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# »International Law Is What International Lawyers Do«

Jens Drolshammer

This free-style essay is a salute to Daniel Thürer – a dear friend and colleague for many years – and a call for a merging of the respective thinkings on a person-centered conceptualization of »lawyers« as key legal actors in the legal process of globalization. In my main profession I was an attorney, founder and senior partner of an international law firm in Switzerland. In my time thereafter – in particular in the time between 1999 and 2008, as visiting research professor at Harvard Law School, I frequently worked on issues of the globalization and the americanization of law and – in particular – legal professions.<sup>1</sup> In my valedictory lecture in 2009 at the University of St. Gallen – the home town of Daniel Thürer<sup>2</sup> – which Daniel Thürer attended, I came forward with a new idea of thinking about the legal process in globalization in the form of a person-centered and conceptualized framework, which gives lawyers as actors in the legal process of globalization their due place.<sup>3 4</sup>

<sup>1</sup> Jens Drolshammer, *A Timely Turn to the Lawyer? Globalisierung und die Anglo-Amerikanisierung von Recht und Rechtsberufen – Essays* (20 texts, 1138 pages), Zurich/St.Gallen 2009; *The Effects of Globalization on Legal Education*, Zurich/Basle/Geneva 2003 ; Jens Drolshammer/Michael Pfeifer (ed.), *The Internationalization of the Practice of Law*, The Hague/London/Boston 2001; Jens Drolshammer/Nedim Vogt, *English as the Language of Law? – An Essay on the Legal Lingua Franca of a Shrinking World*, Zurich/Basle/Geneva 2003.

<sup>2</sup> Daniel Thürer, *Aus meinem Leben*, in: *Jahrbuch des Öffentlichen Rechts der Gegenwart*, Tübingen 2014, p. 531–557.

<sup>3</sup> *The Global Groove of the Harvard Yard – Persönliches zur Person in der »Globalisierung und die Anglo-Amerikanisierung von Recht und Rechtsberufen«*, *Zeitschrift für Schweizerisches Recht* 2009, p. 317–353; a shortened version was published in *DAJV Newsletter. Zeitschrift der Deutsch–Amerikanischen Juristenvereinigung e.v.*, 2010, p. 31 – 36; the text is contained as text 2.42 of the part on *Americanization of Swiss Legal Culture* by Jens Drolshammer (2014) in the *Anthology of Swiss Legal Culture*, [www.legalanthology.ch](http://www.legalanthology.ch), of which Thomas Cottier and Jens Drolshammer are the founding General Editors.

<sup>4</sup> The text is a paraphrase of parts of the valedictory lecture which has been translated into English by Tom Wesel, London, for this specific purpose.

In 2012 Daniel Thürer himself wrote two interesting texts primarily focusing on the role of legal education in globalization.<sup>5</sup> This essay only refers to these two late texts penned by Daniel Thürer. This postmodern telegram is partly a paraphrase and partly a citation of the oral form of the valedictory lecture. It intends to flag some contextual elements and dimensions of this proposed dialogue. As a late salute the telegram also reflects our mutual experiences with American law and American legal culture as well as American law schools as part of our post World War II professional lives.

As an initial contribution to our dialogue I take the liberty – a free style essay – to use images and analogies borrowed from various disciplines of the arts – in Part 1 from the artistic form of a ›play‹, in Part 2 from the artistic form of an ›exhibition‹ and in Part 3 from the artistic form of ›language sentences‹. The title of the valedictory lecture ›The Global Groove of the Harvard Yard‹ refers to music – who knows if this kaleidoscopic glance into the ›Brave New World‹ of a globalized legal world may not profit from a ›free narrative‹ embracing these perspectives of the arts as well. Indeed this might do justice to the theme of globalization, for art often manages to say more and different things with fewer resources, and will generally engage in and complete advances towards globalization before economics, politics and associated academic subjects.

Part 1: The staging of the process of exploration in the ›reflection space‹ (Aby Warburg)<sup>6</sup> using the artistic form of a ›play‹

### *Prologue to the play*

We move straight into a ›free narrative‹ – a journey over nearby Lake Constance – where I throw a kaleidoscopic glance into the ›Brave New

<sup>5</sup> Daniel Thürer/Roman Bretschger, Rechtsentwicklungen und Rechtsausbildung in Europa im 21. Jahrhundert – Lehren einer vergessenen Geschichte, Zeitschrift für Schweizerisches Recht 2012, p. 343–361 and in Daniel Thürer, Die Rechtsausbildung muss wieder einen globalen Charakter gewinnen, Plädoyer 2/2013, p. 42–43.

