

What Do We Mean when We Say 'Folklore'? Cultural and Axiological Diversities as a Limit for a European Private Law

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Abstract: Cultural and axiological diversities between legal orders are considered to be a limit for the unification or harmonization of European private law. This assumption, as a starting point, is analysed in relation with three different cases or tests: same-sex marriages in family law, 'real seat theory' versus 'incorporation theory' in company law, and 'playing at killing people' against human dignity in constitutional law. The diagnosis confirms the hypothesis: legal divergences due to various cultural or axiological options result in restrictions on the free movement of persons, goods or services within the internal market. As European law often justifies these restrictions, they should be removed through 'reactive' harmonization. Nevertheless, the proportionality principle can exclude this possibility, simply because of the scope of some cultural or axiological differences. Finally, this understanding is applied to contractual law in order to show that there is no significant exception in this area. Accordingly, any attempt to unify contractual law must take into account the cultural and axiological diversities and try to minimize their effects, but also accept the implicit limits by implementing soft and more imaginative proposals.

Résumé: Les diversités culturelles et axiologiques entre les systèmes juridiques sont présentées comme des limites face à l'unification ou l'harmonisation du droit privé européen. Cette hypothèse est analysée par rapport à trois sujets différents: le mariage homosexuel dans le droit de la famille, le théorie du siège réel contre la théorie du siège statutaire dans le droit des sociétés, et le fait de 'jouer à tuer' face au droit à la dignité humaine dans le droit constitutionnel. L'analyse confirme les hypothèses de départ: des divergences qui trouvent leur origine dans certaines différences culturelles et axiologiques provoquent des entraves à la libre circulation de personnes, marchandises ou services. Étant donné que plusieurs fois le droit communautaire permet de justifier ces entraves, il faut procéder à leur élimination à travers des techniques d'harmonisation 'reactive'. Cependant, le principe de proportionnalité peut exclure cette possibilité, précisément en prenant en considération la portée de certaines diversités culturelles ou axiologiques. Finalement, cette thèse est appliquée au droit des contrats afin de montrer qu'on n'y trouve pas d'exceptions remarquables. Par conséquent, n'importe quel projet d'unification du droit des contrats doit faire attention aux diversités culturelles et axiologiques et essayer de minimiser leurs effets, mais accepter aussi les limites qu'elles comportent en proposant des solutions plus souples et imaginatives.

Zusammenfassung: Die Grenze für eine Vereinheitlichung oder Harmonisierung des Europäischen Privatrechts bilden kulturelle und axiologische Unterschiede zwischen den juristischen Systemen. Dieser als Ausgangspunkt gewählten Annahme wird anhand von drei unterschiedlichen Fallkonstellationen nachgegangen: der gleichgeschlechtlichen Heirat im Familienrecht, der Sitz- im Gegensatz zur Gründungstheorie im Gesellschaftsrecht sowie dem 'Spiel, um zu töten' im Verhältnis zur Menschenwürde im Verfassungsrecht. Die

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Untersuchung bestätigt die Ausgangsthese: Rechtliche Unterschiede, die auf bestimmten kulturellen oder axiologischen Gegensätzen beruhen, führen zu Beschränkungen der Personen-, der Warenverkehrs- und der Dienstleistungsfreiheit. Da diese Beschränkungen häufig gerechtfertigt werden können, müssen sie im Wege 'reaktiver' Rechtsangleichung beseitigt werden. Gleichwohl kann das Verhältnismäßigkeitsprinzip diese Möglichkeit gerade wegen der Tragweite bestimmter kultureller und axiologischer Unterschiede ausschließen. Unter Zugrundelegung dieser These ergeben sich auch im Bereich des Vertragsrechts keine Ausnahmen. Daher muss jede Maßnahme zur Vereinheitlichung des Vertragsrechts den kulturellen und axiologischen Unterschieden Rechnung tragen. Dies lässt sich vor allem durch mildere und fantasievollere Lösungen erreichen, die einerseits die Wirkungen dieser Unterschiede minimieren, aber andererseits ihre impliziten Grenzen akzeptieren.

Key words: Europeanization of private law, harmonization, cultural diversity, public policy, proportionality principle, contract law

1. Overview

Article 6.3° of the Treaty on European Union states that 'The Union shall respect the national identities of its Member States'. 'National identity' does not come down to a mere political identity or sovereignty excluding a federal political framework for the European Union. Its meaning is deeper: it has to do with respect for the cultural identity of the Member States. Following this line, Article 151.1° of the EC Treaty adds, as a specific policy, the contribution to the flowering of the cultures of the Member States, while respecting their national and regional diversity.

If private law is a part of the culture of each Member State, this assumption - together with the proportionality principle included in Article 5 II EC Treaty - will mean a limit for the feasibility and scope of the unification of European private law. The debate about these premises is well known. Some scholars uphold the unity of European legal culture, even by rejecting any essential difference between civil law and common law.¹ However, most of them emphasize the drawbacks that cultural diversity entails with regard to the unification of private law, especially when it is intended through 'hard law' measures such as a European Civil Code.²

¹ See especially R. ZIMMERMANN, 'Historische Verbindungen zwischen civil law und common law', *Gemeinsames Privatrecht in der Europäischen Gemeinschaft*, 2^d ed., 1999, pp. 103-125; *Id.*, 'El carácter europeo del Derecho inglés. Relaciones históricas entre civil law y common law', *Estudios de Derecho privado europeo*, Madrid, 2000, pp. 161-228 (original in German in *ZEuP*, 1993, pp. 4 *et seq.*); *Id.*, 'El legado de Savigny', *Estudios de Derecho privado europeo*, Madrid, 2000, pp. 37-42 (original in German in *Juristische Blätter* 5, 1998, pp. 273 *et seq.*).

² See this debate and different opinions in M. ANTOKOLSKAIA, 'The Harmonization of Family Law: Old and New Dilemmas', *ERPL*, 2003/1, pp. 37-44. M. BANGEMANN, 'Privatrechtsangleichung in der Europäischen Union', *ZEuP*, 1994/3, p. 369; T.M. DE BOER, 'The Relation between Uniform

