

# **Discussions of Concepts and Methods I: Context of Globalization**

# Life of Law Amidst Globalization

## Notes in Search of a Plenary Paper

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1. In what follows I offer a series of talking points about the life of law amidst globalisation. Although one really ought to be talking about life of law after globalisation. "Amidst" suggests a politics of desire, the terrain of struggles [whether of manoeuvre or position] against the forces of production and relations of production constitutive of globalization. "After" only offers us a limited range of strategies of sleeping with the enemy. The difference between "amidst" and "after" owes much to Antonio Gramsci's counsel to those who would inhabit (post) modern world to accept the "pessimism of intellect" but adopt the "optimism of will".

2. The struggle is to retain the culture of globalism - a "structure of feeling" (to invoke Raymond Williams' notion of culture) which stands moved by the actual sight of starving children in Ethiopia or by data on malnutrition in Bangla Desh, a culture of concrete universalism taking

the real world of five million  
people as an object of concern,  
the whole earth as the physical environment,  
everyone living as the world citizens,  
consumers and producers, and with a common  
interest in collective action to solve global problems  
(Albrow & King, 1990:8)

Globalism was an arena of struggle, although bruised and bloodied by the politics of cold war, in which emerged

- the secure demise of that principle of world order which regarded colonisation legitimate
- the articulation of the principle, and the narrative of self determination
- the emergence of the United Nations as a “weapon of the weak” (to use James Scott’s fertile conception)
- articulation of vision of a just world order
- unfoldment of the principles embodied in the Universal Declaration of Human Rights through a variety of hitherto unbeknown enunciations of human rights enabling progressive participation of human beings in shaping their own destinies and images of governance.

3. Globalism, in all its discursive manifestations, was tinged by a notion of an ethical state; politics was constructed as an instrumentality of pursuit of good society. The State was postulated to be *a lá* Hegel, an ethical entity or, *a lá* Gramsci, as a custodian of values, a moral pedagogic, despite the acknowledged contingencies of the Nietzschean will to power.

4. Globalisation challenges each one of the tenets and gains of globalism. It inclines us to reject concrete ‘ethical universalism’, the culture of empathy, the fellowship in human suffering, to the point that the horrors of ethnic cleansing in Bosnia came to be narrativised as post-modern conflict and war (New York Times, May 23, 1995:1; Mestrovic, 1994) It promotes not “global neighbourhood” but instead “universal otherhood” (Baxi, 1995a). It denies principles of self-determination of states and peoples, creating a borderless world for the movement of capital and technology. In the place of Human Rights, Globalisation celebrates the script of trade-related human rights of conglomerates of late capitalism (Baxi, 1995b). It repudiates the vision of a just world order putting in its place world free trade as the only legitimate ideology, which generates both *weariness* and *wariness* towards human rights discursivity. It reduces space of plurality and diversity in the imagination of human futures, rendering the local into the ghetto of a global marketplace.

5. The forces of production, and accompanying relations of production, in a globalising world need, of course, careful attention. Even when marked by contradiction and complexity, the dominant trends are clear. These are:

- the emergence of a new international division of labour, marked by a 'dematerialisation' of production
- the hegemony of transnational capital, with new forms of economic sovereignty
- the consolidation of the risk society, creating new sources of international inequity
- the production of new epistemologies consistent with the pursuit of "red-in-tooth-and-claw" profit and power
- the capturing of the United Nations
- creation of a symbolic political economy; globalisation as a culture of excess, producing its own hyperrealities.

6. I develop a preliminary understanding of the features in my paper *The Unreason of Globalisation and the Reason of Human Rights* (1996, under publication) and invite your attention to the implications for the life of law amidst globalisation.

