

GLOBALISATION, LAW AND THE STATE

Jean-Bernard Auby

Translated by Rachael Singh

With a Foreword by Gordon Anthony



B L O O M S B U R Y

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GLOBALISATION, LAW AND THE STATE

This book begins—as is customary in globalisation literature—with an acknowledgement of the definitional difficulties associated with globalisation. Rather than labour the point, the book identifies some economic, political and cultural dimensions to the phenomenon and uses these to analyse existing and emerging challenges to State-centric/territorial models of law and governance. It surveys three areas that are typically associated with globalisation—financial markets, the internet, and public contracts—as well as trade more generally, the environment, human rights, and national governance. On this basis it considers how global legal norms are formed, how they enmesh with the norms of other legal orders, and how they create pressure for legal harmonisation. This in turn leads to an analysis of the corresponding challenges that globalisation presents to traditional notions of sovereignty and the models of public law that have grown from them. While some of the themes addressed here will be familiar to students of the European process (there are prominent references to the European experience throughout the book), *Globalisation, Law and the State* provides a clear insight into how the sovereign space of States and their legal orders are diminishing and being replaced by an altogether more fluid system of intersecting orders and norms. This is followed by an analysis of the theory and practice of the globalisation of law, and suggesting that the workings of law in the global era can best be conceived of in terms of networks that link together a range of actors that exist above, below and within the State, as well as on either side of the public–private divide. The whole is an immensely valuable, innovative and concise study of globalisation and its effect on law and the state.

Foreword

I first read Jean-Bernard Auby's outstanding book *La globalisation, le droit et l'État* 12 years ago. The chance to do so came by way of invitation to review the book—then in its first edition—for the *European Public Law* journal. I remember being keen to read the book not just because I was familiar with some of Professor Auby's other work—notably on public authority liability—but also because 'globalisation' was becoming an increasingly prominent term in public law scholarship. This terminological shift was something that had introduced public lawyers to a number of normative and empirical questions about globalisation, where literature from the social, economic and political sciences had already provided important and challenging insights. However, for public lawyers, the idea that there are self-sustaining processes above the level of the state, which engage the state as an 'input' and 'output' actor, was always going to give rise to discipline-specific questions about the nature, source and ordering of power. *La globalisation, le droit et l'État* was thus prominent among a number of legal texts that appeared at that time and which considered globalisation's implications for, among other things, legal institutions, constitutionalism and the creation of (public and private) legal norms.

The approach which informed the first edition of the book—and which has been carried forward for this, translated, second edition—was one that was intellectually pragmatic in the face of debates about the nature of globalisation. The various and well-known critiques of globalisation have long been informed by a range of conceptual and/or sectoral concerns, whether associated with green theory, democratic theory, human rights, cultural relativism, and/or economic development (among other things). Professor Auby's book acknowledges such concerns and that globalisation can rightly be regarded as problematic, although its more fundamental premise is that globalisation is a working reality that has important implications for legal principle and practice. In adopting this approach, the book identifies economic, political and cultural dimensions to the phenomenon—which is also said to have multiple stages and levels—and uses these to analyse a range of challenges for perceived legal orthodoxy. These include a blurring of the public/private distinction, an evolving role for international law and its institutions, the pursuit of accountability through 'global' administrative law principles, and the diminishing space of state sovereignty. These, and other issues, are analysed as aspects of an unavoidably changed legal landscape with far-reaching consequences for the operation of standards and values.

Of course, for UK public lawyers, the publication of the book in English comes shortly after the Brexit vote of 23 June 2016 and it is, in that sense, particularly timely. Although the UK and EU are only beginning to address the political, economic, legal and administrative difficulties that Brexit will entail, it is already clear that the process of UK withdrawal will, at some levels at least, be illusory rather than real. This is very much one outworking of the fact that different legal systems now have multiple points of intersection with one another, where the idea that a national system can disentangle itself from a supranational order is as fanciful as it is misleading. While it is yet to be seen whether Brexit will result in a 'hard' or a 'soft' UK 'departure', it is inevitable that EU law (which can be influenced by—and influence—norms of international/global law) will continue to have direct and indirect influences within the UK system. Brexit therefore provides a particularly striking example of the linkages that Professor Auby's book analyses, and those who wish to understand the challenges that Brexit will present will learn much from this illuminating text.

