European Review of Private Law 4-2012 [901–904] © Kluwer Law International BV. Printed in the Great Britain.

Editorial

In necessariis unitas vel diversitas?

MATTHIAS E. STORME

As our readers will know, this review alternates special issues – with a number of articles around a specific theme – and regular issues; coincidence determines which articles are joined together in such an issue. Nevertheless, when re-reading the articles that will be put together in this way, it more often than not strikes me that a certain theme is present in the majority of them. In this issue, the nature of differences between national legal systems and how they are valued and confronted is a theme present in most contributions (and for the sake of the argument, I am this time leaving the case notes and reviews aside).

In his contribution on the reform proposals for the Spanish law of obligations, Gregor Christandl shows how the codification commission has succeeded in pairing the Spanish tradition with common European tendencies and is thus a good example of convergence from below without being forced by supranational rules. Clearly, contract law is not the field of private law where cultural differences between Member States play an important role, but it is, on the other hand, not free from political choices either. Anne de Vries argues in favour of a 'full harmonization' that deliberately makes use of open legal concepts in order to allow some diversity in their application in the different national legal systems, taking into account the 'cultural' environment. De Cock Buning, Belder, and De Bruin study the divergent application in national law of uniform rules on copyright exceptions, especially in research and education, another field where important 'cultural' differences exist. Tanja Jørgensen shows *inter alia* how, when drafting uniform rules on standards of advice for credit advisors, it is important to take into account the different types of advisors existing in the different national systems. Johann Dieckmann, on the other hand, shows how relatively similar rules – namely on the subrogation of a guarantor in the creditor's rights – are given very different justifications in different national legal cultures.

Two other articles deal with the field of law whose essence is to manage diversity: conflict of laws. Ulla Liukkunen analyses subject-specific conflict rules of internal market law and how they can manage diversity in a coordinated way: They often concern national rules with a relatively strong connection to national legal cultures and economic and social policies. Some fragmentation of conflict rules seems to be necessary to do this. The article by Martina Melcher on the private international law of registered relationships deals with a topic where there are deep-rooted social and cultural connotations, which may differ largely among national legal cultures, but this author stresses rather the need for recognition and freedom of movement.

Two further articles deal, as could be expected, with specific aspects of the proposed Common European Sales Law (CESL). Björn Sandvik analyses in depth the possible consequences of, *inter alia*, the diverging definition of a consumer sale in CESL and CISG (Convention in the International Sale of Goods) leading to a possible conflict between both. Maren Heidemann also deals, *inter alia*, with the Private International Law aspects of the CESL and its relationship to the CISG. Both instruments are intended to overcome the differences between national laws but are also, due to their optional nature, enhancing legal diversity rather than diminishing it.

Opponents of national diversity, especially in cases where there are deep-rooted social and cultural differences, often correctly point to the fact that these differences do not merely exist between national cultures but as much within national cultures. This is especially true in cases where arguments are deduced from 'human rights'. Although the idea of human rights is universal, its content is certainly not; their concretization involves political choices and the basic question is therefore at what level these choices have to be made: centralized or decentralized. Do we have to understand social rights, rights to marriage, or freedom of religion in the same way in all Member States, or even in all local communities within a Member State? Usually, the reference to human rights is used as an argument for uniform, centralized decisions on these questions. However, precisely in matters where there are deep-rooted differences in opinion, there are good arguments to decentralize the decision-making, even if people are as divided on that decentralized level. The more such questions are centralized, the sharper the opposition becomes, and the more ideologies and groups get entrenched. A classical example is the qualification of abortion as a matter of human rights. As the senior Associate Justice of the US Supreme Court, Antonin Scalia, perspicuously noticed in a dissenting opinion (in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey* (1992) (3)), abortion became a 'national' (federal) problem in the United States, dividing society more deeply than before, since the Supreme Court decided (in *Roe* v. *Wade*) that they could deduce a rule from the Constitution and thus the same rule had to be applied in all 50 states.[1] Before *Roe*, the conflict over abortion was a local conflict in many

1 To the argument that *Roe* v. *Wade* had 'pacified', the majority argued: 'Where the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in Roe …, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution', Justice Scalia replied. 'The Court's description of the place of Roe in the social history of the United States is unrecognizable. Not only did Roe not, as the Court suggests, resolve the deeply divisive issue of abortion; it did more than anything else to nourish it, by elevating it to the national level, where it is infinitely more difficult to resolve. National politics were not plagued by abortion protests, national abortion lobbying, or abortion marches on Congress before Roe v. Wade was decided. Profound disagreement existed among our citizens over the issue – as it does over other issues, such as the death penalty – but that disagreement was being worked out at the state level. As

states but not a national conflict. An application of the principle of subsidiarity precisely to these 'essential' questions – more correctly 'essentially contested' questions – has several advantages. First of all, many more people are happy with the locally applicable rule: In nearly every Member State, the rule that finds a local majority will prevail. Further, those who are unhappy with it can still move to a jurisdiction with a different rule. This is not very pleasant for the minority, but it is even less pleasant for a minority when the rule is uniform everywhere, so that this exit does not even exist anymore. Coexistence of different rules in neighbouring states learns people to relativize instead of absolutize their preferences and enables learning from each other. Maybe it is precisely in essential questions that we need to accept diversity; there are enough less important questions where uniformity is less dangerous. *In necessariis diversitas*.

Matthias E. Storme
Joint Editor-in-Chief

---

with many other issues, the division of sentiment within each State was not as closely balanced as it was among the population of the Nation as a whole, meaning not only that more people would be satisfied with the results of state-by-state resolution, but also that those results would be more stable. Pre-Roe, moreover, political compromise was possible. Roe's mandate for abortion on demand destroyed the compromises of the past, rendered compromise impossible for the future, and required the entire issue to be resolved uniformly, at the national level', *Planned Parenthood of Southeastern Pennsylvania* v. *Casey* 505 U.S. 833 (1992), <http://laws.findlaw.com/us/505/833.html>.