Contents

Tables

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Foreword

Courage and Challenge in Law Reform

Rarely is a technical book about law a symbol of courage and a manifesto of challenge. This outstanding book edited by Professor Dr Asif H. Qureshi conjoins both qualities. It tackles head-on one of the most difficult legal problems of our time: how to reform international law, and therefore domestic law, from a holistic perspective, using tools from a variety of disciplines, including but not restricted to law, and focused on justice, now and in the future. It thus provides a detailed guidebook for reforming the architecture of Law Reform processes. Not only is envisaging such a task an act of scholarly courage; such an agenda faces a myriad of challenges. Informed by a critical analysis of current international Law Reform institutions, the book aims to take account of a wide range of stakeholders, governmental, and non-governmental, international, regional, and local; integrate a diversity of legal systems, perspectives, and practices of international law; and deploy a broad panoply of institutions and norms, ranging from our familiar legally binding norms to many forms of soft law and hybrid normative forms.

Only an international conference would suffice to provide a springboard for such reflections. The book is based on a highly successful Workshop organised in November 2022 at Peking University School of Transnational Law (PKUSTL), at Peking University Shenzhen Graduate School, Shenzhen, China. The wide range of participants is introduced in the editor's Preface to this book and revisited in the Conclusion, which clearly indicates the diversity of perspectives shared and discussed at the Workshop. The numerous topics, approaches, and conclusions of the authors will be appreciated by all readers of the book, whether they share the many conclusions of this stimulating scholarly and practical legal debate.

In this brief foreword, I would like to share reflections based mainly on the panel on 'Law Reform: Regional and Multilateral Economic Organisations,' which included excellent papers on 'Reform Mechanisms of WIPO and WTO, TRIPS: In Pursuit of Mitigating the Legal Lag;' 'Role of IMF in Reforming Law;' 'The Approach of Multilateral Development Banks to Fostering Law Reform;' and 'A Critical Evaluation of the African Union Commission on

International Law.' The panel touched on many themes of the Workshop. These themes are summarised clearly in the editor's conclusion as key points to be given, to quote Professor Qureshi, 'discursive and operational space' in 'Law Reform that has a specific technical meaning not to be confused with reform and change in law generally.' The remainder of this foreword emphasises two elements dealt with in these and many other papers, expressly or implicitly: first, normative hybridity, and second, regional integration.

Usually, lawyers focus on legally binding measures, less perhaps in international law than in national law, where legislation, administrative regulations, and judicial decisions reign supreme. In recent decades, however, reflections on globalisation and its aftermath, whether envisaged as 'de-globalisation' or 're-globalisation,' point to the increasing importance of new institutions and new types of norms.[1] Among the former are private organisations, development banks, international standardisation organisations, and regional organisations. In the field of food safety, for example, one can also add the numerous supermarket organisations and international non-governmental bodies such as the International Federation of Organic Agricultural Movements (IFOAM). They produce standards that today are recognised as ubiquitous: just check your local outdoor market, village shop or supermarket. To mention only those concerning food safety and food quality, this group embraces the non-legally binding standards created by Codex Alimentarius, a creation of the United Nations Food and Agriculture Organization and the World Health Organization; Global Gap resulting from a range of initially UK supermarket organisations; and international organic food standards based directly or indirectly on IFOAM standards. Most standards are not legally binding, the main exception being food safety standards in China.

Many chapters in this book acknowledge the importance of soft law, for example in International Monetary Fund (IMF) practice. They do not take the further step, however, of recognising the conjunction that is inherently part of any set of norms and their application and implementation: hard law, soft law, executive practice, or contractualisation. This is normative hybridity. 'Soft law bamboo, hard law oak, the executive management thicket, and the roots of big data are intertwined in so many distinct or semi-overlapping social fields that hybridity is the rule and non-hybridity the exception.'[2]

Papers in various panels touch on regional integration; one paper posed expressly the question of whether the African Union Commission on International Law could serve as a model for other regions. The missing element in many panel discussions is the role of regional integration organisations, based on regional trade agreements (RTA) or free trade agreements (FTAs), in initiating, sponsoring, or implementing Law Reform. There are numerous RTAs and FTAs throughout the world. Those that come to mind most easily are United States-Mexico-Canada (USMCA), European Union (EU), Southern Common Market (Mercosur or Mercosul), Eurasian Economic Union (EAEU), African Continental Free Trade Area (AfCFTA) embracing numerous regional economic communities (RECs), Regional Comprehensive Economic Partnership (RCEP), and Association of Southeast Asian Nations (ASEAN).

From reflection on the potential role of regional integration in Law Reform, one might consider excluding free trade agreements, at least initially, because they are narrower in scope and less concerned with institution-building. However, it should be noted that many FTAs are effectively engaging in Law Reform and in Law Reform in practice. Even an RTA such as the EU, however, has not been successful at Law Reform or Law Reform on sensitive topics, such as immigration or, until recently, climate change. Mercosur may appear superficially to have similar institutions, and the same is true of EACU. But all are led by one or two powerful states, which remain, together with multinational corporations (MNCs), the most powerful actors in the world today. The task remains to study and understand whether and how RTAs and some FTAs fit into the landscape of Law Reform. In this respect, the EU is no longer a viable model, if it ever was, and it may be suggested that the ASEAN way should be examined more closely in searching models on a regional scale.

