Völkerrechtsblog
Der Blog des Arbeitskreises junger Völkerrechtswissenschaftler*innen

DISCUSSION

On American “Dilettantism” and German “Pedantry”

A Comparative Look at Law Journal Culture and the Future of Legal Knowledge Production

KATHARINA ISABEL SCHMIDT — 17 November, 2014

Almost by necessity, the cultural and institutional features of legal knowledge production differ from one system to the next. Like law itself, they are a product of history, borne out of pragmatism rather than advance planning, and deeply connected to the division of competences within the legal profession. Having said that, it would be hubristic and petty to mock the American legal community’s willingness to let first- and second-year law students – jurisprudential

amateurs by any standard – take the lion’s share of editorial decisions. Similarly, it would be bumptious and myopic to ridicule the oh-so-typical German proclivity towards excluding everything novel and interesting via a regime of strictly enforced peer review. Instead, one would do well to acknowledge that path-dependence is real and that the story is always just a little bit more complicated than our comfortably unreflective faith in the superiority of the way things are done back home will have us believe.

American “Dilettantism”?

American law journals increasingly rely on faculty input. The students that run them have often completed extensive graduate-level training. The coveted nature of editorial positions – usually the exclusive realm of top students – guarantees at least a certain level of professionalism. From time to time, certainly, an article of so minimal a substantive contribution to legal scholarship is published that one cannot help but wonder whether someone was asleep at the switch. At other times, it is quite clear that said switch was being operated by someone very much awake, but just not all that interested in law. On the whole, however, American law journals publish articles that are readable and widely read – by jurists on both sides of the Atlantic. At the same time, German law journals are not exactly where fun goes to die. The kind of scholarship they attract and produce is not as doctrinal, conservative and parochial as some people make it out to be. Every so often, an article eschewing the alleged twin constraints of dispassion and mono-disciplinarity does slip past the reviewers. Moreover, the normalizing gaze of their professorial peers pushes German academics to conceptual and analytic heights that are, in some ways, unmatched by scholars elsewhere.

German “Pedantry”?

American law journals are interesting for the most part, if not necessarily always useful. German law journals, in turn, while useful for the most part, are not necessarily always interesting. As adumbrated above, this is due to the particular division of competences within the German legal profession on the one hand and the American legal profession on the other hand. German scholars, unlike their American counterparts, are routinely cited in court decisions. As such, they have no choice but to deliver the doctrinal goods expected of them. In the United States, unlike in Germany, placing articles in top-tier journals constitutes a necessary step on the long and winding road to tenure. As such, one can hardly blame aspiring academics for pretending to reinvent the wheel one case note at a time. In addition, trans-Atlantic divergences in the structure of legal education naturally influence the extent to which German and American jurists are able to produce and consume interdisciplinary knowledge. The – admittedly overblown – distinction between the common and the civil law tradition further contributes to making matters look positively discombobulated.

New platforms – old habits?

So far, so good. Quite obviously the old ‘let’s-all-learn-from-each-other-and-move-on’-approach has little purchase in the present context. Why, then, take a comparative look at the culture behind law journals in Germany and the United States at all? Not a whole lot is to be gained from recreational comparativism. Conscious of these words to the wise I would argue that my brief survey of trans-Atlantic differences in the structure and organization of law journals

facilitates at least one crucial objective: it allows us to re-imagine the future of legal knowledge production in light of the gradual transition from paper-based approaches to digital alternatives. New platforms for the creation and exchange of ideas about law – such as in particular blogs like the one you are perusing right now – are emerging at an astonishing rate. The question is whether these new platforms should perpetuate national idiosyncrasies or opt for genuine innovation.

Law is singular in that it is both a profession and an intellectual tradition. It is a tool for solving real-life problems as well as an academic discipline in its own right. Whatever the exact relationship between theory and practice, legal academics – if they want to stay relevant – need to speak to questions that practitioners find compelling. In light of this, law journals as well as alternative platforms for legal knowledge production necessarily need to strike an adequate balance between publishing pieces that are interesting and publishing pieces that are useful. With the adequacy of this balance naturally dependent on the needs of nationally constituted legal professions, little would be gained from suggesting that law journals and other non-traditional platforms divorce their readership for the sake of some ill-defined scholarly goal.

At the same time I would argue that blogs like the present one hold the potential to facilitate conversations about law that are free from the intricate constraints of national legal science. In particular, the kind of jurisprudential writing they make possible confronts scholars and practitioners alike with ideas that lie outside the realm of their necessarily limited intellectual experience. It is in this way that blogs and other non-traditional platforms allow for a much-

needed re-appreciation of what it means to be a jurist in the 21st century. Therefore, the goal of law blogs and similar projects should be an attempt to counterbalance the deficits inherent in traditional approaches to the exchange of ideas about law and the legal profession – deficits exemplified by my discussion of contemporary American and German law journal culture.

