

Erewhon: The Coming Global Legal Order

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Twenty years ago, almost nobody in the legal world talked about globalization. Suddenly—at least it seems to be sudden—globalization and the global legal order are on everybody's lips. There are conferences, symposia, texts, and a general ferment over the issue.¹ There are books and articles, indeed there are whole journals with "globalization" in their title. In part this is simply a fashion; but it is also more than fashion—it is a response to something real and important in the contemporary world.

Before going any further, we have to ask exactly what we mean by globalization. Of course, there can be no hard and fast definition of the word. The core meaning reflects a change in scale and in site. The term refers to movement, diffusion, and expansion from a local level and with local implications, to levels and implications that are worldwide, or, more usually, that transcend national borders in some way. Exactly what is expanding and diffusing, and how these changes affect the global legal order, is something I want to deal with generally in this essay.

Globalization, whatever else it may mean, is about movement—of images, goods, and ideas—across state borders and, for that matter, across oceans and mountain barriers as well. Globalization means that no man, woman, or nation is an island, to misquote John Donne. There are no longer any hermit kingdoms. There are in fact, few hermits of any sort at the beginning of the twenty-first century.

Trade relations between tribes, groups, and countries are nothing new in human history. But the sheer scale and the share of the world economy that is devoted to transnational trade are new. Similarly, people have always been on the move; ideas, images, religions, and diseases have always traveled from culture to culture. But the modern diffusion of people and concepts is rather different. For one thing, it is far more individual; migration is not migration of

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¹ The literature is getting quite large. I want to mention particularly Klaus F. Röhl & Stefan Magen, *Die Rolle des Rechts im Prozeß der Globalisierung*, 17 ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 1 (1996); and Martin Shapiro, *The Globalization of Law*, 1 IND. J. GLOBAL LEGAL STUD. 37 (1993).

peoples but of people.² Millions of people in countries like the United States or Argentina have migrated as solitary movers, or in tiny family groups. Before contemporary times, population movement was a characteristic of the so-called "immigration countries;" today, all rich and developed countries are targets of people moving from their poorer home countries.

The miraculous advances in technologies of transportation and communication make modern diffusion possible. These technologies are the instruments or tools of globalization. Without radio, TV, satellites, cars, trains, and planes, nobody would be talking about globalization at all. The Internet is now adding yet another dimension to globalization. It is possible to send a message around the world in nano-seconds. Even physical movement is incomparably more rapid than it was not very long ago. Jules Verne wrote *Around the World in Eighty Days* in 1873; any one can go around the world today, if necessary, in about a single day.

In some ways, globalization does not require people to move anywhere, or even to get up from their couches and chairs. Globalization, as I will argue, is most importantly a cultural phenomenon. Scenes, images, and ideas travel at great speed across great distances and can be beamed by television directly into the human brain, so to speak. Television insinuates itself into millions or even billions of homes. The Internet too has the potential to connect everybody with everybody else in the developed world; it is already a storehouse of billions and billions of bits of information; and it is far more interactive than television and other mass media. You can talk back to the Internet; you can buy and sell on it; you can connect with like-minded people. The cultural and social impact of the Internet is potentially immense.

I THE CONTENT OF GLOBALIZATION: TRADE, CULTURE, AND CONSUMPTION

Suppose we ask what it is that globalization is actually globalizing; what is the content of this process of transcending borders? The most obvious answer is trade. Globalization is economic. It is international business, international transactions, international buying and selling and dealmaking. It is tankers of oil from Saudi Arabia, containerships of toys and television sets from Taiwan, shoes and blouses from Indonesia, and wheat and walnuts from the United States. It is also, more and more, the domain of huge multinational corporations, companies that are everywhere and nowhere. These companies operate in dozens of countries, and have offices, plants, business offices, and distribution centers all over the globe.

² To be sure, there are still examples of mass migrations—particularly of the helpless and hapless refugees in places like Kosovo or central Africa.

A second answer is that what has globalized is human capital—people, in other words. Ordinary people, business people, jet-setters, tourists, refugees, in-migrants, and out-migrants move rapidly in and out of their countries and across the world.

Trade and human capital are no doubt at the core of globalization, but both in turn depend on the rise of global culture. From this, everything else follows. Ideas, images, patterns of behavior, and thought processes can be shared all over the world—certainly over the developed world and increasingly elsewhere as well. This global culture comes primarily from the developed countries and spreads from "the West" to the east and the south. Bertrand defines globalization as "the invasive influence of cultural, political, and economic models, which are born in the countries of the first world . . . and are progressively imposed on a great many other countries."³ There is, of course, some traffic in the other direction, but the cultural aspects of globalization predominantly stem from the developed world of the West.

The new global popular culture is reflected in and carried by the media—television most notably. Television spreads its images all over the world, subtly and invisibly, and changes every culture that it touches. The television programs that embody global culture, and which are beamed throughout the globe, are mostly entertainment programs, comedies, game shows, police and detective dramas, talk shows, and sports events, all punctuated at pretty frequent intervals by commercials. Television also devotes a lot of time and attention to "news," but it is getting less and less easy to tell the difference between news and entertainment.

