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Peer Zumbansen

Transnational Law

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EDITORS: Peer Zumbansen (Osgoode Hall Law School, Toronto, Director, Comparative Research in Law and Political Economy, York University), John W. Cioffi (University of California at Riverside), Lindsay Krauss (Osgoode Hall Law School, Toronto, Production Editor)

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TRANSNATIONAL LAW

Abstract: This chapter traces the development of the concept of Transnational Law since Philip Jessup's Storrs Lectures at Yale Law School in 1955. Jessup had famously challenged the doctrinal and conceptual boundaries of both public and private international law to suggest that another concept be more adequately suited to capture the myriad normative and transactional relations across national borders. "I shall use", Jessup wrote, "the term 'transnational law' to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories". Transnational law since became a promising perspective from which to assess the regulatory challenges arising in an increasingly interdependent, globalizing world. The following chapter touches on a number of key areas where the idea of transnational law has proven most fruitful and provocative (lex mercatoria, corporate governance, public international law, human rights litigation) before drawing some conclusions for a methodological understanding of transnational law and its consequences for law school curriculum reform

Keywords: transnational law, law school curriculum reform, lex mercatoria, corporate governance, public international law, human rights litigation

JEL classification: K10, K33, K40

Peer Zumbansen

Associate Dean (Research, Graduate Studies & Institutional Relations).

Director, CLPE Comparative Research in Law & Political Economy
[www.comparativeresearch.net]; Co-Editor in Chief, German Law Journal
[www.germanlawjournal.com]

Osgoode Hall Law School, York University, Toronto ON

Email: pzumbansen@osgoode.yorku.ca

68 Transnational law*

Peer Zumbansen

1 Introduction

The first usage of the term ‘transnational law’ (TL) continues to be disputed. While scholarship focused on the origins of the term for a long time, it has since become apparent that the real challenge of TL lies in its scope and conceptual aspiration (Jessup, 1956; Koh, 1996). Alongside the domestic-international dichotomy that marked international law for a very long time TL offers itself as a supplementary and challenging category within interdisciplinary research on globalization and law. As famously conceptualized in a series of lectures by Philip Jessup at Yale Law School in 1956 (Jessup, 1956), TL ‘breaks the frames’ (Teubner, 1997b) of traditional thinking about inter-state relationships by pointing to the myriad forms of border-crossing relations among state and non-state actors. Now, half a century after Jessup’s lectures, one is well advised to reread the slim but nevertheless immensely rich volume. Without many references, Jessup invites his audience to imagine an altogether different conceptual framework. This framework would help to reflect on the dichotomies underlying and informing international law while decisively moving onward to embrace a wider and more adequate view of global human activities. Jessup writes that he ‘shall use the term “transnational law” to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories’ (Jessup, 1956, p. 2).

When examining the inescapable ‘problem’ of people worldwide whose ‘lives are affected by rules’, Jessup wastes no time in pointing to the contingency by which we attribute the label of ‘law’ to rules, norms or customs that govern various situations. ‘As man has developed his needs and his facilities for meeting his needs, the rules become more numerous and more complicated. History, geography, preferences, convenience, and necessity have dictated dispersion of the authority to make the rules men live by’ (ibid., p. 8). Jessup complements this bold exposition of the multitude of norm-producing institutions and actors with an intriguing presentation of three short dramas that illuminate the parallels between domestic and international constellations. While the first scenes of two of the three dramas

* See also: International commercial regulation.

feature individuals caught up in disturbing, doctrinally challenging, legal conflicts – variously involving divorce or the exercise of membership rights in a stock corporation – the complementing scenes invoke a very similar problem set on the inter-state level. Set against an ensuing discussion between the art critics, Mr Orthodox and Mr Iconoclast, Jessup extrapolates the inseparability of the issues that underlie the allegedly exclusively ‘domestic’ versus the likewise purely ‘international’ constellations. The truly subversive thrust of Jessup’s vision of TL lies in the parallels that can be recognized between supposedly regional or internal issues in one place and those in another one. ‘One’s idea of what constitutes a “region” is apt to be artificial and highly subjective. The people in Boston and New York today might quite properly feel that they have a closer identity with the people of India than their grandfathers felt interest with the farmers of Iowa’ (ibid., p. 26). With regard to stockholders, Jessup lets Mr Iconoclast point out the parallels between purportedly domestic discussions concerning ‘shareholder democracy’ and those involving increased demands for improved participatory rights in the United Nations and other international organizations.

