Critical Legal Studies and the German Law Journal: Remarks About the Lessons and Prospects of Comparative Legal Theory

By Peer Zumbansen[+]

A. Travels back and forth in time

On the occasion of the republication of the "blue volume," containing the proceedings of the 1986 "Critical Legal Thought: An American-German Debate" Conference at the University of Bremen Law School, much or little might be said as to the significance, promises or learned lessons of that event. The original conference conveners, like the editors of the ensuing volume, do much of that in the following pages. In fact, their recollection of the motivations and ideas driving the transatlantic event provides a marvelous view into the evolving mystery of legal thought, education and professionalism – on both sides of the Atlantic. The two accounts rightly embed the mid-1980s conference in a much larger historical context. Christian Joerges' much-referenced account reaches back deep into the constituting phases of nineteenth-century German legal thought. David Trubek's essay is a thoughtful critical assessment of both the gaps and the overlaps between the German and the American legal cultures in the lead-up to and of the globalizing aftermath of the event.

I am grateful to both Christian Joerges and David Trubek for the opportunity to add a few introductory remarks in the context of republishing the original, unchanged contributions in the *German Law Journal*. The republication exposes the oft-cited and yet no longer available texts to, literally, a world-wide audience in digital format. This, alone, is noteworthy because it will occur in a context in which the transatlantic, comparative thought exchange between the critical studies scholars in the United States and the adherents of "*Politische Rechtstheorie"* long have been taking place. Today it is possible to obtain even the rarest of texts, like those republished here, online and in no time at all through breathtakingly fast, evolving, and proliferating opportunities. This stands in contrast to the demanding manner – both in time and resources –relevant foreign materials once had to be acquired through law school librarians or bookstores. Sometimes these demands were made tolerable by memorable, if sometimes haunting or endearing hours in the law libraries in Cambridge, MA, Berkeley, CA, or Madison, WI. The present

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absence of all imaginable obstacles to instantaneously obtaining and reading almost any legal (or other) text renders absurd the memory of those former times, which always involved difficult conversations with airline check-in agents about the enormous weight of odd-looking suitcases. Back then it was paper, and paper over paper: feverishly taken notes, excerpts, acquired books, and photo-copied law review articles. It is inconceivable today, but imagine still having to make a photo-copy of Duncan Kennedy's "Blackstone Commentaries" article – that weighed down our bags!

Now, that all seems a thing of times long past. Today we find it most ordinary that we should be able to convene a group of scholars from different continents for a law review symposium on any legal topic – comparative or not! –exclusively through electronic communication. We see it just as ordinary that we can bring together and finally produce and publish the results of a symposium through online correspondence and text-transfer. The authors never actually have to meet each other in person. The amazing speed at which scholarly communication unfolds today is taken, too often, to mirror a similarly advanced and sophisticated knowledge on the part of the communicating, digital, scholars. The resulting, almost entirely unhampered availability of just about all reading materials in seconds, however, belies the fact that we read less today.[1] Simultaneously, the pressure to cite to both standard and also highly obscure, "rare" materials has grown incessantly. The 24/7 availability of sources on one's computer screen mandates no other result.

The 1986 conference, by contrast, speaks of (or from) another time. What shines through many of the contributions in the book, and is reiterated again in Joerges' and Trubek's introductory comments, is that the participating scholars were very aware of the unique opportunity to have actual "face-time" with each other. The conference allowed for an exchange amongst authors, many of whom had interacted with each other only very occasionally, if at all, in person. Otherwise, they "communicated" only in the classical form of reader-author at one's desk ("back then" it was less frequent to retreat to one of the world's now-ubiquitous Starbucks franchises with internet access to avoid students constantly "popping in") and in the run-up to the conference, by using TELEX communication.[2] What a scholar would bring "to the table" at an international conference was what she had prepared for the particular event and what scholars had read of each other in the months and years before coming to sit in the same room. Today, conference participants chat over lunch about speakers' recent "blog post" from that very morning (probably during a session!) on one of the many online fora.

Why am I going on about this? This is all too well-known to merit attention. And yet, in the context of this introduction, it seemed worthwhile to at least cast a cursory glance at the odd discrepancy between the worlds of 1986 and 2011 – at least as the production,

