A "European Civil Code": Potential, Conceptual, and Methodological Implications

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INTRODUCTION

In the Europe of today there are over thirty different legal orders of private law.[1] Within the European Union and its sixteen legal orders, neither the Treaties establishing the European communities[2] nor the Single European Act[3] nor the Treaty on European Union ("Maastricht Treaty")[4] contain provisions on the unification or harmonization of private law.[5]

The main objective of the European Union, however, is the creation of an internal European market that, according to article 7(a) of the Treaty Establishing the European Community ("EC Treaty"), is a market "without internal frontiers in which the free movement of goods, persons, services and capital is ensured. . . ."[6] As the existing differences in private law function as nontariff barriers, distort competition, and add to existing transaction costs, there is a common understanding that unification or harmonization of private law should be put on the agenda of the European Union.[7] The European Parliament

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[1] *See, e.g.*, J. Degreesurgen Habermas, *Reply to Symposium Participants, Benjamin N. Cardozo School of Law*, 17 CARDOZO L. REV. 1477, 1536 (1996) (stating that there are many national legal orders).

[2] *See* Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140, July 24, 1992, O.J. (C 191) 44 (1992); Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, July 29, 1992, O.J. (C 191) 5 (1992); Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 167, July 29, 1992, O.J. (C 191) 50 (1992).

[3] *See* Single European Act, Feb. 17 and 28, 1986, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741.

[4] See Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719.

[5] *See* Winifried Tilman, *Zweiter Kodifikationsbeschluss des Europäisches Parlaments, in* ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 534, 541 (1995).

[6] Treaty Establishing the European Community, Feb. 7, 1992, art. 7(a), O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 573; *see also* Patrick G. Crago, *Fundamental Rights on the Infobahn: Regulating the Delivery of Internet Related Services Within the European Union*, 20 HASTINGS INT'L & COMP. L. REV. 467, 472-74 (1997) (listing scope of European Union power).

[7] *See generally* Uwe Blaurock, *Wege Zur Rechtseinheit Im Zivilrecht Europas, in* RECHSTVEREINHEITLICHUNG DURCH GESETZE 90 (Christian Starck ed., 1992); Helmut Coing, *European Common Law: Historical Foundations, in* NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE 31 (Mauro Cappelletti ed., 1978); HELMUT COING, 1 EUROPÄISCHES PRIVATRECHT (1985); Arthur S. Hartkamp, *International Unification and National Codification and Recodification of Civil Law: The Dutch Experience, in* QUESTIONS OF CIVIL LAW CODIFICATION 67 (Attila Harmathy & Agnes Nemeth eds., 1990); ARTHUR S. HARTKAMP, TOWARDS A EUROPEAN CIVIL CODE (A.S. Hartkamp et al. eds., 1994); 1 THE PRINCIPLES OF EUROPEAN CONTRACT LAW: PART I: PERFORMANCE, NON-PERFORMANCE AND REMEDIES (Ole Lando & Hugh Beale eds.,

has twice asked for a European civil code,[8] which would mean not only harmonization but unification of private law.[9]

The desire to reach European unity in a central legal area may be justified (1) historically, by a return to Roman-Canon law, (2) politically, in stressing the enormous signaling effect for European unification in creating its own codification comparable to that of Germany in the nineteenth century, and (3) economically, by stressing the economic benefits of unifying European private law.

On the other side, there are critics who point to the price of unification as the extinguishment of existing legal and cultural differences within the rich and colorful pattern of European languages, traditions, and legal cultures.[10] Critics point to the fact that even in a common market there may be two distinct legal orders, such as in the United Kingdom, where English and Scottish law are separate legal orders. But even the critics admit that creating a European private law, in the form of a European civil code or by other means, is more a matter of time and approach than of principle.[11]

The issue, therefore, is not whether a European private law is a desirable objective but rather how to attain that objective. One has to decide which conceptual approach to choose in

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1995); PETER-CHRISTIAN MÜLLER-GRAFF, PRIVATRECHT UND EUROPÄISCHES GEMEINSCHAFTSRECHT (Baden-Baden 2d ed. 1989); JOCHEN TAUPITZ, EUROPÄISCHE PRIVATRECHTSVEREINHEITLICHUNG HEUTE UND MORGEN (1993); Winfried Tilmann, *Eine Privatrechtskodifikation für die Europäische Gemeinschaft?*, *in* GEIMEINSAMES PRIVATRECHT IN DER EUROPÄISCHEN GEMEINSCHAFT 485 (Müller-Graff, Peter-Christian ed., 1993); REINHARD ZIMMERMANN, AMERIKANISCHE RECHTSKULTUR UND EUROPÄISCHES PRIVATRECHT (1995); Ton Hartlief, *Towards a European Private Law? A Review Essay*, 1 MAASTRICT J. EUR. & COMP. L. 166 (1994); Reinhard Zimmerman, *Civil Code and Civil Law — The "Europeanization of Private Law Within the European Community and the Re-Emergence of a European Legal Society*, 1 COLUMBIA J. EUR. L. 63 (1995). For an excellent analysis of the historical background, see generally Coing, *supra*.

