

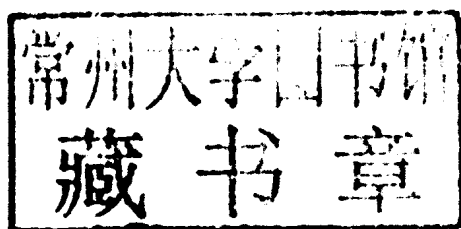
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LAWYERS AND THE CONSTRUCTION OF TRANSNATIONAL JUSTICE

EDITED BY YVES DEZALAY AND
BRYANT G GARTH

Lawyers and the Construction of Transnational Justice

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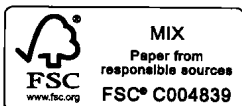
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List of abbreviations

ABA	American Bar Association
ADS	Atrocities Documentation Survey
ATCA	Alien Tort Claim Act
BPRM	Bureau for Population, Refugees and Migration
BTAs	bilateral trade agreements
CCR	Center for Constitutional Rights
CIJ	Coalition for International Justice
CoE	Council of Europe
DRL	Bureau of Democracy, Human Rights and Labor
ECHO	European Community Humanitarian Aid Department
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECOSOC	Economic and Social Council
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
FIDH	International Federation of Human Rights
FPA	framework partnership agreement
FPE	Foreign Policy Establishment
FTAs	free trade agreements
HA	High Authority
HRW	Human Rights Watch
IA	International Alert
IADL	International Association of Democratic Lawyers
ICA	International Court of Arbitration
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
IGOs	inter-governmental organisations
ILC	International Law Commission
INR	Bureau of Intelligence and Research (US)
IO	international organisation

IP	intellectual property
MDM	Medicins du Monde
NAFTA	North American Free Trade Agreement
NGOs	non-governmental organisations
OSI	Open Society Institute
POCs	prisoner of conscience
PRIO	Peace Research Institute of Oslo
SIFEC	Standing International Forum on Ethnic Conflict, Development and Human Rights
TVPA	Torture Victim Protection Act
UDHR	Universal Declaration of Human Rights
USAID	United States Agency for International Development
USTR	US Trade Representative
WHO	World Health Organization
WTO	World Trade Organization

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Part I

Lawyers and the Evolving Global Justice and Human Rights Industry

Introduction

Constructing transnational justice

Yves Dezalay and Bryant G Garth

The ideal of transnational justice has gained many adherents in the past several decades. A large proportion of cosmopolitan lawyers see transnational justice as the key to an enlightened world order, with enforceable legal rules governing the behavior of nations and national actors. Reflecting this attitude and reacting to the Bush administration's unilateralism in foreign affairs, newly elected President Obama nominated the Yale Law School Dean, Harold Koh, to be the Legal Advisor to the US State Department. Koh was in fact a champion of transnational legal process and strong supporter of manifestations of a global transnational justice (and for that reason strongly opposed by US conservatives). Both before and after the election of Obama, in fact, there has been considerable activity toward the construction of a transnational legal field.

The most obvious manifestations of transnational justice in recent years are the various tribunals designed to deal with war crimes. They offer the ideal of bringing war criminals to justice no matter where they are located or their crimes committed. These tribunals to date include the international criminal tribunals set up by the United Nations for Rwanda and Yugoslavia, the International Criminal Court (ICC) established by treaty in 2003, and Special Courts set up for Sierra Leone, Lebanon, Cambodia and East Timor. In recent months, Kaing Guek Eav, the Cambodian former head of a notorious prison during the Pol Pot regime, was sentenced by a UN war crimes tribunal to 19 years' imprisonment. Reports of these events give the clear impression that, despite setbacks, the transnational rule of law is in the process of being created.