For the sake of both accolades and brevity, it must suffice to point to the collection of tributes appearing almost 20 years after *Transnational Law* was published (Friedmann, Henkin and Lissitzyn, 1972), as well as mention Jessup’s clairvoyant treatment of issues that would – much later – still occupy our legal minds. One of these issues concerns the problem of the extraterritorial reach of antitrust statutes (Jessup, 1956, p. 75; Buxbaum, 2004); another issue involves the uprooting of dearly-held convictions of jurisdictional boundaries and competences (Jessup, 1956, pp. 72–7; Michaels, 2004). These elements clearly underscore the relevance of Jessup’s ground-breaking work with regard to the continuing and further differentiating inquiry into the law of globalization.

Although the term ‘globalization’ had not yet entered the Lexicon at the time of Jessup’s lectures, TL has begun to reach deep into the heart of even our present-day struggles over the role of law within dispersed and fragmented spaces of norm production (Fischer-Lescano and Teubner, 2004). TL presents a radical challenge to all theorizing about law as it reminds us of the very fragility and unattainedness of law. At the beginning of the 21st century, we are still at a loss to identify a theory of law that would be subtle enough not to stifle emerging identities in a post-colonial era while providing forms, fora and processes (Wiethölter, 1986) for the collision of discourses that mark post-metaphysical legal thinking (Habermas, 1996). TL works itself like a drill through the few remaining blankets hastily thrown over an impoverished and internally decaying conceptual body. TL lays bare a description of a world that long ago began to give testimony of

Philip Allott's international 'unsociety' (Allott 1990, p. 244). In this world in our conceptual, political and theoretical preoccupation with inter-state relationships has worked to disregard the projection of unreflected domestic notions of power and legitimacy onto the international scene (Zumbansen, 2001, 2002a; Koskeniemi, 2005, p. 122) while otherwise failing to imagine the emergence of an international society of connected individuals. With the dominance of state-to-state relationships, 'progress in international organization' was seen primarily as relating to state actors and functions (Hudson, 1932, 1944). Against this background we can begin to grasp and assess the revolutionary potential of Jessup's concept of TL, which he unfolded in the light of an 'international society in its present condition of still embryonic organization' (Jessup, 1956, p. 104).

In the term's long history, its variances can be attributed mostly to the different doctrinal and theoretical backgrounds of those employing it. This short exposition of TL will introduce the grand strands of discussion in different branches of legal doctrine and theory by way of visiting and revisiting the places and times of TL in the historical and legal consciousness. Inspired by Philip Jessup's exposition of the idea and concept of TL (Jessup, 1956; Schachter, 1986, p. 878), this chapter will address TL from the viewpoint of the commercial (arbitration) lawyer, the corporate and the public international lawyer and the human rights lawyer. Finally, the chapter will conclude with brief remarks on the relationship between the emerging field of transnational (legal) history and TL and the impact of TL on legal education.

2 Lex mercatoria

The rediscovery of the medieval law merchant through the works of commercial lawyers after World War II, began a great revival of the notion of a borderless, universal trade law of nations (Goldman, 1964; Schmitthoff, 1964). This notion had received a great deal of attention and intellectual conceptualizing as early as the 17th century (Milgrom, North and Weingast 1990; Stein, 1995; Cordes, 2003). As seen above, Jessup proposed that TL should encompass and simultaneously challenge public and private international law were the latter to maintain their explanatory and guiding potentials in an ever more integrating world. Commercial lawyers seized this moment and engaged for decades in a far-reaching enterprise of collecting, consolidating, codifying and harmonizing the various laws governing international trade. Peculiarly mirroring today's dispute of 'fervent imagination' versus the 'school of hard knocks', i.e., visionary, theoretical, perhaps religious, legal thinking as opposed to realist, pragmatic, result-oriented doctrine creation (Thomas Franck, in Philip Allott Symposium, *EJIL* 16, 343, 2005), lawyers carried on a dispute over both

the legal nature and the very existence, of *lex mercatoria* as an autonomous legal order (Schanze, 1986; Stein, 1995; Teubner, 1997; Mertens, 1997; Berger, 2001; Gaillard, 2001). Aptly characterized as a battle between 'transnationalists' (those embracing the emergence of a self-producing legal order among commercial actors) and 'traditionalists' (emphasizing the continuously important role of the state in enforcing arbitral awards), the dispute over *lex mercatoria* exposed the vulnerability and burdens of a practice/theory-based challenge to 'official' law, being those state-made norms and statutes, embedded in an institutionally sound enforcement environment (Berger, 1996; Calliess, 2002; Zumbansen, 2002a).