[8] *See* Joachim Zekoll, *The Louisiana Private-Law System: The Best of Both Worlds*, 10 TUL. EUR. & CIV. L.F. 1, 4 n.7 (1995) (illustrating that European Parliment has twice suggested compiling European civil code).

[9] *See* Resolution of the European Parliament 26 May 1989, O.J. C 158/400 (1989); Resolution of the European Parliament 2 May 1994, O.J. C 205/19 (1994).

[10] *See* Friedrich Kuebler, *Traumpfade oder Holzwege nach Europa?*, 12 RECHTSHISTORISCHES JOURNAL 307-14 (1993).

[11] *See* Mauro Bussani & Ugo Mattei, *The Common Core Approach to European Private Law*, 3 COLUM. J. EUR. L. 339, 349 (1997-1998) (describing debate of feasibility of European civil code).

order to create a European private law. The conceptual and methodological problems posed by a European civil code are the selection of procedures to create such a code and the impact of such a code on the existing legal orders. The formation of a European civil code cannot simply be compared with modern attempts to codify, for example, environmental law or labor law in Germany; the characteristic feature of a European civil code is the legal harmonization and unification of Europe, which may be called supranational codification.

Supranational codification has two faces: (1) the constructive one, creating a new legal order for an emerging political and legal entity, the European Union, and (2) the destructive one, extinguishing the existing legal orders of private law in the Member States of the European Union. There are two simultaneous shifts: first, in the vertical structure of competence within the European Union and, second, in the horizontal structure concerning the balance of power between legislature and judiciary. To analyze the impact of a European civil code, it is also necessary to consider the impact of the chosen codification procedure and the vertical and horizontal shifts mentioned above.

The problem, thus, is a very complex one for which traditional explanatory approaches of comparative law, integration theory,[12] and law and economics may prove inadequate.[13] I shall, therefore, first discuss these three traditional approaches, commenting on their shortcomings in explaining the phenomenon of supranational codification in Europe. Following this I shall introduce what I call "modern law and economics," which is a combination of elements of new institutional economics and constitutional economics. Finally, I shall apply this tool to supranational codification. Concededly, this combination of new institutional economics and constitutional economics is a relatively new development in Europe.[14] Thus, the presentation here and

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[12] *See generally* Lang & Stange, *Integrationstheorie: Eine kritische Uebersicht*, 45 JAHRBUCH FÜR SOZIALWISSENSCHAFT 141 (1994); MAURO CAPPELLETTI ET AL., INTEGRATION THROUGH LAW (1986).

[13] *See generally* KIRCHNER, *supra* note 10.

[14] *See generally* RUDOLF RICHTER & EIRIK FURUBOTN, NEUE INSTITUTIONENOEKONOMIK (1996); Joel P. Trachtman, *The Theory of the Firm and the Theory of the International Economic Organization: Toward Comparative Institutional Analysis*, 17 NW. J. INT'L L. & BUS. 491, 507

the attempt to apply this new approach to the supranational codification of private law in Europe is a work in progress. It has yet to be seen whether this new theoretical approach can add something new and fruitful to the ongoing discussion on codification. As such, this Article will not focus on details of European private law but rather on codification and its methodological implications.

I. TRADITIONAL APPROACHES TO LEGAL HARMONIZATION AND UNIFICATION

A. Comparative Law

Supranational codification, one method of legal unification, can only be accomplished through an examination of comparative legal studies. The various national legal orders must be analyzed, and functional equivalents must be determined so that different solutions can then be compared.[15] Scholars of modern comparative law no longer compare legal rules, provisions, and institutions as such, but are instead interested in comparing how they function.[16] The numerous legal orders and their various approaches to legal problems, which have to be defined at the outset of comparative research, are like a toolbox. In studying the various tools, scholars of comparative law better understand the connection between the normative world of legal norms and the actual world in which these legal norms are working.

To look at legal norms functionally means to leave the purely legal world, in the sense of Kelsen,[17] and enter the

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(1996-1997) (discussing new institutional economics and constitutional economics).

[15] *See* Roger Pinto et al., *A Primer on French Constitutional Law and the French Court System*, 5 TUL. J. INT'L & COMP. L. 365, 374-76 (1997) (discussing classical approach to comparative law). For a detailed survey of the "classical approach" to comparative law, see generally LEONTIN JEAN CONSTANTINESCO, 2 RECHTSVERGLEICHUNG, DIE RECHTSVERGLEICHENDE METHODE (1972).

[16] *See generally* 1 KONRAD ZWEIGERT & HEIN KOTZ, AN INTRODUCTION TO COMPARATIVE LAW (1992) (providing framework for comparative law).

