Conference Report — The Transnationalization of Legal Cultures

By Kaitlin Abplanalp & Ronald Bruckmann[*]

A. Introduction

On July 2 and 3, 2009, both old and new friends of the *German Law Journal* (*GLJ*) gathered in Berlin for a symposium in celebration of the *Journal's* tenth anniversary. The two-day symposium, hosted in partnership with the *Budesministerium der Justiz* (the Federal Ministry of Justice) and the Law Faculty of the *Freie Universität*, brought together renowned justices, scholars and practitioners as well as law students from North America and Europe to discuss the transnationalization of legal cultures.

Since the *Journal's* founding in 1999 by Professors Peer Zumbansen of Osgoode Hall Law School at York University and Russell Miller of Washington & Lee University School of Law, the *GLJ* has experienced remarkable success. Today the *GLJ* has established itself as the world's leading online peer-reviewed legal periodical. The symposium provided an opportunity for the panelists to acknowledge and celebrate that success and to continue building upon the transnational and comparative law discussions that the *Journal* has engendered since its inception.

For the North American student editors who made the trip to Berlin it came as a surprise to see how much Germans value the work of the *German Law Journal*. Certainly, the United States would have greater difficulty showing similar appreciation for a journal publishing commentary on American law in German for the German-speaking world. This is in part true because the English language is more accessible to the global community. However, it is also because the United States does not feel the same urgency to compete with legal systems as was clearly evident in the Berlin proceedings. Indeed, the degree to which many of the German participants regarded their domestic law as a product in competition with foreign law was fascinating from a North American perspective.

The work of the *German Law Journal* is not, however, exclusively for the benefit of Germany. The English speaking community also benefits because an understanding of foreign legal systems can deepen and enhance an understanding of domestic law. More

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specifically, we hope that North American legal systems will benefit from having their law students demonstrate an interest in German law. As Professor Kumm of New York University Law School noted, once a system becomes self-satisfied it runs the risk of becoming uninteresting, or worse. The *German Law Journal* student editors in attendance were incredibly grateful for the opportunity to speak and engage with European academics, exploring the challenges that Europe faces during times of globalization and the transnationalization of law within the European Union. More often than not the students' interest in German and European law was reciprocated by European participants in the form of comparative inquiries about the North American legal systems.

The two-day symposium forced the student editors out of their comfort zones, challenging them to conceptualize the transnationalization of legal cultures. While their law school education may not have exposed them to such challenges, it had provided them with useful analytical tools. As students of a common law system, U.S. and Canadian students are trained to compare and distinguish case law. Those same skills can be effectively transferred to the comparative law arena when dealing with similarities and differences between legal systems. As in case law, there are instances in transnational theorizing where legal reasoning is flawed and must be overruled in order to adopt a more sound rationale.

The conversations challenged students to examine the origins and effects of the transnationalization of legal cultures. As Professor Peer Zumbansen and Professor Mattias Kumm explained, Phillip Jessup was the first to coin the term "transnational law."[1] Jessup chose this terminology to describe "all law which regulates actions or events that transcend national frontiers."[2] The panelists, however, had a difficult time describing the more recent developments and applications of the term. Indeed, the illusive nature of transnationalization was made evident by the fact that virtually all the presentations involved slightly different conceptions of the process. The discussion dealt with difficult questions, such as whether the transnationalization of legal cultures should involve the convergence of all national law into a universal legal system. Although functionally attractive, such an expansive view of the transnationalization of legal cultures becomes unwieldy because as more nations join the universal system, more and more contextual differences must be reconciled.

The transnationalization of legal cultures is particularly evident within the European Union. The European project demonstrates how an attempt to unite nations through commonalities also involves confronting significant differences. The impressive accomplishment of the transnationalization of legal cultures is that ever-expanding partnerships allow individual nation-states to maintain their independent identities and

[1] *See* PHILIP C. JESSUP, TRANSNATIONAL LAW (1956).

[2] *Id*.

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regional differences, while also promoting a harmonization of law to more effectively govern cross-border relations. This conference report engages with presentations made at the *German Law Journal's* tenth anniversary symposium to advance the thesis that the transnationalization of legal cultures is both universal and contextual. In other words, transnationalization involves a naturally competitive and comparative process, capable of furthering both national and transnational goals. Thus, transnationalization encompasses both the harmonization of legal cultures and the strengthening of national legal identity.

B. Thursday, 2 July 2009—Federal Ministry of Justice

I. Opening Remarks—Brigitte Zypries, Federal Minister of Justice

Minister Zypries set the tone for the symposium. She framed the celebration of the *GLJ's* success by charting its development and important contribution to the transnationalization of law, especially by promoting the cross-cultural dialogue necessary for legal systems to engage in healthy competition.

This competition between legal systems naturally accompanies the transnationalization of legal cultures and includes the friction between civil and common law approaches. Minister Zypries assured the audience that German law, which is "predictable, enforceable, and affordable," need not shy away from this competition. However, she insisted that the competition must be fair. Minister Zypries explained that in order to engage in a fair competition between the world's legal regimes, it is necessary to have accurate reports of legal systems and the academy must know, compare, and assess the available systems. To her mind, this is where the *GLJ* has become so important. By providing English commentary on German law, she concluded that the *GLJ* offers the English-speaking world a portal through which the German legal system can be observed. According to Minister Zypries, the success of the *GLJ* demonstrates that other nations value German law. She thanked the founders of the *GLJ* for their initiative and commitment, and wished the *GLJ* much future success.

