Book Reviews

Theorising the Global Legal Order

Andrew Halpin & Volker Roeben (eds)

Hart Publishing, 2009

The essays in this collection[1] began as contributions to a conference that, according to the editors, sought 'to bring together a number of disparate and often inchoate concerns about theorising law in the global context'.[2] The outcome is a rather disjointed, yet occasionally stimulating, volume, on which Andrew Halpin and Volker Roeben, in their closing remarks,[3] strive to impose coherence by searching for a peculiarly *legal* theory that is 'capable of supporting further fruitful work in this intellectually challenging and normatively significant arena.'[4] They look to Neil MacCormick's 'institutional' account of law for guidance.[5] Unfortunately, their intriguing turn to his theory serves to emphasise the relative absence of such enquiry from the rest of the book.

In the first of three 'scoping' papers on the general significance of globalisation for law, H. Patrick Glenn identifies a contemporary shift, of which he approves, to more cosmopolitan legal orders, whose lawyers he depicts as opposed to closure of several kinds.[6] He claims that each of these practitioners is not only open to alternative laws and legal beliefs, but also to the past and the future of his or her own order. This loyalty to a particular system may seem anti-cosmopolitan, but Glenn supposes that it is 'inherent

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1 Andrew Halpin & Volker Roeben (eds), *Theorising the Global Legal Order* (2009).

2 Halpin & Roeben, 'Introduction', above n 1, 2.

3 Halpin & Roeben, 'Concluding Reflections', above n 1.

4 Halpin & Roeben, above n 2, 23.

5 See Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (2007).

6 H Patrick Glenn, 'Cosmopolitan Legal Orders', above n 1.

in [law's] ordering function.'[7] He concludes his sketch by noting the normative character, the multivalent logic and the ambivalence towards theory of cosmopolitan legal thought.

William Twining is the author of the second 'scoping' paper.[8] Although his summary of legal-academic assumptions that globalisation challenges may be overly familiar to readers of his other work,[9] his caution regarding 'global' talk is still welcome, as is his suspicion of grand theories, presumably including those 'liberal institutionalism' and 'social constructivism' on which Stefan Oeter, with scant (other than biographical) explanation, relies, in presenting international law as fragmented, problematic, but nevertheless vital.[10]

The remaining papers examine 'particular concerns'. They begin with Ko Hasegawa's exploration of the transfer of legal ideas from one system to another, with specific reference to the introduction of the notion of rights in modern Japan.[11] Hasegawa elaborates on the 'of course debatable' view that 'the incorporation of a foreign legal system [into domestic law] generally begins in the adaptive efforts of intellectual elites over basic legal ideas, and then these ideas and values pervade systematically first into the central part of social institutions and later toward the rest of society'.[12] He develops this hypothesis by suggesting a method of interpretation through which thinkers produce 'a new horizon of language for society.'[13] His optimism regarding the influence of these scholars contrasts, as the editors observe,[14] with Catherine Dupré's disquiet at the increasing reliance of judges on foreign law.[15] Given the 'externality' and 'plurality' of the sources of this material, Dupré classifies it as 'postmodern natural law' and emphasises the need for critical scrutiny of its application.[16] She contends not merely that its use should be transparent, systematic and culturally appropriate, but also that judges ought to discriminate between different models of foreign law with

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7 Ibid 28.

8 William Twining, 'Implications of "Globalisation" for Law as a Discipline", above n 1.

9 See William Twining, *Globalisation and Legal Theory* (2000) and *General Jurisprudence: Understanding Law from a Global Perspective* (2009).

10 Stefan Oeter, 'Theorising the Global Legal Order – An Institutionalist Perspective', above n 1.

11 Ko Hasegawa, 'Incorporating Foreign Legal Ideas through Translation', above n 1.

12 Ibid 85.

13 Ibid 94.

14 Halpin & Roeben, above n 2, 15.

15 Catherine Dupré, 'Globalisation and Judicial Reasoning: Building Blocks for a Method of Interpretation', above n 1.

16 Ibid 116-117.

reference to norms that depend on the (curiously *modern*) ideals of 'justice, democracy and fairness'.[17]

In their chapter on the regulation of international trade, Ari Afilalo and Dennis Patterson argue that the current policy of comparative advantage supposes the persistence of the liberal-democratic nation-states whose strategic goals led to the agreement at Bretton Woods.[18] Because this accord generated a global marketplace and, with it, new state-interests, Afilalo and Patterson claim that another approach is now required. Here is their suggestion:

