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Theorizing Transnational Law – Observations on a Birthday

By *Susanne Baer* *

A. Introduction

There are many ways to theorize transnational law. As always, there is a mainstream, and there are “sidestreams.” However, it may be more interesting to consider from which direction such theories develop. Here, in appreciation of what the *German Law Journal* did to transnational legal conversations, I suggest to consider three directions in transnational legal studies: (1) theorizing from above; (2) theorizing from below; and (3) theorizing from inside. As you will see, much of the theories are in the *German Law Journal* (GLJ).¹

B. Theorizing from Above

Theorizing from above is theorizing in the mainstream tradition of “*Völkerrecht*,” which is the law of nation-states that are represented by elites, speaking for imagined communities. Such mainstream theory may try to understand the formation of a global legal order, as a multilevel system of treaties, or as a web of binding principles and a multi-actor network of treaty bodies, governments, and more and more international lobbying.² Here, a rather etatistic question arises: whether the EU is indeed a state, or rather a treaty system? This question may inspire some to limit transnational developments because they do not exactly mirror what we grew so accustomed to on the national level. At least some German Federal Constitutional Court remarks on the Lisbon

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¹ References will be to GLJ, if not otherwise indicated.

² Frank Schorkopff and Christian Walter, *Elements of Constitutionalization: Multilevel Structures of Human Rights Protection in General International and WTO-Law*, 4 GERM. L. J. 1359 (2003), available at <http://www.germanlawjournal.com/pdf/Vol04No12/PDF_Vol_04_No_12_1359-374_European_Schorkopf_Walter.pdf>.

Treaty³ mirror such attitudes. Moving beyond a national fixation, or even nationalistic, culturalized and ethnized ideology, the focus of international law moves towards social transformation intersecting with state transformation⁴, to transnational governance, in a variety of meanings, as in the work of Bogdandy and others.⁵ Then, the focus is on the arrangements and at the forms of authority which actors employ engaged in transnational lawmaking.

To give such mainstream a critical turn, Koskeniemmi is well known for his critical approach to international governance, as composed of deformalisation, fragmentation and empire, and has engaged in a heated debate, including the question of whether there is "rebellious without a cause."⁶ Others have challenged the neutrality of the state, as the one and only unit interesting in the aforementioned mainstream version of international law.⁷ To add a feminist, as well as a postcolonial turn, we need to understand who speaks to whom, and who is silenced, what kind of gendering and what kind of geopolitical ascription is employed in what ways. It should be asked, and the *GLJ* could do that more often, whether there is, for example, a prolongation of colonial politics in the guise of cooperation underway, or whether human rights regimes reinforce a public private distinction, which discriminates against women. It also seems worthwhile to understand

³ Bundesverwaltungsgericht [BVerwG] Federal Constitutional Court, June 30, 2009, 2 BvE 2/08. (F.R.G.), available at <http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html>.

⁴ Graf-Peter Calliess and Peer Zumbansen, *Law, the State, and Evolutionary Theory: Introduction*, 9 GERM. L. J. 389 (2008), available at <http://www.germanlawjournal.com/pdf/Vol09No04/PDF_Vol_09_No_04_389_396_SI%20Evolution_Calliess_Zumbansen.pdf>.

⁵ Armin von Bogdandy, Philipp Dann and Matthias Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, 9 GERM. L. J., 1375 (2008), available at <http://www.germanlawjournal.com/pdf/Vol09No11/PDF_Vol_09_No_11_1375-1400_Articles_von%20Bogdandy_Dann_Goldmann.pdf>; Armin von Bogdandy, *General Principles of International Public Authority: Sketching a Research Field*, 9 GERM. L. J. 1909 (2008), available at <http://www.germanlawjournal.com/pdf/Vol09No11/PDF_Vol_09_No_11_1909-1938_Articles_von%20Bogdandy.pdf>.

