

The foundations of private law in a multi-level structure: balancing, distribution of lawmaking power and other constitutional issues^o

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In this response to the questions raised under this topic and reply to the challenges made, I will basically deal only with 'constitutional' issues¹, and more precisely comment on the ideas of balancing² and of diversity³ from a constitutional perspective. In doing so, I come to the defence of some values which we could call pre-postmodern and which have come under attack.

1. 'Live with diversity' and the naturalistic fallacy (is-ought gap)

In the first place, the emergence or re-emergence of phenomena claiming to be law or to have primacy / supremacy does not oblige us to recognise them as law and/or simply accept this claimed supremacy. Evidently, new forms of diversity of customs and practices have arisen in recent times (as they have over the course of centuries). We could as anthropologists or sociologists describe them and measure their influence or success just as we could describe the ways in which those practices are countered by other practices or even attacked. We can as historians describe how certain practices and institutions have won or survived and others not. We can describe how societies have adapted themselves, either by changing their norms or on the contrary by maintaining their norms and adapting the way to enforce them. But this

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¹ Evidently, there are many other interesting questions and perspectives on the foundations of private law in a multi-level structure. I have developed some ideas on other aspects in other articles, and will not repeat them here. See inter alia ME Storme, 'Good faith and contents of contracts in European private law', in *Bases de un derecho contractual europea / Bases of European Contract Law*, red. S. ESPIAU ESPIAU & A. VAQUER ALOY, Valencia: Tirant lo Blanch 2003, p. 17 ff = (2003) 6. *EJCL*, No. 1. (<http://www.ejcl.org/71/abs71-1.html>), also @ <http://www.storme.be/goodfaithlleida.pdf>; my articles cited infra fn. 6; and for a practical study M.E. STORME, 'Le rapport entre les Règlements européens en matière de procédure (en particulier celle relative aux petites créances) et le droit judiciaire interne belge', *Revue de la Faculté de droit de l'Université de Liège* 2010, p. 5-30, also @ <http://www.storme.be/procedureeuropeenne.pdf>

² See esp the contribution of D Kennedy in ch 11 of this volume.

³ See esp the contribution of J Smits in ch 19 of this volume.

does not allow us simply to deny the difference between fact and law, to deny that law is essentially to some extent counterfactual, ie normative. The latter does not deny that norms can be changed, but also this change is organised on the basis of other norms and not merely a registration as law of anything that claims to be law. Equally, it is not because certain rules or practices claim to govern utopically - without territorial boundaries -, claim to be valid law anywhere and without boundaries that we should take this for granted. There is a difference between accepting human diversity and diversity of custom and usage, and deducing from it that anything can be recognised as a source of law.

It is still our task as 'professional' lawyers (and not merely legal anthropologists) to stand up for the rule of law and if possibly a better law and a better legal system and not merely to develop strategies to 'live with legal diversity'. The existing legal diversity as a social phenomenon does not release us from the duty to reflect on the distribution of lawmaking power rather than recognise under the rhetoric of diversity any 'source' to govern anything anyone wants that source to govern. Neither does it release us from the obligation to analyse critically the notion of diversity itself.

Reflecting on the foundations of private law in a context that can indeed be described as 'multi-level' is thus equally a normative reflection on attribution and distribution of powers, competences, tasks. The factual situation that there are different levels of rule making and governance invites and requires such a reflection. Whereas 'constitutional' issues arise even where there is only one 'level', they are the more complex in such a multi-level or federal context.

2. A question of distribution of power; also a question of balancing values and principles

A discussion on federalism, the multi-level structure of law and 'diversity' (the Newest Testament ...) in private law is first of all a discussion on the distribution of powers to make law and to regulate relationships on the market or of a private nature - and thus of the legitimacy of such powers. One could say this is also a question of balancing. However, it is balancing in a third degree already.

I do accept the 'modern' (that is, since von Ihering) paradigm of law as a balancing activity (rather than the more mathematical paradigm of deduction from principles, *more geometrico*). Developing the law is to a very large extent a balancing activity.

This is true for different types of legal activity. What we are balancing is partially different depending on the type of activity. Whenever rules are made or developed, whether in the form of codes or statutes or in other forms, this involves a balancing of different values and/or principles.⁴ This balancing in the first degree is to a large extent a political activity, at least in the large sense. It involves making political choices (at least in the large sense), striking a balance on which there is no unanimity in society.

