

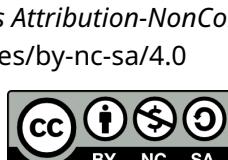
QUID?

Fribourg Law Review

Quid? Fribourg Law Review

www.fribourglawreview.ch · ISSN: 2297-1106 · eISSN: 2813-4397

Franz Werro: From Books to Life. In: Quid? Fribourg Law Review Special Edition 2017, p. 39-44.
<https://doi.org/10.26034/fr.quid.2017.106>



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From Books to Life

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The editors of this journal kindly asked me if I could write something about desirable changes in Swiss legal education. They suggested that my teaching experiences abroad—both in various European universities and in London, at the Center for Transnational Legal Studies, as well as in the United States, mostly at the Georgetown University Law Center in Washington—could inspire my suggestions. As an alternative, they offered me to follow up on the more general theme of the present issue of the journal, and to explain what I would propose if, as they put it, I had the ability to instantaneously change the Swiss or the international legal order.

Of course, many things came to my mind after I started reflecting on these questions, and I felt rapidly humbled by the freedom I had been offered. I finally decided to limit the scope of the inquiry by sketching the beginning of an answer to both questions. Regarding the first one, I thought I should be realistic and concentrate on why proposed changes in legal education are met with resistance, and why they may not even be possible when inspired by foreign models. As to the second question relating to instant changes in the legal order, I decided to use a magic wand and to let my magician's heart speak freely.

I. Are Foreign Inspired Changes in Legal Education Possible?

Going back and forth between two legal cultures for almost thirty years, I have come to realize that educational changes do not happen easily, if at all, when suggested from abroad. Why is that so? Because law is culture, just as culture is law.¹ Like law, the teaching of the law depends on a local path. Very much as legal transplants are impossible from one culture to another,² so are transplants of teaching tools and goals. If changes take place, they do not without adap-

tation and transformation, and certainly not as a consequence of an individual import. Changes in legal education are the outcome of a collective inspiration, slowly nurtured in multiple and invisible ways.

The forces that drive the teaching of law indeed depend on local culture. Thus, despite many qualifications to be made, when one teaches in a civil law environment, one does not do it in the same way as in a common law environment. Certain key ingredients in one are misplaced in the other. Take for example the central reliance on cases in the common law world and the insistence on the grammar of the law in the civil law jurisdictions. When they first learn about any subject, common law students do it from real cases. The casebooks, in which they are gathered for their pedagogical value, contain very limited doctrinal work, if any. Instead, when civil law students acquire their basic training, they do it primarily from various outlines, handbooks and even at times from treatises. Of course, these books contain illustrations, but these remain at the periphery of the subject taught, as a mere way of explaining the fundamental rules and concepts of the law, rather than what really happens in society. In effect, the two teaching cultures have a different agenda. They are not looking for the same learning experience.

In faculties of law, civilians remain primarily interested in the system of the law,³ whereas in law schools, the common law lawyers wish to capture the impact of law on life, and they concentrate a great deal on policy issues. For sure, legal dogmatic is foreign to them. In private law, for civilians, the civil code as constructed by commentators represents that system. Only court decisions that uphold the rules set forth in the code—as interpreted by “*la doctrine dominante*”—are considered as truly legitimate. Where they fail to do so, cases are more often than not dismissed as deviant and indefensible, and not as the expression of a different but valid point of view. Self-referential author-

* I wish to thank Claudia Hasbun, J.D. Candidate, 2017, Georgetown University Law Center, for her help in the preparation of this text.

¹ See Werner Menski, *Plural Worlds of Law and the Search for Living Law*, in RECHTSANLYSE ALS KULTURFORSCHUNG (Werner Gephart ed., 2012).

² See Pierre Legrand, *The Impossibility of Legal Transplants*, 4 MAASTRICHT J. EUR. & COMP. L. 111 (1997).

³ For one attempt, amongst others, to abandon that approach with an exclusively case-based one, see Franz Werro, LE DROIT DES CONTRATS: JURISPRUDENCE FÉDÉRALE CHOISIE ET ANNOTÉE (2012), a book that launched a book series called “Le droit par les arrêts,” but remains the only one in this series so far.

ity and even a certain degree of authoritarianism are inherent to this approach, since “objectivity,” placed at the heart of the inquiry, has little tolerance for departures from the prevailing opinion on what is right, true, and in conformity with the system. Further, in the civil law education system, one still imposes the belief most generally that legal rules in themselves do determine the outcome of particular cases. That is not what one does in the common law academia, where the purpose of serious scholarship is often to remove “the camouflage of the law” and to expose its ideological content.⁴ In quality institutions at least, the teaching mostly moves away from doctrinal work. While academics lose their immediate practical authority there, they help students embark on more creative and freer thinking. In the recent past, legal theories of various sorts—as illustrated by *law-and-ism* in particular—have well reflected the freedom that surrounds legal academic work in the United States. This free and interdisciplinary approach looks enjoyable, as well as enriching—and has indeed often helped attract foreign students to U.S. law schools—just as it looks enjoyable and fruitful to engage in legal realism and in the study of a functioning law without much of a disconnected conceptualization.⁵ While it tends to work there, it does not here. In each world, attitudes and methods are deeply embedded and different.