While the popular programs come in all shapes and sizes, they carry a definite ideology—a content and a message. In truth, this message is not much different from the message of the commercials. It is a message of consumerism, of individualism, of leisure, and of the ways to enjoy leisure. Television, generally speaking, describes a world of fun, thrills, mystery, and adventure. It is a world of celebrities, of the rich and famous, of the young and beautiful, of people who live exciting, sometimes tragic, but rarely humdrum lives. These images almost never reflect the grinding, daily struggle of most people on earth.

These programs also, by and large, originate in the West and show Western styles, dress, and manners. Some popular programs come from elsewhere—soap operas from Latin America, for example—but they are not very different in kind from the programs that come from the United States. My impression is that the rich crop of local programs in such countries as India or

³ Marie-André Bertrand, *Le Droit comme Instrument de Mondialisation*, in GLOBALIZATION AND LEGAL CULTURES (ONATI PAPERS 7), 113–14 (Johannes Feest ed. 1999).

Egypt share with their Western counterparts at least some of their themes and aspects. In any event, these programs have to compete with Western rivals.

Television is enormously popular in all but the most underdeveloped places. Apparently, the single most watched program, as of today, is *Bay Watch*. This is one of America's gifts to the world. This program is about very good-looking young people who run around in bathing suits on the beach. Its popularity is easily explained. It has an obvious, though rather mild, appeal to human lust. Beyond this, it shows a world of fun, leisure, and sunshine, interrupted from time to time with some more or less serious problem that gets resolved by the end of the program. But the primary image is of slimness, youth, beauty, free time, enjoyment, and a healthy dash of sex. These TV images are enormously seductive. They become models for behavior. Foreign television programs have turned girls in Fiji—where once upon a time fat was beautiful—into bulemics, desperate to look slim.⁴ It would be impossible to tell how many people dye their hair, change their style of dress, or take up some new habit because of the images they see on television. The programs arouse, all over the world, a culture of envy and desire.

Movies are another medium of popular culture. They are a U.S. success story; in much of the world the films that make the most money and attract the biggest audiences are from the United States. In country after country, U.S. movies have almost driven the local product to extinction. The United States seems to be the world master at seductive cinematic junk. Germans, Finns, Japanese, and Guatemalans all swarm into theaters to see the latest Clint Eastwood or Bruce Willis movie. The top grossing film in Argentina in 1991 was *Terminator 2*; in Egypt it was *Dances with Wolves*; in Sweden, it was *Pretty Woman*.⁵ A few years later it was reported that the United States "commands a staggering 85% of the world's film market, and 90% of the European film market;" 88 of the top 100 movies in 1993 were from the United States.⁶

There have been attempts at national protectionism, of the cultural sort—in Canada, for example, and in the European Union. Some French elites are determined to protect their culture from the invading Anglo-Saxons, as they like to call them. But cultural borders are even harder to protect than physical borders in the age of satellites and receiving dishes.⁷ The underlying problem is that French audiences like American movies, American music, American TV. If we ask why this is, the answer has to be that Americans are good at it. They have a better sense of what sorts of cultural junk-food people enjoy, just

⁴ Erica Goode, *Study Finds TV Alters Fiji Girls' View of Body*, N.Y. TIMES, May 20, 1999, at A17.

⁵ BENJAMIN R. BARBER, *Jihad v. McWorld* 299 (1995).

⁶ Judith Beth Prowda, *U.S. Dominance in the "Marketplace of Culture" and the French Cultural Exception*, 29 N.Y.U. J. INT'L L. & POL. 193, 200-01 (1996).

⁷ LAWRENCE M. FRIEDMAN, *THE HORIZONTAL SOCIETY* 51 (1999).

as the French seem to have a better grasp of *haute cuisine* and perfume, and the Italians turn out what people consider the world's most wonderful shoes.

Technology makes it possible for culture to ignore national borders. The only real barrier to a global culture is language. But language is unimportant in music, and only a slight obstacle to TV and movies, since these can be dubbed or subtitled. In many movies, the dialogue is almost irrelevant, anyway, compared to the action and the riveting special effects.

The diffusion of images across borders has obviously made an enormous difference in the world, though it is not easy to translate that difference into numbers and statistics. Certainly, the mass media have powerfully affected world culture. They have influenced the patterns of wants and desires, the patterns of consumption and hoped-for consumption, and the demands for goods and services. Hence, global culture is the messenger that prepares the way for international trade.

But who consumes this global culture? More and more, millions of people have the means to act on their desires. Science and technology have revolutionized production, created the industrial world, and as a result, have produced enormous world wealth. The wealth is very badly distributed within many countries, to be sure, and even more so between countries. Most people in the world are still immured in poverty and misery, without access to the Internet, to jet travel, or even to television. Their daily lives are a struggle for a piece of bread or a bowl of rice and a roof to shelter them from rain and wind.

