

INTERVIEW WITH REINHARD ZIMMERMANN AND JAN PETER SCHMIDT

ENTREVISTA COM REINHARD ZIMMERMANN E JAN PETER SCHMIDT

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REVISTA DE DIREITO CIVIL CONTEMPORÂNEO – RDCC¹ – What are the similarities and the differences between the German and the Brazilian legal systems?

Jan Peter Schmidt – If we look only at the written laws, we find many similarities, especially in private law. Our legal tradition is basically the same. It is a tradition that rests on the Roman-Canon *ius commune*. This tradition was brought to Brazil, and also to the rest of Latin America, from Europe. So if a German lawyer comes here today and looks, for example, at the Brazilian Civil Code, he will find many similarities with his own Civil Code, the BGB. In the way the law is structured, in the concepts we use, in the way we think about law, there are many commonalities between Brazil and Germany. So we can say we belong to the same legal family.

Similar things could be said about Brazilian constitutional law, where we see many influences from Germany. The Brazilian Constitutional Court, the Supremo Tribunal Federal, is even citing decisions from the German Constitutional Court. Especially the work of Professor Robert Alexy from

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the German University of Kiel is incredibly popular here in Brazil. Brazilian students seem to know him better than German students. Whether this is a good thing or a bad thing, I don't know.

At the same time, one could point out many differences between German law and Brazilian law. This goes especially for the way law works in practice. One key factor that plays a huge role in everyday life is the way proceedings are handled before the courts. In Brazil, it often takes many years until a final decision is taken. The Brazilian Judiciary is heavily overloaded with cases. In contrast, the German Judiciary works relatively quickly – also compared to other countries, not only Brazil. Besides, it is relatively cost-efficient. As a result, it is much easier in Germany than in Brazil to enforce your rights with the help of the State.

In Brazil, in turn, the so-called 'access to justice' is generally more limited, also due to other factors as, for example, the lack of financial resources to seek professional advice, the lack of knowledge of one's rights, or the lack of the necessary court infrastructure in rural areas. I am aware that constant efforts are made to improve the situation, but it seems that there is still a long way to go. In big cities the situation is much better, of course.

The German society is much more homogeneous than the Brazilian society, the social inequalities are much less marked. This makes it easier to establish a well-functioning legal system. Evidently, that does not mean everything is to say that everything is perfect in our country. We also have complaints about legal proceedings that take too long and have unforeseeable outcomes.

RDCC – You mentioned earlier the Brazilian Constitution, which, incidentally, was influenced by the Weimar Constitution.

Some historians argue that the Weimar Constitution was too permissive, and that it helped pave the way for the rise of Hitler and the Nazi Party. Do you believe the Brazilian Constitution was based on an outdated constitutional model?

Jan Peter Schmidt – It is really difficult for me to answer this question because I don't know the Brazilian Constitution well enough. But I think there are important differences with respect to the Weimar Constitution. For example, under the Weimar Constitution, fundamental rights could not be directly enforced, they were just programmatic. The Brazilian Constitution, on the other hand, contains a long list of fundamental rights, of which at least some can be directly enforced, if I'm not mistaken. It is even argued that they apply directly to relations between individuals. This

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binding nature of the fundamental rights is a big difference between the two Constitutions.

The Weimer Constitution was criticized, as you said, for being too permissive. It did not protect itself against its enemies, and allowed radical parties which openly declared their aim to abolish the Constitution to come to power. This is something that changed with the German Constitution of 1949, the “Grundgesetz”. As a measure of self-protection, it outlaws parties that do not respect the fundamental values and principles of the Constitution. Again, I don’t know how the Brazilian Constitution of 1988 deals with this problem. I think it envisages certain rules that cannot be changed. Some... How do you say it in Portuguese?

RDCC – Cláusulas pétreas.

Jan Peter Schmidt – Exactly, *cláusulas pétreas*. So after all, I am not sure to what extent this parallel between the two Constitutions is really correct. One would probably do better to distinguish them in greater detail.

RDCC – Professor Zimmermann, as a scholar who has focused on European Union law, you have noticed its increasing pervasiveness in a number of areas. What are the limits to the expansion of European Union law? What areas of the law are still considered to be the domain of domestic legislation?

Reinhard Zimmermann – I am interested in the development of European private law. And an important background feature is that we have had a European private law for many centuries: it was the received Roman-Canon *ius commune* that prevailed all over Europe.

There was a common legal scholarship, and a common legal culture. This started to disintegrate at the age of Enlightenment, when the national states in continental Europe codified their law – as you have got the Código Civil, so the French got their Code Civil in 1804; Italy its Codice Civile in 1865, Germany its Bürgerliches Gesetzbuch in 1896, and so on. And then, in 1958, the European Communities were founded. As a result, step by step, an internal market was developed, and we have even got a common currency now. And so the question was bound to arise “do we not also, once again, need a common private law?”, particularly in the field of contract law. Contract law, after all, has always been international in substance and character.

The European Union – as we call it now, at first there were three European communities – does not have a comprehensive competency to lay down laws,

it can only do so where this is specifically permitted, usually for the benefit of the internal market. So in the field of contract law we have now between fifteen and twenty Directives, most of them dealing with consumer contract law. But they constitute a patchwork; they don't fit in well with each other, nor with the rules of general contract law. So, the idea was borne whether we should not have a code of contract law for Europe.

There are efforts on the way towards this goal. There is a draft before the European Parliament at the moment. It will be an optional instrument ...

RDCC – Like a treaty?...

Reinhard Zimmermann – Not like a treaty. It will be a code like the *Código Civil*, but it won't apply automatically to all international transactions. The parties must opt-in. If you are an English seller and I am German buyer, and we conclude a contract, then we can say we want our contract to be subject to the rules of this common European contract law. That is what is called an opt-in code. It has been approved in the first reading by the European Parliament, but the European Parliament has been dissolved and reelected, and there is also a new European Commission. So one does not quite know yet, what the fate of the draft will be. Perhaps this will be the first step on the way towards a European civil code. For the time being, it just deals with general contract law, sales law, and related contracts, and it is based on an opt-in model. Thus, one will be able to see how successful it is, i.e. how many parties to international legal transactions will find it sufficiently attractive to opt in.

RDCC – Do you believe Europe will some day adopt legal codes equally applicable in all European countries? Will domestic legislation only apply to local issues?

Reinhard Zimmermann – There was a time when, I think, many people thought that we would gradually get such general codes for Europe; a Europe that would be on its way towards a federation perhaps along the lines of the United States, or other federal states. But, at the moment, there is a great skepticism towards an increasing Europeanization. A number of years ago an attempt was made to draft a European constitution. But it failed. We have a new European treaty instead, which in some ways is like a constitution. But many national states didn't want a federal system with a constitution for the whole of Europe.

So, in a number of important countries there is a resistance to give away more powers and to federalize Europe. And, in 2017, we may have a

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referendum in Great Britain, and Great Britain might actually want to get out, for the British people tend to think, even at this stage, that Europe is too centralized. And, so, I think the authorities in Brussels must move very carefully if they don't want to lose even more support. There is a lot of criticism and that is kindled also by national politicians who, in some countries, try to shift the blame for everything that goes wrong to the centralized bureaucracy in Brussels. So, I think, the mood in Europe at the moment is less positive than it was a couple of years ago. And, therefore, it is not even clear, yet, whether we will get an optional contract code, let alone a comprehensive piece of legislation covering the whole of private law. That is not envisagable at the moment.

Jan Peter Schmidt – Maybe I can add something else. It is often said that there is a practical need for the international unification of contract law in Europe, because the legal fragmentation caused by the existence of different national regimes is supposed to increase the transaction costs for cross-border commerce. So this is an economic argument for legal unification. But although this practical need for unification argument is constantly asserted, it is actually very difficult to prove.

No one denies that the existence of different national regimes creates certain problems for the businesses that want to carry out cross-border transactions. But it is not clear to what extent these costs are really significant. Because the businesses will always find a way to deal with this problem, for example, by choosing the law that is applicable to the contract or by inserting certain contractual clauses. Hence, it has become more difficult for the European Union to justify the practical need for an instrument that unifies private law, or parts of it, within Europe. As a result, the corresponding projects have come under criticism on two different levels: on the political level, as was explained by Professor Zimmermann, but then also on the practical or economic level.