<sup>6</sup> See among others Aby Warburg, Der Bilderatlas MNEMOSYNE, Ed. By Marfred Warnke & Claudia Brink, Berlin, 2000; Mnemosyne: Meanderings Through Aby Warburg's Atlas (<http://warburg.library.cornell.edu>); E. H. Gombrich, Aby Warburg: An Intellectual Biography; Chicago, The University of Chicago Press, 1986.

World of the globalized legalworld! Right from the very first word we stand at the epicenter of things, for we are opening up our theme ›from the inside towards the outside‹. The mode of presentation for the exploration of our approaches to the theme takes on the artistic forms of a ›play‹, an ›exhibition‹ and ›speech sentences‹, and over the whole one can hear the sound of a ›groove‹ – in this case the ›music‹ – of the Global Groove of Harvard Yard. Indeed this does justice to the theme of globalization, for art often manages to say more and different things with fewer resources, and will generally engage in and complete advances towards globalization decades before economics, politics and the associated academic subjects.

The law and the legal professions have fundamentally changed in the globalised legal world. This globalised legal world has also been significantly influenced by American law, by American legal culture, and by American academic culture. I want to show you that the studies of the future operationalizations of this conceptualization of the New International Lawyers and their networks constitute an approach that does justice to globalization; and above all – and this is a key point – I want to show you that in a truly global competitive academic environment the inclusion (both at the outset and in the execution) of certain American knowledge bases is both desirable and important.

Thus the ›stage setting‹ for our exploration is concerned with more than merely factual knowledge about ›hard science‹, without – in my view – anything important being lost, or going unnoticed, in our dealings with the subject.

*The play and its principal actor – yesterday: Citizen of the world Peer Gynt in America – today: The New International Lawyer – ›theory tuned into action‹*

In Act 4 scene 1, which bears the title ›The Yankee in the Desert‹, Peer Gynt, having become rich in America, and now to be found on the coast of Morocco with a bottle of wine in his hand, presents himself in the following manner to his companions, a group of polyglot desperados:

»v. Eberkopf

How elevating to see here  
Theory turned into action,  
Freed from its grey night,  
Despite all that has gone against it!



*Peer Gynt*

We people from the north, we understand  
 How to win through! In the confusion  
 Of life just one thing really matters:  
 Keeping your ears closed! If you do this  
 No little snake can make you lose your way.  
 And one thing you must be sure to avoid:  
 Never decide entirely in favor of any one thing.

*M. Ballon*

You are Norwegian?

*Peter Gynt*

We are Norwegian by birth!  
 But in our outlook we are citizens of the world.  
 Whatever good has come to me so far  
 I owe it mostly to America.  
 With heavy laden shelves of books  
 My German cousins seek to edify me.  
 From France I obtained my waistcoat,  
 My clear head for thinking and my refinement,  
 From England I got my business sense  
 And an acute feel for my own best interests.<sup>7</sup>

Peer Gynt is speaking here, over 150 years ago as a person who has become a citizen of the world through his travels and his work in the New World of that time. To some extent he speaks »to the outside world from the inside« and »from something small – himself – to something greater – »the world.« In this scene, Peer Gynt tells of his sadness and his emotion evoked in particular by his travels. He speaks with a different, new and cosmopolitan identity.

The transformation of people as professionals and the forging of new relationships between them – professionals in law who are exposed to internationalization and who manifest themselves professionally in

internationalization – is our subject here today. Our subject is the existential life and the work situations of professionals and of the associated international networks as key players in the globalized legal world. I place these international lawyers at the epicenter, as post-modern Peer Gynts and voyagers on the ocean of globalization, and I call them New International Lawyers. For it is they who in the globalized legal world essentially turn »theories« into »action«. The dimensions here are person – situation – position and profession. In the subsequent operationalization, we will be dealing with a »college of international lawyers« and their networking potential in the networks under the aspects of »comparability«, »compatibility« – and to some extent also »competitivity« – and above all of »interoperability«.

I am suggesting as the principal thesis the fact that, by analogy with Justice Holmes' statement that »law is what the judges say it is«, it is reasonable to say in the globalized legal world that »law is what international lawyers do«. It is true to say that in the United States work is being done on the process of the internationalization of persons and professionals in globalization on a »bottom up« and topical basis, but also on a theoretical foundation, from very different perspectives, in very different forms and in different academic spheres. This is being done with interdisciplinary diversity, with a curiosity rooted in reality, and with a focus on the theme that is also strongly anchored in the various academic disciplines. The academic exploration of globalization, and of people and professionals in globalization, still is mainly being carried out in Anglo-America and primarily in the English language. The asynchronicity and above all the asymmetry of the process of inquiry, research, teaching and professional implementation in professional reality are remarkable.

