TILBURG UNIVERSITY

TILEC

TILEC Discussion Paper

DP 2004-008

Unification of the Private Law in Germany in the Nineteenth Century: An Economic Perspective

By

Arnald Kanning

ISSN 1572-4042

Unification of the Private Law in Germany in the Nineteenth Century: An Economic Perspective[*]

by

Arnald J. Kanning

This paper makes an effort to identify a link between economic interdependencies between German regions and developments in the field of private law in nineteenth-century Germany. Growing economic interdependencies seem to have caused German regions to iron out differences in their regionally defined private law. Also, although several German regions seem to have preferred their own private law to the private law of Prussia, they nonetheless chose to place the private law that Prussia wished for into uniform laws rather than any other private law. In doing so, other German regions must have stimulated their own economic growth by encouraging economic activity with Prussia. (JEL: K 00, N 00)

1 Introduction

The aim of the paper is to provide an explanation for efforts to reach a more uniform private law in 'Germany' in the nineteenth century.[1] It seeks to fulfill this aim through investigation of the relationship between economic interdependencies between German

[*]The paper has greatly benefited from comments by Christoph Bergfeld, Barbara Dölemeyer and Jean-Jacques Herings. Responsibility for errors remains solely mine.

[1]In the paper 'Germany' refers to the German Confederation (1815-1866), the North German Confederation (1867-1871) and the German Second Empire (1871-1914).

regions and developments in regionally defined private law in Germany. Private law governs the relations between citizens. Developments in the field of (private) law are a form of institutional change (North [1990]: 96). In exploring the extent to which the growing economic dependence of other German regions upon Prussia over the course of the nineteenth century might have influenced processes of unifying the private law in Germany, the following issue will be considered. More often than not, the private law that Prussia had in mind survived into the final drafts of successful uniform laws. Is this to imply that all German regions preferred Prussian private law to any other private law? If only because several German regions had always showed reluctance towards adoption of Prussian private law into uniform laws, the answer to the question is not self-evident. This paper will reach the tentative conclusion that, although German regions might have preferred their own private law, they might nonetheless have had an interest in placing the private law that Prussia wished for into uniform laws rather than any other private law. For, in doing so, other German regions must have spurred their own economic growth by stimulating economic activity with Prussia.

The paper is organized as follows. The following section offers a general framework in which to think about the interplay between economic interdependencies between jurisdictions and developments regarding the private law in these jurisdictions. The subsequent Sections 3 to 5 survey developments concerning the private law in nineteenth-century Germany. Section 3 provides a broad overview of the impact of the increasing economic interdependencies between the German regions in the course of the nineteenth century on developments pertaining to regionally defined private law. Sections 4 and 5 will elaborate upon the link between the growing economic dependence of other German regions upon Prussia and legislative trends regarding regionally defined private law at more length. Section 4 will develop the point that the year 1866 marked a turning point for quests for a more unified private law within Germany. Section 5 will demonstrate that the miserable failure of the middle states of the German Confederation to end projects to compose uniform private laws successfully in the 1860s was due in large part to Prussia's unfavorable response. Concluding observations will be made in Section 6.

2 *Framework of Analysis*

Jurisdictions may have 'divergent' private law. From a theoretical angle, this section sheds light on the issue of whether a jurisdiction may have an interest in switching to or retaining legal rules that are not most preferred by this jurisdiction. The term 'divergent' is defined in the following way. Private law should ensure that citizens who want to engage in economic activity are able to do so. After all, economic activity can leave everybody involved better off. Private law does more than simply facilitate economic activity, however. It also may affect the way citizens divide potential gains from economic activity (see *e.g.* Baird [1994]: 219). That is, to facilitate economic activity equally well, the private law of separate jurisdictions need not affect the division of potential gains from economic activity in any particular way.[2] Stated otherwise, the private law of separate jurisdictions that facilitates economic activity equally well can still differ in its distributional consequences. It follows that, to understand processes of unifying regionally defined private law, an investigation of whether or not separate jurisdictions, constrained by economic rivalry, will succeed in providing private law that facilitates economic activity does not suffice. The latter issue has received considerable scholarly attention (see *e.g.* La Porta *et al.* [2004]; Mahoney [2001]; Wagner [1998] and references therein).

