German National Reports on the 20th International Congress of Comparative Law

Edited by
MARTIN SCHMIDT-KESSEL

Gesellschaft für Rechtsvergleichung e.V.

Rechtsvergleichung und Rechtsvereinheitlichung
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Mohr Siebeck

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Preface by the editor

The XXth International Congress of Comparative Law will be organised from July 22 to 28 at the Kyushu University in Fukuoka (Japan). The Congress is the internationally leading forum for the discussion of comparative law subjects and takes place every four years. The line of congresses mirrors the development of comparative law and the cities in which they were organised – Vienna, Washington D.C., Utrecht, Brisbane, Bristol, Athens, Caracas, Teheran or The Hague – denominate the rhythm of the whole discipline.

The more than twenty sessions of the XXth Congress find their subjects in all legal disciplines, starting from legal theory and dealing also with classical questions of civil and commercial law, constitutional law and administrative law and criminal law. The German Association of Comparative Law by this book presents the German national reports delivered to the 20th Congress. The German comparative law academia thereby contributes to this congress on the variety topics presented by the International Academy of Comparative Law. At the Fukuoka Congress the national reports will become part of the considerations and will support the General Rapporteurs appointed by the Academy for the respective sessions.

One large focus of the topics of the 20th Congress is on questions of multiculturalism, identity and language, which do not only concern methodological aspects of comparative law but also certain areas of law like family law or transgender. Another set of topics refers to choice and information with particular questions connected to consumer protection (choice of court agreement, information duties, price terms, crowdfunding or travelling and leisure contracts). Several contributions show how much the digitalisation of the legal order, the economy and the society has reached also comparative law and in particular how important data protection and e.g. the right to be forgotten are for national legal orders, harmonisation or unification of the law and for comparative law. The volume gives an overview over the state of discussions within the German academia.

The order of the reports presented in this book refers to the systematic order proposed by the International Academy of Comparative Law, while the internal structure of the reports in most cases is based on questionnaires sent out from the General Rapporteurs to the National Rapporteurs. Usually the National Rapporteurs have organised their reports along the list of questions in these questionnaires.

The considerable number of publications concerning the Fukuoka Congress which does not only consist of the several collections of national reports published on behalf of the several national associations of comparative law. Many General Rapporteurs will bring together all the national reports and the general report in a separate volume, to which herby is made reference. Furthermore, the International Academy of Comparative Law will publish all the general reports in an extra volume, to which the reader is also referred.

Editing this book on behalf of the German Association of Comparative Law I am indebted to Ms. Judith Zölke, Ms. Eva Weigel and Ms. Pia Kraus and the whole team of my chair, who supported me in preparing the various papers collected in this book for publication. I also owe thanks to the team of our publisher, in particular Ms. Daniela Taudt and Ms. Ilse König, who helped to bring about this book in time.

Bayreuth, Mai 2018 Martin Schmidt-Kessel

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Comparative Law and Multicultural Legal Classes: Challenge or Opportunity?

A legal-historical account from Germany

Jan Thiessen

A. Introduction

From a recent German point of view, "multicultural legal classes" is a topic that does not even seem to exist. Of course, many law students today in Germany have very heterogeneous backgrounds with respect to nationality, ethnic origins or religious traditions.[1] However, the majority of legal lectures in Germany are still held in German, regardless of the linguistic capacities of the students. German law schools and German legal scholars still teach predominantly these legal skills that are demanded by public employers in Germany.[2] This is why German law students, who seek for jobs as judges, prosecutors or civil servants, mainly focus on German civil law, German criminal law, German admini-

[1] For the recent situation see the statistics in Sekretariat der Ständigen Konferenz der Kultusminister der Länder in der Bundesrepublik Deutschland (ed.), Studierende ausländischer Herkunft in Deutschland von 1993 bis 2001, 2003; *Isserstedt/Schnitzer*, Internationalisierung des Studiums. Ausländische Studierende in Deutschland, Deutsche Studierende im Ausland. Ergebnisse der 16. Sozialerhebung des Deutschen Studenentwerks (DSW) durchgeführt durch HIS Hochschul-Information-System, 2002, p. 5 et seq. For a local example aside from legal studies see *Feldhaus/Logemann*, Student sein – Ausländer sein – eine Replikationsstudie über die soziale Situation und Integration ausländischer Studierender an der Universität Oldenburg, 2002, p. 17 et seq.; *Meinhardt/Zittlau*, Bildungsinländerinnen an deutschen Hochschulen am Beispiel der Universität Oldenburg. Eine empirische Studie zu den erfolgshemmenden Faktoren im Studienverlauf und Empfehlungen zur Verbesserung von Studienleistungen durch HochschullotsInnen, 2009, p. 15 et seq. For the historical situation of students from abroad in Germany see *Siebe*, "Germania docet". Ausländische Studierende, auswärtige Kulturpolitik und deutsche Universitäten 1870 bis 1933, 2009, p. 11 et seq.

