The Comparative Law and Economics of Penalty Clauses in Contracts

Ugo Mattei

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The question of the desirability and feasibility of a European Civil Code is now on the table of scholarly debate in Europe. In this essay I will use two approaches to comparative legal scholarship to deconstruct some of the issues behind this debate: the common core approach [FN1] and comparative law and economics. [FN2]

This essay is clearly located in the world of the ought to be. It has an openly normative rather than a positive flavor. It is more of an essay in the domain of policy rather than a paper strictly confined to the domain of professional law. Nevertheless, a focus on the relationship between the common core approach and comparative law and economics offers a very interesting opportunity to discuss some basic positive aspects of comparative legal scholarship. [FN3]

I will open with a critical discussion of some of the more important professional approaches to the issue of codification. I will explore briefly their political biases and hidden political agendas. I will then focus on transaction costs to show the areas and the domains in which European codification is cost-justified. I will conclude with some remarks on the relationship between efficiency and common core analysis, demonstrating where we are, in comparative law, on the path to measurement of analogies and differences.

I. The Conservative Strategy

Since I openly take the normative ground, the distinction between legal and political discourse is rather thin. Indeed the very word policy, as opposed to politics, is absent in almost all leading languages, other than English, spoken outside of the common law tradition. [FN4] The question then follows: as a matter of political preference, would I rather support codification, or would I rather be against it?

Whatever the answer might be, I believe that a pseudo-scientific attitude towards this question is not only sterile but also dangerous for legal scholarship. The Savigny-Thibaut opposition in nineteenth century Germany with the former opposing codification and the latter favoring it itself had a strong political stake: Savigny's historical approach representing a thoroughly ethno-centric, conservative, class-privileged, self-serving attitude. [FN5] This same attitude and conservative
politics, is today reflected by Professor Reinhard Zimmermann [FN6] and some of his followers who, by the use of biased historiography, pursue a defense of the status quo in the professional-legal leadership in Europe. [FN7] The only difference is that while Savigny *885 feared the hegemony of the French codification, Professor Zimmermann seems to fear the hegemony of U.S. legal culture and the challenge of different voices within European legal culture.

As a strategy, constructing the issue of civil codification as non-political, technical and neutral helps maintain the present balance of power in European legal leadership with historical and traditional French and German leadership. With the growth of comparative studies and the rise of the common law after World War II, major attention is now devoted to England. This pattern of legal leadership thus corresponds to the political one, itself unbalanced in favor of these three Member States. Stressing the common, historical legal path of all the European legal systems makes the mentioned three a natural focal point. Consequently, the pattern of political leadership becomes culturally justified. Moreover, between Germany, France and England the comparative advantage of the first is obvious. France lost hegemony within the civil law at least a century ago, and English legal culture, surrounded as it is by civil law countries and being historically weak and overshadowed by the United States within the common law world, certainly is not a strong competitor to German cultural hegemony. [FN8]

The effort of creating a code would have a disruptive impact on this status quo. Politically, it would be impossible not to involve scholars from all of the Member States. It would then become obvious that today a number of legal cultures other than the leading ones (and traditionally overshadowed by the leading ones) are more advanced and cosmopolitan; and that, after all, "differences" are still very important. Moreover, if the issue of codification would revert to its obvious political nature, then a number of patterns in academic hegemony would become much less influential. The political connections necessary to become members of the drafting committees would become more important in determining academic success than connections within prestigious publishing companies and international academies. Consequently, it is likely that the European academic nomenklatura might also be sociologically shaken, with a necessary and much larger involvement of members of marginal legal cultures, different professional elites and different sociological groups (gender difference included).

