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LIMITS OF LEGAL TRANSPLANTS

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Abstract. Often, legal ideas are transplanted between legal systems. This can be seen not only in colonial contexts, as is evidenced by the almost global relevance of ideas that originated in English Common Law, but was also visible in particular during the last centuries when Japan and China imported rules from German criminal and private law, respectively, into their domestic legal systems. One of the best known – and most unusual – features of German private law, concerning the transfer of ownership and the abstraction and separation principles, was in turn also the result of a legal transplantation, albeit a rather imperfect one. Using literature research methods, this text aims to show that transplanting legal norms between societies, while often practical, can at times lead to confusing and unintended, results – in particular when the context in which the norm was created is not fully understood.

Keywords: legal transplants, German law, Roman law, civil law.

Introduction

Law is meant to serve the needs of society. This means that, ideally, it is made by those who speak for the members of this particular society and who have the best possible knowledge of the problems that the law is meant to address and the solutions to these problems. While this might be the ideal, historically the practice of law-making in the Arctic, especially in colonial contexts, has been different, with a lack of connections between those making laws and those governed by them. In the contemporary Arctic, at least in Northern Europe, it is in addition not uncommon that inspiration for legislation is sought from other European countries. This is especially the case where domestic legislation is concerned, which is based on the implementation of legal standards imposed by the European Union. In practice, this means that during the drafting period of new laws or regulations existing rules which address similar or identical concerns in other countries are adopted. While this approach is of course practical, especially if the same legal basis in EU law is concerned, it is, however, not without its pitfalls. Often, legal concepts are transplanted from one legal system to another. This is particularly relevant for legal systems which undergo a significant transition. The effect of such legal transplants, however, can be a disconnect between the legal culture which permeates a legal system and the specific transplanted norm. While some legal systems have successfully integrated transplanted concepts, others have been less successful.

It is the aim of this text to show that, in extreme cases, the transplantation of legal concepts not only across legal cultures but also across significant time differentials can be disruptive. For this purpose, legislation and academic writings, primarily from Germany, will be analysed. This text highlights one such case, in which a norm was transplanted without much regard for its context. While it is primarily intended as an anecdote, this might serve as an example for other settings concerning the limitations of legal transplantations between systems and societies. The example introduced to the readers has already been documented (Wesel, 2006) – indeed, it is often perceived

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as one of the first real hurdles in private law for first year law students in Germany, as the specific legal principle in question seems counterintuitive.

The issue in question is at the core of the issues private law systems around the world have to deal with: the transfer of ownership and the abstraction and separation principles (Sadowski, 2014, p. 240). The transitional country in question was Germany at the end of the 19th century, which, shortly after its unification in 1871, required the creation of a nation-wide set of private law norms, which would eventually lead to the adoption of the Civil Code (*Bürgerliches Gesetzbuch*). The norm in question was one of Roman law, and its introduction into the German legal system led to a legal situation which is hardly understood by citizens in Germany and has confused generations of law students: under contemporary German law, a sales contract is entirely legally distinct from the transfer of ownership of the object of the sales contract. The transfer of ownership requires a separate agreement between the parties as well as, normally, the physical transfer of the sold item (p. 240).

1. The origins of law

In an ideal scenario, law is a product of society, with the members of the society having a say in the creation of legal norms. Often, however, legal problems are not specific to a particular society, but are commonly found. This is particularly the case in the realm of private law. It is therefore not surprising that legal solutions which have been found to be effective in other legal systems are adopted elsewhere. Today, this approach can be reconciled with democratic principles. In particular, legal systems which undergo transitional situations can benefit from the adoption of time-tested legal norms. Such a 'transplantation' of norms from one legal system to another requires expertise in both systems concerned. It will be shown in this text that even with a fairly high level of knowledge about the 'donor' system, the risk of mistakes remains relevant. Using what is today a core concept of German private law as an example, it will be shown that the effects of mistakes in the transplantation process can be long-lasting and far-reaching. It will also be shown that there is a practical relevance for comparative law as an academic discipline.

