Setting up a Transnational Law College

1. Introduction

Utrecht School of Law has decided to establish a Transnational Law College, which will supplement but not supplant the existing more nationally-oriented programmes. As will be explained in more detail below, the TLC will be developed in close cooperation with the School of Law of Washington University in St. Louis (hereafter: WASHU), which belongs to the top 15 law schools in the U.S. The present report explains the reasons for setting up the TLC and provides a description of its educational philosophy and curriculum.

2. The nationalisation of the law and of law school curricula

Until the end of the 17th Century academics and students used to travel from one university to another to quench their thirst for knowledge. Law students were taught the principles of Ius Commune, the general law applicable throughout Europe. After completing their studies, lawyers would enter the profession. Using their knowledge of the Ius Commune as a point of departure, they would become acquainted with the local law of the area within which they practised.

This pattern changed at the beginning of the 18th Century due to the emergence of the nation state. Universities became national institutions, mainly drawing students from the country in which they had been established. Although this brought the academic pilgrimage of professors and students to an end, most disciplines retained their transnational character. Academics kept exchanging ideas, information and theories regardless of frontiers. For physicists, chemists and mathematicians, for example, the country from which a theory originated or the nationality of the person who had put it forward were irrelevant.

In law the situation was different, however. The beginning of the 18th Century not only witnessed the nationalisation of the universities, but also of the law. The Ius Commune shattered into a large number of different national jurisdictions. Consequently, from the 18th until the beginning of the 20th century, lawyers were operating in a world which was conveniently arranged along jurisdictional lines.

In combination, the nationalisation of the universities and the law led to law schools limiting themselves to teaching and studying the law of the jurisdiction in which they were located.

3. Denationalisation of the law

From the beginning of the 20th century onwards, however, several important developments started seriously to challenge the premises underlying this approach towards law.

From 31 July to 4 August 1900, a conference took place in Paris, which is widely regarded as the cradle of the comparative approach towards law. The conference proved to be fertile ground for the idea that the questions lawyers are facing in everyday day life are the same in different jurisdictions. This notion of the universality of legal norms has since been challenged by legal anthropologists who have emphasised that cultural differences between peoples make it difficult to compare jurisdictions and to exchange concepts between them. However, this view, which has paralysed the practice of comparative law for decades, has lost considerable ground to the notion that, as a result of migration and cross-border economic

activity, cultural difference can no longer be based on territory.[1] In addition, the emergence of cognitive science has reinforced the view that human behaviour is basically the same everywhere, regardless of territory and culture. Consequently, lawmakers, judges and academics have frequently and successfully compared with and borrowed from jurisdictions other than the ones in which they are active.

In addition, from the beginning of the 20th century onwards the idea has emerged that some problems have become too large and too complex to be tackled by each country on its own and should therefore be made subject to transnational arrangements. This development started in the more obvious areas like telecommunications and transport, but has since spread to other areas as well, which used to be national prerogatives, like the protection of human rights. The atrocities committed during World War II gave rise to the idea that national sovereignty acted as a barrier to effective human rights protection which ought to be dispensed with. The recent emergence of the important discipline of international criminal law also bears witness to this major development.

Furthermore, the osmosis between international and municipal law has increasingly led national jurisdictions to internalise international legal norms. This has added to the importance of treaty negotiations and the development of secondary international law by international institutions.

Moreover, the development of transnational law has also taken root in the areas of trade and economics, where it covers 'bread and butter' issues. During the past half century institutions set up at the global level, like the GATTS/WTO, and the regional level, like the EU and NAFTA, have started to dominate the development of the law and its implementation in the field of economics.

Finally, especially since the 1990s, the transnational practice of law has been boosted by globalisation and outsourcing. Increasingly, business transactions take place regardless of national frontiers. Individuals are constantly crossing jurisdictional lines, either physically or virtually. International communication has become quick and simple as a result of technological innovations such as the fax, e-mail, the Internet, the mobile phone and the Blackberry. Legal questions, therefore, often defy categorization into different jurisdictions, as one single case may involve various legal systems.[2] The increasing citation of foreign precedents in courts bears witness to this development. These trends are being reinforced by the General Agreement on Trade in Services (hereafter: GATS), which also covers legal services. As a result of this treaty, both the law and those who practice it will increasingly become cross-jurisdictional.

Consequently, from a legal perspective the world should no longer be seen as an assembly of separate jurisdictions which are each identified on the map by using a different colour. The creation and enforcement of legal norms has become a polycentric affair.

4. Developments in the legal services market

[1] Akhil Gupta and James Ferguson, Culture, Power, Place: Ethnography at the End of an Era, in: Gupta & Ferguson (ed) *Culture, Power, Place: Explorations in Critical Anthropology*.
[2] Alberto Bernabe-Riefkohl, Tomorrow's Law Schools: Globalization and Legal Education, (1995) 32 San Diego L. Rev. 137 at 149.

Although legal services to a certain extent are still being determined by jurisdictional boundaries, the regulatory barriers are being lowered slowly but surely. Economic pressure and the implementation of instruments like the GATS will lead to an increasing cross-border trade in legal services and will result in the emergence of a global market.[3] Bernabe-Riefkohl even predicts that legal services will become just another commodity available to consumers and subject to the demands of competition and price.[4]

This trend is matched by an increasing internationalization of the legal profession. During the past two decades, several national law firms, mainly British in origin, have turned into large cross-border service providers by forging alliances and setting up branch offices in different countries. Firms like Linklaters & Alliance, Freshfields and Clifford Chance, as well as Baker & McKenzie, have turned into truly multinational organizations, which represent a transnational clientele in a growing number of national and international jurisdictions. Not surprisingly, these multinational law firms employ a substantial number of lawyers who have been educated and trained in a large number of different jurisdictions across the world.

However, the transnational practice of law is not limited to these multinational giants. Many law firms which mainly operate in one particular jurisdiction are developing a foreign-based clientele. A number of global associations have been established to assist medium-sized and small law firms and even solo-practices to spread their wings internationally and to set up international alliances.[5] These firms, too, are increasingly hiring lawyers who were born, educated or trained in other countries,[6] and this example is being followed by multinational corporations and big businesses as well.

Although the transnational practice of law initially was business-driven, in the meantime it has also spread to more nationally-oriented public law fields like criminal law and constitutional and administrative law. The emergence of international criminal law and concepts like 'good governance' have contributed to this development. Not surprisingly, therefore, NGOs and even national government agencies nowadays hire lawyers with transnational backgrounds who are able to operate effortlessly within international contexts.[7]

These developments create fertile ground for transnational law programmes. As a consequence, transnational law graduates will not only benefit from a more holistic kind of education, but they will also be very well equipped for a career in the growing market of transnational legal practice.

5. The case for transnational law programmes

Since the practice of law is rapidly internationalising, law schools have been adding an international flavour to their national programmes. Almost all of them have now inserted international and comparative courses into their curriculum, usually as electives, sometimes as required courses. Some of them have set up summer programmes abroad, hired international faculty and welcomed international exchange and LLM students. Utrecht School of Law has always been at the forefront of this development.

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[3] Van Zandt, *supra* note 3, at 218; Bédard, *supra* note 9, at 255; Wilkins, *supra* note 11, at 415.
[4] Bernabe-Riefkohl, *surpra* note 2, at 156-157.
[5] Fine, *supra* note 12, at 572; cf. Janet H. Moore, Going Global: A Guide to Growing an International Practice, (2006) 69 Tex. B.J. 998.
[6] James H. Carter, Transnational Law: What is it? How Does it Differ from International Law and Comparative Law?, (2004-2005) 23 Penn St. Int'l L. Rev. 797, at 798.
[7] Sumida, *supra* note 17, at 792.

The global challenges created by the development of transnational law should encourage law schools to go further down this road. Since legal practices are no longer being determined by geography or culture alone, law schools are justified in turning transnationalism into the foundation on which to build a curriculum.[8] In so doing they would be able to seize the opportunities offered by GATS, which also covers higher education. By matching the internationalisation of higher education with the internationalisation of the law, they should be able to create transnational law schools that can prepare students for practising law in the 21st Century. In this way they will be able to keep serving their students, the profession and society as a whole.[9]

Putting the programmes on a transnational footing also serves an important academic objective. The nationalisation of the curriculum, which started at the beginning of the 18th century, had no intellectual justification. Or, in the words of Kozyris: "We have lost sight of the fact that law is a universal phenomenon, and not just the temporal product of the lawmaker in a particular society. Common denominators in the human social condition demand a unified legal science."[10] Since the fundamentals of law transcend local and national boundaries, the academic study of the law warrants a transnational approach. Law is about ideas rather than geography. Like climatologists, who do not limit themselves to researching the climate of the area where their university is located, but study the periodicity of weather systems across the globe, academic lawyers should look beyond the confinements of the jurisdiction in which they happen to be based.[11]

Such a movement away from local law and towards transnational law can be regarded as the 'second revolution' in legal education, the first being the adoption of a national law curriculum by some U.S. law schools at the end of the nineteenth century. After the Civil War a national economy started to develop, which benefited from the increasing reliance on the railroads and the telegraph. Led by Harvard Law School and its Dean, Christopher Columbus Langdell, several law schools around that time decided to replace their state-oriented programme by one that focused mainly on federal law. The graduates of these law schools found their way to law firms which were serving a national business community, and which, therefore, were looking for lawyers who could operate in any of the country's jurisdictions. These pioneering law schools became leading in their field.[12]

Utrecht School of Law, which has been internationalizing its programmes for decades, considers the transnational law programme to be an idea whose time has now come. It has therefore decided to start preparing the introduction of such a programme, called the *Transnational Law College* (TLC). The aim is to develop a curriculum which will equip the students to operate effectively in a transnational legal environment. Utrecht is in a unique position to do so. It has extensive experience with accommodating international students, it employs an internationally orientated faculty and it has a comprehensive international

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[8] Van Zandt, *supra* note 3, at 220; Blackett, Globalization and its Ambiguities: Implications for Law School Curriculum Reform, (1998-1999) 37 Colum. J. Transnat'l L. 57, at 66.
[9] Bernabe-Riefkohl, *supra* note 2, at 137-138 and 149.
[10] P. John Kozyris, Comparative Law for the Twenty-First Century: New Horizons and New Technologies, (1994-1995) 69 Tul. L. Rev. 165, at 167-168.
[11] Julie Bédard, Transsytemic Teaching of Law at McGill: "Radical Changes, Old and New Hats" (2001-2002) 27 Queen's L.J. 237 at 278.
[12] John Sexton, Structuring Global Law Schools, (2000) 18 Dick. J. Int'l L. 451 at 453-454; Peter L. Strauss, Transsystemia – Are We Approaching a New Langdellian Moment? Is McGill Leading the Way? working paper, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=879767, 1-2.

network. In setting up the TLC, Utrecht will build on its solid European civil law foundation. In addition, since Utrecht has served for centuries as a cross-roads where goods are traded and information and ideas are exchanged, it will also make use of the Anglo-American concepts that frequently find their way to this academic trading post.

6. The Transnational Law College: its philosophy

6.1. Adopting a cross-jurisdictional approach

The new transnational programmes should deliver graduates who are able to operate effectively across jurisdictions.[13] They should stick to the broad picture rather than display detailed knowledge of the local law.[14] Or in the words of Fine: "attorneys need to have a general understanding of the ways in which other systems operate and to have the basic vocabulary to understand the issues their clients face, and the means by which to help resolve them."[15]

At the moment all roads leading to transnational legal practice run through national law. Thus, in order to become a transnational practitioner one will first have to obtain a degree from a law school that will focus on one jurisdiction in particular. There are those who argue that that is the ideal route to take towards a career in transnational law. However, cognitive psychology and pedagogy teach us that a multi-jurisdictional approach serves this purpose much more effectively.

The key concept in this area is schema theory, which assumes that the human mind contains packets of knowledge, called schemas, which serves as frameworks for interpreting novelty. These schemas can best be compared to scripts which determine how new information will be processed. Schema theory assumes that experience, comprehension and interpretation all involve an interaction between the new input and existing knowledge. Broadly speaking there are two ways in which new information and existing schemas can interact. If a person is faced with propositions which are not in keeping with his own conceptual framework, he can either mould them into existing schemas, which is called assimilation, or modify the existing schemas to harmonize them with the new information, which is called restructuring.

A career in transnational law requires the ability to deal with legal questions from multiple jurisdictions, both in law school and in practice. As far as the legal education part is concerned, in theory there are too ways in which this ability may be developed. The first way is to familiarise the student with one jurisdiction and, as soon as he masters this jurisdiction, to move from there to issues from other jurisdictions. The alternative is to expose the student to multiple jurisdictions from the beginning, instead of focusing on one single jurisdiction. At first sight, both seem legitimate ways to prepare students for a transnational career. However, schema theory makes clear that, in order to prepare graduates for transnational practice, offering a broad cross-boundary legal education is essential.

A person who has already familiarized himself with a particular jurisdiction will only be able to fully understand a new legal system through restructuring, *i.e.* by adjusting existing schemas in such a way that he will be able to approach the system in a detached manner. If he

[13] Van Zandt, *supra* note 3 at 214; David B. Wilkins, Why Global Law Firms Should Care About Diversity: Five Lessons from the American Experience, (2000) 2 Eur. J.L. Reform 415, at 421-423.
[14] Van Zandt, *supra* note 3 at 216; Bédard, *supra* note 9, at 279; Toni M. Fine, The Globalization of Legal Education in the United States, (2000) Eur. J.L. Reform 567, at 568.
[15] Fine, *supra* note 12, at 568.

would resort to assimilation he would view the new system through the lens of his first jurisdiction. In this scenario the information about the new system will be shaped to fit into the existing conceptual framework, which will lead to filtering and simplifying the information and ultimately to the adoption of a distorted picture of the new system.

