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CONSTITUTIVE RHETORIC: THE CASE OF THE “EUROPEAN CIVIL CODE”

1. Introduction

The project for a European civil code has been on the political agenda for over 35 years. As early as 1974, Winfried M. Hauschild, at that time Head of Division in the Directorate General for the Internal Market of the Commission of the then European Communities, is supposed to have said at a symposium at the Copenhagen Business School: “We need a European Code of Obligations”.¹ In the 1980s, support from Community institutions became more substantial. The Directorate General for the Internal Market and Claus Ehlerman, Director General of the Legal Services of the Commission of the European Communities funded meetings of lawyers preparing “Principles of European Contract Law”.² At the end of that decade, the European Parliament started to support the idea of a European civil code.³ In the first decade of the new millennium, the European Commission provided some funding, for example by granting a contract to researchers working on a “Common Frame of Reference”.⁴

This support from Community officials and politicians was well received by academic scholars, who were (or are) participating in the various groups working on the “Europeanisation” of private law. Their names are probably familiar to those interested in the plans for drafting a “European civil code: Piero Guido Alpa, Stathis Banakas, Jürgen Basedow, Friedrich Blase, Hugh Collins, Ulrich Drobnig, Giuseppe Gandolfi, Konstantinos Kerameus, Ole Lando, Martijn Willem Hesselink, Ugo Mattei, Stefano Rodotà, Hans-Peter Schwintowski, Winfried Tilmann, Christian von Bar and, so it seems, Reinhard Zimmermann. Interestingly, these academics, and

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¹ O. Lando/H. Beale (eds.), *The Principles of European Contract Law Part. I: Performance, Non-Performance and Remedies* (Dordrecht/Boston/London 1994), ix.

² Lando/Beale, *The Principles*, ix-x.

³ OJ C 158 (1989), 400-401. OJ C 205 (1994), 518-519.

⁴ OJ C 140 E (2002), 538-542. COM (2001) 398 final, 14-15 and 16-17. COM (2003) 68 final, 16-17 and 23-24. COM (2004) 651 final, 8-9 and 12-13.

others, do not limit themselves to carrying the plans for a "European private law" into effect. They also spent a substantial amount of words on raising arguments in favour of the project. Unsurprisingly, the activities, papers and drafts of these academics provoked critical responses of other scholars, who question the desirability and feasibility of a European civil code.⁵

It seems, however, that in this debate, the advocates and the opponents of this new civil code do not operate on the same level of reasoning. Critics of the project seem to focus on questions of a legal or practical nature, for example whether the European Union has the competence to enact a uniform civil code, whether the (English) common law and the (continental) civil law can be merged into one uniform civil code, whether the differences in language do not constitute an insurmountable obstacle, or how a European Supreme Court would be able to deal with civil cases from all over the European Union. Advocates of the project, on the contrary, seem to have little patience with these kind of "problems" regarding the feasibility of the project. This gives the debate a peculiar character, as if both sides are not actually discussing the same issue. It is the aim of this contribution to explain this specific feature of the debate, by analysing the nature of the arguments that are brought forward by the scholars that support the case for a uniform European civil code. This analysis will start by putting the reasoning of these scholars in a historical perspective, and will subsequently apply the theory of constitutive rhetoric on their argumentation.

Constitutive rhetoric is generally regarded as a species of ordinary rhetoric, in the sense that it is a theory that attempts to explain how a group of persons can be convinced to support a specific decision.⁶ The distinctive feature of constitutive rhetoric is that it does not aim to directly persuade the public of a specific step to be taken, by using arguments that are specifically targeting the issue at hand. On the contrary, it first focuses on transforming the audience into a community. Once a community is created, various decisions will more-or-less automatically follow from being a member of this community, without the need for specific arguments in favour of those decisions. Constitutive rhetoric is, therefore "logically (if not also temporally) prior to persuasive rhetoric".⁷ Constitutive rhetoric can have this effect, because it operates from an "ideology" understood as "a network of interconnected convictions that functions in a man epistemically and that shapes his identity by

⁵ Among others: Y. Lequette, "Vers un code civil européen?" in: *Pouvoirs. Revue Française d'Études Constitutionnelles et Politiques* 107 (2003), 97-126. S.S. Lorenzo, "What do we mean when we say "folklore"? Cultural and axiological diversities as a limit for a European private law" in: *European Review of Private Law* 14/2 (2006), 197-219. P. Legrand, "Antivonbar" in: *The Journal of Comparative Law* 1 (2006), 13-40. W.J. Zwolve, "Een "Common Frame of Reference" als Europees Burgerlijk Wetboek?" in: *Weekblad voor Privaatrecht en Notarieel Recht* 6789 (March 2009), 191-193.

⁶ M. Charland, "Constitutive rhetoric: the case of the *Peuple Québécois*" in: *The Quarterly Journal of Speech* 73 (1987), 133-150.

⁷ M. Charland, "Constitutive rhetoric" in: T. Sloan, *Encyclopedia of Rhetoric* (Oxford 2001), 616-619 (617).

determining how he views the world”.⁸ An ideology usually pretends to present “a self-evidently meaningful world”, denying “historicity” and “contradictions”.⁹

Three features of constitutive rhetoric can be distinguished. Firstly, the style and the language merit attention. By using a specific concept, it is encouraged to view the facts of a given situation in a particular manner, with some facts made more noticeable than others”, a process that is also called “framing”.¹⁰ More often than not, such a concept is part of a pair of opposing concepts, sometimes referred to as a “distinction” or, if a break with an original unity is emphasised, a “dissociation”.¹¹ Since constitutive rhetoric is about creating a new (political) entity, it is, for example, likely to encounter the opposing pair of words “we” and “they”. Secondly, in the context of creating a political community by means of constitutive rhetoric, narratives are essential.¹² After all, if a community is presented as the subject of a story, its existence in the real world is claimed. In this way, narratives open the road to identification and, thus, facilitate the creation of identity. It should be pointed out that paradoxes are an inevitable ingredient of constitutive rhetoric and especially of narratives, because narratives presume the existence of the audience they seek to constitute by their discourse.¹³ Thirdly, since constitutive rhetoric is prior to persuasive rhetoric, practical arguments targeting a specific issue will play a minor role. The way in which concrete arguments in favour of a concrete proposal and practical objections to that proposal are dealt with by those applying constitutive rhetoric should not be taken at face value, but treated from the perspective of the aim of constitutive rhetoric, namely the constitution of an audience.

The structure of this contribution is as follows. Firstly, it will be argued that from a historical perspective, the decisive argument in favour of uniform codifications of private law that were brought about around 1800, and particularly the French *Code civil* (1804), was of a political, or more precisely of a constitutional nature. This civil code was brought about as part of the process of creating, or constituting, a (national) political community. Secondly, it will be argued that the reasoning of the academics who support the plans for a European civil code is of a predominantly constitutional nature as well. They are convinced that such a code is necessary in view of the political unification of Europe, since it can strengthen the identity of the European people. Thirdly, it will be argued that since the case of the proponents of a European code is predominantly founded on an argument of a constitutional

⁸ E. Black, “The second persona” in: *The Quarterly Journal of Speech* 56 (1970), 109-119 (113). Cf. also M. Charland, “Constitutive rhetoric” (2001), 618: an ideology is “the naturalised representation of cultural categories that legitimate power”.

⁹ Charland, “Constitutive rhetoric” (1987), 148 (footnote 1).

¹⁰ J.A. Kuypers, “Framing analysis from a rhetorical perspective” in: P. D’Angelo/J.A. Kuypers (eds.), *Doing news framing analysis. Empirical and theoretical perspectives* (New York/London 2010), 286-311 (300).

¹¹ C. Perelman/L. Olbrechts-Tyteca, *The new rhetoric. A treatise on argumentation* (Notre Dame, Indiana 1971), § 89-90.

¹² Charland, “Constitutive rhetoric” (2001), 617.

¹³ Charland, “Constitutive rhetoric” (2001), 617-618.

nature, it is likely that their approach to the debate will be in line with the theory of constitutive rhetoric. This could explain the particular quality of the debate mentioned above.

At this stage, two final remarks are required. Firstly, the concept of “(constitutive) rhetoric” should be stripped of its negative connotations. As Perelman and Olbrechts-Tyteca have argued convincingly, rhetoric becomes an ordinary phenomenon once it is accepted that truth is intersubjective, dependent on the reception by the public, and that it has limited value as guidance in the process of decision making.¹⁴ This means that everybody uses rhetorical techniques, and that it is also in principle legitimate to do so. One should only be conscious of the use of (constitutive) rhetoric and try to understand how it can influence a debate. It is the purpose of this contribution to illustrate this, not to pass a moral judgment.¹⁵ Secondly, since everybody uses rhetorical techniques, it is likely that the opponents of a European civil code will also do so. An article written by arguably the fiercest critic, Pierre Legrand, immediately confirms this: it bears the title “Antivonbar”, which seems to be a typical *ad personam* argument directed at Christian von Bar.¹⁶ In the contribution at hand, however, the focus will be on the use of constitutive rhetoric in the debate on whether or not to codify “European private law”, not on the use of rhetoric in general. For that reason, the reasoning of the opponents of a European civil code will not be analysed in this contribution, at least not as to their use of rhetorical techniques.