Minister Zypries' comments represent a very nationalistic approach to the transnationalization of legal cultures. For Minister Zypries, the chief purpose of the *German Law Journal* is to promote and strengthen German law by focusing upon how it differs from foreign law. While her comments did not take into account the universal vision of transnationalization, they do demonstrate how transnationalization is being used to further national goals. It is important for universalists to take note of this reality. Just as there must be fair competition between legal systems, the competition between transnational law theories must also be fair. In essence, a competitive forum of transnationalization would identify the common values that become the basis for the harmonization of legal cultures as well as distinguish the independent qualities that make some nations so distinct. Having both qualities arise from the same dialogue creates an

opportunity for openness to consider foreign approaches, while retaining the flexibility to change only as appropriate.

Minister Zypries also commended the choice of artwork for the banner across the top of the *GLJ* web-page, which displays Ambrogio Lorenzetti's fresco, *Allegory of Good Government*, from the Palazzo Publico in Siena, Italy. In the middle, she noted, the State is depicted with the three virtues of good government: magnanimity, temperance and justice. According to Minister Zypries, these characteristics of good governance remain applicable in the 21st Century.

Magnanimity, temperance, and justice are also essential to the transnationalization of legal cultures. As partnerships coalesce, it is important that countries justly determine the balance between having the magnanimity to humbly adopt ideas that are not their own and sharing philosophies unique to their own legal traditions. Moreover, having temperance in restraining from an excessive position on either contextual or universal sides will allow for the natural transnationalization of legal cultures because there will be the necessary balance between national identity and communal union.

II. Transnational Law and the German Law Journal

Following Minister Zypries' opening remarks a series of prominent speakers explored the significance of the *GLJ's* role as it relates to the transnationalization of law in Germany. Introduced by Professor Peer Zumbansen, these speakers included Robert Pollard, Justice Brun-Otto Bryde, Professor Armin von Bogdandy, Axel C. Filges, Professor Heribert Hirte and Professor Russell Miller. Professor Zumbansen set these remarks in motion by welcoming all those in attendance to a celebration of what the *GLJ* tries to achieve: the transnationalization of legal cultures.

First, Robert Pollard, the Minister-Counselor for Economic Affairs at the U.S. Embassy in Berlin, commended the *Journal* for enhancing the understanding of differences and similarities between American and German legal systems. In particular, he praised the *GLJ's* inclusion of North American law students in its production.[3] As a diplomat Pollard is expected to understand German law in relation to a plethora of issues, including the financial crisis, human trafficking, export controls, intellectual property rights, and national security. Moreover, his understanding of German law influences American strategies in these fields. Therefore, he explained that the *GLJ* has an important diplomatic role in facilitating the understanding of German law as it exists and as it develops in the future. According to Pollard, the *Journal* has enhanced the already strong relationship between the United States and Germany.

[3] Since its inception, the GLJ has involved over 150 North American law students serving as student editors and gaining exposure to German legal traditions and culture.

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Professor Heribert Hirte, a member of the Law Faculty at the University of Hamburg and a member of the *Deutsch-Amerikanishe Juristen-Vereinigung* (German-American Lawyer's Association), continued this dialogue by reflecting on the importance of the *Journal* as one of the few portals through which English speakers can learn about German law. Focusing on the transnationalization of American and German legal cultures, Professor Hirte underlined the need to encourage more Americans to study in Germany. Although many German students study in America, Professor Hirte noted that no Americans are currently studying law in Germany on Fulbright or DAAD scholarships. Professor Hirte hopes that the steady stream of *GLJ* student editors in North America will help to reduce this imbalance and he encouraged student editors to continue to pursue their interest in German law through fellowship opportunities after graduation. The imbalance, he explained, is in part a consequence of the German language, which acts as a barrier to students and professionals who only speak English. Although globalization and the presence of European legislation has made it necessary for German legal practitioners to learn English, Professor Hirte believes that proceedings in German courts should remain in the German language in order for the domestic legal system to be at its most effective. For Professor Hirte, like many others who spoke, the transnationalization of legal cultures is very much about encouraging cross-border interaction without jeopardizing the integrity of the domestic system. This understanding reinforces the thesis of transnationalization as a process capable of both furthering legal harmonization and strengthening national identity.

German Federal Constitutional Court Justice Bryde also examined the *Journal's* impact on transnational legal discourse and the importance of cross-cultural dialogue. In particular he found great value in Germans visiting the *GLJ* website to read about German law in English. The *GLJ* is practical for German law professors teaching in English, he explained, because it is a convenient source of materials that include insightful commentaries from foreign lawyers offering perspectives that Germans may not readily see themselves. Thus, even within its narrow function as an online journal published in English and focusing on German law, Justice Bryde concluded that the *Journal* promotes a valued transnational legal discourse and expressed genuine amazement at the *GLJ's* success. Justice Bryde congratulated all those involved in the project.