The apparent march of transnational law may be detected in other settings. Two domains long maintained as part of national sovereignty – trade policy and intellectual property – have been transnationalised through relatively new global regulatory machinery, especially the World Trade Organization (WTO). Commercial disputes earlier became subject to a new *lex mercatoria* – or New York or English law serving as such a universal set of rules – implemented through a transnational private justice system – international commercial arbitration. And throughout the world there is a proliferation of US-style corporate law firms promoting their expertise in transnational rules and practices for global commerce. New law schools and newly reformed law schools in Asia and Latin America, in

addition, have as a major part of their agenda the production of corporate lawyers conversant in these transnational rules and practices (Miyazawa, *et al.* 2008; Montoya 2010).

Then there is the case of Europe, which for many is the model of transnationalism. The successes of the European Court of Human Rights on the one hand, and the European Court of Justice, on the other, offer the image of a Europe progressing steadily through law. The chapters in this volume cover these manifestations of a seemingly emerging transnational justice, but our focus is not on the question of whether or not it will succeed. The volume examines the processes and people involved in the construction of transnational law. In order to understand what is actually happening, it is necessary to look first at the agents interested in shaping and using transnational justice.

One way to examine the emergence of transnational law and legal processes is to attribute them to an emerging global consensus. A group of scholars from international relations, for example, examines transnational norms as the products of epistemic communities and issue networks that produce or embody universals such as international human rights (Haas 1992; Keck and Sikkink 1998; Sikkink 2004; Power 2002). Keck and Sikkink, for example (1998), examine how networks of activists get together. The scholarly and prescriptive story is of the construction of transnational norms through an emerging consensus of idealistic activists and experts.

Radical international political economy, in notable contrast, tends to analyse international normative practices as part of a hegemonic process used to impose transnational regulation to rule the globe imperially. Hardt and Negri (2000), for example, explore transnational regulation as the extension of a hegemonic empire. The transnational experts who espouse and promote the norms are 'organic intellectuals' of the 'Atlantic ruling class' (Van der Pijl 1983; Van der Pijl 2006). The transnational regulations are seen as imposed or adopted pursuant to a kind of false consciousness, which fosters the spread of norms such as free trade that are heavily skewed in favor of global corporate capital.

These two opposing approaches are both too one-dimensional. The first approach, which sees transnational justice as the product of professional communities united by their idealism (Haas 1992; Slaughter 2002), ignores or at the least downplays professional (both interdisciplinary and international) competition as well as conflicts that take place between (or within) different groups of experts with different and competing normative and regulatory agendas. It also downplays the professional and national hierarchies that shape the process and its results. Globalisation according to the more radical approach is seen as the domination of a unified Atlantic economic and political elite. This approach underestimates the conflict and division that takes place within the putative transatlantic elite. The consensual norms, in particular, are contested by political coalitions from the North, exemplified notably by the Seattle demonstrations against the WTO in 1999, but also in many other areas, such as the well-known divisions within the United States and Europe about the role of intellectual property with respect to

the AIDs medications. Any consensus is constantly redefined through political compromises with actors from the South (e.g. Doha and the WTO's concessions to developing countries), and there is also a continuing competition in many areas between approaches – including European approaches versus approaches favored by the United States (Dezalay and Garth 1996; Dezalay and Garth 2002).

Neo-institutionalists take a different tack, neither denouncing nor celebrating the supposed consensus embodied in transnational law and norms. For Meyer *et al.* (1997), the issue of globally converging norms is part of a process of modernisation involving the gradual diffusion of western notions of rationality and even the nation state. From this perspective, transnational justice is part of a process of embedding rational approaches taken from national settings and spreading them through transnational measures. Neo-institutionalists do not question the scientific knowledge of those acting as rational (and rationalising) agents of a 'world society'. The consensus of the other two approaches is replaced here by a simple assumption of an emerging rationality. The contested processes that produce that 'rationality' are again not examined in this research.