This may seem like a cliché. However, it remains that the shapers and makers of the law in both worlds were historically not the same, and while it is true that lawyers and judges ultimately act and think very much alike, here and there, their style and psychology are profoundly different. Just as the substance of the law is the product of a cultural environment, so is its teaching. An exposé “*en deux parties*” is essential in a French academic setting. It makes little if any sense elsewhere. The lack of rigor or even the chaos that civilians denounce in Anglo-American legal rhetoric only worries them, and no one else. When a famous German professor of comparative law keeps saying that the English should put some “order” in their law, it becomes the object of a joke amongst common law lawyers.

Connected to this is the different place that individuals occupy as legal actors in the common law and in the civil law traditions,⁶ both in legal literature and court practice. By allowing more space to individuals, the common law tradition tends to give the legal process more transparency and even more integrity. By having the participants in the legal arena, such as judges for example, speak in their own names, the common law world, at least in the United States and in the United Kingdom, sets in motion a process of disclosure that makes it possible to better identify the concrete interests at stake in a given litigation. Conversely, by preserving the anonymity of its players and treating them not as individuals but as interchangeable figures at the service of a scientific system, the civil law culture ultimately tends to conceal the inner workings of the legal process. The rulings of the French *Cour de Cassation* are prototypical in this respect, but so are treatises and the legal literature produced in civil law jurisdictions in general.

In the common law world that I know of, the approach is essentially fact-based and personalized. The rule of law is maintained by providing justice in light of the facts with the help of (outstanding) individuals. That the judges on the Supreme Courts of the United States and the United Kingdom publish their “opinions” in their names, together with dissenting opinions, is in no way seen as diminishing their authority. As we know, a procedure of this kind would be unthinkable in civil law jurisdictions. The transparency of motives and considerations in common law judgments is indeed not something the legal civilian brain feels comfortable with. One could see the manner in which the European Court of Human Rights formulates its judgements and publishes its dissenting opinions as an exception to this civilian approach. In reality, this is not the case. This Court is indeed a supranational instance, perhaps a hybrid of the common law and civil law approaches, and certainly not typical of either. Further illustrations of this point could be made with respect to the way scholarly work is produced. Civil law’s deeply depersonalized books and commentaries have barely any counterparts in the common law tradition.

Again, at the heart of this difference lies an opposition between two conceptions of law. In the civil law

⁴ See George Fletcher, *Comparative Law as a Subversive Discipline*, 46 AM. J. COMP. L. 683, 689 (1998) (commenting on what the critical legal studies movement has inspired).

⁵ For a skeptical view with respect to the practical outcomes of this pedagogy, see Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

⁶ See Franz Werro, *How to Engage in Legal Comparison: A Reaction*, in COMPARING COMPARATIVE LAW (Samantha Besson & Lukas Heckendorf eds., forthcoming 2017).

tradition, the law is viewed as a logical and coherent system of rules, a creation of pure reason. In the common law, it is seen as a product of experience, or practical wisdom, subject to constant and incremental evolution in the light of changing circumstances and specific facts. Civil law is presented as a closed system, capable of existing—and of being scientifically studied—in the abstract without the input of reality. The common law, by contrast, is supposed to rely on real individuals who will find solutions to problems in specific factual circumstances. In this approach, law is a question of experience, not of logic.⁷

Returning to the question I wish to answer, no matter how seductive a foreign system may appear, it cannot be successfully replicated at home. Just as translation is transformation, so is transplantation of legal institutions or teaching techniques. Of course, this does not mean that one should not try and engage in innovation. One should however cautiously measure the limits of the enterprise and cultivate an awareness of the differences that the cultural environment will keep on imposing. So even if one feels that one has learned from being abroad and from being exposed to differences, one cannot come home and hope for these differences to be adopted without a profound alteration. If and when changes happen, they happen slowly and for reasons that often will only be visible in hindsight. These would explain for instance why indeed I do write this piece in English, and why this would not have been possible thirty years ago in the present format. Actually, nor would have been this journal.