[17] *See* Anthony Carty, *Interwar German Theories of International Law: The Psychoanalytical and Phenomenological Perspectives of Hans Kelsen and Carl Schmitt*, 16 CARDOZO L. REV. 1235, 1239-45 (1995) (discussing Hans Kelsen's pure theory of law). German legal positivist Hans Kelsen articulated a pure theory of law that attempted "to answer the question what and how the law is, not how it ought to be." *See* Dhananjai Shivakumar, Note, *The Pure Theory as Ideal Type: Defending Kelsen on the Basis of Weberian Methodology*, 105 YALE L.J. 1383, 1384 (1996).

world of social science. Social science in its positive version is interested in making predictions about the real world.[18] These predictions are necessary if one has to study functions of legal norms.

Up to this stage the work is an analytical one, abstaining from normative proposals. But in order to come to legal unification such normative proposals have to be made. The underlying problem now is to develop solutions that are superior to the given ones. If it is possible to present such superior solutions, legal unification serves two goals: unification and reform. The problem of traditional comparative law is that the superiority of a new solution must be discussed on a case-by-case basis in order to determine the preferability of one solution over another.

Even if superior solutions are found and accepted among scholars of comparative law, there are two remaining problems. First, no codification, even a general civil code, can embrace all facets of the existing legal orders. This means that the new unified law has to fit into the framework of still different national legal orders. Such incompatibility automatically leads to frictions. Today this problem is widely acknowledged in European consumer law, which fits poorly into the different legal frameworks of private law of the European Union's Member States.[19]

Second, even if it is possible to minimize the frictions between the new unified law and the remaining national legal orders, there are difficult transition problems to be solved. Lawyers who have been trained in their own legal culture and tradition and who are accustomed to thinking within their own legal system must apply and interpret the new law. Furthermore, in order to reach legal unity it becomes necessary to establish a hierarchy of legal courts with a supranational court at the top to ensure the maintenance of legal unity established by supranational codification.

Supranational codification in the light of traditional comparative law becomes, therefore, an optimization task: new legal

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[18] *See* Laurens Walker, *Avoiding Surprise from Federal Civil Rule Making: The Role of Economic Analysis*, 23 J. LEGAL STUD. 569, 574-75 (1994) (describing predictive value of social science research).

[19] Peter Ulmer, *Vom deutschen zum europäischen Privatrecht?*, 47 JURISTENZEITUNG 1-8 (1992).

problem solutions are produced so that the gains reached by unification outweigh friction costs, transition costs, and the cost of maintaining legal unity.

B. Integration by Law

Whereas the comparative law approach analyzes supranational codification from a "better law perspective," the integration approach is concerned mainly with the integration effect of legal unification.[20] It is this second approach that has been the driving force of legal harmonization and unification in the European Community and now the European Union.[21] Differences in the various national legal orders of private law of the Member States of the European Union constitute nontariff trade barriers.[22] In order to minimize or to eliminate these trade barriers, legal harmonization or unification may minimize the legal differences between legal orders. However, even legal unification cannot completely eliminate those trade barriers because friction costs remain as long as distinct national legal orders remain. If full integration with only a single national legal order is the one goal of European law, codification on the European level would be the ideal tool to attain that goal. Similar to the comparative law approach, one would have to take into account friction and transition costs and propose methods of legal unification that would minimize these costs.

But as long as Europe is not a unitary nation state there are potential conflicts between the integration goal and the necessity to preserve national sovereignty of Member States.[23] This conflict of competencies between the European Union on the one

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[20] *See* Christian Kirchner, *Europäisches Vertragsrecht, in* EUEROPÄISCHES VERTRAGSRECHT 103 (H.L. Weyes ed., 1997); *e.g.*, Konstantinos D. Kerameus, *Procedural Harmonization in Europe*, 43 AM. J. COMP. L. 401, 401-03 (1995) (discussing two goals of legal unification: to improve quality of legal rules and to eliminate disparities among diverse legal systems).

[21] *See* Frank J. Garcia, *"American Agreements" — An Interim Stage in Building the Free Trade Area of the Americas*, 35 COLUM. J. TRANSNAT'L L. 63, 102 (1997) (describing integration approaching Europe). *See generally* CAPELLETTI, *supra* note 12.

[22] *See* Paula C. Murray, *The International Environmental Management Standard, ISO 14000: A Non-Tariff Barrier or a Step to an Emerging Global Environmental Policy?*, 18 U. PA. J. INT'L ECON. L. 577, 579 (1997) (stating that international environmental standards were meant to eliminate nontariff trade barriers by eliminating inconsistent environmental standards).

[23] Fritz Rittner, *Die wirtschaftsrechtliche Ordnung der AG und das Privatrecht*, 45 JURISTENZEITUNG 838-46 (1990).

side and its Member States on the other side has been, at least partly, solved by the introduction of the so-called "principle of subsidiarity" into the EC Treaty by the Maastricht Treaty.[24] This has brought to the surface the already existing competence conflict between the European level and the Member State level.[25] Under this perspective, it is no longer valid to state that only full legal unification is desirable on the ground that it most effectively reduces existing barriers to integration. One now has to determine which degree of harmonization or unification leads to the best balance between European integration and national sovereignty of Member States. The issue of codification of private law in Europe becomes, thus, a problem of interpreting the competence provisions in the EC Treaty, namely articles 100(A) and 220. The dilemma of the integration approach is that it has not yet developed the valid theoretical framework necessary to determine the optimal degree of integration.