All of this can be avoided if the issue of codification is constructed as academic and if it is maintained within a highly homogeneous *886 European legal academic elite (a sort of old boys club) who, rather appealingly, argue to close the gates and defeat the Bruxelles Eurocrats. However, the real agenda is different. In avoiding the political process, which is less homogeneous and more pluralistic than legal academia, some legal scholars are more likely to keep their role of hidden law givers. [FN9]

Although hidden behind the technically innovative idea of the reaction against the positivistic blend of national state law, the success of this politically conservative agenda, a thoroughly elitist academic "professional project" to keep the market, in the sense of sociologist Magali Sarfatti Larson, [FN10] is itself revealing of a genuinely and intrinsically conservative attitude of the legal profession at large. [FN11]

Think for a moment what the reaction would be in the domain of language (a domain with strong structural analogies with that of law) [FN12] if someone would propose, without joking, that in order to facilitate communication between the people of Europe (a clearly practical need), Latin rather than English should become the common language. Such a proposal is the perfect counterpart of Professor Zimmermann's attempt to use, once more, the authority of Roman law to cope with the fear of the "Americanization" of European law.
Only lawyers can take such an idea seriously. In any other domain, it would be considered as a sort of reactionary utopia. Professor Zimmermann's attitude goes so far as to suggest that the common law is nothing more than a modernized (and corrupted) evolution of Roman law. [FN13] Today, his view is not only taken seriously but is a standard reference that frames the very terms of the debate. Since, however, the questions asked determine the answers given, such acquiescence calls for a critical reaction. Openly acknowledging the political nature of the choice between code and no code and the stakes behind it is a crucial point that must be made for the sake of intellectual honesty and critique.

History is a serious matter. Everybody should be aware of it and certainly the contribution of Roman law to English common law must not be neglected. [FN14] Nevertheless, some Roman law scholars tend to be extremely aware of the contribution of Roman law to different contexts but deeply unaware of the debts that Roman law contracted with other legal experiences. They tend to look at their subject matter as a model. Consequently, one should beware of historical research that is based on a biased attitude showing what was given but not of what was received. [FN15] A good attitude is to leave history to those professional historians who do not have a stake to defend. It is therefore interesting to see one of the world's leaders of the field Professor Paolo Grossi's reaction to the discussion of the anti-codification movement's use of history:

I do not look at the past as a depository of models for today. Might God restrain us from doing so! The historian should not propose models, because he has no models among the tools he uses in search for knowledge. I'm terrified when some modern Roman law scholar digs out of his magician's hat obsolete Roman law tools in the secret (and sometimes also open) hope to conquer a title of honor in the building of the future uniform European law and to gain a right of citizenship in the future European paradise. Think about the large amount of essays written by Reinhard Zimmermann, a respectable colleague from the University of Regensburg who likes to talk about Usus hodiernus pandectarum. All of this is appalling to me. As an historian, although limited by the great modesty of my scholarship, I have learned the great truth that everything has its time. Today we are called upon to build with our own energies the tools that we need. [FN16] This is the historian's advice that I would like to follow.

II. Fears of Hegemony

One of the main motivations behind the idea of the usus hodiernus pandectarum is the fear of U.S. hegemony. International political scientist Susan Strange points out how today, globalization means Americanization. [FN17] The fear of globalization (or perhaps the lack of attention to it) and the preservationist attitude towards a given cultural model (perceived as weak and in need of protection) seems to be behind another brand of criticism to European codification, and perhaps more generally to codification as an anti-pluralist tool. I refer to the position taken by Professor Pierre Legrand in a few papers, some targeting the prospect of a European code and others the new Quebec Civil Code. [FN18]

I have to confess political sympathies to this agenda that considers the attempt of imposing legal unity by political power arrogant and tries to preserve cultural diversity as a value. [FN19] Despite this sympathy, I must devote a few critical remarks. First, one should point out that although Professor Legrand openly acknowledges his political agenda, he argues, in technical terms, an extreme form of interpretative approach that is mostly borrowed from a philosophical cultural criticism and is ill-equipped for application to the rather practical needs of legal discourse. [FN20] The impossibility of "neutral translations," the unavoidably civilian blend in the very idea of codification and the necessary change of the received pattern in case of legal transplants are certainly important aspects that should be considered in multicultural exercises such as the drafting of transnational law or a code to be used by different interpretive communities. However, these
issues do not preclude the development of culturally aware legal tools able to serve their purpose in different contexts.

