The Case for a common European Sales Law in an Age of rising Nationalism

Hesselink, M.W.

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Articles

The case for a common European sales law in an age of rising nationalism*

Martijn W. Hesselink**

Abstract: The European Commission's recent proposal for a common European sales law was made in a political climate of rising nationalism. The Commission makes a solid economic and constitutional (legal basis) case for its proposal. However, its argument, which focuses exclusively on the internal market, is not likely to fully convince the opposition. The reason is that it fails to address the widespread notion, underlying also many technical arguments, that Member States should remain sovereign in matters of general private law for the reason that private law is a matter of national identity. In this paper, I address that argument head on. I do this by first identifying the nationalist undertone in many technical arguments raised against the Europeanisation of private law and by then defending the CESL as an expression of another identity that many Europeans share, ie their European identity. I argue, in particular, that the proposed CESL should be welcomed as a common European model of justice between private parties, as rules of just conduct for the internal market. Since most people in Europe identify with both their nation-state and Europe, albeit in different degrees, it makes sense to offer them the choices between national and European contract law. Although the question whether to opt into a CESL should be a matter of private autonomy, the question which legal options will be available is matter of the public autonomy of citizens and requires a full democratic legitimation. Therefore, Article 352 TFEU, the flexibility clause that bypasses the ordinary legislative procedure, would be unacceptable as a legal basis.

Résumé: La récente proposition de la Commission européenne d'un règlement européen sur la vente a été faite dans un climat politique de montée du nationalisme. La Commission présente de solides arguments économiques et constitutionnels (base juridique) en faveur de sa proposition. Quel que soit son raisonnement, qui se concentre exclusivement sur le marché intérieur, il n'est pas de nature à convaincre pleinement l'opposition. La raison en est qu'elle échoue à affronter l'idée très répandue, sous-jacente aussi à de nombreux arguments techniques, que les États membres devraient rester souverains pour les questions de droit privé général, pour la raison que le droit privé est une question d'identité nationale. Dans cet article, j'aborde cet argument de front. Je le fais d'abord en identifiant la tonalité nationaliste de nombreux arguments techniques soulevés contre l'européanisation du droit privé, puis en défendant le projet de règlement européen sur la vente comme l'expression d'une autre identité que de nombreux Européens partagent, à savoir leur identité européenne. Je soutiens,

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** Professor of European private law and Director of the Centre for the Study of European Contract Law at the University of Amsterdam.

en particulier, que le projet de règlement européen sur la vente devrait être accueilli comme un modèle commun européen de justice entre des parties privées, comme des règles de juste conduite pour le marché interne. Comme la plupart des gens en Europe s'identifient à la fois avec leur État-Nation et avec l'Europe, bien qu'à des degrés différents, cela a un sens de leur offrir le choix entre le droit des contrats national ou européen. Bien que la question du choix du règlement européen sur la vente devrait être une question d'autonomie privée, la question de savoir quelles options juridiques seront disponibles est une question d'autonomie publique des citoyens et requiert une pleine légitimation démocratique. C'est pourquoi l'article 352 du traité sur le fonctionnement de l'UE, prévoyant une clause de flexibilité qui contourne la procédure législative ordinaire, serait inacceptable en tant que base juridique.

Zusammenfassung: Der Vorschlag für ein Gemeinsames Europäisches Kaufrecht (GEK) kam in einer Phase zunehmenden Nationalismus. Die EU Kommission begründet ihren Vorschlag sowohl ökonomisch als auch kompetenziell auf solide Art und Weise, dennoch wird ihr – allein auf Binnenmarktüberlegungen basierender – Ansatz die Gegner wohl nicht überzeugen. Dies beruht darauf, dass sie das Kernbedenken, das auch viele Einzelfragen bestimmt, nicht anspricht: nämlich dass die Mitgliedstaaten Herren des allgemeinen Vertragsrechts bleiben sollten, weil es die nationale Identität betrifft. Dieser Beitrag widmet sich ganz ebendiesem Bedenken. Zunächst wird auf den nationalstaatlich orientierten Unterton eingegangen, der bei vielen scheinbar technischen Argumenten mitschwingt. Sodann wird das GEK als Ausdruck einer weiteren Identität erklärt, die ebenfalls vielen wichtig ist, namentlich einer Europäischen Identität. Insbesondere wird dahingehend argumentiert, dass es sich beim GEK um ein gemeinsames Europäisches Modell von Privatrechtsgerechtigkeit handele, namentlich um gute Verhaltensregeln für einen Binnenmarkt. Da die meisten Europäer ihre Identität sowohl im Nationalstaat als auch in Europa sehen, wenn auch möglicherweise in jeweils unterschiedlichem Ausmaß, erscheint es naheliegend, ihnen die Wahl zwischen national und Europäisch zu eröffnen. Obwohl das Opt-in als privatautonome Entscheidung ausgestaltet werden sollte, ist die Frage, welche verschiedenen solche Optionen es geben sollte, zugleich eine der politischen Autonomie der Bürger Europas, verlangt also nach einer umfassenden demokratischen Legitimation. Daher erscheint Art. 352 AEUV, die Ergänzungskompetenz, durch die das "ordentliche" Gesetzgebungsverfahren umgangen wird, als Kompetenz inakzeptabel.

I Private law in an age of rising nationalism

1 Nationalism and neonationalism

Nationalism, according to Gellner's widely accepted definition, is 'a political principle, which holds that the political and the national unit should be congruent'.[1] The concept of a nation is historically very young.[2] The nationalist ideology grew up in the 19th Century, in Europe, as a progressive move-

1 E. Gellner, *Nations and Nationalism* (2nd ed, Oxford: Blackwell Publishing, 2006) 1. Similar, E.J. Hobsbawm, *Nations and Nationalism; Programme, Myth, Reality* (Cambridge: Cambridge University Press, 1990) 9; J. Leerssen, *National Thought in Europe; A Cultural History* (Amsterdam: Amsterdam University Press, 2006) 14.

2 Hobsbawm, n 1 above, 18.

ment,[3] and had its barbaric climax in the two world wars after which it seemed impossible for a long time to dissociate nationalism from *Blut und Boden* rhetoric and racist atrocities. However, in recent decades neonationalism has been on the rise, not only in the popular (and often populist) fashions of anti-immigration, Eurosceptic and anti-globalisation movements, but also in the philosophically articulate shape of liberal nationalism.[4] The latter's main point (combining liberal-egalitarians and communitarian ideals) is that loyalty to collective decisions on which democratic institutions crucially depend,[5] and the solidarity required for egalitarian policies (notably the welfare state) cannot be achieved amongst total strangers.[6] Therefore, the nation is proposed as the unit where democratic politics and redistributive policies are still viable.

Today, it is quite generally accepted that nations are constructs, at least in part. They do not exist 'out there', evolved naturally, to be discovered. Rather, they are cultural artefacts. In the words of Gellner, 'it is nationalism which engenders nations, not the other way round'.[7] Anderson speaks of 'imagined communities'.[8] Modern scholars emphasise the contingent nature of the current nation-states in Europe. Leerssen, for example, writes:[9] 'We have come to think of nation-states as an ideally systematic taxonomy of Europe, where the French live in France and speak the French language, and the Germans live in Germany and speak the German language, and each country has its own French or German cuisine, fashions, national anthem, and lifestyle. But this simplistic ideal-type of the nation-state is ultimately the inheritance of the

3 See E. Hobsbawm, *The age of revolution; Europe 1789–1848* (London: Abacus, 2007 [1962]) 173.

4 See Y. Tamir, *Liberal nationalism* (Princeton, New Jersey: Princeton University Press, 1993). Her specific political agenda is to reconcile Zionism with liberal principles and to advocate the two-state solution.

5 N. MacCormick, *Questioning Sovereignty: law, state and practical reason* (Oxford: Oxford University Press, 1999), especially chapters 10 and 11.

6 D. Miller, *On nationality* (Oxford: Oxford University Press, 1995); D. Miller, *Citizenship and national identity* (Cambridge: Polity Press, 2000).