[2] *Martinek*, in: Ritsumeikan Law Review 30 (2013), p. 203 et seq. For the historic roots of this phenomenon see *Krause*, in: Baldus/Finkenauer/Rüfner (eds.), Juristenausbildung in Europa zwischen Tradition und Reform, 2008, p. 95 et seq. Broader historical surveys on legal education are presented by *Rüfner*, in: Baldus/Finkenauer/Rüfner (eds.), Bologna und das Rechtsstudium. Fortschritte und Rückschritte in der europäischen Juristenausbildung, 2011, p. 3 et seq.; *Keiser*, (2001) JURA – Juristische Ausbildung 31, p. 353 et seq.

strative law, German constitutional law and so on.[3] In everyday life, German courts and authorities do not care too much for globalization, Europeanization or post-colonial notions, even in cases they better should do so.[4]

While this picture may appear to be a caricature of reality, it has to be emphasized that Germany has indeed a long tradition of integrating people of different origins under the "roof" of a uniform or unified law. In that sense, Germany has been well prepared to cope with the demands of "multicultural legal classes" for a long time. In my contribution, I would like to illustrate this assertion on the basis of three well-known examples from legal history. First, I will recall how the reception of the re-discovered Roman law in the middle ages shaped a landscape of nearly worldwide-accepted legal rules and institutions (II.). In a second step, I will show how the labourious codification of the German Civil Code became a cornerstone of the belated national unity of Germany (III.). Finally, I will have a look at the European harmonization of law as a work in progress (IV.). More generally, I will focus on private law and on legal education, since these are junctions that connect these three historic paths.

B. From Roman Law to Ius Commune

As we all pretend to know, the digests were re-discovered in Northern Italy during the 11th century.[5] From that time onwards, Roman law has been taught, studied, interpreted, annotated and discussed throughout the Western world and beyond.[6] Much is known about the scholars who taught Roman law at universities.[7] Something is also known about their students, apart from those who

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[3] Still more or less valid is *Schweitzer*, in: Schwind/Brauneder (eds.), Rechtsstudium für das Europa von morgen, 1991, p. 39 et seq., 46 et seq.; cf. *Kison*, Juristenausbildung in der Europäischen Union. Der Einfluss der europäischen Bildungspolitik auf die Regelungen der Mitgliedstaaten unter besonderer Berücksichtigung der Rechtslage in der Bundesrepublik Deutschland, 2014, 167 et seq.; *Martinek* (n. 2), p. 207. More positively on German legal education especially in an international context is *Müller-Graff*, in: Baldus et al. (n. 2, 2011), p. 275 et seq.

[4] German courts are obliged to observe the primacy of European law, see *Schmidt-Räntsch*, in: Riesenhuber (ed.), Europäische Methodenlehre. Handbuch für Ausbildung und Praxis, 3rd edn. 2015, p. 521 et seq.

[5] *Stein*, Römisches Recht und Europa. Die Geschichte einer Rechtskultur, 1996, p. 76 et seq. For the origins of the Codex Florentinus see *Kaiser*, in: Schmidt-Recla/Schumann/Theisen (eds.), Sachsen im Spiegel des Rechts. Ius Commune Propriumque, 2001, p. 39 et seq.; *Kaiser*, in: (2001) Zeitschrift der Savigny-Stiftung für Rechtsgeschichte 118, p. 133 et seq. *Lange*, Römisches Recht im Mittelalter, vol. 1, 1997, p. 60 et seq.

[6] *Stein* (n. 5), p. 80 et seq.; *Rainer*, Das römische Recht in Europa. Von Justinian zum BGB, 2012.