[1] http://www.theamericanscholar.org/reading-in-a-digital-age/

[2] http://en.wikipedia.org/wiki/Telex

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dissemination and "digestion" of (legal) scholarship is concerned. Of greater significance, however, is the substantive side of the debate, which is evident in two ways. The first is the fact that the original editors pushed for a republication of the original materials themselves. The second is that there are contemporary parallel inquiries into the prospects of critical legal thought and legal theory under way in a number of fields of research. As highlighted in the following two introductory essays by Christian Joerges and David Trubek, there is much to reflect upon as regards the prospects of 'progressive', 'left', or 'critical' legal thinking today. But what makes the following texts so intriguing and worthwhile, is their authors' clear-headed perception of the changed circumstances, under which a reassessment or repositioning of legal thought would have to occur today. In that sense, neither author is very explicit about which "lessons" it might be possible to draw from the event and its place in the continuing evolution of critical legal thought. Instead, both authors contextualize the event, and the contributions that flowed from it, within a larger landscape of legal and social thinking. By itself, this landscape evades summary classification, labeling, and – even more – judgment. Both accounts of the fate of the critical legal movement allude to "internal" as well as "external" factors that have left a deep and lasting imprint on the movement.

Again, both are hard to pin down. Internally, the rise of law & economics as arguably the most successful "law & society" movement did not occur in a "heaven of pure legal concepts,"[3] but in a particular political-economic constellation marked by a decline in economic prosperity, partly brought about by the 1970s oil crisis, partly by the comparative ability/inability to adapt to fast-moving and fast-globalizing markets for goods, services and knowledge. The law and economics blaze that spread through law school programs, curricula, and academic careers is far from subsiding. As a consequence the gap between the perceived respective 'applicability' of law & economics (L&E) and critical legal thought (CLT) widened. While L&E scholars have been ready to suggest that an economic analysis promises to provide a "workable" solution to a legal issue the insistence by critical legal studies' scholars (CLS) on law's indeterminacy and fundamental openness appeared less suitable for the task of concrete problem solving. Certainly, the practical usefulness of the former was to no small degree purchased at the price of ignoring the fundamental indeterminacy of legal concepts to begin with. Who here is 'right', however? With the considerable pressure on law schools to design a curriculum with the task in mind of 'educating lawyers'[4], the space for engaging students in law's indeterminacy has always been shrinking. No coincidence perhaps, that the two convening schools, Bremen and Wisconsin, had been among the very few law schools leading the development of a more critical and theory/practice intertwining curriculum, and that they, too, had come under sensible pressure just for that.

[3] Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); reiterated also by Duncan Kennedy, *Comment on Rudolf Wiethölter's* "Materialization And Proceduralization in Modern Law"*, and* "Proceduralization of the Category of Law", in this issue, sub G.

[4] WILLIAM M. SULLIVAN ET AL, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007)

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Another "internal" factor that would tragically, but paradoxically, turn out to have eroding effects on the CLS movement was the continuing sophistication of social science and the tremendous rise in importance of inter-disciplinarity. Both may and in fact have been seen as equally strengthening as well as relativizing the CLS mandate. Eventually the encompassing "cultural turn" would above all result in a far-reaching proliferation of research fields, institutes and curricula with the focus on 'culture', without, however, effectively enhancing interdisciplinary research able to seriously affect the teaching of law. 'Law and…' seminars continue still to be too much a teaching choice preferably for long-tenured faculty members and their oddball students. So, rather than a decline of CLS, as has been sometimes asserted by conservative scholars – with none too little glee – it is more appropriate to highlight the transformation of the school in response to fundamentally changing regulatory landscapes, political climates and scientific classifications and distinctions. It is only in trying to answer the question "What is Left after Left?," in an un-ironic, bitter fashion, that CLS appears to be a bust, pictured as lacking inspiration, insights and generally the ability to "come up with answers."

The state of CLS today must be assessed however by taking a wider view of the epistemological landscape. Of course, CLS drew on legal realism's attack on formalism and, in this sense, can be credited with inspiring a revival in empiricism and inter-disciplinarity. CLS also ushered in a diversification of progressive legal and social thought including, *inter alia*, feminist legal studies, critical race theory, property critique, post-colonial legal theory, and "third world approaches to international law" (TWAIL). It is this wider perspective that both justifies the republication of the proceedings from 1986 and inspires an upcoming conference in Frankfurt in July 2011. Already at the time of the Bremen conference the scholars arriving at the conference by train or by plane felt the need to clarify starting points, background assumptions, legacies, as well as potential misunderstandings and misinterpretations of similar sounding terminology or concepts. Today, the bar is even higher. The contours of the "left" have become less accentuated[5] and the association of a critical theory in law or the social sciences with a leftist agenda has become far more ambiguous than at earlier times.[6] A deconstruction of the public-private divide is no longer a prerogative of "left" legal or social scholarship. The focus on context, on "social norms," and on normative pluralism has long ceased to be an exclusively leftist program.[7]

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[5] TONY JUDT, ILL FARES THE LAND (2010)

[6] Peer Zumbansen, *Law's Knowledge and Law's Effectiveness: Reflections from Legal Sociology and Legal Theory*, 10 GERMAN L.J. 417 (2010), 426-428, available at: http://www.germanlawjournal.com/index.php?pageID=11&artID=1100