⁶ Martti Koskeniemmi, *A Response*, 7 GERM. L. J. 1103 (2006), available at <http://www.germanlawjournal.com/pdf/Vol07No12/PDF_Vol_07_No_12_1103-1108_SI_Koskeniemmi.pdf>; Anne Orford, *A Journal of the Voyage from Apology to Utopia*, 7 GERM. L. J. 993 (2006), available at <http://www.germanlawjournal.com/pdf/Vol07No12/PDF_Vol_07_No_12_993-1010_SI_Orford.pdf>; Mario Prost, *Born Again Lawyer*, 7 GERM. L. J. 1037 (2006), available at <http://www.germanlawjournal.com/pdf/Vol07No12/PDF_Vol_07_No_12_1037-1044_SI_Prost.pdf>; Jason Beckett, *Rebel Without A Cause? Martti Koskeniemmi and the Critical Legal Project*, 7 GERM. L. J. 1045 (2006), available at <http://www.germanlawjournal.com/pdf/Vol07No12/PDF_Vol_07_No_12_1045-1088_SI_Beckett.pdf>; Balakrishnan Rajagopal, *Martti Koskeniemmi's From Apology to Utopia: A Reflection*, 7 GERM. L. J. 1089 (2006), available at <http://www.germanlawjournal.com/pdf/Vol07No12/PDF_Vol_07_No_12_1089-1094_SI_Rajagopal.pdf>; Florian Hoffmann, *An Epilogue on an Epilogue*, 7 GERM. L. J. 1089 (2006), available at <http://www.germanlawjournal.com/pdf/Vol07No12/PDF_Vol_07_No_12_1089-1094_SI_Rajagopal.pdf>. See also David Kennedy, *The Last Treatise: Project and Person (Reflections on Martti Koskeniemmi's From Apology to Utopia)*, GERM. L. J. 1089 (2006) available at <http://www.germanlawjournal.com/pdf/Vol07No12/PDF_Vol_07_No_12_981-992_SI_Kennedy.pdf>.

⁷ See generally Karl-Heinz Ladeur and Ino Augsberg, *The Myth of the Neutral State: the Relationship Between State and Religion in the Face of New Challenges*, 8 GERM. L. J. (2007) 143, available at <http://www.germanlawjournal.com/pdf/Vol08No02/PDF_Vol_08_No_02_143-52_Articles_Augsberg_Ladeur.pdf>.

the symbolic order with its often-racialized visions of the Southern subaltern, or Asia and “tiger states,” and the like.⁸

C. Theorizing from Below

Thus, there are a variety of approaches available to conceptualize transnational law, and there is another direction from which to think about it as well. I call it, for lack of a better term, and with a mild reference to history from below, or people’s history, “theorizing from below.” This approach owes some basic assumptions to, not exclusively but rather largely, German legal sociology. This is law and society research, German style, which also became U.S. émigré style and fostered law and society studies in many places in the long run. It developed a keen interest in people, be it the people who adjudicate, as in early studies on “*Klassenjustiz*,” then “*Richterssoziologie*” and “*Justizforschung*,”⁹ as well as an interest in the people who litigate, but also in the people who simply follow, or disobey the law, who know or do not know the law, who mobilize law in a variety of forms. There is a strong body of research on social movements, not necessarily in the form of NGO’s, which use law in very peculiar ways, for example as a “playground” to scandalize politics (which the German Green party did in its early days), and there is a growing body of research which wonders whether and how that happens in transnational legal settings, for example in abortion cases in which feminists intervene as “*amici curiae*” from all over the world, even where courts do not know such institutional form of participation (which was the case in the German FCC, when U.S. feminists simply sent a brief).

In addition to such socio-legal approaches to transnational law and, again, to theorize transnational law from below, there is the body of critical studies of law, which I tend to call “*interdisziplinäre Rechtsforschung*.”¹⁰ Interdisciplinary studies are critical in that legal studies have to confront the limitations of a legalistic approach, and allow other methodologies to be as important. In addition, interdisciplinary studies of law attempt to not only work with the genealogy of socio-legal studies, but do also expand our understanding of law as a phenomenon towards cultural studies and critical approaches to the force of law, thus including to engage with postmodern philosophy.¹¹ Theorizing transnational law from below than means to reflect on positioning, or location (where is below? for whom?), thus to also look at the dynamics of silencing and exclusion in transnational environments. For example, the Convention, which invited civil society to participate in European law making, drafted the Charter of Fundamental Rights for Europe, had many participate in a wonderful moment of public deliberation, also replicated the digital divide, class and gender distinctions, multidimensional discrimination. This translates into unequal representation and even unequal access, if things look rather open,

⁸ ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW* 2005.

⁹ Udo Di Fabio, *The Present and Future Meaning of the State and the Role of the Federal Constitutional Court - Interview*, 2 GERM. L.J. 20 (2001) available at <<http://www.germanlawjournal.com/article.php?id=20>>.