C. Efficiency-Oriented Law and Economics Approach

If economic theory can contribute to overcome or at least mitigate the problem of scarce resources and achieve efficiency in the allocation of resources, then economic theory should be applied in order to make proposals on improving the efficiency of legal norms, provided legal norms are relevant for that allocation problem. The relatively young economic sub-discipline of law and economics, in its normative Chicago version, is supposed to do just this and produce value judgments on the efficiency of legal rules.[26]

In a context of legal unification, this efficiency-oriented law and economics approach should then do two things: (1) look into the transaction costs that can be attained by unification or

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[24] *See* Akos G. Toth, *The Principle of Subsidiarity in the Maastricht Treaty*, 29 COMMON MKT. L. REV. 1079, 1105 (1992); Clayton P. Gillette, *The Exercise of Trumps by Decentralized Governments*, 83 VA. L. REV. 1347, 1364 (1997) (stating that Maastricht Treaty adopts principle of subsidiarity, which embodies preference for decentralized decision-making).

[25] *See generally* MÜLLER-GRAFF, *supra* note 7.

[26] *See* Ugo Mattei, *Efficiency as Equity: Insights from Comparative Law and Economics*, 18 HASTINGS INT'L & COMP. L. REV. 157, 168 (1994) (stating that law and economics efficiency analysis involves set of value judgments).

harmonization of legal norms, and (2) make proposals for harmonized or unified law based on the increased efficiency achieved by the legal norms recommended.

D. Critical Remarks

The contributions of the comparative law approach, the integration approach, and the efficiency-oriented law and economics approach to the problem of supranational codification of private law in the European Union are valuable, but are of limited usefulness in practical application.

The comparative method is very helpful in analyzing the existing legal orders and developing and proposing new problem solutions. However, it does not give much help when it comes to the normative question of defining what is the superior solution. The normative question in the functional comparative legal approach is a matter of controversy, different value judgments, and general goals attributed to private law. Whether, for instance, a general principle of good faith and fair dealing or the freedom and sanctity of contract with minimal intervention by the courts should be the guiding principle of private law is a typical controversy.[27]

These value judgments are deeply embedded in different legal cultures and in philosophical concepts.[28] To reconcile not only the civil-law family with the common-law family but utilitarian approaches with Kantian ones seems to be a Sisyphus task.

There are two possible escapes from that dilemma: (1) the axiomatic one, and (2) the positivist one. According to the axiomatic approach, one could try to agree on principles at a very

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[27] *Compare* William E. Deitrick & Jeffrey C.B. Levine, *Contractual Good Faith: Let the Contract, Not the Courts, Define the Bargain*, 85 ILL. B.J. 120, 120-22 (1997) (arguing that Illinois courts erred in implying duty of good faith and fair dealing to supplant express terms of contract), *and* David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 375, 460 (1990) (arguing that duty of good faith shall not allow court intervention to honor informal commitments, add legally implied terms to express contract, or correct poor drafting of contract terms), *with* Nicola W. Palmieri, *Good Faith Disclosures Required During Precontractual Negotiations*, 24 SETON HALL L. REV. 70, 87 (1993) (noting that duty of good faith and fair dealing in contracts is widely accepted).

[28] *See generally* Robert S. Summers, *The Formal Character of Law*, 51 CAMBRIDGE L.J. 242 (1992) (attempting to create process to identify general legal values in society); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997) (discussing legal goal of efficiency within American system).

abstract level and then deduce the proposals to be made from these abstract principles. The shortcoming of this axiomatic approach is that such deductions are more on the level of plausibility arguments than on that of scientific rigidity. The second solution turns to legal positivism. The answer would simply be: The lawmaker — the legislature — has to decide. Thus, in Europe, the task is handed over to the lawmaking institutions of the European Union.[29] This is a plausible solution of the normative problem, but it clearly defines the limits of a normative legal comparative approach. Further, it hands over the problem to a lawmaker with only indirect democratic legitimization. Lawmaking by the European Union Council means going back to times before the introduction of the principle of separation of powers of Montesquieu — a democracy deficit of the European Union.

Thus, it may be stated that the functional approach of comparative law, although it contributes valuable insights into the functioning of law, lacks responses to controversial issues in the field of its normative version. Results of normative discussions are based simply on the consensus of legal scholars of comparative law.