This courageous book provides many stimulating ideas about the challenges of Law Reform and deserves to be widely read.

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1 To my knowledge, first outlined in Francis Snyder, 'Economic Globalisation and the Law in the 21st Century', in *The Blackwell Companion to Law and Society* (ed. Austin Sarat) (Blackwell Publishing and Oxford, 2004), 624–640.

2 Francis Snyder, 'Bamboo, or Governance Through Soft Law: Hybridity, Legitimacy, and Sustainability,' in *Research Handbook on Soft Law* (edited by Mariolina Eliantonioa, Emilia Korkeaaho and Ulrika Mörth, Edward Elgar Publishing Ltd., Cheltenham UK, in press for November 2023).

Preface

Law Reform focuses on the relevance of normative legacy whilst borrowing from the future for its engagement in reform. As such Law Reform is about normative renovation necessitated by contemporary changes and development. It is a process in response to the inadequacy of law that is not alive to its inherent faults and contemporary setting. This expectation of an evolutionary lens in the apparatus of law is informed by experience in its operation rather than in political discourse in legislative assemblies as such. Thus, Law Reform is not about revolution, it is about its evolution. This niche legal space has hitherto been neglected, yet it is a critical area of legal engagement that in principle should galvanise the attention of anyone seriously concerned with the development of law and its evolution in this global interconnected time of ours. Moreover, as it concerns the human endeavour for a better society it should not have any disciplinary boundaries. In terms of where this space is to be found in the spectrum of legal sub-sets of law – its institutional aspects are set in a constitutional approach to law whereas its substantive tentacles are to be informed by the exigencies of the subject matter of reform considered in a holistic manner.

My own motivation in this field stems from an interest in international law and International Economic Law – both essential drivers in the development not only of international but also domestic law. Yet this interest could be sparked from almost any discipline of law. My interest has been informed by the manner of the reception of suggestions made for reform in the very apparatus of Law Reform in international law as embodied in the work of the UN International Law Commission (ILC) and the fraternity that has been its pillars. This fraternity has tended to insulate itself from constructive critical analysis from civic society; sealing itself from domestic Law Reform efforts; resisting perfectly reasonable application of good governance principles, such as transparency in the very governance composition and its mandate, based on selective elitist arguments grounded in State sovereignty.

The holistic approach to Law Reform herein taken – focusing as it does about Law Reform from a domestic comparative international indeed interdisciplinary perspective – is intended to bring to bear the full breadth of issues and arguments that are common and relevant to any discourse on reforming the very architecture of Law Reform processes be they at the domestic, regional, and international levels. This holistic focus is articulated in Chapter 1 (Asif H. Qureshi) and organised in the totality of the work. It is followed in Part 1 by an empirical and theoretical focus. Thus, Chapter 2 (Zhuangxu Li, Manyun Li, & Minghao Hu) comprises of an important empirical study that maps the universe of Law Reform processes across the global legal systems from the standpoint of a criteria which includes such considerations as composition and mandate of Law Reform institutions. Moreover, another aspect of this comprehensive approach has been in the provision of the contrast between common and civil law traditions with respect to Law Reform. This theme is particularly highlighted in Chapter 3 (Kyung Sin Park). The holistic theme of reform is further discussed from a theoretical perspective in Chapter 4 (Cecilia J. Flores Elizondo and Sufyan Droubi) wherein the 'symbolic and social boundaries' including disciplinary boundaries for Law Reform, are unblocked for an unconstrained input in the business of Law Reform, albeit in the context of international law. This approach is further echoed in Chapter 16 (Anthony Carty) calling for interdisciplinarity in the work of the ILC. Parts 2 and 3 respectively focus on the way Law Reform is addressed in Civil and Common Law systems. The civil systems chosen by way of examples are certain Latin American countries reflecting the inherited Continental Spanish and Portuguese approaches (Chapter 5: Daniel Freire e Almeida & Dan Wei), along with China (Chapter 6: Hui Huang) and Russia (Chapter 7: Dmitry Poldnikov). Here both the vernacular of Law Reform is not in vogue; nor are there established permanent Law Reform institutions. Amongst the Common Law countries, the UK, of course, had to feature given its historical lead in the institutionalisation of Law Reform Commissions; and the account given of it is from a former member of the Northern Ireland Law Commission (Chapter 10: Venkat Iyer). This is accompanied by the experiences of former British colonies such as India (Chapter 9: Sai Ramani Garimella & Gautam Mohanty), and Nigeria, including other countries in Africa (Chapter 8: Oti Anukpe Ovrawah). Part 4 comprises of six chapters that focus on Law Reform in international law and the ILC generally. Chapter 11 (Paul B. Stephan) is an account of the US Law Reform in international law that centres on the work of the US non-governmental organisation the American Law Institute. Chapter 12 (Zhipeng He & Xiaoxu Wei) provides a Marxist perspective to international law – advancing the idea of reform that promotes an 'international law-based international order.' Whereas this is an account of a Chinese perspective, articulated by Chinese scholars, for the direction of reform in international law – of note here is that some domestic Law Commissions also have specific substantive reform directions set out in the mandate of their constitutions, for example, the Indian Commission is directed inter-alia to pursue reform 'to examine the Laws which affect the poor.' Chapters 13 (Pavel Šturma) and 14 (Aniruddha Rajput) are authored by serving/former members of the ILC. Both contributions critique the emerging *modus operandi* of the ILC in the manner of selecting topics and methodology employed to embody

