Globalisation and the Western Legal Tradition

What can 'globalisation' teach us about law in the Western tradition? This important new work seeks to explore that question by analysing key ideas and events in the Western legal tradition, including the Papal Revolution, the Protestant Reformations and the Enlightenment. Addressing the role of law, morality and politics, it looks at the creation of orders which offer the possibility for global harmony, in particular the United Nations and the European Union. It also considers the unification of international commercial laws in the attempt to understand Western law in a time of accelerating cultural interconnections. The title will appeal to scholars of legal history and globalisation as well as students of jurisprudence and all those trying to understand globalisation and the Western dynamic of law and authority.

Dr David B. Goldman is a Special Counsel at Deacons, Sydney, and an Honorary Affiliate, Julius Stone Institute of Jurisprudence, University of Sydney.

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Editors: William Twining (University College London), Christopher McCrudden (Lincoln College, Oxford) and Bronwen Morgan (University of Bristol).

Since 1970 the Law in Context series has been in the forefront of the movement to broaden the study of law. It has been a vehicle for the publication of innovative scholarly books that treat law and legal phenomena critically in their social, political and economic contexts from a variety of perspectives. The series particularly aims to publish scholarly legal writing that brings fresh perspectives to bear on new and existing areas of law taught in universities. A contextual approach involves treating legal subjects broadly, using materials from other social sciences, and from any other discipline that helps to explain the operation in practice of the subject under discussion. It is hoped that this orientation is at once more stimulating and more realistic than the bare exposition of legal rules. The series includes original books that have a different emphasis from traditional legal textbooks, while maintaining the same high standards of scholarship. They are written primarily for undergraduate and graduate students of law and of other disciplines, but most also appeal to a wider readership. In the past, most books in the series have focused on English law, but recent publications include books on European law, globalisation, transnational legal processes, and comparative law.

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Globalisation and the Western Legal Tradition

Recurring Patterns of Law and Authority

DAVID B. GOLDMAN

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Preface

History shows that humans attempt, with some success, to control what was previously uncontrollable. Now more than ever, globalisation and its technological manifestations attest to humans surprising older generations by increasing their control over, for example, time and space, the atom, health and food production. Yet globalisation has a history with roots deeper than the topsoil of its late twentieth-century receipt into popular language. The roots penetrate to a core reservoir of philosophical, theological and legal aspirations. Thought about in this way, these aspirations appear never to leave us even though, technologically, humans can make such incredible advances over their physical constraints (with good and bad implications).

This book explores the recurring, deeper level problems of authority underlying law in 'the West', with a sense of hopefulness for the future, but also with some anxiety about the way law is conceived and used today. The conviction emerged during the composition of this book that a major theme of the Western legal tradition is that humans invest their constitutions and legal discourses with vital visions for the future which are too easily forgotten when revolutionary urgencies are perceived to have passed. Today, it seems important to be aware of this decadent potential of law. Rights can be proclaimed as 'global', 'fundamental' or 'universal' in the service of partisan objectives without thought for the bloody signposts of their evolution. If those historical signposts are forgotten or worse still ignored, what foundation can there be for the changes which must come in the future? In making choices, what confidence can be available?

These signposts come into focus, in chapter 2, with the exploration of dualities from globalisation literature such as universality and diversity, space and time, and state sovereignty and world society. A 'Space–Time Matrix' is offered as a comparative model for attempting to understand historical patterns of law and authority, by reference to interior moral and exterior political impulses, and versions of history and visions of the future, in chapter 3. This model is then applied to Western history in order to illuminate the development of the Western legal tradition and its usefulness for understanding globalisation and its challenges to the sovereign nation-state.

Chronological discussion begins with the unrest of the original European community, in chapter 4, culminating in the Papal Revolution and the birth of

the Western legal tradition around 1100, in chapter 5. An expansive notion of a 'holy Roman empire' is adopted to describe the God-centred norms and government which grew amidst a universalist moral and political discourse maintained by a supranational Catholic church, constitutionally co-ordinated with feudal princes and their diverse realms. Territorial ideas of law and authority grew away from the Christian commonwealth, leading to the idea of the state, considered in chapter 6. Notwithstanding a universalist European legal science, states fostered their own particular legal orders after the Protestant Reformations, assisted by the 'legislative mentality', explored in chapter 7.