Footnote 2 continued

Substantive Law and Private International Law', *Towards a European Civil Code*, 1st ed., 1994, p. 60; M. BUSSANI Y U. MATTEI, 'The Common Core Approach to European Private Law', 3 *Columbia Journal of European Law*, 1997/98, p. 350; H. COLLINS, 'European Private Law and the Cultural Identity of States', *ERPL*, 1995, pp. 353-365; U. DROBNIG, 'Scope and General Rules of a European Civil Code', *ERPL*, 1997, p. 492; W.F. EBKE, 'Unternehmensrechtsangleichung in der Europäischen Union: brauchen Wir ein European Law Institute', *Festschrift für Bernhard Grossfeld zum 65. Geburtstag*, 1999, p. 191; A.J. ENGEL, 'Ein Europäisches Zivilrechts Gesetzbuch? - Zukunftsperspektiven aus dem Blickwinkel der Gemeinschaftskompetenz', *ZfRV*, 1999, p. 129; A. FLESSNER, 'Rechtsvereinheitlichung durch Rechtswissenschaft und Juristenausbildung', *Rabels Z.*, 1992, pp. 255-256; M. GEBAUER, *Grundfragen der Europäisierung des Privatrecht*, 1998, pp. 102-103; W. VAN GERVEN, 'Coherence of Community and National Laws. Is There a Legal Basis for a European Civil Code', *ERPL*, 1996/4, p. 466; B. GROSSFELD Y K. BILDA, 'Europäische Rechtsangleichung', *ZfRV*, 1992/6, p. 431; H. HEISS, 'Europäisches Vertragsrecht: in statu nascendi', *ZfRV*, 1995, p. 54; E. HONDIUS, 'Condizioni generali di contratto e clausole vessatorie: verso un codice civile europeo', *Quaderni di diritto privato europeo*, 1997/1, p. 45; C. JAMIN, 'Un droit européen des contrats', *Le droit privé européen* (P. De Vareilles-Sommières dir.), 1998, p. 43; C. JOERGES, 'Interactive Adjudication in the Europeanization Process? A Demanding Perspective and a Modest Example', *ERPL*, 2000, p. 5; O. LANDO, 'Why Codify the European Law of Contract', *ERPL*, 1997, p. 529; *Id.*: 'The Principles of European Contract Law after Yaer 2000', *New Perspectives on European Private Law*, 1998, p. 74; *Id.*: 'Die Regeln des Europäischen Vertragsrecht', *Gemeinsames Privatrecht in der Europäischen Gemeinschaft*, 2^d ed., 1999, pp. 568-569; P. LEGRAND, 'Sens et non-sens d'un Code civil européen', *RIDC.*, 1996, pp. 779-812, also in English under the title 'Against a European Civil Code', in 60 *Modern Law Review*, 1997, pp. 44-63; *Id.* 'European Legal Systems are Not Converging', 45 *ICLQ*, 1996, pp. 52-81; *Id.*: 'Le primat de la culture', *Le droit privé européen*, 1998, pp. 1-19; *Id.*: 'La leçon d'Apollinaire', *L'harmonisation du droit des contrats en Europe*, 2001, pp. 37-56; *Id.*: 'On the Unbearable Localness of the Law: Academic Fallacies and Unseasonable Observations', *ERPL*, 2002, pp. 61-76; U. MATTEI Y A. DI ROBILANT, 'The Art and Science of critical Scholarship. Post-modernism and International Style in the Legal Architecture of Europe', *ERPL*, 2002/1, pp. 29-59; L. MOCCIA, 'À la recherche d'un droit privé européen', *RIDC*, 2004/2, pp. 308-309. P.C. MÜLLER-GRAFF, 'Europäisches Gemeinschaftsrecht und Privatrecht', *NJW*, 1993/1, p. 19; F. RITTNER, 'Das Projekt eines Europäischen Privatrechtsgesetzbuches und die wirtschaftliche Praxis', *DB*, 1996, pp. 26-27; S. SÁNCHEZ LORENZO, *Derecho privado europeo*, Granada, 2002, pp. 225 ss.; O. SANDROCK, 'Das Privatrecht am Ausgang des 20. Jahrhunderts: Deutschland-Europa-und die Welt', *JZ*, 1996/1, p. 7; C. SCHMID, 'Anfänge eine transnationalen Privatrechtswissenschaft in Europa', *ZfRV*, 1999, p. 215; K. SCHURIG, 'Europäisches Zivilrecht: Vielfalt oder Einerlei', *Festschrift für Bernhard Grossfeld zum 65. Geburtstag*, 1999, p. 1.111; J. SMITS, *The Making of European Private Law (Toward a Ius Commune Europaeum as a Mixed Legal System*, Amberes, 2002, pp. 31-32, 271-274; A.V.M. STRUYCKEN, 'Les conséquences de l'intégration européenne sur le développement du droit international privé', 232 *RCADI*, 1992/1, pp. 281-282; S. WEATHERILL, 'Why Object to the Harmonization of Private Law by the EC', *ERPL* 1004/5, pp. 647-653; M. ZULEEG, 'Rechtsangleichung innerhalb und ausserhalb des Europäischen Gemeinschaft', *ZEuP*, 1998, p. 512

'Contract law is not folklore':³ Ole Lando declared himself in a really eloquent and categorical way against these objections, which could call into question the achievements of the Lando Commission and the Principles of European Contract Law. He emphasizes thus that commercial and contract laws do not follow cultural guidelines. They are only subordinated to economic requirements shared by all Member States. From the aforementioned, it may be deduced that it does not happen with other legal spheres as succession or family law, which are usually more determined by traditions and cultures. In other words, succession and family law are more 'folkloric' legal fields.

As a matter of fact, personal and subjective circumstances are especially close to family law, which is more deep-rooted in cultural traditions than contract law. However, that must not lead to denying any impact of culture and tradition on contract law. 'Folklore' is a word often used in a pejorative and negative sense: it brings to mind the more superficial and festive cultural expressions, which are not usually very representative of true cultural identity.⁴ Taking the word seriously as synonymous with cultural expression, all related assertions should also be less superficial and festive. When we are talking about a cultural expression, we are not referring to a mere way of revealing the relationship between man or society and the environment. Cultural identity is considered above all as a vehicle to express values, preferences and options, which are not necessarily rooted in traditions or in the past, as social groups, cultures and values are submitted to constant changes. The central question involves establishing whether private law depends significantly on culture, and whether the social groups within the Member States of the European Union develop in a different or in a basically common way, from a legal and cultural point of view.

In my opinion, law is essentially a cultural product. Despite integration processes - even as important as the European Union's - this cultural product still depends widely on the nation State. In Spain we wonder nowadays what the meaning sense of the word 'nation' is; that may not be surprising in a country with different cultures translated into different private laws. The close links between Law and State lead therefore to cultural diversities, which represent potential obstacles for unification of law. The main trend will probably be a gradual convergence of different legal

³ Cf. O: LANDO, 'The Principles of European Contract Law and the *lex mercatoria*', *Private Law in the International Arena - Liber Amicorum Kurt Siehr*, La Haya, 2000, p. 396; *id.* 'Optional or Mandatory Europeanization of Contract Law', *ERPL*, 2000, p. 61 (same text as editorial in *CMLR*). See also E. HONDIUS, 'Condizioni generali...', *op. cit.* in footnote 2, p. 45; *id.*, 'Vers un droit européen de la responsabilité civile', *New Perspectives on European Private Law*, 1998, p. 53.

⁴ In Spain the word 'folklore' recalls immediately the 'flamenco' art. Many foreign people believe that flamenco is a typical cultural expression from Spain. They don't suspect that it is an art well known abroad and of course in Spain, but really characteristic only in a small part of the Spanish country or society.

cultures in the near future. Nevertheless, it is very hazardous in the present circumstances to deny the existence of significant differences, which can affect both family and commercial law. It is even possible to perceive some lines of progressive legal and cultural divergence.

This point of view will be illustrated from three tests related to central questions in present legal debate in the European Union. Firstly, the legal recognition of same-sex marriages in family law (2); secondly, the controversy between 'real seat theory' *versus* 'incorporation theory' in company law (3); finally, the effects of human rights (human dignity) on European movement freedoms in a single case involving the 'play at killing people' (4). After this diagnosis, some concluding remarks about the chances for a European contract law will be formulated (5).

2. First Test: Same-Sex Marriages and the Unification of Family Law

Over the last few years three European countries (The Netherlands, Belgium and Spain)⁵ have decided to recognize same-sex marriages. Moreover, this new understanding entails the possibility of joint child adoptions by the married couple (subject to some limits in the Netherlands and without any limit in Spain). Belgian and Dutch Law shall be applied if at least one of the contracting parties has citizenship or residence respectively in Belgium or in the Netherlands.⁶ The Spanish authorities have recently expressed the extraterritorial scope of Spanish law, which will be also applied to foreign contracting parties if they are residents in Spain, even if they are citizens from a country where same-sex marriages are not allowed.⁷ The following analysis will focus firstly on this detailed and extensive document enacted by the Spanish authorities.

⁵ United Kingdom must be included in this list since 5 December 2005, when the *Civil Partnership Act 2004* came into force. As a matter of fact, there is no difference between homosexual marriage and civil partnership (reserved to same-sex couples), but the name. Chapter 2 of Part V of the Act and the last additions to Schedule 20 clearly states the transposition of Belgian, Canadian, Dutch and Spanish homosexual marriages into the British civil partnership. Furthermore, adoption is allowed in Articles 79 and 203.

⁶ The Belgian Act on 13 February 2003 maintained a traditional characterization of 'homosexuality' or 'heterosexuality' as a question of capacity and required therefore that same-sex marriage be allowed in the respective personal laws of both contracting parties (see A. FIORINI, 'New Belgium Law on Same Sex Marriages and its PIL Implications', 52 *I.C.L.Q.*, 2003, pp. 1.039-1.058). Article 46.II of the new Belgian Act on Private International Law has extended the application of Belgian law in the sense explained *supra*. The Civil Partnership Act only requires residence in England or Wales for at least seven days immediately before giving the notice of proposed civil partnership to a registration authority [8 (1)].