> We identify the new international norm that we believe is needed as the 'global enablement of economic opportunity,' and we believe that a new institution dedicated to unleashing and giving concrete expression to this norm is needed. We call this organisation the 'Trade Council,' and we believe that its membership should include representatives from the principal trading nations as well as from industry and other private interests with a stake in any of the given projects that the Trade Council would undertake. As an international organisation, the Trade Council will step into the regulatory vacuum of the postmodern era and implement programs intended to spread economic opportunity to the vulnerable middle classes of the new epoch, regulating on an *ad hoc* basis in a system based on incentives rather than top-down legislation.[19]

Whatever the substantive appeal of this recommendation, the connection between Afilalo and Patterson's essay and the editors' theoretical project is not evident. The relevance of Oxana Golynker's chapter is even more difficult to identify.[20] If her discussion of migration within the European Union has jurisprudential implications, they are well-hidden from the reader (or, at least, from this one).

Déirdre Dwyer's paper appears somewhat more germane.[21] Her topic is 'the theoretical basis on which a supranational legal entity might proceed with harmonising aspects of adjective law vertically and horizontally within

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17 Ibid 122.

18 Ari Afilalo & Dennis Patterson, 'Statecraft, trade and Strategy: Toward a New Global Order', above n 1.

19 Ibid 137.

20 Oxana Golynker, 'European Union as a Single Working-Living Space: EU Law and New Forms of Intra-Community Migration', above n 1.

21 Déirdre Dwyer, 'The Domestic Enforcement of Supranational Rules: The Role of Evidence in EC Competition Law', above n 1.

its boundaries, in order to promote the enforcement of substantive law.'[22] She looks closely at a proposal by the European Commission to standardise the rules of evidence for Competition Law in the European Community and bemoans its lack of principle. Dwyer then introduces a 'jurisdiction-agnostic' model of three 'paradigms' of civil evidence that furnishes criteria for the assessment of potential reforms. She doubts that harmonisation can succeed without reference to this model, whose paradigms –'genealogical positivism', 'rationalism' and 'natural law' – raise 'fundamental philosophical questions about what evidence law is actually *for*'.[23]

Whether the United Nations' Declaration on the Rights of Indigenous Peoples indicates the development of a global legal order for indigenous peoples is the question to which Stephen Allen gives a negative response in his chapter.[24] He starts from the premise, which he assumes that Martti Koskenniemi has established, that international law is formal as well as normative and deduces that the principles of the Declaration 'can only attract legal validity when incorporated into national law'.[25] He thus insists on acknowledgement of 'the practical limitations of recourse to positive international law' and maintains that '[t]he best way to ensure that normative developments in the international sphere are observed at the national level is by incorporating them into municipal law via domestic legislation'.[26]

John Gillespie is also concerned with local responses to international norms.[27] His paper examines the East Asian reception of 'global scripts', which include laws, procedures and other communications. Following a brief survey of analytical approaches to legal globalisation, Gillespie draws on regulatory theory to argue that the domestication of these scripts is contingent on the interaction of local actors, such as states, businesses and citizens, in a 'regulatory space' that comprises constitutional, non-state and deliberative mechanisms. He accentuates the role of 'epistemic communities' in this process, which may generate different results in different countries. For him, 'legal homogenisation and universalism are only some of the possible outcomes of legal globalisation.'[28]

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22 Ibid 167.

23 Ibid 180.

24 Stephen Allen, 'The UN Declaration on the Rights of Indigenous Peoples: Towards a Global Legal Order on Indigenous Rights?', above n 1.

25 Ibid 196.

26 Ibid 206.

27 John Gillespie, 'Developing a Framework for Understanding the Localisation of Global Scripts in East Asia', above n 1.

28 Ibid 209.

In his contribution, Nicholas Dorn focuses on international administrative governance in the Western Balkans.[29] He does so after identifying 'several parallels between the debates on state pluralism and cosmopolitanism, debates on security governance and criminological debates on "uncertainty" and "risk"'.[30] Even if these connections are less obvious than he supposes, his interest in theory is palpable, which cannot be said of Christian Walter, whose review of judicial reliance on comparative materials is the final paper in this diverse collection.[31]

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29 Nicholas Dorn, 'Governance Through Corruption: Cosmopolitan Complicity', above n 1.

30 Ibid 238.

31 Christian Walter, 'Decentralised Constitutionalism in National and International Courts: Reflections on Comparative Law as an Approach to Public Law', above n 1.