But there is a huge middle class in the developed countries, in Europe and North America, in Australia and New Zealand, in Japan, Korea, Hong Kong and Singapore, and in Israel. In many other countries the middle class is also growing rapidly in size and influence. Even in as poor a country as India, where the middle class is a small part of the population, this class includes tens of millions of people. All of these members of the middle class have a certain measure of affluence and leisure; they no longer live on the razor's edge of subsistence. They have a bit of extra money in their pockets and in their bank accounts. What is even more important is that they have time to spend that money, after work, on Sundays, on holidays, and during vacations. Their time and their leisure turn them into massive consumers. In particular, they have an insatiable appetite for leisure activities; they are, in short, consumers of fun. This brute fact is the underlying motor driving the economic aspects of globalization.

Today's trade is on the whole, however, much different from trade in the days when the West had colonies and got silk and spices from the East. To be sure, different countries still sell different products—copper goes from Chile to countries without copper, and oil from Venezuela fuels countries without oil. Countries with tall mountains or ancient cathedrals still sell their beauty

and their history to tourists. Raw materials are extracted where they lie in the ground and shipped to countries that process them. Some countries specialize in making computers or computer chips, while others specialize in shoes and shirts and sealing wax. But trade is also driven by the commonality of commodities and desires. There is a worldwide hunger for American blue jeans, Nike shoes, or cheese pizza. If Coca-Cola is sold everywhere, it is because there are people in Albania and Honduras and Mauritius who like the taste. In the "global marketplace," the Japanese "eat poultry fattened in Thailand with American corn;" consumers "on both sides of the Atlantic wear clothes assembled in Saipan with Chinese labor, drink orange juice from concentrate made with Brazilian oranges, and decorate their homes with flowers from Colombia."⁸ The obvious point of the quote is that production is global; but implicit is also the globalization of consumption—the idea that consumers want the same things, or much the same things, everywhere.

Of course, there are differences among countries in their syndromes of consumer desire; but, compared to any past era, the similarities are much more striking. The main flow is from West to East, but not exclusively. You can eat sushi in Berlin or Miami as well as in Tokyo. It strikes Americans as weird to see a Pizza Hut in Beijing, but pizza is not American, it is Italian. And it is not really Italian, it is Neapolitan, and was at first perhaps as exotic in Milan as it is in Bangkok. Blue jeans are an American gift to the world, but they were originally designed for miners in California, and their appearance in New York as a fashion statement is as much an example of cultural diffusion as is the fact that blue jeans have also invaded Moscow or Jakarta. It is the hunger for the same sorts of goods that fuels modern international trade; this hunger creates the converging culture of the global village—indeed it is that culture.

No modern phenomenon, perhaps, is as important as this one—that is, the globalization of patterns of consumption. Many of the products, ideas, images, and patterns are definitely American, so it is tempting to talk about U.S. imperialism or cultural hegemony. But "Americanization" is quite selective; many bits and pieces of U.S. culture do not travel well at all. Coca-Cola swept the world, but nobody drinks root beer except Americans. The United States is, for whatever reason, generally very good at satisfying the hungers and tastes of the masses of people clawing their way up into the middle class. The United States was the first middle-class society, and the first society in which broad masses of people, owned some property, voted, and mattered as individuals.⁹ The talent for understanding, and catering to, mass desires may come out of this experience.

⁸ PHILIP MCMICHAEL, *DEVELOPMENT AND SOCIAL CHANGE: A GLOBAL PERSPECTIVE* 1 (1996).

⁹ See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (2d ed. 1985).

"America," moreover, has become a kind of symbol of whatever is seductive about modern life; and American products thus become symbols for America itself. There is, in particular, a peculiarity of American culture which seems unusually attractive to other people. The United States is a nation of "levelers;" everybody tries to copy the lifestyle of the rich and famous, and yet that lifestyle itself borrows from the lifestyle of the poor and obscure. Blue jeans, for example, are both chic and classless at the same time. The habits of the urban ghettos in music and dress filter up into the most unlikely places. Junk food and rock music are classless.

Whatever its sources and impulses, the global culture of consumption is a fact; it is the common property of every middle class. Of course, it is a much debated question whether or not this commonality is more than skin-deep. Take, for example, the case of Japan. The Japanese have cars, computers, skyscrapers, air conditioners, and antibiotics. They dress "Western" and hordes of young Japanese in Tokyo chomp down hamburgers from McDonald's. Arguably then the Japanese are now not much different from your typical Spaniard, Swede, or American. On the other hand, one might argue that the trappings of internationalism and modernity are a mere veneer, a gloss; there is a Japanese core that remains fundamentally different and unchanged. Whether this is so or not is in part a tough empirical question, and also a question of interpretation: how you measure "sameness" or "difference," and what weight you give to phenomena of culture and behavior. My own opinion—and it is only a guess—is that culture is more fluid and malleable than most people think. If you dress modern, eat modern, use modern tools, then you become modern. Your thought processes are, inevitably, altered.¹⁰ Nobody would say Japan at the dawn of the twenty-first century has become exactly like France at the dawn of the twenty-first century. Anybody who has spent time in both places sees all sorts of differences. But is the Japan of today more like the France of today, than it is like the old, feudal Japan of Lady Murasaki or the Kyoto court? The answer, I think, is yes. And the France of today, in turn, is more like the Japan of today than it is like the France of Charles Martel or Jacques Villon.