1.1. Where does law come from?

Law does not develop in a vacuum. Instead, it is the result of a number of (social) factors, be they representative of the people (as in an idealized democracy) or dependent on only one (undemocratic and unchecked) law-maker (as in a dictatorship). In any case, law usually reflects the society from which it emanates and to which it applies. At times, though, it has been useful not to invent legal concepts from scratch but to fill existing gaps in the laws of a society by implanting legal norms or concepts found in other legal systems. Such implants are not unusual and often it is possible to integrate foreign norms into an existing legal system.

One example of this approach can be seen in the continued relevance of Roman law in German private law (Lobingier, 1916; Zimmermann, 2016). While originally general rules (*Gemeines Recht, gemein* here having the meaning of *gemeinsam* (joint) or *allgemein* (general, common), which was frequently referred to as the *ius commune*, which translates as *common law*, but not to be confused with the Common Law applied across the Channel), often influenced by Germanic law, applied across the Holy Roman Empire of the Germanic nation (Wesel, 2006, p. 366 et seq.), Roman law was extensively studied by legal academics in Germany in the 17th to 19th centuries (p. 370) and eventually played a key role in the creation of the German Civil Code, the *Bürgerliches Gesetzbuch* (BGB), which entered into force on 1 January 1900 and was newly promulgated in 2002.

In this text it will be shown that the implantation of Roman law into German law in the 19th century continues to have effects today, but also that it was the result of an attempt by a tiny elite to preserve outdated ideas of society, including the oppression of large parts of the working population. Together with legal norms, Germany also implanted outdated ideas about the human person into its legal system. In one instance, as will be shown, a key feature of contemporary German law, which sets it apart from other legal systems, is based on a simple misunderstanding of a Roman law concept by a single German aristocrat who remains venerated as one of the nation's greatest legal scholars of all time.

1.2. The German legal family

Like French or Italian law, but in contrast to English law, German law is civil law. Comparatists from the global north categorize legal systems in "seven legal families: the French, German, Scandinavian, English, Russia, Islamic and Hindu" (Zweigert & Kötz, 1998, p. 64) families of legal systems. This approach obviously ignores large parts of the world and the contribution of non-dominant societies, including the laws of colonized indigenous peoples. For the purposes of this text, it may suffice that German law is perceived as a distinct legal family within the realm of civil law. This distinction is based on "substance" (p. 64). The idea behind the term *family* seems to be that it can be used to describe connections between different legal systems: "We are told that, as with languages in comparative linguistics, legal systems are to be put into families on the basis of similarities and relationship, but it is never made really clear which common qualities are the crucial ones. It is often obvious enough that one system is a parent system (like the Common Law of England), but we need more help with the difficult question whether a system is affiliated to one parent or to another, especially as legal systems have been known to adopt new parents" (p. 65). This also applies to German law, which today is influenced primarily by EU law, but where Roman law is far more than just a memory.

There are distinctions between Romanic and Germanic law, but both legal families are closer to each other than either is to the Common Law of England (Zweigert & Kötz, 1998, p. 132).

2. Roman law in German law

Today, the Roman history of military power and war has no practical relevance in Germany. Roman law, on the other hand, has had a significant influence on the development of German private law. To understand this influence, it is necessary to look at the historical development of this relationship.

2.1. The Germans and Rome

Two millennia ago, large parts of what is today Germany were part of the Roman Empire. Cities such as Cologne (*Colonia Claudia Ara Agrippinensium*), Mainz (*Mogontiacum*), Frankfurt-Heddernheim (*Nida*), Xanten (*Colonia Ulpia Traiana*), Speyer (*Noviomagus*), or Trier (*Augusta Treverorum*) were founded by the Romans. Buildings like the Porta Nigra in Trier, the Roman Theatre in Mainz, and the remnants of the Limes, Rome's border wall, can still be seen today, while other buildings, such as the Saalburg Fortress near Frankfurt and the Amphitheatre in Xanten, have been reconstructed. This tangible cultural heritage of the Roman Empire, however, is only the first indication of a much broader association. Over centuries, close economic and social ties developed between the German population and the Roman Empire. Indeed, many German tribes became part of the Empire, and there was frequent trade across the border. On the other hand, it is pertinent to ask whether armed conflict with the Roman Empire makes up an important aspect of German history, which remains relevant to this day. An example of this can be found in the wide general interest in the search for the exact location of the Battle of the Teutoburg Forest in 9 AD, when a small group of Germans, led by Arminius (who, incidentally, was also a Roman citizen and formally served in the Roman army), defeated a superior Roman force under Varus, the former governor of the provinces of Africa and Syria, who had gained notoriety for the massacres committed against the resistance movement in Judea. The other key event in the relationship between Germany and the Roman Empire was the conquest of Rome by Odoaker in 476. This marked the downfall of the Western Roman Empire.

