

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

Edited by
MARTIN SCHMIDT-KESSEL

Gesellschaft für Rechtsvergleichung e.V.

*Rechtsvergleichung
und Rechtsvereinheitlichung*

56

Mohr Siebeck

Rechtsvergleichung und Rechtsvereinheitlichung

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Martin Schmidt-Kessel

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Martin Schmidt-Kessel serves as General Secretary of the German Association of Comparative Law. He holds a Chair for German and European Consumer and Private Law and Comparative Law at the University of Bayreuth and heads there the Centre for Consumer Law.

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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 hereby 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 Studentenwerks (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

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 legists¹³ – 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

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 Universitäts-geschichte. 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

Reppen, in: Haferkamp/Reppen (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-

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 abgefasst 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 *Kubli*, *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’abroger 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

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 delusion³⁵, 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-

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-

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.

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 judiciary 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

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.

European law is multicultural law by definition. Although there is a European Union citizenship, most people who come to Brussels or Luxemburg do not consider themselves as coming from Europe, but rather identify as Belgians, Greeks, Portugese or Swedish, regardless if they are legislators, lawyers or lobbyists. National traditions influence the nascent European law just as well as the interpretation, application and, not least, teaching of promulgated European law.⁶³ Nevertheless, the traditional canons of legal interpretation that are used in Germany are complemented by specific European legal methods.⁶⁴ If national law originates from European legal harmonization, national law has to be interpreted in a way that gives effect to the intentions of the European legislator.⁶⁵ The same rule applies, if national law conflicts with prevailing European law. If it is doubted what European law specifies in a particular law suit, the case has to be referred to the European Court of Justice.⁶⁶ If the national law is not open to an interpretation that provides conformity with European law, the national legislator is forced to amend the national law, failing which the European Commission may bring the matter before the Court of Justice of the European Union.⁶⁷ Thus, it is obvious that national law is strongly influenced by European law.

However, legal transplants⁶⁸ also go the opposite way. Uncertainties in the interpretation of European law can both be caused and be solved by national traditions.⁶⁹ So if a litigant, a lawyer or a judge questions the interpretation of European law or the interpretation of national law in the light of European law on the occasion of a law suit that is presented before a national court, it is quite often the case that these questions emerge with regard to a specific solution of the relevant problem in the respective national tradition which seems to differ from European law. And if an Advocate General or a judge at the European Court of Justice is appointed to find a solution in accordance to European law, he or she may find this solution unconsciously in accordance to his or her own national experience.⁷⁰ Fortunately, or unfortunately – depending on your perspective – the one who initiates the procedure and the one who decides the case quite often originate from different national traditions.

National traditions evolve at least partly from legal education. If the majority of the curriculum is primarily dedicated to matters of national law, students will consequently be primarily influenced by national law. The more European

⁶³ *Baldus/Raff*, in: Gebauer/Teichman (n. 59), p. 154 et seq.

⁶⁴ See the contributions in: Riesenhuber (n. 4).

⁶⁵ See *Leible/Domröse*, in: Riesenhuber (n. 4), p. 146 et seq.; *Roth/Jopen*, in: Riesenhuber, loc. cit., p. 263 et seq.

⁶⁶ Treaty on the Functioning of the European Union, Sec. 267.

⁶⁷ Treaty on the Functioning of the European Union, Sec. 258.

⁶⁸ *Watson*, Legal transplants. An approach to comparative law, 2nd edn. 1993, p. 21 et seq.

⁶⁹ *Baldus/Raff* (n. 63), p. 156 et seq.

⁷⁰ An example for this is presented by *Baldus/Raff* (n. 63), p. 156.

law becomes part of the domestic curriculum, the more students will be influenced by European law and its multicultural origins. If European law is taught and studied throughout the European Union, European universities may appear as one single giant multicultural legal class. Professors who teach European law have often attended universities and have passed their exams in other European countries. Students who are interested in European law quite often move to other European countries to study abroad or for private or professional reasons. Their national tradition travels with them, and their European experience returns with them back to their home country. It is quite the same story as it has been told above with regard to the reception of Roman law. It is no coincidence that the tradition of the Roman *ius commune* has been praised, and criticized, as a magic formula for the European legal harmonization.⁷¹ Given that Europe had its common law for centuries, why should it miss out on its own new common law any longer? If *ius commune* was enshrined in various European codifications, could it be actually released from them and resurrected in the shape of a uniform European Civil Code?⁷² This tempting, or threatening, perspective is confronted with the very same question that had been asked during the first cycle of life of the *ius commune*. Which part of the *ius commune* can serve as current law of today under entirely different surroundings, compared to the middle ages and early modernity? Unfortunately, this is not only an issue of practicability but of politics. Nowadays, European unification has lost much of its attractiveness⁷³, and so has European law.