II. GLOBALIZATION OF LAW

If business and trade are globalized, and so too the culture of production and consumption, then there must also be a globalized sector of law. In the modern world, law is dense, ubiquitous, and pervasive.¹¹ Some kind of legal

¹⁰ See ALEX INKELES, *EXPLORING INDIVIDUAL MODERNITY* (1983); ALEX INKELES & DAVID H. SMITH, *BECOMING MODERN: INDIVIDUAL CHANGE IN SIX DEVELOPING COUNTRIES* (1974).

¹¹ Lawrence M. Friedman, *Is There a Modern Legal Culture?*, 7 *RATIO JURIS* 117 (1994).

order or legal culture must operate on the global level. But what does this legal order and culture consist of?

In answering that question we have to be careful not to exaggerate the importance of a global legal order. Most lawyers remain firmly rooted in their own legal habits and traditions, even if they work for transnational corporations. They deal mostly with local management problems and they live in the world of domestic, legal culture. Thousands of lawyers spend their days working on small real estate deals, drawing up wills, helping couples get a divorce, defending criminals, coping with contract disputes between small and medium companies, settling arguments over driveways and boundaries, and handling other issues that are confined to one particular locale. The legal world may be, in some ways, among the more primitive and less globalized sectors of modern life.

But the international legal sector does exist, and it is of growing importance. This follows from the facts of international trade and business. There are more and more huge multinational corporations—companies that are everywhere and nowhere, which operate in dozens of countries and have factories, offices, plants, and distribution centers all over the world. One can even speak of the “global assembly line in manufacturing.”¹² In the early 1990s, U.S. firms had more than 18,000 “affiliates overseas”; German firms had “even more.”¹³ An official of Coca-Cola, speaking at Stanford Law School, announced (somewhat grandiosely) that Coca-Cola was not a U.S. company, but an international one; and, indeed, it operates in more than 100 countries.

It seems quite clear that the international sector of the legal domain is growing rapidly. One symptom is the rise of the transnational law firm. For example, in 1995, the old, famous Wall Street law firm of Sullivan and Cromwell, besides branches in other U.S. cities, had branches in London, Paris, Hong Kong, Melbourne, Tokyo, and Frankfurt. It is not only U.S. firms that have gone in for internationalization. A leading firm of solicitors in London has European branches from Brussels to Moscow as well as offices in Singapore, Bangkok, Hanoi, and Beijing. A Hamburg firm has offices in Bratislava, Budapest, New York, Hong Kong, and other places. An Italian firm adds Dubai and Tirana to the list.¹⁴

In a way, then, the legal world has a form of diglossia—a technical word borrowed from linguistics. It refers to a “situation where two very different varieties of a language co-occur throughout a speech community,” usually divided into a “high” and a “low” version.¹⁵ The low version is used at home,

¹² SASKIA SASSEN, *LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION* 7 (1996).

¹³ *Id.* at 9–10.

¹⁴ See 1 MARTINDALE-HUBBELL, *INTERNATIONAL LAW DIRECTORY* (1998).

¹⁵ DAVID CRYSTAL, *AN ENCYCLOPEDIA OF LANGUAGE AND LANGUAGES* 104 (1992).

on the street, and in popular literature and soap operas; the high version in speeches, newspapers, and formal literature. Diglossia is common in many parts of the world, and a mild form of it is almost universal. In the legal world, the language analogy may not be a bad one. There is a kind of internationalized law, or globalized law, which exists side by side of, or on top of, the national or local sector. It may well represent a minority, even a small minority, of lawyers' work, but its importance is clearly on the rise.

In today's world, people in, say, Estonia, are just as eager to dress internationally and eat international food as their government is to join NATO, the European Union, and other international organizations. But there is a certain tension between this desire to globalize, and the desire to preserve local culture. Estonians amount to only about a million people. They speak Estonian, at least at home, and they treasure their linguistic heritage. But as they enter the world of international trade, or try to, they cannot expect to find dealmakers from abroad who are comfortable speaking Estonian. Business cannot be conducted through grunts or sign language. It is possible to do business through interpreters, and this certainly happens often enough, but it is a clumsy arrangement at best.¹⁶ To smooth the process, a kind of *lingua franca* emerges. As it turns out, for historical reasons, the major candidate today is English. Regionally, there are rivals—Estonians probably still need to be fluent in Russian, for example; and they may find German or Swedish or Finnish exceedingly useful. But English seems likely to prevail internationally, and it is clearly going to dominate in transnational lawyering. In a prominent law firm in Warsaw, Poland, for example, of twenty-nine lawyers, twenty-six claimed fluency in English. This was the claim, too, of virtually all of the 150 lawyers in the largest law firm in Korea.¹⁷

The dominance of English also means that U.S. ways of writing contracts and thinking about the law are likely to have more influence than they otherwise would in the coming global legal order. In some fields of law, U.S. institutions are said to be powerful models.¹⁸ It is obviously valuable, in brute money terms, for U.S. law firms to win the race for international business. One cannot rule out forms of subtle coercion from the world's only superpower and its citizens. But much of what looks like U.S. “influence” or power may simply reflect the fact that the United States, for various reasons, is ahead of the game in devising institutions that fit modern legal needs. The term imperialism, implied to the spread of U.S. law and U.S. lawyering

¹⁶ For small languages, it may not even be possible to do deals through interpreters. An Estonian business that wants to contract with a company from Thailand is not likely to find somebody who can shuttle between these two particular languages with ease. Almost certainly both parties will do their business with each other in English.

