business law, the European Court of Justice has already paved the way for a free movement of companies:<sup>70</sup> they can establish the firm in their country of choice while still doing business in their place of residence. If they find the English limited company a more suitable means for their company than the Dutch BV or the German GmbH, then they are free to choose the former. Within the limits of Article 3 of the Rome Convention,<sup>71</sup> this is also possible in the field of contract law.

Theoretically, one could think of a variant in which not so much an entire legal system is chosen as the applicable law, but *specific rules* are chosen. This “free movement of legal rules” allows the transfer of rules from one country to another on a “market of legal culture.”<sup>72</sup> There is abundant evidence for such “legal transplants,” leading the legal historian Alan Watson to

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68. There are other objections as well. See Smits, *supra* note 27, at 89–96.

69. See, e.g., Catherine Barnard, *Social Dumping and the Race to the Bottom: Some Lessons for the European Union from Delaware?*, 25 EUR. L. REV. 57 (2000).

70. Case C-212/97, *Centros v. Erhvervs-og Selskabsstyrelsen* 1999 E.C.R. I-1459.

71. 1980 *Rome Convention on the Law Applicable to Contractual Obligations*, 1998 O.J. (C 027) 34 (consolidated version).

72. Cf. Ugo Mattei, *COMPARATIVE LAW AND ECONOMICS* (1997); Jan M. Smits, *A European Private Law as a Mixed Legal System*, 5 MAASTRICHT J. EUR. & COMP. L. 328 (1998).

conclude that most legal change is the result of borrowing law from elsewhere.<sup>73</sup> Thus, in the nineteenth century, contract law rules, such as those on offer and acceptance, were exported from Germany to the common law world, while in present times, many Anglo-American institutions like trust, franchising, and lease are being borrowed by European countries. Of course, it would be wrong to think that law can travel through time and place without any fundamental change in meaning, but it is certainly true that these transplants do contribute to a more uniform law.

Second, competition only works if there is sufficient information available about other legal systems. Often, this is not the case: a Dutch party usually does not know the intricacies of German law or English law, let alone Polish or Czech law. This is different in the United States, where there is plenty of information available on the fifty jurisdictions and where all of this information is in one language. Within the European Union, comparative lawyers thus have an important role to fulfill in unveiling information about foreign law. Moreover, by creating an “optional legal system,” this information problem can be partly overcome. The optional code can be made available in all languages of the European Union and can be made as transparent as possible.

## VI. GLOBALIZATION AND PRIVATE LAW: SOME MORE THOUGHTS

The core of the view expressed above is that in a society *where there is not one uniform legal culture*, the people for whom the law is made have to decide whether they accept it. An optional code makes this possible in the field of contract law. Can we transplant this view to the effect of globalization on law generally?

In this author’s opinion, it is important to recognize that, as a result of globalization, culture is no longer necessarily national.<sup>74</sup> Traditional definitions of legal culture emphasize that legal culture is national in nature,<sup>75</sup> but this need not be the case. It is useful to refer to the definition of culture proposed by the well-known Dutch

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73. Alan Watson, LEGAL TRANSPLANTS 95–101 (1974).

74. See also Jan M. Smits, *Legal Culture as Mental Software, or: How to Overcome National Legal Culture?*, in PRIVATE LAW AND THE MANY CULTURES OF EUROPE (forthcoming 2007).

75. See generally Lawrence Friedman, *The Place of Legal Culture in the Sociology of Law*, in LAW AND SOCIOLOGY: CURRENT LEGAL ISSUES (Michael Freeman ed., 2006); John Henry Merryman & David S. Clark, COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS CASES AND MATERIALS 28–29 (1978). Cf. David Nelken, *Legal Culture*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 372, 378–79 (Jan M. Smits ed., 2006).

sociologist Geert Hofstede.<sup>76</sup> He understands culture to be “the collective programming of the mind which distinguishes the members of one group or category of people from another.”<sup>77</sup> This definition of culture as “mental software” emphasizes that culture is something that is shared by a group of people that need not be defined on the basis of nationality. While traditional accounts of legal culture emphasize the relationship between nation-states and culture, this definition allows one to recognize that there can be important subcultures *within* one country and that these subcultures may even cross national borders. One can think of professional cultures (like those of accountants or international corporate lawyers); cultures based on ethnic origins, religion, language, or gender; as well as cultures derived from a social class.<sup>78</sup> One can, for example, speak of a European (or even global) business culture and of a consumer culture. Sometimes the law should take these subcultures into account, and it may well be that in a time of globalization, these non-national cultures are far more important than the monolithic culture of a nation-state.

A similar point was recently taken up by Amartya Sen in his book, *Identity and Violence*.<sup>79</sup> In this book, Sen discusses the European practice of multiculturalism in which people are primarily categorized in terms of inherited traditions: the fact that a Muslim is born into a certain community provides him with an identity that he has not chosen but which still to a large extent decides his fate.<sup>80</sup> Western multiculturalism often means being tolerant of other cultures, which in practice means having a full understanding that homosexuality is condemned in the Muslim world or understanding that in some cultures women are denied an education and marriage is arranged for them by their family. To Sen, this is clearly wrong: people are not destined by their tradition, and anyone who wants to break out of it should be able to do so. People have the right to make their own choices<sup>81</sup> and to choose how they want to live. It is the responsibility of the State to allow for such freedom.