2. A historical perspective on codification

Around 1800, codifications were introduced in France (*Cc* 1804), the Netherlands (*WNH* 1809), Prussia (*ALR* 1794), and the Austrian Monarchy (*ABGB* 1811).¹⁷ The first two codes of law, the *Cc* (1804) and the *WNH* (1809), were introduced in states in which a revolution had put an end to the *Ancien Régime*. Both codifications had two important characteristics. First, the force of these codes of law was formally declared to be exclusive. This meant that in the fields of law covered by the codification no rules existed outside that codification that could be recognised as law. Therefore, judges had to decide cases on the basis of the codification alone. Another important characteristic of these two codifications is that they brought about legal unity, meaning that the rules in these codifications were the same throughout the territory of the state. They, thus, put an end to the legal diversity that had been a distinctive feature of the legal systems of the states on the European continent for many centuries. The two other codes, the *ALR* (1794) and the *ABGB*

¹⁴ Perelman/Olbrechts-Tyteca, *The new rhetoric*, “Introduction” and §16.

¹⁵ This does not mean, of course, that the use of rhetorical techniques is beyond moral evaluation. See Black, “The second persona”, 109–119.

¹⁶ Legrand, “Antivonbar”, 13. Cf. Perelman/Olbrechts-Tyteca, *The new rhetoric*, §18.

¹⁷ See for references related to this paragraph: Peter A.J. van den Berg, *The politics of European codification. A history of the unification of law in France, Prussia, the Austrian Monarchy and the Netherlands* (Groningen 2007).

(1811), were introduced in states where there had not been a radical constitutional change. Nevertheless, even in these two states the old legal doctrine was abandoned. In the Austrian-Hungarian Empire, this break was as clean as in France and the Netherlands: the *ABGB* also had exclusive force. In Prussia less drastic action was taken. The *ALR* was designed as a code with only subsidiary force, which would operate alongside various provincial codes that had primary force. Still, legislation became the only source of law in Prussia too. Rules that were not included either in the *ALR* or in the provincial *codices* that had received royal assent were rescinded. However, both the *ALR* and the *ABGB* were less radical than their revolutionary counterparts, the *Cc* in France and the *WNH* in the Netherlands, in at least one important respect: they were not aimed at complete territorial legal unity. In Prussia, the various provincial codes that were to be drafted were to have primary force in the intended regions. In the Austro-Hungarian Empire, it was specifically stated that the *ABGB* was not to be put into force in Hungary, introducing territorial legal unity only in the German and Bohemian parts of the Empire.

Two different types of arguments were brought forward to support the introduction of these codifications, each of them reflecting its specific features. Firstly, there are arguments of a juridical nature in which the focus is on the beneficial effect of a codification for the litigant. Here, the typical argument or line of reasoning is that a codification leads to increased legal certainty. This will result in a reduction of the costs of litigation, because it will be easier for lawyers and judges to handle cases. In the more radical version of this argument, it is held that a codification will make it possible for a litigant to understand his legal position himself. It should be emphasised, however, that in a juridical argumentation, uniformity is usually not deemed a necessary feature of the proposed codification. An analysis of the *Cahiers des doléances* that were brought to the French Estates General in 1788-1789 clearly shows that codification was usually asked for on the basis of arguments of a juridical nature and that as a result the desired code needed not be uniform. Juridical arguments were also important in the build-up to the *ALR*, which explains that it was - at least initially - not aimed at realising legal unity.

Secondly, there were arguments of a political nature, meaning that codification was used in the process of formation of (national) states. Two different subtypes of arguments can be distinguished here. The first category of arguments is of a practical political nature, meaning that a codification is supposed to provide the state with more money by simultaneously increasing its revenues and reducing the costs of government. Arguments of this category focus on economic and bureaucratic aspects of government. In particular, it is held that a better judicial system strengthens the state, because it furthers the economic activities of the citizens. This argument was the trademark of the mercantilists, or cameralists as they were referred to in the German territories. Most mercantilists believed that a codification would bring legal certainty and would thus lead to a reduction of the number and length of legal procedures. As a result, subjects would have more money to spend on other things. This, of course, resembles the juridical argument, but the difference is that mercantilists emphasised the benefits of this for the state,

for example the increased taxability of citizens. As with the juridical argument, the proposed codification usually did not aim at establishing legal unity. Legal certainty was the main aim. Consequently, mercantilists considered additional measures, such as a reform of the judicial organisation, as at least equally important. A minority of the mercantilists also argued that the state might benefit from a codification as it would facilitate trade between the various regions. Obviously, the latter favoured a codification that was uniform throughout the territory. The bureaucratic argument is related to this; a uniform codification would make it easier to administer the country. After all, the legal system would become more transparent and enable the state to move bureaucrats from one region to another.

The second category of arguments is of a political–theoretical nature. It is based on a constitutional logic, derived from Rousseau’s political theory of popular sovereignty. Rousseau compared the state with a human body. It was a moral political body, which was supposed to have a will of its own, the well-known *volonté générale*. Laws were the expression of this will and to be compared to the brains of a body.¹⁸ In this context, Rousseau emphasised two aspects of these laws. First, he argued that each state should have its own specific laws that would provide it with a distinguishable identity. Each state should have its own traditions, habits and character. Secondly, he forcefully pleaded for these laws to be uniform. Legal unity was a necessary corollary of the state as one political body. If laws are the expression of the *volonté générale* of this body, it is difficult to imagine legal diversity. It is important to point out that, according to Rousseau, the political community was not a pre-existing entity. It had to be created, and codification was a perfect means to that end. In fact, these codifications were meant to constitute a coherent political entity. For that reason, it is hardly surprising that the *Code civil* is sometimes referred to as the proper constitution of France.¹⁹

The constitutional argument turned out to be the most effective one, at least with regard to the introduction of uniform codifications. The juridical argument was, of course, invoked now and then, but it hardly ever resulted in a unified code without the use of other arguments. The practical political arguments were invoked more successfully, particularly the second economic argument related to intra-state trade, and the bureaucratic argument. These arguments were, however, only systematically brought forward by the cameralists in the Austrian Monarchy, in particular by Johann Heinrich Gottlob von Justi (1717–1771). This can be explained by the fact that in the course of the eighteenth century, the Silesian Wars with Prussia laid bare the weakness of the Austrian Empire, showing the absolute necessity to reform the administration of the various parts of this Monarchy. Even in this case, complete legal unity was not the aim. In France and the Netherlands,

¹⁸ J.J. Rousseau, *Oeuvres Complètes* III (Dijon 1970), 244.

¹⁹ Y. Lequette, “Quelques remarques à propos du projet de code civil européen de M. von Bar” in: *Recueil Le Dalloz* 178/28 (2002), 2202–2214. J. Carbonnier, “Le code civil” in: P. Nora (ed.), *Les Lieux de mémoires* II.2: *La nation. Le territoire, l’état, le patrimoine* (Paris 1986), 293–315 (309).

where revolutions had occurred, the constitutional argument was the predominant one. It is no coincidence, therefore, that only in these two countries a uniform codification was brought about that established legal unity throughout the country. The conclusion must be that these two uniform codifications were not in the first place practical assets, making things better for litigants or facilitating intra-state trade, but constitutional tools aimed at forging the political identity of “new nations”.²⁰

3. The reasoning of academics in favour of a European civil code

It is interesting to note that the juridical argument is not strongly represented in the reasoning of the academics in favour of a European civil code mentioned above in the introduction. Only Kerameus favours a European codification solely for juridical reasons.²¹ Such a codification would bring a “unification, renovation and, why not, simplification of European civil law”. Kerameus argues that this is vital, since “today’s multitude of coexisting and overlapping legal rules within the European Union is, partly, an unnecessary and artificial source of confusion and uncertainty”.²² He concludes that “in a world of transcendent uniformity in areas such as means of communication (...), an appropriate degree of legal uniformity would only be adequate and, probably, welcome by lawyers and non-lawyers alike.” Interestingly, he limits his proposal for the time being to a “partial unification”, which can be explained by the fact that he does not use arguments of a political nature.

Some of the other academics also invoke the juridical argument, but only in addition to other arguments. Schwintowski, for example, states at the very end of his paper that “people should be able to take this code and, having read it, know what to do and not to do”.²³ It is also argued that individual citizens will benefit

²⁰ M. Van Hoecke, “L’idéologie d’un code civil européen” in: A. Wijffels (ed.), *Le Code Napoléon, un ancêtre vénéré? Mélanges offerts à Jacques Vanderlinden* (Brussels 2004), 467–494 (468–469), and A. Wijffels, “A new software-package for an outdated operating system?” in: M. Van Hoecke/I. Ost (eds.), *The harmonisation of European private law* (Oxford 2000), 101–116 (114), also conclude that codifications of private law were essential instruments in forging identity and political unity in the European nation states.