The value of cross-cultural dialogue and the exchange of ideas in order to identify commonalities and differences during the transnationalization of legal cultures became a common theme for the symposium. The *GLJ*, as an obvious example of this dialogue, has already effected open consideration of alternative systems, especially between the German civil and American common law approaches. Both systems still retain their unique identity, but as Pollard explained, there is a value in respective influences within each system. Justice Bryde, however, noted the danger posed by the transnationalization of legal cultures.

In this regard, Justice Bryde perceives a widespread concern that the movement to transnationalize legal cultures has gone too far. For this reason he predicted a re-emphasis of national legal cultures. In support of this view Justice Bryde cited the United States' tradition of legal nationalism especially as evidenced by the delay of Yale Dean Harold Koh's confirmation as legal advisor to the state department because he was viewed a "dangerous transnationalist."[4] But Justice Bryde did not single out the United States, noting the increasing pressure within Europe to ignore European Union law in favor of national sovereignty. Nevertheless, Bryde praised the "*GLJ's* contribution to the 'dangerous' and endangered project of transnationalizing legal cultures."

Professor von Bogdandy, Director of the world renowned Max Planck Institute for Comparative Public Law and Public International Law in Heidelberg, was quick to counter Justice Bryde's doubts over the continued transnationalization of legal cultures. The friction between the nationalistic stance articulated by Justice Bryde and the transnational position of Professor von Bogdandy provided excellent evidence of how the transnationalization of legal cultures should proceed. Their exchange bolstered the thesis that transnationalization of legal cultures is a naturally competitive equation that balances both universal and contextual interests. According to Professor von Bogdandy the transnational sphere of law will continue along its path of becoming the dominant sphere of reference. Increasingly, he argued, legal issues and methodologies are determined and defined transnationally. Professor von Bogdandy identified three fundamental changes in German law during the 20th Century that provide evidence of transnationalization. First, German legal scholarship no longer operates exclusively within a German universe but within a European pluriverse. Second, the European Union and the domestic governments of its Member States are determined to introduce institutions dedicated to the research of European law. Third, there is a need to respond to the emerging competition between legal systems.

Facing this legal competition, Professor von Bogdandy argued that German legal institutions have a number of options: they can ignore it, focus on regional needs, simply become part of the Anglo-American common law tradition, or, as Professor von Bogdandy advocated, attempt to evolve their own path in light of Global challenges. It is in assisting with this last option that, to Professor von Bogdandy's mind, the *GLJ* has become such a significant undertaking. Professor von Bogdandy declared that the *GLJ* is transformative because it suggests the ways in which German scholarship might evolve. He went so far as to describe the *GLJ* as the "most important academic enterprise of [his] generation." He praised the *GLJ* for taking the intellectual lead on modern issues, placing German developments into a global framework, involving professors in a transnational discourse during their formative years, approaching and succeeding in addressing different subjects

[4] *See* Carole Bass, *Waiting is over for Koh*, YALE ALUMNI MAGAZINE (June 26, 2009), *available at* http://www.yalealumnimagazine.com/extras/koh3.html.

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on international culture, creating excitement in legal academia and thereby attracting talented minds, and for making innovative use of the internet. Finally, Professor von Bogdandy urged the *GLJ* to continue its transformative project, which he described as the most visible sign that German legal academia is moving in the right direction.

Axel Filges, President of the German Federal Bar, added the perspective of a practicing lawyer to the discussion. Filges echoed the patriotic sentiment of Minister Zypries by claiming that Germany is well prepared to engage in the competition between legal systems. According to Filges, German law is clear, reliable and efficient. The system of codification, he argued, provides attorneys with undeniable advantages by offering swift and straightforward access to law.

A lawyer like himself, Filges noted, does not make the law but simply uses it for his clients. Lawyers, he explained, are the first to see the direct impact of the law, whether through the drawing up of international contracts or determining what rules apply in the divorce of transnational couples. Throughout his career, Filges explained, he has witnessed the evolution of the German legal practice, expanding from within its own borders and now transcending them. Today, lawyers must choose laws by weighing the benefits of different rules and venues and Filges emphasized that this opportunity to use German law should not be underestimated. The *Journal's* role in describing ongoing developments and providing insights to the differences between German and European law is important to his practice, he explained. Indeed, Filges believes that German lawyers can benefit by reading the *GLJ*. The international nature of the *GLJ's* contributors provides German readers with the opportunity to reflect on how German law is perceived abroad and in turn helps them understand where German law might have a comparative advantage.

Professor Russell Miller, one of the *German Law Journal's* co-founders and co-Editors-in-Chief, spoke of the risk and benefits involved in undertaking the study of comparative law. Miller explained how the legal comparatist, as that project has long been understood, has faced incredibly high costs in return for only modest gains. For example, in order to understand the constitutional democracy of a foreign nation, Professor Miller noted that leading comparatists believe that a comparative lawyer must understand governmental structures, general values, the relevant foreign language, and contemporary developments in foreign jurisdictions and interdisciplinary fields. All this, without any assurance that the work will yield a conclusion that will enrich the domestic legal system. Indeed, Professor Miller noted that this classical approach to comparative law has been so demanding that some have even predicted the field's demise. Professor Miller addressed these skeptics. In particular, he cited the work of Mathias Siems, whose recent article was entitled *The End of Comparative Law*.[5] Recalling Siems' justifications for the predicted end of comparative law, Professor Miller proceeded to counter Siems with reference to his experience editing the *GLJ*.