These were mainly military events, but the downfall of the Roman Empire allowed for an opening which was filled *pro forma* when the Frankish ruler Charlemagne made himself Emperor of the Romans (Holy Roman Emperor) on Christmas Day 800. The empire Charlemagne ruled, however, was very different from the Roman Empire at the height of its might. After the dissolution of the Frankish Empire in 836, the Holy Roman Empire of the German Nation essentially claimed to have stepped into the place of the Western Roman Empire. The Holy Roman Empire was dissolved in 1806 after being conquered by Napoleon. After the Liberation Wars of 1813, which ended the French occupation, Germany did not exist as one nation but as many. National unity was eventually achieved in 1871, when the German Empire was founded after another war against France.

2.2. Germany's common law

From a legal perspective, however, despite the practical importance of the Latin language, little changed for the people who lived in the Holy Roman Empire. The law of the land was what was referred to as the *ius commune*, though there were some particular (regional) laws and customs. Roman law was only rediscovered later. For the most part, Europe encountered Roman law in the Middle Ages; Germany only did so in the mid-15th century (Zweigert & Kötz, 1998, p. 133). Unlike for France of England, for Germany the rediscovery of Roman law "meant not only a widespread acceptance of legal institutions and concepts of Roman law but also a much more extensive scientific systematization of legal thought than occurred elsewhere" (p. 133). This has been explained by the absence of strong central political and legal institutions – a consequence of the federal nature of Germany, which has been a country of tribes for thousands of years. Personal identity is often highly local and regional, rather than national. Together with Germany's 20th century history, this might explain why many Germans were open to the transfer of power to Brussels based on the concept of subsidiarity. It also meant that for centuries Germans were used to relatively local approaches to law and justice. Economically, this also meant many borders between dozens of states and statelets, which made trade difficult and expensive. Eventually, it became clear that some rules are best applied nationwide or at least over a larger area.

From the 15th to the 19th century, jurists worked with Roman law in many different contexts (Zweigert & Kötz, 1998): "Jurists trained in Roman law [first in Italy, later in Germany] were first employed in ecclesiastical institutions, the principalities, and the boroughs, but by the end of the fifteenth century they had increasingly taken the practice of law from the untrained practitioners and had themselves moved into judicial positions. […] In the course of the sixteenth and seventeenth century these lawyers […] created the 'usus modernus pandectorum' out of the Roman law which had been received and the indigenous legal ideas which continued in force everywhere. Admittedly no unified German common private law was developed [and] it was only in a few large jurisdictions that any synthesis of the Roman and native laws was achieved", for example in Saxony, Württemberg, or the Baltic States (p. 135). These collections were created by jurists in a way similar to the work of the American Law Institute's Restatements. Eventually, this led to some attempts at codification, most prominently in the form of the Preussisches Allgemeines Landrecht (ALR) of 1794. The ALR was an attempt at a holistic form of positive regulation, including rules on public, private, and criminal law – an attempt at codifying the existing common law (U.S. readers might want to try to imagine putting all of the American Law Institute's *Restatements* into a single Act). This was made possible in part by the Enlightenment, which "gave the lawyer a standpoint from which he could see his way through the *usus modernus pandectarum* with its variety of historically conditioned detail, purge it of obsolete legal institutions, and put it in a new systematic order", which lead to "the idea of codification, the idea that the diverse and unmanageable traditional law could be replaced by comprehensive legislation" (p. 135), as in the case of the aforementioned ALR and Bavaria's *Codex Maximilianeus Bavaricus Civilis* (1756) (p. 137).