[7] Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEG. STUD. 537 (1998); Stewart Macaulay, *Relational Contracts Floating on a Sea of Custom? Thoughts about the Ideas of Ian Macneil and Lisa Bernstein*, 94 NW. U. L. REV. 775 (2000)

B. What, then, Is and Was at Stake?

The republication of the texts in their original form mandates an – admittedly intimidating reassessment of what was at stake then and what the questions are today. A comparative, transatlantic debate about the rise and transformation of a progressive legal theory, with roots in anti-formalist, nineteenth century legal thought and Marxist, post-Marxist social theory in 1986 is being catapulted into the present. But to what avail? Its publication in the *German Law Journal* reflects the *Journal's* (and the CLS movement's) commitment to context, the importance of place, history and political economy, which the authors from both sides of the Atlantic embraced at the 1986 conference.[8] Part of this commitment is expressed in the continuing inquiry into the promises and practice of comparative legal studies, to which scholars from around the world have been contributing in the *Journal* over the years.[9] It is also reflected in the *Journal's* efforts to continuously bring the invisible, the grey, the past, and the ambiguous into focus.[10]

Yet, what was and what is "at stake"? What does the 1986 conference stand for? How might it compare to conference undertakings today? Can such questions be raised at all? Can one expect an answer? Now and again, one has the impression of feeling the weight of too many things unsaid, of yet another conference, randomly thrown together, perhaps too hastily prepared for both the conveners and, as it turns out, some of the speakers. Yes, stepping out of a sometimes taxing routine of teaching, grading and administering, into the realm of idea-entrepreneurialism, can be a burden. But, can this explain the recurring feeling of "what am I doing here?" This creeps into much of today's conference and workshop culture; it often is evident after the delivery of the first round of papers. Somehow, there is this one facet in many of the original conference papers being republished here that shines through and should set off perhaps an alarm for today's "small world" (if the reader will allow this pun at David Lodge's famous rendition of a frantically fast-paced, self-forgetting academic conference circuit). That facet marking the original Bremen papers seems to be a striking absence of a particular breathlessness, which characterizes much of today's legal scholarship. The latter can today be associated with the seemingly never-ending, never-sleeping production of scholarly papers posted on the Social Science Research Network, likely driven by the omnipresent pressure to 'be visible'.

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[8] See the contributions to the 10th Anniversary Symposium for the German Law Journal, "THE TRANSNATIONALIZATION OF LEGAL CULTURES", held at the German Federal Justice Ministry in Berlin, 2-3 July 2009, available at: http://www.germanlawjournal.com/pdfs/TOC/pdf_table_of_contents_Vol_10_No_10.pdf

[9] RUSSELL A. MILLER AND PEER C. ZUMBANSEN (EDS.), COMPARATIVE LAW AS TRANSNATIONAL LAW: A DECADE OF THE GERMAN LAW JOURNAL (Oxford University Press, 2011) – *in print*.

[10] Daniel Augenstein, Introduction: *The reluctance to 'glance in the mirror': 'Darker Legacies of Law in Europe' Revisited*, 7 GERMAN L.J. 71 (2006), available at: http://www.germanlawjournal.com/pdfs/Vol07No02/PDF_Vol_07_No_02_71-82_Articles_Augenstein.pdf

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In contrast to this, the papers from the republished conference volume seem to possess the lightly sensible presence of a certain engagement and persistence. "What was at stake," of course, was not more obvious or easy to grasp at that time than it would be now. But, still, the involvement of the speakers and their commentators, respectively from distinct legal and political cultures, with each others' perspectives, starting points and revealed and hidden idiosyncrasies sends signals into today's ongoing efforts of engaging with comparative insights.[11] That seems to be all that one can say. And already I risk oversimplifying and generalizing as regards the diversity that can be found in today's scholarship.

C. Legal Education, Again

Perhaps, then, it might suffice to point to one other dimension that is prominent in these papers and in fact was explicit in some papers and formed the backdrop for others in Bremen. The connecting of research with conceptual and concrete effects for curriculum design and legal education reform is the dimension that, by contrast, seems to be missing at most of today's scholarly meetings. The link between what we have learned to call the "research agenda" (which informs a particular part of the job-talk, the request for a grant, or the solicitation from one's dean of a summer research fund) and what actually occurs in the class-room marks much of the scholars' work at and around the Bremen conference. Now, to be sure, curriculum reform has been a constant factor in the evolution of legal education. Then and now, the contestable nature of law school curricula, operating under the constraint of the foundational development of a lawyer in just three years, was and is still recognized as a pressing issue. Reform has consequences not merely for a law school's "ranking" and attractiveness for resourceful alumni, it is also a bellwether of profession.[12] At the same time, whatever the explicit or implicit political agenda is in one's scholarship, one will likely try to see it influence the courses one teaches and, to a certain degree, the curriculum of one's law school.

