

What does a lawyer need to know? Should law students learn about foreign languages and foreign legal systems?

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A. Introduction

What does a lawyer need to know? The law, obviously. But beyond that? German legal education has traditionally placed great emphasis on instilling the minutiae of virtually every branch of law, at least those that have existed for a long while. There is a certain obsession with detail in the coverage of studies of law at German Universities, which upon completion emit young lawyers that have enormous factual knowledge, which is hopefully enriched by an equivalent amount of skill. This method of training has occasionally led to a perception that even good lawyers are otherwise of mediocre intelligence.¹

This has somewhat changed with the reform of the German Act on Judges of 2002,² which introduced several new compulsory elements into legal education as a prerequisite to obtaining the qualification to hold judicial office, the be-all and end-all of legal education in Germany. This reform enriched legal education by so-called key skills, such as negotiation management, how to conduct discussions, dispute settlement, rhetoric, mediation, interview technique and communication skills. This not being thorough enough, the legislator further declared that the areas of concentration should serve to impart the interdisciplinary and international connections of the law to students. The latter are further strengthened by the mandate that students must have successfully completed a foreign language legal

course or a language course with legal emphasis before they can proceed to taking their first exam.³

The question which opened this essay has thus been answered by the legislator who prescribes a rather wide content for legal education. Law students thus diligently learn about dispute settlement and mediation, how to conduct a discussion and how to present an argument. They also rush to study the courses on foreign law that all law faculties have on offer. Whether the legislator's stated aim to create competition between law faculties⁴ has been achieved seems uncertain, and this is not the place to investigate it. The question that shall be addressed here is whether there is value for students in learning about a foreign law or legal system, and whether this is also beneficial for the German legal system and wider society.

B. The Legal Market

Most students freely admit when asked why they are taking a course on foreign law, that they must get the *Sprachenschein* before registering for the first exam; some want to get this hurdle out of the way early on in their degree. The majority will study classes on English or US law, as this is the most widely spoken second language among German students. Far fewer turn to French, Italian, Spanish or Turkish law, the latter being mainly the reserve of those who have family connections to Turkey. Most young lawyers thus know a lot about German law and a bit about English or US law, which is one of the supporting arguments made in favour of allowing the greater use of English in German courts,⁵ which will be discussed now.

The emphasis of the common law is not surprising given its dominance on the international legal market: English law is the most frequently chosen system in international contracts, and London dominates international

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¹ Ludwig Thoma wrote „Der königliche Landgerichtsrat Alois Eschenberger war ein guter Jurist und auch sonst von mäßigem Verstand“ in his short story ‘Der Vertrag’, in *Simplicissimus* 1901, volume 5, issue 52, 414, available at https://de.wikisource.org/wiki/Der_Vertrag (accessed 25/7/2020).

² On the reform in general see Burgi, ‘Die glückende Reform: Zur neuen Juristenausbildung an den Universitäten’, NJW 2003, 2804, and Fritzemeyer, ‘Die Bedeutung der Soft Skills für die Juristenausbildung und die juristischen Berufe’, NJW 2006, 2825.

³ Ibid. Note that the reform was not entirely successful and that recently the minimum length for legal studies had to be raised to four years and a half by a statute of 22.11.2019 (BGBl. I 1755): adding a lot of content without making corresponding cuts elsewhere was bound to further prolong the time German law students have to spend at University.

⁴ BT-Drs 14/8629, 2.

⁵ BT-Drs 19/1717, 10.

commercial litigation and also takes a large share of the arbitration market.⁶ There have been attempts in the past to divert some judicial business away from England and into German court rooms instead. The bills of 2010⁷ and 2014⁸ to introduce international commercial chambers in German courts, in which English is the language used not only in the oral hearing but in all stages of the proceedings, have fallen victim to the principle of discontinuity when Parliamentary elections led to the assembly of a new *Bundestag*. At present, a mostly identical bill is with the legislator again but it is to be noted that since its inception in 2018 the bill has not yet been debated.⁹ Nevertheless, in North-Rhine Westphalia, Hesse and Hamburg English can be used in the oral proceedings in certain courts, and the first oral hearing in English took place in Bonn in 2010. It was not entirely successful and there are good reasons to have a degree of scepticism regarding the use of English in German courts;¹⁰ most commentators are in favour of broadening the appeal of German courts via the medium of the English language though.¹¹ Internationally, the trend in several parts of the world is to introduce international commercial courts, which invariably allow the use of English language.¹² Many of this new type of court comprise additional features, giving them further competitive advantage over traditional national courts. One trend is towards introducing aspects which are traditionally associated with arbitration into these modern courts. Use of the English language falls into this category, as do flexibility of the proceedings, inclusion of foreign judges or those of a non-law background, greater openness for application of the law chosen by the parties, limitation of appeals and relaxed rules as to the proof of foreign law. Another trend is for international commercial courts to be established as a separate jurisdiction within the national context they

operate in. The international commercial courts in Abu Dhabi¹³, Dubai¹⁴, Qatar¹⁵ and Kazakhstan¹⁶ have adopted English law or a bespoke version of common law principles as the default law under which their judgments will be given.