⁷ See 'Resolución-Circular de la Dirección General de los Registros y del Notariado de 29 de julio de 2005, sobre matrimonios civiles entre personas del mismo sexo' (Boletín Oficial del Estado. n. 188, 8-VIII-2005).

The grounds for an extraterritorial application of Spanish law are to be found to a large extent in public policy reasons. The rejection of foreign laws which do not allow same-sex marriages is not based on the constitutional right to marriage: Article 32 of the Spanish Constitution allows but probably does not ensure the right to same-sex marriage. The Preamble of the Spanish Act on 1 July 2005 directs the legal reform towards the optimization of two others fundamental rights: the free development of personality and non-discrimination on account of sexual orientation. Accordingly, public policy against foreign laws can appear when there is a significant territorial connection (*Inlandsbeziehung*) with Spain, as the residence of the contracting parties.

Obviously, this extraterritorial scope of Spanish same-sex marriage on public policy grounds has little international and comparative support. This understanding of marriage and family law is not common in Europe, or indeed in the world, apart from The Netherlands, Belgium, Canada, United Kingdom and Massachusetts. It is true that same-sex marriage is recognized in some European rules about the conditions of employment of the officials and other servants of the European Communities.⁸ However, both the ECHR and the ECJ clearly point to a European understanding of marriage anchored in the heterosexual condition.⁹ In fact, case law that opens marriage and other rights to transsexual persons starts by assuming there is a heterosexual marriage, due to an effective sex change.¹⁰ In short, nowadays there is not a European public policy, which can facilitate the extraterritorial recognition of same-sex marriages. On the contrary, under some legal systems such as the French or the German 'heterosexuality' has been considered as an essential or constitutional characteristic of marriage providing the public policy reasons, which prevent the recognition of any same-sex marriage.¹¹

From a European point of view, this axiological diversity about the structural grounds of marriage suggests a deeper reflection. Family law spent many years, even

⁸ Regulation 723/2004, 22 March (*Official Journal*, L 124 de 27 April 2004).

⁹ See in relation with Article 12 EHR Convention, '*Rees v. United Kingdom*' (ECHR, 17 November 1986) and '*Cossey v. United Kingdom*' (ECHR, 27 September 1990). The same restriction can be found in some European cases on registered partnerships: '*Grant*' (ECJ, 17 February 1998, C-249/96) and '*Sweden v. Council*' (ECJ, 31 May 2001, C-122/99 & C-125/99).

¹⁰ See S. SANZ CABALLERO, 'A propósito de las sentencias *Goodwin e I* o el debate sobre el matrimonio de transexuales ante el TEDH', *LV R.E.D.I.*, 2003/1, p. 309.

¹¹ For the debate about this question see H. FULCHIRON, 'Le mariage homosexuel et le droit français (à propos des lois hollandaises du 21 décembre 2000)', *Le Dalloz*, 2001, pp. 1628-1631; A. RÖHTEL, 'Ehe und ordre public', *IPRax*, 2002, pp. 496-500; J. WASMUTH, 'Ehesließung unter Gleichgeschlechtlichen in den Niederlanden und deutscher ordre public', *Liber Amicorum Gerhard Kegel*, Munich, 2002, pp. 237-259. See also C. GONZÁLEZ BEILFUSS, *Parejas de hecho y matrimonios del mismo sexo en la Unión Europea*, Madrid/Barcelona, 2004, pp.122-129; J.M. MARTÍN SERRANO, 'Los matrimonios homosexuales: una aproximación desde el Derecho internacional privado español', *LV R.E.D.I.*, 2003/1, pp. 295-298.

centuries, on the progressive convergence of central aspects such as divorce or children equality. However, the hope of harmonization in family law looks to be threatened by new radical divergences; among these, the openness of marriage to same-sex couples is the most outstanding: it does not mean a mere diversity about the conditions and capacity to marry, but affects its ultimate essence. Belgian, Dutch, Spanish and British Acts represent a 'national' option, closely linked with social and mass demands in order to protect a wider right to freedom of sexual orientation. Both laws and social demands are located in a national area, and they result in exclusively national new values or preferences. Consequently, we are witness to a 're-nationalization' of private family law, which reveals a lack of homogeneity or common values among the Member States, i.e., different marriage cultures, which raise questions about the European unification of family law.

This cultural diversity emphasizes the weakness of understanding sex identity as a capacity problem. The authorization in Belgian, Dutch or Spanish Law of same sex marriages by foreigners whose personal law does not allow it cannot be considered as an exception to the personal law application to capacity to marry. It concerns a territorial imposition of a certain understanding or culture about marriage. In the same way, the foreign law system will be able to refuse recognition of this marriage if same-sex marriage is considered as an 'unknown legal institution'; that will happen on public policy grounds and not by controlling the law applied to the capacity problem. Cases of recognition by transposing same-sex marriages into the legal regime of registered partnerships could also arise.¹² Recognition as a true marriage may even be possible in certain States, which understand 'heterosexuality' as a binding internal condition, but do not extend it as an international public policy.¹³ Nevertheless, there is not a rather checked practice or predictable chance in this last sense.

Certainly, the situation described above will produce negative effects. Same-sex marriages will generate a lack of marital status stability, especially in the other

¹² For more details, from a PIL perspective, see E. ARTUCH IRIBERRI, 'La libertad individual y las parejas ante el Derecho internacional privado', *LIV R.E.D.I.*, 2002/1, pp. 45 ss.; J.M. ESPINAR VICENTE, *El matrimonio y las familias en el sistema español de Derecho internacional privado*, Madrid, Civitas, 1995, pp. 152-153; P. OREJUDO PRIETO DE LOS MOZOS, *La celebración y el reconocimiento de la validez del matrimonio en Derecho internacional privado español*, Navarra, 2002, pp. 299-300.

¹³ See about the recognition within the U.S.A., A. KOPPELMAN, 'Same-Sex Marriage, Choice of Law and Public Policy', 76 *Texas L. Rev.*, 1998, pp. 921 *et seq.*; ANONYMOUS, 'In Sickness and in Health, in Hawai and Where Else?: Conflict of Laws and Recognition of Same-Sex Marriages', 109 *Harvard L. Rev.*, 1996, pp. 1.038 *et seq.*, pp. 2.048-2.050; L. KRAMER, 'Same-Sex Marriage, Conflict of Laws and the Unconstitutional Public Policy Exception', *The Yale Law Journal*, 1997, pp. 1.965 *et seq.* Within the U.K., J. MURPHY, 'The Recognition of Same-Sex Families in Britain: The Role of Private International Law', *International Journal of Law, Policy and the Family*, 2002, pp. 181-201, pp. 185-189.

States corresponding to the citizenship or domicile of contracting parties. Free movement of persons within the internal market will be concerned and a great number of personal, family, social and economic rights from European law will not be applied, because they are based on a heterosexual understanding of marriage. From a private international law perspective, for example, the application of Regulation 2201/2003 by a French court, in order to establish the jurisdiction in a divorce case related to a same sex marriage held in Spain between two French people residents in Spain, must not be expected. Under the most foreseeable interpretation, the application of the Regulation to same-sex marriages will be turned down. Belgian, Dutch and Spanish decisions on divorce or adoptions concerning same-sex marriages will hardly be recognized abroad. In the field of immigration, the extension to registered partnerships of the privileged legal regime included in Article 2 b) of Directive 2004/58, does not entail a guarantee of equality for same-sex marriages. Even if same-sex marriage is considered as a registered partnership, equal treatment will depend on the host Member State putting the registered partnership on a level with marriage, and especially same-sex registered partnership on a level with same-sex marriage. The power to extend the family reunification right contained in Directive 2003/86 to registered partnerships is not a guarantee for same-sex marriages either. One can conclude that the European notion of 'spouse' is still deeply rooted in a heterosexual understanding of marriage.

This simple diagnosis reflects a difficult paradox: despite appearances, different national understandings on family law show a Europe lacking in common principles and values, multicultural and full of national idiosyncrasies. This clearly makes the unification of European law more difficult. Unification is, however, the only way in order to solve the problems arising from this diversity in international relationships. We need a consistent and common understanding of 'marriage' and 'spouse'. Here is the paradox.