E. Some concluding remarks

Multiculturalism is a phenomenon that is closely linked with law. This is in particular true with respect to legal history. The concept of multiculturalism implies that various cultures can at least coexist or even accommodate each other. Indeed, law was, and can be up to the present day, exploited as an instrument of colonialization. In that respect, law is utilized to suppress indigenous legal cultures. However, these indigenous legal cultures resist colonialization at least in the sense that they are merged when it comes to the application of the foreign law to the respective colonialized country. By doing so, foreign law will be altered by indigenous legal cultures, so that it will be applied to its home country in an altered way.⁷⁴ While this process might remain unnoticed for a long time, various legal cultures can coexist or accommodate each other delib-

⁷¹ On the controversy *Kötz*, in: *Rechtshistorisches Journal* 13 (1994), p. 505 et seq.

⁷² With respect to legal education *Willoweit*, in: *Schwind/Brauneder* (n. 3), p. 13 et seq.

⁷³ *Wassenberg*, in: *Moreau/Wassenberg* (eds.), *European Integration and new Anti-Europeanism*, 2014, vol. 1, p. 27 et seq.

⁷⁴ *Duве*, in: *Max Planck Institute for European Legal History Research Paper Series*

erately. This is particularly the case, if various sovereign countries opt for political, economic or legal unification or harmonization. As a result, the respective national legal cultures will become part of a new transnational legal culture.⁷⁵ However, this process will not succeed without transnational, or multicultural, legal education, within the cultural context of the respective country in which law is taught.⁷⁶

I would like to close my contribution with a little anecdote. The last step of the German state examination in law consists of an oral examination, in which a group of four or five students is examined by a group of three examiners. Each student has to be examined in the three main fields of law – namely civil law, public law and criminal law – each of which has been subjected to Europeanization. After each part of the examination, the examiners discuss the students' performance in their absence. When I was part of an examination committee at Tübingen University some years ago, we recapitulated all questions and answers in detail. In the end, we agreed that all of our four students had achieved the same result. All of them passed their examination with the same grade, "above average". I remember this particular examination so well, because our four students had very different origins. The first student was born in Berlin, the second one in Stuttgart, the third one in Kazakhstan and the fourth one in Paraguay. Indeed, all of our four students grew up in South-Western Germany. They attended the same kinds of school, they attended the same university, they studied the same subject and they passed the same examination. And all of them became highly-qualified jurists. I have to admit that I was moved by this experience. Law and legal education can be a level playing field for young people, wherever they come from.

2017:2, <https://ssrn.com/abstract=2976301>, p. 8; *Duwe*, in: *International Journal of Legal Information* 44 (2016), p. 28, 31 et seq.

⁷⁵ *Schulze*, in: Assmann/Brügemeier/Sethe (eds.), *Unterschiedliche Rechtskulturen – Konvergenz des Rechtsdenkens/Different Legal Cultures – Convergence of Legal Reasoning*, 2001, p. 9 et seq.; *van Gerven*, in: Assmann et al., loc. cit., p. 49 et seq.

⁷⁶ *Willoweit*, in: Schwind/Brauneder (n. 3), p. 9 et seq., 14 et seq., 20 et seq.; *Jutras*, in: Assmann et al. (n. 75), p. 75 et seq.; *Sellers*, in: Klabbers/Sellers (eds.), *The Internationalization of Law and Legal Education*, 2008, p. 1 et seq.; *Klabbers*, in: Klabbers/Sellers (eds.), *The Internationalization of Law and Legal Education*, 2008, p. 7 et seq.; *Grossman*, in: Klabbers/Sellers, loc. cit., p. 21 et seq.; *Basedow*, in: van Caenegem/Hiscock (eds.), *The Internationalization of Legal Education. The Future Practice of Law*, 2014, p. 1, 6 et seq.