Part 2: The staging of the process of exploration in the »reflection space« using the art form of an »*exhibition*«

A statement is a compressed assertion that partially transcends the subject to which it relates. It highlights the characteristic typology of possible reasons for the attractiveness of certain American knowledge bases. A most important aspect is that the statements following a globalization-inspired motivational drive deal with the specific features and opportunities of the »other«, the American.

They are a collection of characteristics of American legal and academic culture that facilitate understanding and discussion of the theme:

<sup>7</sup> Henrik Ibsen wrote Peer Gynt in 1867 while in »voluntary exile« on Ischia and in Sorrento, Italy; in the corresponding German translation these verses are translated by Christian Morgenstern.

- »See it fresh – see it whole – see it as it works« – the overriding focus on »facts first«
- The nobilitating shift to »behavior« and »effect« – and the special liaison between »knowledge« and »activity«
- »Take it global« – a deliberate and self-understood choice of perspective on a meta-level
- »The times they are a-changing« – the tackling of the challenges of change.
- The »issue-driven use of theory« — the example of the »situationality and activity analysis« of a new international lawyer as a theoretical platform for a conceptualization of a new international lawyer
- The free jazz of »anything goes« in the interdisciplinary competition and cooperation of the social sciences in constructing the international lawyer in globalization
- The inclusion of postmodernism into the brave new world of law and lawyers in globalization
- The vision of a »visible college of international lawyers«.

Part 3: The staging of the process of exploration in the »reflection space« using the art form of »*language sentences*«

Nine statements and nine guiding principles are signposts for a discursive approach to the postmodern »reflection space« of the personalistic conceptualization of the new international lawyer. With two interesting exceptions, I have deliberately chosen key quotations from Anglo-American writers, mainly from the United States. They are also masters of compression whose sentences are an art form in their own right, guiding us on our journey. They follow a descriptive and thematically inspired dramaturgy and point to central approaches and perspectives to this personalistic approach.

#### *Suspicion towards new ideas*

Guiding principle: This approach to the personalistic conceptualization of the New International Lawyers and their networks as key actors in globalized legal practice is hindered by certain preconceptions about globalized legal practice. Key quotation: John Locke (1632–1704), an Englishman, said: »New opinions are always suspected, and usually opposed, without any other reason, but because they are not common.«

#### *Perseverance and stagnation in law*

Guiding principle: This personalistic approach discusses the evolution of law through legal practice in the course of globalization from a global perspective. Key quotation: Roscoe Pound (1870–1967), who for a long time was Dean of Harvard Law School, wrote, sitting shaded from the sun at his bespoke round furniture: »The law must be stable, but it must not stand still.«

#### *From principles to personalities*

Guiding principle: This personalistic approach is about the »actions« of active individuals who, as legal actors, play a key role in globalized legal practice. Key quotation: Oscar Wilde (1854–1900), an Irishman, wrote the following while staying on Lake Geneva: »It is personalities, not principles that move the age.«

#### *The dishonesty of striving for systems*

Guiding principle: This personalistic approach is a largely American-style, issue-related and topical way of dealing with new realities that seeks to avoid systematization and dogmatization. Key quotation: Friedrich Nietzsche (1844–1900), who collaborated with Jacob Burckhardt in Basle at a time of anti-American sentiment, and is a German who is currently enjoying an unprecedented revival in the United States, wrote in *Sils Maria* in the Engadine: »Distrust all systematizers and avoid them. The will to a system shows a lack of honesty.«

#### *Common sense as the foundation of the scientific*

Guiding principle: This personalistic approach is also a matter of pragmatic, cosmopolitan philosophical common sense, and not simply of a dry, dogmatic hard science. Key quotation: In the words of Oliver Wendell Holmes Sr. (1809–1894), professor of medicine at Harvard Medical School, father of Justice Oliver Wendell Holmes Jr., and a member of the Metaphysical Club together with William James and Charles S. Pierce, who were the fathers of American philosophical pragmatism: »Science is a first-rate piece of furniture for a man's upper chamber, if he has common sense on the ground floor.«



*Finding the essential in what is small-scale and concrete*

Guiding principle: This personalistic approach is about observations, investigations and descriptions that are outward-looking and seek to transform something »small« into something that may be »larger«. Key quotation: In the words of the Indian author and film maker Satyajit Ray (1921–1992): »It is the presence of the essential thing in very small detail which one must catch in order to expose larger things.«

*Recognition as looking from the outside to take an active part in the process of change*

Guiding principle: This personalistic approach is about active participation in the form of observation, investigation, description and shaping of evolving legal life in the context of globalization. Key quotation: The American philosopher, educationalist, sociologist and legal expert John Dewey (1852–1952), who brought American philosophical pragmatism to its first flowering, wrote: »From recognition as looking in from outside to recognition as taking an active part in the drama of an ever-changing world – that is the historical transition whose history we have followed.«