Two developments, however, have shifted the focus away from such pre-occupations. Far from being the product of powerless processes of negotiation, the 'common law of contracts' (Teubner), the autonomous legal order of *lex mercatoria* could be shown to continue and amplify the power cleavages between the haves and have-nots, between the North and the South, the West and the East (Dezalay and Garth, 1995, 1996; Shalakany, 2001). In part this critique premeditated today's scepticism towards what the writer Schneiderman has coined 'new constitutionalism' (Schneiderman, 2000). However, the proponents of an autonomous legal order are well aware that *lex mercatoria* will inevitably undergo dramatic phases of repolitization (Teubner, 1997), by having to meet itself some of the nation states' structural challenges with regulating the economy. This process of repolitization forms one layer of *lex mercatoria*'s coming of age. The concept of TL that underlies and continues to shape the appearance and applicatory scope of *lex mercatoria*, must be seen as unfolding in a much more radical, reflexive manner. Much as in Jessup's drama, TL points to the overarching political, perhaps utopian struggles that are shared among comparable developments and social movements in different 'regions'. The struggle for (legal) recognition of a transnational, denationalized *lex mercatoria* is the otherwise left behind, domestic struggle for the power and legitimacy of order through law. As it is exemplified through *lex mercatoria*, TL reminds us of the never attained positivity of legal rule, which is a conflict that we have come to address by distinguishing between legality and legitimacy. TL breaks with the separation of domestic and international legal (economic, social, cultural, political) problems and, instead, seeks to assess the inner connections and resemblances in their alleged differences. These differences are not, however, the result of the opposition between its domestic and international qualities. Rather, the labels of 'domestic' or 'international' are merely the exertions of definitional and conceptual sovereignty over an otherwise untameable power.

Dramatically exemplified through the emergence of a denationalized commercial law, TL is nothing but a resurgence and restatement of the very

problem of regulatory power and autonomy, of private and public autonomy. In this way, TL reconnects inseparably with both 'domestic', private law discussions (over freedom of contract, duress, unconscionability and consumer protection) and the public law themes of deregulation and privatization. These discussions characterize the continuing ideological struggle over the delineation of the state from the market, and of the public from the private. Seen against this background, the project of a constitutionalized private law undertakes the impossible task, of sustaining the paradox between these irreducible spheres of societal freedom. This project should not be dismissed solely for lacking the enthusiasm to (re-) embrace a perhaps inadequate conception of the 'state' simply to prevent the market from taking over.

3 Corporations

Administered centrally and from within inter-firm networks, transterritorialized globe spanning company activities bring together a multitude of autonomous organizational and economic actors that can easily exhaust the traditional regulatory aspirations of nation states and other political bodies (Hertner, 1998; Herkenrath, 2003). The study of the transnational law of corporate governance focuses on the various existing regulatory frameworks for business corporations on the domestic, transnational and international level and helps to illuminate the embeddedness of firms in layers of rules (produced by regulatory and self-regulatory bodies), economic and political constraints and historically evolved legal cultures (Shonfield, 1965; Granovetter, 1985; Boyer and Hollingsworth, 1997; Zumbansen, 2002b). The embeddedness of business corporations must be understood as relating to their origin and development in systems of production (Storper and Salais, 1997; Jacoby, 2004) as well as in legal and socioeconomic cultures. In relation to the regulation of business corporations, TL differentiates between the hard law that governs the corporation through company law or, e.g., securities regulation and even labour law on the one hand, and the soft law of voluntary codes of conduct, corporate governance codes and human rights codes on the other. As the latter present a dramatic challenge to traditional understandings of lawmaking, the analysis of voluntary codes of conduct further illuminates the complex nature of the regulated and self-regulating firm. Considering the embeddedness of business corporations in an increasingly denationalized knowledge economy, their placement in a multilevel regulatory field, comprised of official and non-official norm producers, becomes more visible. On the one hand, TL comprises the law governing the global business corporation through a multi-level and multi-polar legal regime of hard and soft law, statutes and recommendations, command-control structures of mandatory rules as opposed to an ever