The integration approach stresses the integration effect of supranational codification without being able to determine the optimal degree of integration when it comes to a conflict between European integration and preservation of Member States' national sovereignty.[30] The comparative approach looks into the question of the compatibility of the new codification with existing national legal orders (friction costs); this aspect may be viewed as the major contribution of the comparative approach. The compatibility issue is on the analytical level; when it comes to the normative level, one has to ask under what conditions is legal unification acceptable. The comparative approach stresses the double goal of unification and reform. The integration approach stresses the advantage of more integration, but is unable

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[29] *See* Peter-Christian Müller-Graff, *Europäisches Gemeinschaftsrecht und Privatrecht*, NEUE JURISTISCHE WOCHENSCHRIFT 13-23 (1993).

[30] *See* Ewoud Hondius, *Towards a European Civil Code: General Introduction* to TOWARDS A EUROPEAN CIVIL CODE 7 (Hartkamp et al. eds., 1994) (discussing whether supranational codification is possible considering opposition from European common-law countries).

to determine the optimal level of integration. If it comes to the issue of whose acceptance is relevant, the integration approach tends to consider the interests of the Member States; the comparative approach is more interested in the addressees of the legal norms resulting from the codification process.

The efficiency-oriented law and economics approach faces similar problems and shortcomings. The one general principle this approach introduces is allocational efficiency. If this goal is accepted, it may serve as an instrument to answer the normative questions. This approach is then no longer just axiomatic; but there is a hope to produce testable findings on the efficiency implications of those legal norms that are to be compared and those that are to be recommended.

To criticize this approach on the ground that legal scholars would never accept efficiency as the supreme goal of legal unification or harmonization is too simple. Scholars of economics would simply answer that they produce proposals and give good arguments on the basis of the efficiency goal, and lawmakers are always free to opt for inferior solutions.

Thus, one should instead look to modern economics and the ongoing discussion of the shortcomings of neoclassical economics. The main objections against this efficiency-oriented law and economics approach are the following: (1) the approach is a static one in that it can only compare static situations with each other; (2) the definition of "efficiency" is highly controversial; (3) the approach can produce results only if one starts from a given state of distribution and resource allocation; and (4) the approach often, but not always, is based on the assumption of full information. In criticizing the efficiency-oriented law and economics approach in the context of supranational codification in Europe, one should start with an attack on the static nature of that approach. If just two situations are to be compared, one may concentrate on finding out which one is superior in efficiency terms. But one easily loses sight of the process of legal unification and harmonization. If one starts the process in a given point of time, one has incomplete information about the future. Even predictions on the outcomes of proposed changes of legal norms are nothing more than refutable preliminary hypotheses. This means that decisions on legal unification or harmonization are always decisions of uncertainty. The mo-

ment one implements the change and makes the step of unification or harmonization, one may still have to adjust this decision later in the light of new findings. But the sources of information are now confined to just the observation of unified or harmonized law. There is no longer the chance of referring to the parallel learning processes of various alternative solutions.

The gains in transaction cost reduction, therefore, must be paid through impairment of existing learning abilities. Whereas the efficiency-oriented approach of law and economics is a constructivist one, a process-oriented approach takes into account the conditions under which new solutions may be found. For the task of creating a European private law, this constructivist approach means that existing differences of national legal approaches have to be extinguished in order to find efficient solutions.

The efficiency-oriented law and economics approach might be helpful in analyzing certain proposals for unification or harmonization. But it is highly questionable whether it is prudent to utilize this approach as a methodological basis for the process of unification or harmonization of European private law.

II. MODERN LAW AND ECONOMICS

An examination of modern law and economics indicates that the efficiency-oriented approach does not fully reflect the potential of modern economics due to its foundation in utilitarian theory and its static and constructivist nature. What is proposed here is to examine modern economics and to discover how to combine the various concepts of new institutional economics and constitutional economics. It is further proposed that the economic analysis focus on the process of legal unification or harmonization.

The starting point is a positive analysis of existing proposals for unification or harmonization. The analysis is positive in the sense of positive social science as opposed to normative approaches. Such a positive approach starts with analyzing how legal norms are functioning in accordance with the principles of methodological individualism. This methodological approach views legal norms as either constituting constraints or incentives for individual actors. These legal norms define each actor's

framework of action. Changes of this framework are supposed to lead to changes in behavior, provided the preferences of each actor are assumed to be constant.

It is the objective of this positive branch of modern law and economics to make predictions on the outcomes of changes of legal norms and rules insofar as the similarities with the functional comparative legal approach are clearly visible. Further, there is still a bridge to the efficiency-oriented law and economics approach because it analyzes the efficiency implications of legal changes.

In utilizing the instruments of modern economics, however, one has to reconstruct this functional approach in the following way: assuming that people tend to make decisions that make them better off (self-interested behavior), one may examine the changes of frameworks (constraints and incentives) and formulate hypotheses of how individual actors react to such changes. These hypotheses are preliminary ones; they are refutable. So far, the analysis is in line with traditional law and economics, but one has to accept that the solutions offered cannot be final. Furthermore, removing the assumption of constant preference structures, one then has to consider the differing effects of changed legal norms on the behavior of individuals.

Up to now we have done nothing more than sharpen the tool of the functional approach, which is still to some extent in harmony with the traditional law and economics approach. But the functional approach is still comparative and static in nature. It is also a positive approach that can make no proposals as to which solutions are superior to others.

