

COMPARATIVE LAW IN GLOBAL PERSPECTIVE

Edited by Ian Edge

Transnational Publishers

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Essays in Celebration of the Fiftieth Anniversary of
the Founding of the SOAS Law Department

Edited by Ian Edge
Law Department SOAS

Transnational Publishers, Inc.

Published and distributed by Transnational Publishers, Inc.
410 Saw Mill River Road
Ardsley, NY 10502, USA

Phone: 914-693-5100
Fax: 914-693-4430
E-mail: info@transnationalpubs.com
Web: www.transnationalpubs.com

ISBN 1-57105-171-6

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DEDICATION

This book is dedicated to the generations of law students who have passed through the SOAS Law Department. You are the real — and continuing — fruit of the Department's endeavours.

Acknowledgements

There are many people to thank for their assistance in enabling this book to appear as well as all those who helped to make the original lecture series such a success. It is impossible to be sure of including everyone's name and therefore I thank all those who were involved.

Three people however call for special attention. First, the present Head of the SOAS Law Department, Professor Michael Palmer, without whose constant but supportive pressure and unswaying support this book would never have appeared. Second, John Berger, at Transnational Publishing has been a quietly strong, but constantly reassuring editor throughout the tense and anxious helter skelter to publication that has been made necessary by the constraints of the research environment of higher education in England. Throughout he has been understanding and helpful and the appearance of the publication in the year 2000 will be thanks to him and his dedicated team. Third, there is my secretary, Debra Jones, without whom the entire project would never have got off the ground or been capable of completion in the tight deadline that was engendered. Debra treats every deadline as a challenge which in the chaotic state of my general affairs is an altogether necessary state of affairs.

Preface

Law is a universal phenomenon, with a place of fundamental importance in societies throughout the world. In national constitutions and legal systems it provides the structure of statehood. Religious or customary laws are powerful elements of local cultures in many countries. At the international level law offers the framework for co-existence and co-operation. At regional levels laws are the instruments of choice for political, economic and other collaboration in the protection of human rights or the environment, the promotion of trade, and other purposes.

Yet in most countries lawyers and the law schools in which they are trained have been slow to adopt a world view. In the United Kingdom, despite the expansion of legal education which occurred in the second half of the twentieth century, most law schools find their curricula sufficiently overcrowded with the 'essential' subjects of English (or Scots) law, including the now vital ingredient of European law, with options in international law (although Roman law was for long considered an essential part of British legal education). The comparative study of other people's laws has been generally ignored, as an unnecessary indulgence. Even the scope for a comparative study of English law was long neglected, most basic textbooks giving little attention to the continuing evolution of the common law after its expansion from England to Australia, Canada, India, the U.S.A. and other countries.

In this context the Department of Law at the School of Oriental and African Studies, in the University of London, is a unique law school. Within a unique college, dedicated to the study and teaching of the languages, history and cultures of the peoples of Asia and Africa, the Department has, through the second half of the twentieth century, maintained a programme of teaching and research encompassing the laws of the majority of the world's countries and the overwhelming majority of its inhabitants. In so doing it has made a distinctive contribution to the texture of British legal education. Research conducted and supervised in the Department has con-

tributed significantly to increase and diffuse the available knowledge of foreign legal systems — some of them, at least, otherwise little known or studied beyond (in some cases even within) their own borders.

Of course, there have been distinguished, usually isolated, British scholars of foreign laws for centuries, including orientalists, historians and anthropologists. Moreover, the British Empire was constructed on foundations of power, trade and, especially, law: among the lawyers, judges and other officers who applied the laws of its diverse territories many developed an intellectual fascination for, and expertise in, the local laws which, under colonial policies like that of 'indirect rule', continued to apply alongside the imported English law.

Another consequence of empire was the resort to the institutions of the metropolis by some of her colonial subjects — no doubt a fortunate elite — for educational qualifications, among which a qualification for legal practice (principally, a call to the English Bar) was especially favoured. Until quite late in the twentieth century students from South Asia, Malaysia and Africa were a prominent, even a dominant, presence at the Inns of Court in London and the syllabus for the Bar examinations for many years provided appropriate options in Hindu and Islamic ('Mohamedan') laws and even, from the 1960s, in 'African law'. Those subjects (and another, 'The Indian Penal Code') were also included in the syllabus of the LL.B. degree of the University of London for 'external' students (who could complete their degrees without ever visiting London).