2.3. The very, very, very long 19th century

As we will see, the late 19th century is still very much alive in German law today. From a German perspective, the 19th century was marked by the violent end of the old (800–1806) empire, the French occupation, the liberation of 1813, albeit without national unity, the failed attempt at democracy of 1848, and the emergence as a modern nation state in 1871. It is in this context, especially in the second half of the 19th century, that the interest, or infatuation, of German legal scholars with Rome reached its zenith in the run up to the creation of a nationwide civil code, which was to be one of the measures which were meant to push Germany into modernity.

In the 19th century, this positivist attitude gave way to Savigny's historical school, which "saw law as a historically determined product of civilization, having its roots deep in the spirit of the people and maturing there in long processes. Like language, poetry, and religion, law [was understood as] the product not of the formative reason of a particular legislator, but an organic growth" (Zweigert & Kötz, 1998, p. 138 et seq.). This concept dates back to an academic feud between Savigny and Thibaut, out of which Savigny emerged receiving more support. Rather than making law, Savigny's idea was that the law was already there and had to be found (p. 139). However, the next step was counterintuitive: "since for *Savigny* all law was the product of history, he and his followers concentrated on the historical development of law. In this, *Savigny* realized that the *Germanic* sources

of law had played a great part, and consequently he insisted on the study of Germanic law in Germany. But he and his followers turned exclusively to *Roman* law, not in the form it had taken in the Middle Ages or in the *usus modernus pandectarum* but in the form of *ancient* Roman law as it appeared in the Corpus Iuris" (p. 139[2]). The practice of the historical school, therefore, conflicted with its principle of taking into account all aspects of legal history (Zweigert & Kötz, 1998). It remained unclear how the German national spirit should, in the 19th century, have led to the emergence of law as it had been codified by Justinian in the 6th century (Wesel, 2006, p. 455).

In a sense, the historical school was almost religious in its approach to Roman law. In idealizing ancient Roman law, the proponents of this school ignored that the law of antiquity was also the product of a specific society. "Instead they thought that the Corpus Iuris placed at their disposal a store of legal institutions of eternal validity which could be put to direct use as valid law, if only they were set in the right order" (Zweigert & Kötz, 1998, p. 140). The task of the historical school, which eventually led to the emergence of the pandectist school, therefore was the "schematizing, ordering, and integrating of the concepts of Roman law" (p. 140). The pandectists therefore worked with a finite set of rules, and "one only had to apply logical or 'scientific' methods in order to reach the solution of any legal problem" (p. 140). While this dream is still alive for some lawyers when it comes to the use of artificial intelligence (AI) for the solution of standardized legal problems, and new technologies like AI and blockchain can lead to the automatization of large parts of the legal services industry, the pandectist school failed to understand the social reality of law. In essence, the proponents of this approach transplanted and imposed a set of rules which had been created in a different time and place and by a very different society on 19th century Germany. Today, the effects of this approach can still be felt in Germany through the influence that their work had on the creation of the BGB in the late 19th century.

The pandectists "did not bother to seek out the real forces in legal life, and they did not ask what ethical, practical, or social justification for their principles there might be; consequently much of what they wrote is hairsplitting pedantry and legal spillikins. This has admittedly been recognized for some time, yet these methods of conceptual jurisprudence are still at work behind the scenes in Germany" (Zweigert & Kötz, 1998, p. 141).

As Zweigert and Kötz note, this heritage remains with German lawyers to this day. Legal education, even though it has become more practice-oriented in recent years, is still rather disconnected from the real needs of the members of society. Indeed, criticizing the outdated (but often high-quality) German legal education has been a key concern for many generations of German lawyers. The quality of the law itself, on the other hand, is discussed in terms of legal policy, but usually only with regard to more modern laws; the fundamental principles usually remain untouched.