Different cultures about marriage also concern European citizenship. The ECJ has emphasized the close link existing between European citizenship and free movement of persons as a constitutional right beyond economic freedoms. This interpretation has allowed the extension of European law to mere internal cases.¹⁴ Would, for instance, the progressive 'García Avello' doctrine be applied in a case relating to the name of a children adopted by a French-Spanish homosexual married couple? If the answer is negative, then the same-sex marriage folklore will directly affect the scope of a fundamental European right such as European citizenship. Such a reflection leads to thinking about the constitutional implications of this approach: in a great number of cases, cultural and axiological diversities between Member States do not allow conceiving a common tradition which enables an extended interpretation of fundamental rights included in the European Charter, such as the right to respect

¹⁴ For example, in 'García Avello' case, ECJ 2 October 2003, C-148/02.

for private and family law, the right to marry and to found a family, non discrimination on the grounds of sexual orientation or the right to a family life (Articles II-67, II-69, II-81, II-93 Treaty establishing a Constitution for Europe).¹⁵ The European Charter becomes therefore a text on minimum standards, at least in relation to private law. Cultural and common legal traditions do not permit any more.

3. Second Test: 'Delawarization' of Company Law

Different understandings in the current laws of Member States about the establishment of companies is probably the most pressing problem in order to achieve a solid European free movement of services. Scandinavian, Anglo-Saxon and some other countries, such as the Netherlands, follow the 'incorporated theory'. Pursuant to this theory from an internal perspective, a company needs only a 'formal' seat in order to be incorporated in those countries. This valid incorporation gives them a kind of 'nationality'. Private law implications of this approach are also clear: the company is governed by the law according to which it is duly incorporated. The problem is solved in a quite different way in those countries favouring the 'real seat' theory, i.e., most of the civil law countries. If any company tried to be incorporated in one of them – gaining in such a way its nationality – both formal and real seat (management and control centre or principal place of business) had to be located in that country. Sometimes, as under German law, this approach entails a tough private international law consequence: the existence of the company itself depends on the law of the country where the company has its 'real' seat. If this country is e.g. Germany, the legal existence of a company –duly incorporated in another country as the United Kingdom – will not be recognized. Under the ECJ decision in *Daily Mail*,¹⁶ this legal diversity led to some imperfections in the European services market, because the cross-border seat or primary establishment transfers became impossible or very difficult, even if only real seat was concerned. However, neither European company law, nor the power to negotiate complementary conventions (Article 293 EC Treaty), have achieved a suitable reactive harmonization.¹⁷

Against this background, the ECJ decision on 9 March 1999 in the *Centros* Case (C-212/97) meant a complete revolution. Mr. and Mrs. Bryde, Danish citizens residing in Denmark, were the shareholders of 'Centros Ltd.' (*private limited company*), incorporated in England on May 1992. Its registered office was situated at the home of a friend of Mr. Bryde. The share capital amounting to GBP 100 was divided into two

¹⁵ *Official Journal* C 310 16 December 2004. The scope of the fundamental rights included in the Charter recently leads V. ZENO-ZENCOVICH to talk about the 'constitutionalization' of European private law ('Le basi costituzionali di un diritto privato europeo', *Europa e diritto privato*, 2003/1, pp. 19-31).

¹⁶ ECJ, 27 September 1988, C-81/87.

¹⁷ See M. FRANZEN, *Privatrechtsangleichung durch die Europäische Gemeinschaft*, Berlin/New York, 1999, p. 238.

shares held by Mr. and Mrs. Bryde. The company did not carry on any actual business in England, because its confessed sole purpose was carrying on business in Denmark, thus avoiding the application of Danish legislation that a minimum amount of share capital be paid up. During the summer of 1992, Mrs Bryde requested the Board to register a branch of Centros in Denmark. The Board refused that registration on the grounds, *inter alia*, that Centros, which does not trade in the United Kingdom, was in fact seeking to establish in Denmark, not a branch, but a principal establishment, by circumventing the national rules concerning, in particular, the paying-up of minimum capital (DKK 200 000). Danish judges upheld the arguments of the Board in a judgment of 8 September 1995, whereupon Centros appealed. The Court of Appeal decided to stay proceedings and to refer a question to the Court for a preliminary ruling in relation to the compatibility of this decision with European rules on free movement of services.

The EJC *Centros* decision can certainly be fiercely criticized.¹⁸ However, for the purpose of this article, it suffices to say that ECJ considered the behaviour of Mr. and Mrs. Bryde as absolutely lawful, given that the use of national legal diversity (competition between legal orders) is inherent to the right of establishment and to the freedom to provide services. In fact, although the ECJ allows the destination-State to enforce its binding rules based on imperative requirements in the general interest, any idea of fraud seems to be eliminated in this legal field. Otherwise, the refusal to register the branch of Centros was considered in this case as contrary to old Articles 52 and 58 EC Treaty. The *Centros* doctrine was in a way reproduced by *Inspire Art*. Between them, the ECJ decision in the case *Überseering* – very well founded on the opinion of general advocate – had condemned the absurd ‘real seat conflict-of-laws theory’ followed by German law as contrary to Article 48 EC Treaty.

Both *Centros* and *Inspire Art* tend – consciously or not – to a single axiological understanding characterizing the Anglo-American systems, which follows a liberal or neo-liberal approach to company law and support its deregulation or ‘delawarization’. Certainly, this assumption is only partly true, because the ECJ does not deny the possibility of enforceability of some destination State rules based on general interests (social understanding), which attempt to protect shareholders and creditors, as long as the current conditions (non discrimination, efficiency and proportionality) are respected. In particular, the rules that require a relevant participation of employees in company management would be successfully implemented.¹⁹ In any

¹⁸ Cf. S. SÁNCHEZ LORENZO, ‘El Derecho europeo de sociedades y la sentencia ‘Centros’: la relevancia de la ‘sede real’ en el ámbito comunitario’, 0 *AEDIPr*, 2000, pp. 115-117; *id.* ‘El Derecho de establecimiento secundario de las sociedades ficticias en el ámbito comunitario’, *Libro homenaje a Fernando Sánchez Calero*, vol. I, Madrid, 2002, pp. 451-480.

¹⁹ See M. GÖTTSCHE, ‘Das Centros-Urteil und seine Auswirkungen’, 34 *D.St.R.*, 1999, p. 1-407; G.H. ROTH, ‘Grundungstheorie: Ist der Damm gebrochen?’, 21 *ZIP*, 1999, p. 864; P. ULMER, ‘Schutzinstrumente gegen die Gefahren aus der Geschäftstätigkeit inländischer Zweigniederlassungen von kapitalgesellschaften mit fiktivem Auslandsitz’, *JZ*, 1999/13, p. 663.

case - and this is the most surprising thing - whereas the EJC follows the neo-liberal Anglo-American model of delawarization - upheld by the Advocate La Pergola - the other European institutions align themselves openly with the social - or German - model: in all existing derived European law about company establishment there is a constant value against the 'incorporation theory', requiring a close territorial identity between real and registered seat.²⁰ 'Reactive' harmonization, thus, is inclined to locate real and registered office in the same country, while EJC has decided just in a contrary sense.

There are, finally, two different and divergent understandings about company law. European institutions disagree and hesitate in a very dilettante way. Reactive harmonization follows a social civil law understanding, which basically favours territorial identity between real and formal seat. This approach does not necessarily clash with the rejection of private law implications of 'real seat theory' (*Überseering*), but is clearly contrary to the neo-liberal approach of *Centros* and *Inspire Art*. Such a legal incoherence would not occur if there were true axiological coherence between the European legal orders. Difficulties arising in the design of the European Company, especially with regard to the involvement of employees, were mainly due to these axiological diversities. While employee involvement is an essential criterion in German company law, in common law countries it is often qualified as anathema. Obviously, wide protection of employee participation rights in the European Company could help support the scepticism of British businessmen about this optional formula.