²¹ K.D. Kerameus, “Problems of drafting a European civil code” in: *European Review of Private Law* 5 (1997), 475–481 (480–481). Kerameus (1937) was professor of civil procedure at the Athens University Law School and president of the International Academy of Comparative Law.

²² Kerameus, “Problems”, 480. It is widely acknowledged that the piecemeal private law legislation issued by the European Union results in inconsistencies and confusion. Cf. V. Zeno-Zencovich, “The “European Civil Code”, European legal traditions and neopositivism” in: *European Review of Private Law* 4 (1998), 349–362 (354). U. Drobnig, “Europäisches Zivilgesetzbuch – Gründe und Grundgedanken” in: D. Martiny/N. Witzleb (eds.), *Auf dem Wege zu einem Europäischen Zivilgesetzbuch* (Berlin 1999), 109–123 (118–119).

²³ H.-P. Schwintowski, “The European civil code: A framework code only” in: S. Grundmann/J. Stuyck (eds.), *An academic green paper on European contract law* (Deventer 2002),

from a European civil code because it will offer better, more progressive law. Von Bar, for example, states that "many of our own national private law systems are hopelessly outdated".²⁴ Banakas writes that "the citizens of Europe will probably be happy with a change in their civil law to the better".²⁵ According to Banakas and Hesselink, the new European private law must, therefore, be "forward looking" and bring "progress".²⁶ Even though, however, the juridical argument is obviously present, it should be noted that an explicit argument that a European civil code will reduce the costs of litigation for ordinary citizens is lacking. This is hardly surprising. The juridical argument is historically connected to codification *per se*, not necessarily to a unifying codification. Since most European countries already have codified legal systems, the advantage for the majority of litigants will be limited in this respect. On the contrary, a uniform European civil code could easily lead to more expensive lawsuits, as a result of, for example, the necessity of translations and the distance to a new Supreme Court.

The first practical political argument as used by the mercantilists, the argument that the state benefits from a codification because of a reduction of lawsuits seems also to be absent. Again, this is easy to understand. After all, this argument is closely connected to the juridical argument, which for reasons explained above was not strongly brought forward by the academics. The second argument of a practical political nature, concerning the promotion of intra-community trade, seems at first sight to be an important part of the case made by the scholars. This makes sense, since this argument is historically mostly used to underpin the introduction of a *uniform* codification. Indeed, there is no doubt that according to most academics a uniform European civil code is necessary in order to further the trade between the Member States.²⁷ The argument of Lando may serve as an example: "The existing

235–248 (246–247). Schwintowski (1947) holds the chair of private law, mercantile law, economic law and European law at the Humboldt University of Berlin.

²⁴ C. von Bar, "A Common Frame of Reference for European Private Law" in: *Electronic Journal of Comparative Law* 12/1 (May 2008), 2. Von Bar is professor of private law, European private law, international private law and comparative law at the University of Osnabrück. He is co-founder of the European Law Institute and leads, since 1999, the Studygroup on a European Civil Code. Since 2010, he is special advisor to the commissioner for justice of the European Commission.

²⁵ Banakas, "European tort law", 367. Banakas is a reader in law at the University of East Anglia (UK) and regularly represents the UK in European working groups on the harmonisation of European tort law. Cf. also Drobnig, "Europäisches Zivilgesetzbuch", 120.

²⁶ Banakas, "European tort law", 372. M.W. Hesselink, *The new European private law. Essays on the future of private law in Europe* (The Hague/London/New York 2002), 8. Hesselink (1968) is professor of European private law at the University of Amsterdam and a member of the Studygroup on a European Civil Code. Cf. also Lando/Beale, *The Principles*, xvi.

²⁷ Lando/Beale, *The Principles*, xv. C. von Bar, "From principles to codification: prospects for European private law" in: *Columbia Journal of European Law* 8 (2002), 379–387 (385). J. Basedow, "A common contract law for a Common Market" in: *Common Market Law Review* 33 (1996), 1169–1195 (1172 and 1181–1182). Basedow, "Codification of private law", 41. F. Blase, "A uniform European law of contracts – Why and how?" in: *Columbia Journal of European Law* 8 (2002), 487–491 (490). Drobnig, "Europäisches Zivilgesetzbuch", 116–117.

variety of contract laws in Europe may be regarded as a non-tariff barrier to the trade. It is the aim of the Union to do away with restrictions of trade within the Communities, and therefore the differences of law which restrict this trade should be abolished".²⁸ Lando does not argue, however, that the Union as a governmental entity will benefit from an increase in trade by means of growing revenues. He presents the introduction of a European civil code as a legal consequence of the Treaties, which discharges him from the obligation to specify why furthering trade is considered so important. Basedow is a little more specific, by describing the aim of the Union in this context as "promoting welfare", but there, too, any reference to the interest of the government of the Union is lacking.²⁹ Moreover, the trade argument is usually not fleshed out. Drobniġ, for example, simply states: "Ein einheitlicher Markt bedarf fuer sein *optimales* Funktionieren eines einheitlichen privatrechts. Das zeigt bereits die geschichtliche Erfahrung gerade auch in Deutschland."³⁰ This is at least remarkable in light of the many papers questioning the economic necessity of a European civil code.³¹ It should be emphasised, however, that furthering trade is hardly ever the only argument for those who support the case of a European codification.

Historically, the juridical and practical political arguments were not conclusive in bringing about the unifying codifications of the late eighteenth and early nineteenth centuries. Today, these arguments seem to carry even less weight, at least in the reasoning of scholars. The constitutional argument, however, seems to be as dominant in the present debate on codification as it was 200 years ago, especially since 1992.³² Interestingly, many present-day academics favouring a European codification acknowledge this constitutional function of the codifications of the eighteenth and nineteenth centuries and make it a part of their argumentation.³³ A fine example of this is provided by Collins, where he writes:

²⁸ O. Lando, "European Contract Law after the year 2000" in: *Common Market Law Review* 35 (1998), 821-831 (821). Lando (1922) is professor emeritus at Copenhagen Business School and has been chairman of the Commission on European Contract Law for over twenty years.

²⁹ Basedow, "A common contract law", 1184. Basedow (1949) is director of the Max Planck Institute for Comparative and International Private Law (Hamburg).

³⁰ Drobniġ, "Europäisches Zivilgesetzbuch", 116. Drobniġ (1928) is emeritus director and scientific member of the Max Planck Institute for Comparative and International Private Law (Hamburg). Cf. also Basedow, "A common contract law", 1172.

³¹ H. Wagner, "Economic analysis of cross-border legal uncertainty" in: J.M. Smits (ed.), *The need for a European contract law. Diversity of contract law and the European internal market* (Groningen 2005), 25-51. Cf. also Van Hoecke, "L'idéologie d'un code civil européen" 481.

³² Cf. also Wilhelmsson, "Private law in the EU", 89-90, and Van Hoecke, "L'idéologie d'un code civil européen", 481.

³³ S. Rodotà, "The civil code within the European "constitutional process"" in: M.W. Hesselink (ed.), *The politics of a European civil code* (The Hague 2006), 115-124 (118). M.W. Hesselink, "The politics of a European civil code" in: Hesselink (ed.), *The politics of a European civil code*, 143-170 (153). J. Basedow, "Codification of private law in the European Union: the making of a hybrid" in: *European Review of Private Law* 9 (2001), 35-49 (41). E.K. Banakas, "European tort law: is it possible?" in: *European Review of Private Law* 3 (2002), 363-375 (364). R. Zimmermann, "Civil code and civil law. The "Europeanization" of private law within the →

‘Historically, in nation states, civil law provided the bedrock on which political associations and institutions were constructed. The evolving rules of ownership, trade and personal status contained in private law described the structure and scope of a community. (...) Reliance on the rules implies a common identity and membership in a community. Without such an implicit common identity and membership, it seems impossible to imagine a single polity, an association of all peoples of Europe’.³⁴

Most of the other scholars also emphasise that a European civil code is necessary in order to create a European political community. Banakas, for example, writes that “a political ground for the harmonization of European civil law can be found in the quest for a common European citizen’s identity”.³⁵ Alpa is also very explicit in this regard, stating that “if it is true that the legal component – that is the entire organization of law in a community constitutes an essential characteristic of that community – the drafting of a unitary code at a European dimension will become one of the aggregate factors in cementing that same European Community, and a factor in defining the collective European identity”.³⁶ He believes that “each one of us (...) by studying, interpreting and applying the unified Civil Code will be and feel more European”.³⁷ Zimmermann writes that “the political will exists to advance the process of European integration on an economic, political and cultural level; and it appears to be perfectly appropriate to facilitate this process by striving towards legal unity”.³⁸ It should be noted that according to Zimmermann, a European codification does not lie around the corner. He seems to follow Savigny, arguing that “European legal unification is in the first place a task for legal scholarship, (...) and in doing so may or may not level the ground for unificatory legislation”.³⁹ Blase, too, emphasises the higher constitutional goal of a uniform codification. Interestingly, he does so with an eye on the position of Europe in the world at large. He argues that “with legal unification, legal professionals hold an important key to

European Community and the re-emergence of a European legal science” in: *Columbia Journal of European Law* 1 (1995), 63–105 (73).

