

Chapter 1

Introduction

1 A NEW WORLD?

One way of introducing students to the study of law is to ask them to read every word in a daily newspaper and to mark all the passages that they think deal with law or are ‘law-related’.¹ They nearly always have difficulty in deciding what to include and what to leave unmarked. Even those who adopt a narrow conception of law find it on every page: on the sports pages bodies such as football clubs, national tennis associations, or international sporting bodies (IOC, FIFA, etc) issue decrees, negotiate, litigate, or are even accused of corruption. Professional players deal with sponsors, sack their agents, or are ‘bought’ and ‘sold’, disciplined, charged with drug abuse, or involved in labour disputes. On the arts pages pornography, copyright, defamation, and other issues relating to freedom of expression arise along with licensing, charities law, taxation, and the ubiquitous contract. The advertisements are permeated with legal words and phrases. And so on through the paper.

Students quickly recognise that law is pervasive in society and in many aspects of their lives and that, far from being new to them, they have experienced it directly from birth as bearers of children’s rights, contractees, trespassers, consumers, debtors, copyright violators, internet surfers, protesters, criminals, and victims. This newspaper exercise illustrates how law is pervasive, dynamic, important, complex, and interesting. It also brings home that it is not only domestic law that features in their newspapers. Public and private international law, human rights, religious law, and many kinds of ‘foreign law’ bear directly on the

1 The newspaper exercise is discussed in detail in *BT*, pp 4-11 and *LIC*, pp 210-213. For the key to abbreviations used in the footnotes see p xi above.

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news, in the financial, sports, features, and other sections as well as on the pages dealing with foreign or international news.

A variant on this exercise is to ask of a newspaper or magazine: how many of the events, processes, and transactions that are reported or discussed involve relations that cross geographical boundaries, such as those of the local district, a county or other administrative unit, a state or province, a nation state, a regional grouping (such as the European Union), and so on. It would not be surprising to find a cosmopolitan publication, such as the *Economist*, or *Newsweek*, *The Wall Street Journal* or *The Manchester Guardian Weekly*, regularly and persistently moving between and across local, national, inter-communal, transnational, international, regional, and global relations, and even extending into outer space. What may be more surprising is to look at one's local paper in this way. It is not nearly as parochial as one might expect. As I write this, I glance at the latest edition of the local newspaper, the *Palo Alto Weekly*. I find items not only about local crime, by-elections, and parish pump issues, but also about foreign films, 'ethnic' restaurants, jet-setting artists and lecturers, Japanese cars, immigration, world cruises, multiculturalism, Islamophobia, cosmopolitan TV programmes, and, of course, e-mail, CNN, and the World Wide Web. Palo Alto may be unusually cosmopolitan; look at your own local paper through these lenses. How 'local' is it?

Trying to sort out this flood of messages from all over the world is part of our daily experience. It is also part of understanding law. So, one may ask, how well equipped are we to deal with all this? And to what extent is this a radically new situation? Changes in communications technology have often been heralded as 'revolutionary'. Consider, for example, the impact of the introduction of printing, the penny post, the telegraph, radio, television, the telefax, e-mail and the Internet – to say nothing of what we may expect in ten or twenty years' time. Closely linked to these developments in complex ways are topics that are part of the daily news – wars, genocide, famines, refugee camps, floods, the status of children and of women, global warming, endangered species, currency fluctuations, and market booms and busts. But are there not also continuities that are as least as important? And where is this all heading? In the last two decades such matters have often been discussed under the loose and possibly rhetorical label of 'globalisation'. Each of us has to try to make sense of these bewildering messages in our own way. As a jurist, my special interest has been in the rather esoteric subject of Anglo-American legal theory. In the early 1990s I decided that I should try to get to grips with the implications of this changing situation for my special subject and, a bit more broadly, for the study of law. I decided to start on familiar ground. The project is not finished – how could it be? – but after nearly ten years, at the cusp of a new millennium,

it seems appropriate at least to provide an interim report. Hence this book.

After some preliminary forays, in the spring of 1995 I tapped the keywords 'global' and 'globalisation' into a computerised union library catalogue in Boston.² I gave up after I had scanned entries for some 250 books in which one or other of these words featured in the title. The vast majority of these works had been published in the previous 12 to 15 years. They included books on economics, international relations, business studies, sociology, anthropology, political theory, cultural studies, Islamic and African history, development studies, and world history. Almost none of them were specifically focused on law, although there were, of course, large bodies of specialised literature relating to such fields as public international law, the environment, regulation, and human rights. For a brief period, I seemed for once to be ahead of fashion. But this intellectual lag, if such it was, proved to be short-lived. One only has to look at the titles of articles, books, conferences and new journals to see that by the late 1990s words like 'global', 'globalisation', and 'globalism' were as much in vogue in law as in other disciplines.