In order to solve the normative problem, one has the choice between an axiomatic approach, as is normally used by scholars of comparative law, or an approach based not only on methodological but also normative individualism, which combines the latter approach with modern social contract theories. The deficiencies of an axiomatic approach have already been discussed;[31] there is no need to go into this problem twice.

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[31] *See* Pierre Schlag, Fish v. Zapp*: The Case of the Relatively Autonomous Self*, 76 GEO. L.J. 37, 40 n.16 (1987) (stating that all axiomatic formulations include undecidable propositions); Mark G. Yodof, *In Search of a Free Speech Principle*, 82 MICH. L. REV. 680, 690 n.33 (1984) (arguing that only inconsistent axiomatic system could produce all number-theoreti-

Normative individualism is an approach utilized by constitutional economics. According to this approach, any legitimization of legal and institutional choices relies on consensus of the individual actors. Such choices must be the result of an actual or hypothetical social contract. Thus, this approach draws upon the social contract theories of Rousseau, Locke, Hobbes, Rawls, Buchanan, Vanberg, and Homann.[32]

There is a link between this contractarian approach and the efficiency-oriented law and economics approach. According to the latter approach, a certain solution is preferable because it leads to a better use of scarce resources or comes closer to actual observed preference structures of the addressees of the legal norms. One could argue that people acting in accordance with the assumption of self-interested behavior are expected to reach a consensus on that superior legal solution rather than on other solutions that lead to inferior consequences.

The major difference of the efficiency-oriented approach of law and economics and this new one is the concept of legitimization. Whereas the efficiency-oriented approach of law and economics works within the confines of utilitarianism, the contractarian approach is based on a concept of legitimization through the consensus paradigm.

This conceptual difference carries important implications: If solutions have to be traced back to actual or hypothetical consensus, one has to deal with the problem of uncertainty in a different way than the efficiency approach. Uncertainty is then a necessary ingredient of decision-making. If this is an accepted variable, one must consider how to devise decision-making processes that allow for correcting former solutions which are no longer acceptable. Thus, one has to concentrate on processes to find a solution rather than the solution itself. The approach is evolutionary rather than static without denying the merits of comparative statistics as a tool applied in other theories.

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cal truths).

[32] *See* JEAN-JACQUES ROUSSEAU, THE ESSENTIAL ROUSSEAU 8-9 (Lowell Bair trans., 1974) (stating basic assertions of social contract theory); NORBERTO BOBBIO, THOMAS HOBBES AND THE NATURAL LAW TRADITION 90-93 (Daniela Gobetti trans., Univ. of Chicago Press 1993) (1989) (discussing Hobbes's contractual basis of society); SERGE-CHRISTOPHE KOLM, MODERN THEORIES OF JUSTICE 72-73 (1996) (comparing total social contract theory of Hobbes, Rousseau, Rawls, and Buchanan with limited social contract of Locke).

It is necessary then to closely watch the addressees of the legal solutions proposed because any legitimization of the choice taken must be based on a consensus. Whereas in constitutional economics the normal starting point is a given constituency, if one has to tackle problems of legal unification or harmonization, the constituency is not defined. Such a process of redefining the area of jurisdictions simultaneously changes the constituency. "Legal unification" means that two or more groups of individual actors are forming a united constituency. "Legal harmonization" means that distinct constituencies decide to approximate legal solutions in the light of expected gains for the members of that constituency.

Combining the concept of contractarian legitimization with that of enabling learning processes results in a problem structure that applies well to the issue of creating a European private law. A concept of contractarian legitimization can answer the question of which level to allocate competencies in a hierarchically structured political entity like the European Union or a federal state like the United States. It takes the existing preference structures of existing constituencies seriously. However, it favors competitive learning processes that may then lead to the formation of new, larger constituencies.

Existing national legal orders of private law may reflect different preference structures of national constituencies of the European Union's Member States. However, the individual actors forming these constituencies may be better off in reducing existing transaction costs through unification or harmonization of private law. The issue for resolution is how to initiate a process in which the actors may decide for themselves on how much unification or harmonization of private law is best suited to their preferences in the light of the expected reductions in transaction costs.

Instead of forcing a solution on these actors in which legal scholars determine how the benefits of harmonization should be taken into account, it may be better to let these actors decide for themselves. In practical terms, that would mean enabling such decisions on two levels: (1) on the level of private parties, and (2) on the level of Member States.

If parties are to be free to choose the legal order that in their judgment is optimal, mutual recognition of private laws of

the Member States of the European Union is necessary. As this selection process continues, some Member States may come under pressure to adapt their private law to the preferences of individual actors. Thus, a process of competition between systems is brought into play. Learning processes take place as well on the level of individual contracts and on that of national legislators. European private law as it develops in this twofold learning process is, therefore, legitimized by the citizens of Europe.