7 Gellner, n 1 above, 54. Cf also J. Habermas, *Die postnationale Konstellation; Politische Essays* (Frankfurt am Main: Suhrkamp, 1998) 37: 'kollektive Identitäten werden eher gemacht als vorgefunden.' *Idem* Hobsbawm, n 1 above, 10: 'Nations do not make states and nationalisms but the other way round.' K.W. Deutsch, *Nationalism and Its Alternatives* (New York: Knopf, 1969) 3, puts it more ironically when he refers to the nation as 'a group of persons united by a common error about their ancestry and a common dislike of their neighbors.'

8 B. Anderson, *Imagined communities* (revised ed, London, New York: Verso, 2006). Think only of the interrogation made by E. Renan, *Qu'est-ce qu'une nation*? (Paris: Sorbonne, 1882): 'Pourquoi la Hollande est-elle une nation, tandis que le Hanovre ou le grand-duché de Parme n'en sont pas une?'

9 Leerssen, n 1 above, 70.

encyclopaedic and Enlightenment-anthropological systematization of stereotypes, hearsay and cross-cultural caricatures.'

That nations are artefacts, construed by men and women, is true not only in retrospect but also, of course, for today and tomorrow. And nations are construed not only by football supporters during World Cup matches but also by academics and politicians when debating the future of private law. Just like the recent compilation in the Netherlands of a canon of national history (covering, for the most part, a period when the Kingdom of the Netherlands did not exist),[10] so too is an argument against the Europeanisation of private law in the name of national legal culture or national consumer preferences, not politically neutral. It is an act of nationalism.

2 Private law nationalism

Nation-building and re-building takes place in many different ways including the construction and reconstruction of national legal cultures. Remember that 'legal culture' was not a flourishing concept among private lawyers until the debate on the Europeanisation of private law started. Most of the discourse on national legal culture and diversity of legal cultures is a direct *response* to the Europeanisation process and to the academic proposals for a European civil code.

In other words, scholars and politicians do not *find* national private law but *create* it. By emphasising the national dimension of legal culture they create and reinforce private law nationalism. When national traits of private law are placed on the foreground other characteristics, such as supra- or infra-national aspects, come to look somehow less important and less characteristic of private law. However, the grounds can easily be reversed.[11] Indeed, neopandectists make the exact opposite claim. They emphasise the continuity of Roman law and the *ius commune* and downplay the importance of national difference.[12] (Of course, that claim is not neutral either.[13])

Admittedly, in contrast to the days of the original nationalism today national private law is indeed the default situation. In this sense, private law nation-

10 See 'De canon van Nederland' at http://entoen.nu/(also in English).

11 For this strategy, see M. Foucault, *Les mots et les choses; une archéologie des sciences humaines* (Paris: Gallimard, 1966); E.W. Said, *Orientalism; Western Conceptions of the Orient* (London: Penguin Books, 1995 [first published in 1978]).

12 See eg R. Zimmermann, 'Roman Law and the Harmonization of Private Law in Europe', in A.S. Hartkamp *et al* (eds), *Towards a European Civil Code* (4th ed, Alphen a/d Rijn: Kluwer Law International, 2010) 27–53.

13 See P.G. Monateri, 'Black Gaius; A Quest for the Multicultural Origins of the "Western Legal Tradition"' 51 *Hastings Law Journal* (2000) 479–555. Critical also P. Caroni, 'Der Schiffbruch der Geschichtlichkeit; Anmerkungen zum Neo-Pandektismus' *Zeitschrift für Neuere Rechtsgeschichte* (1994) 85–100.

alism today is passive rather than active, and conservative rather than progressive. But nationalist it is all the same: it is based on the idea that political borders (in this case, the territorial scope of private law rules) should coincide with national borders. Nevertheless, the mere status quo (a fact) does not suffice as a normative argument for private law nationalism. The status quo argument does not have much normative force especially since the status quo of national legal systems itself is largely a product of 19th Century nationalism.

3 Nationalist biases in technical arguments against Europeanisation

Ever since the European private law debate started we have seen a variety of different arguments raised against the Europeanisation of private law in general and against the idea of a European civil code in particular. The European Commission's recent proposal for a Common European Sales law is likely to meet with resistance along similar lines. These arguments include cultural, economic, social justice and systematic arguments.[14] They usually are presented – and genuinely meant – as technical arguments, certainly not as deliberately nationalistic. However, in practice they often display a nationalist bias. There are many examples.[15]

According to the cultural argument, the (further) Europeanisation of private law (through directives, a CFR, a European Civil Code) would be incompatible with the cultural nature of the law. This could be so, either because existing legal cultures would be threatened by Europeanisation or, conversely, because the Europeanisation would be threatened by the existence of different legal cultures (or both). The concept of legal culture and its ingredients (language, values, style, concepts, institutions, consumer preferences etc.) are understood in many different ways by different authors and the arguments also differ a great deal in sophistication and intensity. Sometimes they are inspired by postmodernism, sometimes by cultural anthropology, sometimes by political science, often by a combination of these. However, what they have in common is that the focus is on *national* cultures.

The most classical example is, of course, Pierre Legrand's *Against a European civil code* (1997) where he speaks of 'the French and English legal cultures', relates legal culture to the national character of 'the French', 'the Germans', and 'the

14 For formalist patters of resistance see D. Caruso, 'The missing view of the cathedral: the private law paradigm of European legal integration' 3 *European Law Journal* (1997) 27–32.

15 For brief earlier statements of this argument, see M.W. Hesselink, 'The European Commission's Action Plan: Towards a More Coherent European Contract Law' 10 *European Review of Private Law* (2004) 397–419, 415–417 and M.W. Hesselink, 'The Politics of a European Civil Code' 10 *European Law Journal* (2004) 675–697, 678 *et seq*.

English', and points out that 'a judicial decision at common law textualises aspects of Englishness'.[16] But many others also have described legal culture as national. Schepel, for example, writes that 'it would be hard to think of an area of law in the Member States of the European Union today that is more firmly rooted in national cultures and academic traditions . . . than private law.'[17] Similarly, in his influential article on what he calls 'legal irritants', Teubner, although distancing himself explicitly from Savigny's mystical *Volksgeist* and acknowledging the different ways in which society is fragmented today, when criticising the unfair terms directive for its reference to the concept of good faith he nevertheless does so primarily with reference to national cultures. He writes: 'Good faith will reproduce in legal form larger differences of the national cultures involved, and it will do so, paradoxically, because it is meant to make their laws more uniform.'[18] No evidence is provided for the suggestion that different understandings of what the requirement of good faith entails should occur along national lines, in spite of the fact that prima facie people in Europe (and elsewhere) might just as easily differ and agree along very different and varying distinctions (young/old, left/right, rich/poor et cetera).

In their arguments against European private law, or certain aspects of it, several scholars have relied on the work of the anthropologist Hofstede.[19] For example, Wilhelmsson argues that the 'average consumer' that European law refers to,[20] does in fact not exist because in Europe there are different 'national consumer cultures'.[21] The problem is, however, that Hofstede's idea of 'mental

16 P. Legrand, 'Against a European Civil Code' 60 *Modern Law Review* (1997) 44–62. In another article, Legrand writes that culture 'need not be understood as positing a number of discrete heritages organically tied to specific homelands and considered best kept separate (like the laboratory specimens in petri dishes one also calls "cultures"). Nor does "culture" need to deny their cosmopolitanism to the people being studied. In other words, "culture" allows for a transnational public sphere and certainly need not connote nationalism or isolationism, that is, something like "cultural fundamentalism".' (P. Legrand, 'Antivonbar' *Journal of Comparative Law* [2006] 17). Still, in his discussion and examples of legal culture in that same article culture is almost invariably national.

17 H. Schepel, 'The European Brotherhood of Lawyers: the Reinvention of Legal Science in the Making of European Private Law' 32 *Law & Social Inquiry* (2007) 183–199.

18 G. Teubner, 'Legal irritants: good faith in British law or how unifying law ends up in new divergences' *Modern Law Review* (1998) 23–24.

19 G. Hofstede, *Cultures and organizations; Intercultural cooperation and its importance for survival; Software of the mind* (London: HarperCollinsBusiness, 1991); G. Hofstede, *Cultures and organizations; Comparing values, behaviors, institutions, and organizations across nations* (London: Sage publications, 2001).