Property Meeting the Challenge of the Commons

*Johanna Croon-Gestefeld**

A. General outline of the German property regime

I. Legal categories corresponding to the notion of the commons

In the introduction to the questionnaire, panel organizer *Mattei* suggests a definition of commons, according to which commons are ‘the opposite of property,’ and part of neither public nor private property. Referring to a proposal that sought to include the concept of commons in the Italian Civil Code¹, he further describes commons as goods that produce utilities that are functional to the fulfilment of fundamental human rights and the free development of any human being.

German law does not have an established legal concept capturing all the elements that make up the definition suggested in the introduction. German property law centres on the concept of private ownership. The Basic Law, the German Constitution, guarantees protection of private property as a fundamental right (Art. 14(1) Basic Law). Statutory law vests in the owner, ‘to the extent that a statute or third-party rights do not conflict,’ the power to deal with his property ‘at his discretion and exclude others from every influence’ (§ 903 German Civil Code, *Bürgerliches Gesetzbuch*, hereafter BGB). Within the legal framework, natural as well as legal persons can own property and rely on the rights just mentioned. Since the state – or its subdivision such as a *Land* or municipality –, has the status of a legal person, it can also hold ‘private’ property. The state does not enjoy constitutional protection of its property, as the constitution cannot entitle and put obligation on the state at the same time², but statutory private law applies in relation to its property.

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¹ Commissione Rodotà: per la modifica delle norme del codice civile in materia di beni pubblici, https://www.giustizia.it/giustizia/it/mg_1_12_1.wp?facetNode_1=0_10&facetNode_2=0_10_21&previousPage=mg_1_12&contentId=SPS47617, last accessed 07.11.2017.

² BVerfGE 15, 256, 262; 21, 362, 369 ff.; 62, 354, 369; 70, 1, 16.

However, focusing exclusively on property owners' entitlements would cover the situation insufficiently. Whilst Article 14(1) Basic Law guarantees property as an individual right, it also states that its 'content and limits shall be defined by the laws.' Thus, the configuration of property, meaning the kind and extent of power, an owner has over a thing, depends on the legal framework in place. In addition, Article 14(2) Basic Law explicitly lays down social obligations of the owner, holding that 'property entails obligations. Its use shall also serve the public good.' Therefore, private owners are never entirely free to utilize their property as they please. They are bound by laws that seek to balance the owner's interests with those of third parties, such as neighbours or the general public.

II. A German legal concept of commons?

As shown *supra* (I), a concept of the commons, meeting all the criteria set out by the introduction to the questionnaire, is foreign to German law in force today. However, legal concepts exist that cover parts of the notion captured under the broad term commons. To begin with, the Basic Law contains a provision on the national objective of promoting sustainability. Article 20a Basic Law states that '[m]indful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.' In addition, German law knows the concepts of cultural heritage (Kulturerbe) and natural heritage (Naturerbe) as mentioned in the Convention Concerning the Protection of the World Cultural and Natural Heritage (UNESCO-Convention)³. Furthermore, some conceptions in European law are vaguely similar to the conception of commons in the introduction. Through the mechanisms of direct effect and supremacy of EU law⁴, as well as by the implementation into national law, they became part of German law. The Water Framework Directive⁵ is an example at hand. One of its purposes is to promote 'sustainable water use based on a long-term protection of available water resources' (Art. 1 lit. b Dir. 2000/60/EC). § 1 Federal Water Act (*Wasserhaushaltsgesetz*, hereafter WHG) transposes the requirement into German law.

³ The UNESCO-Convention entered into force in Germany on 23 November 1976, BGBl. 1977 II, 213.

⁴ Direct effect – Case 26/62 *Van Gend en Loos* [1963] ECLI:EU:C:1963:1; supremacy – Case 6/64 *Costa v ENEL* [1964] ECLI:EU:C:1964:66.

⁵ Dir. 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L 327/1.

Moreover, a concept of common usage (*Gemeingebrauch*) exists in German public law. If a thing is dedicated to common usage, the general public is allowed to utilize it according to its purpose without having to obtain a special permit⁶. Statutory law governs whether a thing is intended for common usage. For example, § 7(1) Federal Highway Act (*Bundesfernstraßengesetz*) stipulates that public roads are accessible to all; § 25(1) WHG puts above-ground water into (limited) common usage⁷; and § 59(1) Federal Act on Nature Conservation and Landscape Management (*Bundesnaturschutzgesetz*, hereafter BNatSchG) grants all persons the permission ‘to enter the open landscape ... for purposes of recreation.’ How the concept of common usage is applied in actual cases is explained in greater detail *infra* (B.IV.1. and B.V.).

