

CLS's European "Others"

"68"

Meanwhile 1968 has condensed to a signum – simply "68". Its meaning has, over time, detached itself from the name-giving events and thickened to a myth, comparable to "9/11" or almost, to stay within the tradition of unrest and law, "1789". Admittedly, where the myth unfolds an enigmatic truth, which receives its consecration from the world of gods, a signum, borrowed from mathematics, is merely distinguished by the existence of an omen of real events.

Less than a myth, rather a moment of rebellion, "68" first occurred at universities, burst its banks like a river that had been dammed for too long, and spread to other areas of society, in which traditions of authoritarianism, very much like in academia, were rampant. One does not want to call it revolution. Revolt, more or less. A collective rebellion of students against the low quality of cafeteria food at first, then academic gowns and traditions in Germany (West) the fathers' brooding silence over National Socialism. Finally, after it had been taken to the streets, protests became less provincial and were launched against capitalism (desperately seeking workers to join our ranks) and the borrowed reality of the Vietnam War (actually against a unitedstatesean war in and against Vietnam).

In law's citadels "68", this moment in Europe's "Rollercoaster" movement (Kershaw) after 1945, was not a theoretical melting pot. If anything, it turned out to be something like an ore separating of different elements of activity and strategy guided by theoretical authorities. It happened in law schools, in the streets, in party sessions behind closed doors and in the underground.

Pursuant to the left categorical imperative “The political is personal and the personal is political!”, I pick quite arbitrarily two storylines (a.k.a. narratives) and relate them subsurface to two items of legal critique in Germany and implicitly to the birth and adolescence of CLS.

Storyline # 1: The narcissism of small difference

68-style anti-authoritarianism was a demanding and exciting project that stood little chance to make a dent in German legal education, which was traditionally oriented towards two comprehensive final exams, organized and sequestered by the state, overshadowed by the brooding presence of the unitary mythical figure of the judge. Ossified, impenetrable and oblivious to the Savignys and Jherings of the 19th century, it functioned as a reproduction not only of hierarchy but of a doctrinal and authoritarian mindset that allowed many footmen of Nazi law to carry on.

Conformism prevailed in German law schools: Outside of the law schools Schmitt celebrated himself as the misunderstood genius, and faked his hometown as a site of emigration, whereas in the class-room a brazen but falsely modest Larenz reinvented and presented himself as a Hegelian teacher of nothing but legal method. While he literally read from his treatise on Civil Law, Part I, only students hardened against utter boredom would listen. Others law teachers, as was found out later, wrote undercover expert opinions for Neo-Nazi parties or sported their dark past and new conservatism in penitential robes. It is true that there were anti-authoritarian echoes in half a dozen places (Berlin, Hamburg, Frankfurt, less so in Munich). There was little if any liberalism in the 60s.

Most *law students* of the manageable number who developed what might be referred to as a political consciousness, moved their activity to venues outside

of the university. In the following I'll disregard the unhappy few who went underground to act out the murderous romanticism of armed struggle and focus on three versions of critical legal activity both academic and not:

1. *Cohort no. 1* met in reading circles, presented themselves as study groups (*Arbeitskreis*) that competed viciously, like Robert Scott and Amundsen in their race to the North Pole, in their search for the ultimate and authentic interpretation of Marx's "Economic and Philosophic Manuscripts" (1844) and, even more esoteric, one or the other volume of "The Capital". Thus they satisfied their desire for an intellectual homeland (and its cognitive and interpretative security) in highly authoritarian, self-contained, quasi-academic seminars outside the law schools where one would read and expound one of the privileged authorities. *Grand theory* instead of *doing doctrine* – an esoteric practice that would not seriously challenge legal education.

2. *Cohort no. 2* left the law school grounds altogether and met with like-minded comrades, actually *cadres* for real political activity. They founded political parties. Like functionaries of associations of displaced persons, they occupied themselves with their hermetic search for a new theoretical-political homeland. They clad their alienation from liberalism – capitalism rather – and their desire for a new left *truth* (or *truce*) in revolutionary rhetoric and pursued strategies that received its impulses and direction from usually one of the dominant authorities – preferably Marx, Lenin, Trotsky, and Mao. Later some discovered Gramsci. While they or at least some would have subscribed to "trash the glass of the ruling class", their know-it-all gesture of world interpretation, and their narcissism of the small theoretical difference prevented them from developing a critique of capitalism's law – students, who were looking for interpretative patterns or even a utopian horizon, would find intriguing or even attractive. The various communist, socialist, proletarian and

other “splinter parties” participated in elections (all in all, they mustered no more than 15.000 followers nationwide).