If indeed separate jurisdictions invoke private law that affects differently the way their citizens divide potential gains from economic activity, citizens of separate jurisdictions presumably prefer the way their own private law affects the division of

[2]The potential gains to be derived from a given economic activity are, say, maximally €3. When the private law of separate jurisdictions is able to facilitate the said economic activity so as to create potential gains of €3 in the aggregate, the private law of separate jurisdictions facilitates economic activity equally well. From this angle of perspective, private law that is able to facilitate the said economic activity so as to create potential gains of only €2 in the aggregate facilitates economic activity less well.

potential gains from economic activity. Presumably, as neither a switch of a jurisdiction to different private law nor a move of a citizen to another jurisdiction is costless. Even ignoring this, by acting strictly on their own, without considering any opportunities for coordination, it is far from obvious that separate jurisdictions will succeed independently in issuing private law that affects identically the way their citizens divide potential gains from economic activity. Clearly, in case the operative body of private law in separate jurisdictions differs in its distributional consequences, citizens engaged in inter-jurisdictional economic activity have conflicting interests regarding the applicable private law. Failure to agree on the applicable private law may prevent mutually beneficial economic activity from taking place.

A uniform private law solves the coordination problem as faced by citizens engaged in inter-jurisdictional economic activity. Then, the answer to the question of whether to unify a part of the private law comprises two halves. For example, movements for unification of divergent family law may perhaps draw little support from jurisdictions, not so much because of the distributional consequences of regionally defined family law, but, rather, because the number of inter-jurisdictional family affairs is relatively limited. On the other hand, in spite of possibly large distributional consequences of, for example, regionally defined commercial law, initiatives to unify this part of the private law may nonetheless resonate well with jurisdictions. For example, Larry E. Ribstein and Bruce H. Kobayashi recognize that uniform laws providing default rules for commercial transactions can play a part in facilitating inter-jurisdictional economic activity (1996: 150). The volume compounded by the value of inter-jurisdictional commercial transactions may fuel calls for unification of the commercial law. Unfortunately, no empirical study will be able to provide the detailed information as is required to state with any degree of precision when exactly unification of the private law becomes essential to facilitating an ever-growing economic interdependence between separate jurisdictions. Before taking on the challenge of unifying divergent private law, separate jurisdictions might first settle on enacting a uniform law on conflict of laws. Conflict of laws rules – also known as rules of private international law, according to the terminology of the civil-law tradition – are rules of a jurisdiction that determine whether domestic law or foreign law applies to an inter-jurisdictional legal problem.

To be sure, the supposition made in the paper is that the legal rules of all jurisdictions facilitate economic activity equally well, but, at the same time, differ in their distributional consequences. To suppose otherwise would basically be to deny the need for jurisdictions to coordinate their actions so as to craft uniform private laws. For jurisdictions that hold the same opinion about the way in which their legal rules ought to affect the division of gains from economic activity might independently succeed in providing private law that facilitates economic activity equally well. Instead, the ability of jurisdictions to foster economic growth is exogenous to our analysis. Thus, the issue is whether or not the German regions sought to place the legal rules into uniform private laws of the German region that was strongest able to engender economic growth. In doing so, other German regions might have propelled their own economic growth by spurring economic activity with this German region. That is, an existing economic dependence upon a particular jurisdiction might induce other jurisdictions to place the legal rules into uniform private laws of this jurisdiction. And in placing the legal rules into uniform private laws of a particular jurisdiction, other jurisdictions might accelerate their economic activity with this jurisdiction. Unfortunately, any empirical study will fall short of providing the detailed information as is required to quantify the projected increase in inter-jurisdictional economic activity. There is no alternative but to blend together information about economic interdependencies between separate jurisdictions and developments regarding domestically defined private law. Theoretical reasoning makes clear that, although the divergent private law of separate jurisdictions may facilitate economic activity equally well, separate jurisdictions may have an interest in introducing the private law of a particular jurisdiction into uniform laws rather than any other private law. The point is that this particular jurisdiction is strongest able to advance the economic growth of all other jurisdictions. Then, it is this theoretical finding against which the historical information on developments concerning the private law in Germany in the nineteenth century as presented in Sections 3 to 5 will be interpreted.

3 *Economic Interdependencies between German Regions and Developments Pertaining to German Private Law*

An economic factor that seemed at least to some extent responsible for the production of uniform private laws in nineteenth-century Germany was a rise in interregional economic activity. As the respective German regions could less afford to cling to regionally defined private law, an aim of uniform laws was to (re)impose unity in the private law. With regional private laws splintering ever more, the respective German regions first targeted the laws relating to intellectual property rights, bills of exchange and sales. To avoid compliance with less-preferred private law, several German regions had always endeavored to place their own private law into uniform laws. However, Prussia strongly influenced drafting processes of uniform private laws. The root of this seems at least in part planted in the increasing economic dependence of other German regions upon Prussia. Despite the fact that several German regions seem to have preferred their own private law, they chose to include the private law that Prussia wished for into uniform laws rather than their own private law. To have other German regions accept uniform private laws largely composed along Prussian lines, Prussia could, over time, use the lure of an affluent domestic market and strong banking sector.