One way in which Savigny dramatically misunderstood Roman law still reverberates today: German private law is famous for the separation between the *Verpflichtungsgeschäft* and the *Verfügungsgeschäft* – the creation of an obligation and its fulfilment are separate from each other. In the most basic constellation, the direct sale of a good with immediate payment, this means that the transfer of ownership of the sold item is independent of the validity of the sales contract. This *Abstraktionsprinzip* is based on an incorrect reading, by Savigny, of a 2nd century text by Gaius: Gaius had mentioned in an aside that the transfer of ownership did not require anything in addition to the transfer of possession and the intention of the original owner that the ownership is to be transferred. While Gaius had presumed the existence of a cause for the transfer of ownership, for example a sales contract, Savigny understood the remark to mean that no *Grundgeschäft* were necessary at all (Wesel, 2006, p. 159). To this day, Savigny's invention (which he thought to be a restatement of Roman law) is codified in § 929 BGB and continues to confuse regular citizens, first year law students, and foreign business partners of Germans. The law as it is now does not reflect Roman law, nor the old German common law, and is only the result of a misunderstanding on the part of Savigny, who apparently aimed at preserving the old order (p. 455) – which had effectively already ended in 1806. As a result, the law applicable in the 21st century is based on a 19th century misunderstanding of a 2nd century side-remark. The origin of this misunderstanding lies in an attempt to preserve a legal-political order which has been doomed to end since the late 18th century – specifically since the French revolution. While hardly anybody but lawyers would notice if this particular rule were changed in favour of a rule which better reflects the reality of millions of sales contracts regarding movable goods which are concluded and fulfilled every day, the

[2] Italics added with regard to the name *Savigny* (in the text by Zweigert and Kötz, the name of *Savigny*, like other personal names, is written in small caps), all other italics as in the original.

strongest justification for the continued existence of Germany's exotic position is the conservatism of lawyers: by now, this unnatural separation has existed for longer than anybody alive can remember. There have been several generations of lawyers for which § 929 BGB is like a law of nature. This static approach, however, might be seen as an inherent function of the conservatism of lawyers, but it does not need to be this way, as modern codes from other countries show. Instead, 21st century lawyers in Germany continue to have to work with norms based on ideas from antiquity because of the dominance exerted by and the veneration afforded to a small 19th century elite – the pandectists.

The pandectists did not look to the future, but at the past, yet their influence during the late 19th century means that the BGB still reflects their views in both system and substance: "In language, method, structure, and concepts the BGB is the child of the deep, exact, and abstract learning of the German Pandectist School with all the advantages and disadvantages which that entails" (Zweigert & Kötz, 1998, p. 144). This includes the structure of the BGB as well as the legal institutions contained in the Civil Code (p. 146). When trying to find its bearings, the young empire which was founded in 1871 looked to Rome. This also means that the BGB is a relatively static code. While German Civil Code still works, despite being a static product of the 19th century, this is due to the inclusion of general clauses such as the good faith rule of § 242 BGB, which have been used by the courts extensively to deal with the reality of life (p. 150). In other words, it is up to the courts to ensure that the law fits to the reality of the society which it is meant to serve.

The BGB does not have the average citizen in mind, instead "for the BGB the typical citizen is not the small artisan or the factory worker but rather the moneyed entrepreneur, the landed proprietor, and the official, people who can be expected to have business experience and sound judgment, capable of succeeding in a bourgeois society with freedom of contract, freedom of establishment, and freedom of competition, and able to take steps to protect themselves from harm" (Zweigert & Kötz, 1998, p. 144).

But this approach also meant that in the 19th century, law came of age as a science (Dreier, 1981; Hilgendorf, 2008). Since then, law has become the object of many, very diverse, theoretical approaches (Buckel et al., 2006). Especially research in legal theory has often been intertwined with legal philosophy, and was frequently understood to serve legal policy goals (Hilgendorf, 2008, p. 113 et seq.). Today, however, it is often not clear which, if any, goal many of the theories created in academic legal discourse serve – beyond fulfilling the need for legal creativity. The special nature of jurisprudence as a science and the problem of the falsifiability of legal norms leads to a way to answer questions which is different from that utilized in the natural sciences: a legal theory can only be false if it is incompatible with the norms in question (Dreier, 1981). At first sight, this approach may seem rather positivistic in nature because it presupposes the existence of norms which are knowable and sufficiently clear in order to serve as a yardstick against which theories can be measured. It should be noted, though, that unwritten law can also be clear enough to be applied within a society (e.g., the customary laws of indigenous communities). Hence, legal theories can at least be disproven by others, and the method of analysis can be replicated by researchers elsewhere, which is a key element of scientific research. That said, the 'scientification' of law in Germany appears to have been supported immensely by the systematic approach favoured by German law-makers in the late 19th century. This period saw the creation of landmark codes such as the *Strafgesetzbuch*, which was promulgated on 15 May 1871 and again after a major reform in 1998, the *Gerichtsverfassungsgesetz* (promulgated first in 1877 and again in 1975), the *Zivilprozessordnung* (promulgated in 1877 and again in 2005), the *Strafprozessordnung* (also promulgated in 1877 and again in 1987), and of course the aforementioned BGB (2002), which was promulgated on 18 August 1896 and entered into force on 1 January 1900.