*Imaginatively devising interesting alternatives to current beliefs*

Guiding principle: This personalistic approach is about incentives to the observation, investigation and description of globalized legal practice as something – while supplemental - new and different. Richard Rorty (1931–2007), was a close friend of Jürgen Habermas. After the revival of pragmatism he left his post as professor of philosophy at Princeton University in 1982, was professor of humanities at the University of Virginia from 1983 to 1998 until he became an emeritus, and then served as professor of comparative literature at Stanford University from 1998 to 2004. Key quotation: »People should stop worrying about whether what they believe is well founded, and instead should worry about whether they have managed to summon up enough imagination to think of interesting alternatives to current beliefs.«

*Answers to questions*

Guiding principle: Ultimately, the theme of the personalistic conceptualization of New International Lawyers and their networks as key actors in complex globalized legal practice is a rejection of hasty, non-analytical

opinions and values to undertaking questioning with an inquisitorial mindset – a seemingly simple process which as jurists we often fail to adopt, be it through complacency or ignorance. Key quotation: The American author Gertrude Stein (1874–1946) said before dying: »What is the answer? [...] In that case, what is the question?«

*Epilogue and call for a dialogue*

How could we take these observations and findings of the new international lawyer, which I have described and conceptualized in detail in the essay »The Path to a Turn to the Lawyer(s) – Amerikanische Konzepte und Ideen für einen Blue Print «<sup>8</sup> to take it global?<sup>8</sup> some steps further?

The approach to this described exploration strategy of course is to be found largely outside the realms of traditional continental European legal thought. This methodology results from taking account of the ruinous state of pluralization, digitalization, loss of autonomy and systemic collapse as a characteristic of the Brave New World of law in the age of globalization (Matthias Reimann). It is inspired by relevant legal factors of an American pluralist order, a more associative organization of material, a politicized understanding of law and of the order in concrete problems, and can be seen as a postmodern mode of thought. I therefore suggest that – looking forward – we first put on our European hats in this dialogue as well.

Let us then use this free – »style echo« of the more elaborate and extensive valedictory lecture of 2009 and take it from there by using as a point of reference the seminal Thirteenth Ernst-Rabel-Lecture 2012 delivered by our common friend Matthias Reimann with the title »The American Advantage in Global Lawyering.«<sup>9</sup> Let us try to move beyond and include other emerging legal and professional cultures of the world. Let us extend the focus on education to an integral and integrated focus on the practice of law of legal actors in the process of globalization – let us continue to move away from a black-letter-law and positivist tradition

<sup>8</sup> Jens Drolshammer, A Timely Turn to the Lawyer? – Globalisierung und die Anglo-Amerikanisierung von Recht und Rechtsberufen – Essays; Zurich/St. Gallen, 2009, p. 863 – 1134.

<sup>9</sup> Matthias Reimann, The American Advantage in Global Lawyering, *Rabels Zeitschrift* 78, 2014, p. 1–35. See also Matthias Reimann/James C. Hathaway/Timothy L. Dickinson/Joel A. Samuels, *Transnational Law, cases and materials*, St. Paul/Minneapolis 2013.

of the era after World War II and avoid the pitfalls of a mechanistic, technocratic and one dimensional transaction-lawyering. Let us include neighbouring disciplines of social sciences in an intra-, inter- and trans-disciplinary dialogue and move our considerations under the umbrella of an emerging cultural science embracing legal culture. Let us ground our considerations in a person-centered and conceptualized framework, which gives the lawyers and the actors in the legal process of globalization their due place – if for the first time described holistically, this would be »new« - and let us in particular bring to the foreground their essential contributions in modern professional networks – the deeply needed »interoperability«<sup>10</sup> among the emerging visible ›College of International Lawyers‹ - this even would be »innovative« - and finally let us be guided by Karl Llewellyns metaphoric statement »see it fresh – see it whole – see it as it works« in working on the ›Timely Turn to the Lawyer‹, which you raised as a flag evidencing a globalization-adequate legal mindset.

<sup>10</sup> John Palfrey/Urs Gasser, *Interop, The Promise and Perils of Highly Interconnected Systems*, New York 2012; Rolf H. Weber, *Legal Interoperability as Tool for Combatting Fragmentation*, Global Commission on Internet Governance, Paper Series: November–December 2014, CIGI/Chatham House, Urs Gasser/Jens Drolshammer, *The Brave New World of (Swiss) Law: Contours of a Framework and Call for a Strategy to Shape Laws Digital Revolution*, The Berkman Center for Internet and Society of Harvard University, Research Publication No. 2015 – 8, May 5, 2015; to be published in the *Festschrift der juristischen Abteilung der Universität St. Gallen* for this years Juristentag in autumn 2015.