III. Conceptual and Methodological Problems of Supranational Codification in Light of Modern Law and Economics

A. Introductory Remarks

The characteristic feature of modern law and economics is its combination of elements of new institutional and constitutional economics and its clear separation between positive and normative analysis. The normative fundament of this approach is the consensus paradigm.

In applying this new approach to the problem of supranational codification, one has to distinguish the following problems, each of which has to be addressed in both a positive and normative analysis: (1) evaluation of new problem solutions, (2) transaction cost reduction, (3) friction problem, (4) transition problem, (5) vertical power shifts, and (6) horizontal power shifts.

B. Positive Analysis

1. Evaluation of New Problem Solutions

Codification means that existing solutions to legal problems are replaced with new ones. It has always been the domain of comparative law to analyze and compare the various problem solutions. What modern law and economics may add here is the clear distinction between positive and normative analysis. It should be stressed that as a first step one has to discover the impact on the addressees of the change of a given legal norm. Such an inquiry is that of methodological individualism. Changes of legal norms mean changes of restrictions on the addressees

that may lead to different behavior. Any comparative analysis should be interested in this real impact, which the language of comparative law has called the dichotomy of "law in action" versus "law in the books."[33]

2. Transaction Cost Reductions

Substituting the different national legal problem solutions with a supranational one automatically reduces transaction costs. If the new problem solution becomes the only institutional device available, then all other devices become obsolete. But in practice one should act with caution. There may be a variety of legal solutions other than the now abandoned national solutions from the European Union's Member States: there are also the UNIDROIT principle,[34] the United Nations Sales Convention,[35] and the lex mercatoria,[36] among others. The effect of supranational codification on transaction cost reduction depends, therefore, on the acceptability of the new law. This acceptability has to do with the ability of the codification to invent new superior solutions — superior in the judgement of the legal addressees. One might contradict this statement and argue that this problem of choice only exists insofar as the legal rules are nonbinding. That is generally true. But even if we have binding rules, the issue of acceptability is important as parties have the chance to move their centers of activity. Capital is internationally mobile so that the investor has a chance to take into account not only the price of the physical infrastructure but the price of the institutional infrastructure as well. This international mobility of capital is an important factor when raising the question whether today a European private law is still the major transaction cost reducing factor or whether a world private law could better serve this purpose. The main argument for the European solu-

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[33] *See* William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 U. PA. L. REV. 1889, 2142 (1995) (comparing "law in books" and "law in action").

[34] *See* INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 13 (1996) (providing text of UNIDROIT principles of international commercial contracts).

[35] U.S. Ratification of 1980 United Nations Convention on Contracts for the International Sale of Goods, 52 Fed. Reg. 6262 (1987).

[36] *See* Peter Winship, *Private International Law and the U.N. Sales Convention*, 21 CORNELL INT'L L.J. 487, 530 (1988) (describing use of lex mercatoria in Europe).

tion is the creation of the single market in Europe, which is supposed to lead to higher capital mobility within the borders of free European market as compared to the mobility of capital across international borders. With the continuing success of international trade liberalization, however, any perceived advantage of capital mobility within European borders may dissipate.

3. Friction Problems

The new provisions of the supranational codification — a European civil code in our case — are supranational law and yet still part of the existing national legal order. In order to analyze the frictions caused by this double layer of legislation, one has to look into the ongoing development of new case law. This case law is being produced by both national and the international courts of law. Whereas the national law courts have a tendency to make the new supranational law fit into the framework of the national legal order, thereby nationalizing it, the international law courts have the opposite tendency — they use supranational law as a device to promote integration, thereby further supranationalizing the law. A positive analysis would have to test various hypotheses on these phenomena and make predictions of how their developments affect private parties — the addressees of the legal norms. Such an analysis would specifically examine the degree of legal uncertainty produced by the observed frictions.

4. Transition Problem

The substitution of the existing national legal orders of private law by the new supranational private law leads to a cost intensive transition problem: the existing case law based on the old national legal orders becomes obsolete. In economic terms this case law represents a specific investment; in traditional economic terminology the loss of this investment is a sunk cost. A positive analysis would inquire to what degree the investment into the development of the existing case law has been specific to its original application and to what degree it might be transferred to the production of new case law concerning the new

supranational codification. If a transfer of investment is possible, the cost of introducing supranational codification can be lowered.

This transition problem and its cost implications make clear that there might be a trade-off between the advantages gained by a new superior legal solution and the transition costs. If one chooses a second-best solution in order to reduce transition costs, such a choice might save costs in the short run, but lead to comparatively higher costs in the long run. Only by combining positive analyses of the superior solutions, the friction costs, and the transition costs does one get a meaningful answer to the question of what are the effective costs and benefits of supranational codification.