Unfortunately, the last thing a person will do is make a fundamental change in schemas. Research demonstrates that the implications of new information will be resisted if its acceptance would require a major cognitive reorganization. In other words, the more fully developed a schema the more resistant it will be to change. Consequently, when faced with a new legal system, the mind is much more likely to assimilate inconsistencies into existing schemas instead of resorting to restructuring. This creates a favourable bias towards the first system one has encountered, making it very difficult to accept any new one.

The scientific conclusion that it is hard to distance oneself from the first system in which one has been groomed is, of course, backed up by abundant anecdotal evidence. There are many examples which show that lawyers find it hard to embrace a jurisdiction different from the one is which they were originally educated and trained. The Dutch lawyer will claim that although each system has its merits, at the end of the day the Dutch system is the best. The common law lawyer will acknowledge that despite the fact that there is a lot to be said for the civil law system, the common law system is to be preferred. Such chauvinism hampers the ability to pursue a transnational career.

This 'legal chauvinism' may be harmless when lawyers set out to remain within the boundaries of their own jurisdiction, but it has detrimental effects on those who are intent on pursuing a transnational career. If one is educated fully in one legal system before being introduced to the other, there is a risk that one will assimilate the new system in the knowledge about the old. One will translate the new system into familiar concepts, which distorts the view on the new system. Schema theory, therefore, offers important lessons for transnational law. It strongly favours a multi-jurisdictional approach based on simultaneous rather than consecutive comparison. By contrasting legal systems from day one, one can ensure that the students will keep an open-mind towards the legal questions they will face.

6.2 Preparing students to operate in unfamiliar legal territory

The ideal type approach for preparing students for law practice focuses on teaching the positive law, *i.e.* the law in force at the time in the jurisdiction in which the law school is located. The underlying assumption of this ideal type is that if the student is going to practice within the four corners of one jurisdiction, knowledge of the existing rules will fully equip him to do so. The practising lawyer will constantly be able to pick the appropriate rule from the reservoir that has been created during his time in law school. This model may be characterised as the *backpack model*, because the practicing attorney carries around the rules on which he falls back in practice.

This backpack model is an ideal type which is being applied nowhere in its purest form. For two reasons mainly, no attorney can cope in practice by simply relying on the rules he has learned in law school. First, the law as it stood when we were in law school changes over time. Somehow lawyers are capable to picking up these changes, although they were not taught to them when they were in school. Second, lawyers in practice keep coming across issues and areas of law which are new to them. Somehow, however, they are able to analyze and understand these new concepts, despite the fact that they have not learned them in law

school. The conclusion must therefore be that learning the rules existing at the time in itself will not turn law students into effective practitioners. While learning these rules they also acquire something else that helps them to cope in unfamiliar contexts. That something else is the capability to adapt existing knowledge to new situations. It is clear that no law graduate can do without that capability. Even those graduates who will remain within the jurisdiction the rules of which they leaned in law school, should be able to face new contexts by adapting. In practice, therefore one will encounter the *backpack plus model*, which relies both on learning the rules of the particular jurisdiction and acquiring the capacity to carry the underlying principles and concepts to new contexts.

The graduates of the TLC will not limit themselves to practicing in one jurisdiction, but will be moving from one jurisdiction to another. For them the *backpack model* is clearly unsuited, because no backpack will be big enough and portable at the same time to contain all relevant rules of all jurisdictions. It is clear that for those students will become active in a transnational setting, where they cannot fall back on a set of local rules they have learned in law school, developing the capability to adapt will be a vital element of their training. They should be able to find their way and hold their own in unfamiliar legal territory and should therefore learn how to educate themselves.[16] Instead of carrying around most of the material they need to practice law in their backpack, they will have to rely on their knowledge, techniques and skills to survive in an unfamiliar environment, making maximum use of the conditions on the ground. This can, therefore, best be described as the *survival model*.

In cognitive psychology the capability to adapt, which is the core element of the *survival model*, is called transfer. Transfer has been defined as the ability to extend what has been learned to new contexts (NRC 1, referring to Byrnes). Transfer helps students to operate effectively in situations for which they have no previously acquired information. Although rarely identified, teaching for transfer is one of the most important goals in education. Since usually the context of learning differs markedly from the ultimate contexts of application, educators aim at enabling students to use the knowledge and skills acquired in one setting in others as well (Encyclopaedia).

Psychological research has demonstrated that the only effective way of developing transfer is by extensive and thorough practice in a variety of context (Encyclopaedia, 7). It can be facilitated by teaching the subject in multiple contexts, by using previously learned material as analogies or metaphors, and by including examples that demonstrate wide application of what is being taught (Encyclopaedia, 8, Gick and Holyoak; Bjork and Ricardson-Klavhen) (NRC 14-15). Since transfer is so essential for TLC students, the courses have been designed to achieve maximum results in this area in two ways.

First, an important practical component has been woven into all courses involving exercises which will enable the students to apply the obtained knowledge to other contexts. These exercises will exist of making reports, simulating negotiations, participating in virtual field exercises, writing and presenting papers and taking statements.

Second, the curriculum contains a number of courses which will enable the students to acquire the skills necessary to perform transfer successfully. There will be three of such skills courses, of which each student will take two. All students will take part in a course on lawyering skills, which will be devoted to the drafting of briefs, trial advocacy, interviewing, and conducting negotiations. During this course much attention will also be paid to the use of advanced

[16] Bédard, *supra* note 9, at 262-263; Blackett, *supra* note 6, at 68.

technology, which plays an important part in transnational legal practice. In addition the students will be able to choose one of two clinics. The *International criminal law clinic* will offer students the opportunity to work with defence teams representing individuals before international criminal tribunals. The *Comparative appellate brief clinic* will be devoted to drafting *amicus* briefs for the highest tribunals that consider cases with a comparative dimension. Increasingly, courts like the U.S. Supreme Court and the House of Lords look to other tribunals abroad for inspiration. Interest groups have encouraged this practice by filing *amicus* briefs of a comparative nature. Students will be able to work with these groups in drafting and filing such briefs.

Close ties will be forged between the TLC and key players who are active in transnational legal practice. Thus, the students will serve internships at the international criminal tribunals located in The Hague and the law firms appearing before them. In addition, they will be able to follow an internship at transnational law firms who serve the business community. The students will make regular field trips to transnational institutions, while practitioners will be invited to deliver guest lectures at the TLC and to take part in staff seminars.

6.3 Recognising the strategic dimension of the law

If one approaches the legal process from a normative perspective, the legislature makes the rules required by the public interest; the executive implements these rules in an almost mechanical fashion; and the courts apply them to the facts in cases brought by parties which have a personal stake in the outcome. These normative assumptions do not paint a realistic portrait of what happens in actual practice.

Although this is not always acknowledged in traditional legal education, law is frequently used by legal actors as an instrument to achieve certain strategic objectives. Legislatures frequently enact legislation without intending it to enter into force. Thus, the French Senate recently discovered that a large proportion of the bills it passes never actually become the law of the land, because the Government does not issue the required implementation order. Presumably the main purpose of this kind of legislation is to symbolize the benign intentions of the Government or Parliament or to please a particular constituency. Parliaments have also regularly attempted to pass the buck to the executive or the judiciary in sensitive areas. Thus, the Dutch Parliament waited on the fence until a court was willing to tackle the complex issue of euthanasia. In fact it found this approach so helpful that it let the courts develop and refine the rules in this area for more than a decade before finally codifying them itself.

The executive sometimes develops a similar strategy. Thus, Whittington has demonstrated convincingly that the influential role played by the American Supreme Court in the area of constitutional interpretation is not only the result of attempts of the Court to strengthen its position, but also of the encouragement of the President to do so, which stems from strategic considerations (Keith E. Whittington, Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court , and Constitutional Leadership in U.S. History, Princeton, 2007). Judges use cases sometimes to make a particular legal point, they negotiate amongst themselves and try to carve out a particular role for themselves in the collegiate body of which they are a member, like broker (e.g. Justice Brennan), swing vote (e.g. Justices Powell, O'Connor and Kennedy) or leader of an intellectual movement mainly based outside the court (e.g. Justice Scalia). Finally, private individuals and organisations sometimes go to court, not so much to vindicate their rights, but to use it as a forum to pursue a public interest while bypassing the political branches.

This strategic dimension of the legal process is very important and therefore needs to be highlighted in legal education. This is especially the case for TLC students, who are expected to function effectively in new environments. In order to be able to find their way in an unknown system they should be able to look behind its normative façade by identifying the strategic behaviour of the legal actors involved. The students will therefore enrol in a contextual *Legal strategy* course, during which they will learn that law is often used as a strategic instrument to achieve certain predetermined goals. The course will assist them in detecting and understanding the strategic considerations underlying legal actions.

6.4 Adopting a cross-cultural attitude

There is an important cultural dimension to each legal system which one has to understand in order to be able to acquire a reliable picture. In addition, more than local lawyers, lawyers involved in transnational legal practice are expected to operate in an inter-cultural context.[17] They are often located in a country different from the one in which they were raised and where they obtained their legal education. Frequently, their close colleagues, with whom they work as part of a team, have a national and cultural background different from their own. They are in close contact with local representatives across the world and they deal with clients with diverse personal value systems. Finally, the organization by which they are employed has its own distinct organizational culture. Cultural diversity, therefore, plays an important part in transnational legal practice.

Graduates of the TLC should be able to operate in different cultural settings and to deal with people having varying cultural backgrounds. In order to be able to master the cultural dimension of the law and of transnational legal practice, the TLC students will have to develop a perfect antenna for such cultural diversity and the ability to cope effectively with these differences. Two elements of the programme are designed in particular to prepare the students for this kind of environment.

First, the TLC campus with its diverse student body will create an ideal social forum for inter-cultural learning. The daily exposure to fellow students and faculty with different backgrounds will foster cross-cultural awareness, respect and acceptance. This day-to-day interaction will assist the students in developing inter-cultural skills, like alternative ways of thinking and communication techniques. However, research shows that the creation of such a cultural mix should not be left to chance, since the level of spontaneous cross-cultural interactions tends to be low. A plan will therefore be developed which will include the pairing of students with different cultural backgrounds. The plan will encourage the formation of mixed groups for the completion of academic tasks. To achieve cultural diversity will be an important goal of the selection process.

Second, all students will enrol in a course called *Culture and the Law*, which will introduce the students to the cultural dimension of the law and will acquaint them with legal topics related to culture, like indirect discrimination and affirmative action. The course will also encourage intercultural learning by simulating negotiations and the taking of witness statements.

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[17] Wilkins, *supra* note 11, at 421-423; Bernabe-Riefkohl, *supra* note 2, at 153; Blackett *supra* note 6, at 74; Gerald A. Sumida, Some Comments on the Goals of Transnational Legal Education Programs, (2004-2005) 23 Penn St. Int'l L. Rev. 791, at 792.

Since it is important that TLC students master foreign languages[18], they will enrol in a foreign language course. This will allow them to read documents in their original language, which will open the door to a new legal system. The language courses will be set in a legal context. The students will be able to choose from a selection of languages, including Spanish, Chinese and French. The language course will last much longer than any other course in the programme, spanning the entire two and a half year period the students will spend at Utrecht. This will enable the students to acquire a more than basic command of the language.

6.5 Learning with understanding: contextualism

Since transfer is encouraged if students learn with understanding (NRC 5-6), there will be a contextual component in every course. Courses offered as part of the TLC will draw on the relevant insights of other disciplines, such as political science, economics, administrative science, sociology and philosophy. For example, during the comparative contracts course, students will also deal with the role contracts play in society and the economic effects of contracts and alternative forms of agreement. In addition there will be multidisciplinary courses, like *Law and economics* and *Legal strategy* and *Non-judicial dispute settlement*. The latter course will deal with concepts like arbitration, ADR, negotiation, settlement, restorative justice, plea bargaining, and truth and reconciliation from a comprehensive perspective.

7. The Transnational Law College: an outline of the curriculum

1L

- General principles of law
- Comparative law: finding one's way in unknown territory
- Legal strategy
- Culture and the law
- Legal globalization
- Comparative contract law
- Public international law
- International criminal law
- Foreign language in a legal context

2L

- Lawyering skills
- International criminal law clinic\Comparative appellate brief clinic
- Law and economics
- Non-judicial dispute settlement
- Private International law
- EU law
- Regulation
- Internship
- Foreign language in a legal context

[18] Bernabe-Riefkohl, *supra* note 2, at 153; Blackett, *supra* note 6, at 74; Vivian Grosswald Curran, The Role of Foreign Languages in Educating Lawyers for Transnational Challenges, (2004-2005) 23 Penn St. Int'l L. Rev. 779, at 782.

3L

Private law stream:

1. Mandatory

- Lawyering from a business perspective
- Intellectual property law

2. Elective (one out of two)

- Comparative tort law
- International dispute resolution

3. Elective (one out of three)

- The European Union
- Chinese law and government
- European Private Law

4. Foreign language in a legal context

Public law stream

1. Mandatory

- Comparative Criminal Law
- Comparative Constitutional and Administrative Law

2. Elective (one out of two)

- International humanitarian law
- International human rights law

3. Elective (one out of three)

- The European Union
- Chinese law and government
- Climate change law

4. Foreign language in a legal context

8. Structure and organization

The TLC will have an annual intake of 75 students, who will be selected on the basis of their GPA, prior educational experience, motivation and background. During the first and second years the intake will be lower than normal, *i.e.* 25 and 50 respectively.

