A change in the making

LAW

Every civilized society is governed by a system of laws. Historically, societies made these laws by formulating general principles about how citizens should behave (civil law), and by taking decisions about individual cases and then applying the same judgement to each similar case thereafter (common law, also known as case law). But as society becomes more global, law is changing — and with it, the job of academic legal scholars.

In the past couple of decades, legal scholars have been moving away from studying the application of law (organizing and refining the 'case-by-case' legal system) and towards the study of law-making itself. By working in this way, they hope to come up with new ways of resolving legal problems before they arise. Rather than commenting on case law and refining existing legal doctrines, scholars are increasingly focusing on making proposals for new laws. This focus could prove to be a much more efficient way of maintaining and developing the legal system.

This task is complicated by the fact that there are now far more players in the legal system than ever before. Gone are the days in which only individual states set the rules. Increasingly, other components of society are setting legislation — for example, private companies can insist that their clients and business partners adhere to codes of conduct, and supranational organizations such as the European Union (EU) can instigate union-wide laws. The legal system is a multi-level, multi-player system.

This article focuses on two of the major ways in which the legal system is changing: the existence of 'private' lawmakers and the increasing trend for supranational organisations to make 'optional' laws that can be used in place of national versions.

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A PRIVATE MATTER

Private players, such as companies, stock exchanges and industry associations, can make their own rules and regulations. They are not legally binding in the strictest sense; they will not, for example, be enforced by a national government. But they establish an additional layer of 'soft' law for those doing business with or within that organization.

This is not a new idea — self-regulation has been common throughout history. For example, during the British industrial revolution in the nineteenth century, many of the new businesses regulated themselves, rather than being subject to the laws of parliament.

Globalization is now making this mode of law-making increasingly important. Private codes are especially helpful when conducting transactions across borders, in cases where national laws may not coincide. For example, say that a US pension fund wishes to invest in a tranche of EU companies. To ensure that interactions are fruitful and disagreements minimal, they can 'invent' transnational rules that govern their behaviour towards each other. Pressure among the stakeholders in the system ensures that they all adhere to the codes of conduct.

Another key movement in the arena of private law is the proposed development of a European civil code to enshrine, at the European level, a set of general rules that each member state holds in common. The groundwork was laid by the work of the Lando Commission, which was established in the 1980s at the request of the European Parliament. The commission produced a reference text, the *Principles of European Contract Law*. By combining this pioneering work with the recommendations of more recent commissions, the ultimate aim of the European civil code is to develop a common frame of reference for European private law[1].

Private players are also important online, where jurisdiction can be unclear. A private, non-profit organization called the Internet Corporation for Assigned Names and Numbers (ICANN) has been overseeing the Internet globally since 1999. ICANN is primarily controlled by industry, although numerous countries and the EU also have roles. With its recent successes in developing new domain suffixes and opening up Internet addresses to non-Western characters, ICANN has demonstrated the potential of this type of semi-legal infrastructure.

OPTING IN

A second trend in modern law-making is the development of 'options models' in Europe[2]. These sets of laws cover all member states and provide an alternative way of doing business that leaves national laws untouched. They give market players or whole EU member states a choice between different regulatory models. Their advocates favour them because they promote a single market, largely avoiding the issues that can arise from discrepancies among multiple sets of national laws.

Options models are being discussed

Researchers based at the Max Planck Institute for Comparative and International Private Law are exploring the concept of optional instruments, which could help address the emerging problem of competition among multiple legal frameworks. In particular, they have identified a number of deficits in European contract law that will need to be addressed when the planned Common European Sales Law is drawn up (Eidenmüller, H. *et al. Edinburgh Law Rev.* **16.3**, 301–357, 2012).

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- The way in which laws are made is changing. Many private companies and associations regulate their own affairs instead of using national laws.
- Another development is the advent of 'optional' laws — umbrella laws that offer an alternative to a nation's own.
- For this evolution in law-making to fulfil the needs of today's society, legal scholars need to understand and help refine the new laws.

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for many areas of law, including intellectual property law, insurance contract law and sales law. In February 2014, a proposal to introduce the optional European Sales Law was backed by a large majority in the European Parliament[3]. This law could make buying and selling across national borders in Europe much smoother by offering companies the choice of one Europe-wide law to govern their business, instead of whichever national laws are applicable to each transaction. A similar phenomenon can be observed when new companies are established: they can either be registered under national law (for example, in Germany as an Aktiengesellschaft, or AG) or under European law (as a Societas Europaea, or SE).

Options models are sometimes referred to as the '28th regime' — they do not replace the legislation of the 27 EU member states but rather co-exist with and complement them.

FUTURE DIRECTIONS

Exploring the implications of these new ways of law-making will be rich pickings for researchers. Comparing legal practices across different systems should be useful; researchers will need to look at cultural differences between, for example, European and Anglo-American negotiation practices to ensure that private players in different cultures can interact consistently.

Options models are a new development, and their detailed nature and application also needs attention. Legal scholars will need to design them so that users can make the right decisions for their businesses, in a way that strengthens the European system.

Legal scholars are aware of the changes that globalization has brought to their discipline, and as business with non-Western countries such as China continues to grow, new challenges will arise. Scholars will need to guide society in how to coordinate different players, cultures and sets of policies, and how to harmonize international and supranational law with national law, and state interests with private businesses.

1. Schulte-Nölke, H. *et al.* Joint Network on European Private Law. http://www.copecl.org, accessed April 2014.
2. Fleischer, H. *RabelsZ.* **76**, 235–252 (2012).
3. Common European Sales Law. http://ec.europa.eu/justice/contract/cesl/index_en.htm, accessed April 2014.

above | The seat of the European Parliament in Strasbourg, France. The EU's unique position could see it bring together and supplement national legal arrangements.

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left | The consistency found in Internet domain names is no coincidence — it results from rules agreed among companies and countries. These rules recently changed, allowing Berlin to become the first city with its own domain name, on 18th March 2014.

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