RDCC – How could European laws gain binding force in all member countries? The European Union has been losing support lately, especially in countries that are facing economic crises, such as Spain, Greece and Portugal, not to mention the crisis in Ukraine, which hinges on its potential admission into the European Union. Do you believe it possible to make European laws binding throughout Europe in this crisis scenario? Should they even be binding?

Reinhard Zimmermann – Do we personally want it?

RDCC – Yes...

Reinhard Zimmermann – I, personally, am not a great believer in obligatory European Union law, i.e. harmonization from above and by way of regulation.

Many of the Directives which we have are poorly drafted and policy-wise questionable. Against this background, to draft a more ambitious act such as a European contract code is open to criticism, because it will not be of the quality that we are used to in the national legal systems. Moreover, I believe, first, that we must build up, once again, a common European culture and a common European scholarship. We must discuss much more than we have hitherto done, the legal problems in a transnational spirit. At the moment, we still have a situation that German lawyers tend to focus on German law and have a closed discussion circle among themselves; the same is true in France, and in England, and most other countries. A change has only started to occur in the last twenty years by a more internationally-minded, younger generation of comparative lawyers and legal historians. Academic groups have been created to draft common principles and to write casebooks, textbooks, etc. But that has yet to filter through into the basic teaching and research methodology: we do not really have a common European scholarship on a broad level. And, therefore, it is difficult to envisage a European private law meeting high qualitative standards if it isn't supported by a broadly based discussion, comparative research, international cooperation, etc. The situation is similar to the one in 1814. In 1814, Napoleon had been defeated – well, he was finally defeated in 1815, but in 1814 he was already on Elba –, and in Germany we had a multitude of individual states. But France had a centralized state and a successful and inspiring general civil code. This was regarded by many as a model also for Germany. There was a big debate about this question, and some even saw a civil code for Germany as a symbol and harbinger of political unification. But the person who prevailed was the most famous German law professor of the last two hundred years: Friedrich Carl von Savigny. He argued “Let us wait until we have built up a common scholarship, developed common concepts and doctrines and have thus laid the foundations for a really successful code of private law.” Savigny argued that it would be the wrong way round to have a code first and then a legal scholarship based on it. The same debate in a way is carried on today. A code, enacted from Brussels would be seen as a top-down instrument stifling organic legal development.

RDCC – Do you believe it possible to have a kind of “global constitution”?

Reinhard Zimmermann – I think this is your turn [*speaking to Jan Peter Schmidt*]

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Jan Peter Schmidt – I think this is very difficult. You see, we already have difficulties to adopt a European Constitution, even though the process of integration is already quite advanced. Much more advanced than, for example, in the Mercosul... But, even so, we haven't achieved that. So I think at the moment it is utopian to speak of a global constitution. And I am not even sure whether it would be a desirable aim. I think we have other problems to deal with at this moment.

Reinhard Zimmermann – In a way, of course, we have elements of a global constitution with the international human rights documents. The question is: how global are they actually? They essentially embody Western values. If you look at countries in Africa, for instance, you find societies living there in a different world, and with different concerns and values. Equality of genders, to mention just one example, is just not part of their tradition. So, there is always a danger that a uniform global legal regime will be tantamount to a modern imperialism.

RDCC – Professor Zimmermann, you lived in South Africa during the apartheid regime. Could you tell us a little about your experience as a professor at Cape Town University during this time?

Reinhard Zimmermann – These were difficult times in South Africa. We had, for example, university apartheid, which means that there were “white” universities, “black”, “coloured” and “Indian” universities. The “white” universities were subdivided into those where Afrikaans was spoken, ie the language of the descendants of the Dutch immigrants, and the English universities. I was at what I think was the best English South African university, the University of Cape Town (UCT). It was traditionally permeated by a liberal spirit and was opposed to the apartheid regime as well as to the police system that prevailed, particularly during the state of emergency in 1986, when things started to fall apart, and when the rule of law was completely abolished. I said we were officially designated as a “white” university, but according to a special statute a specific Government minister had the power to fix quotas for non-white students in “white” universities. But no quotas were ever fixed. So, effectively, we were free to accept black students. And, during my time at the University of Cape Town, the number of black students rose considerably. But, it was a difficult process in view of the fact that the black school system was so poor. So, many black students came under-prepared to my university. As a result we had to introduce specific courses and special tuition in order to do what the school system had failed to do. This, in turn, meant that many of the

black students that we wanted to accept had to study two years more in order to achieve the required standard. But that was then regarded as discriminatory: “Why should black students have to study longer than the white ones?”

RDCC – Did the students have to pay for the university?

Reinhard Zimmermann – The University of Cape Town is a private university, though it gets much of its funding from the state, and therefore students had (and still have to) pay for their education. But there were also scholarship schemes, most of them available to black students. So, while we did have an increasing number of black students, the next question was: “Where can they live?” We were a residential university. Undergraduate students lived on campus, in students residences. Strictly speaking this was illegal in terms of the “Group Areas Act”. But we actually allowed our students to live in the students residences and the government did not intervene. So there was a sort of fragile compromise. But, of course, one was always faced with the question: How can we operate “normally” in an unjust society?

Generally speaking, I always thought it is a good thing if there are towers of light such as UCT in a situation such as this: places where a liberal education is offered, emphasizing political neutrality, respect for human rights, the rule of law, etc. But it became difficult to maintain that position, during the time of the state of emergency. I was, at that stage, Acting Dean of my faculty and I was also president of the South African Law Teachers Association. Thus, I wanted the South African Law Teachers Association to protest against the fact that the rule of law had effectively been abolished. Together with some colleagues I drafted a resolution stating that it is bound to undermine our position as law teachers, if we preach something in the lecture rooms which is flouted in practice. When that resolution wasn't carried, I resigned my office as president. Inevitably, in those days I thought of the dark days of the Nazi regime in Germany when most of the lawyers and their official organizations had remained silent in spite of the fact that the legal system had been perverted.

In the political spectrum of South Africa, in those years, my university was on the left. Nevertheless, we had a lot of discussions in those years. Was it right to carry on, or should we subscribe to the idea of “liberation before education”? We had weeks on our campus when it was besieged and invaded by the police, attempting to end students' protests and arresting them. But it was very strange how even in abnormal situations you can have pockets of normality. We could negotiate with the government that we were allowed to bring exam scripts into the prison to our students, so that they could write their final year exams and

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would not miss a year. ... Yet, on the other hand, of course, there were times when we didn't quite know whether we would be able to continue; and when the government issued regulations that, if we didn't discipline our students, they would withdraw its funding from the university.

RDCC – What do you mean by “discipline”?

Reinhard Zimmermann – That they do not engage in protests against the government. Our campus bordered on one of the main highways, and many of our students were, day after day, standing there holding up banners stating “Free Mandela”, and so on. Eventually the police closed the highway, thus infuriating the Cape Townians who got stuck in big traffic jams (like in São Paulo...).

And so, the government said: “If you do not prevent these demonstrations, you will not get any funds any longer”. Thus, we were faced with a difficult decision. We believed in human rights and in freedom of expression, and we did not want to discipline our students. But, of course, we also wanted to continue to function. My faculty eventually brought a lawsuit before the Cape Supreme Court against these regulations. And we won because the Cape Supreme Court was staffed by liberal judges many of whom had studied in our university. Normally one would have said that in the state of emergency these regulations were valid because there were no standards against which they could have been tested and held to be illegal. So the Court resorted to a higher level and held that these regulations were “so unfair as to infringe basic principles of natural justice.” As a result, the regulations were struck down, and thus we could continue to operate. So, those were wild days. The regulations of which I told you were, incidentally, issued by the then Minister of Education, F.W. de Klerk. Just imagine what we thought when he subsequently became president: one of the hawks in the cabinet! But, I suppose that just gave him the legitimacy in the conservative circles to set the wheels in motion for the (relatively peaceful) transition that we experienced. A more liberal politician would not probably have been able to do that. Eventually De Klerk decided to release Nelson Mandela who, in turn, came out of the prison with a message of reconciliation, which was also something I did not expect. Mandela must surely be counted among the most impressive personalities of the 20th century.