20 See CJEU, 16 July 1998, case 210/96 *Gut Springenheide GmbH, Rudolf Tusky* v *Oberkreisdirektor des Kreises Steinfurt – Amt für Lebensmittelüberwachung* [1998] ECR I-4657, and art 2, Directive 2005/29/EC ('Unfair commercial practices directive').

21 T. Wilhelmsson, 'Introduction: Harmonization and National Cultures', in T. Wilhelmsson, E. Paunio and A. Pohjolainen (eds), *Private Law and the Many Cultures of Europe*

software' along national lines relies exclusively on national statistics and surveys,[22] and that national statistic institutions were themselves a product of nationalism.[23] In other words, the argument of national cultural differences is not only largely circular but also historically directly shaped by nationalism.[24]

In France, some scholars have been particularly outspoken about the relationship between legal culture and the nation. Cornu writes:[25] 'La loi des Français se pense et s'écrit en français. Le code civil français forme un tout. C'est notre coutume générale. … Irréductible à une réglementation, le code civil est un monument du droit français parmi nos références primordiales.' See also Lequette's reaction to the European Civil Code project,[26] one of the sources of inspiration for the current CESL proposal: 'En clair, le droit civil français constitue un élément important du ciment de la société française ainsi qu'une pièce essentielle de son système juridique. Imposer un code civil européen, ce serait supprimer cet élément de cohésion des sociétés nationales à un moment où tout concourt déjà à leur ébranlement.' The recent proposals for the reform of French contract law must be seen in this context.[27] They were triggered by the CFR process and inspired by a desire to present a French model on the European scene.[28] Thus, the legal culture argument is not exclusively concerned with the national law within the national borders. Often it is also about

(Alphen a/d Rijn: Kluwer Law International 2007) 3–20, 15. See, in the same volume, also C. van Dam, 'European tort law and the many cultures of Europe', *ibidem*, 57-80.

22 Hofstede (1991), n 19 above, 12.

23 See Hobsbawm, n 1 above.

24 See Leerssen's trenchant methodological criticism of Hofstede's inaugural lecture: J.Th. Leerssen, 'Over nationale identiteit' 15 *Theoretische geschiedenis* (1988) 417–430; J.Th. Leerssen, 'Culturele verschillen en nationale ideologieën: een naschrift' 16 *Theoretische geschiedenis* (1989) 361–365 ('cirkelredenering').

25 G. Cornu, 'Un code civil n'est pas un instrument communautaire' *Dalloz* 2002, 351.

26 Y. Lequette, 'Quelques remarques à propos du projet de code civil européen de M. von Bar' *Dalloz* 2002, 2202–2214, 2202. See recently, Y. Lequette, 'Le Code européen est de retour' *Revue des Contrats* 2011, 1028–1044: 'la suppression des codes civils nationaux qui contribuent à la cohésion de sociétés nationales promises à la disparition.' See also J. Huet, 'Le scandale de l'harmonisation totale' *Revue des Contrats* 2011, 1070–1078, 'Dans ce projet diabolique de laminage des droits nationaux par l'Europe, l'harmonisation "totale" est ainsi devenue l'harmonisation "complète", ou même le "règlement", mais peu importe, c'est la même chose: le même abus de pouvoir, la même idéologie nuisible, le même mépris de la diversité des Etats membres'.

27 See *Avant-projet de réforme du droit des obligations (Articles 1101 à 1386 du Code civil) et du droit de la prescription (Articles 2234 à 2281 du Code civil)* (22 September 2005) (Projet Catala); F. Terré (ed), *Pour une reforme du droit des contrats* (Paris: Dalloz, 2009), and the draft made by the Ministry of Justice (Projet de la Chancellerie).

28 See explicitly, *Avant-projet*, n 27 above, 6. Sceptical about this strategy, R. Sefton-Green, 'The DCFR, the Avant-projet Catala and French Legal Scholars: A Story of Cat and Mouse?' 12 *Edinburgh Law Review* (2008) 351–373.

spheres of influences and hegemony. See Duncan Kennedy who writes:[29] 'My impression is that when the Germans or French appeal to the particularity of national traditions in private law, they understand themselves to be speaking from a strong sense that each of them is really and truly different from other European countries. But they also speak as hegemonic legal powers, with spheres of influence.' Similarly, the 'legal origins' thesis[30] – with its definitional methodology itself a shameless act of extreme American legal nationalism –, led to a wave of legal patriotism and a heroic defence of the French model by the *Association Henri Capitant des amis de la culture juridique française*.[31]

Another familiar argument is the economic argument against the Europeanisation of private law and in favour of competition between national legal systems. Take, as a classical instance of this argument, an often quoted article by Van den Bergh,[32] written in response to the European Commission's 2001 Communication on European contract law.[33] The core idea is that the preferences that individuals have concerning private law differ according to the country in which they live and that national legislators are best placed to respond to those preferences: 'Preferences of consumers in different countries with respect to the priority they accord to consumer protection relative to other concerns are likely to differ systematically. Preferences will vary depending on levels of income and alternative economic opportunities.'[34] However, available statistics show that income differs immensely within countries. Should then Italy have a different consumer law in the South than in the North or should London and Liverpool have separate consumer codes? Along the same lines, Faure also simply assumes that where preferences of citizens differ this will be along national lines. This explains his exclamation:[35] 'Why should

29 D. Kennedy, 'Thoughts on Coherence, Social Values and National Tradition in Private Law', in M.W. Hesselink (ed), *The Politics of a European Civil Code* (The Hague: Kluwer Law International, 2006) 30.

30 See the articles by Shleifer and others and the World Bank's *Doing Business* reports inspired by them.

31 Association Henri Capitant des amis de la culture juridique française, *Les droits de tradition civiliste en question; À propos des Rapports* Doing Business *de la Banque Mondiale* (Paris: Société de législation comparée, 2006). See also B. du Marais (ed), *Des indicateurs pour mesures le droit? Les limites méthodologiques des Rapports* Doing business (Paris: La documentation Française, 2006).

32 R. van den Bergh, 'Forced Harmonization of Contract law in Europe: Not to be continued', in S. Grundmann and J. Stuyck (eds), *An Academic Green Paper on European Contract Law* (The Hague: Kluwer Law International, 2002) 249–268. See also A. Ogus, 'Competition between National Legal Systems: A Contribution of Economic Analysis to Comparative Law' 48 *International and Comparative Law Quarterly* (1999) 405–418.

33 Communication on European contract law, COM(2001) 398 final (11 July 2001).

34 Van den Bergh, n 32 above, 255.

35 M. Faure, 'Economic Analysis of Tort law and the European Civil Code', in Hartkamp *et al* (eds), n 12 above, 977–1000, 985.

we assume that European bureaucrats in Brussels would be more able to find out what the preferences are of the Portuguese than Portuguese legislators and judges could do?' It does not even seem to cross his mind that at least sometimes European citizens are divided as groups along different lines (ideology, sex, profession etc) and that the same question could be asked 'downward' along the national/regional/municipal axis. Indeed, if the public choice argument against the Europeanisation of private law is based on the principal-agent problem and the distance between the law maker and the citizen, then why not first object against the size of certain Member States? Would it not be much more rational to decide in Europe that all Member States must have an efficient size? Some countries would then be lumped together while others could be split into two or more new countries in order for them to reap the benefits of efficient rule making.[36]

In response to the Commission's proposal for a CESL, reasoned opinions for the purpose of the 'yellow card' procedure were submitted by national parliaments from four Member States,[37] claiming that the proposal violated the subsidiarity principle.[38] One of these came from the House of Commons.[39] Clive rejects the Commons' view on subsidiarity as being 'hypocritical', because the Scottish Parliament, which was not consulted, but which is keen to promote the interests of Scottish businesses (as opposed to the interests of the City of London that the UK government seems to be mainly concerned with), might well have been in favour of the proposal.[40]

Two main economic arguments are constantly repeated: first, competition between legal systems is better than harmonisation and, secondly, local preferences can be better turned into law by local legislators. However, even if both claims are empirically sound, the question remains: why national private law? Both claims rather seem to support arguments for sub-national private law. On the regional, provincial and municipal level politicians are even closer to their citizens and may be still better placed to observe local preferences and

36 This idea is explored in a recent study which provides an economic analysis of the size of countries, A. Alesina and E. Spolaore, *The Size of Nations* (Cambridge/Mass: MIT Press, 2003). Although the authors do not tell us what would be optimal borders for the European Member States they do address the idea of a Europe of regions. They write, on 214: that 'in the European Union we see that many regions can afford to be independent if they enjoy the benefits of the European common market.' If anything, that seems to point to regional plus EU law, not national law.