With the end of Empire, despite the emergence of the modern Commonwealth, there was little concern or incentive in most British law schools to offer systematic opportunities to study the laws of the world beyond Europe. However, the Royal Charter of 1916 which established the School of Oriental and African Studies, as a college of the University of London, rightly provided that the subjects studied and taught at the School should extend to the laws, as well as the languages, history and literature of the peoples of Asia and Africa.

In 1931 Seymour Vesey-Fitzgerald was appointed to teach Indian Law at SOAS in the India Department, of which he later became head as Professor of Oriental Laws. He also taught Hindu and Mohamedan Law to students studying for the Bar examinations. A separate Law Department, of which he became the first head, was established in 1947, in the post-war expansion of the School. The Department initially included Norman Anderson and Shaikh Abdul Kader as Lecturers in Islamic law; they were joined the following year by Tony Allott (African law), Duncan Derrett (Hindu

law) and Alan Gledhill (who had retired from the High Court bench in Burma and specialised in constitutional and criminal law). After Vesey-Fitzgerald's retirement in 1951, Norman Anderson, the leading British scholar of Islamic law, headed the Department for twenty years. Henry McAleavy joined the Department in 1953 as its first teacher of Chinese law. With Anderson, Noel Coulson, appointed in 1954, made the Department the leading international centre of scholarship in Islamic law, while Gledhill and Derrett made complementary contributions to the reputation of the Department in the laws of India and Pakistan.

During the decade of African decolonisation, the 1960s, African law studies expanded under Tony Allott's leadership: the *Journal of African Law*, founded under his editorship in 1957, has now been edited mainly in the Department for over four decades. He directed the Restatement of African Law Project, members and associates of which conducted fieldwork research in the unwritten customary laws.

For the first half of its life mainly a centre for graduate and advanced research and teaching, from 1975 the Department has provided a full programme of teaching for undergraduates, although with a distinctive pattern of courses for LL.B. and (joint) B.A. degrees it remains a highly unconventional law school. Its graduates have entered the legal professions (not only in the United Kingdom) with enhanced world views and sensitivity to the legal and cultural diversity of the world — a diversity fully reflected in contemporary British society. As globalisation has extended to legal practice, British firms of solicitors with offices in the Middle East, East Asia and elsewhere have recognised the value of qualified recruits with additional familiarity with local legal systems.

The Department also offers rare opportunities for students from ethnic minority communities in the United Kingdom to combine training for the legal profession with exploration of the legal values and traditions of their ancestral communities or countries. Moreover, those legal traditions are not irrelevant to the practice of the law in contemporary British courts: members of the Department offer a scarce resource of knowledge, regularly tapped for advice by British courts and lawyers on questions of 'exotic laws'.

The papers in this collection, most of them by past and (mainly) current members of the Department, originated as contributions to a series of lectures which celebrated the Golden Jubilee of the Department. They demonstrate the wide range and diversity of subjects and research interests within the Department. The collection includes important contributions

from two of the distinguished scholars whom the Department has welcomed as supportive friends over the years and who accepted invitations to give guest lectures: Professors William Twining and Patrick McAuslan.

James S. Read, Professor Emeritus
November 2000

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PART I

Comparative Law in Global Perspective

CHAPTER I

Comparative Law in Global Perspective

*Ian D. Edge**

GENESIS OF THE BOOK

The genesis of this book was a lecture series at the School of Oriental and African Studies (SOAS), one of the constituent colleges of the University of London, in the years 1997 and 1998, which were entitled the Golden Jubilee Lectures celebrating the founding of the SOAS Law Department in the academic year 1947 to 1948. The lectures were given by a group of present and former members of the Department as well as distinguished visiting speakers who had had a long association with the Department. Of the fifteen original lectures, ten are published as contributions to this volume, although in all cases the final article has been considerably added to and amended for publication. To these have been added a further six essays which although not originally Golden Jubilee lectures, are by members or former members of the Department or colleagues associated with the Department's work and which serve to balance and harmonise the topics and specialisations covered in the book.

The lectures were presented to celebrate the first 50 years of an unusual Law Department, founded by a group of unusual people — two of

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whom, Emeritus Professors Allott and Read, gave outstanding lectures in the series and have contributed to this volume.