Another problem with Professor Legrand's argument is the rather narrow context in which it is applied. Indeed, if one takes a global perspective, the issue of cultural awareness and the arrogance of worldwide cultural imperialism is something that affects the whole Western legal tradition. Consequently, the internal competitive relationship between the common law and the civil law is probably not the arena in which such problems are more politically disturbing.

Without the global dimension, the whole argument for the need to protect the common law from the imperialism of the civil law (the European code) weakens. Actually, for the reasons discussed in the previous section, the need to protect the politically weak part of European legal culture should argue for codification rather than the other way around.

According to economists and common sense, all changes have a cost. Again the parallel with building a new language is helpful. Despite the very successful counterexample of Hebrew, there is no question that if one language was chosen for all of Europe, there would be enormous economies in using English over any other language (including French and German, let alone Latin!). The reason is not only the obvious one, that many people already use it, but also that there are clear advantages of English in international communication and worldwide globalization. English today can be used for transactions outside of Europe much better than any other European language.

Analogously, the attempt to create one legal order for Europe should not be an exercise concerned only with European needs but should be approached from a global perspective. In building the new European order, we should consider that the stake is global and, consequently, the relationship with U.S. law and non-Western legal cultures cannot be ignored. Indeed the change of worldwide legal leadership from Germany to the United States, for the first time after World War II, from the civil law to the common law, is a historical event. Some nostalgics might dislike it, but it is a fact that only can be ignored at very high social costs.

This is why some other objections to codification expressed by Professor Legrand from a completely different political perspective than that of Professor Zimmermann, and certainly outside of hegemonic desires, are also weak. Indeed, the fear that codification would introduce a pattern of law excessively civil law oriented and consequently disruptive of the cultural identity of common law attorneys does not take into account the major cultural impact of U.S. law in today's worldwide legal scholarship. From a global perspective, the trend seems more towards the Americanization-globalization of European (and not only European) law rather than the other way around. In this broader scenario, the comparative advantage of England because of its language and legal culture similarities is too obvious to stress.

It is also questionable whether the code could properly be considered a purely civilian, European tool. In a forward-looking exercise in social engineering like the building of a common law of Europe, one should consider that the code is a rather recent and superficial civilian contribution to the general development of a Western legal tradition. This tradition is deeply characterized by the existence of some strong and independent professional checks on the process of social decision making. Today, strong independent judiciaries (common law) and strong independent universities (civil law) are aspects at play almost everywhere in the Western legal tradition (certainly in the United States) and hence become paradigmatic of it. Consequently, the code, which is not absent from the common law (and many of the proposals of European codification are today significantly restricted to matters that are codified in the American UCC), can be considered a modern tool belonging to the whole Western legal tradition as a legal organization characterized by
the hegemony of professional law. [FN26] The technical desirability of such a tool should be evaluated pragmatically, outside of cultural fears. The final decision, as already mentioned, can and will be taken only on political grounds.

III. Transaction Costs

In this section I will attempt to follow Professor Grossi's advice to be conscious about the past, but to work out our tools for the future independently. Comparative law and economics helps in this direction.

*891 Until recently, economics and law and economics were affected by a clearly abstract and anti-historical approach. Within the neo-institutional approach to economic science however, Nobel laureate Douglass North and a large number of followers repeatedly assert that "history matters." [FN27] Moreover, the idea of the legal tradition as a phenomenon of the "path dependence" of its professional actors (judges, practitioners and professors) is central to comparative law and economics, which has inherited the notion that comparison involves history. [FN28]

I will approach, from the comparative law and economics perspective, the following questions: [FN29]

(1) When and why is a European Code desirable?

(2) What kind of rules or principles should be reflected in the code?