[5] Mathias Siems, *The End of Comparative Law*, J. COMP. L. 2, 133-50 (2007).

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First, Professor Miller explained, Siems suggests comparative law is thoroughly disregarded by judges and academics. However, readers of the *German Law Journal* include judges from around the world. The presence at this 10th anniversary *Festakt* of Justice Bryde of the German Federal Constitutional Court Justice was a clear indication that this supposition is false. Moreover, Professor Miller noted that Justice Ginsburg of the U.S. Supreme Court has openly praised the work of the *Journal*. Also, Professor Miller reported on the many appreciative e-mails the *Journal's* editors receive from jurists in South Africa and Israel. From all of this Professor Miller concluded that judges in fact are interested in comparative law. Second, Professor Miller reported that Siems condemns comparative law as prohibitively complex. The *German Law Journal*'s response to the complexity problem, Professor Miller explained, has been to blindly throw itself into a deep and continuous process of comparison. In other words, the *GLJ's* repeated engagement in comparison and refusal to be paralyzed by the complexities has yielded positive results. Third, Professor Miller addressed Siems' argument that comparative law is irrelevant because there is simply nothing left to compare as a result of the increasing harmonization of law. Professor Miller's message in reaction to this point was clear. The *GLJ* will continue its persistent engagement with transnationalization, forging ahead with its "lived" comparative law.

This "lived" comparative law threads together the process of identifying the commonalities and differences between legal systems, and identifies the value in harmonizing legal culture while retaining national identity. This flexibility eliminates the danger expressed by Justice Bryde because it will allow for the transnationalization of legal cultures in such a way that will not threaten national identities.

III. Theorizing Transnational Law

With the foundations laid, a panel of speakers chaired by Nadia Chiesa of Osgoode Hall Law School delved deeper into the theory of transnational law and suggested ways in which certain methodologies might enhance the transnationalization of legal cultures. These panelists also commented on how the *German Law Journal's* methodology of cross-cultural dialogue fits within transnational legal theory. The panelists included Professor Susanne Baer, Professor Matthias Mahlmann, Professor Mattias Kumm and Professor Peer Zumbansen.

To begin, Professor Susanne Baer of the Law Faculty at Humboldt University noted the complexities faced by the legal comparatist and proposed a multi-faceted methodology that combines a variety of side streams into main streams. Professor Baer described different approaches to theorizing transnational law. First, theorizing from the top, a process driven by elites with a focus on lawmaking. Second, theorizing from the bottom, which involves drawing upon social studies. Third, theorizing from inside, as demonstrated by the traditional functional approach or the critical legal studies approach. Professor Baer

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suggested that law is a pluralist phenomenon, not to be theorized exclusively from the top or bottom, but requiring a plurality of approaches and intercultural conversations.

The *GLJ*, Professor Baer emphasized, promotes such intercultural conversation. Its reflexive methodology, she explained, allows systems to examine foreign legal solutions while re-examining domestic ones. Professor Baer found that the *GLJ's* real strength lies in its curiosity, open-mindedness and willingness to explore both sides of an issue. She noted that the *GLJ* does not rely upon a single theoretical approach but incorporates a variety of different approaches. Furthermore, she praised the *Journal* for being peer-reviewed, timely, selective, and for promoting an exchange of ideas by reaching an international audience.

On the other hand, Professor Matthias Mahlmann of the Law Faculty at the University of Zurich provided a break from the consistent and strong praise being lavished on the *GLJ* by injecting several critiques into the discussion. For example, he noted that the *GLJ* was in fact not very German. He also broke away from supporting a contextual approach to comparative law, with which the *German Law Journal* might be aligned if it in fact were more German, by declaring his firm belief in a more functional, universalist approach. Indeed, throughout the course of the symposium, Professor Mahlmann continually countered proposals for in-depth contextual inquiries with universalist arguments.

In accordance with his universalist stance Professor Mahlmann conceptualized transnational law as a common legal framework for which the world should strive. According to Professor Mahlmann universalism is embodied most clearly in human rights law. While he accepted pluralism as a reality, Professor Mahlmann found it posed no challenge to universalism. Instead, he suggested that the fundamental challenge of universalism was to overcome its lack of a theoretical foundation and the resulting skepticism towards the approach. Difficulties also arise, Professor Mahlmann explained, when there is no longer a practical reason for transnational law but he concluded that the universalist stance is very much alive and remains supported by practical justifications.

Professor Mahlmann's purely universalist stance challenges the thesis advanced in this report. Although universalism is very attractive in terms of its functional potential, it must be checked by contextual considerations to ensure that national identities are not abused. The transnationalization of legal cultures requires elements of both contextual and universal perspectives to co-exist in a competitive system that ultimately benefits both aims. As Professor Mattias Kumm of the New York University School of Law noted, transnational law is not an obvious or easy success, and the same is true of the *GLJ*. Professor Kumm explained that the *GLJ's* unlikely success arises first from the fact that, unlike most successful law periodicals, it is generalist and not specialized to one field of law. Moreover, Professor Kumm noted that the *GLJ* is not written in the language of the law it reviews. Nonetheless, there is widespread interest in the *Journal* because it appeals strongly to comparative law interests. Professor Kumm explained that, in much the same

way, transnational law theory contradicts traditions. It is based upon the philosophy of Phillip Jessup, who was interested in practical business transactions and tried to overcome the traditional formalistic divisions between private and public law, or national and international law, by promoting conflict of laws clauses, treaties, and tribunals.