³⁴ H. Collins, *The European civil code. The way forward* (Cambridge 2008), 6. Collins (1953) holds the chair of English Law at the London School of Economics. He is co-founder of the Society for European Contract Law (SECOLA.org).

³⁵ Banakas, “European tort law”, 366. See also Von Bar, “From principles to codification”, 385; Basedow, “Codification of private law”, 41 (“European identity might very well be furthered by a code”) and J. Basedow, “The case for a European contract act” in: Grundmann/Stuyck (eds.), *An academic green paper*, 147–157 (154). G. Gandolfi, “Un code Européen des contrats: pourquoi et comment” in: Grundmann/Stuyck (eds.), *An academic green paper*, 193–205 (205).

³⁶ G. Alpa, “European Community resolutions and the codification of “private law”” in: *European Review of Private Law* 2 (2000), 321–333 (333). Alpa (1947) is professor of law at the Sapienza University of Rome.

³⁷ Alpa, “European Community resolutions”, 333.

³⁸ Zimmermann, “Civil code and civil law”, 73.

³⁹ Zimmermann, “Roman law and European legal unity” in: A.S. Hartkamp *et al* (eds.), *Towards a European civil code* (Nijmegen 1998 (2nd edition)), 21–39 (39).

a truly unified Europe”, and explains that this would place Europe on the map, internationally: “We would also show our independence from North America”.⁴⁰

Some academics realise that creating a European identity is quite difficult, given the differences in language and culture, and consider a common civil code as one of the few options to achieve that identity. Schwintowski, explicitly referring to the difference between the European Union and the USA in this respect, argues that “because Europeans are finding it so difficult to develop and feel something of a European identity, it is up to the Member States of the Community to take advantage of this unique opportunity and do what already so often brought peace and unity to individual nations: create a common, a European code of civil law”.⁴¹ In line with this, the European civil code is often presented as the “real constitution” of Europe. Mattei, for example, argues that “because economy is not disconnected from culture, ideology and society, this is a constitutional moment”, concluding that the European civil code will be the (economic) constitution of Europe.⁴² Rodotà agrees with this, with an explicit reference to the historical role of codifications. He thinks that, as in the past, “civil codes should play an essential role in the development of the new Europe, representing the real constitution of civil society”.⁴³ Collins, finally, comes to the same conclusion: “A Civil Code provides a vital ingredient in constructing an economic and social constitution for Europe. In the long run, in order to build greater solidarity among the peoples of Europe, it is this social and economic constitution that must be constructed”.⁴⁴

4. Constitutive rhetoric and the debate on a European civil code

Since the main argument of the scholars in favour of a European civil code is of a constitutional nature, it is likely to encounter a specific type of reasoning in their papers, described above as constitutive rhetoric. In this section, the nature of the reasoning of the scholars will be discussed, distinguishing three characteristic features of constitutive rhetoric. Firstly, the style and the language used by the academics will be analysed. Constitutive rhetoric is about creating a (political) entity, so it is important, for example, to use the opposing pair of words “we” and “they”. Secondly, the presence of narratives will be investigated. In the context of creating a political community by means of constitutive rhetoric, a narrative is essential. After all, if a community has a history, it obviously exists. Finally, the way

⁴⁰ Blase, “A uniform European law of contracts”, 490. Blase is a lawyer.

⁴¹ Schwintowski, “The European Civil Code”, 243-244.

⁴² U. Mattei, “Hard minimal code now – A critique of “softness” and a plea for responsibility in the European debate over codification” in: Grundmann/Stuyck (eds.), *An academic green paper*, 215-233 (233). Mattei (1961) is professor of private law at the University of Turin (Italy) and general editor of the series Common Core of European Private Law (Trento Project).

⁴³ Rodotà, “The civil code”, 118. Rodotà (1933) is emeritus professor of private law at the Sapienza University of Rome. He was member of the European Parliament (1987) and of the Convention for the Charter of Fundamental Rights of the European Union (2000).

⁴⁴ Collins, *The European civil code*, 4. Cf. also idem, 94 and 101-103.

in which arguments of opponents of a European codification, usually implying practical obstacles with regard to the feasibility of the project, are dealt with will be investigated. Since the introduction of a uniform codification on a European level is primarily meant as an instrument to constitute the new political entity, it is likely that these arguments are not taken at face value, but treated from the same constitutional perspective.

4.1. *Style and language*

The academics clearly use the terms "we" and "they" frequently, obviously meant to create a group with a "European identity". Von Bar, for example, states that "they oppose it, they accuse us of", thus suggesting that there is a struggle going on.⁴⁵ Elsewhere he writes "let us build a new common law for our old continent".⁴⁶ Banakas even employs terminology associated with war: "academics are drafted to the political task" of preparing a civil code.⁴⁷ This struggle is, of course, not about the civil code itself, but about the future of Europe. Hesselink, for example, emphasises that there is a battle at hand "between Euro-sceptics and intergovernmentalists, on the one hand, and federalists on the other", assigning himself to the latter group. The war-metaphor has the advantage of creating a sense of urgency, thus implying an exhortation to join the group and eventually to act. This sense of urgency is made explicit by, for example, Banakas, stating that "it is a well-known mantra that European unity must constantly evolve or perish".⁴⁸

In this battle, those favouring a European civil code are positively labelled "modern", with the implicit label for the opponents of "old-fashioned" or "backward".⁴⁹ This is usually an effective distinction, because most people would like to be "modern". A very popular distinction is "national" versus "post-national", which makes it possible to associate the opponents with "nationalism", a very negative label indeed.⁵⁰ Hesselink does so indirectly by positively describing the "federalists", as a result of which "we" and "they" trade places. Federalists, he writes, "are more optimistic with regard to the Europeanization of private law. They dismiss the culturalist position as being essentially nationalist. They have a dream in which (part of) private law should be post-national. And they are strongly committed to the ideal of European unity, and look upon the new nationalism with great suspicion".⁵¹ Basedow is less subtle. He criticises the universities, because

⁴⁵ Von Bar, "From principles to codification", 379.

⁴⁶ C. von Bar, "Paving the way forward with principles of European private law" in: Grundmann/Stuyck (eds.), *An academic green paper*, 137-145 (145). Cf. also *ibidem*, 137.

⁴⁷ Banakas, "European tort law", 367.

⁴⁸ Banakas, "European tort law", 367. Cf. also Hesselink, "The politics of a European civil code", 148, who concludes that in this battle the Euro-sceptics "seem to have won the day".

⁴⁹ Von Bar, "From principles to codification", 379.

⁵⁰ Collins, for example, makes abundant use of the concept of the European Union as a "post-nationalist" political entity. Collins, *The European civil code*, 13, 16, 20 and 23.

⁵¹ Hesselink, "The politics of a European civil code", 148.

students of law “learn the false lesson that the essence of law is national”.⁵² As a result, they are “marked by a nationalism which is unknown in other sectors of higher education”. He subsequently states that “this anti-European effect of the teaching of law seems utterly unacceptable”. Since nobody wants to be affiliated with “old-fashioned”, “intellectually unsound” or “nationalistic”, this language strongly invites the audience to join the pro-European civil code group. Consequently, those who question the feasibility of the project will feel the need to emphasise that they are not “anti-European”.⁵³

The idea of constitutive rhetoric is that the audience joins the group as a result of a strong “we” versus “they” distinction. It should be realised, however, that the use of terminology as explicit as just described can be counterproductive. Some terms that are meant to enforce the (political) entity, can easily have the opposite effect. Some words, such as “European constitution”, can be useful to take a community of states to a higher level of integration, but probably precisely for that reason also carry the danger of estranging a part of the audience. Choosing and using concepts is obviously a matter of trial and error, testing the grounds of affiliation. Explicit terminology is, therefore, more often than not mitigated by simultaneously employing mystifying concepts. It is no coincidence that the European Commission refers to the work of the academics on a European private law as a “Common Frame of Reference” or a “non-sector-specific legislative device”, not as a “codification”.⁵⁴ Von Bar is aware of the negative effect the word “civil code” can have on an audience. He writes that “it would not be desirable for the very notion of a European Civil Code to become an emotive term whose use must always be moderated with extreme care to suit the particular readership in question”.⁵⁵ He sometimes even argues that the term “civil code” should be avoided altogether, because “it raises emotions and fears which for the time being are impossible to overcome”.⁵⁶

The word “codification” cannot be completely omitted, however, because of its function in the context of constitutive rhetoric. Von Bar is aware of this. He confirms that the term CFR “has the charm of the unknown and, at least on the face of it, the politically innocent”, but at the same time describes the toolbox function of the CFR as a “synonym for a first class funeral”. It is, therefore, not surprising that he keeps using the term “code”, but tries to play down its significance. While addressing an English audience on the subject, he tells them not to “be worried by the words “civil code”. We have merely adopted the terminology of the European Parliament (...). But what is a code? In the foreseeable future at least we do not mean a continental-

⁵² Basedow, “The case for a European contract act”, 153.