¹⁷ See MARTINDALE-HUBBELL, *supra* note 14. The dominance of English is, of course, a tremendous boon to those of us who speak it as a native language and a disadvantage to all others.

¹⁸ See Wolfgang Wiegand, *Reception of American Law in Europe*, 39 AM. J. COMP. L. 229 (1991).

abroad, may be a shade too strong. In part, what we have here is a matter of taste, like the spread of Coca-Cola. It is perhaps also sheer convenience and the fact that Americans were in the field fairly early, and because their style of lawyering suits the needs of the international order.

A Substance and Style

There are, so far, serious gaps in the literature on the global sector of the legal order. A great deal has been published, but it runs heavily to doctrine. Dozens and dozens of articles deal with conflict of laws. There are also explanations of various treaties and the like, plus manifestoes and general essays like this one. Not much in the way of serious, rigorous, empirical research can be found.

What characterizes the globalized sector of the legal order? There is to begin with a body of hard law: that is, treaties, conventions, GATT and GATT-like arrangements, regional pacts like NAFTA and Mercosur, and the European Union. Some of these are truly international, others are regional, but they all, at any rate, aim at cross-national impact. Some of this "hard law" has also generated the beginnings of what we might call hard institutions—organizations which have the right or the duty to enforce norms and conventions. The World Trade Organization is an example.

Then there is what we might call a body of "soft law"—international customs, practices, and behaviors. There is a large literature on what some scholars describe as a new sort of *lex mercatoria*. The original *lex mercatoria* was a body of mercantile custom in the middle ages. It was closely associated with the Lombard merchants, who formed a kind of transnational business class. Quite a number of institutions of modern commercial law, relating to banking, negotiable instruments, and the like, grew out of customs and practices that were aspects of the *lex mercatoria*. The idea is that the transnational lawyers of today have their own customs, norms, and practices, and a sort of merchant law is emerging, without benefit of legislation, from their patterns of behavior.

Very likely there is less here than meets the eye. To be sure, some aspects of international business law have been formalized—standard contract forms provided by international trade groups, and such devices as the INCOTERMS, which the International Chamber of Commerce puts out. These "contractual provisions with legal or quasi-legal (customary) character" are supplemented by "codes of conduct with more or less sanctioning power," which form part of the international "normative order."¹⁹ All this is supposed to constitute, in Gessner's words, "autonomous norm creation within the international econ-

¹⁹ Volkmar Gessner, *Global Legal Interaction and Legal Cultures*, 7 *RATIO JURIS* 132, 137 (1994).

omy."²⁰ But in the end all such customs and practices have to be validated somehow by national courts applying what they consider to be national law or rules that national law recognizes—or, as is often the case, the law that the parties to a contract may have stipulated.

The new *lex mercatoria* is associated, in particular, with the growing field of international arbitration,²¹ an area recently studied and described by Dezalay and Garth.²² Commercial arbitration is "global" in the sense that it is not closely tied to any particular system of local law. It comes into play when the parties to contracts and deals agree to send problems and difficulties to arbitration. This way, they turn their problems over to a group of skilled and prestigious international practitioners and avoid, at least initially, the courts and the peculiarities of local legal systems. Most such arbitrators are lawyers, but they do not behave "legalistically." Their solutions are supposed to flow from social customs, norms, and understandings that are common to business people all over the world. Businesses tend to prefer to go to arbitration, which seems less drastic than going to litigation.

Lex mercatoria is a fairly fancy phrase and surely conveys something of a wrong impression. Wrong in two ways: first, in suggesting that these norms are precise, hard-edged, and precisely known. Second, in suggesting that jet-set deal makers act in ways fundamentally different from national or local dealmakers. After all for example, commercial arbitration is also common in domestic systems of law. Business people everywhere choose to settle their affairs amicably, if they can, and especially if they have a continuing relationship. Like international business relationships, domestic business relationships are also often governed by customary practices and a sense of what is right and wrong—norms that are not necessarily recognized in the formal law.²³

Of course, without further research, there is not much that can be said about the norms, habits, and practices of the international dealmakers, just as it is hard to say much about the local norms and customs of business people. The research is simply too thin. I suspect that deals and dealmaking have some general traits in common, at any level. This is because of the pervasive influence of unplanned convergence—the process that pulls systems of living law in the modern world closer together. There is nothing mysterious about this particular process. Moreover, all systems partake of the transnational

²⁰ *Id.* at 138.

²¹ See *LEX MERCATORIA AND ARBITRATION* (Thomas E. Carbonneau ed. rev ed 1998).

²² YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1996).