Those divergent understandings entail without doubt some obstacles to internal market efficiency, unless competition between legal orders is accepted as a paradigm (which could nevertheless be considered itself as a neo-liberal axiological option). Which should be the concrete guideline in a non-optional harmonization of

²⁰ Specifically, in relation with the undertaking for collective investment in transferable securities (UCITS), Article 3 of the Council Directive 85/611/ECC of 20 December 1985 still stated that 'for the purposes of this Directive, a UCITS shall be deemed to be situated in the Member State in which the investment company or the management company of the unit trust has its registered office; the Member States must require that the head office be situated in the same Member State as the registered office'. Following this rule, under Article 3 of the European Parliament and Council Directive 95/26/EC (of amending Directives 77/780/EEC and 89/646/EEC in the field of credit institutions, Directives 73/239/EEC and 92/49/EEC in the field of non-life insurance, Directives 79/267/EEC and 92/96/EEC in the field of life assurance, Directive 93/22/EEC in the field of investment firms and Directive 85/611/EEC in the field of undertakings for collective investment in transferable securities, with a view to reinforcing prudential supervision), 'Member States shall require that the head offices of insurance undertakings be situated in the same Member State as their registered offices' and 'each member State shall require that: - any credit institution which is a legal person and which, under its national law, has a registered office have its head office in the same Member State as its registered office; - any other credit institution have its head office in the Member State which issued its authorization and in which it actually carries on its business'.

European company law? Which could be the contribution of a European Constitution to solving these concerns? Which economic model is followed in the European Economic Constitution? We know that some Member States start from a Social State model, which involves the clear subordination of private ownership to social utility. Under these legal orders, company law is understood from a social perspective, whose quintessence is employee involvement. Other European legal systems reveal, by contrast, a much more liberal approach, far from a 'social' understanding of the State and particularly of the market. What is the economic model of the drafted Constitution for Europe? The answer is almost the same as is given in the first test. Rules of the European Constitution about the freedom to conduct a business and the right to property (Articles II-76 and II-77) provide only a standard minimum shared by all Member States - apparently even in conflict with other precepts, such as Article III-425. However, these principles are not detailed enough to give a clear answer to the company model and employee involvement. Nevertheless, those detailed principles can be found in the national Constitutions (e.g. Articles 33 and 128 of the Spanish Constitution for a 'social model'). Accordingly, the only thing that can be expected - and feared - as in the *Centros* case, is a ECJ decision which solve an axiological problem of great magnitude with the weak argument of integration, i.e., grounded on the axiological blindness of European economic freedoms.

4. Third Test: Play at Killing People, Fundamental Rights and Economical Freedoms

Omega, a German company, had been operating an installation known as a 'laserdrome' in Bonn. 'Laser sport' was the game played in the 'laserdrome'. It included hitting sensory tags placed on the jackets worn by players. The equipment used was supplied by the British company Pulsar International Ltd. The Bonn police authority issued an order against Omega, forbidding it from facilitating or allowing in its establishment games with the object of firing on human targets using a laser beam or other technical devices (such as infrared, for example), thereby, 'playing at killing' people by recording shots hitting their targets. According to German authorities, the games which took place in Omega's establishment constituted a danger to public order, since the acts of simulated homicide and the trivialization of violence thereby engendered were contrary to fundamental values prevailing in public opinion. Omega appealed, arguing, amongst numerous other pleas, that the contested order infringed Community law, particularly the freedom to provide services under Article 49 EC, because its 'laserdrome' had to use equipment and technology supplied by the British company Pulsar. Finally, the *Bundesverwaltungsgericht* decided to stay the proceedings and refer a question to the ECJ for a preliminary ruling. According to the *Bundesverwaltungsgericht*, the Court of Appeal was really right to hold that the commercial exploitation of a 'killing game' in Omega's 'laserdrome' constituted an affront to human dignity, a concept established in the first sentence of Paragraph 1.1°

of the German Basic (Constitutional) Law. It was, however, uncertain whether that result was compatible with Community law, particularly Articles 49 to 55 EC on the freedom to provide services and Articles 28 to 30 EC on the free movement of goods.

Several interesting questions for European Law are present in the EJC decision in the *Omega* case.²¹ However, we will focus the analysis exclusively on the scope of human dignity as a fundamental right and an eventual legitimate obstacle to economic freedoms included in the EC Treaty. It must be remembered that currently Article 6.2 EU Treaty recognizes that the 'Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community Law'. In practice, both the European Convention and the European Court of Human Rights case law make up a substantial part of the European *acquis* in this field and they are an irreplaceable - but limited - referent. Unfortunately, in this case that referent does not refer to human dignity and there is no uniform European criterion.

Obviously, the respect for human dignity is a value shared by all Member States, as can easily be concluded from the common constitutional traditions. The ECJ ruled in this sense in relation with the patentability of isolated parts of the human body.²² This assumption is enough in order to justify some restriction to economical freedoms. Under the case-law of the ECJ, obstacles to freedom to provide services arising from national measures which are applicable without distinction are permissible only if those measures are justified by overriding reasons relating to the public interest, are such as to guarantee the achievement of the intended aim and do not go beyond what is necessary in order to achieve it. Human dignity protection entails an overriding reason relating to the public interest, which habilitates a legiti-

²¹ EJC, 14 October 2004, C-36/02. The definition between free movement of goods and free movement of services is especially relevant. In *Omega* the EJC clarifies the preceding case law, in that the problem is considered as a restriction to freedom to provide services, on the grounds of the 'secondarity' principle. Apparently, the importation of the game equipment is a question of free movement of goods. However, the contested order actually restricts the importation of goods only with regards to equipment specifically designed for the prohibited variant of the laser game and this is an unavoidable consequence of the restriction imposed with regards to supplies of services by Pulsar. The importation of goods from the United Kingdom is therefore entirely secondary in relation to the freedom to provide services, which is the central question. Accordingly, all the whole case is considered as a question of freedom to provide services. Thus, the EJC definitively overrules the oldest EJC decisions that clearly separated both regimes - especially in relation to the importation of sound and images supports destined to provide cinema services (*Sacchi*, EJC, 30 April 1974, 155/73; *Ciné-thèque*, EJC 11 July 1985, 60 & 61/84; *ERT*, ECJ, 18 June 1991, C-269/89), following in this way the 'secondarity' criterion still applied in *Schindler* (EJC, 14 Mars 1994, C-275/92) and above all in *Canal Satellite Digital* (ECJ, 22 January 2002, C-390/99) and *Karner* (ECJ, 25 Mars 2004, C- 71/02).

²² *Netherlands v. Council*, EJC, 9 October 2001, C-377/98.

mate restriction to freedom of services by German law. The recognition of a legitimate 'public interest' does not depend on being widely shared by all Member States. On the contrary, public interest involves an axiological reserve characteristic of one Member State. The underlying value is a national product, but its correctness must be declared by the ECJ. In this case, the restriction of freedom to provide services is justified, since the order of the German authorities is grounded on the right to human dignity as a legitimate public interest or value. As EJC argues, it is 'immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right' (§34). More precisely, 'it is not indispensable in that respect for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States with regards to the precise way in which the fundamental right or legitimate interest in question is to be protected' (§37).

In *Omega* the ECJ clarifies some misinterpretations derived from the *Schindler* case.²³ In paragraph 60 of *Schindler*, the EJC referred to moral, religious or cultural considerations, which lead all Member States to make the organization of lotteries and other games with money subject to restrictions. That was a mere verification of facts. In *Omega* the EJC underlines that 'it was not its intention, by mentioning that common conception, to formulate a general criterion for assessing the proportionality of any national measure which restricts the exercise of an economic activity. On the contrary, as is apparent from well-established case-law subsequent to *Schindler*, the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State' (§§ 37 & 38). Accordingly, although abortion e.g. is a widely decriminalized practice in a great number of Member States, a different and more restricted understanding by other legal systems - such as Irish law - even grounded on a single perspective of the human right to life, must be considered legitimate.²⁴

Each Member State can therefore support a different understanding about the 'systems of protection' of fundamental rights, which means rather a different criterion on the content and the scope of those fundamental rights, such as the right to life in relation to abortion practices or the right to human dignity against 'playing at killing people'. These national understandings legitimate restrictions against European economic freedoms. Finally, the *Omega* case is another expression of the cultural diversity of Member States. A consensus about the core of fundamental rights is surely feasible (e.g. abolition of the death penalty), but cultural diversities will arise if the scope of the fundamental right must be determined beyond this minimum standard. Playing to kill, abortion, same-sex marriages, transsexuality,

²³ See *supra* note 21.