The so-called "subsidiarity principle" clearly provides that reliance upon a European code would be justified and permissible only where local law fails to obtain the results that one hopes to obtain by means of a European code. [FN30] To give some content to this vague idea, I will use the economic notion of transaction costs. [FN31]

According to neo-institutional economists, the purpose of legal institutions, both formal (such as codes) and informal (such as the development of a legal culture), is to reduce transaction costs. [FN32] Transaction costs are, generally speaking, all those costs that preclude or reduce the possibility of smooth market transactions. Resources that could be invested in productive, wealth maximizing activities *892 are absorbed by transaction costs and consequently diverted from their purpose. For example, in the absence of a reliable legal system to enforce contracts, the party called to perform second has an incentive to act opportunistically and not perform. [FN33] She has already received her benefit, so why should she pay consideration for it? In the absence of a legal system, parties will spend substantial energy to monitor and fend off such opportunistic behavior. For example, parties will contract only with people whose reputation they know. Alternatively, parties may introduce more or less inefficient forms of self-help (exchange of hostages, etc.).

The legal system works to reduce, or even eliminate, this kind of transaction costs. As a consequence, the parties will be able to contract more freely and will be less inclined to devote resources to monitoring their transactions because the legal system is sufficiently robust to protect them. As a result, more wealth-maximizing exchanges will occur and resources, rather than being used to create the institutional conditions for a contract to work, will be invested in the main productive activity. [FN34] The legal system is justified only to the extent that it is cheaper to develop and maintain by means of the State rather than by having parties work out their own private working institutional system by investing in measurement (selection of who to contract with) or self-enforcement. In other words, if the formal legal system (rather than private informal arrangement) is a better device to reduce transaction costs, it is justified and cost effective. [FN35]
This same model can be applied to the issue of the European civil code in order to give concrete meaning to the subsidiarity principle: If the European civil code is a cost-justified device to reduce transaction costs of the European market, it should be adopted. If it is not, the project should be dropped. In other words, the code is justified if it reduces transaction costs, if it frees for productive purposes resources that are presently spent in measuring and monitoring transactions. The scholar's task, in order to answer the question of whether the European Union should adopt a code, is to map the institutional costs and benefits of codifying and to compare them, from the perspective of transaction costs reduction, with alternative options (e.g. maintain the status quo; enact a few directives; provide some kind of restatement, etc.).

The costs connected with the status quo (no European civil code) are easy to detect. They are mainly in the form of information costs. In a single community transaction where several legal systems may be involved, arguably excessive diversity creates unpredictability and requires a specialized bar. As a consequence, a significant share of business resources must be devoted to specialized practitioners who can give transactional and litigation assistance, rather than to investing in wealth maximizing activities. I focus on practitioners in order to clearly reject normative claims such as those advanced by Professor Basel Markesinis in the recent symposium on codification hosted in Den Haag by the Dutch Ministry of Justice. According to this scholar, rather than codify, the European Union should simply train an elite of truly European practitioners. The high fees of an elite bar (likely to be a significant percentage of each transaction) offer a concrete example of some of the transaction costs in the present situation. Since all participants, particularly small businesses, cannot afford this expensive advice, these high transaction costs give unfair advantages to large businesses--a political problem in European society.

I will not spend time here on the theoretical arguments that: (1) diversity increases efficiency since it creates institutional competition; \[FN36\] and (2) codification will not create uniformity in the absence of a common interpretive community. \[FN37\] Both these arguments might be true and should be considered in deciding whether a code is a cost-effectivetransaction costs reducing device. \[FN38\]

It seems to me that the "efficiency of diversity" argument is very helpful in deciding which areas of the law to codify. On the other hand, the "difference will stay anyway" argument is rather obscure, counter-intuitive and sometimes even suspect, as are all technical arguments used to hide political agendas. Whether differences will persist or disappear depends on a number of factors that simply make it impossible to assert such broad statements. A lot depends on the quality and the semantic level of the code, on its capacity to codify common understandings and on its ability to reflect the diversity of the legal cultures that are at play in Europe today. Furthermore, much depends on the process of codification, on whether the code is an arrogant imposition from the top down or whether it is a development from the bottom up. Moreover, a lot depends on the areas of the law that one is called to codify.

Obviously, a European Civil Code (a formal institutional arrangement) does not solve the problem of the need for informal institutions to lubricate it (the European interpretive community). The common code and the common legal culture, far from being in contradiction with each other, seem to push in the same direction.