37 See www.ipex.eu/IPEXL-WEB/dossier/document/COM20110635FIN.do.

38 See art 5 TEU and Protocol on the application of the principles of subsidiarity and proportionality.

39 Reasoned opinion of the House of Commons, available at n 37 above.

40 E. Clive, 'Common European Sales Law easily survives first subsidiarity challenge' *European Private Law News*, 4 January 2012 22:38 (http://www.law.ed.ac.uk/epln/blogentry.aspx?blogentryref=8844).

take these into account when legislating, including in the area of private law. Similarly, local private law would lead to even more competition, more models to pick from. It seems implausible that the current map of European Member States is the most rational level of private law legislation from an economic point of view. The argument rather seems to be biased by nationalism.

Understandings of social justice and morality are also often said to differ along national lines. For example, Sefton-Green argues that French and English law 'have a different outlook and do not share the same underlying value or ideology'[41] and that these different underlying values make the idea of a European civil code 'difficult and even undesirable'.[42] In other words, values and ideologies differ from country to country: French contract law is based on French values and ideologies while English contract law expresses the English ideology. Similarly, Micklitz analyses the development of private law in Europe in the context of national political traditions.[43] See also Smits, who 'believe[s] in as much uniformity as is possible without sacrificing national moralities in Europe'.[44] Again, the focus is on national borders instead of what one might expect to be more relevant in this regard, i.e. ideological boundaries. This in spite of the fact that most Member States in Europe have had for decades conservative, social-democrat, liberal and green parties which have been in and out of government over time, either or not in coalitions. Of course, there are major differences between the different versions of these ideologies in different Member States, and the role of ideology in politics is in general decline, but are the ideas on social justice held by a German social democrat necessarily more similar to those of a German Christian Democrat (or green on liberal) than to those of a Dutch social democrat?[45] (Of course, also Rawls' theory of justice locates the hypothetical social contract within the (presumably unproblematic) borders of the nation,[46] and relegates matters of transnational justice to a social contract between nations.[47])

41 R. Sefton-Green, 'Cultural Diversity and the Idea of a European Civil Code', in Hesselink (ed), n 29 above, 71–88, 87.

42 N 4 above, 72 and 79.

43 H.-W. Micklitz, 'Introduction', in H.-W. Micklitz (ed), *The many concepts of social justice in European private law* (Cheltenham: Edward Elgar, 2011) 3–53, 6–22.

44 J. Smits, *The Good Samaritan in European Private Law. On the Perils of Principles without a Programme and a Programme for the Future* (Deventer: Kluwer, 2000) 45.

45 In relation to social justice in European private law, the existence of the *Manifesto* seems to suggest the opposite. See Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: a Manifesto' 16 *European Law Journal* (2004) 653–674.

46 J. Rawls, *A Theory of Justice*, revised edition (Cambridge/Mass: Belknap Press, 1999 [1971]).

47 J. Rawls, *The law of peoples* (Cambridge/Mass: Harvard University Press, 2002). Critical M.C. Nussbaum, *Frontiers of Justice* (Harvard: Belknap, 2006) chapters 4 and 5, in particular 234. Contrast the universalism of her own capabilities approach.

These and other supposedly technical arguments against European private law,[48] or certain aspects of it, have one thing in common. They argue, for one reason or another, that private law should be a matter, not for the European Union, but for the national legislator. In other words, these arguments are based, explicitly or implicitly, on the idea that in Europe systems of private law should coincide with national borders.

II The case for a common European sales law

Private law nationalism is on the rise. It is always hazardous to make general quantitative claims. However, compared to a decade ago, when the Principles of European Contract Law were received with general acclaim and the Trento Common Core project was flourishing, the general attitude towards European private law today seems to be distinctly more sceptical. It is in this climate of increasing nationalist resistance against the further Europeanisation of private law, and of more general doubts about Europe as a result of the EU's handling of the economic crisis, that the European Commission is proposing a regulation on a Common European Sales Law.[49] How does the Commission promote its proposal?

1 The CESL and the Internal Market

According to its first provision, the purpose of the proposed regulation is 'to improve the conditions for the establishment and the functioning of the internal market by making available a uniform set of contract law rules'.[50] According to the explanatory memorandum, 'the overall objective of the proposal is to improve the establishment and the functioning of the internal market by facilitating the expansion of cross-border trade for business and crossborder purchases for consumers'.[51] Thus, the focus is squarely on eco-

48 Think also of the linguistic argument and the constant comparison of national legal systems with national languages, nationalism's product par excellence. See eg Cornu, n 25 above, 351: 'La question est d'abord linguistique … Notre langue est notre mère. Il n'y a pas de langue européenne. La loi française ne peut être que la fille de la langue française.' On this type of argument, see Hobsbawm, n 1 above, 57: 'the mystical identification of nationality with a sort of platonic idea of the language, existing behind and above all its variant and imperfect versions, is much more characteristic of the ideological construction of nationalist intellectuals, of whom Herder is the prophet, than of the actual grassroots users of the idiom.'

49 Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law, Brussels, 11. 10. 2011, COM(2011) 635 final.

50 Art. 1 Para 1.

51 P 4.

nomic growth.[52] The Commission's case is further underscored by an impact assessment, which contains the following claims:[53]

'Differences in contract law between Member States may hinder cross-border trade in the EU, by dissuading business and consumers from cross-border transactions. Businesses involved in the trade in goods that export into other EU markets face unnecessary entry transaction costs close to €1 billion every year. The value of the trade foregone by those who are dissuaded due to differences in contract law amounts to some tens of billions of euros.'

Whatever the merits of this rather bold claim, there is hardly any doubt that the introduction of a CESL will bring the European Union a net economic benefit. The CESL will make it easier for small sellers (the main target group) to sell their products, especially through the Internet, in more countries without incurring costs of legal advice, while the overall costs of introducing a CESL will remain comparatively low.[54] The European Commission's Internal Market case seems convincing and, therefore, Article 114 TFEU provides a proper legal basis for a CESL.

2 Beyond the market

The European Union can only act within the limits of the competences explicitly attributed to it. The Commission was therefore well advised to make its legislative competence crystal clear, as it did. However, the Commission is not a bureaucratic organisation that can limit itself to underscoring its proposals with market impact assessments. It is a political institution with a right of initiative for European legislation. And political institutions should address the arguments made by their adversaries.

Whatever its quantitative proportion, an important part of the resistance against the Europeanisation of private law seems to be inspired by nationalism. We cannot simply dismiss this as bad, or ignore it.[55] The nationalist sentiment

52 In its Annual Growth Survey, Progress Report on Europe 2020, Brussels, 12.1.2011, COM(2011) 11 final, 5, the European Commission had already announced its proposal for an optional contract law instrument. See also the proposed recital 16 which underlines the 'potential for growth in cross-border trade, especially in e-commerce'.

53 Commission Staff Working Paper, Impact Assessment, Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law on a Common European Sales Law, Brussels, 11.10.2011, SEC(2011) 1165 final, 7.

54 See M.W. Hesselink, 'An optional instrument on EU contract law: could it increase legal certainty and foster cross-border trade?', PE 425.642 (Brussels, 2010).