A final word about the book is one that is more personal in nature. After writing my review of the first edition, I was fortunate enough to meet Professor Auby at a number of conferences and, thereafter, to collaborate with him on a range of projects. The excellence that characterises this book is something that runs across all of Professor Auby's work, and I have been greatly privileged to have had the chance to work with him. It goes without saying that it has also been my privilege to write the foreword for this English language version of his book, which now complements the original French work, as well as versions that have been published in Spanish and in Chinese. I can think only that the translation of this book into English will further its already considerable influence on debates about the nature and dynamics of globalisation.

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September 2016

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Introduction

Our law here, their law there; one law on this side, another law on that side; international law and domestic law both overlapping and separate; English law and French law juxtaposed and strictly separate... Our accepted view of the legal world is two-dimensional.

Globalisation is gradually forcing us to abandon that conception.

The current trend of economic, cultural and technical globalisation has influenced, and indeed continues to influence, the law, generating new phenomena—intermingling, interconnection, transversality—that radically alter its shape. These phenomena are gradually drawing it towards a three-dimensional geometry that can easily be described as being less and less Euclidian.

The aim of this book is to discuss globalisation's legal dimension. It goes without saying that there are other aspects to the phenomenon, and that different approaches may be taken. Furthermore, decanting its legal aspects is a particularly difficult exercise, as globalisation gives the sense of being driven by economic forces, technical imperatives, even political motivations, rather than legal proposals. The fact that, in addition, it is composed of heterogeneous mechanisms, situated in quite different spheres, together with the fact that the reality of globalisation is only partly complete, also complicates matters. This book claims only to be an essay that aims to shed light on some aspects of the problem at hand.

A word on the method, which may cautiously be dubbed 'critical positivism'.¹ It strikes us that the 'globalisation of law' may only be approached as a subject from a position of relative or critical positivism. We can contribute to the legal understanding of legal phenomena at work here only through the usual positivist approach, which simply requires that no proposition be made without reference to a law, judicial decision, customary rule, contractual practice, etc—in short, confirmation in positive law. Conversely, it must not be forgotten that law does not tell us everything about social realities (of which it is but one level), or that social realities sometimes work contrary to that which the law formally states. The critical caution that an awareness of these facts demands must be exercised, especially when examining an evolving phenomenon, the balances of which are not readily identified

¹ cf Luc Wintgens, *Droit, principes et théories. Pour un positivisme critique* (Brussels, Bruylant, 2000).

and which—and this cannot be overemphasised—tends to destabilise tenets, principles and hierarchies that form the basis of our law. To analyse the globalisation of law when one's mind is full of the certainties one may have on ordinary technical issues is to run the risk of missing many things.

A balanced approach to the subject is all the more difficult in that, as regards globalisation and legal globalisation more specifically, there is the constant temptation to take an approach based on the value judgements that we each necessarily make on these phenomena. There is no need to emphasise the lively and numerous debates on globalisation. As regards the globalisation of law, there are naturally positions of principle, be they violently hostile or effusively supportive. For some, the globalisation of law drives our legal systems to deny some of their basic principles, particularly those relating to the welfare state. For others it is—at least in some respects—a good in itself, a goal to be achieved: this is the stance of those campaigning for the development of a global criminal law and international human rights protection,² and is frequently that of environmental law specialists who wish for a global law on a par with the worldwide environmental heritage to be protected.³ Many, in truth, make a Manichean distinction between what would constitute 'good' globalisation—of values, human rights, the environment—and 'bad' globalisation—economic globalisation, or that which eats into state and corporate power and threatens the various protections associated with it.