²⁴ *Grogan*, ECJ, 4 October 1991, C-159/60.

permission of religious signs, euthanasia, admission of some political parties, freedom of expression and nazi or fascist symbols, are some examples of divergent criteria and values that lead to various legal systems. In particular, there are different understandings about 'efficiency' or 'utility', and diverse priorities or public interests, which affect international transactions, as the *Omega* case shows. Diversity is without doubt a cost transaction.²⁵

Before clarifying whether an elimination of this cost must be advised and, if so, which is the best way to do that, it might be useful to think about the reasons that justify different views of 'playing at killing people' in the United Kingdom and in Germany, given that in the former the game is allowed, while in Germany it is forbidden on grounds of human dignity protection. I am persuaded that any reader of this paper will already have answered this question. Indeed, some games than can be played usually and normally in the United Kingdom must not be played in Germany, due to historical experiences quite different on some points. On their collective conscience German people have the memory of the holocaust, the trivialization of violence against human life just in one of the most cultured people worldwide, the feeling of a kind of collective responsibility for killing - as a game - millions of human beings. This historical background creates a single culture, a characteristic set of values or hermeneutics. Out of this context, the prohibition seems exaggerated, because the game is not rejected by experience and it is seen just as a game. But, in Germany, 'playing at killing people' is not allowed, and freedom of expression does not protect the public display of nazi symbols either. That is perhaps why it is so difficult to imagine playing 'at torturing' in Argentina or Chile, 'at bombing trains' in England or Spain, or 'at crashing planes' into buildings in the United States of America. Of course, this set of values could be universalized, but actually it is by no means universal.

In order to remove the transaction cost in the *Omega* case, a reactive harmonization²⁶ of fundamental rights is needed. Accordingly, there is not a simple philosophical or political reason for a European Charter of Fundamental Rights of the Union, but also an economic basis. Both economic efficiency and philanthropic aspirations come together this time. Will a future European Constitution ensure this harmonization? Or, on the contrary, will cultural diversity and axiological heterogeneity appear once again as an insurmountable obstacle? The first provision of Part II of the Treaty establishing a Constitution for Europe, which includes the European Charter of Fundamental Rights of the Union, is Article II-61: 'Human dignity is inviolable. It must be respected and protected'. Furthermore, Article I-2 of Part I states: 'the Union is founded on the values of respect for human dignity, freedom, democ-

²⁵ See U. MATTEI, 'A Transaction Costs Approach to the European Code', *ERPL*, 1997, pp. 537-540.

²⁶ Vid. M. FRANZEN, *Privatrechtsangleichung durch die Europäische Gemeinschaft*, Berlin/New York, 1999, p. 238.

racy, equality, the rule of law and respect for human rights...'. Title VII of Part II clearly point to both European institutions and Member States – in this case only when they are implementing Union Law – as addressees of the Charter (Article II.111.1^o).²⁷ In relation with the Charter interpretation, Article II-112 refers to the European Convention for the Protection of Human Rights and Fundamental Freedoms, whenever the rights are guaranteed by this Convention included in the European *acquis* (Article I-9), as the ECHR and the ECJ case laws. In the same way, fundamental rights that result from the constitutional traditions common to the Member States shall be interpreted in harmony with those traditions (Article II-112.4). However, it is hardly feasible to achieve a 'European interpretation' of the scope of fundamental rights, beyond the common standard minimum, offering a high protection level in accordance, at the same time, with the European requirements and the common constitutional traditions.

In the light of the European Constitution, *Omega* concerns the interpretation of a fundamental right recognized in the European Charter relating to the application of European Law in a case that affects both European institutions and Member States. Would the German Court have applied in such a case the Article II-61 of the European Constitution? Probably, the Court would have referred to the ECJ for a preliminary ruling about the interpretation of Article II-61, i.e., about the scope of human dignity. The minimum standard derived from the constitutional traditions common to Member States surely allows the establishment of the core of human dignity, which is patent in other fundamental rights such as the right to the integrity of the person (Article II-63), or the prohibition of torture and inhuman or degrading treatment or punishment (Article II-64). However, a common tradition relating to 'playing at killing people' as a practice contrary to the right to human dignity would hardly be inferred. The support of this point of view by a handful of Member States would not be enough. It is submitted that United Kingdom and Germany do not share a common tradition. The ECJ would then have two options: firstly, the European understanding of human dignity could be construed on a European ground, out of the common traditions. But this possibility does not seem to be habilitated by the European Constitution itself. Consequently, the second option lies in following the *Omega* EJC decision, i.e., in recognizing a divergent national interpretation of human dignity, which results in different understandings in each Member State. One

²⁷ Despite the existing limits for the application of European law about economic freedoms, for material, personal and spatial reasons, the wide understanding of free movement of persons as an essential content of European citizenship results in the application of European Law – and eventually, in a near future, of the Charter of Human Rights – which could in many cases be characterized as internal, but affects citizens of other Member States (*Martínez Sala*, ECJ 12 May 1988, C-85/96; *Grzelczyk*, ECJ, 20 September 2001, C-184/99; *D'Hoop*, ECJ 11 July 2002, C-224/98; *Baumbast*, ECJ 17 December 2002, C-413/99; *García Avello*, ECJ, 2 October 2003, C-148/02; *Zu-Chen*, ECJ, 19 October 2004, C-200/02).

Member State would be therefore authorized to restrict free movement of goods, services or persons on the ground of 'its' understanding of the content of a fundamental right, providing that it was a right generically recognized as legitimate. In short, the European Constitution would not entail a great step forward in this field.

Although the three tests considered refer to such different matters as family law, company law and fundamental rights, they show common elements of how legal and cultural diversities result in obstacles to European economic freedoms. These restrictions justify harmonization measures in the sense of Articles 94 and 95 EC Treaty, which are nevertheless limited due to the cultural and axiological scope of some legal diversities. The proportionality principle does not really allow the forcing of cultural identities to reach that point. Given the failure of harmonization, there is no choice but to resort to facultative private international law²⁸ (European Company), negative integration (play at killing people) or the mere admission of the irreducibility of this concern (same-sex marriage). The ECJ and European institutions could force integration arguing reasons of utility or efficiency, but it is not a sensible philosophy. Values must direct and limit the legal treatment of economic freedoms and the scope of integration, and not the other way around. There is still a long way to go to achieve the axiological unity that ensures integration without thorny problems. Nowadays, there is still a wide margin for living together within complexity and developing a post-modern *modus vivendi* that allows both a gradual convergence and the recognition and acceptance of some limits. There is still a long way to go to put an end to the symbiosis between Law and State, on which Hans Kelsen built a pure theory of law that refuses any axiological approach. If his theory were as useful as pure, European integration would be easier and achieved without any damage from the highest of European institutions. In fact, law hardly takes part in 'pure' theories, because its narrow links to the State are also characterized by cultural and axiological elements, which can not be separated from the social experience of the group and emerge simply when somebody start playing at killing people. There is nothing wrong with that. The European Constitution does not change the present situation significantly, but it is perhaps an indispensable step on the long way towards universality... Is contract law invulnerable to this diagnosis?

5. Concluding Remarks: Is Contract Law Folklore?

There is also cultural and axiological diversity in contract law. Human rights are not usually involved, but contract law concerns cultural clashes. Many topics arise, first of all, relating to differences between civil law and common law: the common lawyers

²⁸ See J. BASEDOW, 'Europäisches Internationales Privatrecht', 30 *NJW*, 1996, pp. 1921-1929; also P. DE MIGUEL ASENSIO, 'Integración europea y Derecho internacional privado', *RDCE*, 1997/2, pp. 435-436.

have never worked with any notion of an obligation as a general legal bond;²⁹ the duty to negotiate in good faith, apparently very important in civil law, is openly rejected in common law;³⁰ the circumstances in which a contract is void due to a mistake are quite restrictive in English common law;³¹ there is also a radically different treatment of clauses that involve third parties.³² The predisposition of common law to give up 'consideration' as a ground for validity of contract, thus favouring in such a way a more abstract understanding of contract formation, is the same as can be found in some civil law countries in relation to the 'causa'; but this trends do not facilitate

²⁹ See G.H. SAMUEL Y J.G.J. RINKES, 'The English Law of Obligations', *Gemeinsames Privatrecht in der Europäischen Gemeinschaft*, 2^d ed., 1999, p. 213.