[7] *Fried*, Die Entstehung des Juristenstandes im 12. Jahrhundert. Zur sozialen Stellung und politischen Bedeutung gelehrter Juristen in Bologna und Modena, 1974, p. 87 et seq.; *Stein* (n. 5), p. 80 et seq., 91 et seq., 95 et seq.; *Wieling*, in: Baldus et al. (n. 2), p. 52 et seq.;

became scholars themselves.[8] In the very beginning, the majority of these students, a rare species anyway, may have come from Northern Italy.[9] Two to five centuries later, however, universities had also been established in several European territories north of the Alps.[10] Accordingly, their students originated from several European territories as well.[11] Thus, when Roman law was taught in Bologna, Paris, Oxford or Heidelberg, it was taught in front of 'multicultural classes' *avant la lettre*. Furthermore, it was taught by a multicultural staff, as scholars, as well as students, moved regularly between universities, territories and countries.[12] The subject matter, though, was ostensibly not a multicultural one from the outset. At least from the 16th century onwards, the legists[13] – scholars and students (and courts and lawyers) – used editions of the digests or of the Corpus Iuris Civilis, which may resemble one another in general, but nonetheless remarkably vary in detail.[14] The uniform subject matter united jurists of different origins. These jurists, as well as other academics, shared a common language, both in a linguistic and in a juridical sense.[15] Jurists of different origins were not dissociated among each other, but with regard to non-jurists, regardless of their origins.

Nevertheless, jurists did not live in perfect harmony under the ius commune.[16] Indeed, Roman law was not, and is not, a homogeneous body at all. At

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Lange (n. 5), p. 151 ff.; *Lange/Kriechbaum*, Römisches Recht im Mittelalter, vol. 2, 2007, p. 435 ff.; *Lepsius*, in: Zeitschrift für Europäisches Privatrecht 2015, p. 313, 316 et seq.

[8] *Schmutz*, Juristen für das Reich. Die deutschen Rechtsstudenten an der Universität Bologna 1265–1425, 2000; *Gramsch*, Erfurter Juristen im Spätmittelalter. Die Karrieremuster und Tätigkeitsfelder einer gelehrten Elite des 14. und 15. Jahrhunderts, 2003; *Schwinges*, Studenten und Gelehrte. Studien zur Sozial- und Kulturgeschichte deutscher Universitäten im Mittelalter, 2008, p. 119 et seq.; *Fuchs*, Dives, pauper, nobilis, magister, frater, clericus. Sozialgeschichtliche Untersuchungen über Heidelberger Universitätsbesucher des Spätmittelalters (1386–1450), 1995.

[9] *Lange/Kriechbaum* (n. 7), p. 46 et seq.

[10] *Zonta*, in: Sanz/Bergan (eds.), The heritage of European universities, 2nd edn., 2006, p. 27 et seq.; *Rüegg*, in: Sanz/Bergan, loc. cit., p. 41 et seq.; *Sanz/Bergan*, in: Sanz/Bergan, loc. cit., p. 51 et seq.; *Moraw*, Gesammelte Beiträge zur deutschen und europäischen Universitätsgeschichte. Strukturen – Personen – Entwicklungen, 2008, p. 64 et seq.; *Wieling*, in: Baldus et al. (n. 2), p. 47, 55 et seq.; *Lange/Kriechbaum* (n. 7), p. 32 et seq., 72 et seq., 102 et seq., 123 et seq.; *Gramsch* (n. 8), p. 69 et seq.

[11] *Zonta*, in: Sanz/Bergan (n. 10), p. 32 et seq.; *Müller*, Geschichte der Universität. Von der mittelalterlichen Universitas zur deutschen Hochschule, 1990, p. 21 et seq.; *Ridder-Symoens*, in: Rüegg (ed.), Geschichte der Universität in Europa, vol. 1, p. 255 et seq.; *Garcia y Garcia*, in: Rüegg loc. cit., p. 352 et seq.; *Lange/Kriechbaum* (n. 7), p. 114 et seq.

[12] *Zonta*, in: Sanz/Bergan (n. 10), p. 27, 33 et seq.; *Lange/Kriechbaum* (n. 7), p. 38 ff., 111 ff.

[13] This paper cannot deal with the huge influence of canon law on European legal culture; on that see Helmholz, The Spirit of Classical Canon Law, 1996.

[14] *Troje*, (2004) Tijdschrift voor Rechtsgeschiedenis 72, p. 61, 63 et seq., 73 et seq.

[15] Cf. *Zonta*, in: Sanz/Bergan (n. 10), p. 27.