⁵³ Zwalve, “Een “Common Frame of Reference”, 192: “Men mag dergelijke gedachten niet als anti-Europees bestempelen; dat standpunt zij verre van mij”.

⁵⁴ Cf. Zwalve, “Een “Common Frame of Reference”, 191.

⁵⁵ Von Bar, “From principles to codification”, 385.

⁵⁶ C. von Bar, “A Common Frame of Reference for European private law – Academic efforts and political realities” in: *Tulane European and Civil Law Forum* 23 (2008), 37-49 (40).

type comprehensive civil law”.⁵⁷ It should be noted that Von Bar in turn tries to mitigate this statement by using the proviso “in the foreseeable future”. Such provisos are common coinage in constitutive rhetoric, because it is possible to make a point or use a concept, whereas at the same time the urgency for a possible opponent to react is defused. Finally, the explosive connotation of the concept of a “European civil code”, due to its relationship to the process of nation building, can also be defused by introducing a distinction. Von Bar, for example, distinguishes two different modes of a European civil code: a “legislative act of the conventional type for the purpose of crowning the birth of a state” and “an intellectually sound model with the potential (...) to grow in legal authority and binding force”.⁵⁸ Who will be able to resist an “intellectually sound model”?

Some scholars, however, grow weary of this paradox, which consists in simultaneously affirming and denying that the final purpose is a European civil code. Collins, for example, pierces the terminological veil created by the Commission by referring to the CFR as “a code that denies that it is a code”, or “a code that dares not speak its name”.⁵⁹ Hesselink, too, bluntly states that to his understanding there is no doubt that the Commission aims to achieve a European civil code, because it “decided to allocate the task of drafting the CFR to a Network led by a group called the Study Group on a European Civil Code”.⁶⁰ They obviously believe that repeatedly using the concept of “codification” is necessary to bring it about in the long run.

Finally, the use of words such as “necessary”, “logically” and “inevitably” is significant. In this way, a European civil code is presented as the necessary outcome of previous conduct, decisions or accepted ideals and, thus, as a *fait accompli*. Banakas offers a clear example of this where he writes that “the equal treatment of all European nationals in the geographical area of the Union necessitates harmonization of national liability regimes”.⁶¹ “Universal Human rights”, he argues, “can be seen as inevitably leading to uniform civil rights”. Von Bar states that “European jurists sense that matters cannot stay as they are”.⁶² After all, “that diverse private law hampers the internal market is an everyday experience, whether that admits of empirical representation or not.” It is, therefore, not “transparent how, in the long term, the European Union should operate with presumably (sic)

⁵⁷ C. von Bar, “A new Jus Commune Europeum and the importance of the common law” in: B.S. Markesinis (ed.), *The Clifford Chance Millennium Lectures on the coming together of the common law and the civil law* (Oxford 2000), 67–79 (78).

⁵⁸ Von Bar, “From principles to codification”, 280.

⁵⁹ Collins, *The European civil code*, 77 and 86.

⁶⁰ Hesselink, “The politics of a European civil code”, 160. Cf. also the description of the Common Frame of Reference by B. Lurger, “The Common Frame of Reference/Optional Code and the various understandings of social justice in Europe” in: T. Wilhelmsson/E. Paunio/A. Pohjolainen (eds.), *Private law and the many cultures of Europe* (The Hague 2007), 177–199 (180–181). Lurger is a member of the Studygroup for a European Contract Code.

⁶¹ Banakas, “European tort law”, 366.

⁶² Von Bar, “From principles to codification”, 385.

much more than 20 different regimes of private law.” Schwintowski, provides another example, by arguing that “the true logic of harmonisation entails not only safeguarding what has been achieved at the end of a long discussion process among the Member States of the European Union, but also presenting it to the citizens of Europe in a new quality and in a manner which for the first time, also shows that Europe’s community of law exists not only in the minds of Brussels bureaucrats but also as a code which is truly meaningful for every individual in the world’s largest economic entity”.⁶³

Hesselink, too, writes that a European civil code is inevitable. He admits that there is a lot of vagueness in the communications of the Commission, but he nonetheless expresses the conviction that “a code it will be”.⁶⁴ Interestingly, there seems to be an inconsistency in the paper of Hesselink, because some pages further he accepts that the *Action Plan* of the Commission might not lead to a codification. He warns his public that such a failure,

‘will be highly symbolic as well. When it comes to subjects that directly affect the everyday life of citizens, Europe is hopelessly divided, critics would probably say. This would add to the skepticism concerning the difficulty Europe had in reaching an agreement on a constitutional treaty and the subsequent rejection of it by the majority of the French and Dutch populations’.⁶⁵

Such “inconsistencies” are, however, in fact paradoxes because they are closely connected to the purpose of constitutive rhetoric. Codification is presented as the necessary outcome of a process, in order to convince the audience to join the group of supporters. By doing so, however, there is always the risk that the audience does not see the necessity to act, since a codification will be arrived at anyhow. It is, therefore, more effective to create simultaneously a sense of urgency by suggesting the possibility of a crisis.

Schwintowski provides another fine example of such a paradox, combining the *fait accompli* reasoning with a sense of crisis. He starts his paper by arguing that “Europe is moving towards a European Civil Code” and that “European contract law already exists”. He continues by stating that “it would be absurd for Europe to stop in its tracks and abandon the project of actually realising the harmonisation idea in the form of a common European Civil Code. This would be tantamount to throwing away everything that harmonisation has achieved so far and that has long since become reality in the Member States”.⁶⁶ At the end of the paper, however, he creates a sense of crisis, by concluding that “all this shows how urgently Europe needs symbols that will create a sense of community. A European Civil Code would thus be a superb opportunity to give the European idea another visible and

⁶³ Schwintowski, “The European Civil Code”, 243–244.

⁶⁴ Hesselink, “The politics of a European civil code”, 143. Cf. also *ibidem*, 160.

⁶⁵ Hesselink, “The politics of a European civil code”, 154.

⁶⁶ Schwintowski, “The European Civil Code”, 243.

meaningful symbol. This is an opportunity which we should not gamble away carelessly."⁶⁷

4.2. Narratives

Narratives are also likely elements of constitutive rhetoric. A narrative allows for historical identification, because it suggests continuity. It presents a subject as existing prior to the moment of the action in the narrative itself. The purpose of this in the context of constitutive rhetoric is to bring the audience more easily to the cause, by convincing them that the cause is almost predestined. The suggestion is that there is very little still to decide.⁶⁸ In this respect, there is a strong resemblance with the use of words related to the argument of succession, as discussed above. Von Bar, for example, endorses the narrative in which the Empire of Charlemagne is presented as the predecessor of present-day Europe, by reiterating a statement of Jacques Delors, made in 1992: "Charlemagne nous rappelle que l'Europe est plus ancienne que les états qui la composent. Avec notre communauté, nous redécouvrons l'Europe dans sa totalité".⁶⁹ Particularly remarkable here is the use of the words "nous redécouvrons", because it suggests a prior existence. In the same way, Von Bar suggests the pre-existence of a European private law, by referring to countries "which think they need more time to accommodate to a renewed *jus commune europaeum*".⁷⁰ Hesselink seems to endorse this narrative, by referring to the work on a European civil code as a "(re-)Europeanization of private law".⁷¹ Reinhard Zimmermann, finally, also gives some support to the narrative, where he describes the role of legal science in the process of legal unification: "In carving out their common systematic, conceptual and ideological foundations which are hidden under the debris piled up in the course of the legal particularization over the last two hundred years".⁷²

As has been explained earlier, constitutive rhetoric is prone to create paradoxes and the narratives are no exception to this. The narrative of Von Bar about a "*jus commune europaeum*" can serve as an example. Von Bar suggests with this narrative the pre-existence of a European private law. In another paper, however, he negates the availability of such a common ground. There, he argues that "Europe also needs a "single currency" in law, a further symbol of its cohesion, not least with one eye

⁶⁷ Schwintowski, "The European Civil Code", 246.

⁶⁸ Cf. Perelman/Olbrechts-Tyteca, *The new rhetoric*, chapter 2: "Arguments based on the structure of reality".

⁶⁹ Von Bar, "From principles to codification", 379 (footnote).

⁷⁰ Von Bar, "Paving the way forward", 143. Cf. also Basedow, "A common contract law", 1170, and Schwintowski "The European Civil Code", 246.