In order for the *Journal* and transnational law to be successful, Professor Kumm explained, there must be a thorough understanding of laws in other countries pertaining to practical problems, and what abstract theories such as "commitment to democracy" in the Lisbon Treaty, for example, actually mean. The *Journal* focuses on these theories and includes a wide range of issues. In fact, Kumm remarked that the "*German Law Journal* exemplifies an interdisciplinary engagement." Dealing with topics through a variety of jurisprudential approaches, from Habermas, to Critical Legal Studies and including law and economics, Kumm believes the *GLJ* presents a variety of perspectives that few journals can match. He also found that in some sense, the *GLJ* provides an antidote to the danger of German legal scholarship suffering the same fate as General Motors. Historically, Germany was a world-leader in legal scholarship. However, like General Motors, German legal scholars became self-satisfied. If the focus of a world leader remains solely on the domestic market it risks becoming uninteresting. Kumm explained that the *GLJ* affords Germany the possibility of reconnecting with the past in order to play a greater part in the present. In this way, the comparative and competitive dialogues promote national identity even in the context of harmonizing legal cultures.

However, according to Professor Peer Zumbansen, co-founder and co-Editor-in-Chief of the *German Law Journal* these discussions have failed to yield a lasting transnational law theory. Professor Zumbansen examined transnational law by reflecting on past articles that sought to develop transnational law theory. For example, in Phillip Jessup's *Transnational Law*, it was not enough to simply describe transnational law as crossing national boundaries.[6] Furthermore, in 1996, Harry Arthur's, *Labor Law without the State* examined whether there was any hope for labor lawyers to save workers outside the nation state, and was also a failed attempt to transnationalize the law.[7] By surveying the legal research of transnational law theory through different articles over time, Professor Zumbansen demonstrated the continual frustration experienced by transnational law theorists. Perhaps, he suggested, it no longer makes sense to develop another transnational law theory.

Professor Zumbansen concluded the symposium's first day by noting that all the members of the panel presented slightly different versions of "transnationalism." Certainly, the presentations had made clear that there was no universally accepted definition of transnational law. What was clear to Professor Zumbansen, however, is that while the

[6] PHILIP C. JESSUP, TRANSNATIONAL LAW (1956).

[7] Harry W. Arthurs, *Labor Law without the State*, 46 U. TORONTO L.J. 1 (1996).

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idea as originally conceived has failed, the importance of transnational law remains a consensus.

C. Friday 3 July, 2009 – Freie Universität, Faculty of Law, Berlin

I. Welcoming Remarks - Professor Dr. Helmut Grothe (Dean Freie Universität, Faculty of Law, Berlin)

On the second day of the symposium, Dean Grothe welcomed all those in attendance to the *Freie Universität* and introduced the day's program, which included panels on transnationalization in the realms of public law, private law, legal education and European law. He stressed the importance of comparative law; a hobby of yesterday, but destined to become increasingly prominent. With respect to legal education, Grothe emphasized the need to foster in students an interest in law beyond their national borders. He expressed his firm belief in a global, multi-cultural legal exchange or study abroad that facilitates comparative analysis, discussion and results in a more complete education.[8]

II. Panel 1: Transnationalizing Public Law

The line between public and private law is anything but bright. Some scholars have even questioned the value of the division, while others defend the distinction as an important invitation to examine how the law implements social functions. One way to make the distinction is that public law regards administrative and international technique that focuses on horizontal law, whereas private law is more vertical or hierarchical.

The first panel, chaired by Professor Russell Miller and featuring luminaries such as Professor Bernhard Schlink, Professor Ingrid Wuerth, Professor Dominik Hanf and Professor Christoph Möllers, focused on the transnationalization of public law as a process of combining national values through comparative analysis and practical application. As interactions between independent nation states become more prevalent, the need for a

[8] Friday's proceedings also included a roundtable discussion on the *Transformation of the Legal Profession and the Transnationalization of Legal Education*. These presentations consisted, for the most part, of contributions that appeared in the *German Law Journal* special issue published in July, 2010. We direct readers to those materials. Presenters at the symposium included: Danielle Allen & Bernadette Maheandiran, *"You Don't Have to Speak German to Work on the German Law Journal": Reflections on the Value of Being a Student Editor While Being a Law Student*, 10 GERMAN LAW JOURNAL 1149 (2009), *available at* http://www.germanlawjournal.com/pdf/Vol10No07/PDF_Vol_10_No_07_SI_1149-1168_Allen_Maheandiran.pdf; Nadia Chiesa, *The Five Lessons I Learned Through Clinical Education*, 10 GERMAN LAW JOURNAL 1113 (2009), *available at* http://www.germanlawjournal.com/pdf/Vol10No07/PDF_Vol_10_No_07_SI_1113-1126_Chiesa.pdf; Franziska Weber, *"Hanse Law School" - A Promising Example of Transnational Legal Education? An Alumna's Perspective*, 10 GERMAN LAW JOURNAL 969 (2009), *available at* http://www.germanlawjournal.com/pdf/Vol10No07/PDF_Vol_10_No_07_SI_969-980_Weber.pdf; and Peer Zumbansen, *see, e.g.,* Osgoode Hall Law School – York University, OSGOODE KNOWLEDGE, *available at* http://www.osgoode.yorku.ca/research/knowledge/documents/knowledge_brochure.pdf.

common public law system becomes greater. The challenge arises in determining the common values between nations, and is solved when countries can operate under the same structure, despite their different backgrounds.