IV. Path Dependency

There is one general aspect of a new codification that is crucial to consider in evaluating whether undertaking codification is a productive exercise. A new codification involves a change that has some costs to everybody. Every lawyer faced with a change in the law has to learn the new law, and becoming familiar with the change has its costs. For an economist, these are also information
costs that should be compared with the benefits of codifying any given area of the law. Every change in the law creates some losers and winners. What makes things difficult is that losers and winners can be found at very different levels of analysis.

To begin with, one can focus on national political communities. From this perspective, potential codification losers are the beneficiaries of the political status quo, such as Germany (Zimmermann's research agenda has in fact received very prestigious and generous German financial aid). There are also winners and losers within a given national community and between professional and institutional actors. For example, it is likely that Dutch professors would be winners in case of a new European codification. They are likely to be influential in creating the new European code because of their recent experience in this domain. Moreover, Holland would gain from a European legal earthquake (such as that created by a serious codification project) because, while its legal academy is very cosmopolitan, its share of power and prestige is rather limited compared to France, Germany and England. Nevertheless, because it is highly unlikely that the European Civil Code will look exactly like (or even substantially like) the new Dutch Civil Code, Dutch practitioners who invested a lot of time in the new Dutch code and are reluctant enough to changes in that code, will be worse off if faced with yet another change in their routine. All of these are "professional" costs and benefits, but they are just a few of the potential costs of codification. There are other substantial cost issues such as the winners and losers determined by the content of the new code.

Participants in the legal community tend to protect their own heritage and niche of expertise. Due to this protectionism, there is a danger of chauvinism within the legal community, or in adopting economic jargon, "path dependency." This is an important notion developed in neo-institutional economics. According to this idea, every organization adapts to its institutional setting by developing behavioral and cognitive routines aimed at avoiding reconsideration of the available choices over and over again. This pattern may be adaptively efficient, when the costs of reconsidering the alternatives (and of developing them within the institutional setting) are higher than the discounted alternative path's benefits which are foregone by following the approved routine. It might happen, however, that such routines become sub-optimal, but the organization does not change them. There are several reasons why sub-optimal routines are not replaced by better alternatives: (1) the availability of the alternative is simply ignored (menu dependency); (2) the costs of modifying the institutional setting are wrongly perceived; or (3) the incentives to change the institutional setting are wrongly allocated in the given circumstances. Thus, as a consequence of path dependency, an organization will not change their routines regardless of the performance of those routines essentially because of increasing returns.

Because of the tremendous complexity of the legal system, as an aggregate of formal and informal institutions and as a legitimating device of the lawyer's "professional project," every lawyer is fond of his own routine and perceives global change as inefficient. In fact, each lawyer, and particularly more innovative academics, do advocate some changes usually in the domain of formal institutions. However, when we arrive at global changes that actually modify the informal institutional setting (affecting the lawyer's mentalité), changes are feared or even considered impossible. This is what makes the legal tradition, or as some might prefer, the style of a given legal system, remarkably path dependent.

In the case of a civil codification of European law, the institutional change is perceived as broad and revolutionary enough to become a good example of the impact of path dependency on legal change in general. Indeed, a European Civil Code not only is per se a broad and ambitious exercise of formal institutional modification, but it is also likely to affect the informal institutional setting as well (particularly within a mainly civilian constituency). A new code, drafted and engineered in a completely different way from the old one, will also likely affect a lawyer's way of thinking. The
two big issues in the recent history of civil codification in the civil law tradition are: (1) whether there should be a general part; and (2) whether there should be a separate commercial code. [FN42] These are choices whose impact is certainly not confined to the domain of formal institutions; indeed, they deeply affect a lawyer's way of thinking and other mute professional assumptions. [FN43]

It is likely that the aggregate of fifteen different (perhaps locally optimal) routines will be suboptimal in international transactions. Furthermore, the obvious way to modify institutions (when there is political power to do so) is to begin modification with the formal institutions. Consequently, it is easy to predict that European codification will be resisted because of path dependency. Path dependency makes it very difficult to reach agreement on most basic issues involved in the form of codification, let alone its substance.