⁷¹ Hesselink, "The politics of a European civil code", 150. Cf. also Walter Hallstein (1901-1982), member of the first European Commission, as early as 1964: "die verloren geglaubte Einheit des europäischen Wesens tritt wieder ans Licht". W. Hallstein, "Angleichung des Privat- und Prozessrechts in der Europäischen Wirtschaftsgemeinschaft" in: *Rabelszeitschrift* 28 (1964), 211-231 (230).

⁷² Zimmermann, "Roman law and European legal unity", 38.

on its growing role in the world.”⁷³ In order to support this need for a European codification he compares Europe to the United States, explaining that the situation there is entirely different, as “a single language prevails and it has been possible to build on a predominantly shared legal tradition.”⁷⁴ Again, this paradox is functional because, on the one hand, the audience is told that a European codification does not constitute a radical departure from history, whilst on the other it must be made clear that action is required.

Obviously, a narrative need not be flawless, it probably seldomly is, as long as it is able to serve its purpose: creating a community. If it turns out that the narrative does not serve its purpose anymore, it can easily be adapted or even traded in for another narrative. After all, a narrative does not operate as an indispensable argument. If the Greeks are not completely taken in by the narrative of a European Empire in which Charlemagne figures prominently because they were not part of that Empire, one could decide to look for another, more encompassing story. With regard to the narrative of a “*jus commune europaeum*”, for example, Wijffels emphasises the fact that during the *Ancien Régime*, the local *iura propria* (statutes or customs) always prevailed over this “European common law”, which only enjoyed subsidiary force.⁷⁵ In fact, each territory had developed its own version of the *ius commune*. Alpa seems to realise this and, therefore, replaces this narrative by another one based on the “common legal values that have consolidated in Western Europe”.⁷⁶ According to him, there are in all countries of the European Union “fundamental rights of an identical nature”.⁷⁷

The narrative can even be incorrect, as the founding myth provided by Hesselink concerning the early days of the process of the Europeanisation of private law shows.⁷⁸ Using the typical beginning of a fairy tale, he informs his audience that “in the beginning, the Europeanization of private law was quite romantic” and that “nobody remembers exactly when it started”. He subsequently argues that “it was characterized by harmony and openness”, and that “it was an exciting academic exercise”. He, thus, emphasises the innocence of the activities of the academics by stressing that it was not political. As late as 2001, he argues, the Commission stepped in and the process became politicised. It is easy to demonstrate that the facts on which the narrative by Hesselink is founded are slightly different.⁷⁹ European officials such as Hauschild have been involved from the start and the

⁷³ Von Bar, “From principles to codification”, 385.

⁷⁴ Von Bar, “From principles to codification”, 385.

⁷⁵ Wijffels, “A new software-package”, 114. Cf. also E. Descheemaeker, “Faut-il codifier le droit privé européen des contrats?” in: *McGill Law Journal* 47 (2002), 791-853 (825).

⁷⁶ Alpa, “European Community resolutions”, 328. Cf. also Schwintowski, “The European Civil Code”, 247.

⁷⁷ Alpa, “European Community resolutions”, 328.

⁷⁸ Hesselink, “The politics of a European civil code”, 154-155.

⁷⁹ A slightly different version of this narrative can also be found at Von Bar, “A Common Frame of Reference”, 41 and 43, and at Zeno-Zencovich, “The “European Civil Code”, 353-354.

issue of codification was already dealt with in the European Parliament as early as 1989.⁸⁰ In addition, a close connection always existed between the academics and Community institutions involved. Lando, a good acquaintance of the Director General of the legal services of the Commission in the 1980s, Claus Ehlermann, makes no secret of the fact that his group was already funded by the then EC in that period.⁸¹ Since this narrative is not essential to the reasoning in favour of a European codification as such, however, the strained relationship to the facts is immaterial.

4.3. *The role of arguments in a discourse of constitutive rhetoric*

As has been shown above, most academics in support of the introduction of a European civil code emphasise the constitutional argument. They favour a European codification of private law not so much because it could provide better law for litigants, or because it could enhance the taxability of citizens by reducing the length and number of lawsuits, but because it could contribute to the project of a politically unified Europe by strengthening a common identity. This conclusion has serious consequences for the role arguments play in the debate on the desirability and feasibility of such a European code. Given the overriding importance of the political goal, the specific arguments dealing with the advantages and disadvantages of the codification project itself will be of less relevance to these scholars. Since in their view a European code is a logical corollary of the process of political integration, the reasoning itself will become part of the constitutive rhetoric. This is true for the treatment by the scholars not only of the arguments in favour of a European civil code, but of the arguments brought forward against such a code as well.

It has already been shown that paradoxes are part and parcel of constitutive rhetoric and the use of arguments in favour of a European civil code are no exception to this. Even the main argument in favour of a European civil code, the constitutional argument, does not escape the paradoxical nature of constitutive rhetoric. This argument is often presented in the context of overcoming "nationalism", by creating a distinction between opponents being "nationalistic" and those favouring European integration as "post-nationalists". This serves, of course, the purpose of encompassing the audience, because nobody wants to be associated with "nationalism". However, the distinction results in a paradox, because a closer look at the reasoning of the academics clearly indicates that in fact they are themselves

⁸⁰ See for the involvement of Hallstein, member of the first European Commission, above footnote 71.

⁸¹ Lando/Beale, *The principles*, xii. The funding is also acknowledged by W. Tilmann, "Zweiter Kodifikationsbeschluss des Europäischen Parlaments" in: *Zeitschrift für Europäisches privatrecht* 3 (1995), 534-551 (541-542). Cf. for some research into the funding of the work on a European private law: A. Schreiner, "The Common Core of Trento. A socio-legal analysis of a research project on European private law" in: A. Jettinghoff/H. Schepel (eds.), *In lawyers' circles. Lawyers and European legal integration* (The Hague 2004), 125-140 (130-131).

involved in a process of nation building on a European level.⁸² Their emphasis on the need for symbols, for example, seems to be a reflection of the efforts on an institutional level to create more coherence in the Union by introducing a hymn and a flag, both typical instruments of nineteenth-century nation building.⁸³ The references made by many scholars favouring a European civil code to the codifications of the eighteenth and nineteenth centuries also confirm that there is at least a parallel with nation building on a European level.⁸⁴ Wilhelmsson describes this tension within the argumentation in favour of a uniform civil code, arguing that the idea of a unified legal system is connected to the idea of a unified state and that such an idea might be at odds with the much used concept of the European Union as a “Post-Modern State”.⁸⁵

Interestingly, Collins seems to recognise the paradox and feels obliged to solve it by yet another distinction. Early in his book, he praises the historical role of “civil law” in forging a “common identity.”⁸⁶ Later on, he tries to avoid the nationalistic connotation of the codifications of the nineteenth century by making a distinction between these codifications and the project for a European civil code. Collins argues that “We must reject as a model the nineteenth-century codes of the nation states of Europe. Those symbols of nationalism and centralized authority, with the ambition of comprehensive and detailed regulation of civil society, are inappropriate for the multi-level governance system of the European Union”.⁸⁷ He proposes a different kind of codification, namely “a principle-based regulation at the European Union level (...) leaving the national legal systems scope for tailoring rules to work effectively and efficiently with local customs, practices and functional needs.”⁸⁸

The problem with this distinction is twofold. Firstly, nineteenth-century codifications, such as the French *Code civil* (1804), the Dutch *WNH* 1809 and the Austrian *ABGB* (1811) did not really consist of “detailed regulations”. On the contrary, they contained relatively abstract provisions, precisely because that is the best way to encompass various different legal systems.⁸⁹ This has everything to do

⁸² Cf. C. Shore, “Transcending the Nation-State? The European Commission and the (re)-discovery of Europe” in: *Journal of Historical Sociology* 9 (1996), 473–496. Id., *Building Europe. The cultural politics of European integration* (London 2000). *ibid.*, “Government without statehood”? Anthropological perspectives on governance and sovereignty in the European Union” in: *European Law Journal* 12/6 (November 2006), 709–724.

⁸³ Cf. Peter A.J. van den Berg, “Modern constitutionalism and patriotism in the Dutch Constitution of 1798” in: *Osaka University Law Review* 59 (2012), 57–76 (59–60).

⁸⁴ See above footnote 33.

⁸⁵ T. Wilhelmsson, “Private law in the EU: harmonized or fragmented Europeanisation?” in: *European Review of Private Law* 1 (2002), 77–94 (90–91).

⁸⁶ Collins, *The European civil code*, 6.

⁸⁷ Collins, *The European civil code*, 238–239.

⁸⁸ Collins, *The European civil code*, 239. He introduces another interesting distinction, stating that “the purpose of harmonisation is not to impose federal uniformity but to promote solidarity between the peoples of Europe”. *ibid.*, 240.