Some of our students from the 1980's are now in leading positions in South Africa which is something I see with great pleasure.

RDCC – Until when did you stay in South Africa?

Reinhard Zimmermann – I stayed in there until 1988. In 1988, I accepted an offer from a university in Bavaria, the University of Regensburg. Thus I came back to Germany; but a very different part of Germany than where I had grown up. I have always kept strong links to South Africa. Cape Town is for me a second home. Whenever I am there, I am very happy to see my old friends and colleagues. I have always had a young South African graduate law student in my department. They all came for one year to learn German and to study German and comparative law. Five of them have subsequently become professors in South Africa. Many of my colleagues from South Africa came to Regensburg, and later to Hamburg, with Humboldt scholarships. So, the cooperation continues to flourish.

RDCC – In 2006, you were awarded an Honorary Doctorate by the Cape Town University on account of your contribution to the restoration of the rule of law during the apartheid regime. What does this degree mean to you personally?

Reinhard Zimmermann – Well, as an academic, you usually get an honorary degree for distinguished academic work. Thus, this honorary doctorate is indeed very special to me because it was also given to me for the very modest contribution to society I have made: by the way in which I taught law, led my faculty in what was probably its most difficult year, and attempted to remind my colleagues in the Law Professors Association over which I presided of their responsibility towards their students and the general public. I tried to emphasize that as law professors, we must do our best to preserve the rule of law and its integrity. We cannot just stand back in a situation where faith in law is destroyed. This deeply affects our own integrity and our credibility as law professors. In my own University, at UCT, I had the full support of all my colleagues. That was a wonderful feeling. We were not just colleagues but also friends. We knew that sometimes our views would differ but we could always trust each other. That was not the same in other faculties ... Sometimes, however, we also had to assert freedom of speech and the rule of law against left wing extremists in our university. When they tried to prevent moderates from South Africa and from abroad to speak on our campus, I always maintained that we cannot allow that to happen: We must not descend to the same level of illiberality as the government that we opposed. It was not always easy to argue along these lines in those days when everything seemed to be radicalized and when, as a liberal, you felt that you easily sat between the stools.

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RDCC – Now that you are back in Europe, how does German law compare to that of other countries?

Reinhard Zimmermann – ... I will just start to give you the general background. In Europe it is often said that we have two different legal worlds. We have the Roman legal tradition, i.e. the civil law, and we have the English common law. I have always been interested to find out whether these two worlds are really so different. And, I think that they are not. Over the centuries, there has been much influence of Roman law and of civilian learning on English law. Of course, it is always said that in continental Europe we have codes of private law, and in England we have the (uncodified) common law. But that is only part of the truth. In Germany we also have large pockets of case law, ie of common law. The code often only has abstract rules which must be fleshed out. And, in England, while there is no comprehensive codification, there is certainly a culture of statutory law. In this way I could give you an entire lecture on the relationship between common law and civil law, and of links existing in the past and in the present.

Now, in reply to your question, in the European Union we have a number of states which were formerly under communist rule. During that time they did not have a proper culture of the rule of law. And they did not comply with Western legal standards. They believed in the Marxist ideology that the law, ultimately, will wither away. They still taught law, and in a number of countries the study of Roman law survived, in Hungary for instance. And the study of Roman law was always sort of an enclave in the communist countries, constituting a link with Western Europe. Then, after the fall of the communist regime, one of my colleagues at university of Regensburg, who was a specialist in socialist legal systems, remarked: “My entire discipline has been taken away”. And from Zweigert & Kötz, the standard textbook on comparative law, an entire chapter had to be taken out. The formerly socialist legal systems now all tried to adopt the Western European legal culture, and they have drafted and enacted codifications along the lines of the Western European codifications.

But, as Jan said about Brazil, it is one thing to have a codification in the statute book, but quite another thing whether in all parts of society the same respect for the law prevails as it does, eg in Germany. I am not an expert in Eastern European law, but I think in some of these countries it will take a long time until the rule of law is really respected in every day culture, until the respect for human rights has taken roots, etc.

It is a task of the European Union to reach out to the Central and to the Eastern European countries, and to help them create (or re-create) that culture of law.

Jan Peter Schmidt – Maybe I can add just another detail. In the Eastern European states, where you had those fundamental reforms, especially of private law, you often have the problem that judges are not yet trained well enough to apply the law in a satisfactory manner. Very often you will see, for example, that the so-called “law in the books” is exactly the same as in Germany, because it was directly “imported”, so to speak. Germany sent legal experts, for example, to Georgia, who helped the Georgians to draft their new legislation, which as a result shows many similarities to German law. But when a case comes up before the courts, the Georgian judge might apply the same rule very differently from a German judge. Generally, it can be observed that judges in former socialist countries often apply the law in an extremely formalistic, positivist manner. This is due to the fact that they belong to a generation that studied under the old regime. Hence, it is not enough to adopt new laws, you also need a new generation of judges and practitioners, who were trained under this new law and are able to handle it in a sophisticated manner. For example, by interpreting the law also in a teleological way, instead of just sticking to its literal meaning.

Reinhard Zimmermann – With teleological you mean that judges have to look at the purpose of the rule...

Jan Peter Schmidt – Yes, exactly. As regards Western Europe, you could ask: is one system really superior to the other? I don't think so. Each country in Western Europe has a well-established private law tradition, and each has its own problems. Maybe in one country the contract law is a bit outdated and really needs a reform. Maybe in another country family law no longer reflects social reality. Maybe in some other country legal proceedings take too long and are too expensive. So, each legal system has its strong points and its weaknesses.

In the process of European harmonization, the task is not to establish which national legal system is the best, but to look for each singular problem at the solutions that exist on the national level. Often you will find that these solutions are already identical. In case they differ, then one must try to establish whether maybe the French solution is preferable to the German solution. But you could also reach the conclusion that actually none of the existing solutions is satisfactory, and then you could try to propose a new rule, one that is so far nowhere to be found.

As a result, there is no general distinction between the different jurisdictions in terms of quality. Of course, most lawyers tend to be a bit chauvinistic, believing that their own law is best. But this is mainly because it is the law they *know* best. This makes them underestimate the flaws and overestimate the virtues of their own legal order. Most German lawyers automatically assume that German law is always of a very high standard, French lawyers do the same... Usually, it is the lawyers from the smaller countries who are more modest, because they are used to seeking inspiration beyond the national borders. Lawyers of big countries, in turn, can more easily permit themselves to remain always within their national legal framework. This can create a false sense of superiority.

RDCC – While on the subject of Eastern European countries: how was property regulated in communist countries? For instance, was real property owned exclusively by the State, while individuals were only allowed to use it? How was personal property, such as cars, regulated?

Jan Peter Schmidt – I think it's a difficult question. Probably we'd have to distinguish between different countries. What was usually in the hands of state were the means of production, especially the factories. But private property was clearly recognized as well, even if only to a limited extent. Especially with things like personal belongings, such as clothes, books, or even cars, there was usually an individual attribution. Hence, private law continued to exist in the socialist countries. The German Democratic Republic even enacted a new Civil Code in 1975. Until then, the BGB from 1896 had continued to be in force also in Eastern Germany.

That private law was clearly not irrelevant in the socialist countries is also shown by the fact that they provided regimes of succession law. So private property was even recognized beyond the death of a person, so that his or her belongings could be transferred to another person.

I am not sure to what extent immovable property could be owned by a private person. What I know is that certain citizens enjoyed privileges, and that one of the most cherished privilege consisted in having a kind of holiday house, a so-called 'dacha', somewhere on the seaside. I don't know whether in these cases, the persons became owners of these houses or whether they had only the right to use them... But in a way it boils down to the same thing. They had a special right, regarding a special object, and this we may regard as some kind of property right.

RDCC – People who had high positions in the government ...

Jan Peter Schmidt – Yes, mostly party officials, but also successful sportsmen or other citizens who had distinguished themselves and brought glory to their fatherland.

RDCC – You mentioned Roman law earlier. There are Roman law professors in Brazil and Roman law is offered as an elective course. What is the importance of Roman law for the contemporary law student?