My project represented the convergence of three persistent strands in my interests and concerns: a specialised interest in the Anglo-American tradition of jurisprudence, especially the ideas of Jeremy Bentham, Karl Llewellyn and Herbert Hart; a life-long personal involvement with Eastern Africa – a region that includes Sudan, Uganda, Tanzania, Kenya, and Rwanda; and a continuing, but intermittent, set of professional concerns about law and development, legal anthropology, North-South relations, and the political, economic, and humanitarian problems of poorer countries.

The immediate impetus behind this project can be succinctly stated. By the mid-1990s the discipline of law in the United Kingdom and, to a lesser extent, the United States was becoming increasingly cosmopolitan, but its theoretical branch, jurisprudence, seemed to have lagged behind. In the English-speaking world traditional positivism, normative legal philosophy, critical legal studies, post-modernism, and even economic analysis of law appeared to have been going through a somewhat parochial or inward-looking phase, although there were some notable exceptions. It seemed that the time was ripe for a revival of a more general jurisprudence. However, what this might involve was far from clear. It seemed a daunting task. So I decided to begin with a series of preliminary forays, starting with that part of our heritage of juristic ideas with which

2 In fact I used both 'globalization' and 'globalisation'. In the text, I have followed the publisher's spelling convention of using '-ise' rather than '-ize' except where the latter is used in quotations.

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I was most familiar, viz Anglo-American jurisprudence from 1750 to the present day.

The essays included here are largely the result of these preliminary explorations. They focus on selected phases of our intellectual heritage of Anglo-American jurisprudence and comparative law in the light of changes associated with the complex processes that are loosely referred to as 'globalisation'. Partly historical, partly critical, they explore how far what has been institutionalised as belonging to the 'mainstream' in Anglo-American jurisprudence and comparative law is relevant and useful in trying to make sense of law in the modern world from a cosmopolitan perspective. Before introducing them, it is necessary to outline my views on globalisation and on jurisprudence and its role within the discipline of law.

2 GLOBALISATION

We are now living in a global neighbourhood, which is not yet a global village.³ In the present context the term 'globalisation' refers to those processes which tend to create and consolidate a unified world economy, a single ecological system, and a complex network of communications that covers the whole globe, even if it does not penetrate to every part of it. Anthony Giddens characterises the process as 'the intensification of world-wide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa'.⁴

Roland Robertson breathlessly evokes some indicators of an historical process that my generation has experienced, at least vicariously through the media:

'Inclusion of the Third World and heightening of global consciousness in the late 1960s. Moon landing. Accentuation of "post-materialist" values. End of Cold War and spread of nuclear weapons. Number of institutions and movements greatly increases. Societies increasingly face problems of multiculturalism and polyethnicity. Conceptions of individuals rendered more complex by gender, ethnic and racial considerations. Civil rights. International system more fluid – end of polarity. Concern for humankind as a species community greatly enhanced. Interest in

3 Eg *Our Global Neighbourhood*, The Report of the Commission on Global Governance (Ingvar Carlsson and Shridath Ramphal, Co-Chairmen) (1995).

4 A Giddens, *The Consequences of Modernity* (1990) at p 64; cf his *Sociology* (1990), Ch 16.

Cambridge University Press

978-0-521-60594-6 - Globalisation and Legal Theory

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Excerpt

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world civil society and world citizenship. Consolidation of global media system.⁵

These processes tend to make the world more interdependent, but this does not mean that we are moving inexorably towards a single world government nor does it mean the end of nation-states as the most important actors. Indeed, while the processes of globalisation inevitably change the significance of national boundaries, the impact is not always in the direction of centralisation or the creation of larger units or even of homogenisation.⁶ The post-modern mood stresses cultural relativism. At the same time as the European Union grows in size, we are also witnessing the revival or growth of smaller nationalisms and local identities. It by no means only the Balkans that are becoming balkanised.