Turning to past conceptions of commons, a historical investigation yields the result that ‘commons’ have existed in Germany in the form of *Allmende*. Of course, a caveat should be added that the modern concept of commons is not necessarily the same as the dated concept of commons, and that the legal environment under which *Allmende* thrived was completely different from contemporary conditions⁸. *Allmende* denotes pastures, forests, roads, and water streams, which were not in the hands of a private owner but could be used by all members of a community⁹. They came into existence in the late Middle Ages, and were scattered over the area now constituting Germany. Characteristic for *Allmende* was the extensive manner of their land use, meaning that many people could let their flocks graze on the pastures or chop wood in the forests without entirely consuming the resources offered. Since *Allmende* were not open to everybody, but to members of a specific community, and since grazing times as well as forest stand had to be organized, their utilization became regulated and sometimes even a judiciary was established. With a few exceptions, *Allmende* have disappeared due to a variety of factors¹⁰: Agricultural and forestry developments made it possible to use pastures and forests more intensively, neighbouring noblemen or gentlemen farmers incorporated pieces of land in their real estate, and, as communities developed into municipalities (with own legal personality), ownership of *Allmende* land was often transferred to the municipi-

⁶ BVerwGE 100, 70, 74; 116, 67, 68.

⁷ *Papier/Durner*, in: Ehlers/Pünder (eds.), *Allgemeines Verwaltungsrecht*, 2016, 825.

⁸ On the limited validity of historic comparisons with respect to the concept of *Allmende* *Zückert*, in: Helfrich/Heinrich-Böll-Stiftung (eds.), *Commons. Für eine neue Politik jenseits von Markt und Staat*, 2014, 159, 163.

⁹ *Zückert*, in: Jaeger (ed.), *Enzyklopädie der Neuzeit*, vol. I, 2005, col. 211.

¹⁰ See *Brakensiek*, *Gemeinheitsteilungen in Europa. Neue Forschungsergebnisse und Deutungsangebote der europäischen Geschichtsschreibung*, *Jahrbuch für Wirtschafts-geschichte* 2000(2), 9, 12; *Pass*, *Die Reformen im Dorf. Gemeinheitsteilungen im Beziehungs-geflecht dörflicher Gesellschaften*, *Jahrbuch für Wirtschaftsgeschichte* 2000(4), 71; *Zückert*, *Allmende und Allmendeaufhebung. Vergleichende Studien zum Spätmittelalter bis zu den Agrarreformen des 18/19. Jahrhunderts*, 2003, 207 ff.

pality¹¹. Within today's legal framework, *Allmende* land is best conceptualized as private property of an agricultural cooperative.

III. Commons as a topic of legal academic debate

The topic of commons is discussed in the academic debate in Germany, even if not prominently. Especially a debate on reconceptualising the property order or introducing commons as a collective kind of property is lacking.

Commons appear in discussions in different contexts. They are a feature in debates on sustainability and conservation of earth's resources for future generations. In these deliberations on 'global commons,' participants focus on the non-exclusionary element of commons, using the concept to depict the uniqueness of water, clean air, or uncultivated soil. Given the global dimension of the topic and the multiple connections between environmental protection and international law, the discussions are not limited to the German system. Rather, German scholars contribute to the international debate, at times centring on the situation in Germany¹².

The topic of commons also surfaces in legal evaluations of occurrences in the sharing economy, especially in the realm of copyright law. *Wielsch* has analysed copyright law from the perspective of systems theory¹³ and proposed that authors' rights should be thought of less in terms of individual subjective rights and more in terms of their social function¹⁴. In addition, the terms 'creative commons' or 'science commons' – in English, without translation – have found their way into the debate¹⁵. The 'creative commons'-movement has its origins in the USA, and deals with the question of how works of art or science can be made available to the general public without infringing authors' copyrights, given the new technological possibilities of sharing data¹⁶. Since German

¹¹ BFHR 56, 396 with reference to *Gierke*, Deutsches Privatrecht, Bd. I, 1895, 576 ff. How much influence each of these causes had on the disappearance of *Allmende* is a subject of debate among historians, see *Brakensiek*, in: Jaeger (ed.), Enzyklopädie der Neuzeit, vol. I, 2005, col. 214 ff. with further references.