Any discussion of the sources of law can therefore not disregard the question who has the authority to make law or whether such authority is legitimate. This involves a balancing of legal values and /or principles in a second degree, namely of values and principles precisely on the distribution of this 'political' power in society.

⁴ I am for the moment not distinguishing between values and principles. For the distinction between rules and principles, see below.

In the European context, the question does not only arise in this second degree, but also in a third degree. There is not merely the question of a 'horizontal' distribution and possibly separation of powers, especially between the legislator, the judiciary, and private autonomy, but also the question of a 'vertical' or 'federal' distribution of power between different 'levels', especially between the Union and the Member States. This third degree also concerns the issue of conflict of laws: how far do the institutions of a given political level recognise and possibly implement or apply the law of another one.⁵ Both issues are issues about the scope of autonomy of different political communities.

Summarizing, we have 3 degrees of balancing:

- Law making or -developing in a certain domain involves balancing values/principles relevant for the substance of law;
- making rules on distribution of law-making power involves balancing values/principles relevant for the distribution of such 'political' power;
- making rules on the distribution of power among multiple levels involves balancing values/principles relevant for this distribution.

The third degree can, however, in my opinion, not be discussed in a meaningful way without some view on the second level. Let me therefore just recall some basic ideas. We do not need any adjective such as modern, classical or traditional, as such labelling is only a rhetorical figure.

3. Horizontal distribution of powers and tasks within a legal order

a) The basic postulate of the rule of law to treat equal situations equally requires the idea of legal norms or rules and requires some distinction between the norm and its application. This does not necessarily mean that these functions have to be exercised by completely separated institutions and even less that these two functions can be completely separated, but the equality postulate requires at least a distinction. This postulate does not prohibit the modification of the rule, although this usually leads to a different treatment of the situations governed by the old rule and those governed by the new one. But it requires that as long as the rule is not changed, it be applied in a non-discriminatory manner.

b) The framing of a legal rule is an act of balancing in the first degree: balancing values or principles that are to a large extent and even in essence conflicting. I do not see a fundamental difference between values and principles but I do see a fundamental difference between values and principles on the one hand and rules on the other.⁶ Certainly principles and/or

⁵ There are evidently differences between both issues of the third degree. Foreign law will in principle not displace domestic law in purely domestic relationships, whereas 'federal' law does also displace state law in many purely domestic relationships.

⁶ I do imply a clear distinction between rules and principles which I have developed in other places, with reference to the doctrine of various authors such as N Luhmann (inter alia in 'Positives Recht und Ideologie', 53 *Archiv für Rechts- und Sozialphilosophie* 1967, 531 ff., also in *Soziologische Aufklärung*, vol. I, Westdeutscher Verlag Köln-Opladen 1970, p. (178) 189 ff., JH Nieuwenhuis ('Legitimatie en heuristiek van het rechterlijk oordeel', *Rechtsgeleerd magazijn Themis* 1976, p. (494) 505 https://openaccess.leidenuniv.nl/bitstream/1887/3186/1/353_003.pdf) and others. See my 'Une question de principe(s)? Réponse à quelques critiques à l'égard du projet provisoire de « Cadre commun de référence »', lecture Conference 'The Draft Common Frame of reference', European Legal

values can be classified in different ways and listing them is already a choice. Identifying principles is an important task of legal scholars (see below). Rules do not apply absolutely, but under certain conditions. They spell out the conditions under which a principle prevails over another. When a rule is formulated as a principle, it means that only express exceptions apply and that they should be construed restrictively and not seen as the expression of a competing but equivalent principle.

c) Differing from values and principles as such, rules are the product of choices (an activity of balancing principles) which are 'political' in a large sense (see above) and the rule-maker (the principles-balancer) should therefore have political legitimacy. Recognising a rule-making power is not only, but first of all, a question of democracy; it further is a question of transparency and to some extent of efficiency. And finally it is a question of 'checks and balances' - balancing in the second degree.