*897 This last observation brings us to another fundamental question I wish to address. What content would make the code transaction costs effective? Because of path dependency, it is difficult even for comparative legal scholars trained to look beyond their borders to recommend something different from the local legal system with which they are familiar.

It is interesting to note the behavior of the leading elite of European private lawyers at the mentioned Den Haag conference on European civil codification. [FN44] From Hamburg, Professor Ulrich Drobnig, a follower of the German Civil Code (Bürgerliches Gesetz Buch) path, advocated a general part for the new code. From Paris, Professor Dennis Tallon, a follower of the Napoleonic path, pointed at the French Code as the semantic model for European codification. Professor Basel Markesinis, more a follower of the English path than an Englishman, recommended the Oxford model (where he teaches) as a good way to approach the problem of European private law outside of the need of codification. For several years now, Professor Giuseppe Gandolfi has not been ashamed of claiming the Italian code (to which he is a follower) as the proper model, despite more than one scholar's observation that the Italian code was born old and, on top of it, its semantic level makes it a poor performer of the code's job to provide a set of principles offering a centripetal scheme of interpretation.

Nor it is an unforeseeable surprise, for a politically cynical analyst of institutional behavior used to detect the potential winners and of changes, that the Dutch government would be the one to give momentum back to codification of European private law by sponsoring the Den Haag Conference. Indeed, the Dutch Civil Code is the most recent and cosmopolitan code enactment in Western Europe. It is in the best position to advocate its role as a model for the West, Eastern Europe, Russia, Mongolia and other countries.

I do not believe that the scholarly debate on the need for the European Civil Code should be spoiled by veiled agendas of cultural hegemony. While the final decision on codification is bound to be political, as scholars we should try to offer some (normative) guidelines for principled decision making other than the nationality and stake of the participants in this game.

*898 V. The Common Core Approach

To begin with, let me say clearly that these "guidelines for principled decision making" cannot and should not try to be neutral. There is a political game going on in Europe. Although the issue of codification is certainly not the most important one, scholars must be aware of it if they do not wish to give up their critical role. Scholars working on the assumption that they can be neutral in this area, are bound to offer only very limited contributions to the issue. A look to the content of the two most important and acclaimed transnational scholarly products in the domain of contract law should clarify what I mean. Both the UNIDROIT principles [FN45] and the first published
outcome of the Lando Commission [FN46] are useful pieces of work whose domain and ambition are limited by their attempt to avoid every political choice, while striving to keep a neutral flavor.

Unfortunately, as it made clear by scholarship devoted to the study of institutions, there is no such thing as an institutional vacuum, because informal institutional arrangements and the market, the most pervasive of all institutions, immediately fulfill whatever is not politically decided as a formal institutional choice. [FN47] As a consequence, avoiding political choices in the name of neutrality is itself a political choice in favor of the strongest market actor. Since most private law systems agree to use the market as the prevailing ruling institution in areas of contract law, it is easy to stress this aspect in a restatement or restatement-like enterprise. However, from a critical perspective, it is easy to observe that the very notion of freedom of contract is little more than a tautology in the sense that it has no normative meaning other than deferring to the market as the ruling institution. As a legal notion, therefore, it has no operative meaning. [FN48] Indeed, when the time comes to restate detailed rules of contract law rather than empty general statements around "freedom of contract" or "good faith," different political choices taken by different legal systems become more difficult to conceal. Consequently, it becomes difficult, even for a powerful argumentative device as neutrality, to hide political choices. As a result, such enterprises are limited and circumscribed in their scope.

The problem is that both the UNIDROIT Principles and the Lando Commission offer restatements without having thoroughly looked at the basic question that must be approached by every restatement, i.e. whether there is something common to be restated and what it is.

Is there a European contract law in action to be restated? If the restatement wishes to remain, as it declares, a "bottom-up" enterprise, it needs such knowledge. Without knowing whether there is a European contract law to restate, it is hard to persuade a critical reader of its coherence with its declared descriptive flavor of a professional, scholarly product and normative ambitions of enactment.