more expanding body of self-regulatory rules (Zumbansen, 2002b; Arthurs, 2002). On the other hand, TL constitutes a reflexive practice that critiques itself with regard to its regulatory and legitimizing aspirations. Thus, TL provides a better understanding of the changing nature of the applicable law itself. As we witness the emergence of soft-law standards against regulatory dead-ends and political blockades, the question inevitably presents itself as to how we ought to draw the line between official law and non-official law, between hard and soft law, ultimately between law and non-law. In the context of contemporary struggles over the adequate regulation of business corporations and their relations to shareholders and stakeholders, TL must be seen as holding a central place within a legal theory inquiry into the nature of governance through law.

4 Public (international) law

In the eyes of both the public international lawyer and the domestic administrative/constitutional lawyer of the second half of the 20th century, TL marks a significant challenge to the state-centred view of international relations and international, constitutional and regulatory law. TL undermines and complements the legal view on relationships between states and state actors in the international arena by emphasizing the importance of non-state actors in cross-border relationships. This recognition of private actors' growing relevance in cross-border relationships allows for a much richer understanding of the international community than would otherwise have been possible under the pressure of the oppositional ideology of the Cold War. However, TL offers itself as a label for more than merely private law-based, cross-border transactions involving non-state actors and regulatory networks. Rather, TL also encompasses those relationships between state and nonstate actors across state boundaries that fall short of leading to official international legal acts such as treaties or conventions.

Often overlooked in Philip Jessup's famous definition of TL (Jessup, 1956, p. 3), this public dimension turns the term into both a concept which questions the international law regime based upon the separation of state and non-state actors and a programme, that provokes a more radical legal theory conceptualization of denationalized human and institutional interaction (Sassen, 2003). At first glance, TL apparently prompts the legal imagination of a wealth of untraditional, alternative forms of border-crossing activity through regulatory and judicial networks (Slaughter, 2004). Looking again, it also sparks a rediscovery of the informal, unofficial, contractual *lex mercatoria* of the medieval merchants (Dezalay and Garth, 1995; Teubner, 1997; Berger, 2001; Cutler, 2003; Zumbansen, 2004). Additionally, however, TL must also be seen as shaping and informing a much wider field of work on legal concepts. The fruitful dynamic of

TL today lies in its capacity for illuminating the overwhelming complexity of decentred and highly fragmented socio-legal and political discourses around transnational activity.

From a public law-inspired view on international activity and norm production, TL has both a destructive and a constructive thrust. It is employed to destroy, erode and relativize the view that states alone are relevant actors in border-crossing activity (Zumbansen, 2002a; Berman, 2005). Frequent exchanges and increasing cooperation among different state representatives nurture the view of a highly fluid and increasingly cooperative international field (Slaughter, 2004). Moving from the realism and anarchy of post-war international relations (Bull, 1977; Morgenthau, 1978) to an era of international coexistence and further onwords to one of coordination and cooperation (Fox and Roth, 2000), the beginning of the 21st century is marked by strongly antagonistic dynamics in international relations (Kaldor, 2003; Byers and Nolte, 2003; Paulus, 2004). As a background to any legal theory of globalization, the soul searching of public international law and the subversive notions of exclusion and inclusion (Slaughter, 1995; Anghie, 2005), mitigate the persisting hopes for a non-antagonistic international legal order (Tully, 1995; Koh, 1997; Koskeniemi, 2005). While public international law struggles for de-ideologizations and reformalizations (Alvarez, 2001; Koskeniemi, 2002), arises as an alternative to the continuously state-centred oppositional theoretical framework that informs international law – and sometimes dominates international law (especially in times of perceived 'crisis' and 'exception') (Morgan, 2004; Scheppele, 2004).