The classical scheme of balancing in the second degree still is the 'separation of powers' in one of its forms. There are certainly variations possible, but there still is no better alternative. 'Checks and balances' require at least a democratically legitimised legislator and an independent judiciary. To say that 'it is time to find a new source of legitimacy' instead of the legitimacy of democratic political institutions⁷ is evidently a political choice, and more specifically a choice which precisely rejects the legitimacy of democracy as the source of law. When I stick to the 'modern' (instead of so-called post-modern) idea of legitimacy by democratic political institutions, this still leaves room for different tasks for different players. Next to legislators and judges, academics can also legitimately play a role in the development of the law: there is a role for 'judges, legislators and professors'.⁸ But their respective tasks are different. Just as parliaments cannot claim exclusive legitimacy to make law, so too judges, professors or other players cannot be denied some measure of legitimacy. But the primary democratic legitimacy still lies with democratically elected political institutions (with reservation made for direct democracy, entrusting specific decisions to the people themselves). Whether other institutions (especially Courts) have a sufficient legitimacy to have a - delegated - lawmaking power depends *inter alia* on the mode of selection of judges, their responsiveness, and the acceptance of their authority, which will hopefully be proportional to the quality of their work. Today, parliaments often do not seem to be the best instances to prepare legislation. But they are certainly not the best instance to apply rules in individual cases; a constitutional prohibition of *Individualgesetze* is an important element in the separation of powers. On the other hand, contemporary parliaments too often shift responsibility to judges, whereas citizens are entitled to sufficiently clear rules (legality principle), even if more so in public law (including criminal law) than in private law.

d) Certainly, the task of a judge is also very often a question of balancing (in the first degree). When finding, interpreting and applying the law, there will very often be conflicting interpretations of what the law is (the conflict can arise at different levels, eg also on the question what the rule of evidence is). To what extent the judge is allowed to deviate from the

Academy / Europäische Rechtsakademie Trier 6-7 maart 2008, (2008) 9. ERA-Forum Supplement 1, p. S65 - S77; and 'The (Draft) Common Frame of reference as a toolbox and as a basis for an optional instrument', in A Common Frame of Reference for European Contract Law, Stockholm Conference 2009, also @ <http://storme.be/DCFRStockholm.pdf>

⁷ See J Smits in his contribution in ch 19 of this volume.

⁸ Also the title of a wonderful book by R Van Caenegem, *Judges, legislators and professors : chapters in European legal history*, Cambridge, Cambridge University Press, 1987.

choices made by the legislator is a question of continuous debate (the debate on the sources of law and the methods of interpretation), but this too is a political debate, or rather a debate that should deal first of all with the legitimacy of judge made law (the second degree of balancing, as described above). The meaning of a rule cannot be reduced to the intention of the legislator, and it is often questionable whether there was such an intention and what it was. Judges evidently develop the law and give rules new meanings. But the margin of interpretation they should have is still a question of legitimacy. This legitimacy will depend on different factors, but certainly also on the way judges are selected, courts are composed, judges are controlled, etc. The legitimacy will diminish or increase depending on the way judges judge and how their judgments are received by the public opinion. All this may differ from country to country and even from court to court. But in general, the Courts in our contemporary society will have to find a middle way between the schizophrenia and the paranoia: the schizophrenia as a metaphor for a situation in which the meaning of rules shifts permanently and every rule or term can be interpreted in any way, and the paranoia as a metaphor for a situation in which the literal or received meaning of the rule has an intangible monopoly which prohibits any questioning.⁹

e) Apart from the roles of the legislator and the judge, there is also a task for the legal scholars, the professors. Their first task is to analyse critically how the legislator and the judges are balancing and what the effects are of the rules and their interpretations. Effects include social, economic, moral effects. They should uncover and evaluate the political choices made. In a certain sense, it is the task of the scholars and not of the legislator to identify the values and principles that were or are deemed to have been balanced by the legislator. As a group they have insufficient legitimacy to make the law, but as citizens they are evidently entitled to take part in public debate and to try to influence the evolution of the law. And as scholars they even have a social duty to propose better rules and better interpretations.

4. Vertical and territorial distributions of (law-making) power - issues

Before turning to some tentative answers and proposals, let me first put the questions.

a) When we turn to the question of 'federalism' and the foundations of private law, I would like to stress again the importance of the same values which had to be balanced on the second level: first of all legitimacy (especially democratic legitimacy), but also transparency, efficiency, etc. The question of the foundations of law in a multi-level structure remains first of all a question of the legitimacy of each level for the making of (private) law. The question is evidently much more complex than a simple either/or - either the Union or the Member States. We will not deny that some legitimacy does exist on more than one level. But there is more to say than a simple reference to the subsidiarity principle, even if we accept this principle as an important constitutional principle. Moreover, the issue is not merely an issue of federalism or pluralism of levels and the level at which rules are made. There is also the challenge of those who believe different authorities can legitimately 'compete' in the same territory and about the same relationship¹⁰ and thus reject the territoriality of law in favour of a transnational 'market' of law.