³⁰ S. VAN ERP reproduces a categorical assertion of *House of Lords* in 'Walford v. Miles' (1979): 'A duty to negotiate in good faith is unworkable in practice and it is inherently inconsistent with the position of a negotiating party' (cf. 'The Precontractual Stage', *Towards a European Civil Code*, 2^d ed., 1998, p. 211). This understanding is narrowly linked to the role assigned in common law to legal security and predictability, which could be affected by such a subjective and *a priori* undeterminable criterion (cf. H. KÖTZ, 'The Common Core of European Private Law. Third General Meeting: Trento 17-19 July 1997', *ERPL*, 1997, pp. 550-552; *Id.* 'How to Achieve a Common European Private Law', *New Perspectives on European Private Law*, 1998, pp. 17-18, citing R.M. GOODE). This opinion is shared by some Scandinavian legal systems (see T. WILHELMSSON, 'Standard Form Conditions', *Towards a European Civil Code*, 2^d ed., 1998, p. 262-265). Very interesting in this respect is the analysis of M. HESSELINK, 'Good Faith', *Towards a European Civil Code*, 2^d ed., 1998, pp. 285-310. This author shows that some convergence between common law and civil law on this point remains possible, but the divergence will appear once again if this common idea must be expressed in a legal text, bringing to light finally different mentalities: 'if the role of the judge as a creator of rules is fully recognized, there is no need for a general good faith clause in a code or restatement of European private law... If, however, there is still some doubt as to the power of the courts, a good faith clause could be useful in order to assure that the judge may create new rules' (*ibid.*, p. 309). S. TEUBNER underlines that a flexible use of 'good faith' in a civil law way is impracticable for common lawyers, when that concept has been included in a Code or written legal text, because the need to give a maximum precision to statutes is inherent to common law culture. Consequently, a European harmonization of 'good faith' in contract law would result in new dissonances and in the legal irritation of common lawyers; as a matter of fact, the good faith could never be equivalent to the German notion of *Treu und Glauben*: good faith is always concretized *ad hoc*, while *Treu und Glauben* achieves its materialization through more generic systematization, functions and abstract principles. See 'Legal Irritants: Good Faith in British Law or How Unifying Law ends up in New Divergences', *The Europeanization of Law (The Legal Effects of European Integration)*, Oxford, 2000, pp. 253-258.

³¹ See M. Fabre-Magnau, 'Defect of Consent in Contract Law', *Towards a European Civil Code*, 2^d ed., 1998, p. 223.

³² In contrast with the German model, which favours the effects of contract vis-à-vis third parties, Irish and English law does not recognize these effects, given the 'privity of contract' principle (cf. 'Tweddle v. Atkinson', 1861). However, some authors do not find here an obstacle for the harmonization, provided that relativity of contract is seen as a principle, rather than a rule. (See e.g. E. DU PERRON 'Contract and Third Parties', *Towards a European Civil Code*, 2^d ed., 1998, p. 326).

other contractual questions relating to the binding character of contracts that depend to a large extent on the 'causalistic' or 'abstract' contract culture.³³

If all these differences are considered as reducible, given that they are based on some essential but incidental (folkloric) diversities, then harmonization will not face any obstacle. Unfortunately, this is not the case. *Hardship*, perhaps the most controversial contract law question in international trade, can demonstrate the ultimate reasons that prevent English law from accepting the provisions proposed in the Principles of European Contract Law. It is submitted that English Law does not recognize *hardship* as a legal institution or provision; that is why the parties have to introduce explicit hardship clauses in order to take precautions against uncertain and unforeseeable events at the moment of the contract formation. It is not an incidental option. English law - unlike French law - has overcome the strict sanctity of contract principle (*pacta sunt servanda*) and recognizes impossibility of performance or 'force majeure' situations, even if they are not foreseen in specific clauses. Trying to conserve its legal tradition, English Law introduces a true fiction, the 'implied terms' doctrine ('*Taylor v. Caldwell*'), and goes beyond that in cases of frustration of purpose ('*Davis Contractors*'). This case law really follows fictive theories and often allows the termination of contract and the exoneration of a duty in true hardship cases, even if contracting parties have not included hardship clauses.³⁴ But English contract law tradition is reluctant to recognize effect other than the expressed will of the parties, so that the contract cannot be construed. This theory leads sometimes to unreasonable consequences, which back up the surreptitious introduction of objective reasonability criteria, as they were 'implied conditions' imposed by the true will of the contracting parties. Certainly, this fiction brings common law and civil law much closer together, but not entirely. English law could perhaps take well the legal termination of contract on the grounds of an unforeseeable event, even in hardship cases. However, common law culture cannot support the provision included in Article 6.111 (3) (b) PECL, which empowers the court to adapt the contract if the parties fail to reach an agreement within a reasonable period. The re-construction of the contract by the court is recognized in some civil law orders and also in chapter 6 of UNIDROIT Principles, but it is completely outside English contractual culture. This 'culture' has achieved its own logic through a centuries-old tradition, perhaps debatable, but in any case its own.³⁵ We can conclude that also in

³³ See M. STORME, 'The Binding Character of Contracts - Causa and Consideration', *Towards a European Civil Code*, 2^d ed., 1998, p. 239.

³⁴ See S. SÁNCHEZ LORENZO 'La frustración del contrato en el Derecho comparado y su incidencia en la contratación internacional', *Revista de la Corte Española de Arbitraje*, vol. XX, 2005, pp. 45 et seq., esp. pp. 78-82.

³⁵ B. LEHRBERG refers to the especial solution from Swedish law grounded on re-negotiation, as long as there is a re-negotiation refined and generic culture in private Swedish law (*Cf.* 'Renegotiation Clauses, the Doctrine of Assumptions and Unfair Contract Terms', *ERPL*, 1998, pp. 265-283).

contractual law the limit of a minimum and a maximum common factor can be found.

The cultural origin of European law itself and its interpretation by different cultural systems also deserves our full attention. For example, the German 'inspiration' of Directive 86/653 (self-employed commercial agents) caused a complex and laborious process of transposition into English law.³⁶ The English Law Commission argued that the Directive could be construed and applied easily in Germany on the grounds of B.G.B. German lawyers and judges had the chance to fill the gaps and interpret the different sections of the Directive, while common lawyers, lacking in such a resource, remained perplexed by a set of open and vague rules, which were due to a quite different culture. In common law countries, statutes (written laws), as contracts, must be interpreted word-for-word without any chance of judicial creation or development, contrary to what normally happens with unwritten law (properly, common law). This cultural characteristic also explains why Directives require a longer transposition into Irish or English law as against into civil law systems that trust in the task of judicial development. Some authors refer thus to different 'transposition cultures', which justifies e.g. why German transposition of Directive 87/102 (consumer credit) occupied only eight pages, while Irish transposition needed eighty-nine.³⁷

Such differences do not reflect necessarily the historical roots of every legal system, but also, in a broadest sense, the sociological and economic circumstances. H. Kötz³⁸ has showed with great skill how the divergences between English, German, French or Australian law depend on the types of contract litigated before the higher courts of each country. The cosmopolitan character of English contract law must therefore be understood in the light of international contracts (contracts for the carriage of goods and contracts of insurance, particularly marine insurance). German law is built, by contrast, on a federal case law focused on consumer contracts, while French or Australian laws are deep-rooted in sales of land. This is by no means incidental, because legal practice reveals different preferential markets or economic profiles (commercial, industrial or agrarian). This point of view is shared by G. Teubner in relation with the characterization of 'good faith' in German law; the German 'Treu und Glauben' responds to a special economic framework - that Teubner denominates '*business-coordinated*'³⁹ - which stimulates 'good faith' as a legal motive to cooperation. On the contrary, English law does not need such a func-

³⁶ See H. KÖTZ, 'Gemeineuropäisches Zivilrecht', *Festschrift für Konrad Zweigert*, Tübingen, 1981, pp. 485-486.