[16] On the concept of ius commune *Bellomo*, in: Theisen/Voß (eds.), Summe, Glosse, Kommentar. Juristisches und Rhetorisches in Kanonistik und Legistik, 2000, p. 9 et seq.;

the time when Roman law was re-discovered, it already had been continuously altered, first in transition from the Roman republic to the principate, then in the light of Christianity under the Byzantine Emperor Iustinian, during the encounters of Western Roman law with the customary law of the so called 'Germanic' tribes, and not least in the age of oblivion when it was only applied by the church.[17] Alteration was the default setting of Roman law and continued to be when Roman law was received by European jurists in the middle ages and in early modernity. Which part of the Corpus Iuris Civilis was still 'good law' under entirely different surroundings, compared with late antiquity? This was the crucial question lawyers and scholars were asking themselves from the middle ages to the modernity. Roman law was adopted by lawyers, courts and legislators but it was bound to be adapted for contemporary purposes and for local usage. Local consuetudes diffused with the ius scriptum.[18] Actually, this process already started at university, where each scholar and each student had to match the subject matter of the classes with the underlying premise people had in mind about what the law should be, according to their particular experiences.[19]

As regards the topic of this panel, we can summarize that the study of Roman law was challenged by multicultural classes, whereas the pluralism of local customary law was challenged by having to adopt a, at first glance, uniform common law. People readily changed their minds when studying Roman law, whereas the notion of what Roman law was itself changed due to the input of multicultural students, who eventually became scholars, lawyers or judges themselves. Actually, it is quite the same phenomenon that could be observed with respect to medieval Latin, or the English language today. A foreign language itself is affected and, in consequence, changed by a majority of non-native speakers.[20]

Repgen, in: Haferkamp/Repgen (eds.), Usus modernus pandectarum. Römisches Recht, Deutsches Recht und Naturrecht in der Frühen Neuzeit. Klaus Luig zum 70. Geburtstag, 2007, p. 157 et seq.

[17] *Stein* (n. 5), p. 31 et seq., 48 et seq., 61 et seq., 68 et seq., 73 et seq.; for the impact on legal education see *Stolfi*, in: Baldus et al. (n. 2), p. 9 et seq.; *Liebs*, in: Baldus loc. cit., p. 31 et seq.; *Wieling*, in: Baldus et al., loc. cit., p. 47 et seq.

[18] *Luig*, Römisches Recht, Naturrecht, Nationales Recht, 1998, p. 31 et seq.

[19] For medieval studies see *Walther*, in: Speer/Berger (eds.), Wissenschaft mit Zukunft. Die 'alte' Kölner Universität im Kontext der Europäischen Rechtsgeschichte, 2016, p. 221, 236 et seq.

[20] *Leonhardt*, Latein. Geschichte einer Weltsprache, 2009, p. 235 et seq.

C. From the end of the Holy Roman Empire to the German Civil Code

In 1806, the Holy Roman Empire of German Nation "passed away". How could Roman law exist without the Roman Empire, without the Roman Emperor?[21] Were the German territories about to lose their ius commune, their common law? With respect to the long history of the reception of Roman law, it is surprising that such questions arose. In fact, neither the Holy Roman Empire nor the Roman Emperor explicitly introduced Roman law as a new source of law.[22] In 1495, the procedural code for the Imperial Supreme Court (Reichskammergerichtsordnung) acknowledged, that the court should base its judgments on the "Empire's Common Law" ("nach den Reychs gemainen Rechten"), and it also determined that half of the judges' bench should be staffed by "educated jurists" ("der Recht gelert und gewirdigt").[23] The "Empire's Common Law" had become common to the Empire and to the "educated jurists" a long time before the common court was established.[24] Thus, in principle, the ius commune could persist in practice without the Empire as long as "educated jurists" decided on the law suits.

"Educated jurists", however, were the very profession that constituted a threat for the so-called enlightened monarchs who claimed to make law in a manner that no judge and no lawyer could have any doubt with respect to what the law was.[25] In a famous treatise of 1749, the Francophile Prussian King Frédéric le Grand demanded that an ideal corpus of laws should be designed in a way to regulate all public affairs like a perfect clockwork: "Clear and precise directives would never cause conflicts; they consisted of a distinguished choice of the best what civil laws provide, accompanied by a prudential and simple application of these laws with respect to the customs of the nation."[26] In this quo-

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[21] *Haferkamp*, American Journal of Comparative Law 56 (2008), p. 667, 676; *Haferkamp*, Die historische Rechtsschule, 2018, p. 62 et seq.

[22] *Luig* (n. 18), p. 319 et seq.; *Haferkamp*, in: Haferkamp/Repgen (n. 16), p. 25 et seq.