Indeed, as the nineteenth century unfolded, other regions within Germany looked increasingly likely to give ground to Prussia in disputes over which provisions to incorporate into uniform private laws. The upshot was that Prussia enjoyed substantial influence over the production of the Special Patent Protocol (1842), the Uniform Law on Bills of Exchange (1848) and the Commercial Code (1861). Likewise, in the 1860s, even though the middle states of the German Confederation and the Hapsburg Empire united around proposals to unify patent law (1863), copyright law (1864), civil law (1866) and the law of civil procedure (1866), the final hurdle was winning Prussian assent. As the draft uniform private laws did not bear sufficient resemblance to Prussian legislation, Prussia did not forgo a chance to tweak them. After the collapse of the German Confederation in 1866, Prussia became a driving force behind the promulgation of federal legislation in the North German Confederation (1867-1871) and the German Second Empire (1871-1914). Consequently, the provisions included in the Uniform Law

on Patents (1877) stood in stark contrast to the provisions embodied in the Draft of a Uniform Law on the Granting of Territorial Patents (1863) and the Draft of a Uniform Law on the Recognition of Patents of other Confederal States (1863), to mention an example.

4 The Year 1866 Marks a Turning Point for Efforts to Reach a More Unified Private Law

With hindsight it appears that 1866 was a pivotal year for Germany (see *e.g.* Tipton [2003]). In 1866 the Kingdom of Prussia decisively defeated the Hapsburg Empire in the battle of Königgrätz and, in the very same year, was equally quick to annex the financial centre Frankfurt. Once Prussia got rid of its arch-rival the Hapsburg Empire, the balance of power in this corner of the globe shifted dramatically. Within the German Confederation (1815-1866) the most significant members and main antagonists had been the Hapsburg Empire and Prussia. But since the North German Confederation (1867-1871) excluded the Hapsburg Empire, Prussia was, without a shred of doubt, the most influential member. And Prussia's influence remained felt in the German Second Empire (1871-1914).

Not only had Prussia's military prowess, but Prussia's increasing economic strength also had contributed to the Kingdom's ascendancy in the nineteenth century. Long before 1866, as attempts to strike a deal on customs in the German Confederation had foundered on opposition of the Hapsburg Empire, Prussia had wasted no time to extend its customs system to other members of the German Confederation. It is therefore no surprise that in 1833 Prussia was among the 18 founding members of the German Customs Union. Other members of the German Confederation joined within the next few years, but the Hapsburg Empire never succeeded in gaining admission (Huber [1986]: 287). Taking all members into consideration, Prussia was by no means the principal economic benefactor of the Customs Union. On the other hand, for Saxony, by far the most industrialized member of the German Confederation, Prussia's domestic market was

of vital importance, just as free access – controlled by Prussia – to the North Sea ports (Zorn [1963]: 329; Dumke [1977]).

Moreover, where Prussia gained economic ground in the course of the nineteenth century, Saxony gradually lost ground, especially after 1860. From the 1860s onwards, the western provinces of Prussia, that is, the Ruhr region, began to rival Saxony as the largest industrial district in the German Confederation (Tipton [1976]: 68). Because the financial clout of Frankfurter (private) banks had been enormous in the German Confederation, the Free City of Frankfurt may possibly have diluted the economic influence of Prussia to some extent. Nevertheless, given the amount of 'Prussian' money circulating in March 1866 in the area that was to become the German Second Empire, the importance of the Prussian Bank in Berlin and – to a lesser extent – private Prussian note-issuing banks cannot be overstated either (Zorn [1992]: 416). In 1876 the Prussian Bank became the central bank of the German Second Empire. Frankfurt's importance as a financial centre dwindled even further in favor of Berlin when the Deutsche Bank, established in 1870, became the largest credit bank in the German Second Empire in the late nineteenth century (Guinnane [2002]: 102). This made Deutsche Bank the largest of the *Berliner Großbanken* (Berlin Great Banks). In addition, between 1880 and 1907 the Ruhr region replaced Saxony as the largest industrial district in the German Second Empire (Tipton [1976]: 122). In sum, at the dawn of the nineteenth century, an evolving interregional dependence that marked the development of a 'single' market within the future German Second Empire was still a distant phenomenon (Zorn [1964]: 99). But, as the nineteenth century drew to a close, interregional interdependencies had come to be firmly established in this corner of the map (see *e.g.* Hoffmann *et al.* [1965]).

The year 1866 proved a watershed for tendencies towards unifying the regionally defined private law within Germany. Before 1866, Prussia either delayed or postponed nearly every attempt at unifying the private law. In contrast, after 1866, Prussia had always spearheaded drives to unify the private law.