One issue that arose was whether the transnationalization of legal cultures is best served by competition between differences or communication to identify similarities. According to Professor Bernhard Schlink, Faculty of Law at Humboldt University, comparative constitutionalism is about finding deep structures in common, not simply differences. Professor Schlink began the discussion by recalling his participation in an experiment involving a hypothetical Constitutional Court. Personalities gathered from seven different countries, all with different constitutional backgrounds, and proceeded to simulate a trial. Despite their different backgrounds, the Court quickly reached a decision, with proportionality as the shared instrument to discuss the case. According to Professor Schlink, the shared tool of proportionality is evidence of the universality of constitutional law. While the discovery of a universal structure is important, it is insufficient to justify a complete rejection of contextual considerations. Professor Kumm recognized this when writing about his experience as a German constitutional scholar studying constitutional law in the United States.[9] He noted "how little one knows when all one knows is that structure, and how rich and multifaceted the problems remain that need to be addressed to come to a well-reasoned resolution of a case."[10]

Professor Dominik Hanf, of the Law Faculty at College d'Europe, expressed a preference for communication rather than competition in order to find the common ground between different structures. He described the public law as transnationalizing by bridging cultures, as demonstrated by the European Union's methodology. Through a comparative and interdisciplinary approach, Professor Hanf desires to find solutions that would be acceptable to many cultures. He complimented the *German Law Journal* for motivating such discourse and showing that work still lies ahead to achieve this goal. Professor Ingrid Wuerth, of the Law Faculty at Vanderbilt University School of Law, also described the German Law Journal as "a real public service" because it keeps interested foreigners abreast with German law. This continual and accurate dialogue is necessary for the development of transnationalization.

Professor Wuerth examined whether public law in the United States is undergoing broad transnationalization by reviewing recent United States Supreme Court decisions. She explained that the most recent cases to explicitly engage with classic comparative law were *Roper v. Simmons*[11] and *Lawrence v. Texas*.[12] Beyond these cases, however, the

[9] *See* Mattias Kumm, *On the Past and Future of European Constitutional Scholarship*, 7 Int'l J. Const. L. 401 (2009).

[10] *Id.* at 414.

[11] Roper v. Simmons, 543 U.S. 551 (2005).

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Supreme Court has demonstrated little engagement in classic comparison. Although Professor Wuerth is skeptical that the current Court will take a large spring forward with comparative law, she did name cases where the Court was forced to confront transnational issues, such as *Sosa v. Alvarez-Machain,*[13] *Hamdan v. Rumsfield*,[14] *Sanches-Llamas v. Oregon*,[15] *Medellin v. Dretke*,[16] and *Boumediene v, Bush.*[17] In these cases, the Court was engaged in transnational law analysis in a thin sense in that it considered international law but did not base its decision in transnational comparisons. This case law, Professor Wuerth concluded, affirms pluralism because the Court considered the law of other systems, even though it did not follow it.

Professor Christoph Möllers, of the Faculty of Law at the University of Göttingen, explored the growing uncertainty behind the meaning of transnational law by asking whether it was really a failure or whether there was simply no finality. He identified transnational law as a "fluid transition" that is "problematic to identify." Like Professor Baer, Professor Möllers recommended that lawyers look not above or below, but rather to the side by examining international public law and agency regulations. Upon such international comparative examination, Professor Möllers emphasized that there would always be an end to the comparison because the nation will hold more tightly to the laws appropriate its jurisdiction. Even so, how can both national and transnational systems retain independent power as nations unite in their commonalities but keep separate in ways appropriate for their jurisdiction? This conflict has as much potential to divide as it has to unite. Thus, the question arose as to why there should be transnational law. Professor Möllers described the importance in knowing the different possible solutions in order to help imagine alternatives. This also reflected Professor Hanf's desire to discover solutions acceptable to many cultures, so as to resolve even in division.

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[12] Lawrence v. Texas, 539 U.S. 558 (2003).

[13] Sosa v. Alvarez Machain, 542 U.S. 692 (2004) (addressing whether an Alien Tort Statute allowed private individuals to bring suit against foreigners who violated United States laws in other countries and whether the Federal Tort Claims Act allowed for suits of false arrest planned in the United States but conducted in a foreign country).

[14] Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (addressing whether rights protected by the Geneva Convention could be enforced in federal court through habeas corpus petitions and whether Congress or the President had the power to set up a military commission to try individuals for alleged war crimes).

[15] Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006) (addressing whether a state could hear a claim based upon an Article 36 of the Vienna Convention violation and whether evidence obtained after such violation must be excluded from the trial).

[16] Medellin v. Dretke, 544 U.S. 660 (2005) (addressing whether a federal court should enforce an International Court of Justice's ruling).

