

Critical Theory and Practice in International Economic Law and the New Global Governance

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Abstract This paper discusses the relationship between academic research and engagement with policy and political practices, seen through the author's recollections of his personal experiences extending over half a century working in the field of international economic law. While stressing the importance of an interaction of theory and practice, it also emphasises the need to maintain academic independence and a research perspective, based on reflexive methodology (situating the various actors and their positions in the field) and immanent critique (close analysis of the self-understandings of practitioners in a field and detailed examination of their practices, contrasting the two). It traces the changing character of the relationship between research and political practice, and the increased need for engagement especially by critical scholars of international economic law with critical political practice. This need stems from the characteristics of global governance in the current era, dominated by corporatist public-private structures controlled by small elites, and confronting complex problems that place an increased importance on specialist expertise. This is often depoliticised as technocratic, creating a wide gap between such expert knowledge and the rhetoric of political debate.

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1 The World and the Academy

It is not surprising that international economic law, and particularly the regulation of transnational corporations (TNCs), should have been such an important focus of both politics and policy-making. The world's political economy for the past century has been marked by the interacting and international processes that have transformed both national economies increasingly dominated by large TNCs, and states gradually torn apart by the contending forces of nationalism and globalisation. The study of these processes has fascinated me since my postgraduate student days. Yet I found that, while they were clearly central, their understanding posed challenges to orthodox disciplinary perspectives, as well as to the formulation of political and policy responses.

In the traditional law curriculum both international law and economic law were ill-adapted to understanding this reality, since each was separated into public and private law spheres. The international economy was considered a realm of private markets, so was dealt with only in terms of international commercial law, which largely ignored both state economic regulation and the dominant role of large corporations.¹ Other disciplines were equally unsuited, as politics, economics and even sociology focused on the national state, so that 'international relations' were those of governments, and international economics dealt with flows of goods and money. Indeed, formal economics still treats TNCs in terms of 'foreign direct investment', and the study of TNCs moved to business schools, treating them predominantly from an organizational and managerial perspective. However, more independent and eclectic analyses of TNCs also emerged, from Edith Penrose to John Dunning and Grazia Ietto-Gillies, as well as some excellent work by economic sociologists.²

Hence, I saw that an adequate understanding of important realities required a challenge to orthodox viewpoints, in other words a critical perspective. Furthermore, such a perspective could not emerge solely from academic analysis, which seemed stuck in old orthodoxies, but from some practical engagement with the real world. Interestingly, this seemed easiest in the legal field, perhaps because the interactions of economic and political activities are centrally mediated by law. Indeed, the field of 'transnational law' was delineated as early as 1956 by a lawyer-

¹ The leading text in the UK for many years through successive editions was Schmitthoff's *The Export Trade*; in the US I took a course at Chicago Law School on *International Business Transactions* with Soia Mentschikoff, who had worked on the Uniform Commercial Code with Llewellyn, and took what was later described as a 'regulatory contracts' approach, Collins (1999); and another with Kenneth Dam, Chicago's equivalent of Philip Jessup, who later served in several US administrations before returning to teach.

² Notably the excellent monograph by Kristensen and Zeitlin (2005).

diplomat, Philip C. Jessup.³ This concept quickly invaded US law schools, resulting in a proliferation of law reviews and courses in this field which helped to provide a grounding for the generations of lawyers who spread around the world, facilitating the expansion of TNCs as well as building the regulatory infrastructures of what later became known as global governance. Indeed, the initially unorthodox concepts such as transnationalism no doubt help to mould the emergence of these new forms of business and government in the past half-century.

Thus, practical engagement did not necessarily lead to a critical perspective in policy or political terms, on the contrary it tended mainly to serve politically and economically dominant, or emergent, interests. Perhaps for that reason, many in academia have been reticent or hostile towards such engagement, considering it as contaminating. This may also lead to suspicion of concepts or discourses emerging from the world of practice. Consequently, some academics prefer to stick to orthodoxies, while others develop more radical alternative frameworks aimed at escaping the grip of power, sometimes protecting themselves from it behind abstruse academic jargon. Probably the dominant tendency is to adopt a perspective of technical expertise, separating policy from politics, aiming at a “policy audience” essentially consisting of those with power, which in turn blunts the critical edge of the research agenda.⁴

It is certainly important, even essential in my view, for academic inquiry to be independent and to some extent insulated from social conflicts and power struggles. This should enable a longer-term analysis, abstracting from day-to-day professional practice or the hurly burly of politics, aiming to understand and depict the contours and ecology of the forest as a whole, and not content with knowing only the particularities of specific trees. Indeed, I have often been surprised and intrigued to find, when interviewing or simply talking with a practitioner or policy-maker, that in some ways I had a better grasp of the general policy issues in their field, although they were obviously much more immersed in and skilled at its practical detail. This detachment also means that the academic can appreciate the positions of the various participants in the debates or conflicts in a field, and can discern that each person sees and understands that field in terms which are valid from their own perspective. That appreciation in turn tends to strengthen the preference for detachment. Is it possible to retain that important detachment if one takes a position in the field?

For me it seems that some engagement is inevitable, because even academic detachment itself involves taking a position. The analyses put forward by academics of an issue or a field themselves contribute to shaping those phenomena. Certainly, a purely sociological study can avoid becoming embroiled in the

³ Jessup was in the secretariat of the United Nations Relief and Rehabilitation Administration (UNRRA) conference in 1943, at Bretton Woods in 1944, and a technical advisor to the American delegation to the San Francisco United Nations charter conference in 1945; but his nomination by Truman as US delegate to the UN was blocked in the Senate following accusations by Senator McCarthy of ‘unusual affinity for Communist causes’.