In teaching the programme, Utrecht School of Law has cooperated closely with the School of Law of Washington University in Saint Louis, which belongs to the top law schools in the

U.S. This law school enjoys an excellent reputation, both in the area of teaching and research. It has an international outlook, which is matched by an extensive international network. It employs very experienced and highly skilled faculty members, who are capable of teaching transnational courses to international classes. The law school is characterized by an entrepreneurial spirit, which serves as the driving force for creativity and reform. Finally, it has a great deal of experience with the functioning of the highly competitive American market.

Both law schools will initially set up and teach their own programme, while allowing the other institution's students to spend a semester there. Thus, students will complete five semesters at one law school and one at the other. Furthermore, the Utrecht students will enroll in WASHU's LLM-programme, while the WASHU students will take their LLM at Utrecht. Building on the cooperation in this area, Utrecht and WASHU are seeking to explore the feasibility of setting up a transnational law school together. To this end they have established a Joint Faculty Advisory Committee, which will oversee the programmes. The Committee will ensure, in particular, that the transnational programmes, while remaining distinct from the other programmes offered at the same institutions, will gradually converge.

At each site the programme will be taught primarily by local faculty, which will be supplemented with visiting staff from the other institution and other visiting professors, including in particular colleagues from the University of Tento Faculty of Law and the Law School of Queens University Belfast. The law schools will promote the use of distant learning technology to allow faculty members to co-teach courses, and students to participate therein, even if they are at different locations. All courses will be taught in a condensed format to encourage the involvement of visiting faculty. Because the TLC is an international program involving international scholars and in view of the ambition to set up a joint program with WASHU eventually, staff will be subject to international labor conditions.

9. Exploring the market for the TLC

9.1 The professional qualifications of TLC graduates

The TLC is part of a framework that has been developed and agreed with WASHU. The students will spend their sixth semester as exchange students in St. Louis, where they will be participating in a tailor made program that will focus on U.S. domestic law. After successfully completing the TLC they will have guaranteed access to WASHU's prestigious LLM program, which normally admits only one in every 100 applicants. The LLM program too will have a U.S. domestic law emphasis.

Under the rules set by the American Bar Association, the time spent at WASHU will make the graduates eligible to sit the Bar Exam of the State of New York. If they pass the Bar, they will have a licence to practice law in the U.S. In addition they will be allowed to sit the Irish Qualified Lawyer Transfer Test or QLTT. If they pass the QLTT, they will have access to the Irish profession and, under the Establishment Directive in principle to all European jurisdictions. This dual qualification will make the program very attractive to transnational law practitioners who would like to have access to the profession at both sides of the Atlantic.

Utrecht School of Law and WASHU will assist the students in preparing for these exams by offering preparatory courses. The students can take these courses as a supplement to the TLC program in their spare time. In addition, Utrecht will offer Dutch students who would like to

obtain civil effect the opportunity to take courses in the mainstream program as a supplement to the TLC program.

9.2 The growing market for transnational legal services

Due to international developments the character of the market for legal services is changing rapidly. There are two main factors that push towards transnationalisation of legal services sector, one in the area of business law and one in the public interest field.

In the private law arena the transformation of the legal market is driven by the fact that increasingly the corporate sector is moving across borders. Thus, in Europe in all major industry sectors European companies have taken over the lead from domestic ones. This development is being reinforced by the increasing deregulation of European industry, the weakening of the power of the trade unions, the enforcement of European anti-competition laws and the response of the financial services sector (Hodgart, 482-483). These developments have had ramifications for the character of the legal profession, including in-house counsel, in Europe.

At the top end of the market a consolidation has taken place around the UK Magic Circle law firms of Freshfields, Clifford Chance, Allen & Overy, Linklaters & Alliance and Slaughter and May and some of the 'blue chip' Wall Street firms with European branches. However, these developments also have had an impact on mid-sized law firms, a number of which have moved into the international legal services market to serve national clients with international interests and/or international clients, or to work closely with one of the large accountancy firms concentrating on international financial advice (Tanja, p. 203). These transnational law firms offer their clients a kind of cross-border expertise which purely local firms do not. Consequently, law graduates entering this part of the market should be prepared for this kind of practice through a curriculum which is different from the traditional program (Tanja). According to estimates from within the industry, some 25-30 % of law graduates entering the European labour market will be employed by the multinational firms and the mid-sized firms having an international dimension (e.g. Tanja, p. 201).

Although caused by other factors, a similar transnationalisation of legal practice has taken place in the public law sector. First, topics that used to be considered the prerogative of the nation-State, like human rights and criminal law, have been lifted to the international level. Second, an alternative form of international cooperation is gaining pace, which supplements traditional multilateralism. Increasingly the constituent parts of a State, *i.e.* the legislature, the executive and the judiciary, are forging ties with their counterparts in other States to share information, ideas, concepts and resources (Sassen). This inter-agency cooperation is not moulded into treaties and organisations, but usually takes the shape of informal policy coordination within transgovernmental networks. Thus, judges of the supreme courts, constitutional courts and the highest administrative tribunals meet periodically to discuss problems of mutual interests and to exchange concepts and ideas. Consequently, the proportionally principle, which has become part of the law of many European jurisdictions, was not so much introduced by the legislature, but by judges who had been acquainted with it during these international networking conferences. Similar productive relationships exist between legislatures, and in particular, between regulatory agencies.

This internationalisation of public law is increasingly mirrored by transnational activities of non-governmental organisations. Instead of operating within the four corners of one

jurisdiction, non-governmental organisations operate more and more across national borders. For decades this has, of course, been customary practice for some of the traditional non-governmental organisations like Amnesty International and the International Commission of Jurists. However, a large number of associations which have their origins in national jurisdictions increasingly use foreign or international forums to bring their public interest cases or to file their amicus briefs. Consequently, a number of graduates who would like to pursue a career in public law is likely to benefit from a transnational legal education as well.

The conclusion is justified, therefore, that there is a segment of the legal labour market, in Europe estimated at 25%, which would be served well with graduates of this program.

9.3 The judgment of experts on the transnational legal services market

In order to get a good impression of the employability of the TLC graduates, we have consulted 30 persons with expert knowledge of the transnational legal labour market on both sides of the Atlantic. They were:

- the former Director of the worldwide academy of one of the Magic Circle firms, which not only trains the firm's own associates, but also lawyers employed by the legal departments of multinational corporations;
- a recruiter of one of the Magic Circle law firms;
- five leading attorneys representing Magic Circle and international Wall Street firms;
- five attorneys with considerable transnational experience representing mid-sized domestic law firms with an international component in Europe and the U.S.;
- one leading member of the International Criminal Bar;
- one senior counsel of a longstanding and reputable NGO;
- one senior U.S. judge adjudicating private international cases;
- one former international judge from Europe;
- one senior executive of the American Bar Association;
- three senior officials of European professional organisations;
- one American law Dean;
- one former American law Dean;
- a former student from Europe with a European LLB and a U.S. LLM who took the New York Bar and is an associate at a transnational Wall Street firm;
- one CEO of a multinational corporation with a large legal department;
- two leading scholars on legal globalization;
- two former European education ministers;
- an executive of the Fulbright organisation;
- a high ranking European civil servant involved in international higher education.

All experts received either a version of our business plan or an interim version of the present report and they were subsequently interviewed on the prospects of the proposal. The valuable comments made by them have been implemented in other sections of the present report, in particular paragraph 6. In this section only the general observations on the chances of the TLC will be summarized.

Without exception the experts expressed the view that the TLC will be sustainable in the international market for higher legal education. The rating of the chances of the program becoming a success ranged from 'good' to 'excellent'. All consulted experts expressed the view that the transnational character of the program will offer a viable alternative or

complement to the existing mono-jurisdictional programs. The possibility to learn a second language, the emphasis on skills, the two clinical programs, the importance of cross-cultural learning, the legal strategy course, the Transatlantic foundation and the preparation for the New York Bar Exam and the Irish Qualified Lawyer Transfer Test were regarded as the strong points of the program by numerous interviewees.

One of the experts pointed out that the Magic Circle firms nowadays also recruit from a pool of arts students who have done the one year English law conversion program. According to her, this signals that the three year mono-jurisdictional law programs no longer serve as the exclusive entrance ticket to the transnational legal market. She also emphasised, however, that the Magic Circle firms apparently also attach value to the students having some basis in national law. From this perspective the fact that the TLC is part of a chain which also includes a semester and an LLM at WASHU, which will both focus on national American law, and potentially taking the Bar in New York and the QLTT in Ireland, is an important asset. One expert felt that the students should be allowed to take MBA-type courses on business. A few experts with a business law background felt that there should be less emphasis on public law in the program.

In brief, on the basis of the reactions of the experts it is highly likely that the market will welcome graduates of the TLC, especially after completing their semester and LLM at WASHU. Their market value will be considerably enhanced when they are able to obtain a New York and an Irish licence.

9.4 Potential students

Utrecht School of Law has made an attempt to identify the potential for the TLC in the Dutch higher education market by consulting several organisations and groups.

First, the TLC proposal was submitted to the organisation representing all dual language high schools in the Netherlands, the so-called TTO schools. At these high schools Dutch students are being taught in Dutch and English. The executives explained that many TTO graduates have the ambition of enrolling in English higher education programs after completing high school. Although several universities in the Netherlands offer English bachelor programs in a large number of fields, to date there is no such program in law. As a result, those students who would be interested in taking an LLB in English are forced to go abroad, which has a chilling effect, or to change their subject. Consequently, the TTO executives believe that there is a market for the TLC among their graduates. This impression has been reinforced by subsequent research conducted among 30 student advisers attached to TTO schools. Since all TTO schools charge an additional tuition fee, it is safe to assume that the fact that the TLC fee will be higher than the traditional tuition will not discourage these graduates.

Second, the TLC proposal was submitted to the organisation representing the international schools located in the Netherlands. There too it got a favourable reception. Since there is no English LLB in the Netherlands, and since most parents would like their children to have the option of taking a law degree in the Netherlands, the TLC would fill a niche. Since all international schools charge high tuition fees, it is safe to assume that the fact that the TLC fee will be higher than the traditional tuition will not discourage these graduates.

Third, the TLC proposal was submitted to representatives of the Dutch branch of the Fulbright organisation. Its representatives welcomed the initiative and consider it a very

attractive option for Dutch students who have earned a College Degree in the U.S. with a Fulbright scholarship. As a result of the Fulbright conditions those students are not allowed to return to the U.S. to pursue further education for a period of two years. Those who would like to enrol in an American law school will consider the TLC a very attractive alternative, not least because they will spend a semester at WASHU and have guaranteed access to its LLM. Since these students are used to high tuition fees in the U.S., it is safe to assume that the fact that the TLC fee will be higher than the traditional tuition will not discourage these graduates.

Fourth, Utrecht School of Law is being approached frequently by children of Dutch expats who would like to take their degree at Utrecht, while keeping open the option of practicing elsewhere. They are being informed about the TLC plans, which have invariably been met with enthusiasm. A few of those who have approached Utrecht in this way have requested to be put on a list as potential applicants and to be kept informed about the TLC's progress. A meeting with representatives of Dutch expat organisations has been scheduled. Its main purpose is to explore how this group could be informed structurally and effectively about the TLC.

Although the Dutch market is supposed to become an important supplier of TLC participants, it is the purpose of this program to recruit students from all corners of the world. Attempts have therefore also been made to get some insight into the market outside The Netherlands.

In 2006 and 2007 WASHU has conducted several focus groups, involving both U.S. and foreign students enrolled in their JD and LLM programs. This research shows that a considerable number of students, especially the U.S. students that have been attracted by WASHU's international outlook and the foreign students, would have seriously considered enrolling in the TLC if it would have been available at the time when they started applying for law school. Several of the U.S. respondents indicated that they found the fact that two reputable international law schools have joined forces a huge asset. They also consider it very important that the TLC will prepare them for the New York Bar and the Irish QLTT, which will give them access to the profession in the two most desirable segments of the transnational legal market. A number of foreign students have opted for WASHU's JD program not so much to pursue a career in domestic American law, but to gain access to the transnational legal market exemplified by Wall Street. To them the TLC would be a serious and viable alternative.

Utrecht School of Law has conducted a similar focus group in 2006 involving 15 U.S. students who had enrolled in the Summer Institute of Global Justice, the annual summer school organised by Utrecht School of Law in cooperation with WASHU and Case Western Reserve University School of Law. The outcomes of this consultation were similar to those of the WASHU focus groups. A large number of the interviewees would have seriously considered enrolling in the TLC if it would have been available at the time they started applying for law school. The reasons were identical to those stated by the American students at WASHU. Three of the respondents have since decided to enrol in the Utrecht LLM, which demonstrates that their interest in pursuing a transnational legal career through Utrecht was genuine.

9.5 Competing international programs

The thus far only comprehensive transnational law programme is being offered by the *Faculty of Law of McGill University* in Montreal, Canada.[19] Since 1999 students can enrol in the transsystemic McGill Program, which consists of an integrated training in civil law and common law. Instead of the transnational elements being compartmentalized into separate courses, they have been fully integrated at course level. Although the programme is built around the civil law/common law dichotomy, and understandably so considering McGill's location and history, the programme offers a genuine and thorough transnational education.

