

Legal globalization: an expanding picture

While the picture might be expanding, is a uniformity of legal practices spreading, thereby contracting the diversity of law worldwide? Building on the last issue of *The Barrister*, we continue our investigation into legal globalization and consider in particular the effect different jurisdictions are having on each other.

By **Alistair King** of Justis Publishing

Leaving a slight, almost imperceptible but presumably deliberate comic pause in the phrase “dreadlocks and their... liking of cannabis,” Lord Bingham described just two of the many aspects of multiculturalism and multi-nationalism that have challenged but often enriched British law and its evolution over the decades and centuries.

In this case it was Rastafarianism but, as he went on to illustrate in his keynote address at November’s Bar Conference, there are numerous examples from our long and sometimes inglorious history, from 1290’s edict to Jews that they should “change or go home” to twentieth-century debates on whether Sikh men should be exempt from crash helmet laws and workplace uniform regulations.

Like the English language itself, English law has evolved and – to an increasing extent, the meaning of which I hope will become clear – devolved. Diverging away from other nations’ legal systems in the Middle Ages, it then put itself about in the Eighteenth and Nineteenth Centuries as its British masters set upon their attempt to colonize the planet. Other European colonial powers were no different.

So has their influence effectively brought about a new convergence of laws and legal practices? And what’s the state of play in a Twenty-first Century dominated by the threats and opportunities presented by emerging economies?

Bordering on agreement?

In the last issue of this journal we looked at the globalization of the law from a practice area point of view. Establishing the germs of a consensus in the academic and professional community, we showed how different areas of commercial law, and even family and criminal law, were influencing practitioners’ work across the globe. Though we won’t depart from further consideration of those different areas of work, in this issue we will also expand on the jurisdictional dimension of the story.

We investigate, among other things, how global trade might have made it inevitable

that laws come together; how the internet has influenced the process; if some legal systems are insurmountably incompatible; and we continue to consider how the phenomenon is affecting people’s work, their research and the type of material they need to access.

An LPC graduate with experience in practice, Rory Campbell has worked in Justis Publishing’s editorial department since 2001. Now its manager, he oversees the detailed and discerning process of putting raw law reports and legislation through the electronic mill. Ensuring that they are intuitively searchable, cross-referenced, indexed and compatible with expected legal terminology, his early days were focused on the law reports of the constituent parts of the UK.

Despite significant jurisdictional expansion at the company, both in its provision of full-text case reports and in its development of the provider-neutral JustCite citator, UK cases remain an important part of Campbell’s job. What’s changed, he says, is that in the past four or five years he’s seen a “dramatic and tangible increase” in the number of foreign cases that are being cited in our courts. The internet, he tentatively suggests, might even be the cause of this increase, not just the solution to accessing this material.

When in Rome

The World Wide Web, it has to be said, had less impact on the propagation of Roman law at the time. But in recognition of its historical significance, we should have a quick look at this ancient jurisdiction.

A specialist in comparative legal history and Roman law, Andrew Lewis is a professor at University College London. Though his institution subscribes to them, Justis and JustCite – which go back to 1163 – sadly cannot boast case law from the First Century AD, the era we discuss. But, perhaps surprisingly, with statutes being “few and far between,” some of the methods by which the remarkably sophisticated Roman legal system operated bore some resemblance to our own. Though case law precedent was not authoritative, jurist advice – like common law decisions – was used to build up the law.

Lewis highlights the variety of officials that

would have presided in court. Each with a different level of authority and powers of enforcement, the areas of law they dealt with and the representatives they gave audience to are analogous to today – an example Lewis cites is that of a merchant supplying corn from Africa to Rome and the associated legal wrangling. Containing the fullest statement of the law, “the codification of Justinian in the Sixth Century preserved the writings of earlier jurists,” says Lewis, while reports survive from provinces such as Egypt. But, inevitably, much of it has been lost.

So what have the Romans ever done for us? “On the continent the whole structure and language of private law is deeply permeated with Roman ideas,” says Lewis. “Though it’s been less influenced than other European systems, Roman law has influenced English law too, particularly the law of contract,” he adds.

How does the British Empire compare in its lasting effect on the world?

Never the twain shall meet?

Isam Salah is an American lawyer. A partner at multinational law firm King & Spalding, he operates jointly in the company’s New York and Dubai offices and is head of its Islamic Finance practice. Many of his transactions involve enabling his Middle Eastern clients to adhere to their Sharia principles, while operating in an essentially Western legal setup. Local laws operate in countries such as the UAE, Saudi Arabia and Kuwait, Salah says, but these have been influenced over the years by the likes of Ancient Egypt, Napoleon and, of course, the British. And it’s the British – or rather English – system that Salah says has become the “law of choice,” at least in the commercial world where parties can effectively choose which jurisdiction’s contract laws to use.

But what of the legal compatibility of Sharia and Western law? Well, they’re not quite as mutually exclusive as some tabloid leader writers would have us believe. Putting aside criminal law, where one must consider not just how crimes are treated but what’s actually classed as a crime in the first place, commercial law can be adapted quite easily. A basic tenet of Sharia is that one can neither

pay nor receive interest. This would appear to preclude strict Muslims from obtaining mortgages. And this is the case. However, contracts that are effectively the same as mortgages can be drawn up. Though “substantively different,” Salah explains that they are economically equivalent, even though some of the burden of risk is assumed by the “lender”, who buys a commercial property, for example, and then leases it to the buyer for a period until they’ve paid back an appropriate amount to acquire full ownership.