7. There is no doubt that legal imagination is central to the project of globalism and of globalization. And yet by and large lawpersons (judges, jurists, lawyers) have lacked the daring to preserve the fighting faith of yesteryear at the enormous privatization of power which is occurring worldwide under the auspices of Late Capitalism (cf Kelsy, 1993). The ability of lawpersons to enunciate, and reiterate, foundational truths in ways which make state ethical, power accountable and governance just, stands assailed by a variety of "postisms", be they of post industrial, post-modern, post (even) Marxist genre. This cognitive impoverishment is not unrelated to, if not directly caused by, the emergence of *sustainable thought*, ruled by canons of sustainable development, and formations of censorship writ large on political correctness as relates to the configurations of material interests of late capitalism.

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8. And yet juridical criticism (we would perhaps never be able to arrive at a *critique*) of globalization has at least taken three forms: politics of nostalgia, reexploration of the role of legal profession in relation to capital and the celebration of prefigurative juristic and legal *praxis*. I visit each genre, albeit briefly.

8.1. As to the first, I can do no better than to refer you to Sir Daryl Dawson's recent keynote speech to the Australian Legal Convention (The Australian, September 28, 1995:1) Sir Daryl, from his exalted seat of justice, bemoans the emergence of mega lawyering disvaluing "loyalty between partners and between lawyers and clients" and generating a "milieu" in which making of money, far from being subordinated to the notion of service, is the predominant consideration". He laments the growth of practise "incompatible with legal professionalism" (such as advertizing, contingency fees and multi-disciplinary practices). A possible criticism of Sir Daryl's daring articulation is that it is excessively eulogistic and overlooks the fact that in reality "both lawyering and business and public and private roles of lawyers are, and probably always have been imbricated within each other" and that there is no warrant to encourage "a belief in stark divisions between a pure realm of 'lawyering' and the grubby world of business" (Sugarman, 1994: 105). This is undoubtedly wholly true, but also wholly irrelevant. Politics of nostalgia is always the practice of reimagining the past in order to restore a human future. It is a politics of desire in a struggle to preserve social languages otherwise doomed to oblivion in those halcyon days of globalization. The reminder that legal profession is a social service and not a business or that elements of service should not be excessively dominated by considerations of profit and power occupies the same terrain which seeks to make formations of power rule-of-law oriented formations.

8.2. If the search for ways through which legal profession can be ever-so slightly deimbricated from transnational capital is an important aspect of politics of nostalgia, so is the search for redefining the role of lawyering in relation to capital. In a stunning analysis, Maureen Cain concludes that "capital and law" are "*reciprocally*" constitutive. It is not just capital which is given its form by law but law is given its form by capital" (1994:447). Undoubtedly, this is even more true of the life of law amidst globalization. Lawyering is central to the processes of

globalization even when conceived wholly in economic terms - whether the changing of production process, linking of financial markets, increasing importance of transnational firms, increasing proliferation of regional trading blocs, structural adjustment and privatization, and hegemony of "neo-liberal concepts of economic relations" (Trubek et al, 1994:409-410). Through a versatile analysis of internationalization of national legal 'fields' (particularly through the differential impact on the mode of production of Euro-law by introduction of American law firms), David Trubek and his colleagues reach a strikingly similar conclusion to Maureen Cain: "*As lawyers are remade by the emerging global order they are actively trying to remake it*" (1994:412). Cain's thesis of "creative dependence" of lawyering and capitalism thus stands vividly reinforced in globalization of law studies. The question of questions which must be addressed to this mode of analysis is: how far does it go to accomplish the demise of Globalism? And at *whose* and *what* human rights/social costs?

