

Comparative Law in a Global Context

THE LEGAL SYSTEMS OF
ASIA AND AFRICA

SECOND EDITION

WERNER MENSKI

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PREFACE AND ACKNOWLEDGMENTS

While the long-awaited first edition of this book was explicitly directed at a specific student readership, it attracted much attention worldwide as a pioneering model of global legal analysis. This revised second edition ventures further beyond the still somewhat exotic ambit of comparative legal education pursued at the School of Oriental and African Studies (SOAS) in the University of London. It places legal pluralism more confidently into the mainstream study of comparative law, addressing some of the serious deficiencies of comparative law and legal theory in a global context.

Having read much of what appeared since 2000 in this fertile but still largely uncultivated field, I feel empowered to write with more clarity about the challenging experience of applying in practice what some writers, particularly Santos (1995), Twining (2000) and Cotterrell (2003), have been suggesting as viable strategies to promote plurality-sensitive, globality-conscious legal theory. There has been growing recognition of the fact that academic activities in the complex fields of legal theory and comparative law remain underdeveloped and still too eurocentric. As Western academics we seem, by our own histories and training, to be too wedded to ways of perceiving and studying law that do not take sufficient account of the culture-specific social embeddedness of legal phenomena in the world. We continue to ignore principles and models of good practice that have been developed elsewhere, particularly in Asia and Africa. As lawyers, we need to accept that law in its various manifestations all over the world is, and will always remain, culture-specific (Allott, 1980; Twining, 2000). We fail to admit that globalisation does not primarily lead to universal homogenisation, but rather increased legal pluralism in ways that make legal research ever more challenging and complex. Postmodern, globality-focused legal scholarship is a tough enterprise.

Twining (2000: 30) has argued that, unlike the science of geology, which is subject to universal physical laws, law is culturally relative. This basic observation puts a huge obligation on legal theorists and comparative lawyers to educate today's postmodern readership, and our current generation of students, about how to understand law itself and its various manifestations in a truly global context. While none of us can cover everything, some tasks are do-able within a lifetime. There is an urgent need to research particularly how

the legal systems of Asia and Africa react today to the demands of globalisation, developing in many cases in ways that we did not expect a few decades ago. We may find it hard to accept this today, because *they* often do not follow *us* and our ideas, but develop their own hybrid methods of dealing with legal issues. In understanding such complex processes of pluralisation, we can count on the active participation of many researchers and teachers from the South. But they, too, often require reminders that globalisation is today not just leading towards a uniform world legal order, given the strong ideological impact of existing eurocentric and uniformising scholarship in the fields of legal theory, comparative law and increasingly international law.

The present study remains geared towards combining inquisitive interrogation of Asian and African legal systems in a comparative global context with a self-critical questioning of dominant Western assumptions about the nature of law itself. The theoretical critique of global jurisprudence of the first edition is retained, and is now interwoven with arguments presenting legal pluralism as an integrated fourth theoretical approach that combines and yet transcends the familiar three dominant major theories in the study of law worldwide, namely natural law, legal positivism and socio-legal approaches. In four separate historically based chapters, the study provides a detailed historical overview of major legal systems of Asia and Africa to critically examine how these legal systems in the countries of the South are developing today in respect of my proposed theoretical approach.

The introduction to this revised edition focuses explicitly on globalisation and its pluralising effects in the legal field, while chapter 1 retains its focus on comparative methodology and emphasises the changing understanding of the nature of law in today's globalising world. The former chapter 2 has been split into two substantive chapters. The new chapter 2 allows for a more specific focus on legal pluralism and a global pluralistic legal theory, while the newly carved-out chapter 3 reassesses the more familiar ground of standard legal theories in their eurocentric, Western-dominated forms. Chapters 4–7 then discuss, in turn, the historical evidence of, and theoretical contributions made by, major legal systems of Asia and Africa, focusing on Hindu, Muslim, African and Chinese laws. The conclusion emphasises the extent to which a globally focused, plurality-conscious jurisprudence accounts for the evidence coming from non-European legal systems about the intrinsically plural nature of all laws in the world, no matter how globalised and commercially inter-linked they may have become at a certain formal level. The study proposes that as law continues to be culture-specific all over the world, the key challenge for legal theorists remains to develop a globally valid model of legal analysis rather than more studies on legal eurocentrism. This should permit a deeper investigation of the ways and forms in which hybrid legal phenomena worldwide emerge and are reproduced as a result of interplay between local and global legal inputs and competing elements within the internally plural phenomenon of

law. The dynamic interplay and competition of different perspectives in and on law requires constant negotiation in a spirit of tolerance of other viewpoints, rather than myopic assertion of idiosyncratic positions. Plurality-conscious legal construction and debate will remain a constant challenge everywhere.