Since 2001 *Osgoode Hall Law School* has offered an International Comparative and Transnational Law Program (ICT), which is an optional specialisation.[20] Students enrolling in this programme take several required transnational courses, like Globalization and the Law, Public International Law, Conflict of Laws and Comparative Law, supplemented with electives from the general LLB curriculum. Although the programme contains some courses, like the Colloquium and the Capstone Course, during which all transnational strands are pulled together, the transnational element is less well integrated than in the McGill Program.

Since the second half of the 1990s, *New York University School of Law* has offered a Global Law School Program, which consists of three initiatives.[21] First, some twenty international faculty member have been hired by the law school. Second, the law school has created twenty full scholarships each year for law students from countries throughout the world. Third, it has established the Engelberg Center on Property and Innovation in a Global Economy, which stimulates teaching and research on the impact of the global economy on fundamental notions of property, ownership and trade regulation. Although this programme adds a significant international flavour to NYU's JD programme, the core of the curriculum is still mainly nationally-oriented.

Since 2000, *Bucerius Law School* in Hamburg, Germany has offered practice-oriented, bilingual legal education with a focus on international business law.[22] Although students spend a significant part of their studies at one of its affiliated partners across the world and the programme offers many transnational law courses and foreign language training, Bucerius' core curriculum still focuses on German law.

9.6 Competing Dutch programs

Although most LLB programs offered by Dutch law schools contain international elements like comparative and international law courses and semesters abroad, their programs, like Utrecht's mainstream curriculum, focus primarily on serving the domestic Dutch market.

There is nevertheless one program that deserves to be mentioned, *i.e.* Maastricht's European Law School because it has a similar outlook. Like the TLC the European Law School offers a transnational curriculum enabling its graduates to function optimally in today's

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[19] Bédard, *supra* note 9, 237 ff.; Strauss, *supra* note 10; Yves-Marie Morisette, McGill's Integrated Civil and Common Law Program, (2002) 52 J. Legal Educ. 12; Nicholas Kasirer, Bijuralism in Law's Empire and in Law's Cosmos, (2002) 52 J. Legal Educ. 29; Armand de Mestral, Guest Editorial: Bysystemic Law-Teaching – The McGill Programme and the Concept of Law in the EU, (2003) 40 C.M.L. Rev. 799; Rosalie Jukier, Where Law and Pedagogy Meet in the Transsystemic Contracts Classroom, (2005) 50 McGill L.J. 789.

[20] Craig Scott, A Core Curriculum for the Transnational Legal Education of JD and LLB Students: Surveying the Approach of the International, Comparative and Transnational Law Program at Osgoode Hall Law School, (2004-2005) Penn St. Int'l L. Rev. 757.

[21] John Edward Sexton, The Global Law School Program at New York University, (1996) 46 J. Legal Educ. 329.

[22] Brochure 'Bucerius Law School', available at: www.law-school.de

internationalized legal world. However, there are important differences as well, like the fact that it is a master program, does not move from general to specific, does not prepare for the New York Bar nor the Irish QLTT and does not involve a foreign partner institution.

ANNEX 1: THE FIRST YEAR CURRICULUM IN DETAIL

GENERAL PRINCIPLES OF LAW

Language of Instruction: English
Administered by: the Faculty of Law

Course Description

This course will offer students a general introduction to law and the system of law. The relationship between the concepts of 'law' and 'justice' will be discussed. It will deal with the major models, including natural law and natural rights theory, positivism, utilitarianism, legal realism and critical legal studies. Attention will also be devoted to the sources of law.

Rather than presupposing acceptance of one legal tradition over the other, this course will impart to students the basic principles of law from both the common law and civil law perspectives. It is imperative that students of the Transnational Law College gain a fundamental understanding of these two legal traditions and use their knowledge of both systems in making reasoned observations of legal problems.

Therefore, this course will provide students with an introduction to the common law and civil law legal systems. In addition to discussing the historical developments of the two systems and their basic principles, the course will examine major topics in both legal systems ranging form private law topics (tort reform and increased litigation) to criminal law topics, where the traditions have similar, yet very distinct, perspectives. Finally, in light of increased globalization and cooperation the course will examine what implications the two systems may have in the future on transnational law, international law and economics. Similarities and distinctions between the two systems will be emphasized throughout the course. In addition, students will practise and develop the following skills: seminar speaking, summarising, report writing, presenting and comprehending legal texts. A range of legal topics from both traditions will be covered.

Course Materials

Course Reader with selected articles.

Stephen E. Gottlieb, Brian Bix, and Timothy D. Lytton, An Introduction to the Philosophy of Law and its Application, 2006

John Henry Merryman, The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America, 2nd ed., Stanford, CA: Stanford University Press, 1985

Richard B. Cappalli, *At the Point of Decision: The Common Law's Advantage over the Civil Law*, (1998) 12 Temp. Int'l & Comp. L.J. 87

Robert Adriaansen, *At the Edges of the Law: Civil Law v. Common Law: A Response to Professor Richard B. Cappalli*, (1998) 12 Temp. Int'l & Comp. L.J. 107

State Government Insurance Commission v. Trigwell 142 CLR 617

Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 Harv. L. Rev. 16

R. v. Secretary of State for Foreign and Commonwealth Affairs, ex p. World Development Movement [1995] 1 WLR 386

Elihu Inselbuch, *Contingent Fees and Tort Reform: A Reassessment and Reality Check*, (2001) 64 Law and Contemp. Probs. 175

Maureen Spencer, *The Common Law Legacy and Access to Justice*, (2000) Nottingham L.J. 32

Melvin M. Belli Sr., *Punitive Damages: Their History, Their Use and Their Worth in Present-day Society*, (1980-1981) 49 UMKC L. Rev. 1

Problems and Proposals in Punitive Damages Reform, (1999-2000) 113 Harv. L. Rev. 1783

Robert A. Kagan, *Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry*, (1994) 19 Law & Soc. Inquiry 1

Deborah J. La Fetra, *Freedom, Responsibility, and Risk: Fundamental Principles Supporting Tort Reform*, (2003) 36 Ind. L. Rev. 645

Palsgraf v. Long Island Railroad Company 162 N.E 99

State Farm Mut. Auto Ins. Co. v. Campbell 538 US 408

Henry J. Abraham, *The Judicial Process*, seventh edition, New York 1998, pp. 125-150

Sandra J. Jordan, *The Criminal Trial Jury: Erosion of Jury Power*, (2000) 5 How. Scroll Soc. Just L. Rev. 1

Roger T. Brice, *Grand Jury Proceedings: The Prosecutor, the Trail Judge, and Undue Influence*, (1971-1972) 39 U. Chi. L. Rev. 761

Del Dickson, *The Selection and Appointment of Magistrates in England and Wales*, (1991-1992) 23 U. Tol. L. Rev. 697

Batson v. Kentucky 476 US 79

David Luban, *Lawyers and Justice*, An Ethical Study, Princeton 1988, pp. 68-93

John Barbara, June Morrison and Horace Cunningham, *Plea Bargaining-Bargain Justice?*, (1976-1977) 14 Criminology 55

Furman v. Georgia 408 U.S. 238 (1972)

US v. Gunther, No. 05-2952 (3d Cir. Sept. 11, 2006)

Course Requirements and Assessment

Class participation: 20% of the final grade. This includes any presentations and regular class discussions and debates of the assigned readings.

Group Paper: 80% of the final grade.

Attendance: Attendance in class is mandatory. Non-attendance will be factored into the class participation grade.

Course Structure

Session 1: The main schools of thought
Natural law and natural rights theory
Positivism
Utilitarianism
Legal realism
Critical Legal Studies

Session 2: Sources of Law, Judge-made and codified
Codification
Statutory law
Judicial behavior
Judicial philosophies
Public interest litigation
Trust in the system

Session 3: Rule of Law and Separation of Powers
Role of Courts
Role of Legislature
Role of the Executive
The purpose served by the Rule of Law
The purpose served by Separation of Powers

Session 4 : History and Basic Principles of the Common law
Comparative models (U.S., U.K., Australia, Canada)
Rights of the individual focus
Statutory and regulatory law
Legal education system (case-based reasoning)

Session 5: History and Basic Principles of the Civil law
Comparative Models (France, Germany, Dutch, Latin America)
Social stability focus
Legal education system

Mixed systems

Session 6: Access to Justice and Litigiousness
Contingent fees
Punitive damages
Adversarial legalism
Tort Reform

Session 7: Trials: adversarial or inquisitorial
Lay Justice
Jury Selection
Jury Trials
Role of parties

Session 8: Criminal Law
Basic Principles; Actus Reus and Mens Rea
Criminalization and Punishment
Elements of Crimes
Defenses and Sentencing
Adversarial v. inquisitorial
Plea bargaining
Death penalty

Session 9: Implications
Economic implications of the two systems
Transnational and International Law (criminal and private)
Legal cultures

Course Objectives

The main objective of this core course is for students to gain a fundamental understanding of general principles of law through the common law and civil law perspectives. It is hoped that by teaching the similarities and differences of the two systems, and at the same time emphasizing their historical developments and current trends, the students will gain a critical understanding of domestic, transnational and international practice and legal philosophy.

COMPARATIVE LAW:
FINDING ONE'S WAY IN UNKNOWN LEGAL TERRITORY

Language of Instruction: English
Administered by: the Faculty of Law

Course Description

A century, almost to the date, after it entered the stage as a new an promising discipline of law, comparative law appears to be in a crisis.[23] Many of those teaching comparative law and those writing on it feel handicapped by the absence of a generally accepted method for

[23] Cf. Mathias Reimann, The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century, (2002) 50 Am. J. Comp. L. 672.

comparing law. Adding insult to injury, some influential theorists who have been dominating the debate lately, have cast doubt on the feasibility of comparing systems all together.

This has always been the view of nationalists who see their own jurisdiction as being unique and incomparable to others. Nationalism is the product of traditional legal education, which usually focuses on one or a limited number of jurisdictions. It is not surprising, therefore, that many traditional law students and graduates are convinced of the uniqueness of their own jurisdiction. The opposite view would challenge the philosophical basis of their education. But the nationalists have been joined by the so-called 'postmodernists' who challenge the very foundations of comparative law as an academic discipline by arguing, *inter alia*, that linguistic and cultural barriers are impossible to overcome.[24]

However, there are two important developments which make this position difficult to defend. First, there is a tendency among anthropologists to no longer consider culture as being tied to a particular territory. Culture can move with migrating people and then mix with cultural patterns existing at their new destination.[25] Second, cognitive science, which considers human behavior to be virtually the same regardless of territory, is becoming a more and more important factor.[26] It opposes the idea that legal phenomena are incomparable as a result of cultural differences.

In contrast with the malaise characterising the academic debate on comparative law, the use of comparative law has never been so popular and widespread in practice. Lawmakers have always had an open mind towards interesting developments taken place in other legislatures, and this approach was later also adopted by executive authorities. This trend seems to have been reinforced by the fact that members of the political branches meet and interact frequently with their foreign counterparts during international meetings and summits.

In addition, during the last few decades slowly but steadily courts too have started to borrow from the case law of tribunals in other jurisdictions. What started as a interesting references to illustrate a point, in many jurisdictions has grown into persuasive authority. Arguably in some instances foreign judgments have acted as *de facto* decisive authority,[27] although judges have usually formally denied this. On numerous occasions courts have been referring and relying on foreign sources which to a greater or lesser extent have determined the outcome of the case. It is likely that this phenomenon is reinforced by the regular meetings appellate judges from different jurisdictions tend to have.

This growing importance of comparative law is affecting the everyday practice of attorneys. Increasingly, in order to serve their clients and to win their cases, they should be able to look for and find authority in other jurisdictions. Consequently, even traditional national lawyers should nowadays be able to find their way in foreign legal systems. This, of course, is even more so as far as graduates of this program are concerned. Being able to cross borders intellectually will be a core requirement of their every day's work. This will especially be the case for those graduates who will practice in one of the growing number of mixed

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[24] Cf. Pierre Legrand, The Impossibility of 'Legal Transplants', (1997) Maastricht Journal of European and Comparative Law 111.

[25] Akhil Gupta and James Ferguson, Culture, power, place: ethnography at the end of an era, in: Gupta & Ferguson (ed) *Culture, Power, Place: Explorations in Critical Anthropology*.

[26] Rafaelle Caterina, Comparative Law and the cognitive revolution, (2003-2004) 78 Tulane Law Review 1501.

[27] *Hunter v. Canary Wharf* [1997] AC 655 (HL); *Roper v. Simmons* 543 U.S. 551.

transnational legal regimes which constantly draw on legal sources from multiple jurisdictions.

Most comparative law courses taught in traditional law schools are devoted to the existential debate on comparative law and its methodology, which has brought many to the conclusion that comparing legal systems is very difficult or even impossible. The present course will, of course, pay close attention to this exciting intellectual exercise. But in two important respects it will go beyond that. First, it will reflect on a relatively young counter-movement that is gaining pace, which argues that some of the methodological objections that are being raised against comparing systems are not valid. This movement draws from the insights of anthropology and cognitive science and so will the course. Second, since students need to learn how to find their way in foreign legal systems in order to become effective practitioners, a part of the course will be devoted to learning how to do this.

This is no mean feat, because there does not seems to be an accepted method for doing so. However, a method has been chosen for the purpose of this course. It relies on the insights of several disciplines other than the law, like anthropology, sociology, political science, cognitive science and it draws inspiration from the pioneering work of some leading comparative law scholars, like Koopmans.[28] The method is called 'contextual functionalism'.