[23] Ordnung des Kayserl. Cammer-Gerichts zu Worms, aufgericht Anno MCCCCXCV, in: Neue und vollständigere Sammlung der Reichs-Abschiede, Welche von den Zeiten Kayser Conrads des II. bis jetzo, auf den Teutschen Reichs-Tägen abgefasset worden sammt den wichtigsten Reichs-Schlüssen, so auf dem noch fürwährenden Reichs-Tage zur Richtigkeit gekommen sind, vol. 2, 1747, p. 6 et seq. (§§ 1, 3). For the 'law in action' see *Oestmann*, Rechtsvielfalt vor Gericht. Rechtsanwendung und Partikularrecht im Alten Reich, 2002, p. 431 et seq.

[24] See n. 16.

[25] *Kuhli*, Carl Gottlieb Svarez und das Verhältnis von Herrschaft und Recht im aufgeklärten Absolutismus, 2012, p. 180 et seq.; *Beales*, Enlightenment and Reform in Eighteenth-century Europe, 2005, p. 35 et seq., 44 et seq.; *Birtsch*, in: Birtsch/Willoweit (ed.), Reformabsolutismus und ständische Gesellschaft. Zweihundert Jahre Preußisches Allgemeines Landrecht, 1998, p. 47 et seq.

[26] Dissertation sur les raison d'établir ou d'abrogér les lois, in: Friedrich der Große, Phi-

tation, the monarch implies the dichotomy of the received Roman law and the local, or national, customs. By this, he touched on the topic of multiculturalism of law. He did not deny the necessity to build a new code on the grounds of the Corpus Iuris Civilis. Nonetheless, he insisted that the new code he ordered to elaborate on in 1780, had to be short and simple, to make sure that, according to Montesquieu, "les juges de la nation ne sont […], que la bouche qui prononce les paroles de la loi; des êtres inanimés, qui n'en peuvent modérer ni la force ni la rigueur".[27] As a result of this "simplification", "many educated jurists" should "lose their mystic reputation", they should "be deprived from their subtleties' stuff", and "the whole corps of advocates should become useless".[28] The code that was only finalized after Frederic's death, may have been simple but it was not short at all. However, from the perspective of Frederic's successor, it was, in fact, too modern. Therefore, it was not implemented until the second partition of Poland required a uniform code both for Prussia and the occupied territories of Poland.[29] A multi-ethnic population was exposed to a uniform code, which originated from multi-ethnic sources, although the multi-ethnicity of the code differed from the multi-ethnicity of those who were subject to the code. Other famous codes of that era match this pattern. The French Code Civil of 1804 was introduced in certain European territories, with the result of several translations of the Code.[30] The Austrian General Civil Code of 1811 also applied to some specific territories of Austria, which later became (part of) independent states.[31]

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losophische Schriften/Frédéric le Grand, Œuvres philosophiques, Potsdamer Ausgabe/Édition de Potsdam, Berlin: Akademie Verlag, 2007, p. 286 ("Des ordonnances claires et précises ne donneraient jamais lieu au litige; elles consisteraient dans un choix exquis de tout ce que les lois civiles ont eu de meilleur, et dans une application ingénieuse et simple de ces lois aux usage de la nation.").

[27] *Montesquieu*, De l'Esprit des Lois, Livre XI, Chapitre VI, in: Œuvres de Monsieur de Montesquieu, edition 1764, vol. 1, p. 391.

[28] Abdruck der allerhöchsten Königl. Cabinets-Order die verbesserung des justizwesens betreffend, 14 April 1780, in: Novum corpus constitutionum Prussico-Brandenburgensium Praecipue Marchicarum, vol. 6, 1781, column 1935, 1942 ("so werden freylich viele Rechtsgelehrten bey der Simplification dieser Sache ihr geheimnißvolles Ansehen verlieren, um ihren ganzen Subtilitäten-Kram gebracht, und das ganze Corps der bisherigen Advocaten unnütze werden").

[29] *Janicka*, in: Dölemeyer/Mohnhaupt (eds.), 200 Jahre Allgemeines Landrecht für die preußischen Staaten, 1995, p. 437 et seq.; *Finkenauer*, in: Zeitschrift der Savigny-Stiftung für Rechtsgeschichte – Germanistische Abteilung 113 (1996), p. 40, 54 et seq., 88 et seq., 156 et seq.

[30] *Dölemeyer*, in: Dölemeyer/Mohnhaupt/Somma (eds.), Richterliche Anwendung des Code civil in seinen europäischen Geltungsbereichen außerhalb Frankreichs, 2006, p. 1 et seq.