The global does not exclude the local, but rather they interact in very complex, sometimes contradictory ways. As Boaventura de Sousa Santos puts it, one needs to distinguish between 'globalized localism' and 'localized globalism': in the former some local phenomenon is successfully globalised – examples include the spread of the English language or Coca Cola or American copyright laws; 'localized globalism' occurs when local conditions, structures and practices change in response to transnational influences, such as the impact of tourism on local crafts or wildlife, ecological dumping, or the adaptation of local commercial law to deal with transnational transactions,⁷ or deforestation to pay for foreign debt. In Santos's analysis 'the core countries specialize in globalized localisms, while upon the peripheral countries is imposed the choice of localized globalisms'.⁸ These concepts map two extremes of North-South relations in a context in which other more complex interactions occur at many levels.

It is difficult to interpret these trends and it is easy to underestimate them; but it is also easy to exaggerate the extent and the speed of the process, to oversimplify its dynamics, to foreshorten history by treating

5 R Robertson, 'Mapping the Global Condition: Globalization as the Central Concept' in M Featherstone (ed) *Global Culture: Nationalism, Globalization and Modernity* (1990) at p 16.

6 R Robertson in Mike Featherstone, Scott Lash, and Roland Robertson (eds) *Global Modernities* (1995) at p 34.

7 For example, the National Law School of India University in Bangalore, in collaboration with the Government of India and UNDP has embarked on a major programme of research into the implications for policy in respect of (local) economic laws in the context of the globalisation of the economy (Project LARGE, 1993-); see, for example, N R Madhava Menon and Bibek Debroy (eds) *Legal Dimensions of Economic Reforms* (New Delhi, 1995).

8 Boaventura de Santos, *Toward a New Common Sense: Law, Science and Politics in Paradigmatic Transition* (1995) at, p 263. Santos contrasts the ideas of localised globalism and globalised localism with two 'counter-hegemonic' trends, cosmopolitanism and the common heritage of mankind, see below, Ch 8.4.

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a story that stretches over several centuries as if it is a recent development, to assume some inevitable, teleological progress in a single direction, and to ignore the countervailing processes of fragmentation and localisation.⁹

Recognition of these processes has stimulated a new academic industry, 'globalisation theory'. In most disciplines in the humanities, social sciences and physical sciences the implications of globalisation are firmly on the agenda. A fairly typical summary reads as follows:

'[I]n social science there are as many conceptualizations of globalization as there are disciplines. In economics globalization refers to economic internationalisation and the spread of capitalist market relations ... In international relations, the focus is on the increasing density of interstate relations and the development of global politics. In sociology, the concern is with increasing worldwide social densities and the emergence of "world society". In cultural studies, the focus is on global communications and worldwide standardization, as in CocaColonization and McDonaldization, and on the post-colonial culture. In history, the concern is with conceptualizing 'global history' ...'¹⁰

There has already been a series of debates, some familiar, some relatively new – for example, about the relative significance of the nation-state as an actor on the world stage or how to explain the collapse of communism or the significance of Islamic fundamentalism.¹¹ It is not necessary for present purposes to enter here into the debates between strong globalisers, such as Benjamin Barber, Boaventura de Sousa Santos, and Anthony Giddens¹² and sceptics who, like Paul Hirst, claim that 'globalizing

- 9 See generally, Fred Halliday, *Rethinking International Relations* (1994).
- 10 Jan Nederveen Pieterse 'Globalization as Hybridization' in M Featherstone, S Lash and R Robertson, *Global Modernities* (1995). Equally typically, there is no mention of law.
- 11 Within international relations as a discipline, Halliday identifies at least four major perspectives that have advanced 'solutions' to the challenges presented to the subject by the accelerated globalisation: traditional empiricism or the 'English School', of whom Martin Wight and Hedley Bull were leading examples; 'Scientific Empiricism or Behaviouralism', an American tendency, which proclaimed a quantitative, ahistorical, and rigorously social scientific approach to the study of international politics; the neo-realism of Kenneth Waltz, which applied a version of systems theory to international relations; and post-modernism. Halliday, adopting a modified Marxian perspective, criticises all four for being 'unanchored in historical explanation'. Fred Halliday, *Rethinking International Relations* (1994), Ch 2.
- 12 Benjamin R Barber, *Jihad vs. McWorld: How the Planet is Both Falling Apart and Coming Together and What This Means for Democracy* (1995); Santos (1995), op cit; on the much more complex views on globalisation of Giddens, see David Held

rhetoric' can be dangerously overblown.¹³ Indeed, it serves my purpose to keep strong globalisers and moderate sceptics in counterpoint. On some issues I am frankly agnostic; on a few I am quite close to the sceptics. However, I believe that the world is increasingly interdependent, that the significance of national boundaries and of nation states is changing rapidly, and that one cannot understand even local law by adopting a purely parochial perspective.