⁹ I borrowed this idea from J Defoort, 'De simulatie voorbij', *Liber amicorum Albert Tiberghien*, Antwerp, Kluwer, 1984, p 113, 127.

¹⁰ See J Smits in ch 19 of this volume.

b) As to the vertical distribution of law-making power, different techniques have been developed in the course of constitutional and legal history. They are the main objects of the study of federalism.

The distribution of powers can be exclusive or concurring. In case of exclusive power, a separate conflict rule is unnecessary, and the question of hierarchy of norms between these powers does not arise. The Belgian model of federalism, for example, basically knows only exclusive powers, and there is thus no hierarchy between federal and regional rules (both subject to the Constitution).

Where powers are concurring, there is either a hierarchy of norms or a non-hierarchic form of coordination. In case of a hierarchy, priority can equally well be given to the 'higher' level (*Bundesrecht bricht Landesrecht*) as to the lower level (*Landesrecht bricht Bundesrecht*, according to the old maxim *lex particularis derogat generali*). We are used to the idea that 'federal' or 'uniform' law must have priority, but there are important examples of the opposite principle. The old *ius commune* did not have priority over the *ius particulare*, and the states of the US may derogate from the Uniform Commercial Code just as the Scandinavian countries may derogate from the Uniform Nordic laws. Where priority is given to the 'higher' level, the power of that level may nevertheless be restricted by other techniques, such as the requirements of the subsidiarity and proportionality principles (eg in the EU). Where there is no hierarchy of norms, powers either freely compete (a system which only works for certain matters of private law) or they have to be coordinated in an obligatory cooperation. Further, the criteria for the distribution of powers can lead to more or less homogeneous or to very fragmented domains of jurisdiction.

Choosing the best technique of distribution of powers also requires the balancing of competing values or principles. Some forms of distribution have more democratic legitimacy than others - mainly because some levels have a higher democratic legitimacy than others. There may be economics of uniformity or economics of diversity, etc. A stricter separation of powers or an intertwining of them may each have some virtues.

c) Apart from these techniques, there is always the fundamental question which level has the last word on the distribution of powers itself - where lies the *Kompetenzkompetenz*.

d) Finally, there is the question of conflict of law rules, including rules determining the priority between different sets of rules pretending to govern a relationship. Such conflict of law rules are also rules on the distribution of power to regulate relationships and not merely rules to manage diversity. When a federal level has the power to make these rules, it limits the power of each member state or other legal order to determine itself the territorial or personal scope of application its rules. The choice of a conflict rule is neither neutral nor innocent: it involves a political choice and has a direct impact on the equality before the law or equality of rights of different persons at a single location.

That is also true when the conflict of law rule claims to leave it to the market to determine the applicable law. This does not mean that enhancing the autonomy of the parties, either directly or by broadening the choice of law, is not a legitimate legal policy - it just means it is not a neutral policy. The use of words like pluralism and diversity, however, hides the real questions and political or other choices to be made. These words frequently even constitute rhetorical devices intended to hide these questions. They moreover hide the fact that accepting pluralism or diversity in law can mean very different things.

What is called pluralism or diversity is in my view first of all a question of autonomy and we should again frame it in those terms, thereby distinguishing at least three different questions:

- first the question of autonomy of national (or regional) law v loss of autonomy by uniformisation of the law;
- secondly, the question of private autonomy v mandatory law;
- and thirdly the question of the free choice of law v mandatory connection in 'international' relationships (conflict of laws in the classical sense).

The call for the recognition of diversity may however also hide a call for the recognition of 'identities' or feelings of affiliation. Thus Smits sees the core of legal pluralism precisely in 'the idea that people can feel affiliated with different groups and feel bound by the norms of these groups'.¹¹ As a conservative, I do not belong to those who find the idea of identity in itself already suspect. I do not believe that only voluntary relationships are legitimate, but this does not mean that I try to cover up the distinction between voluntary and involuntary relationships by putting them together in categories like diversity or identity. There may be good reasons to defend national autonomy, to defend private autonomy for private law relationships, to defend choice of law as a conflict rule; but this does not mean that invoking group identities is a sufficient justification to set aside the equality before the law and the application of the law of the land. The essential characteristic of territoriality is precisely that it guarantees the equality before the law of all on a given territory.