For the domestic constitutional and administrative lawyer, the role of the state has been changing dramatically (Di Fabio, 1997; Zumbansen, 2000; Arthurs, 2001). Lawyers, political scientists and sociologists are heavily invested in a deconstruction of the state. While they see an emerging multipolar network of state regulatory agencies (Slaughter, 2004; Schimmelfennig 2004) and non-state actors (Hofmann and Geissler, 1998; Kaldor, 2003) in the international arena, it is also mirrored by the overwhelming presence of intermediaries and other non-state agencies and public-private actors on the domestic regulatory level. Again, Harold Koh's work on the transnational legal process is of great significance (Koh, 1996). It exposes the challenge of the Westphalian legal order – centred around nation states that relate to each other in accordance with the principle of sovereign equality – and traces the narratives of these changes back to national trajectories of studying and teaching these transformations (Perez, 2003). TL short-circuits legal concepts with regard to the global against the background of the domestic. In that sense, TL makes visible the projection of domestic analogies onto denationalized spheres of social activity.

Parallel to the increased exchange among these border-crossing actors, whose status can only inadequately be reassigned to well-known public/private distinctions we witness the emergence of a large, decentralized and non-harmonized body of norms. Whether or not the focus is on agreements between large corporations and other commercial actors (*lex mercatoria*, policy negotiations within regulatory networks (Slaughter, 2000, 2004; Schimmelfennig, 2004) or the still much more fragile and fleeting principles and standards of an emerging global humanitarian law (Scott, 2001; Wai, 2003; Scott and Wai, 2004), these norms constitute an emerging transnational normative regime that links current searches for law across territorial and conceptual divides. The most abiding example of such a divide emerges between the domestic and the international. Transnational law is both and neither.

Both constitutional and administrative law give strong testimony to the in-between state of TL when reacting to the shifting balance between public administration and private execution, between government and governance (Aman, 1997; Freeman, 2000). After early, unheard, recommendations to consider administrative law as a core element of a transnational legal science (Joerges, 1972; Wiethölter, 1977), its recognition as an important field of such a science is of more recent date (Aman, 2004; Shapiro, 2000). The background is constituted partly by what has been called 'regulatory fatigue' (Stewart, 2003), which has otherwise been depicted as the welfare state's increased inability to adequately structure widespread public law and public policy interventions into the social sphere. The promises of a transnational administrative law in the sense of a widely conceived administrative science as regulatory science (Aman, 2004) particularly lie in the unfolding of a more responsive and experimental approach to public administration (Ladeur, 1997). This approach must be understood in two ways. First, in a procedural sense, transnational administrative law seeks to facilitate processes of participation and deliberation in an otherwise highly dispersed and fragmented public sphere. Second in a normative sense, it aims at the creation of a regulatory regime that can accommodate public and private claims evolving from privatized and deregulated frameworks of (formerly) public administration (Frankenberg, 1996; Zumbansen, 2003). TL's focus on norm production is connected closely to this twofold experiment in administrative theory. Here, TL allows for a parallel view on the allegedly separated spheres of domestic and international legal struggles. The global arena is populated by a multitude of norm makers and rule producers, such as standards and standard-setting organizations. While these entities materialize in widely differing fields, their appearance raises closely connected questions with regard to regulatory base and scope, as well as legitimacy of grounds and enforcement (Salter, 1999; Brunsson and Jacobsson, 2000; Schepel, 2004).

5 Human rights litigation

In the last two decades of the 20th century, civil litigation seeking compensation for human rights abuses occupied courts and – on all fronts – lawyers, academics, practitioners, politicians and journalists around the world (Scott, 2001). Inspired by the *Filartiga* decision (630 F.2d 876 [1980]), many claims by former victims of human rights violations have been brought against states, state officials and private corporations. The fate of these cases has been mixed at best. While they mostly fail to overcome various existing state immunity thresholds (whereby states and their officials are immune from lawsuits before courts in foreign states) or are rejected because the courts were declared ill-suited to hear cases involving far away incidents (the so-called *forum non conveniens* doctrine), plaintiffs and their lawyers do not seem willing to give up their struggle for legal recognition of the wrongdoing (Neuborne, 2002; Stephens, 2002).