Attention to globalisation has stimulated quite fundamental rethinking in a number of disciplines. There is, of course, no consensus. There are, however, some relatively clear themes that are directly relevant to my thesis.

First, it is widely agreed that the processes of globalisation are not entirely new. In some respects they antedate the rise of the modern nation state and can be traced back at least until the 16th century. As Halliday puts it:

'One can indeed argue that far from the "international" arising from the national, and from a gradual expansion of links between discrete entities, the real process has been the other way around: the history of the modern system is both of the internationalisation and the breakdown of pre-existing flows of peoples, religion, trade into separate entities: the precondition for the formation of the modern nation-state was the development of an international economy and culture within which these distinct states then coalesced.'¹⁴

What has changed recently is the pace and complexity of the processes, especially in the area of communications.

Secondly, there has been a good deal of self-criticism within disciplines about the extent to which they have over-emphasised the importance of boundaries and have treated societies, states, and 'tribes' as self-contained, decontextualised units. In the mid-1980s, I attended a week-long seminar at Bellagio which was notable for the fact that a collection of distinguished anthropologists confessed to having erred in treating small-scale societies in which they had done their fieldwork as if they were timeless, self-contained units, isolated from the outside world. Their fault had been that they had ignored the wider contexts of time and space. They reaffirmed the idea that the core *focus* of

and John B. Thompson (eds) *Social theory of modern societies: Anthony Giddens and his critics* (1989).

13 Paul Hirst and Grahame Thompson, *Globalization in Question* (1996), cf 'Globalisation: Ten Frequently Asked Questions and Some Surprising Answers', 4 *Soundings* 47 (Issue on The Public Good, 1996).

14 Halliday, *op cit*, at p 2; cf p 20.

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anthropology must still be small societies and communities, but in future the study of the local must be seen in the context of history and of ever-widening geographical spheres – relations with neighbours, colonial boundaries, Western colonisation generally, and the world economy.¹⁵ Since then most work in anthropology has shifted in this direction.¹⁶ Similarly, Anthony Giddens and others have criticised orthodox sociology for giving far too much weight to the idea of ‘society’ as a bounded system.¹⁷ Again, moral philosophers have been criticised for failing to face up to the ethical implications of interdependence. Nowhere is this more apparent than in the criticisms of the treatment of international relations in John Rawls’ *A Theory of Justice* and its assumption that any theory of justice today can treat a society as a ‘hypothetically closed and self-sufficient’ unit.¹⁸ To which his friendly critic, Thomas Pogge replies:

‘In the modern world there are no self-contained national societies; a closed background system exists only at the global level. The question, therefore, is whether Rawls’s conception, if it applies at all, applies to open national societies (as Rawls seems to prefer) or to the closed social system of humanity at large ...’¹⁹

The general theme is clear across disciplines: the processes of globalisation are fundamentally changing the significance of national and societal boundaries and generally, but not inevitably, making them less important. This presents a challenge to all ‘black box theories’ which treat nation states or geographically bounded ‘societies’ or legal systems as discrete entities that can be studied in isolation either internally or at the international level.

A third theme, on which there is broad agreement, is that one needs to distinguish between different patterns and levels of relations. It is now widely accepted that international relations, which traditionally focused

- 15 See Jane Collier and June Starr (eds), *History and Power in the Study of Law* (1989); cf Gulliver’s later work on Ireland: Marilyn Silverman and P H Gulliver (eds), *Approaching the Past: Historical Anthropology Through Irish Case-studies* (1992).
- 16 For example, three book-length works advancing different interpretations of globalisation as it bears on anthropology were published in 1996: Arjun Appadurai, *Modernity at Large: Cultural Dimensions of Globalization*; Ulf Hannerz, *Transnational Connections*; and Michael Kearney, *Reconceptualizing the Peasantry: Anthropology in Global Perspective*. I am grateful to Anna Tsing for these references see A Tsing, ‘The Global Situation’ (forthcoming).
- 17 Giddens, *op cit*, above.
- 18 J Rawls, ‘The Law of Peoples’, in Stephen Shute and Susan Hurley (eds.), *On Human Rights* (Oxford Amnesty Lectures, 1993) at p 44, discussed below at Ch 3.4.
- 19 Thomas W Pogge, *Realizing Rawls* (1989) at pp 7-8. Cf Halliday, *op cit*, pp 78-81.