From 1815 onwards, a root cause for continuous calls for unification of the private law in the German Confederation was at least partly to stop the regional legal orders from

evolving in independent paths. Whilst the members of the German Confederation had not lost a competence to legislate in matters of private law, unity in the private law was to be achieved by means of uniform laws. In 1836 the Kingdom of Württemberg, at the first General Conference of the Customs Union in Munich, called for unification of sales and bills-of-exchange law (Wadle [1985]: 126). But as Prussia's economic strength rose in the course of the nineteenth century, the Kingdom became able to delay action so as to increase its leverage over the production of projected uniform private laws. Over time, other members of the Customs Union looked likely to succumb more readily to pressure from Prussia to construe uniform private laws compatible with the Kingdom's demands. Prussia's ten-year delay of the production of a uniform law on bills of exchange was to a greater or lesser extent designed to heighten pressure upon other members of the Customs Union to include the legal rules that it wished for. For similar reasons, in the 1830s and 1840s, Prussia declined to embark upon projects to unify other branches of the private law. Thus, it was only in 1846 that Prussia finally approved, though reluctantly, the production of a uniform law dealing with bills of exchange. The Prussian draft of a bills-of-exchange law (1847) was used as a model for the Uniform Law on Bills of Exchange that saw the light of day in December 1847 (Coing [1986]: 2874).

In anticipation of a Constitution for the German Confederation, the Uniform Law on Bills of Exchange was placed on a federal level as of November 26th 1848 (Huber [1978]: 791). Indeed, Article 13, No. 64 in Chapter 2 of the abortive Constitution of the Church of St. Paul in Frankfurt of March 28th 1849 empowered the National Assembly to produce federal codes in the field of civil law, commercial law, bills-of-exchange law, penal law and civil procedure (Wesenberg [1955]: 359). Additionally, as work on a federal commercial code had already been started in 1848, the Frankfurt Draft Commercial Code could be presented in March 1849. But due to the dissolution of the National Assembly and the nullification of its laws in 1850, the draft was not properly discussed at all, let alone enacted. Either way, all members of the German Confederation voluntarily sought to enact the Uniform Law on Bills of Exchange (1848) within the next fifteen years. In this respect, it is worth observing that even Prussia's arch-rival the Hapsburg Empire could ill afford to steer clear of enacting the said Uniform Law (Coing [1986]: 2945).

Meanwhile, the unification-torch had passed to Bavaria. In 1857 this Kingdom started to call, once more, for unification of commercial law within the framework of the German Confederation. Again, Prussia demonstrated a by now characteristic reluctance to engage in such a matter. And only after the Prussian envoy Otto von Bismarck had contrived to protect the interests of his Kingdom, resulting in the use of a Prussian draft of a code, which was yet to be finalized, as the main basis for future deliberations, did Prussia give its indispensable veto at the very end of the same year (Kraehe [1953]: 17; Bergfeld [1987]: 108). Now that a Commercial Code was to be produced along Prussian lines, Prussia, in addition, proved anxious to use its draft of a bankruptcy law (1855), which drew to some extent on French bankruptcy law (Thieme [1977]: 108), as a model for a possible unification of this branch of the law. This plan evoked widespread disapproval from various corners of the German Confederation, however. Therefore, only a German Commercial Code was promulgated in 1861. Just about all members of the German Confederation implemented the German Commercial Code (1861) within the next five years, albeit with modifications and amendments. It pays to notice that even the Hapsburg Empire came round to endorsing the first four books of the said Code (Coing [1986]: 3051). Largely thanks to Prussia's unfavorable response, further initiatives of Württemberg, Bavaria and Saxony to unify patent law (1863), copyright law (1864), the law of obligations (1866) and the law of civil procedure (1866) eventually foundered (see in greater detail Section 5).

A major exception to the observation that Prussia stalled initiatives of other members of the German Confederation to unify the private law before 1866 was in the field of patent law. According to Prussia, Württemberg, Bavaria and the Hapsburg Empire used patent law as a device to engage in anti-competitive conduct. Whereas these members pursued lavish policies in respect of the granting of patents, Prussia, in this regard, pursued a stringent policy (Coing [1986]: 4149). At the time, Prussia emphasized that the grant of exclusivity by patent legislation could be misused by being incorporated into cartels and market-sharing arrangements or monopolistic practices that denied access to markets. Indeed, both Kingdoms did not so much argue that the grant of an exclusive right for a limited period of time to an inventor to exploit the invention was a necessary incentive for investment in research and development and would stimulate economic

growth and competitiveness accordingly. Rather, Bavaria and Württemberg held the opinion that lavish policies towards the granting of patents could protect and, thereby, favor their own constituents. In any event, Prussia's stringent policies towards the granting of patents were, in effect, not harming Württemberg and Bavaria. But, the other way around, the exclusive territorial patent rights awarded by these two Kingdoms amounted to restrictions on imports from Prussia. Yet, in the 1830s, Prussia encountered grave difficulties in building support for a uniform patent law that largely suited its own needs. And although the members of the Customs Union hammered out a compromise in 1842, some disagreement remained, which even intensified in the early 1860s (Grothe [1877]: 14), and was only 'resolved' after 1866 when Prussia could have it almost exclusively its own way.