¹⁰ This is the credo of the new Law & Society Institute Berlin, at Humboldt University,, available at <<http://www.institut-fuer-recht-und-gesellschaft.de/>>.

¹¹ JACQUES DERRIDA, *FORCE OF LAW: THE “MYSTICAL FOUNDATION OF AUTHORITY”* (1992).

yet are closed to some.¹² In light of such experiences, we need to rethink several principles precious to our understanding of law at home, just as Claire O'Brien started rethinking "deliberative cosmopolitanism."¹³

D. Theorizing from Inside

A third way to theorize transnational law is theorizing from within. It profits from the long tradition of comparative legal studies, not only in Germany, but in Germany with a very long tradition of global curiosity and a willingness, compared to the U.S., and closer to Canadian jurisprudence, to be a bit less "originalist" and a bit more transnational or international at times. This approach to transnational law comes in varieties, too, and is severely transformed by adding interdisciplinary research.

Although German comparativists have prominently articulated a functional approach, a critical response became as prominent when articulated by Günter Frankenberg years ago, and, as one *spiritus rector* of the *German Law Journal* explained, inspiring still.¹⁴ In "critical comparisons," Frankenberg pledged to take a theoretical stance of "differencing and distancing," of anti-legalese, of contextual reflexivity – a point I have tried to put to practice with a call to intercultural competence as a key methodological requirement in the field.¹⁵ This fits nicely with Choudry's idea of migration, in comparative constitutional law.¹⁶ Yet concepts of traveling have also been challenged, in feminist theory, to carry the risk to loose precious baggage when traveling too fast.¹⁷ In transnational legal settings, we may fall back to the illusion that legal transplants always work if we do not understand the full scope of meanings a legal concept entails. To do so, Tilmann Schneider at the Junior Research Group on "Constitutions beyond the Nation-State" at Humboldt University,¹⁸

¹² See generally Susanne Baer, *Citizenship in Europe and the Construction of Gender by Law in the European Charter of Fundamental Rights*, in GENDER AND HUMAN RIGHTS: COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 83-112 (Karen Knop ed., 2004).

¹³ Claire O'Brien, *Reframing Deliberative Cosmopolitanism: Perspectives on Transnationalisation and Post-national Democracy from Labor Law*, Vol. 9 GERM. L. J. No. 8 (2008), available at <http://www.germanlawjournal.com/pdf/Vol09No08/PDF_Vol_09_No_08_1007-1042_Articles_O'Brien.pdf>.

¹⁴ Peer Zumbansen, *Comparative Law's Coming of Age? Twenty Years after Critical Comparisons*, Vol. 6 GERM. L. J. No. 7 (2005), available at <http://www.germanlawjournal.com/pdf/Vol06No07/PDF_Vol_06_No_07_1073-1084_Articles_Zumbansen.pdf>.

¹⁵ Susanne Baer, *Verfassungsvergleichung und reflexive Methode: Interkulturelle und intersubjektive Kompetenz*, ZAÖRV (2004), available at <http://www.hjil.de/64_2004/64_2004_3_a_735_758.pdf>.

¹⁶ See also Carl Lebeck, *National Constitutionalism, Openness to International Law and the Pragmatic Limits of European Integration - European Law in the German Constitutional Court from EEC to the PJCC*, Vol. 7 GERM. L. J. No. 11 (2006), available at <http://www.germanlawjournal.com/pdf/Vol07No11/Vol_07_No_11_907-945_Articles_Lebeck_pdf>. But see SOUJIT CHOUDRY, *THE MIGRATION OF CONSTITUTIONAL IDEAS* (2006).

¹⁷ Gudrun-Axeli Knapp, *Race, Class, Gender. Reclaiming Baggage in Fast Travelling Theories*, EUROPEAN JOURNAL OF WOMEN'S STUDIES 249-265 (2005).

¹⁸ For a critical approach developed in this context, see Isabelle Ley, *Verfassung ohne Grenzen?*, in EUROPA JENSEITS SEINER GRENZEN 91 (Ingolf Pernice et al. eds., 2009).

thinks about whether we should abandon migration as a metaphor, and use “translation” instead, to understand how law as a pluralist phenomenon in itself develops.

