

REVIEW

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Laurence Boule: *The Law of Globalization*

By Judge Dennis Davis

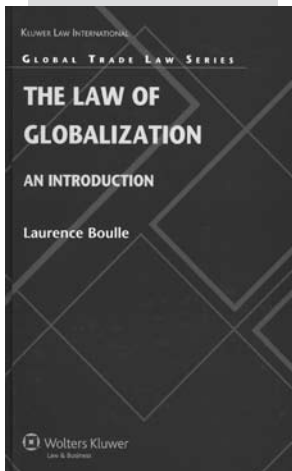
Globalisation has become the key word over the past 2 decades with which to describe the nature of the international political economy. Lying at the heart of this emerging form of globalisation is the global trading regime. In his recent book, 'Free Trade Imagined', Roberto Unger has suggested that the emerging world trading system is based on 4 principles:

- i the maximisation of free trade constitutes the proper goal of the world trading regime
- ii the practical identification of universal free trade with the enforced propagation of a particular form of market economy
- iii a willingness to analogue freedom from the movement of capital to freedom of the movement of goods and services, and an unwillingness to apply any such analogy to the free flow of labour
- iv an acceptance of wide disparities in the rewards and rights of labour among countries as well as within them.

Unger's description of the key principles of globalisation at the beginning of the 21st century may be contested but they serve to illustrate the wide ranging implications which this model of the international political economy holds for all countries, developing nations in particular. It also serves to describe the particular form taken by globalisation in the 21st century.

The nature, scope and structure of globalisation is an immense topic. To his great credit, Professor Boule has sought in one volume to examine the complexity of globalisation together with the international and national laws which underpin its operation. Boule makes the important point that, while globalisation has restricted the capacity of the national state to fashion its own particular social and economic policies, national law remains essential to the continued operation of the global system. For example, national contract and property law are critical to the operation of the market. The global economic system is predicated on agreements which are underpinned by national law, as are property rights, which exist because of the operation of law. Thus, as Boule notes, "whatever the idea of the logical claims of the market to be autonomous of the law, it is intimately dependant on a legal frame work". This insight raises the important question of the scope which national states might possess in resisting the imposition of the kind of neo-liberal framework captured luminously by Unger's description, so that governments may respond to the particular social and economic needs of their country, in line with the particular socio-economic mandate of the electorate.

That question has become far more pertinent since the financial crisis of 2008. As John Cassidy argues in *How Markets Fail: The Logic of Economic Calamities*, the idea that



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Introduction

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financial markets are rational and self-regulating mechanisms is but an invention of the past 40 years. The critical question on the contemporary agenda is the balance that has to be struck between regulation and the operation of the market.

In his book, Boule refers to the classic text of Karl Polanyi, *The Great Transformation: The Political and Economic Origins of our Time*. Polanyi developed a concept which he termed the “double-move”. He illustrated how the historic emergence of the market mechanism was characterised by attempts to liberate the economy from various forms of political, social and other non-economic controls. These initiatives were coupled to a second move: the development of protective mechanisms to mitigate against the harshness of the market and its operations. When the market was freed from regulation, labour was reduced to a commodity and the core social fabric of society was placed under considerable stress. Protective mechanisms, such as bargaining rights in the work place and the welfare system, emerged as an essential part of the “second move” to preserve social cohesion.

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Boule is to be commended for raising the implications of the work of Polanyi. Arguably, given the vast scope of his work, there was insufficient space to further develop the implications of Polanyi’s classic text. This is unfortunate, because the significance of Polanyi’s double move concerns the possibility of another double move; that is, a double movement in the context of a global, as opposed to the 19th century national, system with which Polanyi was concerned. The current financial crisis presents, as a potential response, the possibility of protective mechanisms to curb the excesses of the global market.

This question is of particular interest when considered within the context of Boule’s discussion of international organisations and, in particular, the World Trade Organisation (WTO). Not only is one of the major criticisms of the present international political economy, as set out in Unger’s four principles, the exclusive focus on trade at the expense of economic development and distribution (and hence distributive justice), but this criticism is extended to the operations of the key international organisations, particularly the WTO. Boule’s treatment of the WTO shows the extent to which the free trade arrangements which, it is enjoined to facilitate, have worked to the overwhelming advantage of the developed world.

Yet, as Boule notes, since the original General Agreement on Tariffs and Trade (GATT) agreement in 1947, economic development has been one of the proclaimed goals of the global economy, initially in the form of raising standards of living. The question of implementation for the present is whether a new balance may be struck between free trade and economic development. This is not to say that international law and organisations have not been the site of considerable struggle. Boule describes how law has been used “assertively” by non-governmental organisations in India, various movements in the United States of America employing the Alien Tort Claims Act of 1789 and, on occasion, the World Trade Organisation (WTO) to promote a more progressive agenda.

In this connection, a South African example is illustrative. The Alien Tort Claims Act has been employed by groups, dissatisfied with the programme of reparations (to the extent that there have been any) which followed upon the Truth and Reconciliation Commission. Litigation is now far advanced against USA multinational corporations which, it is alleged, breached the Alien Tort Claims Act by virtue of their complicity with the apartheid regime.

Boulle correctly points to the limitations to the Trade-Related Intellectual Property (TRIPS) treaty which provides protection to holders of patents as well of trademarks, industrial designs, and trade secrets. An exception was negotiated, allowing for an infringement in cases of national emergency or other circumstances of extreme urgency. This exception has domestic significance. The exception permitted Brazil to legitimise the production of generic versions of drugs which could treat HIV-AIDS and other diseases. In South Africa the Truth and Reconciliation Commission (TRC) employed strategies ranging from the invocation of the TRIPS exception to the employment of the Competition Act to ensure that generic anti-retrovirals were made available in South Africa. Although this litigation was not ultimately determined by the courts, since the cases were settled, the initiative of the TRC is illustrative of Boulle's conception of affirmative litigation which can be employed using existing international law.

These, however, are exceptional cases rather than the rule. As Boulle shows, background global rules have been skewed in favour of developed countries and multi-national corporations. Can it be that the tide has now changed as a result of the ongoing financial crisis? Further, to what extent can South Africa play a more assertive role in ensuring that the WTO, for example, responds not only to the demands of free trade but also to those of economic development? The initiative would be focused on ensuring that background rules become more favourable to developing countries. Within the present uncertain climate, in which the possibility of a global "double move" cannot be discounted, there is considerable scope for innovative international negotiations in which South Africa can play a significant role.

The answer to these questions, of course, depends on a careful analysis of the global political economy and the law which underpins its structure. Boulle's book provides an excellent introduction to this vast area. The reader will gain an understanding of the key international organisations, the nature and scope of the relevant international treaties and the role of law, both domestic and international, in the reproduction of a particular system which, at present, is under considerable stress.

The main weakness of the book is that Boulle has sought to paint upon so vast a canvass that, on occasion, the paint appears thin and unable to cover the entire canvass. But as a serious and scholarly introductory engagement to this complex field, Boulle's book represents a most significant contribution.

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