[31] For the unification of private law within the Austrian territories *Schennach*, in: Dölemeyer/Mohnhaupt (eds.), 200 Jahre ABGB (1811–2011). Die österreichische Kodifikation im nationalen Kontext, 2012, p. 71 et seq.; for the reception of Austrian Law in Liechtenstein and the Thuringian territories see *Berger*, in: Dölemeyer/Mohnhaupt loc. cit., p. 177, 189 et

From 1806 to 1815 – between Napoleon's victories and defeat – German scholars discussed the necessity of a German Civil Code. Once again, a code was in demand that could embrace several legal traditions – Roman, Prussian, French, Austrian and others. At this time, Germany was divided into numerous sovereign territories. The battles for liberation against Napoleon triggered national sentiments beyond the political borders. According to Anton Friedrich Justus Thibaut, Professor of Roman Law in Heidelberg, "the Germans could not be happy in their civil relationships, if it was not for a civil code which should be drawn up with joint efforts of all German [territorial] governments and be implemented throughout Germany". The new code had to be "clear, unambiguous and exhaustive", "wise and appropriate". It was supposed to refrain from simply replicating Roman law. Instead, it had to be "elaborated with German strength, in a German spirit".[32] The contents of this code, however, remained unclear, for no one could define what "German strength" or "German spirit" was. Throughout the entire 19th century, the so-called Germanist legal scholars, especially those who called the reception of Roman Law a "national disaster"[33], tried to demonstrate what was "German" about "German Privat Law"[34]. Not surprisingly, Thibaut's antipode Friedrich Carl von Savigny, Professor of Roman Law in Berlin, could easily refute Thibaut's proposal as a delusion[35], caused by "an entirely unenlightened educational impulse". Savigny criticized in particular, that the philosophers and jurists of the age of enlightenment had "lost any sense for the grandness and peculiarity of former times and for the natural evolution of nations and constitutions, hence for everything that makes history beneficial and fruitful".[36] Admittedly, Savigny did not plead for multiculturalism. Quite the contrary, he opined that there was an interdepend-

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seq.; for certain Italian territories see *Ranieri*, in: Dölemeyer/Mohnhaupt loc. cit., p. 199, 201 et seq.; for Poland see *Malec*, in: Dölemeyer/Mohnhaupt loc. cit., p. 255 et seq.; for Czechoslovakia see *Skřepjpková*, in: Dölemeyer/Mohnhaupt loc. cit., p. 255 et seq.

[32] *Thibaut*, Ueber die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland, 1814, p. 12 et seq., 26 ("daß die Deutschen nicht anders in ihren bürgerlichen Verhältnissen glücklich werden können, als wenn alle Deutschen Regierungen mit vereinten Kräften die Abfassung eines […] für ganz Deutschland erlassenen Gesetzbuchs zu bewirken suchen"; "klar, unzweydeutig und erschöpfend", "weise und zweckmäßig", "mit Deutscher Kraft im Deutschen Geist gearbeitet").

[33] *Beseler*, Volksrecht und Juristenrecht, 1843, p. 42 ("die unbedingte Reception des vollständigen Materials und die Unterdrückung und Verkrüppelung des eigenen Rechtslebens, welche nothwendig daraus folgten, bleiben immer ein Nationalunglück, welches der Patriot nur beklagen kann, wenn es auch aus der Verkettung der Verhältnisse wie mit Nothwendigkeit hervorgegangen scheint").

[34] On the origins of "Deutsches Privatrecht" *Luig* (n. 18), p. 395 et seq.; for the 18th and 19th centuries see *Schäfer*, Juristische Germanistik, 2008, p. 77 et seq., 395 et seq.

[35] *Savigny*, Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft, 1814, p. 155 et seq.

[36] *Savigny* (n. 35), p. 4 ("ein völlig unerleuchteter Bildungstrieb"; "Sinn und Gefühl für die Größe und Eigenthümlichkeit anderer Zeiten, so wie für die naturgemäße Entwicklung

ency between law and people, or between law and nation: "From the beginning of documented history, civil law already possesses a certain character, inherent to the people, as well as its language, customs, constitution. […] This organic interrelation between the law and the nature and the character of the people proves itself also during the progress of eras, and, also in this regard, it has to be compared with the language. […] Therefore, the law grows with the nation, emerges from the latter and finally dies off, when the nation loses its peculiarity."[37] Despite the latent racism which is implied in terms like "nations of noble origins"[38] or the "peculiarity" of nations, Savigny acknowledged an interrelation between law and culture.[39] Only the "strict historical method of jurisprudence" could make "veritable useful sources of law out of the common law and the state laws". This method "pursues to retrace every given matter back to its roots in order to unveil its organic principle, so that everything which is still alive will be separated by itself from that which has already died off and only belongs to history".[40] Consequently, these matters of law, that still belong to the living cultural heritage of a nation, will persist. In the end, "the historic substrate of law, that impedes us now everywhere, will be scrutinized down to the bottom, so that it will enrich us. Then, we will have an own national law, which will not lack a powerful language. Then, we can pass the Roman law to history, and we will achieve not only a weak imitation of the Roman conception but an entirely own and new conception."[41]