Reinhard Zimmermann – But, I have been told that in the University of São Paulo it is an obligatory course.

RDCC – Indeed. But in most other law schools, such as the ones at Mackenzie Presbyterian University and the Pontifical Catholic University of São Paulo, it is an elective course.

Reinhard Zimmermann – So, the University of São Paulo, can then be said to be the last bastion of culture...

Look, Roman law, in my view, is the basis of our legal culture. The Roman lawyers were the one ancient nation which developed a very sophisticated private law. The Roman private law was inherited in Europe through a process, which we call “reception”, from the Middle Ages onwards. It was a civilizing and unifying force. And it propelled the European legal systems to an unparalleled level of sophistication. It was by virtue of being a learned law, a law that had to be taught and studied in the university, that it attained that level of sophistication. Thus, it became the basis for the legal culture prevailing in Europe.

Now, what is the importance of Roman law today? On the one hand, it provides you with an overview of a legal system which can be studied from a distance and which teaches you how a legal system operates within a certain society. That is very interesting in itself: a highly sophisticated legal system of the past, where you can observe: what did the lawyers do, how and why did they develop their legal rules and doctrines, what was the social setting for these rules, etc. But more important, for me, is that many of the legal rules, principles, concepts, arguments, are still with us today. They have shaped our modern legal mind.

Our modern legal mind has, of course, been shaped by many influences, but one very basic influence is Roman law. I believe that for a student it is essential that he does not only learn the rules of his own legal system. If you only know about your own legal system, you tend to take everything in it for granted.

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You think this is how it must be. You can only really start to comprehend, i.e. to understand, your own legal system if you see it in comparative perspective. This shows you the specific profile of your legal system. We have certain rules, but they are not natural. We have them for specific reasons, sometimes good reasons, and sometimes bad reasons. In other systems you sometimes find similar rules, sometimes different ones, sometimes working well and sometimes not so well.

But the comparative perspective is not enough, because if you just look at German law, Italian law, Brazilian law, French law, etc., you see certain commonalities and you see certain differences. That is quite interesting in itself, but it does not tell you enough. In order to understand the commonalities and the differences, you need to know how and why they have developed. And so you need a historical approach in addition to, and coupled with, the comparative one. Not so much for the sake of comparative law or legal history, but for the sake of becoming a refined and sophisticated lawyer within your own legal system, a lawyer who understands the rules, their function, their background, their purpose, and their profile. You need to be able to assess your own legal system, and the best basis for that is Roman law. It allows you to trace the development of legal rules, and that is what I have tried to do in my book: “The Law of Obligations: Roman Foundations of the Civilian Tradition”. In that book I attempt to look at Roman law not as something that is past but that has had an effect, and has built up a tradition, and that tradition can be traced down in French law, German law, South African law, Brazilian law, even English law. You then have a sort of common ground on which you can compare experiences, assess developments, etc. That perspective, in my view, is of central importance for the legal training and I wish it would be emphasized much more strongly in our curricula, at the expense of many of the specialized disciplines, which universities these days are obsessed to bring in because they think that in this way they can better equip their students for legal practice.

But teaching practical skills and subjects is not really the key task of universities; that is something students will learn in practice. They will learn that much better and much more easily in practice. But it requires them to have a good general background about the law and its foundational elements, about legal methodology, and about the way in which the law develops. For a person who is well educated in foundational subjects, it is no problem to specialize in one or the other direction. But if already at university you specialize in one direction, you can no longer easily move on to other areas of the law.

RDCC – I couldn't agree more with you. However, as I see it, there are two problems with this view. First, I believe the market, generally speaking, does not place much value on this kind of knowledge. Second, most students consider subjects such as Roman law, History and Philosophy to be of secondary importance. Most look forward to studying the more specific subjects.

Jan Peter Schmidt – ... Maybe I can add that the students here in Brazil are primarily concerned with passing the Bar Examination, and so they are, very understandably, concerned with learning what is required in that exam. The same thing happens in Germany. 95% of the students only want to study, only want to hear about those subjects that are part of the state examination. And as there is no mandatory exam on Roman law, most students say: "Well, then why should I be interested in it?" In this sense, we face the same problem in Germany and in Brazil.

Reinhard Zimmermann – Well, my experience is that in quite a few of the big international law firms operating in Germany, the experienced partners will say: "Don't try to do a job that we can do better. Give us young lawyers with a good intellect, with a broad range of interests and with a good grasp of the foundations of the law and of the core subjects."

This has been confirmed by the career of many of my doctoral students who have not remained in academia but have gone into legal practice. In addition, the big law firms these days operate internationally. They want persons who are not just German lawyers but who have also studied in England, who have done a master's degree, are able to speak French and have acquired an international horizon.

RDCC – The Brazilian Ministry of Education will soon overhaul law school curricula. What is essential to a having a high-level legal education?

Reinhard Zimmermann – As I have already said: foundations, foundations, foundations.

(laugh)

RDCC – Could you tell us about succession law and its present-day importance? Some students consider it to be a very boring subject. What is the current state of succession law in Germany?

Reinhard Zimmermann – In Roman law and during the era of the *ius commune* the law of succession was extremely important.

A very large part of Justinian's Digest is devoted to it. Today it is, indeed, in many countries a neglected area of the law. Also, hardly any comparative work has been done until very recently. One of the reasons has probably been the general idea that the law of succession is essentially culturally determined so that it does not lend itself to comparative study and to an assessment of which law is "better". Also, many lawyers think that the rules on succession (e.g. form requirements) depend on essentially arbitrary decisions by the legislator. And, thirdly, lawyers also often take the rules of their own legal system for granted, as if they were a kind of natural law. But, if you apply a historical and comparative perspective, the whole subject comes to life. You start asking yourself questions such as: Why do some countries, such as Germany, have the parentelic system in intestate succession, while others, such as Brazil, follow the three-line system? Is it sensible to have a witnessed will? The other day I had an interesting experience. We have a weekly workshop in my department in Hamburg where we discuss what each one of us is working on. We also always have guests there, and after I had been presenting some work on intestate succession, three young Brazilian lawyers came to me and said: We have never thought about this. We have always learned that we have the three-line system. This was so natural to us. I had actually criticized that system and compared it to the other systems existing in the world. And I had asked questions such as: How do these different systems operate? What are their advantages and disadvantages? Why has the one system developed here and the other elsewhere? And then the law of succession becomes a tremendously interesting subject that is very under-researched. Apart from that, of course, it is a subject of great practical importance generally and particularly in a country such as Germany where the members of the generation that is now about to die have built up their fortunes in the peaceful times after the Second World War. In addition, people try to set up trusts and use other devices (one may talk perhaps of "will substitutes") to pass on their property to the younger generation. This also throws up very interesting questions.

Jan Peter Schmidt – An additional fact that underlines the huge practical importance of succession law is the adoption, in 2012, of a European Regulation on cross-border succession cases. It will enter into force in 2015. Each European Member State continues to have its own substantive succession law, but from now on we will have uniform rules of private international law, that is, rules which determine the applicable national law and the competent court. This European Regulation was adopted in view of the ever increasing number of cross-border succession cases. Families have increasingly become international. Spouses might be of different nationality, their children live in

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different countries. Also a person's assets are often no longer restricted to just one country. A German citizen, for example, who owns a flat in Hamburg, might at some point in his life decide to buy a little house on the Spanish coast, or on the island of Mallorca, in order to spend the winter there, because it is much warmer than in Germany. Maybe he has assets in a third country, for example a bank account in England. When he dies, it is not clear at all which national law is to govern his succession, and this creates huge problems in practice. It is not rare, for example, that someone obtains a decision from a German court which declares him to be the heir, and then presents this decision to the Spanish authorities, in order to register the house under his name. But the Spanish authorities will usually not recognize such a decision, because they don't understand what it says. In addition, they might even say: according to our laws, you are not even the heir, or at least you have to share the estate with another person.

Many of the problems will disappear with the new European Regulation. But of course it will also create new problems. It has already stimulated a lot of academic discussions and brought a new dynamic into succession law as a whole. The Regulation also highlights the necessity to study the substantive succession law regimes of the European Member States, which still differ in many aspects. Because a proper understanding of the national succession laws is a prerequisite for the successful application of the Regulation.