⁴ Sarat and Silbey (1988).

substance of the processes, and some detachment can be created by reframing the issues using a ‘reflexive’ research methodology, based on analysing the positions and interests of the various actors in the field. Such an approach has been ably applied by sociologists of law inspired by Pierre Bourdieu, notably Yves Dezalay and his various collaborators and followers.⁵ I have found this work very insightful, and helpful in facilitating a more dispassionate analysis, discounting preconceptions and emphasising investigation of practices and structures. Viewing the processes of construction of transnational fields, or networks of global governance, as strategies of competition between different professionals deliberately avoids taking any position about what is at stake. However, formulating such analyses in terms which claim detachment or objectivity is exactly what gives the opinions of academics power, which can be appropriated by other participants or by their own participation in a field.⁶ Indeed, it may be preferable for academics to make their policy preferences explicit, rather than claim a spurious objectivity. Further, it seemed to me that analysing these processes from a pure sociological perspective was somehow missing their substance.

Involvement also has become increasingly necessary, especially in the field of international economic law. The increased necessity for more direct involvement of academics seems to me to be due to the emergence of the very phenomenon which is now central to international economic law: global governance. This form of rule rests to an unprecedented extent on knowledge, especially that of specialized professionals, including academics. This gives academics a responsibility which we cannot and in my view should not avoid.

2 Changing Interactions

Perhaps I can explain this best by reflecting on my own experience, which now spans the whole period of emergence of this phenomenon. My first job was at the new university in Dar es Salaam,⁷ in a period of great political ferment, marked by post-colonial nationalism. Politics was very much in the air, and there were many urgent policy issues, but in the university our main concern was the revision of its educational approach, especially the curriculum. Our role, we thought, should to be

⁵ For a good account of the methodology in the context of transnational law see Madsen (2006), pp. 33–36. I think that it can be possible to deploy the methodological techniques he discusses even while engaged in the type of participant-research I prefer. I also combine reflexive methodology with an approach of immanent critique, involving close analysis of the self-understandings of practitioners in a field and detailed examination of their practices, contrasting the two (see Conclusions for further discussion).

⁶ As Madsen himself points out: “the actors often rely on academic and quasi-academic resources for legitimising their practices”, Madsen (2006), p. 33.

⁷ At that time a University College, part of the University of East Africa, in Tanganyika, which while I was there joined with Zanzibar to form the United Republic of Tanzania.

to ensure that both the teaching and research in this new university should be relevant to its new country, but politics and policy formation were a matter for the legislature and the government. Interestingly, the Law Faculty led the way in the process of change, in which the university became a focus of lively political and intellectual debates.

However, these stressed the 'limits of the law',⁸ taking a critical view of instrumental conceptions which assumed that economic and social change could be produced by state power through legal mechanisms. In the field of international economic law this conception of economic development was expressed in the New International Economic Order Declaration of 1974 and related documents, and the hopes placed by many in nationalisations of foreign-owned assets, especially of raw materials. Although I supported strategies which aimed at reversing the legacies of colonialism and underdevelopment, my academic work took a critical view of both nationalist politics and state ownership policies, and pointed to their limitations and difficulties.⁹

Of course, in Tanzania I was an expatriate, but there were other non-Tanzanians who were closely connected with policy formulation as government advisers. Then when I returned to the UK in 1968, for me the relationship to politics was much the same. I was soon plunged into the campus movements, but their central concern was reform of universities; any wider political impact was understood to be a matter of alliances with other social forces. In the 1970s this meant working with community groups and workers' organizations, in relation to which I saw my role as providing expertise and research services. I found it very rewarding when critical theory and practice could interact, nurturing and strengthening each other, but nevertheless my academic work remained quite separate from my political engagement.

The academic and policy or political spheres have quite different dynamics and time-scales. Those engaged in the latter begin from a teleological perspective, knowing their objectives and so seeking the best means to those ends, justifications for their actions, and proof of their beliefs. The academic of course also has pre-formed views and preferences, but academic inquiry, especially if it is critical, entails adopting a sceptical stance, challenging received opinion, treating initial ideas as hypotheses to be tested. It also has a longer time horizon: a research program lasts many years, sometimes a lifetime, and even the shortest project is rarely completed in less than a year or two.¹⁰ The policy world is of course much more fleeting, a news item disappears in hours or days at most, and while broader

⁸ Shivji (1986).

⁹ Faundez and Picciotto (1978).

¹⁰ There are of course significant differences for full-time researchers and those who also have teaching and other responsibilities, but even a full-time PhD is rarely completed within the 3 years it is supposed to take. The longest I have supervised took a dozen years, but this was Yao Graham, who was drawn into direct political involvement for several years when Fl. Lt. Rawlings came to power while he was doing field work in his country, Ghana; happily, he survived a serious injury and a spell in jail to return and complete his thesis.

policy issues are not quickly resolved, proposals and campaigns usually demand papers to be written within days and to produce effects within months. Thus, from the policy perspective academic work often seems irrelevant, even utopian; so it may remain neglected outside (or even inside) academia, although it may turn out later to have been prescient and find its moment.¹¹

My academic work on TNCs in the 1970s for a while came into closer conjuncture with my more political activities helping to provide research services to workplace trade union organizations. The election of a Labour government, with Tony Benn appointed as Minister for Trade and Industry (formerly the Board of Trade), sparked an attempt to introduce continental European-style co-determination, with the Industry Act of 1975. The historical strength of shop stewards in the auto industry of Coventry seemed to put them in a good position to take advantage of this, and it seemed that a more structured form of research support could help them engage with corporate strategies, especially involving internationalisation, the central challenge to the British auto industry of the time. At the same time funding for research had begun to stress relevance to policy and to users. This rightly aroused academic suspicions, and continues to do so, as disfavouring longer-term and especially critical and anti-establishment research. Nevertheless a colleague (Richard Hyman, a specialist on industrial relations) and I determined it was worth a try to submit an application for funding to the Social Science Research Council (SSRC). Somewhat to our surprise we eventually received a letter announcing that we had been successful. However, the sting in the tail was that we were required to confirm that we had the necessary ‘research access’, which meant a letter of approval from the company management. Needless to say, this was not forthcoming, despite the shop-floor power of our trade unionist sponsors.