The emergence of a European public international law system of states in the seventeenth century was increasingly secular. Universalist moral and political authority decreased. By the eighteenth century, and the arrival of the liberal political economy, it becomes possible to see the God of the loosely defined Holy Roman empire being challenged by what might be thought of as a new god of Mammon. In the extreme, this may be associated with a 'wholly Mammon empire', although the picture is more complicated. Contemporary with the Enlightenment and the French Revolution, universal human rights and the 'codification mentality' have their origins, discussed in chapter 8, although constricted in operation to the nation-state and its particularistic notions of authority which are explored in chapter 9. The common human catastrophe of the twentieth-century 'World Revolution' of the two world wars, we see in chapter 10, has established human rights and free trade norms as morally and universally attractive although politically problematic as tenets of a pervasive new secular authority.

Two case studies of competing jurisdictions highlight, respectively, the recurring natures of public authority and private authority. Publicly, the European Union demonstrates the constitutional reversion from the European public international law model to a modernised version of the Christian commonwealth, centred less on God than on market values. This we see in chapter 11, where lessons of regional and global scope are drawn from European Union constitutionalism. Privately, international commercial law is traced historically to illustrate the change in the underlying god-concepts and to show the historical viability of law without the state, in chapter 12. The *lex mercatoria,* international arbitration and the codification of European contract law are evaluated for their elucidation of cross-border authority.

I have not been able to separate bookish tendencies from my practice as a lawyer and concern as a human being. (These latter two attributes are not necessarily mutually exclusive.) These pages endeavour to reflect more than a purely historical or conceptual approach to law. Recommendations are presented by way of conclusion, in chapter 13, for understanding and participating in law more meaningfully in our global era through a renewed historical consciousness.

Perhaps ironically, the space and time constraints inherent in writing a book have led to shortcomings in a work devoted to developing a legal theory which

promotes the relevance of space and time. At the outset, I should respond to two obvious criticisms. A book about the Western legal tradition which is based upon sources appearing only in English commits an injustice by ignoring shelves of relevant Continental writings. For this I must plead personal linguistic limitations and practical experience of only the Anglo-Australian legal system. Fortunately there are some (but not enough) books in translation which I have considered. Also inviting criticism is this book's degree of generalisation in covering such vast spaces and times, a defence of which is offered in chapter 1. Because no discipline, profession or vocation alone tells the whole story about the creation, acceptance and maintenance of authority, I have trespassed outside my own experiences of legal education and practice. Whatever criticisms may be deserving, I do hope that they will be vindicated in some measure by provoking debate about the relationship of history, globalisation and law in the quest for meaningful and just social orders at all levels.

This book has benefited immensely from the support and encouragement of the persons and institutions below, to whom I extend my deepest gratitude (of course, without implicating them in any deficiencies which remain in my text). Momentum for the thoughts in this book was sprung from a stimulating undergraduate legal education at Macquarie University Law School in the early 1990s. The book began as a Ph.D. thesis at the University of Sydney Faculty of Law, supervised by Klaus A. Ziegert, later with indispensable co-supervision by Jeremy Webber and associate supervision from Patrick Kavanagh. The law firm Deacons accommodated my need at times for flexible employment arrangements. An Australian Postgraduate Award scholarship enabled me to undertake full-time research between 1999 and 2001. William Twining has generously commented on the revised manuscript of this book, amongst other kindnesses. I have also benefited greatly from comments and kind support at various stages from Harold J. Berman, H. Patrick Glenn, Ian Lee, Heidi Libesman and James Muldoon. Anonymous reviews from Cambridge University Press were also helpful. The Julius Stone Institute of Jurisprudence at the University of Sydney and its Law Library have extended vital research facilities and collegiality. Cambridge University Press, particularly Finola O'Sullivan and Sinéad Moloney, have been patiently supportive, and provided professional production by Richard Woodham and Wendy Gater with keen-eyed copy-editing by Sally McCann.

My mother, Rhonda, and sister, Jane, have been encouraging of this enterprise and tolerant of my distractedness; in addition to which my father, Alec, has assisted with current affairs observations from his many subscriptions. Especially to my wife Yvonne, and infant sons, Benjamin and Jeremy: thank you for your patience and for being a voice of measure for this book and in life – it is now time for an overdue holiday and much more play.

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