55 Contrast O. Lando, 'Liberal, Social and "Ethical" Justice in European Contract Law' 43 *Common Market Law Review* (2006) 817–833, 822–823 who claims that 'contract law is not folklore' and the critical response by S. Sánchez Lorenzo, 'What do we mean when we say "folklore"? Cultural and axiological diversities as a limit for a European private law' 14 *European Review of Private Law* (2006) 197–219.

is a genuine sense of belonging that people have.[56] It may sometimes be caused by ignorance, myopia or fear of the foreign and the new (a European super state, the global economy, or Muslim immigrants), but it would be demagogical to suggest that neonationalism will lead us down a dangerous path towards new violent clashes between European nations. The community may be imagined, but it is not imaginary. National differences do exist (nationalism has been successful), also in private law, and these differences mean something important to many people in Europe.

Making an exclusively economic argument (however understandable, indeed indispensible, from the constitutional point of view) does not respond to this concern. Now we have the very odd situation where, on the one hand, national civil codes are defended as crucial expressions of national identity, while on the other hand, an optional European contract code is proposed as everything except that (we cannot even call it a code). Democratic political institutions should respond to the genuine concerns of citizens. And technocratic elites at the centre of power should be sensitive to sentiments at the periphery. Therefore, the case for the CESL should be made also (maybe even primarily) in terms of identity and sense of belonging. Such a case can actually be made. And quite a convincing one, at that. Indeed, as I will argue, private law nationalism does not fit well with the fact of our postnational condition. Moreover, the CESL, as a code of contracts that will be available as a second *national* regime and a common *European* law at the same time, represents the right response to the plurality of our different senses of belonging, in particular our dual identity as national and European citizens.

3 Taking the postnational condition seriously

The emphasis on the national character of private law ignores, disregards or downplays a number of facts that together we can refer to as our post-national condition.[57] As a claim to ultimate or exclusive authority for the national legislator, nationalism – even though legitimate from a normative perspective – is problematic because it does not match well with the fact of our postnational condition.[58] To put it differently, a consistent private law nationalist

56 See MacCormick, n 5 above, 183: 'There is at least a prima facie case for some kind of right to respect for national identities as a part of respect for persons, for implicit in respecting human individuals is respect for whatever goes into their individuality.' Contrast M.C. Nussbaum, 'Patriotism and Cosmopolitanism' *Boston Review* October/November 1994, who regards the nationalist sentiment as 'a morally irrelevant characteristic'.

57 Habermas, n 7 above.

58 Compare N. Krisch, *Beyond constitutionalism: the pluralist structure of postnational law* (Oxford: Oxford University Press, 2010) ch 1. See also M.J. Sandel, *Democracy's discontent, America in search of a public philosophy* (Cambridge/Mass: Belknap Press, 1996) 344–345.

cannot be satisfied with the status quo, which from a nationalist point of view, seems wholly arbitrary. She would have to rewind and undo much of what we have become familiar with. She would have to embark upon a massive private law re-nationalisation programme.

The main problem with a nationalist programme to make nation and legal system coincide, therefore, is the presence today of a large body of existing private law of non-national origin. In the area of contract law, there is not only the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG),[59] which applies to cross-border sales of goods between business unless they have opted out (which is done only by sophisticated parties, assisted by professional legal advisors), but also the many European directives. Most of the arguments we saw above would equally apply to eg the commercial agency directive (1986), the unfair terms directive (1993), the consumer sales directive (1999) or the consumer rights directive (2011) which, moreover, were also more intrusive than the CESL would be, since they required the Member States to modify their national private laws in some of its core areas. One would expect a consistent private law nationalist to have a view (or even a programme) concerning the *acquis*: should it be abolished?

Furthermore, the nationalist view of private law ignores the fairly obvious fact that many contracts do belong to not merely one but two (or more) national legal cultures. And it is for these cross-border contracts that the CESL is actually meant.[60] Usually, the cross-border aspects of private law relationships are addressed by conflict of law rules. However, that approach is artificial since it aims at nationalising transnational relationships. These and other facts (such as the internal cultural diversity of Member States),[61] would have to be ignored by a nationalist fundamentalist.[62] Incidentally, card-carrying members of the integralist private law nationalist movement are probably very rare. Most authors cited above do probably not regard themselves as nationalists at all. They may well reject nationalism as an ideology, if asked about it.

On a benevolent reading, the European Commission's argument, although stated in exclusively economic terms, can actually be seen to address this point: by definition cross-border contracts do not belong to one national legal culture. The realities of postnational rule making and the increase in cross-border

59 Interestingly, there was no nationalist opposition when that Convention was negotiated and ratified, even though the CISG is much more intrusive than the CESL because of its opt-out system. See art 6 CISG.

60 See art 4.

61 See Sefton-Green, n 41 above, 72.

62 Cf Sandel, n 58 above, 'Where civic virtue consists in holding together complex identities of modern selves, it is vulnerable to corruption of two kinds. The first is the tendency to fundamentalism, the response of those who cannot abide the ambiguity associated with divided sovereignty and multiply-encumbered selves.'

contracting make it difficult to locate many private law relationships, such as cross-border contracts, in merely one Member State and to trace clear borders between national and EU law. The current renationalisation of these contracts may be regarded as a denial of the postnational condition. In this light, the hybrid nature of the CESL which is proposed both as a common *European* and as a second *national* regime, seems an adequate response to this condition.

4 The European identity of private law

Moreover, as said, there is another story to be told. Some people regard legal culture and private law justice as a European matter. Call this the fact of private law Europeanism. They see no reason why private law should be an expression of national identity. Even if private law became primarily national at some moment in the past (although it was not national during a much longer time before that), why should it also remain so in the future? There is an obvious parallel here with European constitutionalism that questions the supremacy of national constitutionalism. As Maduro argues, 'there is no a priori claim of higher validity for national constitutionalism vis-à-vis European constitutionalism'.[63]

Private law Europeanism is an instance of general Europeanism.[64] Many people identify with Europe. Just like nationalism, also Europeanism, ie the identification with Europe, comes in very different degrees and varieties. During the last year only we have heard arguments for a political union,[65] for a federal 'United States of Europe',[66] while still others advocate a 'Republic of Europeans', inspired by liberal republicanism,[67] or argue that we should regard Europe as belonging, at the same time, to the citizens and the peoples of Europe.[68] That people have different convictions concerning the nature and

63 M. Poiares Maduro, 'Europe and the constitution: what if this is as good as it gets?', in J.H.H. Weiler and M. Wind (eds), *European Constitutionalism beyond the state* (Cambridge: Cambridge University Press, 2003) 74–102, 74.

64 J. McCormick, *Europeanism* (Oxford: Oxford University Press, 2010).

65 Vice-President of the European Commission V. Reding, 'Europe needs democratic rejuvenation. Rome was not built on one day, and neither will be a European political union' *Wall Street Journal*, 8 February 2012, A13.

66 See the president of the Confederation of Netherlands Industry and Employers, B. Wientjes, 'Wientjes: Hoera voor de VS van Europa' *Volkskrant*, 28 January 2012. See also former Belgium prime-minister G. Verhofstadt, *The United States of Europe; Manifesto for a new Europe* (London: Federal Trust for Education and Research, 2006).

67 K.A. Lavdas and D.N. Chryssochoou, *A Republic of Europeans; Civic potential in a liberal milieu* (Cheltenham: Edward Elgar, 2011).

68 J. Habermas, *Zur Verfassung Europas: Ein Essay* (Frankfurt am Main: Suhrkamp, 2011). Compare art I-1, Para 1, of the failed Constitutional Treaty: 'Reflecting the will of *the citizens and States of Europe* to build a common future, this Constitution establishes the European Union'. (emphasis added).

purpose of the EU is entirely natural. There is no reason to think that people can only identify with the EU if there is a consensus concerning the EU's nature, purpose and future.[69] People also identify with their Member State for different reasons.[70] Being a European may well be an important part of the identity of a individual even if Europeans are in disagreement about the EU's identity.[71] Indeed, maybe we should speak about European identities in the plural: not only European citizens but also Europe itself has multiple identities.[72]

Some people question whether a European identity exists at all. However, that is the wrong question. Given the fact that national and other collective identities are constructs, the real question is what kind of Europe we want to build together.[73] The current Euro-crisis may have raised concerns that the EU may fall apart but the direct consequence has been that the debate on the future of Europe became highly political (although not more, indeed sadly rather less, democratic): it is on the front pages every day and every citizen in Europe holds a view on whether it is right that German tax payers should pay for the early retirement of Greeks or, conversely, that Greek tax payers should bail out irresponsible German banks. After decades of 'permissive consensus' vis-à-vis the technocratic construction of a European Community by an elite, the identity of Europe has finally become a highly political subject.[74] As Haltern reminds us, nations were founded on shared memories of crisis and disaster.[75]

69 See D. Castiglione, 'Political identity in a community of strangers', in J.T. Checkel and P.J. Katzenstein (eds), *European identity* (Cambridge: Cambridge University Press, 2009) 29–51.