The German Confederation had, as said, lacked a competence to legislate on a federal level altogether. Much to the regret of Prussia, the central legislative competence enshrined in Article 4, No. 13 of the 1867 Constitution of the newly formed North German Confederation did not include the entire field of (private) law. This could not prevent Prussia from establishing the Uniform Law on Bills of Exchange (1848) and the Commercial Code (1861) as federal law in 1869 (Schubert [1988]: 484). Also, a Uniform Law on Literary Copyright composed in large part along Prussian lines was placed on a federal level in 1871. And a commission was charged with the drafting of a Code of Bankruptcy Law. The German Second Empire received the Constitution remodeled from the North German Confederation. Again, Prussia introduced a proposal to extend the central legislative competence to cover the whole field of private law (Schubert [1979]: 243). However, in 1871, with regard to efforts directed at unifying segments of the private law, Württemberg, Saxony and Bavaria, in particular, more or less adopted the pre-1866 delaying tactics of Prussia. Little wonder, then, that in order to gain influence over a possible production of a code of civil law, these members of the Empire turned the Prussian motion down. Württemberg represented the view of Saxony and Bavaria by associating legal unity within the Empire with Prussian centralization (Schubert [1977]: 174). The proposed amendment of the Constitution was said to be an unjustifiable interference in the internal affairs of the members of the Empire. Even so, at the very end of 1873, after some minor concessions on the part of Prussia, the central legislative

competence of the Empire was officially extended to matters of private law anyhow (Laufs [1973]: 744).

Within the German Second Empire central bureaucracies got involved in promulgating federal legislation (see *e.g.* Schulte-Nölke [1995]). And within the Imperial Parliament political parties that represented the interests of citizens of different constituencies had to pass legislation (see *e.g.* John [1989]). But the Empire was, of course, still to place the private law on a federal level of the region that was most able to generate economic growth. This is to say that Prussia remained able to press the case for incorporation of the private law that it wished for into federal legislation. By way of illustration, the Justice Office of the Empire had never obtained the authority to present legislative proposals without the prior assent of the Prussian Ministry of Justice (Hattenhauer [1977]: 27). So, federal legislation was unlikely to embody private law that Prussia violently opposed (Schubert [1977]: 170). Federal private laws that became operative in the German Second Empire were the Uniform Law on Copyright in the Arts and Photography (1876) (Coing [1986]: 4019), the Uniform Law on Patents (1877) (Coing [1986]: 4158), the Code of Bankruptcy Law (1877) (Thieme [1977]: 17), the Law of Judicial Organization (1877) (Coing [1982]: 2680) and the Civil Code (1896) (Coing [1982]: 1611).

5 Absent Prussian Approval other Members of the German Confederation Fail to Unify Areas of the Private Law in the 1860s

At the three Conferences held in Würzburg (1859, 1860, 1861) ten middle states conceived to conduct a (common) strategy towards containment of Prussia within the German Confederation.[3] The first Conference of Würzburg was held from November 23rd 1859 until November 27th 1859. At the time, the Hapsburg Empire had been quick to

[3]The ten middle states were Bavaria, Saxony, Württemberg, Kurhesse, Hesse-Darmstadt, Saxe-Meiningen, Saxe-Altenburg, Braunschweig, Nassau, Mecklenburg-Schwerin and Mecklenburg-Strelitz respectively.

encourage the middle states to stand up to a dominant Prussia. The (first) Conference of Würzburg provides powerful evidence that initiatives to unify the private law within the German Confederation could not count for much should Prussia not give its unconditional approval. By and large, Prussia only displayed support for uniform private laws that followed in large measure Prussian legislation.

No doubt, Prussia was to set the stage for efforts to bring pressure to bear upon other members of the German Confederation to incorporate Prussian legislation. Hence, in the early 1860s, calls of middle states in the National Assembly in Frankfurt, notably of Bavaria and Saxony, for codes of patent law, copyright law, civil law, as well as civil procedure were part and parcel of a policy geared towards strengthening the institutions of the German Confederation (Gruner [1973]: 193). However, in this period, Prussia could but reject schemes that tied it into a confederal structure, which might even be dominated by other members. In point of fact, it seems highly improbable that, in the 1860s, the middle states, ganging up against Prussia, could ever have been able to determine the (political) course of the German Confederation. This was at least in part because the economic dependence of the middle states of the German Confederation on Prussia became larger than the other way around (Kerwat [1976]: 586). In retrospect it seems that Prussia's economic leverage within the German Confederation had become too great to be flatly ignored by the middle states.