³⁷ See G. DANNEMANN, 'The Drafting of Consumer Credit Legislation. A Structural Comparison between the EU Directive and the English, Irish and German Acts', *Europäische Rechtsangleichung und nationale Privatrechte*, 1999, pp. 191-194.

³⁸ See H. KÖTZ, 'How to Achieve...', *supra* note 30, pp. 19-21.

³⁹ See the development of this idea with some examples in 'Legal Irritants...', *supra* note 30, pp. 259-266.

tional 'good faith' understanding, because the English economic model would not be 'business-coordinated', as demonstrated by the lack of any link between standard terms of contracts and the role of business associations.

Nevertheless, some scholars maintain the weakness of cultural arguments, at least in the contractual or commercial sphere. They usually argue that it is not culture, which is the central question there, but political and economic ideas, which are in the essential the same in all European countries. Axiological divergences would be minimal, due to European identity based on the values derived from the Christian tradition and the common economic level and interests.⁴⁰ Finally, the cultural essence would be the same. If goals of economic policies agree, formal or aesthetic ways to design legal institutions should not entail any obstacle.

The philosophical significance of European axiological identity is undoubted. The above-mentioned argument considers that commercial law values are shared and reflect therefore a single economic thought. Accordingly, the political composition of the European Parliament and the circumstantial conservative or progressive representation of European peoples would be really insignificant, given that economic targets are so closely pre-determined. However, the fact that all Member States share a common Economic Constitution or a free market principle does not justify the assumption of an axiological identity behind the cultural diversity. As the existing different political trends in Europe and the political debate itself show, some options still remain in order to orientate the European economic project. These ideological options extend not only to family or criminal law (same-sex marriages, euthanasia), but also to the guidelines of commercial law, tax law, labour law or criminal law, whose content finally determines a specific mechanism of distribution of wealth. Paraphrasing G. Teubner, 'European efforts at harmonization have not yet seriously taken into account the 'varieties of capitalism', the difference of production regimes'.⁴¹ It has been noted *supra* how the European harmonization of company law confronts two great ideological paradigms about the understanding of economic relationships: firstly, a liberal approach represented by common law and the 'incorporation theory'; secondly, a more 'social' and interventionist understanding inspired in

⁴⁰ Cf. O. LANDO, 'Why Codify...', *supra* note 2, pp. 529-530; *id.*: 'Guest Editorial: European Contract Law after the Year 2000', *CMLR*, 1998, p. 825; *id.*: 'The Principles...', *supra* note 3, p. 394; *id.*: 'Optional...', *supra* note 3, p. 65.

⁴¹ 'Legal Irritants...', *supra* note 30, p. 266. See also T.M. DE BOER, 'The Relation between Uniform Substantive Law and Private International Law', *Towards a European Civil Code*, 1st ed., 1994, p. 60); V. ROPPO, 'Sul diritto europeo dei contratti: per un approccio costruttivamente critico', *Europa e diritto privato*, 2004/2, pp. 445-446; G. CANIVET & H. MUIR WATT, 'Européanisation du droit privé et justice sociale', *ZEuP*, 2005/3, p. 522. Moreover, the political and ideological scope of private law is undoubted. Recently, *Critical Legal Theory* has demonstrated this assumption in an almost indisputable way (see D. KENNEDY, *A Critique of Adjudication (fin de siècle)*, Cambridge, Massachusetts, 1997, and the comments in relation with European private law in M. HESSELINK, 'Special Issue on Critical Theory and European Private Law', *ERPL*, 2002/1, pp. 3-5).

the 'real seat theory', whose quintessence is German company law.⁴² Likewise, different awareness in relation with consumer protection has required a European consumer law grounded on standard minimum Directives, which can habilitate different criteria.⁴³ These are only two examples: axiological options are always relevant in any commercial and contractual legal system, even if they add mere nuances. The concept of 'general interest' itself, as a touchstone for the negative integration, implies the recognition of national cultural singularities when it comes to concretizing e.g. how to protect employees, consumers, road safety or artistic heritage. Only the national values that entail an economic safeguard measure must always be rejected in the integrated space. In other cases, the success of this limit depends on the analysis of its discriminatory character, lack of efficiency or proportionality.

Consequently, different values lie behind the divergences about legal principles or policies and, especially, a single perception of individuals on values and the moral climate where they deal. This cultural context plays an essential role in legal life. H. Collins emphasizes convincingly this idea referring to the graphic example of different perceptions existing in Member States on the Directives requiring employers to consult worker representatives in the event of collective redundancies and transfers of undertakings.⁴⁴ Finally, the harmonization of contract law, especially through hard law, cannot be justified on the grounds of an axiological neutrality of contract law, even if the axiological implications are not so critical as in family law.⁴⁵ In short, private law values respond to differential cultures. Which will be the prevailing values in the new European private law? Which will be sacrificed? Which will be the criteria used to take this crucial decision?

⁴² See V. NEßLER, 'Wettbewerb der Rechtsordnungen oder Europäisierung - Stand und Perspektive des europäischen Gesellschaftsrecht', *ZfRV*, 2000/1, pp. 1 and 6.

⁴³ See H. COLLINS, 'European...', *supra* note 2, p. 364.

⁴⁴ Cf. H. COLLINS, 'European...', *supra* note 2, pp. 358-359. Very similar examples are cited by B. GROSSFELD Y K. BILDA in order to show axiological differences (cf. 'Europäische...', *supra* note 2, p. 429). See also P. HOMMELHOFF, 'Corporate and Business Law in the European Union', *Towards a European Civil Code*, 2^d ed., 1998, p. 589). Divergences about the determination of *res intra* and *extra commercium* are also very representative of the axiological scope of commercial law. As H. COLLINS underlines, because of the universalistic and conceptualistic paradigms together with the codification development, the nineteenth century led to the divorce between law and the commercial practices and usages, which were overcome during the twentieth century only through an arduous task of de-codification. In this respect, a European Civil Code would entail a new separation between harmonized official economic culture and social reality represented by commercial usages (*ibid.*, pp. 360-361).

⁴⁵ See e.g. K.D. KERAMEUS, 'Problems of Drafting a European Civil Code', *ERPL*, 1997, p. 479.

Unfortunately, a common law requires common statutes, principles and mentalities, but also a unique culture or thought.⁴⁶ Fortunately, efficiency is too weak a flag to break the rich European cultural diversity, expressed through different languages, thought systems, mentalities and values, which even get over a unique law. Same-sex marriage, coincident registered and real seats, 'playing at killing people' ... is not folklore; neither is contract law. Cultural and axiological diversities in European legal systems about the first three questions actually result in obstacles to free movement of persons, goods and services within the internal market. Given their significance, they may be something more than folklore. Many fundamental rights included in the European Charter and the European Constitution will be interpreted and construed with difficulty, due to these 'folkloric' questions. Maybe divergences are not so significant in contractual matters, but they cannot be disregarded or rejected burying our heads in the sand. The way towards a European private law must include axiological and cultural diversities and consider carefully their actual significance. Cultural and axiological plurality must be recognized and the implementation of measures to minimize its negative effects on the internal market must be less rigid and more imaginative. Giving up these divergences in the folkloric field entails an unfair treatment of cultural diversity, but is also clearly ineffective in order to achieve the goals of economic and legal efficiency of any harmonization process. Such a deep-seated contempt for cultural and axiological diversity can only be explained if harmonization aims surreptitiously to achieve a real political goal, which was already implemented by codification movement during the nineteenth century. But I prefer to believe that scholars do not have this Maquiavelic option in mind.

⁴⁶ T. WILHELMSSON shows how many scholars openly emphasize that European private law harmonization does aim merely at economic union, but also at strengthening or achieving a common identity. In this respect WILHELMSSON cites a categorical sentence from H. THUE: '[t]he eagerness to harmonize European law may result in abolishing the Idea of Europe' (*cf.* 'Private Law in the EU: Harmonized or Fragmented Europeanization?', *ERPL*, 2002/1, pp. 89-90).

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