⁸⁹ Peter A.J. van den Berg, “Politics, principles and the law. Or how a European codification will affect our legal system” in: *HLS Cahier 2: Methodology and its applications/La méthodologie et son* →

with the method of comparative law as aptly described by Zweigert and Kötz, and explains why the result of the Lando-group bears the title "Principles of European Contract Law".⁹⁰ A European codification based on principles, as proposed by Collins is, therefore, perfectly in line with its historical predecessors. Secondly, the scope for "local customs, practices and functional needs" will probably not differ very much from the leeway in this respect left by the nineteenth-century codifications. After all, one of the reasons why Collins proposes to replace the present system of mutual recognition is, that "mutual recognition affirms the need to respect the diversity and integrity of nations".⁹¹ In view of these two problems, it becomes clear that the distinction is not real and predominantly functions in the context of constitutive rhetoric. It makes it possible to contribute to the process of nation building on a European level, and at the same time apply the negative label of "nationalism" to those critical of this process.

Other arguments used by those academics in favour of a European civil code will not primarily be used due to their merits, but in order to support the constitutional argument. As stated earlier, Schwintowski favours a European civil code for predominantly constitutional reasons. In addition, he invokes the juridical argument, expressing the hope that the new codification will be "clear, simple and comprehensible for all Europeans", so that people "know what to do and not to do".⁹² He seems to be not completely consistent here, however, because he also argues that "the European Civil Code should avoid going into detail". According to him, these "details and the actual implementation of the basic rules set out in the European Civil Code will be handled by each country's national laws".⁹³ This is a wise proposal, since, as argued above, a "code of principles" is best suited to encompass various legal systems. Moreover, leaving detailed regulation to the Member States will facilitate the political acception of the new code. It is not quite clear, however, how such a hybrid legal system will be comprehensible to ordinary citizens. Nevertheless, focussing on such criticism would be missing the point. In the context of constitutive rhetoric, the argument has already served its purpose by referring to these citizens as "Europeans".

Von Bar also provides another example of the use of corollary arguments that have a function beyond the merits of the arguments themselves. Von Bar invokes the juridical argument, but continues by arguing that a new European civil code would also be beneficial to other countries outside Europe, probably China or Russia. He

application (Bremen/Groningen/Oldenburg 2002), 107-123. The essay is also available at http://recht.nl/doc/european_codification.doc.

⁹⁰ K. Zweigert/H. Kötz, *Introduction to comparative law* (Oxford 1998), 44.

⁹¹ Collins, *The European civil code*, 13. Cf. also Collins, *The European civil code*, 7: "The need for a European Civil Code derives from the need to facilitate the construction of a European civil society, in which national boundaries appear less significant as social and economic ties cross these **artificial** borders".

⁹² Schwintowski, "The European Civil Code", 246-247.

⁹³ Schwintowski, "The European Civil Code", 248.

writes that “Europe is the home continent of private law. We as a Union should have something on offer not only because so many of our own national private law systems are hopelessly outdated, but also because other parts of the world are looking at us as well and wondering whether we can convincingly contribute to their needs to modernize their private law systems”.⁹⁴ It is, of course, questionable whether private law in Europe is really “hopelessly outdated”, or whether China is anxiously waiting for a European civil code. This is not important, however. The real function of this argument is not to be found in these concrete “merits”, but in the references to a collective identity, embodied in the words “Europe is the home continent of private law” and “we as a Union”. In this way, the argument is in fact a part of constitutive rhetoric, and becomes thus supportive of the constitutional argument.

Finally, Von Bar also expresses the hope, connected with the drafting of a “Common Frame of Reference” that “for the first time for approximately 200 years students from all over Europe could be taught parts of the law in all European universities on the basis of an identical text. Whether they go to Uppsala, Edinburgh, Budapest or Amsterdam, they could be sure that for at least one or two terms they would study there exactly what they would have studied at home”.⁹⁵ Again, questioning the relevance of studying abroad if there are no differences in the curriculum would be missing the point, because this is not a decisive argument, important for its concrete merits. It is above all a vehicle that allows making an (implicit) reference to the narrative of the *ius commune* and using the concept of “European universities”.

Arguments in which the feasibility of a European civil code is questioned will, as a rule, also not primarily be dealt with on their merits by academics favouring such a code for constitutional reasons. This is quite understandable because these scholars have set their mind on using a European civil code to further the creation of a European polity. Since their project serves a higher purpose, they will hardly be impressed by objections of an ideological, legal or practical nature. Particularly the reactions to the ideological and legal objections are best understood when taken as a part of the constitutive rhetoric.

The ideological objection is in fact the counterpart of the constitutional argument of those favouring such a code. In this objection, the legal diversity is presented as a fundamental aspect of Europe that must be preserved. It is argued that if the differences in legal cultures are erased, the essence of Europe will be lost. Scholars favouring a uniform European codification immediately incorporate this argument in their constitutive rhetoric. Von Bar, for example, simply returns the argument by stating that “it is culture that is at issue, for sure, but it is the culture of a truly European private law”.⁹⁶ Hesselink makes the objection a part of his distinction

⁹⁴ Von Bar, “A Common Frame of Reference”, 38.

⁹⁵ Von Bar, “A Common Frame of Reference”, 38.

⁹⁶ Von Bar, “From principles to codification”, 385.

between nationalists and post-nationalists, by dismissing what he calls “the culturalist position” as “being essentially nationalist”.⁹⁷

The reactions to the legal objections also show the influence of constitutive rhetoric. Various writers question the competence of the European Community (now Union) to legislate comprehensively in the field of private law, and that the introduction of a European civil code is probably legally impossible.⁹⁸ It is argued that a specific competence to codify private law is missing and that it not easy to use the internal market clause as a legal basis. In addition, it is sometimes held that activities in the field of codification are contrary to the principle of subsidiarity, implying that the Community can only take action if and in so far as because the “objections of the proposed action” cannot be sufficiently achieved by the Member States”.⁹⁹ It is argued that Member States are perfectly able to regulate their own legal systems without hampering the realisation of the goals of the Community.

The appeal to the principle of subsidiarity is possibly easiest to deal with, since it is notoriously difficult to make this principle operational in a legal way.¹⁰⁰ Basedow even solves the problem in a way that leaves no scope for the principle at all. He simply states that the objective of the Community is to introduce uniform laws and subsequently argues that “it is clear that a single Member State cannot bring about uniformity by its own laws and that this objective can much better be achieved by Community action.”¹⁰¹ The problem with this solution is that legal unity is not an objective *per se*, but a means to an end, for example to facilitate trade, or to prevent lawsuits between citizens.

The objection that the European Union lacks the specific competence to introduce a comprehensive uniform civil code is approached by the academics favouring a European code for constitutional reasons in two different ways. Firstly, a kind of implied powers doctrine is used to extensively interpret the internal market clause. Schwintowski, for example, states that “it would be the concept of the internal market itself that would constitute the basic legitimation of a future European Civil Code”.¹⁰² In his words, “Europe is above all a community of law”.¹⁰³ Basedow, admitting that the “cultural effect of a legal unification of European contract law” does not provide for a legal basis, argues that this should not prevent the

⁹⁷ Hesselink, “The politics of a European civil code”, 147.

⁹⁸ J. Ziller, “The legitimacy of the codification of contract law in view of the allocation of competences between the European Union and its Member States” in: Hesselink (ed.), *The politics of a European civil code*, 89–113 (92–103). Descheemaeker, “Faut-il codifier le droit privé européen des contrats?”, 836–837. S. Weatherill, “Reflections on the EC’s competence to develop a “European Contract Law” in: *European Law Review* 3 (2005), 405–418.

⁹⁹ Cf. for example Zwalve, “Een “Common Frame of Reference”, 191.

¹⁰⁰ Cf. G. Davies, “Subsidiarity: the wrong idea, in the wrong place, at the wrong time” in: *Common Market Law Review* 43 (2006), 63–84.

¹⁰¹ Basedow, “A common contract law”, 1191–1192.

¹⁰² Schwintowski, “The European Civil Code”, 235–236.

¹⁰³ Schwintowski, “The European Civil Code”, 242–243.