To defeat renewed attempts of the middle states and the Hapsburg Empire at reforming the German Confederation in their own interest, Prussia was conspicuously absent from all deliberations on unification of the private law. Supposedly, Prussia was of the opinion that the Confederation lacked legal competence to address unification of the proposed areas of the private law. In truth, this dissenting opinion was part of a wider conflict between Prussia and other members of the German Confederation over the nature of the German political economy. In consequence, by the time the drafts of a code were finalized, the political basis for unification had already disappeared and, small wonder, much in-depth discussion had never been entered into. Indeed, a reason for the projects to end in utter failure was that the Hapsburg Empire and the middle states failed to secure the support of Prussia. As noted earlier, without Prussian assent, the projects to compose

the Uniform Law on Bills of Exchange (1848) and the Commercial Code (1861) would also have been doomed to yield disappointing results, if not have led to outright failure.

After 1866, Prussia planned to codify the law specifically in the fields that the middle states of the German Confederation already had in mind in 1859 after the first Conference of Würzburg. Now that the Kingdom was influential enough to overcome opposition to its legislative practices, the normal method of preparing legislation within the North German Confederation (1867-1871) was that draft laws were prepared almost exclusively by Prussia alone. For example, copyright law (1871) (Vogel [1993]: 194; Wadle [2003]: 50) and bankruptcy law (1877)[4] were unified by Prussia in this way. Within the German Second Empire (1871-1914) Prussia managed to continue this practice. Quite obviously, this is to suggest that, in the 1860s, Prussia had never been against unification of the private law *per se*. But did the Prussian-inspired federal legislation really lay down other private law than the drafts that had already been issued by the middle states of the German Confederation in the early 1860s? In other words, had Prussia actually had a need to delay action until after 1866, in order to protect its legislation against drastic revision by federal decree? Patent law is a case in point. The differences between the Draft of a Uniform Law on the Granting of Territorial Patents and the Draft of a Uniform Law on the Recognition of Patents of other Confederal States released by the middle states of the German Confederation in the 1860s on the one hand and the Uniform Law on Patents largely drafted along Prussian lines in 1877 on the other were profound (Beier [1974]: 203). But a salient exception to the observation that more often than not Prussian legislation was placed on a federal level was in respect of the law of obligations. The provisions of the Saxon Civil Code (1865)[5] were used as principal guidelines for the German Civil Code (1896) (Coing [1982]: 1553). Needless to say, that this could only have happened after a Prussian nod of approval (Schubert [1978]: 40).

[4]In this regard, Thieme ([1977]: 61) speaks of the '*preußische Phalanx*' (Prussian phalanx).

[5]The coming into being of the Saxon Civil Code is discussed extensively by Ahcin [1996].

6 Concluding Observations

Calls for unification of the private law in nineteenth-century Germany seem to have been motivated by ever-growing economic interdependencies amongst the respective regions, reflecting a desire to stop divergent regional private law from slowing down interregional economic activity. Early plans sketched out by German regions to unify their divergent laws pertaining to bills of exchange and sales are explainable in terms of this argument. This is a tentative conclusion because, given the available data, there is no way to tell with any degree of certainty when exactly unification of the private law became essential to facilitating the evolving interregional economic interdependence between the German regions. More often than not, the legal rules that Prussia wished for were placed into uniform private laws. Yet, the choice for the private law of Prussia was not automatically to imply that other German regions preferred the private law of Prussia to any other private law. Actually, several German regions had always jockeyed for adoption of their own private law into uniform laws. Instead, it seems that, from the second half of the nineteenth century onwards, the growing economic dependence of other German regions upon Prussia gave Prussia increased leverage to press for adoption of its own private law into uniform laws. In including the private law that Prussia wished for into uniform laws, other German regions must have propelled their own economic growth by advancing economic activity with Prussia. Again, this is a tentative conclusion because, given the available data, the projected increase in economic activity with Prussia is not susceptible to measurement. Then, the suggestion with which the paper ends is that, although several German regions seem to have preferred their own private law, they might have chosen to introduce the private law of Prussia into uniform laws rather than any other private law because Prussia became able to boost economic growth the strongest in Germany in the nineteenth century.

References

Ahcin, C. [1996], *Zur Entstehung des bürgerlichen Gesetzbuchs für das Königreich Sachsen von 1863/65*, Studien zur Europäischen Rechtsgeschichte, Ius Commune Sonderhefte 85, Veröffentlichungen des Max-Planck-Instituts für Europäische Rechtsgeschichte Frankfurt am Main, Vittorio Klostermann: Frankfurt am Main.