Public law, on the other hand, remains fairly unstructured, which is also due to the widespread competences of the federal states (*Länder*) instead of the federation (*Bund*) in this regard. This in turn follows from the general competence of the states to enact legislation as defined in the *Grundgesetz* (literally: Basic Law), the post-World War II constitution of the Federal Republic of Germany (Grundgesetz, 1949, Article 70, Paragraph 1), and the limited exceptions allowing for federal legislation (Articles 73–74). Despite many changes, the organization and style of these 19th century codes continue to dominate the way German lawyers tend to think about law.

3. Critique

Late 19th century law-making, based on the views of legal scholars, has effects which can still be felt today. For more than a century, during the Empire, the Weimar Republic, Nazi rule, the occupation after World War II and in West-Germany after 1949, as well as in reunified Germany since 1990, courts have worked to correct these mistakes and have continued to develop the law further. While later corrections have also been made by the legislature, the lasting impact of the work of the legal scholars of the 19th century, who were often disconnected from the reality of the everyday lives of the overwhelming majority of people, continue to limit the legal system in Germany.

In reality, "except for a tiny minority of the idle rich, or the leisure class, […] work has been the defining condition of humanity throughout most of its history" (Chang, 2014, p. 347). Compared to the daily reality of the majority of the population, the drafters of Germany's Civil Code seem to have had a richer class of legal actors in mind. This is highlighted, for example, in the fact that for large parts of his life, Max Weber, who wrote his *Habilitation* thesis on "*Die römische Agrargeschichte in ihrer Bedeutung für das Staats- und Privatrecht*" (Ferguson, 2011, p. 259), lived based on his family's inheritance rather than his own work – but praised an ethic focused on hard work (p. 262).

The implantation of Roman law into the German legal system was not merely a scientific project. Instead, it was a political-social project orchestrated by members of the dominant class with the aim of preventing change and development during the time between the failed attempt at democracy in 1848 and the formation of the German nation state in 1871 – i.e., when Germany did not exist as one state but consisted of many, often tiny, states, governed by unelected rulers who already felt the desire for change in large parts of the German population, almost a century after the French revolution. Bringing ancient, static law into the German legal system was a move backwards, and the moral dimension usually underpinning legal developments (Alexy, 2008, p. 23) was largely absent in the work of 19th century Roman law experts, which foreshadowed the coming dominance of positivism and which would eventually contribute to the darkest years of German legal history, when law was a tool in the service of systematic injustice on an unprecedented scale.

While many modern legal problems cannot be answered with old law, many basic problems of private law were already covered by Roman law. Other aspects of contemporary German law which are fundamental, such as the unconditional respect for human dignity (Alexy, 2008, p. 23) required by Article 1 paragraph 1 of the *Grundgesetz*, are not found in Roman law. The idea of the human being held by the drafters of the BGB was rather disconnected from the reality experienced by most people in everyday life. The concepts of *Privatautonomie* and *Vertragsfreiheit* presuppose the existence of a near-perfect egalitarian society, which did not exist back when the BGB was a draft – and which does not exist today. At first sight this might be contrasted with the rather paternalistic view held by many EU institutions, which has led to far-reaching consumer protection rules, but the comparison would not do justice to the fact that the BGB was created by the elite of the time. They did so by relying not merely on the commonly applied norms found in different parts of Germany during the 19th century, some of which had already been codified regionally, but by important outdated legal concepts, at times even without understanding them properly. In so far, the implantation of Roman law into the German legal system was primarily a political endeavour of representatives of a kind of past area and, decades before the end of the Empire in 1918, a retreating battle of Germany's *ancien régime*, wrapped in the language and style of scientific discourse.