[17] Boumediene v, Bush, 128 S. Ct. 2229 (2008) (addressing habeas rights in Guantanamo Bay, Cuba under United States law and the Geneva Convention).

Comments to the panel also included the question of how to attain universalism and what commitment to universal standards should be required. Professor Wuerth indicated that public law may lead us to universalism by a common consent to norms, which may create a direction for domestic and international standards, while Professor Schlink indicated that the key is to find the deepest structure of constitutional principles in different contexts. Consequently, the goal would simply be to have justices cooperate and have an awareness of what foreign counterparts are doing, and not to make courts more international.

If the goal is one of cultural sensitivity and awareness, however, does the transnationalization of law act as a universal ideal or as a problem solver? Is it more substantive or functional? Professor Möllers described transnational law as deeply functional when related to international relations because the original theory was to eliminate nation-states for peace and prosperity. In that sense it might also be a universal ideal, but such a conclusion would merely be a provisional solution to be tested. The key then, is to view the law with open eyes and not be restrained by vocabulary. Transnational law and comparative law are useful methods to open discourse, but there is always the option to close the discourse as well.

III. Panel 2: Transnationalizing Private Law

Chaired by Professor Zumbansen, the day's second panel consisted of Professor Gralf Calliess, Professor Marc Amstutz and Professor Gregor Bachmann. The panel explored the transnationalization of private law and emphasized the regulatory challenges in a quickly changing commercial environment.

The first issue, addressed by Professor Gralf Calliess, a member of the Faculty of Law at the University of Bremen, regarded whether there is a need for public control when private law has found its own mechanisms of governance. Professor Calliess described a research project he has been conducting at the University of Bremen that focuses on new forms of legal certainty in the globalized exchange process, and it aims to produce an evidence-based theory of transnational commercial law. The research seeks to answer how global commerce functions in the absence of global law. Professor Calliess has been looking at the many private governance mechanisms available to international commerce, such as the private or self-enforcement of contracts, network theory and international commercial arbitration. His research has revealed an increasing transnationalization in the governance of cross-border transactions. As governance mechanisms become increasingly decoupled from state legal systems they are at the same time internationalized and privatized. Further, business actors in cross-border situations are increasingly relying on transaction-type governance regimes, recombined from different public and private mechanisms of control. Consequently, public institutions such as contract law, courts, or legal sanctions are of rather peripheral importance. This results in a lack of expertise with respect to

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commercial transactions in the public sphere. Professor Calliess argued that private resolutions still need public control to ensure the protection of weaker parties.

Next, Professor Marc Amstutz, of the Faculty of Law at the University of Fribourg, noted that the transnationalization of private law is a difficult phenomenon to define, but that an effective analysis considers both its development and consequences. Professor Amstutz underlined the distinction between the transnationalization of private law and national private law. He explained that in a world society, illusionary privacy shifts from normative to cognitive expectations. Thus, national private law develops according to normative expectations, while the transnationalization of private law develops according to cognitive expectations. The consequence is that the world society will tolerate differences only in relation to cognitive functions. Society's vision of transnationalization of private law is for it to be autonomous but also mutually generated according to different sociological rules. Thus, the transnationalization of legal cultures requires a delicate review of the basis for each system in order to create an autonomous transnational system compatible with national structures.

According to Professor Gregor Bachmann, of the Faculty of Law at the University of Trier, today's global world faces common problems to which there are similar solutions. He referred to several indications of the transnationalization of private law. First, the horizontal effect of transnational values has influenced the interpretation of private law. While the horizontal effect in German law has been well documented, Professor Bachmann noted that the comparative perspective of horizontal effect has been neglected. Also, competition between legal regimes has encouraged the transnationalization of private law. Professor Bachmann cited the convergence of company law as an example of private law transnationalization resulting from foreign competition. The 2008 reform of the law governing the German limited liability company (GmbH) demonstrates how German law has changed in a large part as a response to competition with the United Kingdom limited company. Under the reformed law, there is no longer a minimum capital requirement. Professor Bachmann questioned whether this was a good thing and expressed a concern that the transnationalization of corporate law might result in a race to the bottom. He noted that another common problem involves the issue of excessive management remuneration and the global struggle of legislatures to address the problem. As all nations face similar issues, it seems only logical that a cross-cultural dialogue regarding common and different strategies would aid in the resolution of individual private law cases.

All of the panelists emphasized the importance of looking upon private law as a reflection of ongoing regulatory transformations with regard to the role of the state and what until recently seemed like an unbroken belief in the market's self-regulatory capacities. All participants more or less agreed that the financial crisis underlined the need to develop global regulation of cross-border transactions. Thus, the transnationalization of legal cultures could benefit individual nations through the identification of successful solutions to common problems.

IV. Panel 3: Europe as Transnational Law

The deepening and widening of the European Union's authority means that reporting developments in European jurisprudence has become an increasingly significant function of the *GLJ*. The final panel acknowledged this a mere two days after the German Federal Constitutional Court had rendered its eagerly awaited 118-page verdict on the Lisbon Treaty. Speakers on this panel included Professor Christian Calliess, Professor Heike Kruger, Professor Christoph Safferling and Professor Karl-Heinz Ladeur.