In the 1980s, as my teaching and research on international economic law expanded, I planned to write a book covering the main important areas. I decided that my focus should be on TNCs, but analysed in the wider perspective of their historical development and the interaction of this process with changes in the international state system. However, I determined that it should include a chapter on international tax, a topic I had not much studied till then, but which was clearly central to both states and TNCs. As I became immersed in it, the intended chapter grew into a book.¹² As I expected, it received little attention among tax specialists, since I adopted a wider political economy and critical legal approach; at the same

¹¹ Among many examples I may single out Ronald Coase, whose main work was done in the left-wing intellectual context of the London School of Economics in the 1930s, but was taken up some three decades later in Chicago, resulting in the award of a Nobel Prize in 1991. Although his work probed the limits of both market-based coordination (due to ‘transaction costs’) and of corporate management or public planning, in the policy climate of the 1980s it sparked enormous outputs of free-market oriented work. Coase himself, however, sharply criticised the version of his views put forward especially by Richard Posner, the dominant figure in law-and-economics (his mildest comment was that it was “highly inaccurate”: Coase (1993), p. 96; and see Campbell and Klaes (2005).

¹² Picciotto (1992) now enjoying a second life at <http://taxjustice.blogspot.be/2013/06/international-business-taxation.html> (last accessed 14 August 2015).

time, it was too technical and detailed for many of those in the policy communities; its most receptive audience was in the emerging field of international political economy, pioneered especially by Susan Strange and Robert Cox.

Once it was published I moved on, or rather back, to a wider range of issues, especially trade, which was merging with investment regulation with the establishment of the World Trade Organization (WTO) in 1995. Understanding the complexity of this phenomenon took me several years of teaching and research, mixed with other duties and a change of university. I also conducted some research into regulation of financial markets. As part of this, a colleague and I wrote a paper warning of the dangers of financial derivatives,¹³ which we had difficulty getting published, and which was duly ignored by policy-makers, as were similar warnings by a few others with more influence than we had. Only finally towards the end of my academic career was I able to resume my plan to work on a more comprehensive book which was eventually completed, greatly helped by the fortuitous award of a 2-year research fellowship, as *Regulating Global Corporate Capitalism* (2011).

In the meantime, I had taken another plunge into policy arenas. In 1997 a colleague and friend, Jane Kelsey, drew my attention to the draft of the Multilateral Agreement on Investment (MAI), which had been leaked to and then publicized by activist groups. This was now the period of academic debates about 'globalisation', and of activist 'anti-globalisation' campaigns. I was critical of the academic debates, much of which seemed shallow and superficial, and I could not identify with the activists, since I regarded myself as an internationalist.

However, the text of the MAI proved fascinating, and drew me into studying its policy and political context. It created broad obligations on states for protection of property rights, derived from investment treaties, as well as the non-discrimination principles of national treatment and most-favoured-nation treatment, modelled on those in trade agreements. It applied to 'investors' and 'investments', very broadly defined to include contractual as well as property rights, but no mention of TNCs. It seemed based on a very simplistic understanding of both international political economy and of legal regulation. Interviewing some of those involved with the negotiations suggested that they were driven by short-term political considerations and ideology favouring 'free trade', with little understanding of the implications of the legal instruments they were designing. The campaigners seemed right in their opposition, but this seemed based on gut reactions. Even an academic economist, called in as a consultant by the UK Department for International Development to evaluate the campaigners' criticisms, produced what seemed to me to be a very superficial analysis, based on macro-economic assumptions about the benefits of 'open markets'. Working with researchers in some civil society organizations, especially Oxfam, we produced a volume of research-based analyses aimed at strengthening the debate.¹⁴ I also published a more academic analysis, in which

¹³ Campbell and Picciotto (2000).

¹⁴ Picciotto and Mayne (1999).

I analysed the MAI in terms of the emergence of networks of international economic regulation.¹⁵

3 Academics and Global Governance

My involvement with the MAI brought home to me that my academic work in the field of international economic law was unavoidably part of the policy arena. More than that, engagement with this arena seemed a responsibility, due to the nature of the phenomena I was studying. The policy debate was dominated by neo-liberal ideologies favouring the liberalisation of markets, privatisation and deregulation. Even opponents of these ideas understood projects such as the creation of the WTO, and the proposal for the MAI, in such neo-liberal terms, and denounced them as such. Yet it seemed clear on closer examination that it was resulting in an enormous growth of regulation in many fields, from technical and health or safety standards for products to regulation of banks and other financial institutions. As Stephen Vogel pointed out, the creation of so-called free markets actually involved many more detailed and formalised rules.¹⁶ On the other hand, what was generally described as a ‘market’ economy seemed to me quite different from my conception of a market, since it was dominated by corporate behemoths. Liberalisation was not a ‘retreat of the state’, but its transformation, into a new type of public-private corporatocracy.

I found it impossible simply to describe these phenomena in a detached way. Academics, as technical experts, had become direct participants in the creation of what was being described as global governance. International lawyers were enlisting as WTO panellists, and investment arbitrators, just as scientists were active in debates about biotechnology patenting, food safety or environmental protection. When I tried to describe the outlines of the multi-level or networked system that seemed to me to be emerging, I was denounced by some critical academics as having adopted the techno-speak of its protagonists. Yet it seemed to me impossible either to ignore or reject these processes, which like it or not were changing the world.