²³ This is the message of the classic study by Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 *AM. SOC. REV.* 55 (1963).

commonality of products and desires.²⁴ After all, in the modern world, there are problems and situations common to every developed country. Everybody has to deal with air traffic control, with international phone calls, with intellectual property, and with the tax problems of people and businesses that operate or live in more than one country. Common problems often lead to common solutions. But even when they do not, they generate a common vocabulary and a common conceptual framework.

It is, of course, an empirical question how far this convergence goes.²⁵ It is widely believed that there remains an "American" way of drafting contracts—with every possible contingency spelled out—and a "Japanese" way which simply sets out the general framework and leaves the rest, through a handshake or nod of the head, more or less to the good faith of the parties. Oddly though, it is the "Japanese" way which, on the surface at least, seems to presume more convergence. After all, the parties to a deal must share some kind of normative presupposition to make the handshake effective. The deal has to rest on an understanding, on a framework of custom.²⁶ Between two Japanese business people, the handshake may mean one thing; in the international sphere it would be another matter entirely.

The literature about national styles of legal behavior is relevant to the question of how deeply economic and legal systems are converging. This literature tends to suggest deep-seated and irreconcilable cultural differences between the "Confucian" countries of the Far East and the rest of the developed world. There is also an opposing literature which ridicules this idea. Some studies contrast family-style enterprise (supposed to be more prevalent in the same Confucian zone, with Latin America thrown in and perhaps Italy and France), and the more impersonal, market-oriented, managerial enterprises of the United States (with Britain perhaps also part of the bargain).

In her studies of the overseas Chinese, Janet Landa has tried to systematize the idea that there are efficiencies to be had in dealing only with kinsmen or members of one's own ethnic group.²⁷ Obviously, the "American" style of business, which is more impersonal, makes more use of lawyers and presumably generates a different style of contractual legal behavior. Can family or clan-based businesses thrive in the shark-filled waters of international trade? There comes a point when you can no longer confine your deals to cousins and people from your hometown. As businesses move into the international arena, family businesses will have to take a deep breath and "Americanize"—they

²⁴ Friedman, *supra* note 11, at 117.

²⁵ John Henry Merryman, *On the Convergence (and Divergence) of the Civil Law and the Common Law*, 17 STAN J INT'L L 357 (1981).

²⁶ See Clayton P. Gillette, *Harmony and Stasis in Trade Usages for International Sales*, 39 VA J INT'L L 707 (1999).

²⁷ Janet Tai Landa, *A Theory of the Ethnically Homogeneous Middleman Group: An Institutional Alternative to Contract Law*, in TRUST, ETHNICITY, AND IDENTITY 101 (Janet Landa ed., 1994).

will also have to hire a batch of lawyers. Here, then, we see the primacy of culture again—a global economic and legal culture.

B. Risks, Misfortunes, and Opportunities

The globalization of risk and misfortune—the internationalization of problems—is also important for the legal order. Ulrich Beck has described what he calls the "risk society."²⁸ His book, which attracted considerable attention, was stimulated by the Chernobyl disaster. A nuclear reactor in what was then the Soviet Union failed; radioactive winds swept over neighboring parts of Europe. Such winds, like global warming, have no respect for borders. Burning forests in Indonesia, acid rain, holes in the ozone layer: these are issues that transcend national interests.

Global problems are often caused by processes that may seem to be totally local. In a sense, the birth rate in Kenya is nobody's business but the Kenyans. But the soaring populations of African countries, in the first place, are in part due to modern medicine and technology—a transnational process which has cut back the rate at which little babies die. And a population explosion in Africa or Brazil does affect the rest of the world; it eats away at global resources and creates instabilities. Those cannot be contained in Africa; they inevitably spill over into other parts of the world. Genocide in Rwanda is also, in a sense, not a problem for, say, the Netherlands. But twentieth century culture, with its emphasis on human rights, makes it difficult for the rest of the world to remain indifferent to wholesale slaughter, even if it confines itself to a single country. Cultural convergence includes not only consumption patterns but also the growing popularity of the notion of a single, overarching code of ethics, a code of human rights.

Again, the ravenous Chinese appetite for turtlemeat or rhinoceros horns may seem of no concern to anybody else but the Chinese. The problem is, these tastes cannot be satisfied within the borders of China, since China has no rhinoceroses and too few turtles. The demand for these products could drive these poor creatures to the brink of extinction. In the world we live in, killing off pandas almost seems more unacceptable than killing off a lot of people inside "sovereign" countries. The culture of modernity includes the sense of global interconnection; and the environmental movement is both powerful and thoroughly modern. It of course transcends borders. The Giant Panda has become an international celebrity—the poster child for endangered species. It is not the only example of animal charisma. Condors, rhinoceroses, mountain gorillas, and leatherback turtles have their fan clubs as well. We live in a world in which some countries feel obliged to tell other countries not to kill

²⁸ ULRICH BECK, *RISIKOGESELLSCHAFT [RISK SOCIETY]* (1986).

whales; in which the United States bans the importation of ivory; and in which people are willing to spend millions to keep big, ugly raptors alive.