RDCC – Several economists, such as Thomas Piketty, who wrote a book entitled “Capital in the Twenty-First Century”, recommend imposing a heavy tax on inheritances in order to reduce inequality. Brazil is one of the most unequal countries in the world, and the tax rate imposed on inherited assets is a meager 3%. How is this issue regulated in Germany, and what do you believe is the ideal way to regulate it?

Jan Peter Schmidt – The problem you mentioned certainly exists, namely, that succession law has a tendency to perpetuate huge fortunes, huge accumulations of patrimony, and thus it creates and perpetuates social inequalities. A situation like this can also be criticized as evidently unjust, because someone who inherits a large fortune gets a huge head start in life, without having deserved it, so to speak, while another person has to start from zero. This is very problematic indeed for a society that is based on the principles of equality and personal merit. That's why some people even argue for the complete abolition of succession law.

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RDCC – The assets would then go to the state ...

Jan Peter Schmidt – ... Exactly, the assets would go to the state. However, I think that such a radical approach would not have any chance to succeed in practice, because people would find countless other ways to transfer their assets to the persons they want to, for example through gifts, simulated contracts, etc. I think most people regard it as a kind of natural right that their property remains in private hands also after their death, and that, at least in part, they may freely decide to whom it goes. Hence, if the state enacts rules which would expropriate the owner at the time of his death, most people, especially rich people, would not accept that and look for mechanisms to circumvent this regime.

Besides, the abolition of succession law would be very inefficient from an economic point of view. It would threaten to destroy private businesses, and it would also create many problems for families. Should a widow and her children not be allowed to keep the house that belonged to the husband/father?

For the mentioned reason, a total abolition of succession law, or measures that would be similar in effect, such as a 90% inheritance tax, would either not work or cause more harm than good. So one must not seek radical solutions, but an adequate balance between the interests of the individuals and those of the society. Inheritance tax is probably the best tool for that aim, because it allows for a lot of flexibility. German inheritance tax law, for example, treats spouses and close relatives of the deceased more favourably than other family members and non-relatives. They also enjoy the benefit of huge tax exemptions, that means that up to a certain amount they don't have to pay any tax at all. It is 400.000 Euros for children and 500.000 Euros for spouses.

These exemptions may of course be criticized. If, for example, the deceased is survived by five children, two million Euros pass from one generation to the next without any taxation. Is that really justified? Often the argument is made that the deceased's assets were already taxed during his lifetime and that therefore they should not be taxed again after his death. But this is not a very strong argument in my view, because one should rather look at the person who receives the money. And from his or her perspective it is just a gift of, let's say, 400.000 Euros. So why shouldn't he pay tax for that?

As regards the adequate rate, I am not sure. Probably a progressive system, as we have in Germany, makes sense, so the higher the value of the estate, the higher the tax rate. For children and spouses, the maximum rate is 30%, for non-family members it is 50%. The maximum rate applies in case the value of the estate exceeds 26 million Euros.

If you say that in Brazil there is a flat inheritance tax of 3%, I think this is very little, too little, especially for a country with such a high level of social inequality. Inheritance tax could allow for a redistribution of wealth, at least to some extent.

However, one also has to take into account another aspect, and this is something that has been intensively discussed in Germany recently. We have lots of family-owned businesses. In fact, these small or medium sized family-owned businesses are the backbone of the German economy. As they are -often worth millions of Euros, their transfer from one generation to the next by way of succession law would normally trigger a substantial inheritance tax. But this tax, it is feared, would threaten the economic existence of the enterprise, because the heir might have to sell parts of it in order to be able to pay the tax. Exactly for that reason, the law grants family enterprises huge inheritance tax privileges. However, very recently, our Constitutional Court decided that these privileges were unconstitutional for being excessive and thus discriminatory against other heirs. At present, a new inheritance tax regime is discussed in Parliament. One needs to find the right balance between the interests of all those involved, that is the deceased, his family, the economy, and also the state.

Reinhard Zimmermann – One often reads about cases in the newspapers of, for instance, noble families who have land and property from their forefathers and when that is passed on to the next generation they get into difficulties because they are not able to pay the inheritance tax if they want to preserve their estates within their families. In Regensburg (where I taught for many years), this happened to the Thurn and Taxis family: when the Prince died, they had to sell their table silver, their paintings, etc. I think the same can happen in many other cases, quite ordinary cases. Today, the intestate succession laws all over the world favour the surviving spouse. They do so because they want to ensure that she can continue to live in the same comfort and in the same environment as she did when her husband was still alive. Now, if the wife inherits and then has to pay a lot of tax, she may have to sell the house she has inherited (unless she has also inherited a sufficient amount of cash, or has a fortune of her own). So, these considerations just confirm what Jan has said, that there is a very difficult balance that must be drawn.

Jan Peter Schmidt – In Hamburg, we have a colleague who has very radical views on this matter and always argues for the complete abolition of succession law. So we are fortunate that he is not here today.

(laugh)

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RDCC – The Brazilian Civil Code has many general clauses that enshrine principles such as the *social fuction of ownership* or *good faith*. In your opinion, how should Brazilian courts apply these clauses?

Reinhard Zimmermann – This is a question on Brazilian law and therefore it is a question for Jan. But let me just introduce the answer very briefly. In Germany we also have such general clauses. So this is not a problem specific to Brazilian law. Of course, general clauses give the judge considerable leeway. But they also allow the private law to be suffused by the constitutional values, as laid down in the human rights provision of our Constitution. This is, of course, quite important in countries such as Germany where the code is quite old and dates from the time before the enactment of the Constitution. We have developed the doctrine of “mittelbare Drittwirkung”, or indirect effect, of the human rights for this purpose. From what I hear the constitutionalization in Brazil has gone much further ...

Jan Peter Schmidt – Yes, maybe the constitutionalization of private law, which is a phenomenon you find in every country with a modern constitution, has gone a bit out of a hand in Brazil, because there is a widespread desire to apply the constitution even directly to private relationships. So Brazilian private law is in danger of losing its autonomy. However, I also get the impression sometimes that the whole debate is rather a matter of rhetoric, or even of ‘marketing’. Because it is not clear to me whether there are really so many private law cases where the result is derived directly from the Constitution. And even where this happens, probably you could get to the same result just by relying on the ordinary rules of private law.

In my view, one should not exaggerate the role of the constitution in private law. Of course it sets out values and principles which private law must not contradict; no one will doubt that. But first, it is not the function of the constitution to substitute a code of private law, and second, its rules are usually much too abstract to derive concrete results from it.

As already mentioned by Professor Zimmermann, we had a very similar discussion in Germany after the Second World War, when we had our new Constitution, the “Grundgesetz”, in 1949. People then asked: “Well, we have the old Civil Code from 1896, and now we have a new Constitution, with new values, especially new fundamental rights, so what do we do with that?”. And so the discussion developed as to whether fundamental rights can be applied in private relationships, and if so, whether they apply directly or indirectly. The debate was quite intense in the 1960s and 70s. By now, this debate has more or less died down. No one doubts, of course that the

Constitution is of a higher rank, and that our private law has to respect its values and principles. But at the same time people have understood that it's better to solve private law cases by applying private law rules, because they are much more sophisticated, much more differentiated. If you take human dignity, for example, "a dignidade da pessoa humana", which is so frequently invoked in Brazilian law these days. What does it really say, how can you solve a case with it? Of course you might say for example: Human dignity requires that the victim of a car accident has a claim for damages. But this is obvious. The difficult questions only come after that: Is it necessary that there was negligence on the part of the person who caused the damage? What happens if the victim acted negligently himself? What if the victim suffered another accident on the way to the hospital? Obviously, the recourse to human dignity cannot answer any of these questions, we need doctrines that are much more specific.

Another reason for which the Constitution is of little help in cases of private law is that you have private citizens on both sides of the legal relationship. And both of them can invoke their fundamental rights. So then you have to balance these fundamental rights against each other, which is something very difficult.