The world of nation-states and national economies has been dissolving, or fragmenting, restructuring around intertwined public-corporate bureaucracies.¹⁷ This has weakened the already fragile traditional forms of democratic accountability or checks on power within states. In the political sphere, representation through class-based political parties has given way to ‘audience democracy’, based on the “construction of vague images prominently featuring the personality of the

¹⁵ Picciotto (1998).

¹⁶ Vogel (1996).

¹⁷ I have tried to analyse this, most extensively in my book of 2011, and also by revisiting my earlier work on Marxist state theories: Picciotto (2010).

leader”.¹⁸ At the same time, policy arenas now depend much more heavily on knowledge and expertise, largely because the world and its governance have become much more complex and interconnected. The economic sphere continues to be dominated by the large corporations which had emerged in the twentieth century, but rather than growing ever bigger they have tended to become ‘lean and mean’, focusing on their core business, while extending their tentacles through international supply chains of subcontractors, or systems of franchising and licensing. Their cadres have become ever more expert at managing the business itself, but increasingly driven by the short-term pressures from capital markets, resulting from the disintermediation of finance and ‘financialisation’ of capitalism. The corporate and public policy spheres have become highly intertwined, as the competitiveness and sometimes even survival of business is highly dependent on regulatory decisions, while politicians want access to corporate funds for campaign finance, not to speak of personal enrichment. At the lower levels, regulatory officials and corporate managers also interact closely, and ‘responsive regulation’ has created technocratic ‘epistemic communities’, while also creating a seed bed for corruption.

This new world of ‘governance’ has spawned new organisational forms of producing, managing and deploying policy expertise. On the one hand in older professions such as law and accountancy, the large corporatist firms which had already diverged from the traditional family businesses and partnerships, have expanded their provision of policy advice and lobbying services, for both business and governments. The broadest and largest are now the Big Four (Deloitte, EY, KPMG and PwC), then the large global business consultancy and law firms (Accenture, Baker & McKenzie etc.), a number of smaller public policy advice and public relations firms, followed by an array of smaller boutique firms focusing on specific issues, such as taxation. Business or industry associations range from the Chambers of Commerce, which have a wide scope and a long history, coordinated and with a significant international presence through the International Chamber of Commerce, to more specific groupings such as the Chemicals Industry Association, which set up a global system of chemicals plant safety regulation following the Bhopal disaster.¹⁹

In many ways set against these was a motley range of campaigning organisations of various types. Some, especially in the fields of ‘development’ and the environment, are large, international, and quite well resourced—Oxfam, Friends of the Earth and others. Although their resources are mainly geared to raising funds and disbursing assistance, they have increasingly focused on campaigns around policy issues related to their concerns, which resulted in the establishment of research departments. Indeed, it was with researchers from Oxfam, the Worldwide Fund for Nature and others that I had worked on the MAI campaign. Others are targeted at more specific issues so are generally smaller, although those with a global reach can be quite large, such as Transparency International. Some trade union organisations

¹⁸ Manin (1994); see also Manin (1997).

¹⁹ King and Lenox (2000).

have also developed a policy role, especially the international sectoral federations. The scope of their activities has been somewhat limited, because of both their reduced resources due to declining union membership, and their reluctance to expand their concerns beyond the traditional ambit of employment conditions. Nevertheless, some of the public sector union organisations in particular have taken up wider issues, such as Education International on services liberalisation, and Public Services International on tax issues. Outside economic questions, campaigning organisations such as Amnesty have been joined by others working on broader issues of human rights and 'security', which may however include economic aspects such as corruption, money laundering and capital flight. Some position themselves less as campaigners and more like the think-tanks, which have a longer history, in many countries often linked to political parties.

Inevitably, all these organisations are dependent on, and therefore more or less beholden to, their different sources of funding. This is more direct and explicit for organisations emanating from or linked with business, which unabashedly represent the specific interests and concerns of their constituencies. Hence, although all such policy-oriented bodies have been very generally referred to as nongovernmental organizations (NGOs), those which regard themselves as working from a public interest perspective have preferred to be described as civil society organizations (CSOs). They are of course generally less well-resourced than business or professional organisations, and their need to raise funds can affect their choices of both campaigning issues and strategies. However, their staff are generally driven by ideological commitment more than career considerations, so are more likely to take independent positions, although this may result in partisanship or even fervent advocacy.

Although I have always been interested in business and economic issues, even in practical ways, my focus on understanding and analysis led me away from professional practice and to an academic career, and my concerns for emancipatory social change prompted a preference for working with CSOs. Surprisingly, this choice has not been unproblematic. It seems to be viewed by some as an abandonment of independence and of academic standards of 'objectivity', somehow undermining the integrity and reliability of my analyses and arguments. This is curious, since it seems much more acceptable for academics to have a parallel professional practice, or to work as consultants for business or professional firms. It has become increasingly normal also for such firms to finance academic research institutions especially on business and economic matters, and these institutions organise conferences and symposia with the combined participation of academics and practitioners, usually from business. These seem to me to foster shared perspectives which become received as common sense, so that the academic's commitment to critical inquiry is threatened and in many ways corrupted. These kinds of close interactions of academics with business professionals and managers seem to me much more threatening of academic integrity than work with CSOs, but they are rarely criticised.

Yet the relationship with activists is also challenging. In choosing this option it may be tempting to become a campaigner, but I have not seen this as my primary

role. It seems to me more important, valuable and rewarding to prioritise critical research, since this is what is most lacking in policy arenas, yet essential for their effective functioning. Academics are in a unique and privileged position that allows them the time and independence for longer-term research from a critical perspective. Certainly, over my career, both the amount of time and the degree of independence have been reduced, with the intensification of academic work, and the shift towards private sources of funding. On the other hand, there has been some encouragement to engage in research which is relevant to policy. Although, as my experience in the 1970s with the SSRC showed, this tends to be interpreted as meaning work with business and government rather than social movements, at least it allows a space for such work. The academic's reluctance to move into this space is often due to a preference either for the easier and more financially rewarding path, or conversely to an inclination to abandon research for activism. I have preferred to maintain my focus on academic research while trying to contribute to policy debates through supporting social movement organizations.