5. Distribution of (law-making) power - some answers

a) Kompetenz-kompetenz

Let me start with the fundamental question of the Kompetenz-kompetenz. Are the member states still the 'masters of the treaties'? And should they be? This is fundamentally a matter of democracy, and from this perspective it is rather evident to me that the legitimacy of most member states is much stronger than that of the Union, as much because of the internal constitutional organisation of the Union (inter alia from the perspective of separation of powers, but also the absence of a right of initiative for members of parliament, etc.) as because of the comparative weakness of a European *demos* (compared to the demos of most member states), especially given the absence of a common language of the people. Democracy is under pressure in most member states, but is still incommensurably more tangible than at the European level. I therefore support the German Constitutional Court in its arguments, especially in the judgment on the Lisbon Treaty¹², in favour of the nation states as the masters.

b) Distribution of powers in relation to private law

¹¹ With reference to Amartya Sen, *Identity and Violence*, London, Penguin Books, 2006.

¹² *Lisbon*, Judgment of the Second Senate of 30 June 2009 – 2 BvE 2/08. Available @ http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html and in English @ http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html. Anyway, were standards of contract law applied, the Lisbon Treaty would be void because the consent of at least some member states was obtained by threats and unfair exploitation, inasmuch as there has been any consent at all of the peoples concerned for whom the governments have acted as agents outside their authority as agents.

i. Actual situation

The actual situation can be summarised as follows:

- the European Union has only attributed powers;
- most of these are non-exclusive and thus concurring (with the member states);
- the exercise of these concurring powers is governed by complex rules (different procedures depending on the legal basis, use of the so-called coordination method, etc.)
- Union law has always priority over the law of the member states and their subdivisions;
- the power of the Union is *de facto* extended by the doctrine of *effet utile*;
- within the - thus extended - scope of Union law, European judges have found and often also invented 'principles common to the law of the member states'.¹³

This loss of power of the member states was up to now in part 'compensated' in part by:

- using Directives instead of directly applicable instruments such as regulations (the 'means' are left to member states)
- harmonising only minimum standards.

The results of all this have been analysed in detail by many authors; especially the question of minimum versus full harmonisation (and the illusory character of full harmonisation in many instances) is today debated at length.¹⁴

ii. My 'principles' for vertical distribution of law-making power

1 Where choices are political, separation of responsibilities has to be preferred over intertwining. The methods of obligatory cooperation between different levels are killing democratic accountability (no one is accountable; everyone can hide behind the others).

2 Unless there are excellent reasons for having or maintaining rules on more than one legislative level, a single level of legislation for every topic is to be preferred. The disadvantages of legislation on more than one level are in most cases greater than the advantages.¹⁵ The identity of the Union and the member states is not served by maintaining power of both in all matters, and better served by distributing powers in a more homogeneous way.

3 Rules having priority over another level (in the present situation thus rules of Union law) should be construed restrictively instead of extensively: where the federal level has the power to overrule national law, it should do so explicitly and not in a hidden or creeping way.¹⁶ The old *ius commune* was indeed interpreted extensively, but it did not have priority over local law (*ius particulare*) (see below).

¹³ For an example of an invented principle, see the decision in Case C-144/04 *Mangold* [2005] ECR I-9981, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0144:EN:HTML>.

¹⁴ For a collection of relevant essays see G Howells and R Schulze (eds), *Modernising and Harmonising Consumer Contract Law*, Munich, Sellier European Law Publishers, 2009. See also ME Storme, "Consumer rights proposal and DCFR", Editorial, (2010) 18 *European Review of Private Law (ERPL)*, 1-3 = <http://storme.be/ConsumerRightsProposalandDraftCFR.pdf>

¹⁵ See in this volume inter alia the criticism of the present state of affairs by H Schulte-Nölke in ch 2.

¹⁶ Compare the idea in the USA that there is in principle no federal 'common law' but only federal statutory law (*Tompkins v Erie Railroad* (1937) 304 US 64 = <http://laws.findlaw.com/us/304/64>) - (even if we all know that federal judges have interpreted the Constitution itself extensively).

4 There are good reasons for the harmonisation of private law as well as for leaving it to the member states, but there are also some bad arguments for the one or the other, such as 'identity' or 'common values'.

I do believe that a sufficiently common identity is important for a political community (and even a requirement for such a community to function in a democratic manner), and that we Europeans all have some multi-level identity (European, national and regional or local), but it does not give us helpful criteria for the precise distribution of powers over private law: it is only marginally relevant to judge which parts of private law can better be made uniform and which ones better remain on a lower level.