8.3. Perhaps this interrogation is more congenial to the third genre of juristic response to globalisation. The prefigurative response to globalisation seeks to preserve or even create impulses and movements for decelerating the pace of globalisation or to deglobalise the world or to globalise it from below. Salient among the strategies of deglobalising the law or to bend it in pursuit of globalism, are, of course, the women's movements which have imaginatively pursued the Vienna 1992 maxim 'Women's Rights are Human Rights'. This powerful movement proclaims that the notion of 'common good' is an insufficiently gendered notion; when it becomes gendered common good will signify not just that order which respects the rights of women but human right of women to be women. As Drucilla Cornell has memorably observed:

"...if what is prized is only the possibility of a new choreography of sexual difference and not the feminine within the sexual difference, we will reinstate gender hierarchy despite itself" (1991:188)

Allied prefigurative critiques emerge from the movement for the last frontier of human rights: the rights of indigenous peoples. In all this, although the working class remains the deprived bearer of human history, critical alliances of human rights

empowerment of labor remain potent: whether it is through the categories of migrant workers rights, rights of works in the free trade zones (Adelman, 1993) or labor in ultra-hazardous industries (Baxi, 1994).

8.4. Yet another, and less spectacular, genre of prefigurative critique is the envisioning of a 'third culture' in cross-border legal relations. The 'third culture' emanates from the fact that the behaviour of the typical transnational corporate actors increasingly lacks any national identity; the "trend towards 'stateless' corporadon is unmistakable" (Korten, 1995:124-128). An imaginative analysis suggests that the "'third culture' is receptive to legal control even though it does not necessarily need it, given its competence in regulating itself". Its 'competence' lies precisely in taking the "advice of international banks and large law firms which use quasi-universal business language and which thrash out differences on the level of interest rather than that of values, world views or social norms" (Gessner & Schade, 1990:269). But, equally, precisely the problematic and conflicting needs create images and constitute reality of the corporate deviance which calls (as in Bhopal or now in relation to Enron deal in Maharashtra, India) for regulation. The lawyers imagination needs to work, on behalf of globalism, creatively on the anomie of relations between transnational capital and the host state in ways which enhance human futures articulated in the paradigm of human rights.

## References

- Adelman, S., 1993. 'The International Labour Code and Exploitation of Female Workers in Export Processing Zones' in S. Adelman & Abdul Paliwala (eds) *Law and the Crisis in the Third World*, London: Hans Zell Publishers, 195-218.
- Albrow, M and King, E. (eds), 1990. *Globalization, Knowledge and Society*, London.
- Baxi, U., 1994. Introduction to *Valiant Victims and Lethal Lingation: The Bhopal Case*. Bombay. N.M. Tripathi (U. Baxi and A. Dhandha eds).

- Baxi, U., 1995a. "Global Neighbourhood" and "Universal Otherhood": Notes on the Report of the Commission on Global Governance', Mimeo, August 1995.
- Baxi, U., 1995b. "Summit of Hope" in the Depths of Despair?: Social Development as Realisation of Human Rights', paper submitted to NGO Forum, Copenhagen, World Summit on Social Development, March 1995.
- Cain, M., 1994. 'The Symbol Traders' in Maureen Cain and Christine B. Harrington (eds) *Lawyers in a Postmodern World: Translation and Transgression*, New York: NY University Press.
- Cornell, D., 1991. *Beyond Accommodation: Ethical Feminism, Deconstruction and the Law*, New York: Routledge.
- Gessner, V and Schade, A., 1990. 'Conflict of Cultures in Cross-Border Legal Relations...' in *Global Culture*, London, Sage; M. Featherstone (ed).
- Kelsy, J., 1993. *Rolling Back the State: Privatisation of Power in Aotearoa/New Zealand*, New Zealand, Bridget Williams Books Limited.
- Korten, D.C., 1995. *When Corporations Rule the World*, San Francisco: Barrett Kohler Publishers and Kumarian Press.
- Mestrovic, S.G., 1994. *The Balkanisation of the West: The Confluence of Postmodernisms and Postcommunism*, New York: Routledge.
- Sugarman, D. 'Blurred Boundaries: The Overlapping Worlds of Law, Business and Politics' in *Lawyers in a Postmodern World*, op cit.
- Trubek, D.M. et al, 1994. 'Global Restructuring and the Law: Studies in the Internationalisation of Legal Fields and transnational Arenas' in *44 Case Western Reserve Law Review* 407-98.