4 International Tax Research and Activism

I was fortunate to have been able, following formal retirement from the university, to engage more fully in policy work, to a degree that would be hard or impossible for most academics with substantial teaching and other responsibilities. It is this latest experience that has brought home more directly to me the issues explored in this paper. As already mentioned, after the publication of my book on international tax in 1992, I had again broadened out my research interests, leading to my work on the WTO and the MAI, and then on financial markets. However, I remained interested in corporate taxation, especially in the ways in which international tax avoidance had led to the creation of the tax haven and 'offshore' finance system.²⁰ While working with Oxfam on the MAI, I suggested that this should be an area on which they do some work, and although they had too much invested in other topics to redirect their main efforts, some short-term funding did result in a report with which I helped: *Tax Havens: Releasing the Hidden Billions* (2000).

Although Oxfam did not immediately follow this up with any campaigning work on tax, other organizations did, notably War on Want. This was the period of the World Social Forums and the anti-globalisation movement, about which, as mentioned above, I had reservations. Nevertheless, the Forums provided an arena in which the international tax issue, among many others, could be debated by a combination of activists and researchers. The Tax Justice Network was launched following a discussion at the European Social Forum at Florence in 2002, mainly through the efforts of John Christensen. An economist originating from Jersey, John had worked as economic adviser there, but quit in 1998 due to his disagreement

²⁰ See especially Picciotto (1999).

with its government's policy of fostering the island's status as a tax haven and offshore finance centre.²¹ He had contributed a chapter to the edited book in which I had also written about the offshore system,²² and had also worked with Oxfam and helped with the report in 2000. John has been the main driving force of TJN since then, and by 2010 it had spawned a global network of tax justice groups and organisations, which in 2013 set up a new umbrella body, the Global Alliance for Tax Justice. I helped organise TJN's first conference or workshop at Essex in 2003, and seeing my role more in terms of research than activism, I was described as a Senior Adviser of TJN (with a number of others), and this remains the case. However, I travelled to Nairobi and participated in the meeting linked with the World Social Forum there which led to the foundation of TJN-Africa.

The issue of international taxation became increasingly politicised during this period, so TJN rode on the crest of a wave, which to some extent it also created. International tax evasion and avoidance had already been taken up by the G7 world leaders, and the communiqué from their meeting in Lyon in 1996 stated that "[t]ax schemes aimed at attracting financial and other geographically mobile activities can create harmful tax competition between States", and supported action on this through the Organisation for Economic Cooperation and Development (OECD), the main international tax body. This resulted in the OECD report on *Harmful Tax Competition* in 1998,²³ which was relatively timid, but was further weakened by a US volte-face in 2001, after lobbying of the new Bush administration by the far-right Centre for Freedom and Prosperity. The initiative became focused on the negotiation of bilateral treaties for exchange of information for tax matters, which was a very slow process, and was in any case limited to provision of information on request, which gave secrecy jurisdictions plenty of scope to stall.

From its formation, TJN called for a comprehensive multilateral system for automatic exchange of information, which we suggested could be based on the OECD-Council of Europe multilateral convention for administrative assistance in taxation, published in 1988 though ratified by only a handful of states by 2001. Although such a system was considered politically impossible at that time, after the renewed political pressures following the financial crisis of 2008 it became the new global standard. The multilateral convention was amended in 2010 and thrown open to all states, and in 2013 both the G8 and the newly formed G20 finally agreed to support multilateral automatic exchange of information for tax purposes. The OECD's Global Forum on Tax Transparency set about implementation, based on a Global Reporting Standard published in 2014. TJN continues to track tax transparency through a small team compiling the Financial Secrecy Index.

²¹ See Warren J (2014) Tax is the Lifeblood of Democracy: An Interview with John Christensen of the Tax Justice Network. Spirit of Contradiction, <http://spiritofcontradiction.eu/niebuhr/2014/08/18/interview-with-john-christensen-of-the-tax-justice-network> (last accessed 13 July 2015).

²² Hampton and Abbott (1999).

²³ OECD (1998) Harmful Tax Competition: An Emerging Global Issue, <http://www.oecd.org/tax/transparency/44430243.pdf> (last accessed 13 July 2015).

My main interest was international corporate taxation, which seemed to me to have further deteriorated since publication of my 1992 book. The basic tax treaty rules had been little changed since first devised under the League of Nations in 1928, and attempts to patch them up through the OECD had worsened the situation. Regulations on transfer pricing drawn up by the US in 1968, exported to other countries through the OECD, had resulted only in entrenching the ‘separate entity’ principle. This required adjustment of prices on transactions between entities under common control by reference to ‘comparables’ between independent parties, which experience showed did not exist. Based on a fundamentally faulty assumption, the approach proved ineffective in practice, as had become increasingly apparent in the 1980s, and was detailed in my 1992 book. The response of the US authorities was to develop more sophisticated methods, leading to conflicts within the OECD, and further elaborations, embodied in the OECD Transfer Pricing Guidelines of 1995. Although formally only soft law, in practice these Guidelines have come to be treated as global norms, often referred to by courts,²⁴ and incorporated into national law by legislation,²⁵ even in non-OECD countries.²⁶

International tax, and especially transfer pricing, quickly emerged as an important field, and its practitioners exploited its broad principles to devise ever more elaborate corporate structures. These generally take advantage of the encouragement provided by the independent entity principle to form affiliates in convenient jurisdictions with responsibility for specific functions, with the aim of reducing

²⁴ In Kenya, the High Court allowed a company to use a transfer pricing method relying on the Guidelines even though those Guidelines were at that time not mentioned anywhere in Kenyan law.” We live in what is now referred to as a ‘global village’. We cannot overlook or sideline what has come out of the collective wisdom of tax payers and tax collectors in other countries. And especially because of the absence of any such guidelines in Kenya, we must look elsewhere”. (Judge Alnashir Visram, *Unilever Kenya v KRA* 2005, 12). Similarly, a Malaysian court upheld a transfer pricing method based on the Guidelines, rejecting an adjustment made by the tax authority under local law, which it held to be invalid: *MM Sdn Berhad v Ketua Pengarah Hasil Dalam Negeri* Appeal No PKCP(R) 55/2009 (2013) MSTC ~10-046 (2013).