At this juncture, Justice Story's invocation of a law governing commercial transactions and itself being a branch of the 'law of nations' (*Swift v. Tyson*, 41 U.S. (16 Pet) 1 [1842]) meets the jurisprudence in the U.S. involving the 1789 Alien Tort Claims Act (28 USC 1350). Reaching back to Cicero (*Non erit alia lex Romae, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore una eademque lex obtinebit*), Justice Story and Lord Mansfield before him recognized the law merchant as border-transgressing and as a genuinely denationalized body of law. While subsequent times did see some domestication of this jurisprudence in federalist disguise (*Erie R.R. Co. v. Tompkins*, 304 U.S. 64 [1938]), the frame-breaking character of a transnational law of human rights protection remains a pressing challenge and promise (Scott and Wai, 2004). Such a body and practice of law arises against the resistance of jurisdictional and conceptual boundaries firmly erected by private international law(yers). Against this background, TL illuminates the degree to which issues of jurisdiction flow from a state-based understanding of jurisdictional competence. However, the conflict of laws that purportedly confronts the respective courts refusing to hear these cases can no longer be confined to territorial borders. Increasingly, the norms governing the human rights claims are of such border-transgressing nature that they both undercut and surpass the territorial boundaries upon which various jurisdictional competences have been predicated up to this point. While this observation applies naturally to the case for universally binding norms of international law regardless of whether or not states have transposed these obligations into their domestic legal regime, cases involving civil suits against states, present and former state officials and against corporations do not (yet) build on binding international law. Clearly, the general openness and receptiveness of domestic courts towards international law

becomes a prime issue in ascertaining the prospects of cases for human rights abuses committed on foreign soil (Scott, 2001; Brunnée and Toope, 2000–2001; Zumbansen, 2005). TL suggests nothing less than an alternative interpretation of the process whereby domestic courts apprise themselves and appraise human rights abuses and the need to grant legal standing to the victims. Simultaneously, this re-interpretation requires a nuanced apprehension of the relevant norms that courts will have to draw upon in order to resolve these cases (Scott, 2001; Wai, 2001). TL offers itself as a means to capture the ambiguous dream of transnational civil human rights litigation in its widest sense. No-one can deny that there are more problematic aspects to such human rights litigation than mere issues of merely procedural or even substantive law. Through an increasingly widespread discussion, concern and awareness of distant rights abuses, transnational human rights litigation is preceded and fuelled by a global scandalization of human rights abuses.

At present, the importance of past cases and current proceedings can be measured in so far as they resound in a greater wave of legal initiatives and court decisions in other countries. Among these echoes we find cases in the United States, beginning with the aforementioned *Filartiga* case of 1980 and culminating for now, in the *Sosa v. Alvarez-Machain* decision that was delivered by the Supreme Court in 2004. As it severely limits the scope of the *Filartiga* case law, this decision will most certainly overshadow subsequent decisions by the Supreme Court, and lower-level courts alike. The most recent and notable example of this effect was the November 2004 decision in the *Apartheid* litigation. Heavily relying on *Alvarez-Machain*, a US District Court dismissed the *Apartheid* class actions that had been brought by a large group of former Apartheid victims and related interest groups against corporations for their alleged collaboration with and support of South-Africa's Apartheid regime. Along with a number of decisions coming out of Germany, Great Britain, Italy and Greece, this case forms part of a compelling series of judgments that show courts addressing issues that go beyond the boundaries of their own respective legal regimes jurisdictional competences and immunities. In an almost urgent sense, the cited decisions all reflect the courts' shared awareness of the necessity of considering the current developments in neighbouring jurisdictions. For the longest time, decisions such as *Filartiga* served as a transnational reference point for similar court proceedings in many parts of the world. *Filartiga* was both a precedent and an inspiration. Far from being judicial events of merely domestic significance, these cases have and will continue to exert considerable influence in shaping transnational legal consciousness in many other jurisdictions.

6 Transnational (legal) history and societal memory

The 'big bang' of military or political revolution, setting free dynamics of transition and transformation, of post-conflict, post-apartheid and post-war justice, has triggered a widespread and wide-ranging research agenda around the world that is concerned with the chances of a new 'beginning' and the need to account adequately for legacies and past experiences in the process (Teitel, 2000). Countries such as post-apartheid South Africa, the East- and West-German narratives of the Nazi past to post-genocide Rwanda and the current nation building in Iraq, the existing accounts of this process challenge our understanding of how to go about the future while minding the past.