Functionalism, which has a rich tradition in the social sciences, in particular anthropology, urges researchers not to take concepts at face value. Thus, both Britain and The Netherlands are being reigned by a monarch. At first sight both are very similar, since their office is hereditary and they symbolize the unity of the nation. However, such a superficial comparison based on the constitutional façade will not pas muster under a functional analysis. Functionalism requires that every concept or institution is broken down into its constituent parts, like an atom can be divided into neutrons, protons and electrons. For each individual element a functional equivalent will be sought in the companion concept from the other jurisdiction. Such an approach brings important differences to light between both monarchs. Both are Heads of State, but in addition the Dutch monarch is also a part of the Government, which the British king is not.

This means that from a functional perspective, the Dutch monarch is closer to the U.S. President than to the British king. True, the Dutch king, unlike the American president, has no electoral mandate. But like him he is both the Head of State and part of the Government. Both have the power to assent to or to veto legislation and to appoint ministers. On the basis of a functional legal analysis alone, the proverbial visitor from Mars may come to the conclusion that The Netherlands is not only being reigned but also ruled by a powerful monarch, who, unlike the American president, cannot be removed from office by the electorate. However, although these conclusions are close to the truth if one limits oneself to a legal analysis, they will be corrected if political and historical consideration are being taken into account.

This is the essence of contextualism, which require researchers to look at the outcomes of functional legal comparison through the lens of the setting in which the institutions operate. This approach guards against the one-dimensional view that might result from a purely functional legal analysis. Or, as Korzyris has eloquently put it:

"My second, and rather obvious point, is that you cannot truly pursue the comparative method through the study of formal legal texts alone. It is necessary to get to know what is behind the

[28] Cf. Tim Koopmans, *Courts and Political Institutions, A Comparative View*, Cambridge 2003.

texts and also, even more important, how they function. This requires understanding the legal culture that produced the laws, and more broadly, the social and economic structures and the ethical and political values that support them. Laws cannot be grasped in an idealized form outside the context of the society that created them. Before a legal model can be transplanted, the conditions in the two societies – the one from which it comes and the one to which it goes – must be taken into account."[29]

The comparison made earlier with atoms and their components is apt to illustrate this point. The behaviour of electrons is being determined to a large extent by factors which are part of the atom's environment. Thus, when a hydrogen atom is joined to an oxygen atom its electrons will behave in another way then when the atom is combined with a carbon atom.

In addition to applying the method of contextual functionalism, the course will also teach the students how to move from the existing to the new, or, in more technical terms, to transfer knowledge and skills to untaught contexts. In one way or another every lawyer learns how to build on his knowledge of law acquired during law school to deal with new developments. Thus, a practicing barrister or solicitor who has received his legal training during the 1980s will still be able to master developments in the case law that have taken place subsequently under the Human Rights Act , which entered into force in 2000. Although this adaptability is a crucial element of lawyering, it is acquired implicitly rather than by way of a separate course. It is part of 'learning to think like a lawyer' which means being able to handle abstract notions, to match the facts with the law and to operate on the basis of analogy.

The capability to find one's way in unknown legal territory will, however, be taught as a special course in the Transnational Law Program for two reasons. First, this capability is crucial for lawyers operating in a transnational environment, and should not, therefore, be left to chance. Transnational law practice involves crossing jurisdictional boundaries, and therefore presupposes the ability to find one's way in the law of another jurisdiction. Second, the participants will not be immersed in local law, like their traditional counterparts. Since this local law serves as the ore from which the adaptability can be gained, something else should take its place. The comparative and international law which are important parts of the program can partly serve as an alternative, but more than that will be necessary.

The aim of this course is to equip the students is such a way that they will be able to hold their own in unknown legal territory. They will learn how to detect the most important sources of law, how to get insight into the fundamentals of any given system and how to identify its key actors. Although this is a legal course, it will also draw on the insights acquired in other disciplines like anthropology, sociology and cognitive science, while some of the techniques used in military reconnaissance will also be part of the course. Role play and virtual fieldwork will be part of the teaching method.

Course Materials

Course Reader with selected articles.

Tim Koopmans, *Courts and Political Institutions, A Comparative View*, Cambridge, 2003

Dawson, *Oracles of the Law*

[29] Kozyris, Comparative Law for the Twenty-First Century: New Horizons and New Technologies, 69 Tul. L. Rev. 165 at 168-169 and 171.

Merryman, *The French Deviation*

Merryman, *The Civil Law Tradition*

Legrand, How to Compare Now?, 16 Oxford Journal of Legal Studies 232

Legrand, The impossibility of "legal transplants" (1997) Maastricht Journal of European and Comparative Law 111

Rafaelle Caterina, Comparative Law and the cognitive revolution, 78 (2003-2004) Tulane Law Review 1501

Mathias Reimann, The progress and failure of comparative law in the second half of the twentieth century, 50 (2002) Am. J. Comp. L. 671

Akhil Gupta and James Ferguson, Culture, power, place: ethnography at the end of an era, in: Gupta & Ferguson (ed) *Culture, Power, Place: Explorations in Critical Anthropology*

Horatio Muir Watt, La Fonction subversive du droit compare, 2000 RIDC 504

Paul Schiff Berman, From international law to law and globalization, 43 (2004-2005) Colum. J. Transnat'l L. 485

Michael A. Faia, *Dynamic functionalism, Strategy and tactics*

Walter Goldschmidt, *Comparative functionalism, An essay in anthropological theory*

Mathias Reimann and Reinhard Zimmerman, *The Oxford Handbook of Comparative Law*, Oxford, 2006

Course Requirements and Assessment

Class participation: 20% of the final grade. This includes any presentations and regular class discussions of the assigned readings.

Paper: 80% of the final grade. Twenty page paper on the topic chosen by the student in consultation with the professor.

Attendance: Attendance in class is mandatory. Non-attendance will be factored into the class participation grade.

Course Structure

Session 1: Comparative law: dead in theory, alive and kicking in practice
Introduction
Purpose of the course
The malaise of comparative law in theory
The vibrancy of comparative law in practice
Relying on foreign sources and borrowing by judges

Session 2: The alleged impediments to comparative law
The Legrand approach: culture as an impediment to comparison
Critical anthropology
Cognitive science

Session 3: Mapping the field
The artificial distinctions between systems
Common law vs. civil law?
Legal families
Legal transplants
The methodological quagmire
Contextual functionalism

Session 4: Contextual functionalism applied (I): litigiousness vs. informal dispute settlement

Session 5: Contextual functionalism applied (II): lay justice vs. professional adjudication

Session 6: Finding your way in a foreign legal system: virtual fieldwork (1)

Session 7: Finding your way in a foreign legal system: virtual fieldwork (2)

Session 8: The added value of comparative law

Course Objectives

Students will gain insight into the theoretical discussions on comparative law. They will learn to appreciate its instrumental value. They will also be trained in comparing legal concepts in different jurisdictions using the method of contextual functionalism. Finally, they will be trained in finding their way in unfamiliar legal territory through virtual fieldwork.

LEGAL STRATEGY:
EXAMINING HOW LAWYERS USE PLANS TO ACHIEVE THEIR GOALS

Language of Instruction: English
Administered by: the Faculty of Law

Course Description

Like actors in any other field, individuals active in the area of law use the resources at their disposal to achieve their goals. Non-governmental organizations will sometimes initiate court proceedings, either under their own name or on behalf of plaintiffs selected and supported by them. Through the courts they try to put pressure on the agency to enforce existing rules (private attorney-generals) or to bring about a change in the law. Attorneys will consider whether the interest of their client is best served by going to trial or by settling the case. If a trial appears to offer the best prospects, the attorney will try to reach a favorable outcome by developing a strategy. This strategy will determine the attitude to be adopted during pretrial discovery, the choice of venue, the selection of members of the jury, the storyline followed in the briefs and during oral argument, and the decision which witnesses to call.

To have an impact on the outcome of the case or the development of the law in a particular area, judges will set the tone during oral argument, embrace or distinguish precedents, lobby their colleagues, join the majority or appeal to the public by filing a dissent. The legislature may enact laws by way of a symbolic gesture to placate a particular constituency or leave a sensitive issue unresolved by delegating it to an agency or the judiciary (hot potato). The executive will some times deliberately refrain from enforcing a particular rule to show its disagreement or to encourage its repeal. It will portray unpopular decisions as the outcome of a decision-making process during which it enjoyed little or no discretion. And it will sometimes argue that it lacks the authority to take the measures some expect it to take (cf. *Massachusetts v. EPA*)

Every practicing lawyer relies on these and similar strategic considerations, which, consequently, play an important part in everyday legal life. According to a study carried out by Morison and Leith (*The Barrister's World And The Nature of Law*) practicing attorneys devote a lot of their time and work to developing and implementing such strategies, much more so than to studying and applying law.

The scholarly attention paid to legal strategy is still very limited, although some very important publications have seen the light of day. Walter F. Murphy's *Elements of Judicial Strategy* (Chicago, 1964) can be regarded as a pioneering attempt to map judicial strategies. In *Choices Justices Make* (Washington D.C., 1998) Lee Epstein and Jack Knight systematically provide clear and convincing evidence that judges do think and act strategically. Finally, in *A Theory of Legal Strategy* (49 Duke LJ 1405) Lynn Lopucki and Walter Weyrauch have provided the first theoretical model for the study of this important topic.

The professional literature on the topic, however, is vast. Through judicial biographies, attorney's memoirs and the growing number of publications discussing separate court cases, practicing lawyers and journalists have made an important contribution to the understanding of legal strategy.

Developing a strategy, therefore, is one of the pillars of practicing law, like acquiring an understanding of the law applicable in the case at bar and applying the necessary skills. Getting an insight into these strategic considerations should therefore be part of the curriculum of the Transnational Law Program. In addition to this general reason for including such a course, there is a special need for it in the TLP. The role of the graduates of the Transnational Law Program will be different from that of the traditional local attorney. They will not become experts with a detailed knowledge of a certain area in one particular jurisdiction. Their added value will lie in their ability to view the big picture and to use that view strategically to guide the more locally oriented colleagues. Having a clear insight into legal strategy is indispensable for performing such a role.

Course Materials

Course Reader with selected articles.

Henry Mintzberg, Bruce Ahlstrand, and Joseph Lampel, *Strategy Safari*, London, 1998

Charles Fried, *Order and Law, Arguing the Reagan Revolution*

John Morison and Philip Leith, *The Barrister's World And The Nature of Law*

David Boise, *Courting Justice*

Walter F. Murphy *Elements of Judicial Strategy* (Chicago, 1964)

Lee Epstein and Jack Knight *Choices Justices Make* (Washington D.C., 1998)

Lynn Lopucki and Walter Weyrauch, *A Theory of Legal Strategy* , 49 Duke LJ 1405

Christopher Bank, *Judicial Politics in the D.C. Circuit Court*,

Steven Waldman, *The Bill*

James Baker, *Work Hard, Study … And Keep Out of Politics*

Robert Zelnick, *Winning Florida, How the Bush Team Fought the Battle*

Charles Grant, *Delors: Inside the House that Jacques Built*, London, 1994

Renaud Dehousse, *The European Court of Justice: The Politics of Judicial Integration*, 2002

Karen J. Alter, *Establishing the Supremacy of European Law, The Making of an International Rule of Law in Europe*, Oxford, 2001

Course Requirements and Assessment

Class participation: 20% of the final grade. This includes any presentations and regular class discussions of the assigned readings.

Paper: 80% of the final grade. Twenty page paper on the topic chosen by the student in consultation with the professor.

Attendance: Attendance in class is mandatory. Non-attendance will be factored into the class participation grade.

There will be two guest lectures, to be delivered by a practising attorney and a judge. The students must write a two page reflection paper analyzing these lectures. These reflection papers will be factored into the class participation grade.

Course Structure

Session 1: Legal strategy
Introduction,
Purpose of the course
Theories on (legal) strategies
Difference between strategies and tactics,
Relevance of strategies for the area of law

Session 2: Plaintiff's strategies
Public interest litigation
Achieving social change through the courts
Enforcement through the courts
Case selection by non-governmental organizations
Negotiating
Lobbying Parliament
Amicus briefs

Session 3: Attorney's strategies
Deciding whether or not to go to trail
Threatening to sue
Plea bargaining and settlement
Trial strategies
Using the media

Session 4: Judicial strategies
Set cases for reargument
Assigning the opinion
Bypassing precedent
Use of foreign sources
Per curiam or seriatim
Defusing the controversy by not applying a new radical rule to the detriment of the administrative authority in the case at bar (*Wednesbury*, *Fleet Street Casuals*) or depoliticizing the issue (*Fire Brigades Union*)

Session 5: Legislative strategies
Delegation to agencies
Delegation to judges
Delegation to citizens ('private attorney generals')
Making symbolic legislation
Sitting still
Sunset clauses

Session 6: Executive strategies
Negotiated rulemaking
Refraining from enforcing a particular rule to show its disagreement or to encourage its repeal
Portraying unpopular decisions as the outcome of a decision-making process during which it enjoyed little or no discretion
Arguing that it lacks the authority to take the measures some expect it to take
Selecting 'executive-friendly' judges

Session 7: Case study: *Bush v. Gore*
The Gore and Bush strategies

Session 8: Case study: *Bush v. Gore* (continued)
The Courts' strategy
Which options did the Courts have?
What was the purpose of the Supreme Court's per curiam?
Did it achieve that purpose?

Course Objectives

Student will gain insight into the strategies used by lawyers and learn how to detect them. This will serve as a first step on to road to applying them themselves in practice.