70 Compare MacCormick, n 5 above, 172: 'there must be as many Englands as there are English people, and these are not all the same thing. Rather, there is at best a partially overlapping consensus of England-ideas from the point of view of those who self-identify as English, and then also, perhaps, from the point of view of self-defined outsiders. England as a nation is not something that justifies the overlapping consensus, but an idea that emerges from it, to the extent that any consensus does in fact emerge.'

71 Attempts at canonising the European identity have a long history. See eg the Document on the European Identity published by the Nine Foreign Ministers on 14 December 1973, in Copenhagen (*Bulletin of the European Communities*, December 1973, no 12, Luxembourg).

72 J.T. Checkel and P.J. Katzenstein, 'The politicization of European identities', in Checkel and Katzenstein (eds), n 69 above, 1–25. See also T. Risse, *A community of Europeans? Transnational identities and public spheres* (New York: Cornell University Press, 2010) 37–62: 'multiple Europes'.

73 See J. Habermas, 'Ist die Herausbildung einer Europäischen Identität nötig, und ist sie möglich?', in *Der gespaltene Westen* (Frankfurt am Main: Suhrkamp, 2004) 68–82, 81.

74 See Checkel and Katzenstein, n 72 above.

75 See U. Haltern, 'On Finality', in A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (2nd ed, Oxford: Hart Publishing, 2010) ch 6.

Arguably, Europeanism can be regarded as a form of nationalism, ie 'Euronationalism'.[76] This is true not only for the most obvious examples, such as Giscard d'Estaing's hymn and flag.[77] Also the ideas of a European legal identity and a European legal culture,[78] and indeed the present article advocating the CESL as a European model of private law justice, may be regarded as attempts at European nation building. Indeed, the most typical characteristic of Europe-building by the EU has been that it has taken place through law.[79] The EU, having no army of its own, invades new countries with its *acquis*.

However, that hardly disqualifies private law Europeanism. On the contrary, just like nationalism, also Europeanism is a genuine sense of belonging. Some people (including myself) strongly identify with Europe, much more strongly than with the Member State where they were born or the one where they currently live.[80] And they might like to see their European identity expressed also in private law, as their 'constitution civile' containing rules of proper conduct among Europeans.[81]

Of course, the more Europeanism were to become internally intolerant towards other (eg nationalist) loyalties or even fundamentalist (eg striving for a European super state), or externally closed (fortress Europe) or imperialistic towards the rest of the world, that would make the Europeanist ideology become more questionable. In this respect, Europeanism is not different from any other sense of belonging. Except that Europeanism today, especially when

76 See G. Comparato, *Nationalism and private law in Europe* (forthcoming). Risse, n 72 above, ch 2, reserves the term 'Euronationalists' for those who view Europe primarily in cultural terms, as a civilization with a common cultural heritage, Christianity as its core religion, and clear geographical boundaries (which exclude Turkey), contrasting them with those who regard Europe as a modern, political entity based on liberal values such as democracy, human rights, the rule of law and the market economy.

77 See the failed Treaty Establishing a Constitution for Europe (2004), art I-8 (The symbols of the Union).

78 M.W. Hesselink, *The new European legal culture* (Deventer: Kluwer, 2001).

79 Cf R.D. Kelemen, *Eurolegalism; the transformation of law and regulation in the European Union* (Cambridge/Mass: Harvard University Press, 2011) 19: 'It seems that nearly everything the European Union touches turns into law.'

80 N. Fligstein, *Euroclash; The EU, European identity, and the future of Europe* (Oxford: Oxford University Press, 2008) ch 5, found that people who strongly identify with Europe, whom he calls 'the Europeans', tend to be more education, enjoy a higher socioeconomic status and travel more frequently than others.

81 The expression is usually attributed to J. Carbonnier, 'Le Code civil', in P. Nora (ed), *Les lieux de mémoire* (Paris: Gallimard, 1986) vol II, 293–315, 309, who writes with reference to the French civil code: 'Mais, matériellement, sociologiquement, si l'on préfère, il a bien le sens d'une constitution, car en lui sont récapitulées les idées autour desquelles la société française s'est constituée au sortir de la Révolution et continue de se constituer de nos jours encore'. See also J. Carbonnier, *Droit civil: introduction* (25th ed, Paris: PUF, 1997) 82: 'la constitution civile – la véritable'.

compared to nationalism, seems so weak that it is difficult to imagine how it could ever become dangerous. Therefore, private law Europeanism, especially when conceived as at the same time post-nationalist and proto-cosmopolitanism, may be very attractive.[82]

5 A European model of justice between private parties

The proposed CESL has a limited substantive, personal and territorial scope.[83] This makes sense for an optional instrument; it is prudent to start small and see whether parties find it useful. Having said that, however, most of its rules would work for other contracts just as well. The reason is that their origin lies in general contract law. The expert group that drafted the instrument continuously used the DCFR, PECL and Unidroit Principles as sources of inspiration. Moreover, the limited scope was adopted only very late in the day. This latter decision determined, in particular, the current structure where the general contract law remedies for non-performance and the specific sales remedies are integrated. Therefore, in reality the proposed CESL consists to a large extent of general contract law rules. This means that it could easily be used by the CJEU as a source of inspiration and as a European model of justice between private parties. In recent years, on several occasions, the Court has referred to 'general principles of civil law',[84] for example with regard to the principles of the binding force of contract,[85] discharge by performance,[86] and good faith[87] and unjustified enrichment.[88] Once the CESL becomes formal European law, the Court could decide to refer to it as evidence of existing common European private law principles.[89]

More generally, the CESL could become a common European model for how to behave in the Internal Market, a model for just conduct among European citizens. Because the instrument would be optional and would also contain many default rules, which can be set aside by the parties (although they may

82 See further M.W. Hesselink, 'How many systems of private law are there in Europe? Nationalist, Europeanist, cosmopolitan, dualist and pluralist perspectives', in L. Niglia (ed), *Pluralism and European Private Law* (Oxford: Hart Publishing, forthcoming).

83 See art 4–7 of the proposed regulation.

84 See M.W. Hesselink, 'The General Principles of Civil Law: Their Nature, Roles and Legitimacy, D. Leczykiewicz and S. Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Oxford: Hart Publishing, forthcoming).

85 Case 277/05, *Société thermale d'Eugénie-les-Bains* v *Ministère de l'Économie, des Finances et de l'Industrie* [2007] ECR I-06415.

86 Case 412/06, *Annelore Hamilton* v *Volksbank Filder eG* [2008] ECR I-02383.

87 Case 489/07 *Pia Messner* v *Firma Stefan Krüger* [2009] ECR I-07315.

88 *Ibidem*.

89 See further M.W. Hesselink, 'A toolbox for European judges' 17 *European Law Journal* (2011) 441–469.

'stick' and become *de facto* binding), the instrument will very much be primarily a model, a *Leitbild*, as the Germans say. Having said that, it is a model with strong normative power. Therefore, it could contribute to 'thickening' the moral dimension of a European identity.[90]

Pursuant to Article 2 CESL, 'each party has a duty to act in accordance with good faith and fair dealing'. According to Article 2 of the proposed regulation, '"good faith and fair dealing" means a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question'. In other words, this general good faith duty provides a general standard for conduct. In the European Union, parties to a contract are expected to act honestly and take each other's interests into account. That is a strong normative message. Good faith and fair dealing is one of the three 'general principles' underlying the CESL. The other two are the principles of freedom of contract (Article 1) and co-operation (Article 3).