'Common values' is another misleading argument. In order to have a well-functioning private law, we do not so much need common values but rather common methods, common concepts and to a certain extent common rules. The fact that people share common values does not say much about how they fill in these values or how they balance them. Making rules is balancing values and principles in order to determine which gets priority in which circumstances. Article 2 TEU states that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. It is perfectly possible to be strongly divided over these common values. I would even say that most if not all of the sharp ideological conflicts in our societies - sometimes called essentially contested concepts¹⁷ - are conflicts about the interpretation and balancing of common values. To some extent even these conflicts are similar in the different member states. But precisely in these situations to impose uniformity of rules only makes things worse.¹⁸ Given the diversity of opinion on how to balance such values, there is already on the national level a serious problem of democratic legitimacy, but the problem only increases when moving up to the European level.

5 Democratic legitimacy and accountability of the decision-making institutions on the other hand are strong arguments in order to distribute power and to determine which level has the last word. And whether we like it or not, this does for the moment plead against the priority of Union law. Not only the legitimacy but also the accountability of the legislator, and even more of the judiciary, is today much lower at the European level. The national judiciary as a whole is much more representative of the people than a single European Court with judges

¹⁷ In the words of Walter B Gallie, 'Essentially Contested Concepts', (1956) 56 *Proceedings of the Aristotelian Society* 167-198.

¹⁸ Compare the dissenting opinion of A Scalia in *Planned parenthood of Southeastern Pa. v. Casey*, <http://laws.findlaw.com/us/505/833.html>: 'The Court's description of the place of Roe in the social history of the United States is unrecognizable. Not only did Roe not, as the Court suggests, resolve the deeply divisive issue of abortion; it did more than anything else to nourish it, by elevating it to the national level, where it is infinitely more difficult to resolve. National politics were not plagued by abortion protests, national abortion lobbying, or abortion marches on Congress before Roe v. Wade was decided. Profound disagreement existed among our citizens over the issue - as it does over other issues, such as the death penalty - but that disagreement was being worked out at the state level. As with many other issues, the division of sentiment within each State was not as closely balanced as it was among the population of the Nation as a whole, meaning not only that more people would be satisfied with the results of state-by-state resolution, but also that those results would be more stable. Pre-Roe, moreover, political compromise was possible. Roe's mandate for abortion on demand destroyed the compromises of the past, rendered compromise impossible for the future, and required the entire issue to be resolved uniformly, at the national level'. For Europeans, read evidently 'federal' or 'Union' for 'national'.

appointed by the national governments. And on both levels, the democratic legitimacy and accountability of Parliaments is much higher than of judges. However, the European Parliament has not even a right of initiative whereas on a national level every single Member of Parliament can start the legislative procedure by introducing a bill.

6 Diversity of rules certainly creates problems in private law, and uniformity thus certainly has advantages, but the most serious problem is not diversity of law as such, but intransparency of diversity. Making diversity transparent may be a better and more feasible solution than uniformisation.

iii. My proposal for a European civil code

Given these considerations, I would like to plead for the reversal of the existing situation in the field of private law (as described above). Instead of national codes that are overruled in a fragmentary way by Union law, in itself extensively construed by European judges, we should rather have a European Civil Code, leaving however to national parliaments the right to deviate from its rules in certain ways (basically in two ways, indicated below). This is basically the model of the American UCC.

(a) Such a European Civil Code should cover most of the 'classical' patrimonial private law (the whole law of obligations, including specific contracts, and large parts of property law, including insolvency) as well as 'new' parts of private law, often of a 'regulatory' nature¹⁹ and nowadays often not integrated within the Civil Codes, such as most of consumer law, parts of marketing law, etc. It may turn out that the latter is more difficult than the former, as there is more 'common core' (in the sense of a shared heritage and common concepts) in the former.²⁰

Such a Code could probably be agreed under the umbrella of enhanced cooperation²¹; if not a parallel treaty would be required.

A real code would be required, as other methods of uniformisation (bottom-up) will never result in anything similar within a reasonable period of time.²² This is not contrary to the point that the *preparation* of such a Code cannot be the work of political institutions only.