the codification outcomes. Chapter 15 (Nany Hur) focuses on the important topic of the manner of the selection of ILC members – particularly the record of the gender composition of the ILC. Part 5 focuses on regional and multilateral economic organisations that engage in Law Reform. One important regional organisation of specific note in terms of reform in international law is the African Union Commission on International Law. This is dealt with in Chapter 20 (Mohammed El-Said). There is in this part focus also on multilateral economic institutions. This is not however to imply that Law Reform is not or could not be the subject of deliberation in non-economic multilateral organisations. However, economic organisations such as development banks and the IMF play important roles in Law Reform given their weight in financial terms – albeit in terms of their mandate – as set out in Chapters 17 (Gerard J. Sanders: Multilateral Development Banks) and 18 (Nadia Rendak). Finally, the rapid pace of advancement in technology is posing challenges domestically and internationally to the manner and speed at which Law Reform needs to accommodate these changes through codification and/or progressive development. In this respect the speed at which the World Intellectual Property Organisation (WIPO) and the World Trade Organisation (WTO) can respond to and translate technological changes to normative adaptations and innovations with reference to Intellectual Property Rights becomes important. This is considered in Chapter 19 (Danny Friedman). Finally, in Part 6 there is a focus on international Law Reform in terms of specific substantive disciplines. The disciplines focused on are International Economic and Environmental Law. Other disciplines could have been chosen equally. Thus, Chapters 21 (Asif H. Qureshi), 22 (Ji Ma), and 23 (Leïla Choukroune) deliberate on the question of whether, and if so, what kind of reform should take place in the sphere of International Economic Law. Hitherto the ILC has not taken an active role in the field. In the sphere of environmental law, however, the ILC has deliberated and this work of the ILC is the subject of analysis in Chapter 14 (Abhishek Trivedi & Stellina Jolly) wherein the authors are critical of the methodology adopted by the ILC in its research. In sum, the respective contributions raise an amalgam of issues that are relevant in all manner of Law Reform processes whether of an institutional or substantive character, and which are germane to a discourse on Law Reform at all levels whether domestic, regional, or international.

This work was first launched at a Workshop organised at the School of Transnational Law, Peking University, Shenzhen, China in November 2022. I am grateful to those who contributed to making that workshop a success. The Workshop involved the contributed papers which form the basis of the chapters herein being discussed by designated Chairpersons/discussants. Considerations of word limit meant that the observations of the discussants could not be separately incorporated in this work. Nevertheless, their input including those of the Chairpersons of the various panels is warmly acknowledged viz., Dr Aniruddah Rajput of Withers LLP, UK; Professor Clair Gammage of the University of Exeter, UK; Claudia Yi Lu of Peking University School of Transnational Law (STL), China; Professor Francis Snyder, STL; Professor Dayuan Han from Renmin University of China, China; Professor Kyung Sin Park of Korea University, South Korea; Professor Munir Maniruzzaman of Portsmouth University, UK; Onur Sabri Durak of Shanghai Jiaotong University Center for Polar & Deep Ocean Development, China; and Professor Jingxia Shi of Renmin University of China. My gratitude is also expressed to those who presented a paper at the workshop but for several reasons could not proffer a final written paper viz., Professors Nohyoung Park & Dr Han Kyun Kim (Korea); Dr Muhammad Raheem Awan (Pakistan); Dr Rajesh Sharma (Australia); Professor Yifeng Chen (China); and Professor Lin Zhang & Xin Zhang (China).

This work would not have been possible without the excellent contribution of Zhuangxu Li, Manyun Li, and Minghao Hu from Peking University School of Transnational Law, China. They helped in the organisation of the Workshop, the coordination of all the papers; in the writing of Chapter Two which speaks for itself; and finally, in assisting in the editing of the various chapters. In particular, I am grateful for the hard work and dedication of Manyun Li (Renee) whose attention to detail laced with diplomacy took us through the long and on occasion difficult journey of fulfilling our obligations to Routledge. We are grateful to Routledge and their reviewers for their support and assistance in this publication.

Finally, this work is dedicated to all those who aspire to reform the law! In legal scholarship, this must be a necessary driver.

Asif H. Qureshi
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