Such fragile and vulnerable societal projects challenge the role of law. In the context of and in concert with other complementing disciplines, TL reveals the distinct quality of fertilizing other conceptual searches while being informed by the transformations occurring within these disciplines. As much as TL has been shown to lay bare the raw and vulnerable foundations of law in all of its absurd contingency and utopian aspiration while being based in social practice administered with violent, denominational authority (Moore, 1973; Bourdieu, 1987; Derrida, 1990; special issue of the *German Law Journal*, 6 (1), 1 January 2005), law itself reaches out to disciplines such as history, cultural studies and anthropology to tell its own story. With legal history emerging as a transnational enterprise (Merry, 1992; Anghie, 2005), such valuable undertakings can build on and learn from the work being done by historians and cultural studies scholars. The emergence of transnational history gives overwhelming testimony of the border crossing inquiry into the legitimacy narratives of state and nation building. Formerly conceived and framed in discrete fashions, domestic, national historical narratives are discovered as sharing and being informed by experiences and semantic appropriations in comparative, transnational and global perspectives (Bright and Geyer, 1995; Bentley, 1996; Middell, 2000; Conrad and Osterhammel, 2004; *Geschichte-transnation*). This research bears large potential for concurrent explorations in work done in transnational legal history and TL in general (Zumbansen, 2006).

7 Transnational legal education

The preceding sections demonstrated the degree to which transnational human rights litigation, transjudicial communications and constitutional 'borrowing' (Slaughter, 2004), 'constitutional analogies' (Helfer, 2003) and the 'proliferation of international judicial bodies' (Romano, 1999) have long ceased to be of concern only to those working in international law. Any assessment of current developments in core fields of a law school curriculum will inevitably be informed by 'outside' influences of international,

transnational and comparative law. While this insight is beginning to take hold in curriculum reform committees everywhere, there is still a long way to go to bridge the gap between the mostly traditional canon of First Year courses and the *crème de la crème* curriculum specializations that are usually restricted to Upper Year programmes. While the struggle for democratic access to higher education still continues through today (Boyd, 2005), change has been long in coming with respect to the demographic and territorial transformation of today's student (and faculty) bodies. With prospective students likely to be more mobile and deterritorialized in their selection of higher education institutions, the same is suggested to them with respect to employment opportunities after graduation. In this light, the questions regarding the direction and content of curricula might have progressed, matured and changed to reflect a higher degree of the Law School's nervousity and responsiveness to the 'needs of the market' (Arthurs, 2000). And yet current, sometimes frantic, attempts to adapt the university to market demands also speak of a lack of self-reflection, reconsideration and wider-scale assessment of the conditions, role and function of education and learning as such (Macdonald and MacLean, 2005; Macdonald, 1990). With national traditions and trajectories proving to be very influential in shaping future conceptual thinking about education and university reform, the need arises to bring together these distinct, nationalized or segregated discourses. Focusing on legal theory from the perspective of the 'political economy of (legal) education', the formation and training of lawyers becomes a crucial inquiry into the democratic accessibility of university studies, into the training of elites, and into questions of power and exclusion, of identity and of finding oneself again (Goodrich, 1996).

This dialectical process is painfully felt throughout one's academic career. The ambiguity of technical terms, legal concepts and principles coincides with the daily challenge to position oneself and one's work (Wiethölter, 1965, 1968, p. 168). This anxiety is particularly prevalent where academic research, writing and teaching is so intertwined with real politics (Arthurs, 2002a; Weiss, 2003). The open-endedness of categories such as labour law, economic law, social law, 'public' and 'private' law, allows us to lay bare and to make visible 'national traditions' of legal scholarship; in turn, these traditions are themselves intertwined, non-linear, disputed and contested. And of course, how could this not be otherwise? (Glenn, 2004, 2005). It is the constant challenge of the researcher and the teacher to work in the light of this complex history in order carefully to help shape the future. Whether or not keywords, suitable for database archives or for bullet-pointed speech outlines, succeed in capturing the wealth of complex history hidden behind simple formulae matters less than that they are taken as invitations to dig

deeper into the history and into the sociological, political, economical and legal discourses through which these terms have come to prominence. While such an undertaking inevitably reveals local, regional and national histories, it also highlights the connections, interdependencies and parallels between different national and transnational discourses. Why not use keywords in transnational legal scholarship to strive for a better understanding of the law – and of ourselves?

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