2. The Magic Wand and Some Heartfelt Suggestions

As I began writing this text, on January 19, 2017, I was sitting in my Washington study. Former President Obama was still in office for a couple of hours. At that time, many of my colleagues and students kept hoping that the election of Mr. Trump had just been a bad dream. As the inauguration took place and the days of his administration went by, the first decisions of the new president fell, and the bad dream became reality.

As I was trying to put things in perspective, I recalled that it is actually by far not the first time in history that one sees illiterate, narcissist loonies run

the show of power and politics. The Romans had various Caligula and other Nero, and powerless Europe witnessed the election of Hitler and the rise of fascism without being able to make a move. I begin to believe that we are witnessing with this election the same kind of catastrophe here. It certainly does not feel unreasonable to think so. The huge number of protesters in U.S. cities and throughout the world the day after the presidential inauguration and thereafter has already expressed that fear.

After all, laws and constitutions are just pieces of paper, and there is nothing intrinsically good that one can derive from them without a commitment to certain unwritten values and ideals. This is what former President Obama just said in his farewell speech.⁸ The words of the law belong to those who use them, not to those who wrote them. They have a life of their own, and everything depends on who will use them, with what intentions, and in what context. The question now, I feel, is whether the forces required to save democracy can effectively be mobilized and how. I see no one presently able really to articulate a discourse that would help us move away from the forces of populism, nationalism, and authoritarianism, which seem to be emerging. George Soros is right: Mr. Trump looks like an apprentice dictator.⁹ While we must stop him, I sense that we do not know yet how, and the rule of law, as we relate to it, I fear, might remain powerless. Unfortunately, Donald Trump is currently not alone. To name a few, Marine Le Pen, Geert Wilders, and Nigel Farage belong to the same breed and practice the same hate discourse. In Switzerland, some leaders of the UDC cultivate a similar spirit, and they have managed for quite some time now to inspire in the heart of the population an irrational fear of foreigners, particularly when it comes to Muslims.

It may be that before we find a remedy to fix democracy, as we have known it in the West for the last 70 years or so, a big world disaster has to happen, politically, economically, and ecologically. Maybe, this is a necessary condition for consciences to wake up and to find alternatives to the present way of life. An

⁸ See *Administration of Barack Obama, 2017: Farewell Address to the Nation from Chicago, Illinois*, Jan. 10, 2017, <https://www.gpo.gov/fdsys/pkg/DCPD-201700008/pdf/DCPD-201700008.pdf>.

⁹ See Jeff Cox, *George Soros Calls Trump a 'Would-be Dictator' Who 'Is Going to Fail'*, CNBC, Jan. 19, 2017, <http://www.cnbc.com/2017/01/19/george-soros-calls-donald-trump-a-would-be-dictator-who-is-going-to-fail.html>.

⁷ See OLIVER W. HOLMES, THE COMMON LAW 3 (1881) ("The life of the law has not been logic: it has been experience").

event of huge magnitude may have to happen so as to rescue the planet and save it from the disasters that global capitalism and consumption have inflicted on it. Or not? Charles Eisenstein, a public speaker and an inspiring activist, as well as the author of several books, suggests that the beauty of the world is at our disposal, just ready to be embraced. Yet, he also clearly states that we will have to dare a drastic change of paradigms, including the stopping of economic growth, a dogma, he thinks, jeopardizes our survival outside of total alienation and destruction.¹⁰ When I heard him in London, on October 6, 2016, he predicted Trump's election and suggested that this somber event could help precipitate the course of action and force us to reinvent a new model.¹¹ As others, such as Jean-François Billeter,¹² have put it, it looks like an alternative may only emerge if we place the economy at the service of mankind instead of the opposite, as societies have been doing since the Renaissance. Only if we free human beings from the tyranny of contemporary capitalism and consumerism might we start to liberate humans from their unprecedented enslavement.

Regardless of what society will be able to achieve, the path feels still awfully unclear and steep, and this is why, if instant changes are requested, I still feel the need of a magic wand. If I had such a wand, I would first want the invention of a law that debunks populism and the lies it builds upon, as well as a law that promotes entitlement based on transparency and information. I believe Brexit would not have happened had the citizen not been lied to. The same is true with "trumpism." I want to believe that Americans would not have elected the kind of dangerous buffoon they got themselves had they not been manipulated in some profound ways. True, the manipulation and the lies did not succeed without some causes, including anxieties about globalization and ongoing societal changes, but it remains that for the most part, success simply rested on the power of money, false constructions, bigotry, and lies. Ideology, lies, and the rest have always surrounded the functioning of power, but the kind Mr. Trump has used thus far resemble

those of the worst tyrannies.¹³ As dictatorial leaders do, Mr. Trump has of course repeatedly declared that journalists are the public enemy, and one is just waiting for new attacks in this unprecedented war against them.¹⁴