²⁵ For example as authoritative guidance for interpretation of tax treaty provisions: e.g. in the UK, the Taxation (International and Other Provisions) Act 2010 s.164 provides that treaties based on the OECD Model should be interpreted ‘in accordance with’ the Guidelines and with any documents published by the OECD as part of the Guidelines prior to May 1998, and any documents designated in an Order made by the Treasury after that date as comprised in the Guidelines. This is a good example of global lawmaking, in which soft and hard law become intertwined, see Picciotto (2011), pp. 20–22.

²⁶ The Nigerian Income Tax (Transfer Pricing) Regulations No. 1 (2012) specify that they shall be “applied in a manner consistent with” the OECD Guidelines “as supplemented and updated from time to time” (s.11); there is identical language in the Tanzania Income Tax (Transfer Pricing) Regulations 2014 s.9; the boilerplate provisions suggests a systematic process of ensuring adoption of these norms, presumably resulting from ‘capacity building’ through the World Bank or the OECD itself. Even where countries enact their own regulations, the Guidelines are relied on in practice, and referred to by courts, e.g. in India a Tax Tribunal even recently referred to a draft report proposing changes to the Guidelines although it had not yet been approved: *Income Tax Appellate Tribunal, Mumbai, ITA No. 1565/Mum/2014, Watson Pharma Pvt Ltd v DCIT* (9 January 2015), para. 61.

overall effective tax liability.²⁷ The regulations introduced in response by tax authorities still began from the independent entity assumption, so have been largely ineffective, except to create a field of complex technical rules. While some tax officials were frustrated by this, for others it provided an opportunity to invest in expertise, and many took advantage of the revolving door into private practice after a period in the public service. Private practitioners flooded into the field, offering a range of specialisations and services, and corporate tax departments grew from a handful to a hundred or more people—in the case of General Electric, which from the early 1990s built tax minimisation into its management structure, and set up its own finance affiliate, GE Capital, as many as one thousand.

In the meantime, the Oxfam report of 2000 was followed up by occasional exposés from other CSOs, often explaining the avoidance strategies of specific companies and estimating the tax losses especially for poor countries. Reports by investigative journalists followed, initially in the more liberal papers and later, especially following the fiscal crises resulting from the financial crash of 2008–2009, also in mainstream and business media channels such as Reuters and Bloomberg. Parliamentary inquiries in many countries also highlighted the issue, focusing in particular on the very low taxes paid on their non-US profits by US-based internet companies, such as Apple, Amazon, and Google. Discussion of the ‘Dutch Sandwich’ and the ‘Double Irish’ moved from specialist tax publications to mainstream media.

These political concerns generated new pressures on the OECD tax experts. An opportunity for a new direction came with the retirement in 2012 of Jeffrey Owens, who had built the OECD’s Centre for Tax Policy and Administration from a handful to some 100 staff over two decades.²⁸ During his tenure, the OECD had continued to prioritise the role of tax treaties as preventing double taxation in order to facilitate international investment. His replacement, Pascal Saint-Amans, arrived in February 2012 with a clear agenda to redirect attention to ‘double non-taxation’, and he quickly launched an initially low-key project on ‘base erosion and profit shifting’. The acronym BEPS soon gained high visibility after the publication in January 2013 by the OECD of a 30-month 15-point BEPS Action Plan, and its endorsement by the G20’s St Petersburg Declaration of September 2013.

Work on analysing the defects of international tax rules had also taken place in parallel through TJN and other organisations. Funding from the government of

²⁷ For further details see Picciotto S (2013) Is the International Tax System Fit for Purpose, Especially for Developing Countries? ICTD Working Paper 13 <http://www.ictd.ac/en/publications/international-tax-system-fit-purpose-especially-developing-countries> (last accessed 14 August 2015); Corporate Reform Collective (2014), chs. 1 and 10.

²⁸ Owens J, Seminar on Liable to No Tax, 65th IFA Congress, Paris, 15 September 2011; ITR Correspondent, Jeffrey Owens Joins Ernst & Young, International Tax Review, 8 June 2012, <http://www.internationaltaxreview.com/Article/3043711/Jeffrey-Owens-joins-Ernst-and-Young.html> (last accessed 14 August 2015); Owens Looks Back on his Time in Office, International Tax Review, 1 February 2012, <http://www.internationaltaxreview.com/IssueArticle/2967120/Archive/Owens-looks-back-on-his-time-in-office.html> (last accessed 14 August 2015).

Finland enabled TJN to organize a seminar in Helsinki in June 2012, very ably planned by David Spencer, another TJN Senior Adviser. He brought together many leading specialists, including Reuven Avi-Yonah, Ilan Benshalom, Michael Durst and Michael McIntyre, and revenue officials or practitioners from several countries including Brazil, China, the Dominican Republic and India. The conclusions of the seminar were clear, that the separate entity principle created a fundamental flaw in the system, and most of those participating advocated a shift towards treating TNCs as unitary firms. I therefore followed up the event by drafting a paper arguing for 'unitary taxation' of TNCs, and discussing how a transition to such a system could be achieved, building on work especially by Michael McIntyre, Reuven Avi-Yonah and Michael Durst.²⁹ I also received helpful comments on the draft from others associated with TJN, except for David Spencer, who only made clear his disagreement. I was sorry that we could not find a way to debate the issue further within TJN, especially as David subsequently resigned, having failed to convince others also of his view.