In a global age, it is almost impossible too, to keep maggots, beetles, weeds, and invasive pests from spreading all over the world: they come in cargo ships and fly along with passengers on the fastest jets. A plague of tree snakes on one island, mosquitoes in New York, fruit flies in California—the list is long and depressing. There is always the danger, too, that some exotic virus will leap from an animal host to human beings. Once it does so, it might conceivably spread all over of the world. This is, apparently, the history of the AIDS virus. Other viruses, just as deadly, may be lurking almost anywhere. All of this, of course, heightens the sense of interconnection.

Transnational risks are nothing new. Plagues never respected border lines, and the Black Death spread much further and killed vastly more people than the winds of Chernobyl. Still, it seems likely that there are more global risks today than ever. Never before were there risks, such as nuclear war or environmental devastation, which literally threatened to extinguish life on earth. Global risks are an obvious problem for the international order. These risks demand solutions on a scale as universal as possible. No one country can save the whales. No one country, not even a group of countries, can patch up the hole in the ozone layer. No one country can stop the proliferation of nuclear weapons or prevent genocidal wars. Yet the mechanisms for handling all these risks are severely underdeveloped. The international community has to rely on voluntary actions, treaties, conventions, and the like. It is hard to get everybody to sign on to these various instruments, and many countries, for political and economic reasons, will always be tempted to break the rules. Other countries are simply too weak, governmentally speaking, to enforce the treaties they sign. And there is no clear, or at least consistent, way to control, monitor, and discipline sovereign nations. All this suggests a need for hard and enforceable law that covers all nations. The whole world needs clean air and water, and it needs (in a less obvious sense) the rain forests and the steppes and the prairies and the coral reefs. Yet habitats and resources are located, legally speaking, within national borders, and a giant, invisible fence, called “national sovereignty,” keeps foreigners, for the most part, out. More and more people recognize that *laissez faire* here is intolerable. This suggests a need for hard law, and enforceable law: but where would this come from, and how?

There is another kind of risk which developed countries take very seriously. This is the global risk to standards of living. The vast increase in international trade has tied every major nation up in a single ball of string which cannot be untangled. Trade, after all, has consequences. Mostly, these are supposed to be good consequences. Everybody is better off with free trade; that, at any rate, is the gospel of orthodox economics. But “free trade,” like

the free market itself, is not just an absence, a negative, a form of liberty; it is an institution, and it presupposes customs, norms, and structures. And it is a process that ruthlessly hands out rewards and punishments. The invisible hand cares nothing about the standard of living in Belgium or Ghana. A rising tide is supposed to raise all the boats; but some of the boats, alas, are in poor condition and the rising tide sinks them to the bottom of the sea. Uncontrolled trade is, or can be, destructive. It has little or nothing to promise workers in sweatshops all over the third world and it threatens to erode wages and protection for workers in the developed countries as well.

The conventional wisdom is that free trade and free markets are essential props of democracy and good government because they produce stability as well as wealth. But Amy Chua has argued that “free trade” under some conditions may actually undermine stability and democracy. This occurs when an ethnic minority, for example the whites in South Africa and the overseas Chinese in Indonesia, are economically dominant. The minority gets to enjoy most of the benefits that global business brings to the country. Under such circumstances “development” can actually be destabilizing; it leads to “ethnonationalism” and conflict. Chua mentions Sri Lanka, Malaysia, and the former Soviet Republics as examples.²⁹ There are no doubt counterexamples.

Development can threaten stability even without an ethnic minority. Development can increase the social and financial distance between rich and poor. An economist can argue—and perhaps correctly—that in the long run most people will benefit. But how far off is the long run? Poor people, and all people in fact, live in the short run—bread has to be put on the table today, not tomorrow. Developed countries, their banks, and the big world organizations seem far more concerned with getting rid of barriers to trade than in coping with the problems free trade may unleash. The erosion of borders may be as big a threat to social justice and social peace as the HIV virus.

Globalization is more than a matter of trade. It is also the movement of people. Thousands of men and woman are migrating, legally or otherwise, from one country to another. This migration gives rich countries an ethnic and racial diversity which they may not particularly want. Some of these countries, Norway for example, were once fairly monotone demographically speaking; but no longer. When thousands and thousands bang on the doors of rich countries, pressure builds up to tighten laws of immigration and citizenship. Immigration, asylum, and citizenship rights were not high on the agenda of Germany and France in the nineteenth century; now they most definitely are.

²⁹ Amy L. Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 YALE L.J. 1 (1998).

Well into the twentieth century, most European countries were exporters of bodies, not importers; Swedes and Poles and Greeks and Italians left for the United States or Canada or Chile or Australia. The United States, like Argentina, Australia, and the other "immigration" countries, were at one time eager to recruit new citizens; they even advertised for souls in foreign countries. But they always did this on the assumption that the right sort of people would come. Nobody expected thousands of Chinese peasants or impoverished Tongans or Hindus to knock on the door.³⁰ In the twentieth century, however, the cultural barriers to immigration have broken down. As I have argued, globalization is above all a cultural process. Television and the movies have spread the word to remote places; traditional societies are undergoing rapid change; in some countries, runaway growth in population puts strains on resources; land in the villages can no longer feed all the hungry mouths. There is a tremendous pool of surplus labor. As many as 80,000,000 "expatriate laborers" are working all over the world;³¹ and tens of millions more would gladly join their ranks. Moreover, once there are colonies of fellow-countrymen in London or Rome or Sydney or New York—people who speak your language, serve your food, and practice your religion—it becomes easier and less alienating to leave your village or your country and move to the foreign city. The rich countries build fences around themselves, literally and legally, to protect themselves from a world in which cultural barriers against immigration have largely if not entirely broken down.