Whatever the reasons are that allow populism to grow, I would want the magic wand to help people get rid of their (at times legitimate) anger and embrace their desire to put their generosity forward. I would want them to adopt laws that save compassion, peace, and love. Taking the U.S. landscape as an example, instead of watching the rise of Islamophobia, denying global warming, and appealing to the repeal of Obamacare, everyone would be well inspired to help replace institutionalized individualism and egotism with the promotion of solidarity and a sense that all of us share a common destiny on this planet. If, no doubt with the help of the magic wand, this transformation occurred, one would soon understand that one cannot count on a bunch of multibillionaires to help poor and disenfranchised people to make any improvements to their situation. In that sense, Bernie Sanders was clearly on to something that is worth listening to.

But what the Americans want or not for themselves is after all mostly their problem. What I find intolerable, however, is to powerlessly witness the rise of a megalomaniac, narcissist,¹⁵ ignorant, sexist, racist womanizer, who cannot distinguish true from false, whose

¹³ Some examples of these lies or inconsistent statements include White House press secretary, Sean Spicer, stating that the number of attendees at Mr. Trump's inauguration was the "largest to ever witness an inauguration—period" when a photo comparison with Obama's inauguration clearly demonstrated otherwise, and Mr. Trump claiming that there was massive voter fraud in the 2016 presidential election even after his lawyer, on behalf of Mr. Trump's campaign, submitted a court filing in Michigan to squash the recount efforts stating that no evidence supported the conclusion that there was voter fraud in the election. See Glenn Kessler, *Spicer Earns Four Pinocchios for False Claims on Inauguration Crowd Size*, WASH. POST (Jan. 22, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/01/22/spicer-earns-four-pinocchios-for-a-series-of-false-claims-on-inauguration-crowd-size/?utm_term=.001904ef8a71; Toluse Olorunnipa, *Trump Charges Millions of Fraudulent Votes And Asks for Probe*, BLOOMBERG (Jan. 25, 2017), <https://www.bloomberg.com/politics/articles/2017-01-25/trump-calls-for-major-investigation-into-alleged-voter-fraud>.

¹⁴ See Julie Hirschfeld Davis & Matthew Rosenberg, *With False Claims, Trump Attacks Media on Turnout and Intelligence Rift*, N.Y. TIMES (Jan. 21, 2017), https://www.nytimes.com/2017/01/21/us/politics/trump-white-house-briefing-inauguration-crowd-size.html?_r=0.

¹⁵ See Karen Wehrstein, *Here's What's Psychologically Wrong with Donald Trump (UPDATED)*, DAILY KOS (Jan. 26, 2017), <http://www.dailykos.com/stories/2017/1/26/1625715/-Here-s-what-s-psychologically-wrong-with-Donald-Trump>.

business morals and sense of liabilities are nonexistent, and who has the potential if not the ambition to jeopardize world peace as we know it. I am deeply concerned and scared when I see this dangerous individual (and his dubious, racist, multibillionaire, male friends) rise to the top of the most heavily armed country, without having the right (as a non-American) to say and do anything about it. With its unprecedented and unique arsenal of weapons of mass destruction, the United States can, like no other single country, ever, endanger if not destroy the planet, without victims having the right to speak and defend themselves.

Mr. Trump has already proclaimed that global warming is an invention of the Chinese, announced the legitimacy of taking the oil in Iraq, and stated that torture can be justified. As I write, he has just signed an executive order barring people from seven majority-Muslim countries from entering the United States.¹⁶ This kind of racist and populist provocation clearly exposes the United States and the world to more terrorist attacks, which in turn will justify the kind of devastating crusade that the current administration wants to fight.¹⁷ Without even taking into account the financial interests Mr. Trump and his friends have in the Middle East, this action is consistent with their alliance with current Israeli leaders. Of course, this alliance is a recipe for further disastrous violations of U.N. resolutions, and a direct and deeply unfair threat

¹⁶ One of the first editors of this journal, Alborz Tolou, currently studying in Boston, appears to be one of the many victims of this decision. As an Iranian, he can momentarily stay in the United States, but cannot return there, despite his additional Swiss and French passports. On a positive note, however, civil groups have come together and mobilized in a quick manner. For example, in an effort to express their opposition to this act, by January 30, 2017, nearly 9,000 academics signed the petition, "Academics Against Immigration Executive Order," <https://notoimmigrationban.com>. Federal Judges have also pronounced the executive order unconstitutional and various lawsuits have been initiated, including some with the help of the ACLU. Meanwhile, Mr. Trump fired Acting Attorney General, Sally Yates, just after she declared that she would not defend the order. See Michael D. Shear, Mark Landler, Matt Apuzzo & Eric Lichtblau, *Trump Fires Acting Attorney General Who Defied Him*, N.Y. TIMES (Jan. 30, 2017), <https://www.nytimes.com/2017/01/30/us/politics/trump-immigration-ban-memo.html>.