CULTURE AND LAW: UNDERSTANDING THE CULTURAL DIMENSION OF THE LAW

Language of Instruction: English
Administered by: the Faculty of Law

Course Description

It is the purpose of this course to familiarise students with the existing legal traditions, national and organizational cultures.

Glenn has analyzed seven of the world's most important traditions in detail. They are indigenous law, Talmudic law, civil law, Islamic law, common law, Hindu law and Asian law. The students will be acquainted with these traditions during the course.

In his pioneering research Hofstede has identified five major differences between national cultures. First, the way in which societies deal with power distance is different; in some national cultures inequality is felt to be problematic, while in others it is being perceived as being beneficial. In addition, in some national cultures the interest of the group prevails over the interest of the individual, while in others it is vice versa. Furthermore, in some societies assertiveness is regarded as desirable, while in others modesty is considered a virtue. Moreover, the nationals of some countries thrive on unpredictability and risk, while those in others have a low tolerance for uncertainty. Finally, some cultures are long-term oriented in the sense that they value thrift and perseverance, while in short-term oriented cultures respect for tradition and the need to fulfil social obligations are deemed very important. During the course the students will develop an insight into these natural cultures.

In addition to these national patterns, Hofstede has identified six dimensions of organizational cultures. First, some organizations are process oriented, which means that the employees avoid risks and only put a limited effort in their jobs. In result oriented organizations, on the other hand, the employees, who put in a maximum effort, feel comfortable in unfamiliar situations. Second, in employee oriented organizations the welfare of staff members is being taken into account, while many important decisions are being taken collectively. In job-oriented organizations, there is strong pressure to complete the job, the welfare of the employees is less relevant and important decisions are being taken by individuals. Third, in parochial organizations there is no strict boundary between work and private life, while the employees do not look far into the future. Members of professional organizations, on the other hand, distinguish between work and private life and look far ahead. Fourth, in open systems newcomers are made to feel at home quickly, while they remain outsiders for a long period in closed systems. Fifth, in loosely controlled organizations costs are not on everybody's mind, while meeting times are aspirations rather than agreements that should be kept. In tightly controlled organizations employees tend to be cost-conscious and punctual. Finally, pragmatic organizations are market driven, while normative organizations see it as their main task to

implement inviolable rules. During the course the students will be introduced to these organisational cultures

Course Materials

Course Reader with selected articles.

H. Patrick Glenn, *Legal Traditions of the World*, Oxford 2000

Geert Hofstede and Gert Jan Hofstede, *Cultures and Organizations*, *Software of the Mind*, New York, 2005

Course Requirements and Assessment

Class participation: 20% of the final grade. This includes any presentations and regular class discussions of the assigned readings.

Paper: 80% of the final grade. Twenty page paper on the topic chosen by the student in consultation with the professor.

Attendance: Attendance in class is mandatory. Non-attendance will be factored into the class participation grade.

Course Structure

Session 1: Introduction

Session 2: Legal traditions (1)
Indigenous law
Talmudic law

Session 3: Legal traditions (2)
Islamic law
Hindu law
Asian law

Session 4: Legal traditions (3)
Common law
Civil law

Session 5: National cultures
Power distance
Group versus individual interest
Assertiveness versus modesty
Risk versus certainty
Long-term (thrift and perseverance) versus short-term (tradition and the need to fulfil social obligations)

Session 6: Organizational cultures
Process oriented versus result oriented organizations

Employee oriented versus job-oriented organizations
Parochial versus professional organizations
Open versus closed systems
Loosely controlled versus tightly controlled organizations
Pragmatic versus normative organizations

Session 7: Gender: rape shield law versus due process
Debate on the arguments for and against rape shield laws

Session 8: Race: affirmative action versus colour blind action
Debate on the arguments for and against affirmative action

Session 9: Simulation
Negotiating in a culturally diverse setting

Course Objectives

Students will gain insight into the cultural dimension of the law and will learn how to deal with that dimension effectively.

GLOBALIZATION AND THE LAW

Semester: 1, period 1
Language of Instruction: English
Administered by: the Faculty of Law

Course Description

Introduction

Law and globalization are connected in four ways. First, law facilitates and is impacted by the globalization which takes place in other areas, mainly in economics (the law of globalization). Second, the field of law is subject to globalization as well (globalization of the law). Third, the three branches of which the state exists are increasingly cooperating with their counterparts in other states (transgovernmental networks). Fourth, across the world the role played by law in society appears to be increasing (legalization and judicialization).

The law of globalization

Law is a tool used in shaping relations between individuals and corporations that allows them to interact and to pursue their interests. Areas like torts, contracts, consumer law, commercial law, business law, but also tax law, regulatory law and anti-trust law, all support individuals and corporations in performing economic activities and business transactions. Mainly as a result of the development of free trade, the emergence of the Internet and the outsourcing of business activities, the economy has increasingly acquired a global character. The fact that the tax returns of many Americans are being dealt with in India rather than the U.S, that the persons handling our customer complaints and requests are often employed by a call centre at the other side of the world, and that we buy products and acquire information through the Internet, are all illustrations of this development.

Since economic activities take place across national borders, so do the legal aspects related to them. For example, since the respondent in *Dow Jones v. Glutnick* was successful in convincing the High Court of Australia that for the purpose of establishing defamation the location where the publication is downloaded is decisive, publishers will now have to ensure that their products are in conformity with the law of Afghanistan, Zimbabwe and every jurisdiction in between. In brief, since economic actors have become part of a global market, the law will have to follow suit. This phenomenon can best be characterised as the indirect globalization of the law. It is indirect in the sense that it is triggered by developments in other areas than the law itself.

Globalization of the law

The law itself is rapidly globalizing as well. This direct globalization affects both the applicability and the source of legal norms. More and more legal norms become detached from territories. Consequently, concepts developed in one jurisdiction find their way to others. Thus, the proportionality principle, which originated in Germany, has since become an important feature of many other jurisdictions. The members of appellate courts frequently borrow from judgments handed down in other jurisdictions and exchange concepts when they meet their foreign colleagues during international meetings. Under the General Agreement on Trade in Services the State parties are required to liberalise their legal services industries, which will lead to lawyers being admitted to the bar of a jurisdiction other than the one in which they have received their legal education. These activities do not only ignore national borders, but also the rules and principles that have been developed regarding comparative law.

Transgovernmental networks

Increasingly the constituent parts of a State, *i.e.* the legislature, the executive and the judiciary, are forging ties with their counterparts in other States to share information, ideas, concepts and resources. This inter-agency cooperation is not moulded into treaties and organisations, but usually takes the shape of informal policy coordination within transgovernmental networks. Thus, judges of the supreme courts, constitutional courts and the highest administrative tribunals meet periodically to discuss problems of mutual interests and to exchange concepts and ideas. Similar relationships exist between legislatures, and in particular, between regulatory agencies.

Legalization and Judicialization

The law and the courts appear to be on the march everywhere. There were people used to rely on the political branches to pursue their interests courts have taken their place. Citizens increasingly bypass the political process, which they consider to be cumbersome and ineffective. Low standing barriers, the culture of rights, the reduction of administrative discretion and the shrinking of non-justiciable areas have turned the courts into attractive forums in which to pursue social change. The emergence of adversarial legalism and public interest litigation are related to these developments.

The contents of the course

During the course the students will familiarise themselves with all four aspects of law and globalization.

First, they will be introduced to the general phenomenon of globalization and the impact is has had on the law that regulates economic activities. They will discover that this indirect legal globalization offers both risks and opportunities to those who are involved in business and trade. As the *Microsoft* cases have made clear, companies run the risk of getting involved in multiple proceedings in several jurisdictions with conflicting outcomes. On the other hand, the global economy also offers companies important opportunities, as the success of Amazon.com and Google demonstrates. The graduates of this program should be able to advise their clients on protecting themselves against the risks and on making use of the opportunities created by this type of globalization.

Second, the students will acquire knowledge of and insight in the globalization which is taking place in the area of law autonomously. They will be familiarised with the attempts that have been made thus far to conceptualise globalization as a legal phenomenon. Since these attempts have benefited from the progress made in disciplines like economics, sociology, political science and anthropology, the students will also be exposed to those insights. The students will also be trained to abstract from geographically determined jurisdictions with fixed boundaries. As a result of direct globalization these boundaries have become less relevant and, consequently, the development and enforcement of legal norms is in flux. Finally, the students will reflect on the consequences of direct globalization for the legal profession, in particular access to the bar of jurisdictions other than where one has received his education, and for legal education. Direct globalization is already having an impact on the curriculum of law schools, which used to focus on national jurisdictions, as the recent changes at Harvard Law School demonstrate.

Third, the students will be acquainted with the causes and effects of informal interagency cooperation. Attention will be paid in particular to the cooperation between judges and regulatory agencies. Finally, the students will analyze judicialization and legalization and will assess the benefits and disadvantages of these developments.

Course Materials

Course Reader with selected articles.

Saskia Sassen, *Territory, Authority, Rights, From Medieval to Global Assemblages*, Princeton, 2006

Anne-Marie Slaughter, *A New World Order*, Princeton, 2005

Jean-Bernard Auby, *La Globalisation, le Droit et l'Ét*at, Paris, 2003

Paul Schiff Berman, *The Globalization of Jurisdiction*, (2002-2003) 151 U. Pa. L. Rev. 311

Martin Shapiro, *Courts, A Comparative and Political Analysis*, Chicago, 1981

Alec Stone Sweet, *Governing with Judges, Constitutional Politics in Europe*, Oxford, 2000

Kal Raustalia, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, (2002-2003) 43 Va. J. Int'l L. 1

Course Requirements and Assessment

Class participation: 20% of the final grade. This includes any presentations and regular class discussions of the assigned readings.

Paper: 80% of the final grade. Twenty page paper on the topic chosen by the student in consultation with the professor.

Attendance: Attendance in class is mandatory. Non-attendance will be factored into the class participation grade.

Course Structure

Session 1: Introduction

Session 2: The law of globalization

Session 3: Globalization of the law

Session 4: Jurisdiction

Session 5: The paradox of the growing role of the State

Session 6: Transgovermmental networks

Session 7: Legalization

Session 8: Judicialization

Course Objectives

Student will gain insight into the legal aspects of globalization.

COMPARATIVE CONTRACTS:
CONTRACTS FROM A COMPARATIVE AND ECONOMIC PERSPECTIVE

Language of Instruction: English
Administered by: the Faculty of Law

Course Description

Comparative contract law and economics is a new discipline located at the frontiers of contemporary legal research. This innovative comparative course, while combining the analytical tools and concepts of economics and comparative law (in order to develop a critical approach to legal rules and institutions) will convey a distinctive comparative perspective of the theory, practice and understanding of the law of contracts and its economic implications for different legal systems. Thus one should, due to its economic dimension, sharply distinguish it from traditional comparative contract courses which lack precisely this additional, economic perspective.

Although traditional comparative law has a long-standing tradition as an advanced branch of legal scholarship in Europe as well as in the USA, up until now it has primarily focused on discovering similarities and differences among legal systems throughout the world. Moreover, due to the lack of these additional analytical tools, which economics offers, comparative contract law has also demonstrated a disturbing propensity to become either a mere discussion of foreign law or a mere parallel exposition of different legal systems (Mattei, 2001).

However, the introduction of an additional economic perspective overcomes this narrowness offering the additional instructive insights and understanding of economics as the major driving force behind all laws of contract. Such a study of comparative contract law significantly enriches its practical and theoretical perspective. Employing economic tools hence opens the door to comparing operative rules, to comparing the real law in action, rather than mere doctrinal descriptions. It thus opens the door towards a deeper and better understanding of real, and not just doctrinal, differences or similarities between different legal systems. It enables one to understand and to deal with all the significant economic implications that different contract systems may have for daily business and legal practice.

Such law in action reflects the concrete availability of remedies that each individual may obtain in order to assure for himself or herself the backing of the legal system for a proposed course of action. In addition, economic tools are used to measure the real impact of a given set of legal signals on the market actor. Comparative contract law and economics, by assessing the law of alternative legal systems with these economic tools, thus conveys the possibility of measuring the core of legal systems, that is, the actual analogy (or differences) in the signals they convey to the market actors. Moreover, it gives one a universal, or to put it in different terms, a transnational understanding of different contract laws.

This course will employ functionality, micro-comparison and efficiency as basic methodological principles to compare the rules used to solve actual problems, to compare the features of different legal systems which fulfill the same function. The course will also use additional economic tools and efficiency criteria as a uniform term of comparison for the contract law of the USA, England & Wales, France and Germany (occasionally other legal systems will also be included, e.g. Italian or Chinese law). First, the essential features of each of those main representatives of the legal families will be discussed (country by country) and then critically analyzed from an economic perspective.

The course will first discuss comparative principles as economic methods and techniques and will then proceed with a discussion of the major stages in the life of a contract in all four jurisdictions. Essential elements, features, cases, doctrinal positions, apparent (as well as real) differences and similarities between those jurisdictions will be carefully assessed concerning the pre-contractual, formation and performance stages of the contract. Since the comparative analysis will be founded upon an actual observation of the elements at work in a given legal system it will therefore result in a better and deeper knowledge of the various systems compared.