Commission from taking action. After all, the Commission has also the competence “to strengthen the confidence of citizens in the orderly operation of the internal market, i.e. measures which are designed to break down psychological barriers preventing the participation of individuals and undertakings in intra-community commerce”.¹⁰⁴ Von Bar provides an interesting example of how far the concept of the “internal market” can be stretched. He expresses the hope that “even the distinction which we all make today between cross-border and purely domestic cases might well have disappeared for many purposes in a market that describes itself as a single internal market”.¹⁰⁵

This first response is still based on Treaty provisions, although these provisions are extensively interpreted in view of the higher purpose of creating a European political entity. In the second response to the competence issue, such legal reasoning is surpassed. A completely new source of legitimacy is exploited by asserting that the issue of codification has already been decided on a higher, constitutional level. In a kind of *fait accompli*-reasoning, so typical of (constitutive) rhetoric, it is argued that the EU already has entered a “constituent phase”, and that, therefore, a new source of legitimacy is already in place.¹⁰⁶ The following argumentation of Rodotà may serve as another example. He states that “an explicit and formal European constituent process” has started in June 1990 when the European Council of Cologne established that the European Union needed a Charter of Fundamental Rights.¹⁰⁷ He subsequently argues that this “ongoing constituent process” is also relevant for the issue of codification. According to Rodotà, “We cannot discuss European codification by prevalingly looking at the past. This apparently realistic approach, risks creating a circumstance in contradiction with the new constitutional data.”¹⁰⁸ The *Common Frame of Reference* as proposed by the Commission in the *Action Plan* (2003) is such a “circumstance” and for that reason rejected by Rodotà. He concludes that “the European constituent process cannot be amputated of the codification perspective.”¹⁰⁹

Rodotà’s reasoning, introducing a new source of legitimacy, makes it possible to bypass a strict legal approach to the competence issue. However, it is also noteworthy that the reasoning itself surpasses specific legal reasoning. After all, the declaration of the European Council in Cologne mentioned by Rodotà is not a binding document, probably because of its broad scope. Nonetheless, it is useful as a part of an argumentation based on constitutive rhetoric, precisely because of its broad scope. For the same reason, preambles can be more relevant than black letter lawyers tend to think, as the example of the US-Constitution shows. In constitutive

¹⁰⁴ Basedow, “A common contract law”, 1183.

¹⁰⁵ Von Bar, “Paving the way forward”, 145.

¹⁰⁶ Ziller, “The legitimacy of the codification of contract law”, 105, also recognises this type of reasoning in the European codification debate.

¹⁰⁷ Rodotà, “The civil code”, 115.

¹⁰⁸ Rodotà, “The civil code”, 117.

¹⁰⁹ Rodotà, “The civil code”, 124.

rhetoric, legal texts are not so much used because of their legal value, but for the references they make to the collective identity. For scholars in favour of a European civil code for constitutional reasons, it suffices, therefore, to refer to any type of instrument of an institution of the European Union, such as resolutions of the European Parliament or declarations of the European Council, regardless whether these texts are binding or not.¹¹⁰ Von Bar, for example, does not consider it a problem that his proposal to draft a set of principles encompassing all private law, not just contract law, “deviates a bit from the EU-Commission’s communication”, because “we feel that we not only have some important backing from the Tampere Summit (...). The European Parliament has in mind exactly the same scope of work to be done as we have”.¹¹¹ Non-binding corollaries of European Treaties texts, such as preambles (“an ever closer union”) or protocols, can be used in the same way.

This reference to the European Parliament is not a coincidence, because the new source of legitimacy is ultimately founded on the concept of a “European people” as the obvious subject of the “constituent phase”.¹¹² This allows Banakas, for example, to almost grant the European Parliament the competence to decide on the issue of codification. According to him, “the EP has long ago asked for a European civil Code (...) undeterred by Governments or decisions of the European court. This is significant, as the Parliament (...) may be seen as representing the people of Europe better than any other European institution”.¹¹³ It is hardly surprising that the existence of this “European people” is presented here as a fact. Basedow endorses such empowerment of the European Parliament, stating that the community should accept the task of unification “in accordance with the resolutions of the European Parliament.”¹¹⁴ Tilmann even excludes the possibility that “das Europäische Parlament sich auf dem klarsichtig und eindeutig eingeschlagenen Weg beirren oder aufhalten läßt”.¹¹⁵

Hesselink is also in favour of creating legitimacy for the draft of a European civil code by emphasising that “the democratically elected representatives of the

¹¹⁰ Ziller, “The legitimacy of the codification”, 104–105.

¹¹¹ Von Bar, “Paving the way forward”, 139. Lando/Beale, *The principles*, xvii.

¹¹² Cf. for other examples of the use of the concept of “a people” in a rhetorical context: M.C. McGee, “In search of “the people”: a rhetorical alternative” in: *The Quarterly Journal of Speech* 61 (1975), 235–249. Peter A.J. van den Berg, “The integrative function of constitutions: a historical perspective” in: F. Amtenbrink/Peter A.J. van den Berg (eds.), *The constitutional integrity of the European Union* (The Hague 2010), 13–53 (22–29). Cf. for a rhetoric in which “the people” is the explicit subject: M.D. McGuire, “Rhetoric, philosophy and the Volk; Johann Gottlieb Fichte’s *Addresses to the German nation*” in: *The Quarterly Journal of Speech* 62 (1976), 135–144.

¹¹³ Banakas, “European tort law”, 367. Cf. also Mattei, “Hard minimal code now”, 219, and Tilmann, “Zweiter Kodifikationsbeschluss”, 543.

¹¹⁴ Basedow, “A common contract law”, 1195. Cf. also *ibidem*, 1172.

¹¹⁵ Tilmann, “Zweiter Kodifikationsbeschluss”, 551. Cf. also W. Tilmann “The legal basis for a European civil code” in: *European Review of Private Law* 5 (1997), 471–473 (473). Tilmann (1938) is lawyer in Düsseldorf and professor of law at the University of Heidelberg.

European citizens” should be “part of the drafting process”.¹¹⁶ He suggests submitting “fifty political questions on European contract law to the European Parliament and the other stakeholders”.¹¹⁷ He has less confidence in the present Parliament than Tilmann, however, and therefore resorts to the foundation of the new European political entity: the “European people”, or the “European citizens”. In his view, the European Commission should take the lead here: “The Commission should show more courage and make a real effort to include the European citizens in the political process towards a European civil code.”¹¹⁸ This route via direct democracy is, of course, a convenient way to bypass legal questions concerning competence. For that reason, Hesselink’s list of “fifty political questions” also include the question whether the “European citizens” think such a European civil code should be enacted.¹¹⁹

5. Concluding remarks

Academics have been discussing the desirability and feasibility of a European civil code of for over 35 years, and some of them have spent much time and energy working on drafts for such a code. In this debate, the advocates of a European code and their opponents do not operate on the same level of reasoning. Critics of the project focus on questions of a legal or practical nature, for example whether the European Union has the competence to enact a uniform civil code, whereas advocates of the project seem to have little patience with these kind of “problems”. This peculiar quality of the debate can be explained by analysing the nature of the arguments that are brought forward by the scholars that support the case for a uniform European civil code from a historical perspective, and by subsequently applying the theory of constitutive rhetoric in their argumentation.

Historically, the two uniform codifications that were introduced around 1800, namely the French and Dutch civil codes (1804 and 1809), were not in the first place practical instruments, making things better for litigants or facilitating intra-state trade, but constitutional tools aimed at forging the political identity of “nations”. In other words, the constitutional argument was conclusive in bringing about these uniform civil codes, and not juridical or practical political arguments. The analysis in this paper shows that in the present debate, the constitutional argument is predominant as well. Most scholars favouring a uniform European civil code emphasise that this code is necessary in order to create a European political community. For that reason, it should come as no surprise that a specific reasoning, characteristic for constitutive rhetoric, can be found in their papers.

¹¹⁶ Hesselink, “The politics of a European civil code”, 166.

¹¹⁷ Hesselink, “The politics of a European civil code”, 166.

¹¹⁸ Hesselink, “The politics of a European civil code”, 166.

¹¹⁹ Question 50. Cf. for the list: Hesselink, “The politics of a European civil code”, 166-170.

Three features of constitutive rhetoric stand out in particular. First, academics favouring a European civil code use a style and language that is suitable to create an audience, for example the distinction between “we” and “they”. This use is accompanied by a terminology that provides the newly created group with a positive identity, by labelling it as “modern” or “post-nationalist”, or creates a sense of urgency. Secondly, narratives are introduced to strengthen the collective identity of the audience. In accordance with the theory of constitutive rhetoric, paradoxes are part and parcel of these narratives, because in the narrative the prior existence of the audience to be created is already assumed. Lastly, it has turned out that both the other more practical arguments used by the scholars proposing a European civil code, and the reactions of these scholars to the arguments of their opponents should not be regarded as contributions to the debate on the desirability and feasibility of such a code itself, but as elements of the constitutive rhetoric.

For that reason, miscommunication in the debate between the academics favouring a uniform European civil code for “constitutional reasons” and those critical of such a project for more practical reasons lies just around the corner. These opponents probably believe that they are involved in a discussion on the pros and cons of a uniform European civil code itself and might conclude, for example because it has turned out that the “stakeholders” are not convinced of the necessity of such a code, that working on such a code is “an expensive and time-consuming solution looking for a problem.”¹²⁰ These critics are, however, missing the point. In the context of constitutive rhetoric, practical arguments for or against a European civil code itself are immaterial. It is about constituting a “European audience”.

¹²⁰ R.J. Tjittes, “Europees contractenrecht: it giet oan” in: *Rechtsgeleerd Magazijn Themis* 171/4 (August 2010), 149.