But, where does this discussion take place? How often do we find ourselves speaking with colleagues about the political agenda of a course or, even more, the curriculum of the places where we are at? There are, of course, trends, we seem to align ourselves to or distance ourselves from. But, who is setting them? What, then, can we say is "left" of the earlier more visible concerns about legal education and the ability or inability of curriculum designers to come up with a program that teaches students to "think like a lawyer" in a grand way? This is a very hard issue to address – all the more so in the limited space

[11] In this vain, Alexandra Kemmerer, *Constitutional Law as a Work of Art - Experts' Eyes: Judges of the World examine the Constitution of Europe*, 4 GERMAN L. J. 859 (2003), *available at* http://www.germanlawjournal.com/index.php?pageID=11&artID=304

[12] See eg http://law.wlu.edu/news/storydetail.asp?id=376.

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available here. Would it suffice, then, to allude to the political consequences of curriculum reform, of any effort made to better bring together the practical and theoretical dimensions of "being a lawyer" in law school were somehow more tangible then than seems to be the case today? Would that even be correct? Isn't the present concern of law schools, pretty much around the world, the effort to provide their students with the tools to operate in a globally connected, complex world?[13] Isn't that just a continuation of the charged battles over the "social justice" orientation of law schools in the 1970s and 1980s? Who is to provide a satisfying answer to the question whether the breathtaking expansion of offered courses in today's law schools, which mostly echoes the differentiation of both practice and theory of law, should be seen as a good or a bad development? The presently ubiquitous and potentially conflicting claims of making legal education both more "professional" and more "international" is perhaps today's terminological answer to the development of legal-curricular thinking as it made its way through the past two decades. Again, who is to say whether these terms are less political aims than the attempts to bring "critical" and "social" dimensions into the law school of the evolving welfare state?

D. Towards a Continuation of Dialogue

Raising these questions and falling short of even suggesting an answer, however, may not appear a very effective way of inviting an internationally distributed journal's readership to revisit academic papers delivered at a conference some two and a half decades ago. And yet, our readers might be nudged to "re-visit" these papers if only in light of the fact that so many of the questions raised during the 1986 conference are still valid today, even if they are not raised in the same way. These questions may have become more difficult to spot and to pursue, which adds to their complexity to begin with. Well, if anything, turn around and ask yourself, how many of your colleagues are interested and in – one way or the other – in the longer-term development of curriculum reform and legal education. How many are interested in, or perhaps even successful at, opening a space for questions concerning the connection between research and curriculum and professional-practical-critical-reflective training? Then, continue by asking yourself how many of those colleagues, about whom you could give a positive answer to these questions, seem to have fatigued and are resigned today from such engagement. What follows at that point is to ask yourselves why this might be the case.

In light of these slightly unsettling inquiries, what is – from the perspective of the *German Law Journal* – the motivation to republish the original conference's papers? As editors of a journal that grew out of a spontaneous idea – between a U.S. trained, criminal defense

[13] See, recently, Martha Minow, *Legal Education: Past, Present and Future*. Lecture delivered on 5 April 2010, available at: http://www.law.harvard.edu/news/spotlight/classroom/related/legal-education-past-present-and-future1.pdf; Rajish Bindal, *Legal Education – A Global Perspective*. Undated. Available at: http://www.highcourtchd.gov.in/right_menu/events/events/GlobalSpeech.pdf

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lawyer and constitutional law scholar and a German-French-U.S. trained private law theory scholar – in the fall of 2000 to provide English-language commentaries on German case law and legislative developments, we are extremely pleased about the opportunity to bring these texts together anew and to make them available to a world wide web-based audience. We are, at the same time, very excited and curious in anticipation of the reactions, comments and impulses they might trigger. Clearly, one of the guiding ideas of this project has been to initiate various sorts of possible engagement with and responses to the question and its underlying rationale, namely: what is the future of the "left after the left?" Meanwhile, it has become clear that such inquiries require, then as today, the location of issues in their context. This effort becomes more manageable if we recognize that – already in 1986 – the (many) issues, which seem to have informed and shaped the comparative exchange between the conference participants, the critical legal scholars in Germany and in the United States, were not as easily confinable and distinguishable as the event's title could have suggested. In hindsight (I was graduating from high school at the time of the conference!), "Critical Legal Thought" sought to capture a continuously evolving, diversified and complex inquiry into the place of law in society. One of the tasks connecting the 1986 event to its republication in 2011— and to what might ensue – will be to ask that question again – and again.