Moreover, although it is often claimed that the contract laws of assessed countries are distinctively very different, our economic analysis will reveal some surprising, contrary results. Although the students will not become contract experts in one of the four legal systems, this course will enable them to see a wider, global picture. It will provide them with an overview of the contract law of the USA, England & Wales, France and Germany and with all the economic implications which those systems may have for daily business and legal

practice. It will enable them to strategically guide locally-oriented colleagues (e.g. by detecting the points of attention in different contract settings) as well as discussing contractual questions with businesses and economists in major financial centres around the world. Making them familiar with the contract law of all four major jurisdictions and with the economic reasoning underlying court decisions, the doctrine and legislation will help them to work as real transnational lawyers. Moreover, an understanding of the economic perspective will provide them with a comparative advantage in relation to local contract experts and other lawyers not familiar with this subject.

Course Materials

Course Reader with selected articles and court decisions.

Beale, Hugh, Hartkamp, Arthur, Kotz Hein and Tallon Denis, *Contract Law: Cases, Materials and Text*, Hart Publishing, 2002.

Cooter, Robert and Thomas Ulen, *Law and Economics,* Addison Wesley Longman, 5th Edition, 2006.

Farnsworth, E. Allan, *Contracts,* Fourth Edition, Aspen Publishers, 2004.

Markesinis, Basil, Unberath, Hannes and Johnston, Angus, *The German Law of Contract: A Comparative Treatise,* Hart Publishing, 2006.

McKendrik, Ewan, ″Contract Law: Text, Cases, and Materials,″ 2nd ed., Oxford University Press, 2005.

Zweigert, Konrad and Kotz Hein, »An Introduction to Comparative Law«, Third Edition, Clarendon Press-Oxford, 1998.

Course Requirements and Assessment

Requirement: basic law and economics course.

Paper: 50% of the final grade. The paper (by each person) should be at least 2,500 words in length and at most 3,500 words on a topic chosen by the student in consultation with the lecturer. The marks will be based on the quality of the paper (40%) and the quality of its presentation (10%); the presentation should be no longer than 10 minutes.
Topics: papers must consist of a "comparative contract law and economics" analysis of a specific contract law rule, a specific contract or a specific contract term (at least the law of the USA, the UK, Germany and France should be compared).

Written test: 50% of the final grade.

Attendance: Attendance in class is mandatory.

Course Structure

Session 1: Introduction, Methods and Techniques
Introduction

Principal comparative legal methods and techniques
Principle of functionality as the main comparative method
Micro/Macro comparison
Introduction to economic tools: incentive, transaction costs and risk analysis
Introduction to basic economic concepts: allocative efficiency, welfare loss, welfare gain, externalities, scarce resources
Efficiency as a uniform term of comparison

Session 2: Pre-contractual stage
Pre-contractual duty of disclosure, misrepresentation
Pre-contractual good faith, promissory estoppel

Session 3: Formation of contracts I
Non-discrimination
Offer and Acceptance; duration, communication, irrevocability
Pre-contracts; Option Contracts, Letters of Intention
Formal Requirements

Session 4: Formation of contracts II
Validity of Contracts
Immoral and illegal contracts

Session 5: Formation of contracts III
Fraud, mistake and misrepresentation, right to rescind,
Abuse of circumstances and excessive benefit

Session 6: Formation of contracts IV
Assignment
Representation, undisclosed agency

Session 7: Performance of Contracts
Claims to Performance and their enforcement
Breach and termination of a contract, late performance, non-conforming performance, partial failure of performance

Session 8: Effects of supervening events
Impossibility of performance, Force majeur (Vis major)
Imprevision,
Commercial impracticability
Hardship
Wegfall des Geschäftsgrundlage

Session 9: Applications - Paper presentations
Paper presentations

<u>Course Objectives</u>

Students will gain an overview of the law of contracts of four major legal systems, as well as additional, transnationally (universally) applicable economic insights into the theory, practice and understanding of the law of contracts of the different legal systems. Moreover, the course

will equip students with an additional pool of possible solutions to related practical legal problems and will enable them to detect real differences or similarities in those four main legal systems.

PUBLIC INTERNATIONAL LAW

Language of Instruction: English
Administered by: the Faculty of Law

Course Description

An understanding of the basic principles of what is generally referred to as Public International Law is crucial for all students who plan on working in the international field, whether directly participating in intergovernmental matters, or as international specialists in human rights, corporate, trade, environmental, or other so called "private" law matters, including international litigation. Moreover, international law is also increasingly becoming important for those individuals who may have previously considered themselves as purely "domestic" lawyers. This course will provide an introduction to the system of norms, rules, institutions and procedures that regulate interaction among subjects of international law. Three essential areas will be examined (1) the source and nature of international legal rules; (2) various international legal processes; and (3) the relationship of these international rules and processes to individuals, organizations, and states.

In addition to examining public international law primarily from a legal perspective, this course will also study public international law from an international relations viewpoint. Many political scientists view international law as a meaningful tool for providing order to world politics and for minimizing global conflict. Whereas other scholars of international relations dismiss international law as unimportant. For these scholars, state interests, and not internationally agreed-upon rules, principles, and norms, direct interaction among states. This course will investigate the basic question underlying this debate over the utility of international law. Namely, does international law act as a constraint on state autonomy, or is it merely used by states when it is in their self-interest? Upon successful completion of this course students should have a sound working familiarity with the basic principles of Public International Law.

Course Materials

Course Reader with selected articles.

International Law (Carter, Trimble and Bradley, eds., 2003), ISBN 0-7355-2706-7. 2003 Supplement to this text, ISBN 0-7355-2708-3. Published by Aspen Law & Business. William R. Slomanson, *Fundamental Perspectives on International Law*, 4th Edition (New York: West Publishing Company, 2003). The Slomanson text includes a course web site which provides access to additional international legal materials, a research guide on international legal resources, and information on career opportunities in international law.

Course Requirements and Assessment

Class participation: 20% of the final grade. This includes any presentations and regular class discussions of the assigned readings.

Final Exam: 80% of the final grade.

Attendance: Attendance in class is mandatory. Non-attendance will be factored into the class participation grade.

Conferences and site visits: Students must attend a minimum of 1 conference/outside lecture on the subject of international law and write a one page summary of their thoughts. This reflection papers will be factored into the class participation grade.

Course Structure

Session 1: Introduction to International Law
What do States comply with it?
Actors in international law

Session 2: Sources of International Law
Treaties
Customary international law
General Principles

Session 3: International Dispute Resolution
Negotiation, Mediation, Conciliation and Arbitration
International Court of Justice

Session 4: Recognition of States and Governments
Recognition and Succession
Self-determination

Session 5: Individual and Corporation in the International System
State Responsibility for Injury to Aliens
Human Rights and International Criminal Law

Session 6: Allocation of Legal Authority Among States
Jurisdiction to Prescribe:
Territorial jurisdiction
Nationality
Protective, Passive Personality, Universal
Enforcement powers; extradition issues

Session 7: Sovereign and Other Immunities
Sovereign immunity
Diplomatic and Head-of-State Immunities

Session 8: Act of State Doctrine
Acts of State

Session 9: Global Issues and International Law
International Law of the Sea
International Environmental Law

Course Objectives
Students will gain an overview of the international legal system, its historical developments, its limitations and how it is currently practiced. Moreover, course-specific objectives include: (1) developing students' ability to identify and apply international legal principles relevant to current issues and events in global politics; (2) developing students' skills in analytical reasoning; and (3) improving students' ability to write with precision, clarity, and logical coherence.

INTERNATIONAL CRIMINAL LAW:
EXAMINING TRIBUNALS FROM A TRANSNATIONAL PERSPECTIVE

Language of Instruction: English
Administered by: the Faculty of Law

Course Description

International criminal law has developed rapidly within the past 15 years. At present, approximately nine international, hybrid or mixed criminal tribunals are in the process of trying individuals for war crimes, crimes against humanity and genocide. In the early 1990s, some 50 years after the judgments at Nuremberg, the United Nations Security Council created the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) to prosecute atrocities that took place in those countries. In 2002, the international community established the permanent International Criminal Court (ICC) through ratification of the Rome Statute. The past few years have also seen the formation of courts to prosecute war crimes and crimes against humanity in Sierra Leone, East Timor, and Cambodia, as well as national courts in Bosnia, Kosovo and Iraq. In the wake of egregious human rights abuses, the international community is under increasing pressure to shift from a culture of impunity to true accountability, while endorsing principles of impartial justice and addressing the concerns of a growing number of victims.

Because international criminal law has undergone dramatic developments in the past decade, it is important for the study of law to keep up with these changes. This course will provide students with an introduction to the international criminal law system by examining the theory and practice of the tribunals, with a specific focus on the ICC and a critical look at the role legal traditions play in helping to shape the Court.

From its inception, the ICC has had the challenging task of merging common law and civil law elements, such as adversarial and inquisitorial traditions, into coherent and fair international criminal procedures. Arguably, while adversarial systems tend to provide better safeguards for accused, inquisitorial systems provide better safeguards for victim participation. In fact, there are a number of academics that argue the primacy of one legal system over the other. And in an international context these arguments become contentious. Obvious tensions, therefore, exist between the two legal systems at the international level, which in turn has affected the development of the rules of the Court. So while the idea of a criminal trial is clear in national jurisdictions, the role of defense, prosecution and victims becomes less clear in international criminal proceedings; particularly because international criminal law is still developing.

This course will first discuss the historical development of individual criminal responsibility under international law and the elements of war crimes, crimes against humanity, genocide and the crime of aggression. In addition to introducing students to general theories and principles of international law this course will examine, amongst other topics, the actual practice of the courts and how they have developed procedures based on a mixture of legal traditions. This course will familiarize students with the procedures of the ICC from a number of different perspectives, including the prosecution, the defense and victims, and compare the procedures of the ICC to other legal systems and tribunals. Finally, the course will look at select court orders and jurisprudence from the various tribunals and examine them in light of the current situation before the ICC. The approach of the course will be comparative, historical, analytical, and evaluative. The students will be encouraged to question general statements about the court and various legal traditions in order to draw their own conclusions on whether or not such statements are mere rhetoric or sound reasoning.

Course Materials

Course Reader with selected articles.

Scharf, Michael P., *Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg* (Carolina Academic Press, 1997).

Paust, Bassiouni & Williams, *International Criminal Law: Cases and Materials* (Carolina Academic Press, 1996)

Cassese, Antonio, *International Criminal Law* (Oxford University Press, 2003).

Course Requirements and Assessment

Class participation: 20% of the final grade. This includes any presentations and regular class discussions of the assigned readings.

Paper: 80% of the final grade. Twenty page paper on the topic chosen by the student in consultation with the professor.

Attendance: Attendance in class is mandatory. Non-attendance will be factored into the class participation grade.

Conferences and site visits: Students must attend a minimum of 2 conferences/outside lectures on the subject of international criminal law and write a one page summary of their thoughts. These reflection papers will be factored into the class participation grade. In addition, due to their convenient location in The Hague, students will be required to visit either the ICTY or ICC or any other working international criminal tribunal. They must write a maximum one page reflection paper on their experience.

Course Structure

Session 1: Common law and Civil law traditions in criminal law
In theory, approach and procedure

Session 2: The General Context of international criminal law
Principles of State jurisdiction
Individual criminal responsibility
Universal jurisdiction
Customary international law and conventional international law

Session 3: Substantive international crimes
Defining the elements of crimes
War crimes, crimes against humanity, genocide, aggression, treaty-based crimes and emerging international crimes

Session 4: The Nuremberg and Tokyo Tribunals
Individual Criminal Responsibility, how it changed
Jurisdiction and organization of the tribunals
Elements of the crimes: War crimes, crimes against humanity, aggression
Theory and practice of the tribunals

Session 5: The Cold War period
International cooperation (or lack thereof)

Session 6: The Ad Hoc Tribunals
The Yugoslav Crisis and Tribunal
The Rwandan Crisis and Tribunal
Jurisdiction (extradition issues) and organization of the tribunals
Elements of the crimes: war crimes, crimes against humanity, genocide, violations of common article 3
Theory and practice of the tribunals
Investigations, prosecutions, defense, appeals, enforcement of sentences
Ongoing issues at the Courts
Special Court for Sierra Leone

Session 7: Theory and Practice of the International Criminal Court
Compromises leading to the Court
Statute and Rules of the Court
Organization of the Court and departures from other international tribunals
The Lubanga Case
Ongoing issues at the Courts

Session 8: Domestic Courts enforcing International Criminal Law
Training
Interaction with and reliance on international courts
Political issues

Session 9: International cooperation in criminal matters
Extradition
Surrender of individuals
Mutual legal assistance

Session 10: Overview
Ad Hoc Courts v. ICC

International criminal law and human rights
Victims' Issues
Defense Issues
Reflection on the effectiveness and desirability of international criminal courts

Course Objectives

Student will gain an overview of the international criminal justice system, its historical developments and how it is currently practiced. Moreover, students will become familiar with the detailed procedures of the ICC and learn how to critically examine the Court through a variety of perspectives.

FOREIGN LANGUAGE IN A LEGAL CONTEXT

All students will enrol in a foreign language course. This will allow them to read documents in their original language, which will open the door to a new legal system. The language courses will be set in a legal context. The students will be able to choose from a selection of languages, including Spanish, Chinese and French. The language course will last much longer than any other course in the programme, spanning the entire two and a half year period the students will spend at Utrecht. This will enable the students to acquire a more than basic command of the language.

ANNEX 2: A BRIEF CHARACTERIZATION OF THE 2L AND 3L COURSES

Lawyering skills

This course will teach students the skills necessary to analyze rules, to draft texts, to present oral arguments, to solve problems and to interview clients. Special attention will be paid to appellate brief writing. As part of the course students will also be acquainted with ICT technology, the importance of which is growing in transnational practice.