The prospect of genuine innovation requires us to turn to questions and issues that matter in an increasingly globalized world. It also requires us to take seriously globalizing tendencies within law and the legal profession itself. In order to make sense of legal phenomena in the 21st century we need to take account of the theoretical and philosophical foundations of law as well as of the cultural and historical trajectory of the various societies in which it operates. It follows that the increasing need for comparative and transnational pieces on the history, theory, sociology, anthropology and philosophy of law can hardly be overstated. Stylistically, much would furthermore gained from supplanting the lengthy American-style law journal article as well as the heavy German-style *Rechtsaufsatz* with experimental formats likely to engage a non-traditional, non-specialist and generally more diverse audience.

Towards dynamic, democratic and decentralized production of legal knowledge

This leads me to my final point. Taking a comparative look at law journal culture holds promise because it reminds us that the structure and organization of legal knowledge production is, importantly, about voice. Equally as pertinent as what is being said or who is listening is who does the talking. Both American and German law journal culture

exclude a great number of voices. While this is necessary to some extent, it bears the serious risk of supplanting pre-existing disciplinary rifts – those between practitioners and theoreticians, jurists and non-jurists as well as lawyers from different legal traditions – with yet another such rift: an intergenerational one between the jurisprudential establishment and those who aspire to join, modify or transform this establishment in accordance with their own ideas and values.

By way of conclusion, I would suggest that the particular merit of law blogs and other non-traditional platforms for the production of legal knowledge results from their capacity to advance the following two objectives: Firstly, to facilitate transnational self-reflection on the kind of endeavor we, as jurists, consider ourselves to be engaged in. Secondly, to give a voice to younger scholars and practitioners who have historically been excluded from important conversations about the future of law and the legal profession. For this purpose we should by all means continue to take advantage of the dynamic, democratic and decentralized nature of non-traditional approaches to legal knowledge production for the purpose of remedying the particular flaws of traditional national law journal culture – as exemplified by my discussion of the situation in Germany and the United States.

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BERNARDKEITHVETTER
23 November, 2014 at 22:57 (Edit) — Reply

“On the whole, however, American law journals publish articles that are readable and widely read – by jurists on both sides of the Atlantic.” This is true only if the Bench and Bar are eliminated from the definition of jurists. Too many American Law Review Articles are written by Academics for Academics, and are rife with jargon, gobbledygook , provender and fodder – the last two courtesy of W.C. Fields.

SA

24 January, 2015 at 15:21 (Edit) — Reply

Schmidt is wrong to assume American “dilettantism” and German “pedantry.” Witnessing both editorial processes will make it clear that a German law professor cannot even come close to the pedantry of a 3L law review editor, even if he actually reads the submission. To wit: where, Ms. Schmidt, is the German Bluebook? Schmidt is also wrong to assume German “unmatched conceptual and analytic heights.” Really? Take a look at the Dodd-Frank Act, the Bankruptcy Code, and the UCC, and talk to us about unmatched conceptual heights. Law reviews aside, open the CJS, AmJur, and the treatises and talk to us a about unmatched analytics.

Schmidt tries to mask the unoriginality of current German scholarship by putting it on the same footing with American scholarship, when it is not. She justifies doctrinalism and academic recycling (where support for a novel idea is found in cross-references to the very same idea) by a peer’s “normalizing gaze” and by painting a no-choice situation forced upon the scholars by, behold, the courts. The courts, who have no control over what academics do, but do have expectations which the academics would not want to disappoint? The courts, who are, absent scholarly commentary, incapable of legal reasoning? The courts, who are, albeit a constitutionally recognized power, subservient to the wise men of academia, smoking a pipe and practicing armchair lawmaking? This must be why Schmidt opted for an JSD at Yale, instead of a Habilitation at Cologne.

Schmidt is also hypocritical to call for legal academics to “speak to questions that practitioners find compelling” when she herself spends her time writing “Towards More Realistic Jurisprudence: Facticity, Normativity and the Turn to ‘Life’ in Early 20th Century German and American

Legal Thought.” It sounds like it has a spot in a law review, but not on a lawyer’s desk in New York, Frankfurt, DC, or Karlsruhe.

But who reads journals today anyway? It’s the age of blogs. This must be why Schmidt calls for the blog to “counterbalance the deficits” of traditional journal culture. But why, why doesn’t she publish her scholarly piece on a blog? Oh, shoot, because it will not get her to tenure, neither in Germany, nor in America. On the other hand, dropping words like “discombobulated” and “adumbrate” just might.

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