So at the moment the situation in Brazil is complicated, but maybe in ten or twenty years from now we will see the same thing that happened in Germany and other countries, namely that this discussion dies down, that people start to focus more on private law again. Because they will realize that the Constitution is not the place where we should discuss matters like car accidents or contract interpretation. The Constitution doesn't say anything about it. Of course, every once in a while cases do come up where we have to ask ourselves whether a certain rule of private law, or a certain interpretation of such a rule, is in conflict with the Constitution. But these are rare exceptions, because the largest part of private law is already in line with the Constitution.

To come back to the matter of general clauses, they also fulfil another important function, namely to allow the constant adaptation of the Civil Code to changes in society. For example, if you have a general clause that establishes a strict liability for dangerous objects, then you can apply this rule also to new technical devices, which at the time the code was enacted did not yet exist. If instead you had a very casuistic regulation which established strict liability, let's say, for cars and for trains, then at the moment some new medium of transport comes up, for example the aeroplane, then this case is not regulated. So general clauses give you more flexibility, and because of that, they are very useful tools of legislation. To give you another example: if you have a clause

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saying that a juridical act (*negócio jurídico*) which violates the public order, “os bons costumes”, is void, then the judge can take his decision in accordance with the views of society at the time. To give you one example: in Germany, for the most part of the 20th century, wills, or testaments, in which a married person did not give his property to his wife, but to his lover, his mistress, were declared void for being against good morals. But since then, the views on these matters have changed, people these days are much more liberal. A contemporary judge can take this change into account and regard a testament of the mentioned kind as valid. So although the rule itself didn’t change at all, it can be applied differently in different times. This again shows the advantage of flexibility.

Then, of course, general clauses have one big drawback. They create legal uncertainty and might confer too much power to the judge. Or at least they might make the judge believe that he has been granted more powers than he actually possesses. This is something that can be observed in Brazilian court practice these days. Brazilian judges show a tendency to disregard the specific norms that were enacted by the legislature. Instead, they prefer to rely directly on the principle of good faith, for example. Even if usually this does not matter for the result of the decision, this method is to be criticised from a methodological point of view. Because it shows a mistaken understanding of the relationship between general clauses and the more specific rules. The latter usually concretize the first, therefore they have to be applied with preference. The general clauses only fulfill a subsidiary function. For the same reason, a general clause does not entitle the judge to overrule a specific decision by the legislature. If it were otherwise, we would not need a civil code and other statutes at all. We could do with just one single provision which says: “The judge decides all cases according to the principle of good faith”.

So the function of a general clause is to enable the judge to decide cases in a reasonable and flexible manner when there is a legislative gap, that is, when the legislature refrained, be it voluntarily or involuntarily, from providing a solution for a particular problem. Of course you might argue that it can often be very difficult to decide whether there is a gap or not. Also, a clever judge who is well versed in legal methodology will always be able to argue that a particular problem has not been dealt with by the legislature, and that therefore he can decide the case according to general principles. “So what is really the difference?”, you might ask. But there is of course a big difference between a judge who, without further ado, applies the principle of good faith, and a judge who carefully analyses the specific provisions in question and

explains why he thinks that he can disregard them in the present case and apply a general clause instead. The second approach is much more nuanced and transparent than the first, and it allows the legal community to understand and discuss the decision.

It is needless to say that also for students it is extremely harmful if their professors give them the impression that it is not really necessary to know and understand the provisions of the Civil Code, but that it is enough to rely on “good faith” or “the social function of the contract”. These students will never be able to become good lawyers. Students, but also judges, should stick to the following guideline when dealing with a case: in a first step, try to forget about the existence of general clauses and search for specific provisions that could apply. If you do not find any, you may think about applying a general clause. But you should also consider whether you can fill the gap by way of an analogy. If, in turn, there are specific provisions, apply them, and everything is fine. It would be unnecessary, and even wrong, to invoke the general clause in addition. In case you think the applicable provisions lead to unsatisfactory results, then see whether you can interpret the provisions in a different manner. Only when this fails as well, you may think, as a last resort, about “correcting” the result by recourse to a general clause. But in that case you will have to argue extremely well and explain why you think the legislature decided the problem wrongly, or why you think it overlooked something important.

It is essential that legal theory supports the courts, by providing the theoretical foundations for the correct use of general clauses, in order to attain a good equilibrium between equity, that is, justice in the concrete case, and legal certainty. At the moment, one can observe a strong preference of Brazilian judges, but also of many doctrinal writers, for equity. Legal certainty, in contrast, sometimes seems to be regarded as something outdated or “formalistic”. But I think that it is necessary to maintain, or even restore, a reasonable balance. First, because legal certainty is a fundamental value for any legal order; citizens need to be able to rely on the law, on their contracts. Second, because often it is by no means evident what the fair solution for the individual case actually is. Judges, and people in general, are usually very quick in forming a view on what is “fair” and what is “unfair” in a particular situation. But the criteria behind their judgement are often totally unclear. So a decision based on equity might in fact represent no more than the personal opinion of the judge, and it can be hard to justify it from an objective point of view.

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Decisions which claim to do concrete justice are often actually very unfair, because they grant a favour or a privilege to one person, to the detriment of a big number of other persons, or even the society at large. Judges must not only think about the case before them, but also reflect, to the extent that this is possible, on the consequences of their decision for the society. In particular, they must ask themselves whether their decision in the concrete case could be formulated as a general rule.

Reinhard Zimmermann – But, to come back to the Constitution, that document with its basic (or human) rights provides a very broad framework. The Constitution does not determine the details of private law. Of course, private law rules must not infringe the constitutional provisions.

And the constitutional values permeate through the general clauses into private law. But, private law remains private law. It is dealing with disputes between two individuals that have to be resolved. Private law is not a specialized branch of Constitutional law.

RDCC – What is your opinion regarding Brazilian contract law? Do you consider it to be favourable to the business environment?

Reinhard Zimmermann – You are the expert. Sorry, this is again a question for you.

Jan Peter Schmidt – One characteristic of present Brazilian contract law is its very high level, at least from the European perspective, of consumer protection, and its strong tendency to favour the so-called weaker party. Of course, in a private relationship to favour one party automatically means to disadvantage the other party. You can't have anything for free.

This does of course not mean to say that consumer protection is not important and necessary. From what I learned from my Brazilian colleagues, the Consumer Code from 1990 was extremely successful in practice, it really changed the whole business environment and led to a new business culture, so to speak. At the same time, things have gone too far in some respects, the protection of the consumer may in certain points have reached a level which is very difficult to justify. And as I said before, nothing comes without a price. So the price of a very high level of consumer protection is, in the end, often paid by the consumer himself. Likewise, some products might entirely disappear from the market, because the legal framework, or the lack of legal certainty, renders them unprofitable. As I was told, this happened in the past with certain leasing models.

My impression, which many Brazilian colleagues have confirmed in personal conversations, is that the discussions on Brazilian contract law, or on Brazilian law in general, are often a bit one-sided. It is as if two parties were opposing each other, for example, the defenders of the consumer rights and the defenders of the interests of businesses. The first group always argues for more consumer rights, the second for less. Actually, similar things happen in Europe. But legal academics should of course always try to take a balanced view. Things are not only black and white. It should be possible to say: in this particular respect, we need more consumer protection, while in another respect, we need to reduce the protection. But people expect you to take sides, which you then have to defend no matter what. It is difficult to say, for example, that the Consumer Code has been very successful in practice, but that from a technical point of view it contains a number of flaws. This will easily be understood as a criticism of consumer law as such. It is desirable that academic debates were more open and more nuanced.

It is also important to understand that too much consumer protection might do the protected more harm than good. Also, it is often overlooked that the best tool for consumer protection does not consist in granting the consumer as many rights as possible. The consumer is best protected by a functioning market, where due to the strong competition, businesses can simply not allow themselves to take unfair advantage of the consumer. If the consumer can freely choose the enterprise that offers him the best conditions, he is not “weak” or “vulnerable” at all. Businesses will respect his interests even where the law does not strictly require them to do so, solely for economic reasons. Of course, markets never function perfectly, and in Brazil there may be sectors of the economy where there is even a clear market failure. In these situations, consumer protection needs to step in. But one must not think that it is the only tool to work with. One must also think about improving and safeguarding the economic competition.