German lawyers are thus well advised to have a sound knowledge on the English language and some knowledge of features of a common law system if they want to be able to represent their clients in one of the international commercial courts, in international arbitration, or in a court in one of the many English speaking countries. Whether proceedings in English in German courts will ever take off remains to be seen; the success remains doubtful as long as the proposals are limited to allowing use of English language and no other features commonly found in international commercial courts are added. A positive development since the earlier attempts to introduce international commercial chambers has been that, in addition to the Civil Code,¹⁷ now at least the Civil Procedure Rules are available in English translation.¹⁸ Discovering German law remains difficult for foreign clients though and German lawyers will have a difficult task of translating the often complex and convoluted provisions to them.¹⁹

⁶ *Vogenauer & Weatherill*, 'The European Community's Competence to Pursue the Harmonisation of Contract Law – An Empirical Contribution to the Debate', in: *Vogenauer and Weatherill* (eds.), *Harmonisation of European Contract Law: Implications for European Private Laws, Business and Legal Practice*, Hart Publishing, Oxford 2006, 105; *Kieninger*, 'Europäische Vertragsrechtsvereinheitlichung aus rechtsökonomischer Sicht', in: Eger (ed.), *Internationalisierung des Rechts und seine ökonomische Analyse: Festschrift für Hans-Bernd Schäfer zum 65. Geburtstag*, Gabler, Wiesbaden 2008, 353 et seq.; *Vogenauer*, 'Regulatory Competition Through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence', (2013) 21 *European Review of Private Law* 13.

⁷ BT Drs 17/2163.

⁸ BT Drs 18/1287.

⁹ BT Drs 19/1717.

¹⁰ *Bisping*, 'Conquering the Legal World: The Use of English in Foreign Courts' (2012) 20 *European Review of Private Law* 541.

¹¹ From the literature see only *Armbrüster*, 'Englischsprachige Zivilprozesse vor deutschen Gerichten?' ZRP 2011, 102 and recently *Pika*, 'Die Kammer für internationale Handelssachen. Eine einmalige Chance nach dem Brexit', IWZVR 2016, 206.

¹² An introduction and overview is provided by *Requejo Isidro*, 'International Commercial Courts in the Litigation Market', MPI Luxembourg for Procedural Law Research Paper 2019/2, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3327166 (accessed 25/7/2020).

¹³ Abu Dhabi has enacted the Application of English Law Regulations 2015 to apply on the Abu Dhabi Global Market, <https://en.adgm.thomsonreuters.com/rulebook/application-english-law-regulations-2015-0> (accessed 25/7/2020).

¹⁴ The Dubai International Financial Centre has its "own civil and commercial legal framework, ... modelled closely on international standards and principles of common law and tailored to the region's unique needs", <https://www.difc.ae/business/laws-regulations/difc-laws-regulations/> (accessed 25/7/2020).

¹⁵ The Qatar Financial Centre promises "0 complications. English Common Law guides best practices", <https://qfc.qa/en/about/qfc> (accessed 25/7/2020).

¹⁶ The Constitutional Statute of the Republic of Kazakhstan on the Astana International Financial Centre s. 13(5) provides: "The activities of the AIFC Court are governed by the resolution of the Council on the Court of Astana International Financial Centre, which is based on the principles and legislation of the law of England and Wales and the standards of leading global financial centres", <https://court.aifc.kz/files/legals/7/file/constitutional-statute-with-amendments-as-of-30-december-2019.pdf> (accessed 25/7/2020).

¹⁷ https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html (accessed 25/7/2020).

¹⁸ https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html (accessed 25/7/2020).

¹⁹ Some of the infidelities of the translation of the Civil Code are highlighted in *Bisping*, no. 11, 553.

Practicing international commercial law is the preserve of the few though and not everybody would want to practice this branch of law. The question then remains whether there is a benefit for lawyers to know about foreign legal systems, and whether this comes alongside societal benefits.