In theory, the necessity for a restatement is not necessary for a code which is typically a "top-down" exercise of political power. Nevertheless, looking at law as an aggregate of both formal and informal institutional arrangements shows that the very opposition between top-down (code) and bottom-up (restatement or common culture) is not clear cut. The function of institutions to reduce transaction costs in order to increase economic performance must be pursued by tackling both the formal and the informal aspects of them. [FN49]

In the particular domain of restatements and codes, philosophers, in general, and legal historians demonstrate that a completely descriptive exercise is impossible. Economists teach the value of knowing what is already out there as the existing institutional background on which a new code will be enacted. It is now part of the general common sense that the questions asked determine the answers received. [FN50] As a consequence, consciously or unconsciously, the restatement projects in the United States have been interpretive, hidden and normative exercises. [FN51] Conversely, the civil codes, including the more ambitious and revolutionary ones, were never fully able to impose a completely new legal order. [FN52] If "history matters" in the search for the best possible institutional arrangements, the knowledge of what is already out there as an institutional background is crucial in proposing a "principled" content of a European Civil Code that goes beyond the nationality and personal stakes of the decisionmakers involved.

As already discussed, legal change has a cost that is proportional to the degree of its departure from previous routines. The more radical the change is to formal institutions, the more the developed informal routines will become adaptively sub-optimal, and the more necessary it is to
invest resources into changing all routines (formal and informal). I submit that the best transaction cost reducing codification is the one that is able to verbalize and codify what is already out there in common between as many of the member States as possible. This is what I would call the "common core" approach to codification.

While this is a rather simple recipe coming out of comparative law and economics focusing on transaction costs (change as little as possible in the local routines by keeping as much as possible of what is already in common), there are two rather serious problems. First, nobody knows what is already common in Europe today, despite talk of a common history and the common period of the jus comune. [FN53] Discovering common elements among European countries requires a systematic and painstaking use of the factual approach, discussing common practical problems and looking for their actual solutions in all national legal systems. Of course, this must be done with the particular sensibility offered by the use of the most advanced tools of comparative legal research, such as Rodolfo Sacco's "Legal Formants." [FN54] As Professor Kötz recently reminded the many scholars that are today engaged in this ambitious enterprise within the Common Core of European Private Law Project in Trento; playing with general principles and broad ideas of jurisprudence might make it rather easy to find common aspects in European private law. Finding the technical details might be more difficult, and the overall complexity of "common core" research might make it prohibitive. [FN55]

*901 Second, it may be that, after undertaking serious common core research, it turns out that there simply is no common core to codify or restate in some areas of the law. Legal systems within Europe genuinely diverge on a number of technical issues. In such cases, principled, non-chauvinistic choices need to be made. Such choices are political, but comparative law and economics might carry them through political change. Using efficiency as a measurement device for institutional effectiveness will let policy makers know the costs of the choices they make. For example, efficiency analysis highlights what set of incentives are created for different market actors when penalty clauses are banned from contracts or when a contract is (or is not) enforced under particular circumstances or under contract principles of fairness.

Of course, this is not an easy task to carry on in practice. We are still far from knowing whether transaction cost reduction can actually be used to bring comparative law beyond its present taxonomic phase to a point where differences between alternative institutional arrangements actually can be measured. To be sure, in order to make this kind of measurement in the complexity of the real world, not only is there a lot of data collection to complete, but there is the need to cope with the very problem that makes measurement more difficult in social sciences than in natural sciences: institutions never stand to await measurement. They change at an incredibly fast rate so dynamic tools (still underdeveloped in economics) are needed. This, however, goes beyond the scope of this paper concerned as it is with the technologic problem of codification. Developing the tools needed to address these problems might, however, be the scholarly payoff of working on the European civil codification project.

I believe that, hard as it might be, common core research is an unavoidable prerequisite to reducing the transaction costs of the codification of European private law. The research should provide information about what is already common in the different European legal systems, as a byproduct, it should stimulate the development of a methodology shared by an international legal community, a crucial informal aspect of the European institutional scenario. [FN56] Common core research may eventually lead to informed conclusions as to whether European codification is a cost effective enterprise compatible with the subsidiarity principle.