Take, as another example, Article 51 (Unfair exploitation). That article reads as follows:

'A party may avoid a contract if, at the time of the conclusion of the contract:

(a) that party was dependent on, or had a relationship of trust with, the other party, was in economic distress or had urgent needs, was improvident, ignorant, or inexperienced; and

(b) the other party knew or could be expected to have known this and, in the light of the circumstances and purpose of the contract, exploited the first party's situation by taking an excessive benefit or unfair advantage.'

Among other things, this article makes clear that by European standards predatory lending, the practice in the United States that started the financial crisis which now endangers the future of the Euro (and, according to some, of the European Union), is inadmissible. Any victim of such unfair exploitation (be they a consumer or a business) can avoid the contract by giving notice (Article 52).

Thus, the CESL conveys the message that the Internal Market is based on a substantive notion of freedom of contract; mere formal freedom is not sufficient. What is required for 'making a binding contract' (the title of Part II of the CESL) is a genuine expression of true autonomy. Only in the absence of fraud (Article 49), unfair exploitation et cetera is a party actually bound to a contract. The notion of substantive freedom of contract is quite similar to the

90 A. Williams, *The ethos of Europe: values, law and justice in the EU* (Cambridge: Cambridge University Press, 2010) explores the 'institutional ethos of the EU'. Something similar could be done on a lower scale for contract law. How can European contract law contribute to making the EU become more just? A coherent set of private law principles, as a European model, could contribute to that effort.

capabilities idea.[91] In a liberal society, private autonomy is a fundamental value, but freedom only has that value when it is substantive, not merely formal.

Such a common European set of general contract law rules will not only have the direct consequence of increasing confidence in cross-border shopping and in the Internal Market at large, as reliable safety nets. These rules also express the fundamental idea that the Internal Market is not a jungle where might is right. In other words, the European model of justice between the parties is a concrete expression and implementation of the idea of a social market economy (Article 3, Para 3 TEU).

In sum, the CESL could serve as modest attempt at a European 'constitution civile'.[92] That is how it was rightly seen at the time when the European Commission presented its Action Plan that launched the process which led to the current proposal.[93] And that is how we should evaluate the proposal now. Whether the CESL actually could become a common European frame of reference for civil justice is, of course, not a matter of expert opinion. The most important arena in this respect is the European Parliament which is taking its task very seriously, starting with an extensive series of hearings.

Of course, the CESL is rather limited in scale and, therefore, inevitably also limited as a civil constitution. Just like the Lisbon Treaty is not a constitution, the CESL is not a civil code. Still, it may be as close as the EU will ever get to a civil code. Is that bad? To paraphrase Maduro's question concerning the constitutional treaty: Europe and the civil code: what if this is as good as it gets?[94] I do not think this is a problem at all. Rather, a limited civil constitution corresponds to the fundamentally limited nature of the EU legal order.

Having said that, even as a limited European model of just conduct between contracting parties the CESL is not complete. In particular, rules on immoral contracts and legal incapacity would be desirable. Ideally, a provision concerning the infringement of fundamental principles should be included. Such an article could read as follows: 'a contract is void to the extent that it infringes a principle recognised as fundamental in the European Union and nullity is

91 See M.C. Nussbaum, *Creating Capabilities; The Human Development Approach* (Cambridge/Mass: Belknap Press, 2011).

92 Similar, H. Collins, *The European civil code: the way forward* (Cambridge: Cambrigde University Press, 2008); B. Fauvarque-Cosson, 'The need for codified guiding principles and model rules in European contract law', in R. Brownsword, H.-W. Micklitz, L. Niglia and S. Weatherill (eds), *The Foundations of European Private Law* (Oxford: Hart Publishing, 2011) 73–87, who, however, both argue for principles ('common legal principles' and 'guiding principles' respectively) rather than rules.

93 See *Manifesto*, n 45 above.

94 N 63 above. Micklitz, n 43 above, has drawn attention to the parallels between these two 'grand projects' which are both doomed to fail, in his view, and for similar reasons.

required to give effect to that principle'.[95] Such a rule would also make the instrument become more self-standing as courts would no longer have to resort to national law for resolving questions concerning immorality. However, for reasons of political expediency, the Commission has placed the issue beyond the scope of the instrument and has thus left it to the Member States. These reasons are, of course, related to essentially nationalist sentiments. The assumption is that standards of morality are national. However, it is doubtful to what extent this is actually true. The catalogue of founding European values in Article 2 TEU, the Charter of Fundamental Rights of the EU and the ECHR seem to provide sufficient guidance for distilling principles recognised as fundamental in the European Union.

III Private and public autonomy

So, a European contract law could be an expression of the European identity of citizens, while, in turn, a CESL could contribute to further shaping the identity of the EU. It could broaden its normative scope and deepen its moral underpinning, as a statement of common European principles of just conduct between private parties. However, as we saw, private law is also regarded as an expression of national culture. And from that perspective a proposal for a common European sales law seems a step in the wrong direction. Who is right? How can we settle this dispute? Both nationalism and Europeanism, at least in their moderate, non-fundamentalist versions, seem to be reasonable doctrines that should have their place in a democratic society characterised by reasonable pluralism.[96]

At first sight, this dispute simply seems to replicate the many battles between Euro-enthusiasts and Eurosceptics. However, there may be a difference here in the sense that with regard to private law, individual choice is possible. Non-mandatory (or default) rules can be set aside by the parties in their contract, in cross-border cases parties can make a choice of law, and now the European Commission is proposing a further choice between a first and a second national regime. This raises the question: if people have different and multiple allegiances in relation to private law should this be a matter exclusively of individual choice?

1 Multiple identities and positive sum

Individuals have multiple senses of belonging. Geographical links (to one's city, region, country, Europe, or the world) are merely one of many dimen-

95 This would amount to a slightly modified version of art II-7:301 DCFR.

96 See J. Rawls, *Political Liberalism*, expanded edition [first edition 1993] (New York: Columbia University Press, 2005) 36.

sions of our complex identities. Very different aspects of our identity may be relevant – and in conflict – in different contexts, or even in the same context.[97] It is entirely natural for one person to have very different, often conflicting, allegiances at the same time. Derrida declares: 'je me sens européen *entre autres choses*'.[98] And Sen writes:[99] 'The same person can be, without any contradiction, an American citizen, of Caribbean origin, with African ancestry, a Christian, a liberal, a woman, a vegetarian, a long-distance runner, a historian, a schoolteacher, a novelist, a feminist, a heterosexual, a believer in gay and lesbian rights, a theatre lover, an environmental activist, a tennis fan, a jazz musician, and someone who is deeply committed to the view that there are intelligent beings in outer space with whom it is extremely urgent to talk (preferably in English). Each of these collectivities, to all of which this person simultaneously belongs, gives her a particular identity. None of them can be taken to be the person's only identity or singular membership category.' Nor is this anything new.[100]

Most of us would have great difficulty in reducing our different senses of belonging to only one. But it would be worse, indeed an act of violence, if we tried to force other people into the mould of one single identity. The recent proposal by the Dutch government to abolish double passports is a worrying example of such aggressive cultural monism. Nationality incarceration is wrong.[101] Determining the hierarchy among our different allegiances in different contexts and over time is a matter of individual choice and the freedom to

97 For example, when examining the CESL-proposal we may ask ourselves whether we should give priority to our concern for a high level of consumer protection or to our sense that private law should remain national (or, in my case, to loyalty to the Expert Group that I was part of).

98 J. Derrida, *L'autre cap* (Paris: Les éditions de Minuit, 1991) 80. See also T. Judt, *Postwar, A history of Europe since 1945* (London: Vintage, 2010 [2005]) 798, writing in 2005: 'The European Union in 2005 had not superseded conventional territorial units and would not be doing so for the foreseeable future. … What was new, and thus rather hard for outside observers to catch, was the possibility of being French *and* European, or Catalan *and* European – or Arab *and* European.'

99 A. Sen, *Identity and Violence; The Illusion of Destiny* (London: Penguin Books, 2006) xii. For a similar list, see J.H.H. Weiler, *The Constitution of Europe; 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (Cambridge: Cambridge University Press, 1999) 328. See also Sandel, n 58 above, 343 and MacCormick, n 5 above, 182.