on relations between nation states, have expanded to include non-state relations across frontiers (transnational relations) and the operation of the global system as a whole (global relations).²⁰ But, of course, the web of relations is very much more complicated than that. Consider, for example, the internal and external relations of such groupings as major religions (the Islamic world, the Catholic Church, Judaism), the Commonwealth, the Irish Diaspora, OPEC, the European Union, NATO, international drugs networks – all of which cut across simple geographical divisions. This raises a number of conceptual questions about the relations between such notions as sovereign states, governments, peoples, nations, societies, communities, and classes.¹

A fourth theme from the inter-disciplinary literature on globalisation is the variety of significant actors who are relevant to analysis of patterns of legal and law-related relations in the modern world:²

‘A wide range of actors may be involved in any one area of governance. To cite just one example, those with a role in bringing order to international trade in sugar and sweeteners include transnational firms, national and international authorities in charge of competition policy, a global group (The International Sugar Council) with specific responsibility for trade, and a host of smaller private associations, including plantation workers, beet farmers, and dieticians. An international organization may easily develop an interest in a local issue, as when the World Bank finances an agricultural project in a country. A local voluntary association may just as easily become a participant in an international regime.’³

Despite disagreements about the relative importance of particular kinds of actor and their long-term prospects – for example, about the long-term political significance of multi-national corporations, the United Nations and small states – it seems reasonable to assume that nation states will continue to be among the most powerful kind of actors for a long time to come, and that some major powers will be more equal than others. Conversely, anything approaching world government is not likely to be on the agenda for the foreseeable future. However, in analysing the contemporary world, it is not enough to focus on the traditional small cast of actors: sovereign states, official international organisations, and

20 Halliday, Ch 1.

1 See below, Ch 3.5 and 7.2.

2 Ingrid Detter usefully distinguishes between actors, subjects and creators within public international law, but rather less plausibly suggests that nation states are the only formal creators of legal rules: *The International Legal Order* (1994) at pp 176–178.

3 *Our Global Neighbourhood*, op cit, n 1, at p 3.

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individuals. Can one, for example, give an adequate account of law in the modern world which does not give some attention to the significance of transnational non-governmental organisations (Amnesty International, Greenpeace, the Catholic Church, transnational women's networks, international trade union organisations), to peoples that are nations without states (the Maoris, the Welsh, gypsies, the native peoples of North America and Australia), to organised crime, liberation movements, multi-national companies, transnational law firms, and significant classes such as the vast herds of displaced persons (both refugees and the internally displaced)?⁴ The concept of legal personality, an old favourite in Austinian analytical jurisprudence, may be ripe for a revival in a global context.⁵

Finally, the processes of globalisation change the agenda of issues with which any field of study is concerned: it revives and recasts old issues such as those surrounding sovereignty and war; it makes familiar problems more urgent, such as environmental control and the regulation of multi-national corporations; and it creates new ones such as those connected with developments in technology and communication, for example, Internet and CNN World News. What are problems, what should be the agenda, what are priorities depend on a whole raft of ideological and other assumptions. But it is clear that if legal theory is to engage seriously with globalisation and its consequences a critical re-examination of its agenda, its heritage of ideas, and its conceptual tools is called for.

3 JURISPRUDENCE AND LAW AS A DISCIPLINE

Globalisation, I have suggested, seemingly offers fundamental challenges to contemporary legal theory. In order to clarify what this

- 4 The sharp distinction between international refugees and internally displaced persons (an even more numerous category) is rapidly breaking down, F M Deng, *Protecting the Dispossessed: A Challenge to the International Community* (1993).
- 5 I remember reading Dennis Lloyd's *The Law of Unincorporated Associations* (1938) as part of the study of the concept of legal personality in analytical jurisprudence over forty years ago. Remarkably little has happened in legal theory on the subject since Lloyd wrote about it (a notable exception is S Stoljar, *Groups and Entities* (1973)). The concept of legal personality is no longer a standard topic in taught jurisprudence. Yet, if our discipline is to take the implications of globalisation seriously, both the formal conceptions of legal personality and the sociological concepts of significant legal actors and, more generally, of agency are in need of re-examination. On the dearth of recent literature in England, see Roger Rideout, 'The Limited Liability of Unincorporated Associations' (1996) 49 CLP 187, n 1. This article gives a graphic account of the continuing vagueness of the treatment accorded by both legal theory and English courts to unincorporated bodies.