This highlighted one of the problems of working with an organization like TJN, which combines research with campaigning. For me, it is important to find ways to debate different views, if they fall within the general aims of the organisation, but this can be difficult. People invest a lot in developing their understanding of issues, and hence tend to become committed to their own perspective, making it hard to be open to different ideas. The organization needs to take a stance and campaign for specific policies, and advisers who feel their views have been disregarded feel slighted. Such organisations also may attract forceful personalities with large egos, which can make it difficult to sustain open debate and team-work. Tensions can also arise over competition over access to scarce funds, and researchers dependent on grant funding may naturally feel resentful of academics in secure jobs, while academics feel conscious of the risk to their careers from identification with activism. These problems are not unique to such organisations, and academia itself is also rife with conflicts and feuds mixing clashing opinions and personal hostility. The inter-personal aspects can be dealt with to some extent by flexibility in organisational affiliation, as individuals can have different types of link with organisations, and can move between them. The more important issue is to decide the appropriate balance for each organisation between campaigning and research.

My preference is to prioritise research, not only because of my personal background and skills. A central characteristic of global governance today is both the importance of detailed or technical understanding of issues, as well as the wide gap between such understanding and the broad-brush terms in which policy debates are generally conducted.³⁰ That is why academics and researchers generally have a crucial part to play in helping to ensure that such debates are better informed. It is especially important, in my view, for critical views to be presented and given a fair

²⁹ Picciotto S (2012) Towards Unitary Taxation, http://www.taxjustice.net/cms/upload/pdf/Towards_Unitary_Taxation_1-1.pdf (last accessed 13 July 2015).

³⁰ Picciotto (2015).

hearing in policy arenas, which can otherwise become stuck in a stultifying consensus based on received opinions, generally supporting the dominant corporatist perspectives. This again suggests the importance of contributions from academics, who are privileged to be able to be more independent, if they wish, from big business interests.

Without any deliberate strategy, I found myself devising different ways to straddle research and campaigning. Research work emerged from my involvement as a member of the Advisory Board of the Centre for Tax and Development (ICTD), set up in 2010 and headed by Professor Mick Moore at the Institute for Development Studies at Sussex University in Brighton, with funding from the UK's Department for International Development, and Norway's Norad. He and his very able Research Directors, Odd-Helge Fjeldstad and Wilson Prichard, have pioneered research on taxation in developing countries, but were less knowledgeable about international corporate taxation, which is an important source of revenue for such countries. Finding it hard to evaluate funding applications they received in this area, they convened an informal meeting of experts in summer 2012, shortly after TJN's Helsinki seminar, and at a time when little was known about the BEPS project.

Stimulated by the discussions both in Helsinki and Brighton, I suggested that the ICTD issue a call for applications focusing especially on issues raised by a possible transition to unitary taxation of TNCs. The idea quickly snowballed as I contacted potential researchers, and we put together a program of seven (later eight) related projects, involving economists, lawyers and accountants, which after revisions eventually passed the ICTD's peer-review process for funding. It was soon shown to be very well timed, as the publication of the BEPS Action Plan laid out a high-profile agenda for international corporate tax reform. Meetings we organized to map out our research at the start (May 2013), and to review progress after some months (January 2014), attracted participants from staff of the IMF, OECD, the UN Tax Committee and the European Commission. Research outputs from all the project were published, following peer-review, within 2 years of the start of the program, which is good going for academic research.³¹ We followed this up with a more targeted program for research aimed at helping developing countries to cope with the outcomes of the BEPS project, including practical ways to protect their tax base.

The launching of the BEPS Action Plan by the OECD also offered an opportunity and a challenge for policy activism, and a number of activists and researchers met in London in summer 2013 to consider how to respond to it. The BEPS project was to be run through the OECD's Committee on Fiscal Affairs (CFA), which had been the main custodian of international tax rules for over half a century, although with the addition of non-OECD G20 member states for this purpose. The tax officials representing their governments in the CFA, and those employed in the OECD Secretariat, considered themselves to be engaged in specialist technical and

³¹ See <http://www.ictd.ac/en/unitary-taxation-transnational-corporations-special-reference-developing-countries> (last accessed 14 August 2015).

therefore ‘non-political’ work, while also conducting consultations aimed essentially at business representatives and tax advisers. My main concern was that it would clearly take considerable effort to track, analyse and provide comments from an independent perspective on all the proposals which would flow from the Action Plan. We also considered it important to try to widen the debate beyond the international tax specialists. These considerations led us to formulate two initiatives.

To tackle the task of analysis, we decided to create an international network of international tax specialists, academics, researchers working for CSOs, and perhaps even practitioners, which I agreed to coordinate. We chose to call it the BEPS Monitoring Group (BMG), on which we were later commended by a tax insider, who thought it made the group sound semi-official, though probably some activists considered the name too obscure. Certainly, once we had set up a rudimentary blog website, one of the first comments pointed out that we needed to explain first what BEPS meant. I drew up some basic procedural rules, which in the event worked well. Individuals would be members for their expertise, and not representing organizations; the BMG’s comments and reports would be prepared by those who volunteered for each topic (a minimum of three people), and should be approved by a majority of those who had worked on drafting each paper, who would normally be identified as its authors. We had no funding,³² so participation was necessarily limited to people already interested in tracking the issues, and with the time to do so. Starting with a handful of members, it grew to over 30, although with a much smaller core of active members.