Without doubt big differences still stand but the trend – if slow – is one of moving towards a gradual compromise.

The application of international court decisions

Salah’s company now subscribes to the *International Law Reports Online*, which Justis Publishing launched in November. The only publication in the world wholly devoted to the regular and systematic reporting in English of decisions of the international courts, these fully searchable reports stretch back to 1919.

Covering all significant cases of public international law and dealing with such topics as treaties, war, terrorism and refugees, they are crucial for litigators practising in the international courts.

However, rulings from these courts are also creeping into numerous countries’ national courts as persuasive precedent – a point not lost on Mark Muller QC. A senior barrister at JustCite-subscribing Garden Court Chambers in London, Muller was on the five-year-long “Access to Justice in Afghanistan Project”. For his unpaid work on this he, and the rest of the four-person team, won the recent Bar Pro Bono Awards, presented by our man Bingham following his aforementioned speech.

Muller explains that under the UK’s Terrorism Act (2000), it’s very easy to ascribe charges of terrorism to the activities of any number of pressure groups around the world. Preparation for such cases, he says, requires much consideration of comparative and international law. Muller allows that tensions can arise as British courts are often loath to accept international law. However, the “arguments are being raised, even if they’re not [necessarily] accepted.”

Time will tell how many decisions are followed at a national level. Given the global political and economic upheavals we’re going through, my hunch is that it will be a significant proportion. Proof, perhaps, will be offered by JustCite, which from later this year will index and cross-reference the *International Law Reports* against national cases and journal articles from an expanding

range of jurisdictions, currently including England, Scotland, Ireland, Australia, Canada and Singapore.

Of course in the international courts themselves there’s no debate on their admissibility.

Professor David J. Bederman lectures in public international law at Emory University Law School in Atlanta. “I mix teaching with advising in private,” he says, and he is “often called upon for the Appellate Bar and US Supreme Court.” It was while litigating at the latter on the issue of foreign sovereignty immunity that he successfully cited a case from the *International Law Reports*.

But here’s the rub: this was before their digitization, so Bederman had to rely on the hard copies. “I didn’t begrudge going through them book by book, index by index, because we won the case,” he says, “but I’ll sure be glad in the future that you can do intelligent Boolean searches and get the same results.” Now, of course, he can.

So why should a law firm subscribe? “Because they could save an associate 27 hours in a case where it matters” is Bederman’s analysis, based on his estimate that the “25 to 30 hours I spent going through volume after volume” would be reduced by an “order of magnitude”.

Continental divide: closing the gap

Legal research isn’t all about time-saving but it certainly helps, particularly if your area of law is influenced by recent European legislation and there’s precious little domestic precedent on which to support your arguments in court. In many branches of commercial law, particularly intellectual property and competition law, this is all too often the case – and English courts are beginning to recognize this, with many of them allowing precedent from other European national courts.

Such a problem arose for Jane Wessel, a litigating solicitor at London law firm Crowell & Moring. Last year she represented a company who claimed to have been overcharged by a carbon brush manufacturer that was found to have been part of a European price-fixing cartel.

Seeking damages for her client through the English courts, Wessel didn’t at the time have access to Caselex, a new service distributed by Justis Publishing that solves the problem of easy access to other member states’ national court decisions by providing a searchable database of case summaries in English.

Wessel eventually found the European cases she needed to fight her corner but Caselex, to which she has since subscribed, could have made things much simpler.

“Previously I used the European Commission website to search for cases,” she says, “but you can’t enter a search and scan through to see whether you need to refine it for future searches.”

However, she adds, with Caselex “... competition law, appeals, cases on jurisdiction under the Brussels regulation... it’s all so easy to find, so you’re confident that you’ve completed your search.”

Orient hearing

So what of the future? One of the big questions is China. In the aftermath of the Cultural Revolution, the country had effectively no legal system. Britain’s China Law Council was set up by the Bar Council and Law Society in the late 1980s to provide practical training in the UK for a fledgling base of Chinese lawyers. Still continuing that drive, the council also provides a network for practitioners to exchange ideas and pursue opportunities in both countries.

Adrian Hughes QC of 39 Essex Street Chambers is the Bar’s joint Chairman of the council. “The industrial powerhouse may have a newly developing legal system but it has a 1,500-year tradition of mediation compared to our more recent adoption over the last 20 years,” says Hughes, so it’s a two-way educative process. “In the past five or 10 years, our mutual collaboration has been viewed by practitioners as increasingly relevant to both sides,” he adds.

Though its legal system is codified, the Chinese government has a strong commitment to law reporting. And the decisions of its courts are becoming of increasing interest to Western courts. A new database, iSinoLaw, has sprung up to cater for this and the concept is met with enthusiasm by Hughes. But, as we won’t do justice to the service – or to Chinese law itself – in the penultimate paragraph of this short article, we’ll have to save expansion on this for another day.

And for the closing paragraph itself? Well, the argument must remain moot. A New World Order of Law remains a distant dream (or nightmare); but frequent use of other jurisdictions’ arguments and systems could soon be the norm.

• Before joining Justis Publishing, Alistair King was a journalist for *Building* magazine. This followed time with academic publishers Routledge and Pickering & Chatto. Along with *The Barrister*, he has written for the *Student Law Review*, *Your Witness* and the *Australian Law Librarian*, and he has collaborated with the *Irish Times*. Articles from these – and more – can be read at www.justis.com and www.justcite.com.