Baird, D.G. *et al*. [1994], *Game Theory and the Law*, Harvard University Press: Cambridge, MA.

Beier, F.-K. [1974], "Gewerbefreiheit und Patentschutz, zur Entwicklung des Patentrechts in Deutschland im 19. Jahrhundert," pp 183-205 in: H. Coing and W. Wilhelm (eds.), *Studien zur Rechtswissenschaft des neunzehnten Jahrhunderts*, Bd. 4: Wissenschaft und Kodifikation des Privatrechts im 19. Jahrhundert, Vittorio Klostermann: Frankfurt am Main.

Bergfeld, C. [1987], "Preußen und das Allgemeine Deutsche Handelsgesetzbuch," pp 101-114 in: D. Simon (ed.), *Ius Commune XIV*, Veröffentlichungen des Max-Planck-Instituts für Europäische Rechtsgeschichte Frankfurt am Main, Vittorio Klostermann: Frankfurt am Main.

Coing, H. [1982], *Handbuch der Quellen und Literatur der neueren Europäischen Privatrechtsgeschichte*, Bd. III: Das 19. Jahrhundert, Tlbd. 2: Gesetzgebung zum allgemeinen Privatrecht und zum Verfahrensrecht, C.H. Beck'se Verlagsbuchhandlung: München.

– – [1986], *Handbuch der Quellen und Literatur der neueren Europäischen Privatrechtsgeschichte*, Bd. III: Das 19. Jahrhundert, Tlbd. 3: Gesetzgebung zu den privatrechtlichen Sondergebieten, C.H. Beck'se Verlagsbuchhandlung: München.

Dumke, R.H. [1977], "Intra-German Trade in 1837 and Regional Economic Development," *Vierteljahrschrift für Sozial- und Wirtschaftsgeschichte*, 64, 468-496.

Grothe, H. [1877], *Das Patent-Gesetz für das Deutsche Reich*, eingeleitet durch eine Geschichte des Deutschen Patentgesetzes, Verlag von I. Guttentag: Berlin.

Gruner, W.D. [1973], "Die Würzburger Konferenzen der Mittelstaaten in den Jahren 1859-1861 und die Bestrebungen zur Reform des deutschen Bundes," *Zeitschrift für bayerische Landesgeschicht*, 36, 181-253.

Guinnane, T.W. [2002], "Delegated Monitors, Large and Small: The Development of Germany's Banking System, 1800-1914," *Journal of Economic Literature*, 40, 73-124.

Hattenhauer, H. [1977], "Vom Reichsjustizamt zum Bundesministerium der Justiz, Stellung und Einfluß der obersten deutschen Justizbehörde in ihrer 100jährigen Geschichte," pp 9-117 in:

Bundesministerium der Justiz, *Vom Reichsjustizamt zum Bundesministerium der Justiz: Festschrift zum 100jährigen Gründungstag des Reichsjustizamtes am 1. Januar 1877*, Bundesanzeiger Verlagsges. mbH.: Köln.

Hoffmann, W.G. *et al.* [1965], *Das Wachstum der Deutschen Wirtschaft seit der Mitte des 19. Jahrhunderts*, Springer-Verlag: Berlin.

Huber, E.R. [1986], *Deutsche Verfassungsgeschichte seit 1789*, Bd. I: Reform und Restauration 1789 bis 1830, Bd. II: Der Kampf um Einheit und Freiheit 1830 bis 1850, Bd. III: Bismarck und das Reich, W. Kohlhammer Verlag: Stuttgart.

Huber, U. [1978], "Das Reichsgesetz über die Einführung einer allgemeinen Wechselordnung für Deutschland vom 26.11.1848," *Juristenzeitung*, 23/24, 785-791.

John, M. [1989], *Politics and the Law in Late Nineteenth-Century Germany: The Origins of the Civil Code*, Clarendon Press: Oxford.

Kerwat, M. [1976], *Die wechselseitige wirtschaftliche Abhängigkeit der Staaten des nachmaligen Deutschen Reiches im Jahrzehnt vor der Reichsgründung*, Dissertation: München.

Kraehe, E.E. [1953], "Practical Politics in the German Confederation, Bismarck and the Commercial Code," *Journal of Modern History*, 25, 13-24.

Laufs, A. [1973], "Die Begründung der Reichskompetenz für das gesamte bürgerliche Recht – Ein Beitrag zur Geschichte der deutschen Rechtseinheit," *Juristische Schulung*, 13, 740-744.

La Porta, R. *et al.* [2004], "Judicial Checks and Balances," *Journal of Political Economy*, 112, 445-470.

Mahoney, P.G. [2001], "The Common Law and Economic Growth: Hayek Might Be Right," *Journal of Legal Studies*, 30, 503-525.