A related issue that one might regard as problematic as well is the clear-cut distinction many people want to make between consumer contracts on the one side and general, or commercial, contracts on the other side, as if both types of contracts were totally unrelated to each other and autonomous. So, special courses are taught, special textbooks are written ... I think this approach leads to a very undesirable fragmentation of contract law, not only as regards the rules themselves, but also as regards the legal discourse. Instead, one can, and should, conceive contract law as a whole, as a uniform subject matter. In the end, all contracts rest on the same paradigms, the same principles. Of course

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this does not mean that all contracts should be subjected to the exactly the same rules. For example, consumers might be granted a right of withdrawal in certain situations, standard contract terms may be controlled more intensely in consumer contracts than in business contracts. But these differences are only gradual in nature, not fundamental.

[To Reinhard Zimmermann] Maybe you want to add something...

Reinhard Zimmermann – We have the same problems and the same discussion in Europe, particularly in the European Union, because much of the consumer legislation comes by way of directives from the European Union. It is exactly as Jan has said for Brazil that the belief within the European Union seems to be widespread that more consumer protection is always better for the consumer. But that is not true. Let me just give you one example: It is widely believed that a well-informed consumer can make a better decision. That is why duties have been imposed on businesses to provide information to consumers, so that they can make an informed choice. But this has gone out of hand. The consumer is often faced today with an avalanche of information. And a consumer who is faced with too much information will usually not absorb it, perhaps not even be able to absorb it. Thus, he is in the same position as if he had no information at all. The information paradigm is wrongly calibrated...

We also have the discussion about the relationship between consumer law and general contract law. Is consumer law a special branch of the law, governed by special considerations such as “social justice”? And is it thus set apart from general contract law which is governed by freedom of contract? Or are we not dealing with one integrated area of contract law where we have certain general requirements, certain general tools and mechanisms which you apply flexibly and which may have a different significance in b2c as opposed to b2b contracts? In Brazil, you have a special Consumer Code. This entails the danger that things drift apart and freedom of contract becomes of a subordinate importance. In my view, it is the general lodestar for contract law, including consumer contract law.

Jan Peter Schmidt – Freedom of contract implies self-determination and self-responsibility. So people who enter into a contract should bear the consequences arising out of it, provided that they were not lured into this contract, that they were not deceived in any way, that there was no undue influence. But in Brazil, and also in Europe, there is a strong tendency towards ...

RDCC – Paternalism...

Jan Peter Schmidt – Exactly, paternalism. So when some poor individual realizes that the object he bought was actually too expensive for him, ways are

sought to let him out of the contract. But then where does this lead to for the principle of self-responsibility?

Reinhard Zimmermann – Contract law and freedom of contract are not ends in themselves. They are a means to allow parties to exercise their right of self-determination. Of course, a contract must be the result of acts of self-determination of two parties. And the law must make sure that *both* parties can actually make a self-determined decision. And therefore if one party is structurally disadvantaged, the law has to do something to redress the balance.

RDCC – The excessive protection the consumer code affords is one of the main reasons why Brazilian courts are overloaded. Do you believe disputes involving small claims should be resolved outside the courts through alternative means of conflict resolution, such as conciliation?

Jan Peter Schmidt – Yes. I would totally subscribe to that. You can think of special proceedings of conciliation or mediation. Or you could create an institution that comes from Scandinavia, the so-called ombudsman.

Reinhard Zimmermann – Or you could introduce small-claim courts, as they have done in South Africa in order to dispense justice quickly and informally.

Jan Peter Schmidt – Which you have in Brazil as well, small-claim courts

...

Reinhard Zimmermann – Well, if the dispute does not exceed a certain value, i.e. if we are dealing with a normal humdrum kind of transaction, you can go to a small claims court where somebody experienced in practice listens to your case and then decides it.

RDCC – Jan Peter Schmidt, you wrote a thesis about the codification process in Brazil. The Brazilian Parliament is currently discussing a draft commercial code, which would merge various scattered rules on the subject. What is your opinion about this draft?

Jan Peter Schmidt – I have to say that I haven't studied the draft, I only know of its existence. But from a general perspective, I am rather critical of this initiative for a number of reasons. The first is that Brazil had tried since the times of Teixeira de Freitas, i.e. since more or less 1865, to enact a unified code, a code that deals both with civil and commercial law. At that time, Brazil had the Commercial Code from 1850, and Teixeira de Freitas had been entrusted by the government with the drafting of the first Brazilian Civil Code. During his work, he realized that it actually didn't make much sense to have two separate

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codes, so he proposed to create a unified code. But the government didn't like this idea so much, so Teixeira de Freitas could not carry out his plan. But his idea continued to live on in the minds of Brazilian scholars, and later several reform attempts were undertaken to reach such a unification. With the new Civil Code from 2002, which incorporated most of the Commercial Code from 1850, the dream came finally true. So from this point of view, it is rather curious that, after having tried for almost a hundred and fifty years to get the unification done, now, ten years after it has been finally achieved, some people say: no, now we want to have separate codes again.

The second reason why I am sceptical about this initiative is that the idea to have a unified code for private law and commercial law is actually a very modern idea. Both in Europe and Latin America, many jurisdictions have carried it out during the last decades. The latest example is Argentina, which in September this year enacted a new unified code. It carries the unification even in its name, "Civil and Commercial Code of the Argentinian Republic". So we can observe that there is an international trend towards this unified model.

Finally, there are also a number of substantive arguments in favour of a unified code. It is a simpler and more coherent solution. The separate codification of commercial law is difficult to justify. The fact that there are still many countries with a separate Commercial Code, such as Germany or France, is mostly explained by historical reasons. In the Middle Ages, commercial law developed autonomously. It was not regulated by the state, but created by the merchants themselves, through their customs of trade and their own commercial courts. When in the 18th and 19th century the national states codified their private law, they decided to preserve this legislative autonomy of commercial law, even if in the meantime it had come to be regulated by the state. Teixeira de Freitas was one of the first to question this dichotomy between civil code and commercial code, which at the time many regarded as natural. Freitas asked himself what the theoretical basis of this distinction was, and failed to find an explanation. Countries like Switzerland and Italy were the first to adopt unified codes. Other countries followed suit, like The Netherlands, Poland, Russia, Paraguay, and now Argentina. Also in Germany there are many scholars who are in favour of this solution, and if Germany has not carried out a unification of the BGB and the Commercial Code, it's just because a reform of such a scale would be very complex and not without risks. But nonetheless many would regard it as the ideal solution.

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Reinhard Zimmermann – It's actually something that resembles the topic that we have just discussed. If you look at private law, you have consumer transactions and you may want to make them the object of a specialized consumer code. And then you may want to make commercial transaction the object of a specialized commercial code. But what is then left of the core of private law? Not very much ... Just certain private transactions between individuals, ie c2c contracts. The result is a complete and regrettable disintegration of private law.

Jan Peter Schmidt – I might add that if commercial lawyers in Brazil are dissatisfied with many rules of the Civil Code, then the easiest solution is to reform these rules. But this does not mean that you have to destroy the unity of the code.

Reinhard Zimmermann – And many of the rules of commercial law also apply, in a modified way, in general in private law; again, this is the same as in consumer law. If you look at the German commercial code for instance, it is not a proper code. It is a compilation of certain rules which you cannot understand if you don't read them against the background of the general civil code.

Jan Peter Schmidt – Exactly. Actually one very pertinent criticism of the mentioned Draft for a Commercial Code in Brazil is that it contains many rules which are not just of commercial, but of general nature.

RDCC – In this sense, our Parliament is also debating a draft Family Code. Do you believe family law should be removed from the civil code?

Reinhard Zimmermann – Well, if I wanted to be facetious, I would say one legal system in Europe, which had removed family law from the general civil code, was the German Democratic Republic.

Jan Peter Schmidt – And also many other former socialist countries had a separate code for family law. But of course there are also substantive arguments for why I think this would be a bad solution. Actually, we can see many parallels with the discussion we had before on commercial law. If family lawyers are dissatisfied with certain institutions and rules of present family law, well, then change the corresponding rules. But why take the whole family law out of the Civil Code? I don't see which advantages this would encompass, I only see many dangers. Because a reform of such a scale always creates problems no one foresees. And Brazil, I'm sorry to say that, already has a long history of drafts that encountered many problems in the legislative process, and as a result were adopted with many technical flaws, if they were adopted at all. The Civil Codes from 1916 and 2002 are "excellent" examples of good codes, but

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suffered from an extremely long legislative procedure. Therefore, Brazil should know by now that large scale reforms are never as easy as one initially thinks. It is much more advisable to take small steps, to reform provisions that are outdated or no longer satisfactory, but to leave the Code as it is.