Without disputing the importance of legal expertise, this should be seen as a warning that legal expertise is not sufficient for those who create legislation or apply the law. Instead, it is necessary for lawyers to be critical of the texts they are working with. In some ways, law as a science is closer to theology and the interpretation of sacred texts than to other social sciences. The text-based approach to law appears to be inevitable in larger, more anonymous societies due to the fact that written text is the best way available for making norms known to a wider audience whilst also ensuring legal certainty.

As importantly, a multi-disciplinary academic outlook should be combined with practical life and work experience outside the legal field. It remains possible to become a judge without having ever studied any subject but law at the university level, and without any work experience outside the *Referendariat*. Especially given the large

number of law graduates leaving universities today, and in light of the different ways of work of future lawyers thanks to developments such as artificial intelligence, a more holistic approach to legal education is called for. Legal implants are not *per se* negative – indeed, they can often help solve problems in an effective manner, especially in smaller jurisdictions which might have less opportunity to deal with specific cases than a larger legal unit. In the long run, the effective creation and application of legal standards requires lawyers to be more than lawyers. Given the already long duration of legal training, the demand for a broader education increases the risk that not everybody will be able to afford it, which in turn would benefit those future lawyers who are already coming from a solid financial background. It might be a better alternative to require a number of years of work experience in non-legal areas, regardless of when or how they were obtained – e.g., by working part-time while studying (which many students already do anyway). The three months of internships currently required of law students by German law (Deutsches Richtergesetz, 1972, Section 5a, Paragraph 3, sentence 2) do not fulfil this function. As it is right now, there is a disconnect between legal education in universities and the practice of law which would be unacceptable in other academic disciplines.

Conclusions

The disconnect between legal practice and legal studies at universities is reflected both in the legislative choices of the past and in the limitations of the current system. This problem has been discussed by lawyers in Germany for generations, but reform is notoriously slow. Indeed, like in the case of the transplant of a misunderstood legal rule from the Roman era, law-makers are often not cognisant of alternatives. This might be especially true for lawyers who are trained in a particular legal system, which is then perceived as the normal system of making and applying law, although alternatives do exist. If one compares, for example, the way in which legal norms are written in the Nordic countries – accessible for the reader, providing clear answers to everyday legal questions – with the approach still found in Germany, where legal disputes quickly necessitate professional legal advice and representation due to the arcane nature of many norms, the potential for improvement becomes obvious.

Legal transplants can play a role in improving the law, but they are not without risk. The distinction between a sale and the transfer of ownership and the multitude of legal relations inherent in such dealings appears to be counterintuitive because it was never meant to be that way – the law as it remains is not the result of an organic response to a specific regulatory need. This is the risk inherent in the transplantation of norms between legal systems – although often that approach can facilitate lawmaking processes.

For the time being, though, the gap between legal practice and legal science, in particular teaching at German universities, remains too great. In the last decades, there have been many laudable attempts by German legal academicians to overcome this hurdle,[3] but as long as law students are required to know a multitude of legal theories which are completely irrelevant for the practical application of the law in the courtroom just to pass a single exam, this will take time. Centuries of history will not be overcome easily. However, any attempt to bridge this gap between legal practice and legal education should be welcomed because it would help students to better prepare for their future professions. Law does not only exist in books, but is a consequence of the lived reality of societies. By taking this into account, legal academia can help future and legal practitioners to do their job even better. The heritage of the transplantation of Roman law into German private law in the late 19th century is a constant reminder of this gap and of the limitations of law as a scientific discipline.

Of course, it is important to learn from other legal systems, and the contribution of comparative law scholars for the development of law, in particular in remote, sparsely populated countries and post-colonial settings, is not to be underestimated. But the transplantation of legal concepts, even when not undertaken with a colonial mindset, contains inherent risks. It is therefore essential for all who are involved in decision-making processes, and in particular in processes which lead to the creation of new legal norms, to be aware of the needs of the people of the target society and those challenges they face which can actually be solved through regulation. As such, it is essential for lawmakers to interact with local communities. The dissemination of scientific knowledge across all scientific disciplines, including law and governance, can play an important role in facilitating the work of policy-

[3] For example, the Refugee Law Clinic and the *Studies in Applied International Law* approach at the author's *alma mater*, Justus-Liebig-University in Giessen, Germany.

makers and legislators. Most of all, they will need a willingness to learn and compassion for the people for whom they work.

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