The point Sen is making on a general level should also interest those who discuss the role of culture in unifying private law. Sen

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76. See generally Geert Hofstede, CULTURES AND ORGANIZATIONS: SOFTWARE OF THE MIND (2d ed. 1997); Geert Hofstede, CULTURE'S CONSEQUENCES (2d ed. 2001) [hereinafter Hofstede, CULTURE'S CONSEQUENCES].

77. Hofstede, CULTURE'S CONSEQUENCES, *supra* note 76, at 9.

78. *Id.* at 10.

79. Amartya Sen, IDENTITY AND VIOLENCE; THE ILLUSION OF DESTINY (2006).

80. *Id.* at 150.

81. Amartya Sen, DEVELOPMENT AS FREEDOM 5 (1999).

stresses that people should be able to choose a culture other than the one in which they grew up. But this does not mean that one should accept this other culture in all its aspects. The essence of Sen's view is that culture is not indivisible: everyone belongs to diverse categories at the same time and has multiple identities.<sup>82</sup> This is also true for the law: it may be that English contract law suits the interests of commercial parties better<sup>83</sup> than French contract law, whereas some may prefer Spanish family law to Dutch family law. But these other jurisdictions are not preferred because they are English or Spanish, but rather because of their *content*: they come closest to the cultural segments that cross national borders because they are preferred by a group of people regardless of their nationality or place of residence. As Gunther Teubner stated: "Globalising processes have created one worldwide network of legal communications which downgrades the laws of nation-states to mere regional parts of this network which are in close communication with each other."<sup>84</sup>

In my view, individuals should—at least to some extent—be allowed to choose the cultural segments (Teubner's "networks") created by this globalization process. If individuals are allowed to choose the segments they like best, it will automatically become clear where unification of law is possible. Or, to be more precise, the fact that individuals from different countries are willing to choose a given cross-border cultural segment—such as an optional contract code—implies that they prefer this segment to their own national law. This makes this area ripe for unification. Again, legal convergence takes place where society feels the need for it.<sup>85</sup>

This still leaves open the question: what is the exact relationship between national law and the local or international cultural segments to which this article seeks to give a larger role? Clearly, not every cultural segment should be allowed to prevail over national law. If, for example, Muslim culture (including the *sharia*) were recognized as always prevailing over national law, then there would be a violation of what constitutes a fair society under European standards. This calls for the formulation of a (European and national) *minimum level* of fairness. Once this

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82. "[W]e see ourselves as members of a variety of groups—we belong to all of them. A person's citizenship, residence, geographic origin, gender, class, politics, profession, employment, food habits, sport interests, taste in music, social commitments, etc. make us members of a variety of groups." *Id.* at 4.

83. See Vogenauer & Weatherill, *supra* note 51, at 105.

84. Teubner, *supra* note 62, at 16. See also Gunther Teubner, *GLOBAL LAW WITHOUT A STATE* (Gunther Teubner ed., 1997).

85. See Martijn W. Hesselink, *The Politics of a European Civil Code*, 10 EUR. L.J. 675, 678–81 (2004).

minimum level is established, it is possible to give more leeway to cross-border segments and subsequent individual choices.

The best method for putting this into operation is to design optional jurisdictions, also outside the field of contract law. Contract law is the ideal candidate for designing an optional code, as most of the contract law rules are only non-mandatory default rules. But there are no fundamental objections against drafting optional European codes of, for example, family law and property law that also contain some mandatory elements, if public policy so requires.<sup>86</sup> Of course, these optional codes should meet certain requirements as to their legitimacy and creation.<sup>87</sup>

The aim of this article is to show how the European situation of dealing with diverse jurisdictions may inform the debate about law making in a global world. Its main finding is that we should not impose one binding law upon diverging jurisdictions (“legal cultures”) if there is uncertainty about the need for uniformity or about the effect of binding supranational law on the existing national legal systems. Instead, a bottom-up approach to harmonization is preferred. This approach should acknowledge that legal culture (such as the culture of commercial contracting parties) does not have to coincide with the nation-state. This approach calls for the drafting of optional codes for cross-border cultural segments: it should be left to the parties to decide to what extent they prefer these codes to their own national law. If the challenge of globalization for the law is to find new modes of governance—as is generally recognized<sup>88</sup>—optional codes are a promising method for dealing with private law relationships.

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86. See Ralf Michaels, *Private or International? Two Economic Models for Private International Law of Torts* 26 (Duke Law School Working Paper Series, Paper No. 18, 2005). On an optional regime of mortgage credit, *Green Paper—Mortgage Credit in the EU*, COM (2005), July 19, 2005. See also *Green Paper on Financial Services Policy*, COM (2005), May 3, 2005.

87. This cannot be elaborated in the context of this article. See Smits, *supra* note 27, at 66–89.

88. See generally Hertz, *supra* note 1.