In addition to these approaches, theorizing international law from inside also calls for an understanding of the meanings of law, from a multidisciplinary perspective. For example, it is worthwhile to study, while reading the *GLJ*, the paradigms employed in the world of law—“Westphalia”¹⁹—as assets of a symbolic order, rather than only as historical references. As another example, there is a question of how law deals with taboo, i.e. in states of exception.²⁰

E. Transnational Conversations

One may have noticed that my sympathies lie with the critical approaches to transnational law. I profit tremendously when people look at law this way, and abandon the illusion of law as a homogenous national body of rules, to understand the pluralism of law within and beyond the borders of nation-states, thus: transnational law. Now how does one come to develop this perspective, and to join such discussions?

You will need a reflexive methodology, including intercultural and inter-subjective competence,²¹ a modest stance towards the world, and your own position on and in it—which is not as easy as it may sound.

You will need to be curious, and open-minded, especially when your hidden assumptions come under scrutiny, willing to change.

You will need to be good, really good, something Germans tend to call “excellent” these days, based on a national competition for research funding.

And you will need to exchange ideas with a lot of people.

How do you do that?

¹⁹ Marcilio Toscano and Franca Filho, *Westphalia: A Paradigm? A Dialogue Between Law, Art and Philosophy of Science*, 8 GERM. L. J. 955 (2007), available at <http://www.germanlawjournal.com/pdf/Vol08No10/PDF_Vol_08_No_10_955-976_Articles_Filho.pdf>.

²⁰ Volker Heins, *Giorgio Agamben and the Current State of Affairs in Humanitarian Law and Human Rights Policy*, 6 GERM. L. J. 1217 (2005), available at <http://www.germanlawjournal.com/pdf/Vol06No09/PDF_Vol_06_No_09_1217-1242_Articles_MaLaren_Schwendimann.pdf>; Cornelia Vismann, *Derrida, Philosopher of Law*, 6 GERM. L. J. 5 (2005), available at <http://www.germanlawjournal.com/pdf/Vol06No01/PDF_Vol_06_No_01_005-13_SI_Vismann.pdf>; Ulrich Raulff, *Interview with Giorgio Agamben – Life, A Work of Art Without an Author: The State of Exception, the Administration of Disorder and Private Life*, 5, GERM. L. J. 605 (2004), available at <http://www.germanlawjournal.com/pdf/Vol05No05/PDF_Vol_05_No_05_609-614_special_issue_Raulff_Interview.pdf>; Giorgio Agamben, *Bodies Without Words: Against the Bio-political Tattoo*, 5, GERM. L. J. 167 (2004), available at <http://www.germanlawjournal.com/pdf/Vol05No02/PDF_Vol_05_No_02_167-169_Legal_Culture_Agamben.pdf>.

²¹ See Baer, *supra* note 15.

There is a clear answer: Read, at least,²² the *German Law Journal*, and submit contributions to it.

Curiosity and open-mindedness—the Journal publishes way beyond the mainstream, confronts you with critical approaches, with interdisciplinary thinking, with deconstruction, with (some, there could be more²³) feminist, as well as anti-feminist,²⁴ thinking, and with some postcolonial ideas.

Good, or excellence—the Journal gives you excellent and fast accounts of key German court decisions, and the Journal is peer reviewed, and accepts around 30 % of the manuscripts submitted. It is interesting, I promise.

And: A lot of people—the *Journal* has had millions of visits online.

To theorize transnational law, there is a space, online. I am grateful for that, to both spirits behind, Peer Zumbansen and Russell Miller, and to all the students who work for it. Congratulations—and please: go on.

²² For those interested in constitutional law around the globe, see <http://www.law.nyu.edu/icon/index.htm>.

²³ See INTERNATIONAL LAW: MODERN FEMINIST APPROACHES (Doris Buss and Ambreena Manji eds., 2005).

²⁴ Compare Nicola Vennemann, *The German Draft Legislation on the Prevention of Discrimination in the Private Sector*, 3 GERM. L. J. 137 (2002), available at <<http://www.germanlawjournal.com/article.php?id=137>> with Karl-Heinz Ladeur, *The German Proposal of an "Anti-Discrimination" Law: Anti-constitutional and Anti-common sense. A Response to Nicola Vennemann*, 3 GERM. L. J. 152 (2002), available at <<http://www.germanlawjournal.com/article.php?id=152>> and Viktor Winkler, *The Planned German Anti-Discrimination Act: Legal Vandalism? A Response to Karl-Heinz Ladeur*, 3 GERM. L. J. 158 (2002), available at <http://www.germanlawjournal.com/article.php?id=158>>.