The conviction behind this book is that globalisation and the globalisation of law are neither good nor bad in themselves. That they transform the frameworks in which our collective value systems are rooted, that they change the way in which the public good is formulated and implemented, is undeniable. However, the effects that they produce in doing so are sometimes positive, sometimes negative.⁴ In any event, these are facts that must be studied as such before we concern ourselves with assessing them in order to judge the phenomena that cause them.

We must stress again that a collection of emerging realities will be discussed: we will be in the presence of processes rather than states; a

² eg, especially Mireille Delmas Marty. See, in particular, *Trois défis pour un droit mondial* (Paris, Le Seuil, 1997).

³ See, eg, Michel Prieur, 'Mondialisation et droit de l'environnement' in Charles-Albert Morand (ed), *Le droit saisi par la mondialisation* (Bruxelles, Bruylant, 2001) 397.

⁴ Economic globalisation, for instance, contributes to the development of emerging nations while deepening inequalities if it is not accompanied by a global redistribution strategy—see, eg, Zaki Laidi, *La grande perturbation* (Paris, Flammarion, 2004). It contributes to international prosperity, but also frees economic forces that are likely to threaten a number of essential protections: Pierre de Senarclens and Ali Kazancigil (eds), *Regulating Globalization: Critical Approach to Global Governance* (United Nations, United Nations University Press, 2007) 275ff.

developing system rather than an established one. We will describe the orientations at work rather than stabilised legal configurations.

Six years passed between the 2004 and 2010 French editions of this essay, which was published as part of the *Clefs Montchrestien* collection. The question arose as to whether the subject matter had evolved literally and metaphorically in the meantime.

The realities of economic, social and cultural globalisation have not been disproved. Even the 2008 financial crisis had no tangible effect on its trajectory: states undoubtedly appear to have regained the upper hand, but this does little to disguise the fact that the crisis was, by its very essence, transnational and that national control was confined within particularly narrow limits. The economic difficulties faced by developed nations have without doubt reduced migratory flows, but that reduction would appear to be limited and temporary.

Legal globalisation has also peacefully taken its course towards a growing interconnection of systems, national systems, international law and domestic law, etc. The vagaries of the discussions within the World Trade Organisation (WTO) show that economic globalisation is by no means a quiet river, but WTO law is not the only factor in the legal globalisation phenomenon.

The scope of the book's ambitions extends to describing the current status of a process that is far from complete. The transformations that globalisation brings about within the world's political, economic and legal organisation are on such a scale, and the phenomenon gives such a striking impression of only having displayed part of its potential, that analysts are necessarily compelled to sail the waters of conjecture and prediction. This is perhaps all the more true for law than it is for other spheres. The global legal space, the global legal system, have yet to offer up all their secrets, and our view of the world's legal structure is adapting little by little to what they gradually allow us to glimpse of their development.

According to one modern political philosopher, 'education, politics and law cannot keep up with the pace set by a globalised world'.⁵ What is absolutely true, in any event, is that legal science chases after the changes that globalisation induces, using all its branches in a bid to understand what is happening. The task of overhauling existing concepts is undoubtedly considerable, and all the good will in the world will be needed to accomplish it.

First, we will examine how law is influenced by globalisation, before questioning the processes by which the globalisation of law operates (chapter 1). Next, we will discuss the main areas of legal globalisation (chapter 2) before describing its mechanics, the way in which norms and relations between

⁵ Daniel Innerarity, *Le futur et ses ennemis. De la confiscation de l'avenir à l'espérance politique* (Paris, Climats, 2008) 114.

systems emerge therein (chapter 3). The question of power and legitimacy in the global legal space will then be considered (chapter 4). We will venture to formulate hypotheses on the operation of the global legal space (chapter 5) and the structure of a global law under construction (chapter 6). We will finish by offering a number of complementary points on the implications of globalisation for public law (chapter 7).

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