The SOAS Law Department is in many ways a unique law department. It is that uniqueness which this volume celebrates, but with the broader aim of supporting and establishing the importance of the study of comparative law in general and particularly in the rare garb of legal studies of the legal systems and traditions of Asia and Africa. The Department is one of the social science departments in SOAS, which in itself is a world-ranked institution for teaching and research into the multifarious cultures of Asia and Africa. The Law Department fits into the intellectual life of SOAS by attempting to develop, enhance and disseminate knowledge and understanding of the legal systems of Asia and Africa.

At its origin in 1947–48, the Department was purely research-orientated; it had only a few students who studied for doctoral theses and it had only a small input into the London Masters (LLM) programme. As a result it had only a small staff in its early days, although all the original members of the Department were to go on to be the leading figures in their subjects. In its early days, and for 40 years thereafter, the Department saw the growth to fame of Professor Vesey-Fitzgerald, Professor Sir Norman Anderson, Professor Tony Allott, Professor Duncan Derrett, Professor Alan Gledhill, Professor Noel Coulson and Professor Jim Read. In the last few years it has seen the rise of a second generation of scholars including Professor Andrew Harding, Professor Anthony Dicks and Professor Michael Palmer, along with many others who have yet to attain professorial status. It had no equal then and now in the field of African and Asian law.

In the late 1970s the Department succumbed to the general expansion of universities and introduced an undergraduate law degree. Much negotiating with the legal professional bodies obtained the significant concession that even in the core subjects of English law, up to 25% of the curriculum could be taught from non-English materials. Hence, contract law can use precedent from say East Africa, which it did when Margaret Rogers (former Dean of the University of East Africa) taught it; commercial law can look at developments in the Middle East and China (as it does); property and criminal law can use Commonwealth precedent and family law has considerable input from Africa, the Middle East and China. The undergraduate programme went from strength to strength as students realised here was a different law school presenting a different degree, although one which was

recognised by the professional bodies for practical purposes. The Department expanded and has never looked back.

Every member of the Department is expected to have developed an expertise in one of the legal systems of Asia and Africa. As a rule of thumb the areas covered are: Africa, the Middle East, South Asia, South East Asia, Central Asia and Far East Asia. Of course the Department may not necessarily have expertise in all these areas at any one moment, although it is expected that certain key legal countries or systems (such as Islamic law, Africa, China and Japan) will always be covered. Generally members of the Department have attained their culture-specific orientation before arriving in the Department but, in the past, time and effort was expended in developing such expertise within the department. As this generally meant learning a difficult non-Western language, there was often a considerable period of time before establishment as a recognised scholar in one subject and consequent difficulty in the RAE-ratings-obsessed environment that is the present state of research in the UK. From the beginning, however, the Department has maintained a steady stream of publication and the established texts in many subjects of legal study in Asia and Africa are still those of the founders and members of the Department.¹ Many members of the Department have also written interesting and surprising books on a number of non-legal matters.²

¹See for example J.N.D. Anderson "Islamic Law in Africa" HMSO (1954), "Islamic Law in the Modern World" NY University Press (1959); N.J. Coulson "Succession in the Muslim Family" Cambridge University Press (1979) and "The History of Islamic Law" Edinburgh University Press (1964); J.D.M. Derrett "Religion, Law and the State in India" Faber & Faber, London (1968) and "Introduction to Legal Systems" Sweet & Maxwell, London (1968) and "Essays in Classical and Modern Hindu Law" Brill Amsterdam 3 vol (1977); A Allott "The Limits of Law" Butterworths, London (1980) and "Essays in African Law" Butterworths, London (1960) and "New Essays in African Law" Butterworths London (1970); and A. Gledhill "The Republic of India: The Development of its Laws and Constitution" Stevens, London 1st Ed 1951; 2nd Ed 1964 and "Pakistan: The Development of Its Laws and Constitution" Stevens, London 1st Ed 1957, 2nd Ed 1967.

²The first such pioneer was Henry McAleavy, Reader in Chinese Law who produced a number of wonderful books concerning the social history of China. The first was "That Chinese Woman: The Life of Sai-chin-hua" Allen & Unwin (1959) which recorded a famous relationship during the Boxer Rebellion and was translated by McAleavy from the Chinese. He followed this up by "The Chinese Bigamy of Mr. David Winterlea" Allen & Unwin (1961) and "A Dream of Tartary: The Origins and Misfortunes