In contrast, our approach considers conflicts and competition as central to the processes leading to the gradual reformulation of norms and knowledge at the national and transnational levels. What is at stake in these often neglected or hidden turf battles (Abbott 1988) is the social credibility of the professionals who produce and use the normative knowledge in order to promote, expand (and constantly redefine) transnational regulation, while seeking at the same time to impose themselves as the legitimate agents of these regulatory processes. Success in the turf battles equips these professionals to sell and profit from a symbolic good that they succeeded in legitimating.

The turf battles are fought on many levels: competition between national regulatory models; competition between regulation at the national and transnational levels, shaped or influenced by the regulatory model of a hegemonic state; and competition between competing (and complementary) expertise (law, economics, political science, management, statistics, criminology, etc.) that can be mobilised for either national or transnational regulation.

The key to understanding these processes is to focus on the role of the lawyer as a broker between different forms of capital and between the national and the transnational. As brokers, lawyers constantly renegotiate the interchange between social relations and what is considered to be law. Their central role in the negotiation process is also a profitable one. Like financial brokers or bankers, they are not just neutral translators. They use the various forms of capital (social, legal, political, economic) that they have already accumulated to build their credibility (and power) as brokers. For the purpose of this volume, we especially highlight the interaction between the national and the transnational. In particular, it also makes sense to employ the concept of 'multi-level regulation' associated among others with Robert Boyer (e.g. Hollingsworth and Boyer 1997). In order to understand the rules of the game for the global economy (and global 'governance' more generally), according to this perspective, it is important to examine the impact of various

levels that may be in harmony or clashing. The challenge is to see how different levels articulate.

Our approach in this volume takes up the challenge by following the activities of lawyers as agents. Each new level of regulation provides not just a set of potential rules, but also a new market for translators between different levels. They serve in the role of compradors between different levels, working both sides of the exchange. Those who create the new market or regulatory level are in the best position to profit from that market.

The focus on the role of lawyers as agents also leads to a different perspective on what is often seen as the juridification or legalization of foreign relations (Goldstein *et al.* 2000; Hirschl 2004). From this perspective, it is not simply a matter of moving conflicts to a legal arena. The process is more complex. What we see is a displacement of some approaches and practices along with the creation of new forums. The new forums provide activities for specialists who can take advantage of their expertise and help clients navigate through it. But the key is the strategy of orienting clients to the process, professionalising practices, and even monopolising. This brokerage activity is similar to lawyer activities serving as brokers and agents between national spaces, which is the focus of our other recent edited volume (Dezalay and Garth 2011). Part of the game in transnational disputing involves forum shopping among a wide variety of state and transnational forums. Further, as we suggest in Chapter 12, the development of transnational forums is closely related to national professional strategies.

The existing literature offers clues on these interactions, but there is very little analysis of the different levels, what is constructed, and by whom. This volume starts from the proposition that this kind of analysis is a key to understanding the emergence and impact of transnational justice. Accordingly, we focus considerable attention on the emergence of Europe since the Second World War. It serves as a natural test case for our theoretical approach. In building a legal Europe, both the human rights side and the corporate law side each required idealists, entrepreneurs and institution builders.

In addition to highlighting the role of lawyers as agents, we also note that new forums are not created from scratch. They always represent the reconversion of old mixes of knowledge and practice that get disqualified by accident or some kind of crisis (Klein 2008). The accident or crisis provides an opportunity for particular groups armed with potentially marketable assets to invent or reconstruct a new ensemble of knowledge, people and practice with new recipes to succeed in the new market conditions. As we shall see, each of the stories involves some kind of crisis capable of disturbing the institutional equilibrium and providing a space for lawyer entrepreneurs. Each of the chapters tracks these processes in relation to the construction of a transnational legal field.

Part I of the volume includes five subsequent chapters on 'Lawyers and the Evolving Global Justice and Human Rights Industry'. The chapters provide pictures of what has emerged on the human rights side of a transnational legal field. Chapter 2, by Ron Levi and John Hagan, entitled 'Lawyers, humanitarian