A real code consists of rules; just formulating common terms and principles will not do.²³ We certainly do need a common terminology. But in drafting the Common Frame of Reference²⁴

¹⁹ See for a recent synthesis H-W Micklitz, 'Europäisches Regulierungsprivatrecht: Plädoyer für ein neues Denken' (2010) 7 *Zeitschrift für Gemeinschaftsprivatrecht (GPR)* 1.

²⁰ Compare the contribution of R Michaels in ch 8 of this volume.

²¹ See Article 20 TEU and Articles 326 – 334 TFEU.

²² See the contribution of M Reimann and D Halberstam in ch 22 of this volume.

²³ See my 'Une question de principe(s) ? Réponse à quelques critiques à l'égard du projet provisoire de « Cadre commun de référence »', above n 6, and my 'The (Draft) Common Frame of reference as a toolbox and as a basis for an optional instrument', Conference *A Common Frame of Reference for European Contract Law*, Stockholm 22 - 23 October 2009, also @ <http://storme.be/DCFRStockholm.html>

²⁴ Christian von Bar, Eric Clive and Hans Schulte-Nölke and Hugh Beale, Johnny Herre, Jérôme Huet, Peter Schlechtriem†, Matthias Storme, Stephen Swann, Paul Varul, Anna Veneziano and Fryderyk Zoll (eds), *Principles, Definitions and Model Rules of European Private Law - Draft Common Frame*

we experienced very clearly that concepts do not exist without rules. We thus need common rules. As to common principles (in the sense clarified above), formulating them is not a task for a legislator and they do not belong in a Code.

Derogation by national parliaments would be allowed under rather strict conditions (b, below), except where constitutional guarantees are at stake (c, below).

(b) As explained, diversity must in the first place be transparent. This implies that a derogation from a common Code can in this proposal only be made expressly and in a precise manner, namely by specifically replacing a named rule by another one ('art. X.1 ECC is replaced by / supplemented by ...'). In order to enhance transparency, derogatory provisions should be published in all official languages of the Union. Further, whereas the national '*ius particulare*' would have priority, it would be interpreted in a restrictive manner ('*statute stricte sunt interpretanda*'²⁵) and the 'common' law (ECC) on the contrary in an extensive manner.

(c) These strict conditions should not apply for the priority of constitutional guarantees (fundamental rights and freedoms in national constitutions), which should anyway have priority. It is sad to say, but the major threats to our liberties and constitutional rights nowadays stem from the EU and other 'supranational' institutions with limited democratic accountability.²⁶ Forced uniformity in this respect would only worsen things, as argued above.. *In necessariis diversitas* !

(d) I am aware that a common text does not guarantee a common interpretation. A fully uniform interpretation does not even exist within a national legal order. We will have to develop further techniques to enhance exchange of information and common interpretation without having to send every case to a single European Court.

6. A Law Market v Market Law ie Rule of law

I have already criticized the rhetoric of pluralism and diversity as hiding the political questions related to conflicts of laws. Although I do advocate more freedom of contract and private autonomy in private relationships, I would also like to defend basically the present system of conflict of law rules, as found in the so-called Rome Regulations (subject to minor improvements, as always). The arguments given by Jan Smits to replace this by a 'Law Market' have not at all convinced me. Leaving the law to a free transnational market is the negation of the rule of law. Certainly, there can be good arguments to broaden the choice of law in certain matters. A certain degree of competition between legal systems can be beneficial; and an optional instrument which could be chosen as applicable law instead of a national law, especially in cross-border transactions, is a sensible idea.

of Reference (DCFR), Outline edition, , on-line @ <http://www.storme.be/DCFR.html> or http://ec.europa.eu/justice_home/fsj/civil/docs/dcf_r_outline_edition_en.pdf

²⁵ See W Zwolve, 'Interpretatieproblemen voor de codificatie' in J Erauw (ed), *Liber memorialis François Laurent*, Brussels, Story Scientia, 1989, 447 ff.; R Zimmermann, '*Statuta Sunt Stricte Interpretanda?* Statutes and the Common Law: A Continental Perspective', (1997) 56 *Cambridge Law Journal* 315.

²⁶ I could refer to the arrest warrant, limitations of free speech, freedom of association and freedom of religion by anti-discrimination rules governing also horizontal relationships; the abolition of bank secrecy; the restriction of the legal privilege of lawyers (rules on money laundering), etc.