One has to admit that in adopting a Family Code, Brazil would follow a recent Latin American tendency, because a number of countries from this continent have taken this path. Actually, I don't know where this tendency comes from. But what my research on this matter showed, is that the separate codification of family law easily creates problems. Because family law is of course not disconnected from the rest of private law. For example, it's very hard to separate family law from the law of persons. So what happens when you deal with these matters in different codes? You easily lose sight of these connections. I have seen various examples in Latin American jurisdictions where this danger materialized. The legislature lays down a rule in the Family Code and does not realize that it is inconsistent with a rule from the Civil Code. The more legal sources you have, the greater the legal fragmentation, the greater this danger is. Where in turn you deal with everything in one code, then it's much easier for the legislature to see: well, if I have this rule here, and that rule there, then I should make sure that they don't contradict each other. In general, I would say that it is very difficult to cut out family law from the Civil Code without mutilating both.

Reinhard Zimmermann – What Jan has just mentioned is the most important consideration. Probably the main reason why a country might want to take family law out of the general civil code is that it changes so quickly. Just think of homosexual partnerships and many other reforms brought about by societal changes. So the idea is that the law can be changed more easily if it is in a special piece of legislation. But what will then remain of the code if consumer law, and commercial law, and family law, and possibly also other parts have been taken out? I think it is wrong to look at a code in that way. You can also change a code and you should in fact change it in an incremental way. But you will then always be reminded that the different parts of private law are in many ways interconnected. Of course, the code may lose a bit of its aura as a timeless monument and will become like a building site. But it may be better to be involved with a building site than to live in a legal museum.

(laugh)

RDCC – The draft family code currently being discussed in Congress carries a definition of family. At this very moment, Brazilians are voting on

what that definition should be. In view of the fact that many countries are recognizing same-sex marriage, do you consider it convenient to create a strict definition of family?

Jan Peter Schmidt – I don't think it's a good idea. It is generally not a good idea to have legal definitions. It's always dangerous because it creates limitations. Besides, definitions are almost never exact.

Reinhard Zimmermann – You have asked me about the relevance of Roman law. Well, here is an example, for the Romans coined the sentence: *Omnis definitio in iure civili periculosa est*. Definitions are dangerous straightjackets.

Jan Peter Schmidt – This is especially true when the matter in question is so controversial, such as the concept of family. Moreover, it is a concept that is not stable, but changes over time. We have the same discussion in Europe these days, what is a family? So when the matter is so controversial and so difficult to grasp, it is very important not to try to fix it into a definition. Because this definition will very likely be inexact, and maybe it will also be outdated very soon. Besides, it is also rather authoritarian if one group of the society tries to impose its vision of family on the rest. I think this is something that should not happen in a liberal society. Instead, the concept of family should always be open to discussion and change.

RDCC – Regarding the section of the Brazilian Civil Code on personality rights, some people criticize it for being too restrictive. For instance, one cannot write a biography without previous consent from the individual whose life is being told, even if the person in question is well-known. What is your opinion on the matter?

Jan Peter Schmidt – I haven't studied this in detail, but just two weeks ago on a conference, I learned about this discussion. I would agree that the protection of personality rights has gone too far in this respect. Having said that, it should not be too difficult to interpret the relevant provision, Art. 20 of the Civil Code, in accordance with the Constitution, in order to take into account the legitimate interests of the society.

By the way, the mentioned problem can be regarded as a further example of the dangers of one-sidedness, which I mentioned before in the context of consumer law, but which can be observed in many other fields as well. The legislature, judges and scholars often focus exclusively on the protection of a certain group of persons, let's say the consumers, the women, the children, or the holders of personality rights, and hereby they often forget that although

these interests of course deserve to be protected, the interests of other persons or groups also need to be taken into account. You cannot grant one individual a right without simultaneously restricting the freedom of others. And private law must always be concerned with striking the right balance between the different interests involved. Art. 20 CC has failed to provide such a balance, probably because the legislator did not realize that an excessive protection of personality rights unduly restricts the interests of the society at large.

RDCC – Professor Zimmermann, you are director of the Max Planck Institute, in Hamburg, and senator of the Max Planck Society. Could you explain the structure and the mission of these institutions?

Reinhard Zimmermann – The Max Planck Society is composed of three divisions, which we call “sections”: (i) biology and medicine; (ii) chemistry, physics, technical sciences; and (iii) humanities. Many people find it surprising that the Max Planck Society has institutes in the humanities, because Max Planck was a very famous natural scientist who won the Nobel prize for physics. There are specific historical reasons why what was founded as the “Kaiser-Wilhelm-Gesellschaft”, i.e. the Emperor William Society, was re-named after the Second World War “Max-Planck-Gesellschaft”. All in all, there are today about 85 Max Planck Institutes across Germany and five more abroad. I myself was involved in founding the Max Planck Institute in Luxembourg for Comparative and International Procedural Law. Within the humanities section, we have 22 institutes, a number of them in law: comparative private law in Hamburg, public international law in Heidelberg, comparative criminal law in Freiburg, etc. The basic mission of a Max Planck Institute is foundational research in fields which are intellectually stimulating; they thus supplement the university system.

Some Institutes are long-established (ours, for example, was founded in 1926), others have been founded only recently, or have been completely redirected because we believed to have located a newly emerging field which promises rich new insights to be gained. Two examples in my section are the Max Planck Institute for Empirical Aesthetics and the Max Planck Institute for the History of Mankind. In the latter of these Institutes we are bringing together natural scientists, archeologists and historians to discover and interpret new data, eg by genome analysis. How did the pest epidemics spread in Europe? When and in which sequence were the islands in the South Sea discovered? These are the kinds of questions to be asked and answered. In many of the Max Planck Institutes, particularly in the natural sciences, we have big and

really expensive instruments which you could not have in a normal university. In a similar way this also applies to many Institutes in my section. Thus, in our Hamburg Institute we have what is probably the best library in private law and business law in Europe, and possibly in the world. We have more than 500.000 books in our magazines, and our library has thus become a hub for international scholarship in our fields. Every year we host in the reading-rooms of our library between 300 and 400 long-term guests. They come from all over the world and include many students, postdocs and colleagues from Brazil and other Latin-American countries. Thus, as I said, we are a research institution. We also do some opinion work for courts which are faced with the necessity of applying foreign law and for the government if it wants to enact new legislation in the field of private law, taking into account experiences that have been made elsewhere. Every Max Planck Institute is directed by two or three, or even more, directors; in Hamburg we are three directors, each of us with his own working group of doctoral students and postdocs (*Habilitanden*, as we say in Germany). Each director also has a part-time appointment at a university where he does a certain amount of teaching. I, for example, teach Roman law and legal history in the Bucerius Law School in Hamburg. We want to have this relationship with a university also because the Max Planck Society is not an organization that confers degrees. The people working under my supervision get their degrees (i.e. their doctorate or their Habilitation) through the Law School where I am professor. The head office (*Generalverwaltung*) of the Max Planck Society is in Munich; it is the institutional roof for the about 85 Max Planck Institutes. The supreme governing body of the Max Planck Society is the Senate. The Senate is composed of about 40 members, most of them representing the Federal Government, the Governments of the federal states, the other top academic institutions (Germany Research Council, Union of University Presidents, Humboldt Foundation, etc.), and the most important institutions of public life in Germany: trade unions, big businesses, the churches, the Constitutional Supreme Court, etc. I was a member of the Senate for four years when I was chairman of the humanities section and subsequently, in 2011, I was elected in my personal capacity to represent my section in the Senate.

PESQUISAS DO EDITORIAL**Veja também Doutrina**

- Limitation of liability for damages in European Contract Law, de Reinhard Zimmermann – *RDCC* 3/215-248 (DTR\2015\6575).