100 With regard to the 19th Century, Hobsbawm, n 1 above, 123 writes that 'these different attachments would not make incompatible demands on a person, so that a man might have no problem about feeling himself to be the son of an Irishman, the husband of a German woman, a member of the mining community, a worker, a supporter of Barnsley Football Club, a Liberal, a Primitive Methodist, a patriotic Englishman, possibly a Republican, and a supporter of the British empire.'

101 Cf Sen, n 99 above, 10: 'civilizational incarceration'.

do so is a crucial aspect of liberty.[102] Cultural monism (and more generally, value monism) are incompatible with a liberal society.[103] It is illegitimate to try to turn people into Europeans, cosmopolitans or neonationalists against their will.[104]

As to territorial links, most people in Europe today count a European sense of belonging among the different aspects of their identity, albeit usually not with a prominent place. Statistics show that Europeanists are a rather small minority but that nationalists are not the majority. According to a survey, around 13 percent of the population regard themselves primarily as Europeans, 43 percent sometimes think of themselves as Europeans while considering themselves primarily as nationals, while 44% only have a national identity.[105] On the basis of these data, Checkel and Katzenstein recently concluded:[106] 'The number of unambiguously committed Europeans is simply too small for the emergence of a strong cultural European sense of belonging. The number of committed nationalists is also too small for a hegemonic reassertion of national sentiments. The remaining part of the population holds primarily national identifications that also permit an element of European identification.' Fligstein refers to this latter group of people who in certain circumstances think of themselves as Europeans, as 'situational Europeans'.[107]

In these circumstances, the enactment of a European Civil Code replacing national private laws (one of the options in the European Commission's Green Paper consultation),[108] would rightly be experienced as an act of violence against all those (the vast majority) that identify primarily or even exclusively with their nation. However, refusing to grant those European citizens who would be interested, for commercial or other reasons, to freely opt into a CESL would equally be an act of intolerant cultural monism. As a

102 Cf Sen, n 99 above, 157: 'Being born in a particular social background is not in itself an exercise of cultural liberty'.

103 I. Berlin, 'Two concept of liberty', in I. Berlin, *Liberty* (Oxford: Oxford University Press, 2002) 166–217.

104 In a recent paper, G. Davies, 'Freedom of Movement, Horizontal Effect, and Freedom of Contract' (forthcoming), characterises free movement law as 'an exercise in social engineering, seeking to nudge Europeans into changing their domestic preferences for more European ones.' It is very doubtful that there should be any role to play for libertarian paternalism when it comes to identity. But see Nussbaum, n 56 above, who advocates cosmopolitan education.

105 N. Fligstein, 'Who are the Europeans and how does this matter for politics?', in Checkel and Katzenstein (eds), n 69 above, 132–166, 154.

106 J.T. Checkel and P.J. Katzenstein, 'Conclusion – European identity in context', in Checkel and Katzenstein (eds), n 69 above, 213–227 (numbers omitted).

107 *Ibidem*.

108 Green Paper on policy options for progress towards a European Contract Law for consumers and businesses COM(2010) 348 final, 1. 7. 2010.

matter of fact, the idea of an optional European sales law seems to represent an almost perfect match with the current state of affairs. It could be an attractive option for the small minority of people who think of themselves primarily as Europeans only, and for the relatively large group of 'situational Europeans'. Cross-border contracting could be for at least some of them a situation in which they think of themselves as Europeans rather than nationals.

An important question about national and European identities is whether the relationship between them is of a 'zero sum' or a 'positive sum' nature. If one can be Parisian and French, Tuscan and Italian, British and English (or women and German) at the same time, then maybe also national and European identities 'do not wax or wane at each other's expense'.[109] Indeed, the acquisition of European citizenship does not seem to have diminished in any sense the value of national citizenship. See explicitly Article 9 TFEU: 'Citizenship of the Union shall be additional to and not replace national citizenship.' Similarly, the CESL is not meant to replace national contract law. See the Explanatory Memorandum:[110] 'The proposal for an optional second contract law regime has the advantage that, without replacing the national contract laws in the Member States, it allows parties to use one single set of contract law rules across the EU.' The proposed regulation would therefore merely add a common European sales law, as an option available for cross-border relationships, to the pre-existing national regime. Thus, the sum of private law identities, national and European, could also be positive.

2 Individual choice and democracy

Opting into a CESL constitutes an important act of individual choice, not only of cultural choice but also of economic choice (in a narrow sense). In turn, having a European image or post-national image could, of course, also become economically profitable for a business.[111] This suggests that a legal system could actually have a market value, as a product.[112]

109 Checkel and Katzenstein, n 72 above, 9–10.

110 P 10.

111 A study determining the main drivers for choosing the European company (SE) corporate form, found as the second driver – after the mobility of the SE – the European image of the SE. See Ernst & Young Société d'Avocats, *Study on the operation and the impacts of the Statute for a European Company (SE)* (2008/S 144-192482 Final report), 9 December 2009, 12. Similarly, one could imagine that some businesses that aim at selling to consumers Europe-wide might wish to present themselves as truly European, or as post-national in the sense that they do not whish to be associated with one Member State only.

112 See E.A. O'Hara and L.E. Ribstein, *The law market* (Oxford: Oxford University Press, 2009); H. Eidenmüller, 'Recht als Produkt' 64 *JuristenZeitung* (2009) 641–653.

In its most radical form, the idea of a law market, with free, unfettered individual choice of law, would be quite revolutionary, although such a libertarian programme would be attractive only in the eyes of those who believe that a society and its rules (as opposed to individual conduct) can never be just or unjust.[113] In more limited forms, where the freedom of legal choice is limited on substantive grounds by the legislator, the idea is, however, unremarkable.[114]

For, although the question of whether to opt into a CESL should be a matter of private autonomy, the questions what options will be available should be a matter of the public autonomy of citizens, ie of collective deliberation and decision making, in which everyone affected should have a say.[115] This deliberation, which will have to be transnational,[116] should concern the crucial questions of whether general contract law is exclusively a national or also a European matter, whether the choice for the instrument should be limited by formalities, as it is proposed by the Commission,[117] of the substantive limits to freedom of contract (the doctrines of unfair exploitation, unfair terms, immorality et cetera) that the instrument should contain, and to which parties (consumers, SMEs, all parties) protective measures should extend.

Of course, a truly inclusive debate is not limited to representative democracy but should extend to a much broader public sphere. Still, the full involvement of parliaments surely is a minimum requirement for legitimacy. It is for this reason that the suggestion that Article 352 TFEU, the intergovernmental route where the European Parliament would not be the co-legislator that it is under the ordinary legislative procedure required by Article 114 TFEU, does not constitute a proper legal basis for a CESL.[118]

113 F.A. Hayek, *Law, Legislation and Liberty; A new statement of the liberal principles of justice and political economy* (London and New York: Routledge, 2003) vol II: *The Mirage of Social Justice*, 69.

114 R. Michaels (forthcoming), in Niglia (ed), n 82 above.

115 See J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: Polity Press, 1996) 408–409. Similar MacCormick, n 5 above, 165, on self-determination in the dual sense of individual self-determination and collective self-determination.

116 Cf Habermas, n 73 above, 82: 'Eine politische Identität der Bürger, ohne die Europa keine Handlungsfähigkeit gewinnen kann, bildet sich nur in einem transnationalen öffentlichen Raum. Diese Bewusstseinsbildung entzieht sich dem elitären Zugriff von oben und lässt sich nicht wie den Verkehr von Waren und Kapital im gemeinsamen Wirtschaft- und Währungsraum durch administrative Entscheidungen "herstellen".'

117 See art 8–10. Critical, M.W. Hesselink, 'How to opt into the Common European Sales Law? Brief comments on the Commission's proposal for a regulation' 18 *European Review of Private Law* (2012) 195–212.

118 The ordinary legislative procedure consists in the joint adoption by the European Parliament and the Council of a regulation, directive or decision proposed by the Commission. See art 289, 294 TFEU.