But it is also sensible to maintain in principle the application of (national) mandatory law, in principle on a territorial basis. Unlimited choice of law is often simply imposing the law chosen by the offeror (and the country-of-origin principle is a more limited form of this²⁷). It is justified to limit the choice of law in certain relationships, or at least to limit its effects by applying the mandatory rules of (for example) the country of the consumer, the tenant, the employee, etc. When we take the protective function of law seriously, when we believe that there are other values than private autonomy to be balanced, then we need a Market Law rather than a Law Market; and then we cannot simply throw this rule of law away simply because a relationship is cross-border. There is no justification for a dichotomy between a protective domestic regime on the one hand and 'anything goes' in transnational contracts.

It is also absolutely necessary to maintain the rule of law over claims by groups or organisations trying to impose their rules also outside the field of private autonomy as limited by national (or European) law. Whereas Smits defends the idea that people can feel affiliated with different groups and feel bound by the norms of these groups²⁸, I believe we should protect citizens against such norms, whether it is the *shariah* or the so-called *lex sportiva* (to name just two existing threats). I simply do not want to recognise either, unless the matter remains within the field of private autonomy and is accepted voluntarily as a contractual arrangement. If people freely become member of an association, they are bound by the rules of the association. Not in other cases. And where private organisations have a dominant position, like sport associations, private autonomy should be limited for that reason.²⁹

7. How to move forward

The realisation of a European civil code, even if not fully binding on the member states (in accordance with my proposal above), will require the combined efforts of different players, including as a minimum politicians and academics. Those efforts will be useful even if such a Code would not result. As stated, parliaments are not the best place to draft codes, but they are the institution with the highest degree of legitimacy to decide the political choices to be made when making the rules and thus also the institution which is most properly justified to make these rules binding. In that sense, neither Savigny nor Windscheid have 'made' the BGB³⁰ - although one could say that Huber did really make the ZGB. And even the BGB would not have been there without the preparatory work of Savigny - *malgré lui* - and Windscheid, just as the Code Napoleon would not have been there without the preparatory work of Bourjon and especially Pothier. In that sense there is certainly also today a 'Vocation of Our Age for Legislation and Jurisprudence' - *ein Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*.

The *res publica professorum* has its own task and responsibility, indeed not the same one as that of the political institutions. It is not because they have no legitimacy to issue a Code that

²⁷ See, in ch 2 of this volume, the critical remarks on the country-of-origin principle by H Schulte-Nölke.

²⁸ Cf Sen above n 11.

²⁹ See S. Grundmann, 'On the Unity of Private Law - From a Formal to a Substance Based Concept of Private Law', *ERPL* (2010), 1055 ff.; see also F. Cafaggi, 'Private regulation in European private law', *EUI Working paper RSCAS 2009/31* @ http://cadmus.eui.eu/bitstream/handle/1814/12054/RSCAS_2009_31%5Brev%5D.pdf?sequence=3.

³⁰ As is stressed in the contribution of Reimann and Halberstam in ch 22 of this volume.

they have no legitimacy to propose and draft one. They even have a responsibility to develop, with techniques proper to their profession, by teaching and writing, the law. In recent history, nearly all good codes have been prepared by law professors. Their success was partly dependent upon the ability to formulate the political choices and present them to the political institutions. The realisation of the Dutch Civil Code of 1992 is a good example, where the *'vraagpuntenprocedure'* (procedure of points in question) was used. The academic drafter, Professor EM Meijers, presented to Parliament the main issues on which a political choice had to be made, in total 48 points 'in question'; at the same he proposed answers in the form of rules in a first, 'academic' draft. This procedure took about one year. The academic drafter then made a revised draft based on these choices. Although Parliament had the last word, the translation of political choices into legal rules was first of all the task of the 'professor'. Given this experience, the authors of the Draft CFR could maybe themselves make a list of points in question to be submitted to the European political institutions (at least to the European Parliament), maybe supplemented with alternative answers. This would evidently not prohibit anyone else from discussing the issues and proposed solutions, to propose alternative solutions and their respective effects. Whereas the idea of a Law Market for Citizens as a place where the rule of law itself is treated as a commodity should be rejected, in contrast the Law Market as a Market of ideas, especially for legislators, could be useful.

The other task of academics consists of teaching the 'common law' of Europe as well as the variations between legal systems. Those differences should not be hidden, but showing them, also requires that the law is to a large extent taught on a European and comparative basis. And the aim of providing materials for this form of teaching was precisely one of the aims of the DCFR itself. Maybe such teaching materials constitute after all, the primary foundations of European private law.