North, D.C. [1990], *Institutions, Institutional Change and Economic Performance*, Cambridge University Press: Cambridge.

Ribstein, L.E., and B.H. Kobayashi [1996], "An Economic Analysis of Uniform State Laws," *Journal of Legal Studies*, 15, 131-199.

Schubert, W. [1977], "Franz von Kübel und Württembergs Stellung zur Erweiterung der Reichskompetenz für das gesamte bürgerliche Recht," *Zeitschrift für württembergische Landesgeschicht*, 36, 167-198.

– – [1978], “Die Beratung des Bürgerlichen Gesetzbuchs in systematischer Zusammenstellung der unveröffentlichten Quellen,” in: H.H. Jakobs and W. Schubert (eds.), *Materialien zur Entstehungsgeschichte des BGB – Einführung, Biographien, Materialien* –, Walter de Gruyter: Berlin–New York.

– – [1979], “Preußens Pläne zur Vereinheitlichung des Zivilrechts nach der Reichsgründung,” *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Germanistische Abteilung*, 96, 243-256.

– – [1988], “Die Einführung der Allgemeinen Deutschen Wechselordnung und des Allgemeinen Deutschen Handelsgesetzbuchs als Bundesgesetze (1869),” *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht*, 144, 484-492.

Schulte-Nölke, H. [1995], *Das Reichsjustizamt und die Entstehung des Bürgerlichen Gesetzbuchs*, Studien zur Europäischen Rechtsgeschichte, Ius Commune Sonderhefte 71, Veröffentlichungen des Max-Planck-Instituts für Europäische Rechtsgeschichte Frankfurt am Main, Vittorio Klostermann: Frankfurt am Main.

Thieme, J. [1977], “Zur Entstehung der Konkursordnung,” pp 35-69 in: W. Uhlenbruck *et al.* (eds.), *Einhundert Jahre Konkursordnung 1877-1977: Festschrift des Arbeitskreises für Insolvenz- und Schiedsgerichtswesen e. V. Köln zum einhundertjährigen Bestehen der Konkursordnung vom 10. Februar 1877*, Carl Heymanns Verlag KG: Köln.

Tipton, F.B. [1976], *Regional Variations in the Economic Development of Germany during the Nineteenth Century*, Wesleyan University Press: Middletown, CT.

– – [2003], *A History of Modern Germany Since 1815*, University of California Press: Berkeley, CA.

Vogel, M. [1993], “Urheberpersönlichkeitsrecht und Verlagsrecht im letzten Drittel des 19. Jahrhunderts,” pp 191-206 in: E. Wadle (ed.), *Historische Studien zum Urheberrecht in Europa: Entwicklungslinien und Grundfragen*, Bd. 10: Schriften zur europäischen Rechts- und Verfassungsgeschichte, Duncker & Humblot: Berlin.

Wadle, E. [1985], “Der Zollverein und die deutsche Rechtseinheit,” *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Germanistische Abteilung*, 102, 99-129.

– – [2003], *Geistiges Eigentum*, Bd. 2: Bausteine zur Rechtsgeschichte, C.H. Beck Verlag: München.

Wagner, R.E. [1998], "Common Law, Statute Law and Economic Efficiency," pp 313-317 in: P. Newman (ed.), *The New Palgrave Dictionary of Economics and the Law*, Macmillan Reference Limited: London.

Wesenberg, G. [1955], "Die Paulskirche und die Kodifikationsfrage: Zu §64 der Paulskirchenverfassung," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung*, 72, 359-365.

Zorn, W. [1963], "Wirtschafts- und Sozialgeschichtliche Zusammenhänge der Deutschen Reichsgründungszeit (1850-1879)," *Historische Zeitschrift*, 197, 318-342.

– – [1964], "Binnenwirtschaftliche Verflechtungen um 1800," pp 99-109 in: F. Lütge (ed.), *Die Wirtschaftliche Situation in Deutschland und Österreich um die Wende vom 18. zum 19. Jahrhundert*, Bd. 6: Forschungen zur Sozial- und Wirtschaftsgeschichte, Gustav Fischer Verlag: Stuttgart.

– – [1992], "Die Wirtschaftliche Integration Kleindeutschlands in den 1860er Jahren und die Reichsgründung," pp 398-429 in: H. Pohl *et al.* (eds.), *Wirtschaftlich-soziale Bewegung und Verflechtung* – Ausgewählte Aufsätze, VSWG Beihefte Nr. 100, Franz Steiner Verlag: Stuttgart.

Arnald J. Kanning
Tilburg Law and Economics Center
Tilburg University
P.O. Box 90153
5000 LE Tilburg
The Netherlands
E-mail:
a.j.kanning@uvt.nl