5. Vertical Power Shifts

Supranational codification means that powers are transferred from the national level of Member States to the supranational European level. This is a constitutional problem. In terms of a positive analysis, one would have to clarify the impact of such vertical reconstruction on the citizens of Europe. They are affected on two levels: (1) on the level of the political decision process — in their function as lawmakers who legitimize the legislature to act on their behalf — and (2) on the level of addressees of the new legal norms. On the lawmaking level, a transfer of powers from the national level to the supranational level means higher agency costs. It becomes more difficult for the voters to control and supervise a European legislature than a national one. This is especially true in the European Union with its complex procedure of lawmaking and its interlocking competencies of Council and Parliament. The problem is aggravated by the fact that the Council acts as legislature on the European level, but constitutes the executive branch on the national level.[37] A positive analysis of the agency problem would have to look into the changes of the uncontrolled (or difficult to control) powers of the European legislature.

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[37] *See* Christian Kirchner & Joachim Haas, *Rechtliche Grenzen für Kompetenzuebertragungen auf die Europäische Gemeinschaft*, 48 JURISTENZEITUNG 760-71 (1993).

The vertical transfer of competencies affects the citizens of Europe not only in their function as lawmakers but in their function as addressees of the new legal norms. A positive analysis must consider the problem of changed legal uncertainty and the changes in getting legal protection not only through national law courts but through the combination of national and supranational law courts.

6. Horizontal Changes

Codification means, regardless of whether supranational codification is at stake, that powers are shifted horizontally from the judiciary to the legislature. In the case of supranational codification of European private law, this change particularly affects the two common-law countries of England and Ireland. In terms of constitutional economics, this horizontal shift is important in so far as the judiciary has a different kind of legitimization than the legislature. Whereas the members of the legislatures are elected, the members of the judiciary may either be elected or, what is more often the case, legitimized indirectly through appointment. In this case, a codex of interpretation methods has the task of guaranteeing that the development of case law is in accordance with what the legislature has decided or would have decided if it had to decide the case now. Horizontal power shifts to the legislature, therefore, mean that direct legitimization gains a more important role vis-à-vis indirect legitimization. But this effect is relativized by two observations: (1) analysis of developments of case law in common-law countries has led to the hypothesis that law produced in that way is economically superior in terms of allocative efficiency to law made by the legislature; and (2) in Europe the legitimization of the legislature is a major problem.

A positive analysis of the horizontal power shifts would only be complete after examining the period after the introduction of the supranational codification and analyzing any vertical power shifts. The section on friction problems discussed what might be expected to take place once the codification has been introduced. In the long run it will be the supranational law courts that will become the real producers of law due to the supremacy of European law over the national law of Member States. Under

the present legal circumstances within the European Union, the European Court of Justice would become the paramount source of developing European private law. The impact on the citizens of Europe as addressees of legal norms consists of the horizontal shift evolving into a vertical one with a high degree of centralization of lawmaking power in just one court.

C. Normative Analysis

A normative analysis is based on the positive analysis discussed in the preceding sections. This positive analysis has shed light on the various cost aspects of supranational codification. A normative analysis could propose codification based on the positive analysis, which provides the overall superior solution. Such a normative solution would be in accordance with traditional law and economics by stressing the efficiency of the solution proposed. But if one does not rely on that efficiency aspect, but rather applies the consensus paradigm and takes into account the problem of incomplete information, one has to be more cautious. The results of the positive analysis are not a very robust foundation; they are hypothesis that might be falsified either by new developments or by access to new information. This problem of incomplete information leads to normative conclusions: the solutions proposed must be capable of revision. To access new information it is essential to have an institutional framework that fosters open learning processes. If we substitute an efficiency oriented welfare approach with an approach based on normative individualism, such learning processes have to be institutionalized in a manner allowing the individual actors to actively participate not only in the learning processes but in the decision processes as well.

Viewed from these three normative statements, supranational codification carries, besides the benefits discussed, a number of potential dangers. First, the legitimization of the lawmaking process itself is very questionable in light of the existing democratic deficit of the European Union under existing treaties. Second, supranational codification might close down the existing learning processes. As discussed in the preceding sections, the real lawmaking power in the field of private law would be vested in the European Court of Justice. The participation of the citizens of Europe would be minimized. Finally, the learning pro-

cess itself and the revision of old hypotheses would be borne by a court of law, which could easily be overburdened by such a task. These negative side effects of European supranational codification of private law may easily outweigh the potential benefits. The side effects are structural ones that cannot be evaded through better lawmaking. To exclude these dangers, one would have to change the codification approach to one stressing processes over static results. The task would be to develop an institutional framework that would lead to a jurisdictional competition between the national legal orders in the field of private law in Europe so that the ongoing learning processes in the long run would benefit European codification. But, as previously mentioned, by that time it might be better to aim not for a European but a world private law.

CONCLUSION

Supranational codification will necessarily create a new legal order for the emerging European Union, but it will also dismantle existing legal orders of European private law. Selecting a conceptual approach to, and analyzing the impact of, supranational codification is a complex problem for which traditional explanatory approaches of comparative law, integration theory, and law and economics may prove inadequate. Modern law and economics hopes to provide an alternative approach to adopting a European civil code through a combination of new institutional and constitutional economics and a separation of normative and positive analysis.