So where is the connection between these well-known quotations and "Comparative Law and Multicultural Legal Classes"? Law is formed by various sources, and it is, in turn, source itself of various new forms. At Thibaut's and Savigny's time, law in Germany was not only a juxtaposition, but even a blend of Roman and Prussian law, Roman and Bavarian law, Roman and Saxon law, and so on.[42] A new German civil code had to include all these different traditions and different cultures. This implies, that all these different traditions had to be acquired, and compared with each other by the legislators. And in-

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der Völker und Verfassungen, also alles was die Geschichte heilsam und fruchtbar machen muß, war verloren").

[37] *Savigny* (n. 35), p. 8 ("Wo wir zuerst urkundliche Geschichte finden, hat das bürgerliche Recht schon einen bestimmten Charakter, dem Volke eigenthümlich, so wie seine Sprache, Sitte, Verfassung."), 11 ("[D]ieser organische Zusammenhang des Rechts mit dem Wesen und Charakter des Volkes bewährt sich auch im Fortgang der Zeiten, und auch hierin ist es der Sprache zu vergleichen."; "Das Recht wächst also mit dem Volke fort, bildet sich aus diesem, und stirbt endlich ab, so wie das Volk seines Eigenthümlichkeit verliert.").

[38] *Savigny* (n. 35), p. 8 ("bey Völkern edler Stämme").

[39] *Savigny* (n. 35), p. 11 et seq., 45 et seq., 52, 115 et seq.; see in contrast *Thibaut* (n. 32), p. 33, 50 et seq., 55 et seq., 58 et seq.

[40] *Savigny* (n. 35), p. 117 et seq.

[41] *Savigny* (n. 35), p. 133.

[42] Cf. *Thibaut* (n. 32), p. 13 et seq.; *Savigny* (n. 35), p. 14, 18, 27 et seq., 37 et seq., 83 et seq., 111 et seq., 135 et seq., 149, 151 et seq.

deed, the elaboration of the German civil code at the end of the 19th century was a product of comparative law.[43] Outside Germany, it is hard to imagine that the various regions of Germany constituted, and in a way, constitute sovereign states up to the present day. In fact, the German federal states maintain their own embassies in Berlin and in Brussels. Although German nationality may foster a sense of identity, being born in Berlin, Hamburg, Munich or Frankfurt can cause strong feelings of diversity.[44] Upon the occasion of the fiftieth anniversary of the German Imperial Supreme Court in 1929, the "citizenship" of the judges was not specified as "German", but instead as "Bavarian", "Prussian" or "Hanseatic".[45] These ties were so powerful, that elder Prussian judges were allowed to retire prior to their regular pension age so they did not have to study the new civil code of 1900.[46] Although the remaining judges of the Supreme Court had to apply the unified German Civil Code of 1900, they stuck to their regional tradition for at least one more decade.[47] Here comes to mind that Savigny dealt not only with legislation but also, and above all, with legal education.[48] The "strict historical method of jurisprudence" was also a method of education, not merely a scholarly program.[49] The study of Roman law should enable its students to stay in touch with their prospective colleagues abroad. This included other German territories, regardless of whether there was a code or not.[50] The same postulate re-occurred after the promulgation of the German Civil Code in 1896.[51] For more than three decades, Roman law remained an essential part of legal education in Germany. The Nazis eventually broke with this tradition.[52] Needless to say, their ideology was the very opposite of any kind of multi-culturalism.

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[43] *Zimmermann*, in: Schmoeckel/Rückert/Zimmermann (eds.), Historisch-kritischer Kommentar zum BGB, vol. 1, 2003, p. 9.

[44] See already *Thibaut* (n. 32), p. 8.

[45] *Lobe*, Fünfzig Jahre Reichsgericht am 1. Oktober 1929, 1929, p. 337 et seq.

[46] Gesetz, betreffend die Versetzung richterlicher Beamten in den Ruhestand vom 13. Juli 1899, Gesetz-Sammlung für die Königlichen Preußischen Staaten, p. 123.