This book, with departmental plans for its production under discussion since the early 1980s, should have been a co-operative effort involving several regional specialists. However, many factors inhibited co-operation and ultimately prevented a joint project from materialising. The pressures of modern academic life have become such that even speaking to one's colleagues has become a luxury and the e-mail, convenient as it may be, has replaced face-to-face discussion. In addition, modern academic structures do not sufficiently encourage co-operative research efforts across regional boundaries. In the end, this book had to be written, and now rewritten, by one person. This actually helped, looking back at this exciting experience, to achieve greater analytical coherence and depth, and to aid comparability.

Having listened to the lectures of many regional experts over the past twenty-five years, some of them now deceased, while others moved on or retired, I owe an enormous debt of gratitude especially to Professors J. Duncan M. Derrett, Noel J. Coulson (1928–86) and Antony A. Allott (1924–2002), stalwarts of comparative legal studies at the University of London. Each in his own way made sure that the important subjects covered in this book would not be neglected. Many others have contributed to the comparative law programme at SOAS over time, in particular the key course on 'Legal Systems of Asia and Africa'. Their names are too numerous to mention here. They made some input into the present work, duly acknowledged in footnotes and references to published writing, where it exists. Professor Esin Öricü at the University of Glasgow, Professor S. P. Sathe, Honorary Director of the Institute of Advanced Legal Studies in Pune, and Professor Humayoun Ihsan, Principal of the Pakistan College of Law in Lahore, deserve special thanks for engaging discussions about comparative law and global legal issues.

Several helpful research assistants contributed to the first edition, particularly Clare Fazal, Malachi Broome, Eric Bakilana and Samantha Pearce, whose unfailing support helped to make writing this book an enjoyable experience of study and learning in an environment where co-operation and frank exchange of views and perspectives needed to be protected from parochial challenges. The present revised edition has benefited from the critical comments of Professor John Bell of Cambridge University and a number of other reviewers. The partly sceptical feedback given by some colleagues and by many law students at SOAS between 2000 and 2005, especially the classes in 'Legal Systems of Asia and Africa' of 2003–4 and 2004–5, are gratefully acknowledged. All of this enlivened further ongoing thought processes, to which especially Dr Prakash Shah, Dr Ihsan Yilmaz, Dr Lynn Welchman and Nidhi Gupta have contributed. This edition was updated with the assistance of Shahin Baghaei, Biswajit Chanda,

Sameer Bhawsar and Jeremy Brown, who also helped me with the graphics. I also thank Finola O'Sullivan, Jane O'Regan and their colleagues at Cambridge University Press for professional guidance and a smooth production process.

The subject matter covered in this book is of such enormous dimensions that nobody could hope to cover every aspect. Many selections had to be made in view of constraints of time and space. Many difficult technical terms from different languages needed to be used; they are found with explanations in the glossary. Any mistakes and omissions are of necessity mine, and I shall continue to be grateful for constructive criticism from readers, which will in turn it is hoped lead to an updated and revised third edition.

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ABBREVIATIONS

AD	Anno Domini
ADR	Alternative dispute resolution
AIR	<i>All India Reporter</i> (India)
AP	Andhra Pradesh
BC	Before Christ
BJP	Bharatiya Janata Party
BLD	<i>Bangladesh Legal Decisions</i>
Cal	Calcutta
CLR	<i>Pakistan Civil Law Reports</i>
FB	Full Bench
FSC	Federal Shariat Court (Pakistan)
INLR	<i>Immigration and Nationality Law Reports</i> (UK)
J	Judge
Kar	Karachi
KLT	<i>Kerala Law Times</i> (India)
Lah	Lahore
LJ	Lord Justice
MFLO	<i>Muslim Family Laws Ordinance</i> , 1961 (Pakistan)
NUJS	National University of Juridical Sciences, Kolkata
PLD	<i>Pakistan Legal Decisions</i> (Pakistan)
PRC	People's Republic of China
Rs.	Rupees
SC	Supreme Court
SCC	<i>Supreme Court Cases</i> (India)
SOAS	School of Oriental and African Studies

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