¹⁷ Such action seems to reflect the ideals that chief White House strategist, Stephen Bannon, has been advocating for some time. See e.g., Hunter, *Bannon's Last Job Was Peddling Racism, Conspiracies—but Trump Gives Him a Top National Security Seat* (Jan. 31, 2017), <http://www.dailycos.com/story/2017/1/31/1627681-Bannon-s-last-job-was-peddling-racism-conspiracies-but-Trump-gives-him-a-top-national-security-seat>; David Ignatius, *For Bannon, the Game Has Only Just Begun* (Jan. 31, 2017), https://www.washingtonpost.com/opinions/for-bannon-the-game-has-only-just-begun/2017/01/31/567c920a-e7fc-11e6-bf6f-301b6b443624_story.html?utm_term=.d74f62cd1da.

to Palestine and the peace process. It is not that U.S. foreign policy has not been a total failure in the Middle East and everywhere else in the world since the early 1950's, but now it is taking a uniquely dramatic turn for the worse.

So here comes my second magic wand suggestion! The change in the international legal order I would want to see come through is a change in the effective functioning of the United Nations laws in general, and the recognition more particularly of a right for all citizens in the world to vote whenever their interests are at stake. In the most recent events, citizens worldwide should have had a say in the kind of election that (a minority of) Americans have imposed. The ridiculous slogan "America First" that Mr. Trump has proclaimed is not new.¹⁸ Though less brutal and vulgar, his predecessors were always chauvinistic enough to sing the virtues of this claim, rooted in American exceptionalism and a unique need for domination. No one other than Americans, however, can put up with that nonsensical discourse, other than sometimes by making fun of it.¹⁹ More tragically, this rhetoric based on primitive Manicheism also backs up illegitimate, when not illegal, wars, like the one against Iraq that the Bush clan launched twice. World destabilization is now the price that the West has to pay for these crazy acts. True. Empires always misbehave, especially before they disappear. It is therefore however more than ever time again to create mechanisms that counteract so as to give peace and world stability a better chance.

This could be the case if citizen of the world were entitled to a transnational right of veto. Indeed, America should not be allowed to decide locally and then impose globally. Finally, we have here one reason to grant "transnational" law a useful recognition!²⁰ A similar point could be made about Brexit, if we think about the ways in which this ill-informed vote may

¹⁸ See Eric Rauchway, *How 'America First' Got Its Nationalistic Edge*, ATLANTIC (May 6, 2016), <https://www.theatlantic.com/politics/archive/2016/05/william-randolph-heast-gave-america-first-its-nationalist-edge/481497/>.

¹⁹ For an example of this mockery, where an imaginary Dutch government made a video in which it asks Mr. Trump to recognize the Netherlands as "second," see Pro Zondag Met Lubach, *Netherlands Welcomes Trump in His Own Words*, YOUTUBE (Jan. 23, 2017), <https://www.youtube.com/watch?v=ELD2AwFN9Nc>.

²⁰ For a skeptical view regarding the legitimacy of this labeling other than for privately issued norms, such as the *Lex Mercatoria* or the *Lex Sportiva*, see Franz Werro, *Is There Such a Thing as Transnational Law?*, in RECHT ZWISCHEN DOGMATIK UND THEORIE: MARC AMSTUTZ ZUM 50, 311 (Stefan Keller & Stefan Wiprächtiger eds., 2011).

affect Europe. I also wish there would be a recognition that the decision concerning Brexit did not belong only to a minority of Europeans, located in the United Kingdom.

I told you I wanted a magic wand! Meanwhile, and

more realistically, I left my books in my office, and I participated in the women's march that gathered apparently nearly half a million people in Washington on January 20, 2017.²¹ This was life at its best! Despite the somber mood in which we are, the wonderful women and men I met there gave me some glimpse of hope.

²¹ See Tim Wallace & Alicia Parlapiano, *Crowd Scientists Say Women's March in Washington Had 3 Times as Many People as Trump's Inauguration*, N.Y. TIMES (Jan. 22, 2017), <https://www.nytimes.com/interactive/2017/01/22/us/politics/womens-march-trump-crowd-estimates.html>.