C. Domestic Advantages

The knowledge of a foreign legal system and language allows German lawyers to advise clients from a different background; in multinational marriages, for example, it is useful if the lawyer speaks the language of the foreign spouse if their German is not very good. Non-German speakers involved in traffic accidents or accused of criminal acts will also relate better to a lawyer who speaks their language and giving advice will be easier. Communication with foreign lawyers in those matters will be swifter and lead to fewer misunderstandings. Judges will benefit to a lesser extent from these language skills though as in court they are bound to using the German language;²⁰ in matrimonial matters the language requirement is relaxed though. Of advantage is here in particular the ability to speak the foreign language. Knowledge of a foreign legal system is less important.

Studying a foreign legal system in its own language brings about benefits for law students more generally. Being presented with different approaches to legal issues helps the learner to reflect on their own law and to better understand its distinctive features and way of operating. This comparison and reflection is what turns law into an academic discipline, a social science, that transcends the realm of mere interpretation and application of positive law. Comparative law is typically taught in German, of course, and this is entirely adequate to teach the method and purpose of comparative law. A fuller picture of the comparison is available only via the direct appreciation of the foreign law in its own language as translation necessarily involves an act of interpretation which might distort the true meaning that the foreign law has to a lawyer trained in it. To meet this aspiration of teaching foreign legal systems, a well-designed course in this area should invite students to reflect the solutions they are presented with there with the ones chosen in German law and should try to elaborate why there might be differences. These skills do not only lead to a better understanding of the subjects studied on German law, they will also enable those future lawyers who work in administration and policy making to shape the law from a better-informed perspective.²¹

²⁰ § 184 Constitutional Law of Courts (GVG).

²¹ The limited importance of comparative law in legal education due to time constraints is lamented by Jansen, 'Die Bedeutung der Rechtsvergleichung für die deutsche Zivilrechtslandschaft im 21. Jahrhundert', in: Janssen and Schulte-Nölke (eds.), *Researches in European Private Law and Beyond*, Contributions in Honour of Reiner Schulze's Seventieth Birthday, Nomos, 2020, 299, 302.

One of the tools used by comparative lawyers in the *presumptio similitudinis*,²² the presumption of similarity: as lawyers cannot possibly know about all legal systems on earth, they may presume that within a legal family (i.e. the common law family, the Germanic legal family, the French legal family, etc)²³ the laws of the filial systems will be sufficiently similar to that of the mother jurisdiction. While this can be criticised on several grounds, it is a useful starting point and explains why the larger legal systems, such as English and French law are taught at most German Universities. Lawyers with knowledge of another legal system will find it easier to gain access to the understanding of a related legal system which they have not studied before.

D. *lingua franca*

Finally, and again focussed more on English law than on other systems, English is the *lingua franca* of contemporary legal discourse.²⁴ Like Latin facilitated the spread of the classic Roman law across Europe, one reason of the dominance of English law internationally is that it is easily accessible in English language, which is the most widely spoken second language. Similarly, contributions to the legal discourse in English language reach an audience of millions across the world, while publishing in German is accessible to far fewer readers only. It is not surprising that legal publishers C.H.Beck continuously increase their English legal titles under the imprint Beck-Hart-Nomos.²⁵ Young lawyers interested in contributing to the scholarly debate on items of general interest or wishing to shape the law at level of the EU, the UN or other international organisations, will need to do so in the language that all contributors to the debate have in common, which is likely to be English.

E. Conclusion

This paper did not address the general question asked above, what should lawyers know? It addressed the aspect whether lawyers should learn about legal systems other than their own, and comes firmly to the conclusion that they should. For those wishing to work in an international context, knowledge of English law and language in particular is inevitable. But for a fuller picture, law students

²² Zweigert, 'Die "praesumptio similitudinis" als Grundsatzvermutung rechtsvergleichender Methode', in Rotondi (ed), *Inchieste di diritto comparato*, vol II: *Buts et méthodes du droit compare*, Padova, New York, 1973, 735 – 758.

²³ See Zweigert and Kötz, *Introduction to Comparative Law*, Oxford, 1998, part I.B.

²⁴ Vogt, 'Anglo-Internationalization of Law and Language: English as the Language of the Law?', (2004) 29 *International Legal Practitioner*, 112.

²⁵ <https://www.beck-shop.de/verlage/beck-hart-nomos/1195/> (accessed 25/7/2020).

are well advised to keep an open mind and learn about the structures and principles of other systems too. This will not only enrich their studies, it will give them a deeper understanding of their own national law and help them use the law as a creative tool. This has benefits to the wider society too in that the future development of the law is fed from a wider range of concepts and ideas and that minority groups in the population might be better catered for. Whether the legislator's aim to bring judicial business to Germany by allowing parties to have court proceedings in English is a yet unanswerable question.