¹² *Halfmeier* AcP 216 (2016), 717, 754; *Bosselmann*, Earth Governance: Trusteeship of the Global Commons, 2015. The latter underwent legal training in Germany and is now Professor at the University of Auckland (NZ).

¹³ See *Luhmann*, Soziale Systeme. Grundriß einer allgemeinen Theorie, 1984; *ibid.*, Das Recht der Gesellschaft, 1993.

¹⁴ *Wielsch*, Zugangsregeln, 2008, 47.

¹⁵ E.g. *Dreier*, in: FS für Gerhard Schricker, 2005, 283; *Dreier/Schulze/Dreier*, 5. Aufl. 2015, UrhG Einl. para. 23; *Wagner* MMR 2017, 216.

¹⁶ See *Wagner* MMR 2017, 216, 217. Under creative commons licencing, 'the licensor grants the licensee a worldwide, non-exclusive, permanent and irrevocable licence to multiply, show, adapt and disperse a work. The licensee has to name the author and inform about the licensing conditions each time he or she shows or disperses the protected work' (*Wiebe*, in: Spindler/Schuster (eds.), Recht der elektronischen Medien, 2015, § 31 UrhG para. 21).

authors and media consumers participate in the exchange of data over the internet etcetera, German copyright lawyers also discuss the ideas of ‘creative commons’ or ‘science commons.’ This leads me to a more general observation: legal scholars tend to take up the notion of commons, when they gain momentum in neighbouring sciences such as sociology¹⁷ or economics¹⁸.

In addition, there is quite a lively debate on the protection and administration of ‘collective goods’ or ‘public goods’ (*Gemeinschaftsgüter*)¹⁹. In interdisciplinary research, legal academics, together with economists and psychologists, explore whether the market or the state offers a better institutional framework for administering these goods. Leading in this type of research are the works by the Max Planck Institute for Research on Collective Goods²⁰.

IV. Public property and its alienability

When approaching the topic, it seems imperative to give an overview of the German public property regime. As stated *supra* (A.I.), the state, or state entities, can hold private property. In addition, the German legal system knows ‘public property’ (*öffentliches Eigentum*). However, the subtleties of the conception are rather peculiar. The state can establish ‘solid’ state ownership under public law, but has seldom availed itself of this option. Merely the Road Law of Hamburg (*Hamburger Wegegesetz*), the Water Law of Hamburg (*Hamburger Wassergesetz*), and the Water Law of Baden-Württemberg (*Baden-Württembergisches Wassergesetz*) subject certain roads, flood control installations, or riverbeds to

¹⁷ For an overview, see *Helfrich/Heinrich-Böll-Stiftung* (eds.), *Commons. Für eine neue Politik jenseits von Markt und Staat*, 2014; *Helfrich/Bollier/Heinrich-Böll-Stiftung* (eds.), *Die Welt der Commons. Muster gemeinsamen Handelns*, 2015.

¹⁸ See e.g. *Ostrom*, *Die Verfassung der Allmende* (transl. Schöller), 1999.

¹⁹ For further reading, see *Engel*, *Die Verwaltung*, 1997, 429; *Zacher*, in: FS für Peter Lerche, 1993, 107. *Zacher’s* conception of collective goods is embedded in an understanding of law that centres on the role of the individual within a community, see *ibid.*, in: Maydell/Eichenhofer (eds.), *Abhandlungen zum Sozialrecht*, 1993, 209 (esp. 227); *ibid.*, in: FS für Franz Knöpfle, 1996, 413; *ibid.*, in: Becker/Ruland (eds.), *Abhandlungen zum Sozialrecht II*, 2008, 281.

²⁰ Collective goods/public goods are not the same as commons. Pursuant a differentiation between private (consumption) goods and collective (consumption) goods coined by *Samuelson* (*The Review of Economics and Statistics* 1954, 387), collective (consumption) goods are non-excludable, as well as non-rivalrous. That is to say that ‘each individual’s consumption of such a good leads to no subtraction from any other individual’s consumption of that good’ (387). In contrast, commons are said to be non-excludable, rivalrous goods, meaning that each individual’s consumption reduces the availability of the good for all other individuals. Despite this difference, I mention collective goods in this context because the estimation whether a good is rivalrous or non-rivalrous can be difficult to assess, and because certain things such as clean air are sometimes referred to as collective goods, and sometimes as commons.