Professor Christian Calliess, of the Faculty of Law at the Freie Universität, addressed the importance of values in the European Union and asked whether the establishment of European values will contribute to further integration. Professor Calliess identified three important groups of values: peace and integration; solidarity and subsidiarity; and human dignity and equality. These values are significant, he explained, because they create a separate identity for Member States by fostering an "us and them" attitude. They also promote democracy by integrating values through majority rule. Professor Calliess concluded that while contextual differences mean that values are unique to specific contexts, a multi-level constitutionalism is capable of generating a European community of values. These values will shape how law is interpreted on the transnational level.

In a rare exposure to criminal law, Professor Christoph Safferling, of the Faculty of law at the University of Marburg, presented a slide show entitled *A Criminal Law for Europe: Between National Heritage and Transnational Necessities*. First, Professor Safferling noted that perhaps more than any other area of law, criminal law is deeply rooted in the national community. Within the European Union, the Member States have very different understandings of criminal law and therefore it is difficult to generalize. The presentation explored the theory upon which a transnational European criminal law could be based. Professor Safferling proposed a three-pronged approach to European criminal law that mixes both cooperative and supranational structures. The approach combines the protection of EU institutions, the protection of basic social values by core crimes, and the protection of EU policy interests. For Professor Safferling, the credibility and acceptability of any European criminal law system is dependent upon a restricted use of criminal law in its traditional sense. Furthermore, he noted, the German Constitutional Court's Lisbon decision supports this rejection of simply widening criminal law in favor of a more socially integrative method.

The panel continued to grapple with the problem of conceptualizing the transnationalization of law in Europe. Professor Karl-Heinz Ladeur, of the Faculty of law at the University of Bremen/Hamburg, stressed that transnationalization does not necessarily mean the convergence of legal orders. While the European project seeks greater unity, it is important to know where unity is valid and where it is not. Essentially, there must be a reason to change from pluralism. Professor Ladeur believes a new conceptualization of

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law is required for grappling with the complexities of Europe's emerging legal system. He proposed a network theory, in which European law is not hierarchical but composed of overlapping networks. This kind of network perspective would allow countries to benefit from the co-existence of a domestic and transnational system.

Professor Ladeur examined the emergence of transnational legal networks as they continue to evolve. He explained how these transnational networks, located in-between national and supranational spaces have transformed space itself. The network-like regimes generate, develop and manage their own rules and are held in place by the tension created by their overlap. Professor Ladeur finds this development of critical importance for the institutional design of the European project. Drawing upon lessons from these network-like regimes, the European system of governance should also be experimental and networked, not hierarchical. He called upon academics to further develop the "network" conception of Europe, which he believes will provide a structure of transnationalization capable of both furthering integration and preserving differences. The network conception of transnationalization recognizes the co-existence of both universal and contextual perspectives. More than any other speaker, Professor Ladeur attempted to explain what this co-existence looks like and how it operates. The network theory of transnationalization is certainly one that merits further attention.

Professor Heike Krieger, of the Faculty of Law at Freie Universität, viewed transnational law as an inherent global force. She envisions comparative law playing a leading role in the future development of the European Union. Drawing upon the judicial reasoning demonstrated by the European Court of Justice and the European Court of Human Rights, she concluded that the comparative method is being explicitly woven into European Court decisions. Throughout the deliberations of this concluding panel, it became strikingly clear how the European project in so many ways crystallizes the comprehensive challenges to law in a transnational world. To be effective, the project must involve a competitive and comparative process which allows for the strengthening of relations between Member States' by recognition of common values, while maintaining national identities that are open and flexible to change.

D. Conclusion

For ten years, the *German Law Journal* has provided a forum for comparing the competing theories of transnationalization. The tenth annual symposium was no different in terms of promoting that dialogue. As the proceedings progressed it became clear that even the understanding of the *German Law Journal's* role within the transnationalization of legal cultures differed remarkably between panelists. For example, nationalists such as Justice Zypries and Axel Filges viewed the *Journal* chiefly as a means to promote and strengthen the influence of German law. By contrast, for transnationalists such as Professor von Bogdandy, the *German Law Journal* is supposed to do the very opposite and drag Germany

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away from its parochial tendencies. The ability of the *German Law Journal* to somehow satisfy both perspectives is a mysterious achievement.

The thesis that transnationalization is both universal and contextual has been challenged by the panelists but has emerged largely intact. Some argued that the transnationalization of legal cultures will result in a universal system, while others explained that such a system would be taking the developments too far and that the result should tend more toward national identities. Finally, there were those such as Professor Ladeur who adopted a more subtle approach, recognizing that the transnationalization of legal cultures must involve elements of both retaining national identity and developing universal system, through an open and flexible dialogue. It is through open forums like the *German Law Journal* that promising models such as Professor Ladeur's network theory are most likely to develop.

Professor Miller concluded the symposium by observing that perhaps the real strength of transnationalization is in the elusive nature of its definition. It seems it is something between a normative aspiration and descriptive identification. Whether in application to public or private, educational or professional, local or Global, the transnationalization of law is an undeniable and likely inevitable development. Those who attended the symposium probably left with more questions than when they arrived but they also took with them a renewed motivation to continue to build upon what the *German Law Journal* has sought to encourage for the past ten years: the transnationalization of legal cultures.

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