International criminal law clinic

The International Criminal Law Clinic offers student-professionals the opportunity to work with defense teams representing individuals before international criminal tribunals, either during trial or on appeal. The student-professionals will be required to assist the defense council on a variety of tasks, including researching questions of international and national law, drafting possible pleadings and other submissions, drafting questions to use on direct or cross-examination, and overall case management.

In addition, student-professionals will attend court proceedings and case theory sessions. Because contact with the client will be limited, which is often the case in the international criminal law field; students will struggle with issues of client contact and fact gathering over long distances with difficult means of communication. The course focuses on lawyering skills, ethical issues and preparation for the practice of law. Teaching methods are experiential and student-focused, including extensive use of simulation and role-playing exercises in addition to their work for their cases.

The clinic offers the student-professional instruction in the following areas: case preparation, case theory, client counselling, collaboration, decision making, discovery practice, drafting,

informal advocacy, institutional analysis, interviewing, legal writing, negotiation, oral argument, proof of facts, planning, strategic fact investigation, trial advocacy, and witness preparation.

Comparative appellate brief clinic

The participants in the comparative appellate brief clinic will make comparative contributions to amicus briefs that will be commissioned by non-governmental organizations. The practice of filing amicus briefs has grown extensively over the past decades. Some courts of final jurisdiction, like the U.S. Supreme Court, the House of Lords, the Israeli Supreme Court, the Canadian Supreme Court, the Australian High Court and the South African Constitutional Court in their judgments increasingly rely on comparative information. They therefore welcome comparative briefs. The students in this clinic will assist ngo's that would like to include comparative information in their briefs, but lack the resources to provide that information themselves.

Law and economics: examining the effects and efficiency of legal rules and regulations

The results achieved may be different from what the law-makers had in mind when enacting legislation. In their future careers many law students will be involved in policy-making as a legal advisor, a legislator, a judge, a member of a consultative body, a business lawyer, or in other capacities. Law and Economics helps to understand the impact of legal rules on a client's commercial situation, on individuals involved in a legal dispute, or on the economy at large for fundamental legal changes. Economic analysis of law (or 'law and economics') uses modern microeconomic tools to analyze legal rules and institutions. It studies the effects of legal rules on incentives, risk allocation and transaction costs.

The course discusses the Law & Economics of different domains of law, such as corporate law, contract law, property law, tort law, antitrust law, consumer law, financial law, health, safety and environmental law, and more. For example, in the field of property law it is shown how the assignment of property rights provides the maximum amount of economic incentives to use resources efficiently. Likewise, in the field of tort law, the analysis makes clear how the welfare of society is improved when legal standards of negligence include the trade-off between the cost of accidents and the cost of resources used to prevent accidents. And it is shown, how the number of crimes committed also depends on the probability that a person will be arrested and convicted, the expected severity of punishment and variables reflecting the alternative income-earning potential. Thus, it offers not only explanations of criminal behavior but also perspectives on how to deter crime efficiently.

Law and Economics obviously ought to be part of a Transnational Law program. It contributes in the understanding of the logic of law irrespective of particular jurisdictions. It helps predicting the effects of legal rules and offers perspectives on optimal decision making by policy-makers or in legal practice.

Non-judicial dispute settlement

This course will deal with several topics which are different in nature, but have one element in common, *i.e.* negotiation. Although arbitration, ADR, settlement, restorative justice, plea bargaining and truth and reconciliation are part of different legal disciplines, they all revolve around negotiations between the parties involved. The questions that will be raised during the course are: What are the advantages and disadvantages of dealing with legal problems out of

court? What kind of protection is offered to the weaker party? How can be ensured that all involved act out of their own free will? Can those involved fall back on the court if the agreement is not kept? A simulation, based on the Harvard 'Getting to yes'- model will be part of the course.

Private international law (Conflict of laws)

The course will demonstrate, by the analysis of cases and statutory provisions, how one should determine whether the proposed forum has proper jurisdiction to adjudicate and which of the competing state's laws should be applied to resolve the dispute. The course will deal with issues like renvoi, proof of foreign law, domicile and residence, the doctrine of forum conveniens, the relevance of EU law, recognition and enforcement of foreign judgments and choice of law.

EU law

This introductory course to European Law will deal with the structure of the EU, the role of the Court of Justice, actions against Member States, judicial review of EC acts, direct effect, supremacy, free movement of workers, freedom of establishment, fee movement of services, social policy, citizenship, free movement of capital and multi-level governance.

Regulation

This course will offer a comparative perspective on regulatory questions, mainly from an EU and a U.S. perspective. The course will deal with the following issues: agencies, judicial review, rulemaking, individual acts, adjudication, notice and comment regulating risk, jurisdiction shopping, general principles of law, freedom of information, alternative to classic regulation (emissions trading, negotiated rule making, settlement) and enforcement issues.

Lawyering from a business perspective: examining how law and the business environment interact

Many TLC students will seek a career in a law firm or a multinational corporation operating in a competitive environment. For that reason it is of crucial importance to understand the implications of rivalry in the market and the factors that contribute to a competitive advantage. At the same time, the law lays down a number of standards with respect to different aspects of the firm's choices and behaviour that are important for the firm to comply with or to take into account. Often the law offers a number of contractual or organisational alternatives from which a firm is allowed to choose. But to be able to advise on these choices, the lawyer needs to have a good perspective on the goals, strategies, structure and performance of the firm. Furthermore, and perhaps more importantly, students should also be fully aware of the possible tensions between the profit motive in the business world and the codes of ethics and standards of conduct required in the legal profession. This course offers a basic understanding of the fundamental aspects of firms in a competitive environment and the interaction of these aspects with the law.

Intellectual property law

The course on intellectual property law will deal with the question how the law should protect innovation and creativity. The students will be acquainted with the underlying rationale of

intellectual property law, its multiple regimes and how to use these strategically. Topics that will be discussed include biotechnology law and ethics, copyright law, trademarks, patent law, entertainment law, and e-commerce.

Comparative tort law

The course will focus on similarities and differences between tort law regimes. It will cover issues such as negligence, nuisance, defamation, the scope and extent of liability, defenses and remedies. Throughout the course an economic and comparative analysis will be applied. Issues like the influence of EU law on domestic law and the harmonisation of tort law in Europe will be taken into account.

International dispute resolution

The course will deal mainly with issues related to international commercial arbitration, such as the determination of applicable law, procedural law, the taking of evidence, the determination of jurisdiction, provisional measures, form and content of awards and recognition and enforcement.

The European Union

Since the rejection of the Constitutional Treaty by the people of France and the Netherlands the movement towards closer economic and political union appears to have lost its momentum. Europe's political leaders seem at a loss how to find a way out of the present crisis. During the course the causes of the breakdown of the European integration process will be discussed. The course will go into the historical development of the EU and the struggle between the two organizing principles that have shaped it, *i.e.* the state and the market. Building on this historical analysis the participants will discuss how the integration project can be repaired and how Europe's experiment in economic and political union can succeed.

Chinese law and government

For nearly three decades, the People's Republic of China has been pursuing a sweeping, if uneven, process of legal reforms that have been high on the political agenda and played a crucial role in the market-oriented economic reforms and democratic developments in China. This course is designed as a broad introduction to contemporary Chinese law from a multidimensional perspective. The first part of the course will focus upon the history of law in imperial and modern China (1912-1978). Special attention will be given to classical Chinese legal philosophy; traditional Chinese views on the role of law in society; the introduction of the Western legal system to China and legal reform in the early twentieth century; and the dismantling of the legal system during the years of the Cultural Revolution. The main part of the course will focus on the introduction to the contemporary legal system in China, and its role in relation to political, economic, and social developments. This part will include constitution and state structure, legislative authority and legal interpretation, implementation of law, dispute resolution, the legal profession, procedural law and substantive law. The course concludes with a discussion of the major legal issues confronting China today, such as human rights protection and intellectual property issues.

European private law

This course will deal the gradual harmonization of the national private laws of the EU Member States. It will review, first of all, the impact of EU law on the national private law of the Member States. In addition, it will discuss the academic proposals for common European rules and principles in the area of private law. The course will introduce the students to developments in areas like civil procedure, consumer protection, judicial cooperation, family law and private international law.

Comparative criminal law

This course examines several aspects of criminal justice from a comparative perspective. The participants will discuss whether there are any fundamental principles which underlie all criminal justice systems. Students will acquaint themselves with the basic characteristics of criminal procedure under the inquisitorial and adversarial systems. Much attention will be paid to the right to a fair trial and the right to legal representation.

Comparative Constitutional and Administrative Law

The aim of this course is to provide students with an understanding of comparative constitutional and administrative law. The course is different from some of the more traditional programmes, which subject a limited number of jurisdictions to an in-depth country-by-country analysis. In contrast, the participants in this course will focus on a single theme, *i.e.* the concept of separation of powers, drawing on the experiences of a large number of jurisdictions.

During each class students will discover how a particular phenomenon, for example the scope of judicial review, justiciability, or standing works out in different jurisdictions. The judiciary will be the focal point of the course. The participants will study the methods that courts have developed over the years to consider the lawfulness of administrative acts and the constitutionality of legislation, while at the same time avoiding to cross the boundaries of their jurisdiction, as defined by the Constitution, or at least avoiding to be seen to cross these boundaries, which is almost as important.

Although the course focuses on issues rather than countries, at the outset some background will be provided on the two systems that appear to be at the opposing ends of the spectrum, *i.e.* the United Kingdom and the United States. The dominant feature of the British system is Sovereignty of Parliament; whereas in the American case it is constitutional supremacy. Comparing these two features will help students to put the material into perspective.

International humanitarian law

International humanitarian law (IHL) is a branch of public international law aimed at the regulation of armed conflicts. It defines acceptable means and methods of warfare and establishes various forms of protection against the effects of war on both people and property. At their core the rules comprising international humanitarian law seek to balance military necessity against fundamental notions of humanity.

The past decade has witnessed some remarkable developments in the area of international humanitarian law. The complexity of contemporary conflicts is creating a host of new pressing challenges for the interpretation and enforcement of IHL norms. In an increasingly globalised world, new types of combatants, changing methods of warfare, weapons

advancement and novel means to finance conflicts make the implementation of international humanitarian law an increasingly strenuous task. Most recently Afghanistan and Iraq revived attention to the rules governing inter-State conflicts. Violence in Rwanda, Sierra Leone, the former Yugoslavia, Chechnya, Eastern Timor and elsewhere has served to highlight the need to re-evaluate the effectiveness of existing mechanisms for ensuring compliance with IHL and, at the same time, the novel difficulties associated with its application. The growing threat of terrorism has only exasperated the already existing problems in relation to enforcement.

To fully grasp the implications of the new challenges that IHL has to face, understanding the inter-relationship between international humanitarian law, human rights law and international criminal law as well as the dynamics behind the sweeping development of the latter disciplines in the past decades, is the key. The course *International Humanitarian Law* as a part of the *TLP programme* will explore IHL norms and themes within the broader context of international human rights law and international criminal law.

The course is divided into two parts. The first part of the course will explore the content, development and implementation of international humanitarian law in theory. The legal basis for IHL (both customary law and treaty law) and the principles pertaining to the conduct of hostilities, the treatment of combatants and non-combatants, and the regulation of internal conflicts will be discussed followed by a survey of how these principles are being realised and what avenues for accountability exist for those responsible for their violation.

The second part of the course will focus on the application and effects of international humanitarian law in modern conflicts. In particular we will examine the relationship between (1) IHL and non-state actors (e.g. rebel groups, mercenaries, private security companies and transnational corporations), (2) IHL and terrorism, (3) IHL and policy-making, and (4) IHL and the NGO sector. In class, and through individual research, we will explore the context of ongoing armed conflicts around the world, scrutinise the application of international humanitarian law in these conflicts by policy-makers, military officials and other relevant parties on the local, national and international levels, and utilise the knowledge acquired during the theoretical part of the course to critically evaluate contemporary conflicts and the role of those involved therein from an IHL perspective. The new significance that international humanitarian law has attained post-9/11, in particular with regard to terrorism-related litigation in the United States, will be comprehensively discussed. Also the controversy surrounding the notion of state terrorism will be delved into. The inter-relationship between IHR and policy-making, both on the national and the international level, will be explored. Lastly, the role of medical professionals and NGOs engaging in humanitarian missions in conflict zones around the world will be analysed with a view to the unique opportunity with which their work presents them in order to witness and document violations of both humanitarian and human rights law, to raise awareness of applicable international norms on the ground-level and to seek the enforcement of such norms.

International human rights law

This course will focus on the human rights catalogues and the corresponding enforcement mechanisms developed at the universal and the regional levels, in particular the UN, the Council of Europe and Inter-American systems. The course will deal in detail with the case law developed by the (quasi-)judicial bodies overseeing the implementation of the respective treaties. Attention will be paid to the crippling effects the workload appears to have on the effectiveness of the oversight mechanisms. The importance of the requirement of an effective

remedy will be highlighted. The question to what extent human rights are universal and the emergence of human rights skepticism will be discussed.

Climate change law

This course is devoted to the legal issues related to the increasing involvement by states and international bodies, but also by individuals and non-governmental organizations, in the area of climate change. It will deal with international and statutory instruments that target this phenomenon. It will also look into the legal strategies, taken both from public law and private law, used by interest groups within the framework of climate law litigation. The course is an amalgam of environmental law, international law, regulation, health and safety law, product liability, torts and other relevant legal disciplines.