[47] *Thiessen*, Unternehmenskauf und Bürgerliches Gesetzbuch. Die Haftung des Verkäufers von Unternehmen und Unternehmensbeteiligungen, 2005, p. 103 et seq., 106 et seq.; *Thiessen*, in: Auer et al. (eds.), Privatrechtsdogmatik im 21. Jahrhundert. Festschrift für Claus-Wilhelm Canaris zum 80. Geburtstag, 2017, p. 71 et seq. On the judicature prior to 1900 *Geyer*, Den Code civil "richtiger" auslegen. Der zweite Zivilsenat des Reichsgerichts und das französische Zivilrecht, 2009, p. 25 et seq.; *Löhnig*, Rechtsvereinheitlichung trotz Rechtsbindung. Zur Rechtsprechung des Reichsgerichts in Zivilsachen 1879–1899, 2012, p. 45 et seq.

[48] *Savigny* (n. 35), p. 48 et seq., 111 et seq., 117 et seq., 125 et seq., 136 et seq., 153 et seq.; cf. *Thibaut* (n. 32), p. 31 et seq.

[49] *Haferkamp* (n. 21, 2018), p. 51 et seq., 95 et seq.

[50] *Savigny* (n. 35), p. 141 et seq., 151 et seq.

[51] *Luig*, in: Rechtshistorisches Journal 5 (1986), p. 291 et seq.

[52] *Landau*, in: Stolleis/Simon (eds.), Rechtsgeschichte im Nationalsozialismus. Beiträge zur Geschichte einer Disziplin, 1989, p. 11 et seq.

D. From national law to European legal harmonization

After the defeat of the Nazi regime, Germany and Western Europe were re-constructed in the spirit of European unity.[53] The legal harmonization started very early, though not with regard to civil law and legal education. Back then, today's European Union was a "European Economic Community" that was built on coal and steel in first place.[54] Commerce comes first, civilian society comes second – in the words of Bertolt Brecht: "But till you feed us, right and wrong can wait!"[55] It was the same procedure that had already been adhered to in 19th century Germany, when a Uniform Commercial Code was promulgated in 1861, while the Civil Code followed almost four decades later.[56] In post-war Europe, however, another reasoning was essential. The Germans, who were responsible for starting two world wars were to be embedded within a network of peace, freedom and democracy.[57] These values could only prevail under conditions of economic prosperity. Private law was indirectly affected, as it was prohibited to restrict economic competition by private contracts under the rules of anti-trust law, which was one of the first subjects of legal harmonization.[58] Whereas national experts took part in the building of European legislation and administration, the ordinary citizen (or the "consumers") went on to live as subjects of their respective national law for more than two decades.[59] Thus, legal education did not really open up to European law until the fall of the Iron Curtain. European unification was one of the grand narratives that were told after the so-called "End of History".[60] It was the more credible, the more European citizen experienced a Europe without borders, both with regard to trans-European tourism and consumption patterns.[61] European law was transmitted by consumer protection law into the legal sphere, which is inhabited by everyone. In this way, it eventually became part of basic legal education.[62]

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[53] *Loth*, Building Europe. A history of European unification, 2015, p. 20 et seq.

[54] *Loth* (n. 53), p. 28 et seq.

[55] *Brecht*, The Threepenny Opera, in: Three German Plays, 1963, p. 200.

[56] *Flume*, in: Comparative Legal History 2 (2014), p. 46, 47, 57, 64 et seq.

[57] *Doering-Manteuffel*, Wie westlich sind die Deutschen? Amerikanisierung und Westernisierung im 20. Jahrhundert, 1999, p. 44 et seq.

[58] *Weitbrecht*, Kartellrecht in der Europäischen Union – von den Anfängen bis heute, in: Siekmann et al. (eds.), Festschrift für Theodor Baums, 2017, vol. 2, p. 1377 et seq.

[59] On the emergence of European Consumer Protection Law *Schmidt-Kessel*, in: Gebauer/Teichmann (eds.), Europäisches Privat- und Unternehmensrecht, 2016, p. 238 et seq.

[60] *Fukuyama*, The End of History and the Last Man, 1992, p. 39 et seq.; *Germond*, in: Larres (ed.), A companion to Europe since 1945, 2009, p. 208 et seq.

[61] From a historical point of view *Rosenberg*, in: Leffler/Westad (eds.), The Cambridge history of the Cold War, vol. 3, 2010, p. 489 et seq.

[62] *Schweitzer* (n. 3), p. 42 et seq.