

## **Remarks at the Opening of the Symposium Celebrating the 10<sup>th</sup> Anniversary of the *German Law Journal* – In Praise of Transnationalism**

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### **A. Introduction**

My short intervention has two parts: First, I want to congratulate the team of the *German Law Journal* on ten years of successful work from the perspective of a German reader. Second, I want to praise the transnationalization of legal culture, the subject of this conference.

### **B. Congratulations**

I congratulate the editors of the *German Law Journal* on ten years of an astonishing success story. In the same efficient way that they organized this Festakt and conference, they have provided us with a fact sheet containing the relevant data of the *German Law Journal's* success to make it easier for us on the podium to know what we are praising.

To be the number one online, peer-edited law journal in the world (five years running) is truly remarkable. That the *German Law Journal* is the number twenty eight online journal, all subjects I find even more astonishing given the tremendous number of different subjects one can find on the Internet. The *German Law Journal* had visits from ninety two countries, and two and a half million visits from almost a million visitors in one year. I am one of those visitors.

I hope the editors are not offended when I express amazement about this success. I have to admit that when I learned of their plans, I expected a rather modest product for a small group of devotees. I would not have predicted that an English language journal published exclusively online—ten years ago this was not so common a form of publication as it is today—paying special attention to developments in German jurisprudence could become the number one online, peer-edited law journal.

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Actually, the modern possibility of tracking hits on the Internet, which allow you to give us this data about the number of "hits" at the *German Law Journal* website while also revealing the countries and IP addresses from which those hits came, makes me a little nervous. After all, I am old enough to have taken part in the early struggles over data protection. When I tested the new search engine "Wolframalpha" and typed in the question, "Where am I?" I got the answer "Bundesverfassungsgericht, Karlsruhe." As I do not believe that Wolframalpha possesses some secret technology, I suspect that you, too, could probably find out how often your paper was accessed from the Federal Constitutional Court. Quite a few of those hits came from me. Therefore, my chief justification to be on this podium is as reader.

As a German, I belong to an interesting sub-group of readers about which I might speculate a little bit. The fact sheet tells us that the *German Law Journal* website has been accessed from ninety two countries. One might ask: How often has it been accessed from Germany? I suspect the answer is: Quite often. On first sight, this should be surprising. One does not think of Germans as the typical audience for an English language paper about German Law. Its main purpose appears rather to be to provide information about German law to readers who are not able to read German.

But there are very good reasons to recommend the *German Law Journal* to German readers.

Some of these reasons are just practical: German professors teaching courses of German law in English, abroad and increasingly also at home, need English materials. I know from my own experience as a visiting professor in the United States how difficult it is to find such materials. The *German Law Journal* has facilitated that task tremendously.

A second, mundane reason is the speed with which an online journal can react to jurisprudential developments. Quite often, I found the first thorough analysis of one of the judgments of the Federal Constitutional Court in the *German Law Journal*.

But my interest in English-language commentary on German law goes deeper. In the literature on the methodology of comparative law, comparatists often distinguish research in foreign law from true comparative law research, which for them begins only with at least two different legal systems. I always found this approach rather narrow-minded. Researching and writing about another legal system always has a comparative dimension. A look from the outside from a lawyer with a different training and culture brings new approaches and new insights to the foreign law that would not have been available to somebody on the inside. Therefore, I always find commentary about German law from foreign lawyers extremely enlightening. It would be very good for German legal scholarship and also the courts, including my own court, if such foreign voices were heard more often.

However, a lot of the *German Law Journal's* authors are German. Why should I be interested in a German's writing about German law in English? Occasionally, I should not be. Sometimes you publish articles by German luminaries—obviously translated from a German publication, even where no credit is given to the translator—which were not written with a foreign audience in mind. I do not suggest that you should not publish such pieces. They are good public relations for both sides and serve the main purpose of the *German Law Journal*: to inform the non-German reading public about German law. But they are not of a particular interest for the German reader.

It is different with another, much more common type of contribution by German authors. These purposefully try to explain German law to a foreign audience and to integrate it into a transnational legal perspective. Similar to the work of a foreign author on German law, such a translation effort for a foreign audience has a comparative dimension that can also help to further the understanding of our own system. In my own writings in English I always found the transferability of German legal concepts into English a valuable control for clear thinking (and the lack of it). I do not envy those who had to translate the ethnocentric theorizing—both in content as well as in language—of our Second Senate's Lisbon decision of 30 June 2009. Difficulties in translating a German discussion into English should always raise warning signs. Unfortunately, those who need to see those warning signs the most cannot see them.

### **C. In Praise of the Transnationalization of Legal Cultures**

I proceed to the second point, the subject of this conference.

The transnationalization of legal cultures is an important subject, although I doubt that the conference organizers were aware of how controversial this subject was when they were planning the conference.

In my writings, for instance, on the constitutionalization of international law and the internationalization of constitutional law, I treated the transnationalization of legal cultures as something that was demonstrably happening under our eyes, not as something that one had to defend or to fight for or against. Recent events have made me doubtful about this premise. Many signs are pointing in the opposite direction, namely towards the re-nationalization of legal cultures. Not long ago, there was widespread agreement among European lawyers that they were witnessing a process of harmonizing the different sets of human right catalogues into a European human rights system. Now, there is an increasing insistence on the national specificity of human rights even between neighboring states. In Germany, German human dignity is considered to be something completely incomparable, and of course much better, than alien human dignity.

In terms of ones career, it may even be to the point where it is dangerous to hold oneself out as a transnationalist.

If one runs a Google search, the word most often accompanying "transnationalist" in the past weeks would probably be "dangerous", as in "dangerous transnationalist." I am, of course, referring to the confirmation fight about Dean Harold Koh of Yale Law School, one of the foremost international lawyers in the United States. His confirmation for his appointment as Legal Adviser to the State Department, which should have been routine given his credentials, was held up in the Senate for months because he is a "dangerous transnationalist." This discussion was hardly noticed outside the United States. The transnationalization of legal culture has not advanced so far as to raise international concern, though it should have. I am not talking about right-wing bloggers or the ideologues getting their voice on the Fox News network, but of members of Congress who objected to his confirmation because Koh supported customary international law, advocated fulfilling treaty obligations that the respective politicians did not like, or proposed, in his academic writings, that the U.S. should ratify human rights conventions like the Women and Children Conventions. That these should be legitimate arguments with which to filibuster against a future legal adviser of the State Department is disturbing if one supports the international rule of law.

But I do not want to single out the U.S. as an example of the legal nationalist mindset. Harold Koh was confirmed on 25 June 2009, after all, and the renunciation of the international rule of law in the name of national sovereignty is not an American specialty.

Also in Europe the most successful experiment of a transnational democracy under the rule of law is in mortal danger. Ever louder voices are asking to ignore international and European law and court decisions in the name of national sovereignty.

At this point, I am in a dilemma between two demands of politeness. In this international gathering, I would display good manners if I countered criticism of the U.S. with self-criticism. This would be easy to do, but it would bring me into conflict with another imperative of courtesy. A graphic example of the lack of comprehension of the functioning of a transnational legal system and a transnational democracy could be found in a very recent, two day old judgment of the neighboring senate of my own court. Fortunately, the organizers gave me so little time that I am spared the agonizing decision of how far I can go with a critique of a decision of my own court.

So I come to the end of this short intervention. Let us praise the *German Law Journal* and its contribution to the dangerous and endangered project of transnationalizing legal cultures.