The second suggestion, aimed at fostering a wider debate, was that we try to establish a Commission, consisting of high-profile public intellectuals from around the world. A Steering Group was set up, and some seed funding from CSOs enabled us to employ a part-time consultant, for the organisational work such as drafting funding proposals and meeting representatives of funding bodies. The Independent Commission for the Reform of International Corporate Taxation (ICRICT) met in New York in March 2015, and issued an impressive report, officially launched at the UN Conference on Finance for Development in Addis Ababa in July,³³ though we did not succeed in hitting our ambitious funding target, which would have enabled the Commission to have even higher visibility and hold several hearings around the world.

³² We later received a grant of \$10,000, which helped fund travel to meetings or consultations by members who had no other access to such support. I considered it legitimate to use ICTD funds for my own expenses, which became significant once the OECD consultations got underway, because the ICTD research benefited enormously from the intimate knowledge I gained, as well as contacts made, from following the process so closely. However, the BMG was not a sponsor or supporter of the ICTD, since this might be considered by some to compromise its academic independence. In wearing several hats, I in some ways resembled the tax advisers also participating in the BEPS consultations, such as Mary Bennett, who works for law firm Baker McKenzie (after spending some years as an OECD official), but has also represented various industry groups.

³³ The Report is available, together with other details of the ICRICT, www.icrict.org (last accessed 13 July 2015).

5 Conclusions

I hope that these very personal reflections have helped to map some of the tangled terrain of policy formation in global governance, as well as explaining how I have seen my role. I would like to close by briefly drawing out a few general analytical points.

The first concerns the concept of critique. For me being critical does not mean being oppositional or subjecting ideas to criticism from the outside, or from an alternative criterion of value. I apply what I understand to be a Marxian approach of immanent critique,³⁴ which begins from a thorough historical examination of the social practices and institutions concerned, and their associated ideologies. The critique emerges from contrasting the self-understanding of practitioners in a field with a detailed examination of their actual practices, and demonstrating the contradictions between the two. However, the aim is not to denounce hypocrisy, but to understand how and why these understandings developed, and point the way to a transformation. I should say that I did not begin with such a worked out methodological strategy or theory, but have groped my way towards it, through actual practice.

Thus, my research on the history of international business taxation revealed that from the beginning there was a tension between the reality of TNCs as they emerged as internationally-integrated businesses, and the methods developed by tax authorities to regulate them according to the bureaucratic rationality of national accounting and tax systems. I discovered a plea for a global approach to business taxation, made to the UK Royal Commission on Income Taxation in 1920:

In a business of this nature you cannot say how much is made in one country and how much is made in another. You kill an animal and the product of that animal is sold in 50 different countries. You cannot say how much is made in England and how much is made abroad. That is why I suggest that you should pay a turnover tax on what is brought into this country. . . [i]t is not my object to escape payment of tax. My object is to get equality of taxation with the foreigner, and nothing else.³⁵

This was from none other than William Vestey, co-founder of a family-owned global food supply business, who went on to pioneer international tax avoidance techniques, resulting in long-running disputes with the British tax authorities.

I traced the emergence and development of the rules for adjustment of accounts between related entities, and saw how they led to the development of tax avoidance techniques using intermediary entities in convenient jurisdiction, and how this in turn led the formalisation of rules on transfer pricing, which only reinforced the ‘arm’s length principle’. When I wrote my book, starting in the late 1980s, others were advocating a shift towards a worldwide unitary taxation system, but this was controversial, and I analysed the reasons for the divergent perspectives, without

³⁴ See e.g. Stahl T (2013) What is Immanent Critique? SSRN: <http://ssrn.com/abstract=2357957> (last accessed 13 July 2015).

³⁵ UK Royal Commission on Income Tax 1920, Evidence, p. 452 Question 9460.

taking a position. In the more recent period of my more direct engagement with policy, I became an advocate for such an approach. It was nevertheless very important not to present such proposals as a mere alternative developed from outside the existing system, but to show how existing rules in many ways had already shifted towards it, as the only effective way of dealing with the business reality. Equally, the obstacles and objections could be explained in terms of the positions in the field of the practitioners and policy advocates expressing them.

Secondly, it seems to me that the special position of academics gives them both a responsibility and a unique opportunity. This is not only because that position gives them a degree of independence of special interests. This is certainly important, especially in relation to business and economic law and regulation, which is so dominated by corporate and pro-business views that some counter-weight is essential to ensure a genuine debate. However, academics are also subject to pressures, especially from career concerns. Research funding can also create restrictions, not only when it derives from business sources, as my experience in the 1970s with the SSRC showed me.

More importantly, an academic position offers the chance to take a long-term view, and engage in proper research. Policy fields today are teeming with pressure groups and lobbyists, often with their own policy departments, or employing consultants. However, the research which they carry out tends to be geared to the short-term agendas and timescales of campaigning and policy advocacy. Its aim is to buttress the arguments for existing policy positions, rather than to evaluate evidence, or identify and study alternative approaches. Too often policy research institutes and think tanks are also driven by short-term agendas. The impetus for the emergence of TJN and its agenda came from researchers and practitioners such as John Christensen and Richard Murphy, who did not begin as campaigners. I am sure that the same can be said for other CSOs that have helped to define important global governance issues from outside the accepted orthodoxies.

Hence, my call is not for academics to become campaigners, far from it. I consider that it is much more important that they remain rooted in a commitment to research, especially from a critical perspective. There are many specialists in designing media campaigns and crafting snappy sound-bites. There are even more professionals, lawyers, accountants, and others, making a lucrative career practising in fields such as international economic law. In my experience it is much more rewarding to aim to combine critical theory with some form of critical practice in this field.

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