*902 If a common core is not detected in one or more legal areas (which is indeed very likely),
codification may still be worthwhile because there may be an overall reduction in transaction costs in some areas of the law. In this case I agree with Professor Gambaro that comparative efficiency analysis of alternative institutional solutions (rough as it might be in the present stage) might provide a powerful tool to make efficient guesses for a cost effective European codification. [FN57]

[FNa1]. Alfred and Hanna Fromm Professor of International and Comparative Law, Hastings College of Law, University of California; Professore Ordinario di Diritto Civile, Universita' di Torino, Italy.


[FN4]. See George P. Fletcher, Basic Concepts of Legal Thought (1995).

[FN5]. For a brilliant discussion on the use of biased historiography as a strategy in the Western Legal Tradition, see P.G. Monateri, Black Gaius, 50 Hastings L.J. (forthcoming 1999).


[FN7]. On the decline of German leadership in legal studies, see Ugo Mattei, Why the Wind Changed: Intellectual Leadership in Western Law, 43 Am. J. Comp. L. 199 (1994).

[FN8]. See id.


The analogy between the political use of linguistics and that of comparative law is fascinatingly discussed by Monateri, supra note 5.

Possibly attracted by the success that in academic circles follows exaggeration, Professor Zimmermann made this point in Der Europäische Charakter der englischen Recht. Historische Verbindungen zwischen civil law und common law, 1993 Zeitritt für Europäisches Privatrecht 4.


See Monateri, supra note 5.


I discuss the needs of positive scholarship and the difficulty of comparative law in being a completely interpretive exercise in Mattei, Comparative Law and Economics, supra note 2, at 3. See also Diritto, Giustizia e Interpretazione [Law, Justice and Interpretation] (Mauro Bussani et al. eds., forthcoming 1999) (including essays by legal scholars such as Rodolfo Sacco, Antonio Gambaro, P.G. Monateri, Stefano Rodotà, Ugo Mattei, Mauro Bussani and philosophers Gianni Vattimo, Maurizio Ferraris and Jacques Derrida).

See Laura Nader & Elisabetta Grande, Current Illusions and Delusions About Conflict Management, in Traditional African Conflict Medicine (W. Zartman ed.) (unpublished manuscript, on file with the U.C. Berkeley, Dep't of Anthropology).


See Legrand, Against a European Civil Code, supra note 18.


See Mattei, supra note 22.


[FN32]. See North, supra note 27.


[FN35]. See North, supra note 27, at 27.


[FN37]. This is the argument usually associated with the work of Reinhard Zimmermann, supra note 6. A strong case against codification is also made by Hein Kötz. See, e.g., Hein Kötz, Comparative Legal Research: Its Function in the Development of Harmonized Law: The European Perspective, in Towards Universal Law: Trends in National, European and International Lawmaking (1995). The argument can be graduated and goes from the Savigny inspired idea (it is too early to codify because the common culture is not ripe) to the extreme version (by Pierre Legrand) that considers the differences between civil law and common law so wide that they can never be overtaken because of the cultural interpretative gap.


[FN39]. See North, supra note 27.

U.C. Berkeley, 1997).

[FN41]. See Kötz, supra note 37.

[FN42]. See Schlesinger et al., supra note 3.


[FN44]. The papers of the conference are published in 5 European Review of Private Law 455 (1997).


[FN47]. See generally North, supra note 27; Furboth-Richter, Neo Institutional Economics (1997); Oliver E. Williamson, Organization Theory (1990).

[FN48]. The point is very clearly made by a line of scholarship that certainly cannot be considered politically radical. See Schlesinger et al., supra note 3; Rodolfo Sacco, Legal Formants: A Dynamic Approach to Comparative Law, 39 Am. J. Comp. L. 1 (1992) (explaining the need to look for operative rules rather than declamations).

[FN49]. See North, supra note 27.


[FN53]. See id.


[FN56]. See Bussani & Mattei, supra note 1.

[FN57]. See Mattei, supra note 36, at 97.