Grand politics (with an authoritarian touch) instead of politicizing legal education (which they, according to the basis/superstructure distinction, did not consider as a genuine workplace it seems).

It was easy not to join any of the academic/esoteric groups or the cadres of this new, albeit tiny international. Because they shared, each in its own way,

(1) *in* (what may be euphemistically called) *practice*: a preference for *grand gestures* over a critique of law & legal education and its disciplinary mechanisms,

(2) *in theory*: a very *unsexy dogmatism* that disavowed and ran against what we believed to be the anti-authoritarian heart of 68.

(3) In consequence, they lived in a *borrowed reality* where they invariably bred a remarkable narcissism and authoritarianism.

Storyline # 2: The Birth of a Critical-Legal Journal

Cohort no. 3: takes us back to 68 again for another, less disenchanting narrative. An all-male group of unaligned students with a strong sense of political spontaneity (some would qualify as lizard-typesetters) and weak union-, left social-democratic or socialist orientations, sought a way out of the dead-end street of sterile theorizing, endless teach- or sit-ins, or illusory party politics. They decided to launch a critical-legal journal (unusual in Germany where law reviews have never been in students’ hands). With the support of Fritz Bauer, Prosecutor General in Frankfurt and mastermind of the Auschwitz trial, the project went off the ground in 1968. Its program: anti-fascism (the

role of law and judges after 1933), anti-restorationism (conservative after 1945) and exploring the socio-economic foundations of law and struggles for “legal positions”.

Despite the somewhat weird name of the journal, “Kritische Justiz” (shorthand: KJ), it became fairly successful, considering its clearly left political and theoretical orientation. It gained a reputation of a politically non-aligned journal – especially not with the very traditional German Communist Party; there were correspondences with socialist journals, though. Over the years it represented and published a wide spectrum of heterodox approaches: While the union and social-democratic orientations were fading away towards the end of the 1970s, feminism came on board in the mid-1980s, later queer theory and only in the 1990s postcolonial critiques of law. There has always been one strand (authors and texts) that would be identified as left-liberal/social-democratic critique with a normative twist.

Despite university budget cuts, digitalization, the old guard of 68-lawyer activists cancelling subscriptions (the revolution was over, no time to read), some formerly leftists now turned renegades, and a general rise of pragmatism in law (critique getting the reputation of being “not very practical”), - surprisingly enough the KJ survived (unlike most of the 68 journals). However, it lost a large segment of its subscriptions. The gender profile of the journal’s editorial board, which I joined in 1978, changed dramatically: the association of men turned into a more gender-mixed group in the 1980s, and is now dominated by a female two-thirds majority.

Though disciplined by the rules and regulations of the publishing market, once even threatened by the publisher’s bankruptcy, the KJ maintained its position on the market and its (marginal) mark and status in the attention span of law

students and teachers. Maybe its success hinged upon being widely regarded as “left” but ideologically non-aligned.

Why CLS could not have happened in Bremen, Brest or Brighton

Against this background CLS was attractive (for European critics, maybe only for me) because it appeared to stand for a quite-different project. If painting with a broad brush is permitted, CLS seemed more like a decampment rather than revolution following and translating a solid, hermetic ideological agenda. Some of features I found strikingly different:

- No grand (legal) theory focus – despite various Marxian-Foucaultian, later Derridaesque and other romances – but “doing doctrine”, thus continuing and radicalizing the project of legal realism [and also Wiethölter’s political theory of law as disenchantment] --- rather than a more *empirical sociological jurisprudence*.
- No grand revolutionary politics and visions of a better world (which incidentally demystified “public interest lawyering”) but a focus on the structures of legal education --- rather than *social-democratic legal reformism*.
- No unitary theory but a (not always happy [see the controversy over the critique of rights] but always lively ensemble of) heterodox approaches to legal history, contracts, labor law, criminal law, international law and so on... (mark the famous footnote 1). --- Rather than another well-known, traditional *attempt at preserving the left-liberal heritage*.
- In short: intellectual guerilla tactics rather than conventional warfare, invading law with an outside or outlandish theory.

Günter Frankenberg