There is, however, an element of hypocrisy in this newly invigorated fence-building. Many of these societies have come to depend on legal or illegal migrants to do the dirty work, washing dishes and toilets, picking lettuce and scrubbing floors. There is, in other words, a deliberate hole in the fence. The real policy, as opposed to the official policy, is to keep the hole the right size. For the better sort of jobs, however, labor is in surplus in many of the wealthy countries. Factories are shutting down. They move to countries where labor works for pennies. High unemployment puts a strain on the welfare state, domestically; and internationally, increases the worry about erosion of labor standards. There are attempts to block the sale of goods made under conditions that would violate the law of rich countries. But the dogma of "free trade" sometimes stands in the way. Do the developed countries really need to buy sweaters and blouses made in sweatshops, or rugs woven by eight-year olds?

The price of Western goods no doubt has to take into account costs of environmental controls and worker safety, not to mention the fact that the work-

³⁰ In the United States, Protestant immigrants from Northern Europe were the most welcome, and the influx from Southern and Eastern Europe—Catholic, Jewish, and Orthodox—led eventually to the passage of a restrictive immigration law in 1924.

³¹ MCMICHAEL, *supra* note 8, at 187.

ers are used to a middle-class life. Third-world countries pay (on the whole) little attention to safety and the environment; and the multinational corporations often seem to be beyond anybody's control. Shell Oil can pollute the Niger delta in Nigeria—and does—without much fear that the Nigerian government, or any government, will do something about it. The imperial countries are, in some ways, prisoners of multinational corporations just as much as the imperialized countries at the bottom of the heap.

The arguments for free trade are politically and economically powerful—almost beyond challenge. And "free trade" includes the free flow of capital. In fact, the argument seems to work politically for all of the factors of production except one: labor. Within the United States, or within the European Community, to be sure, people are free to move from place to place looking for jobs. But nobody dares extend the logic of free trade to immigration, although some purists insist that the world as a whole would be much better off if there were no barriers at all to migration. The rich countries, naturally, are totally convinced they would be much worse off if they opened their doors, and let everybody in. There is absolutely no chance any country would adopt such a policy. Hence they all draw a sharp line between the movement of labor, and the movement of goods, money, capital of all sorts, and cultural commodities.

III CONCLUSION

In sum, in the age of globalization, borders mean less and less, both culturally and economically. On the other hand, precisely because of their cultural and economic weakness, national borders in another sense matter more and more. After all, there was a time when people tended to stay where they were; a Spaniard or a Romanian, let alone a Sri Lankan, was born and died at home or near home; moving to Italy was unthinkable. This kind of demographic fixity is now a shambles. Control over borders prevents a politically intolerable movement of people—movement from places where they do not want to be, to places that seem more attractive, places that glitter with wealth and with jobs. The problem is not only economic; it seems to be cultural. Germans worry about the future of a Germany filled with "foreigners." France worries about the future of French culture in a multicultural world, a world that speaks English. The irony is that what threatens these cultures is, in fact, cultural convergence. It is the breakdown of barriers—especially cultural barriers. The same process that brings the croissant to Tokyo and the hamburger to Jakarta makes it easier to turn every country into a "melting pot."

It is not only the hamburger, pizza, and rock and roll that have internationalized; so too have concepts like the rule of law or basic human rights. In a way, a regime of human rights, enforceable against the state, is a kind of privatization. Just as the state sells off railroads, telephone companies, and nationalized industries, it is also privatizing some of its monopoly of violence and power. Constitutionalism and judicial review transfer some state power to the citizen. Of course, each country makes its own legal system, devises its own constitution, provides on its own for courts, the rule of law, and a bill of rights. But the global culture of rights, the recognition that some rights are inherent and universal—a characteristic of our period—has spread around the world with the same force and speed as modernity itself. To be sure, these rights are resisted by dozens of wicked and dictatorial regimes, by the world's kleptocracies, and by the strongholds of backlash and backwardness. Still, in the late twentieth century, more and more countries joined the club of democracy. Franco died, Hitler was defeated, the Greek colonels were overthrown. The Soviet Union let go of Poland, Hungary, and the rest of its satellites; then the Union itself dissolved. Pressure from below brought democracy to Korea and Taiwan. There is every hope that the regime of rights will win more converts.

The metaphor of the "global village" had its vogue. But the global order is nothing at all like a village. Villages were small, self-contained, and provincial. The world of pizza and the Internet is no village; it is not even a city, or a state, or anything easily described in conventional terms. It is *crewhon*—nowhere; and it is everywhere. Its future is obscure. Its legal future is equally obscure.