

General Jurisprudence

Understanding Law from a Global Perspective

WILLIAM TWINING



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To my students.

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Preface

The aim of this book is to present a coherent vision of the discipline of law and of jurisprudence as its theoretical part in response to the challenges of globalisation. Western traditions of academic law have a rich heritage, but from a global perspective they appear to be generally parochial, narrowly focused, and unempirical, tending towards ethnocentrism.¹ *General Jurisprudence* presents an alternative vision and agenda for legal theorising that includes creating reasonably comprehensive overviews of law in the world; constructing and refining cross-cultural analytic concepts; critical evaluation of our stock of theories about law, justice, human rights, diffusion, convergence of laws, and legal pluralism; and the construction of a workable normative basis for co-existence and co-operation in the context of a world characterised by pluralism of beliefs and dynamic multiculturalism.

The central thesis is that most processes of so-called ‘globalisation’ take place at sub-global levels and that a healthy cosmopolitan discipline of law² should encompass all levels of social relations and of normative and legal ordering of these relations. The mainstream Western canon of jurisprudence needs to be critically reviewed and extended to take more account of other legal traditions and cultures, and of problems of conceptualisation, comparison, generalisation and critique about legal phenomena in the world as a whole.

What is a healthy discipline? One answer is given by a report prepared for the British Academy in 2004 on the actual and potential ‘contributions of arts, humanities, and social sciences to [a] nation’s wealth’. The title ‘*That Full Complement of Riches*’³ is borrowed from Adam Smith. It doffs its cap to the modern climate of accountability and free enterprise, while making the point

¹ On ethnocentrism, see Chapter 7 below.

² ‘Cosmopolitan’ is used here descriptively to mean covering the whole world. ‘Cosmopolitanism’ is sometimes used in a narrower sense to refer to an idealistic vision of a unified world community constituted by universal moral principles (e.g. Held (1995), (2006)). My reasons for preferring this adjective to international, transnational, and global, are discussed below in Chapter 1 and Twining (2002a).

³ The full title is *That Full Complement of Riches, the contributions of the arts humanities and social sciences to the nation’s wealth*. The Committee was chaired by Professor Paul Langford and is referred to as the Langford Report (2004). The report unashamedly makes the case for an increase in public expenditure and support for humanities and social sciences relative to the physical

that ‘wealth’ in this context cannot sensibly be restricted to economic prosperity, but must include cultural and intellectual enrichment, individual well-being, and new knowledge and understanding.⁴ The report conceives of a healthy discipline in terms of this broad concept of ‘enrichment’ together with an understanding of major challenges of the age, such as climate change and poverty; contributing to public policy and debate; and providing a rigorous, beneficial and fulfilling education. In this view a healthy discipline of law is one that adequately performs these functions. In order to do so it needs to be conceptually well-equipped, ethically aware, and empirically informed throughout its various fields and specialisms.

Law as an academic discipline occupies a modest position that uneasily straddles the humanities and social sciences. Many non-lawyers envisage law as a dry, technical, ‘applied’ subject; many academic lawyers aspire to be recognised as genuine scholars. Almost everywhere, law is perceived as a ‘cheap subject’ involving worse staff:student ratios and smaller demands on research funds than most other disciplines. Law schools are institutionalised in a variety of ways.⁵ Throughout the history of academic law there have been recurrent tensions about ideology, objectives, perspectives, and methods. Some of these have been expressed in terms of dubious dichotomies: liberal versus vocational; black letter versus contextual; formal versus critical; knowledge-based versus skills-based; pure and applied research; hard versus soft disciplines. These tensions have played out in a variety of patterns in different countries and periods of history. Pessimists view these conflicts as debilitating;⁶ optimists prefer to talk of ‘creative tension’. I count myself as an optimist. I am an enthusiast for my discipline. I believe that law can pervade nearly all aspects of social life, that it is potentially a marvellous subject of study, and that a legal perspective can provide important lenses on social and political events and phenomena. Law *is* important – for better or for worse.⁷

sciences. It is, in my view, a brilliant example of advocacy that convincingly answers the question: why are these disciplines important? The core of the message is that the contribution of non-scientific disciplines to the public good is systematically underrated, but that their health depends on an appropriate balance between short-term and long-term benefits, between ‘pure’ and applied research, and between instrumental uses of research and the advancement of knowledge for its own sake.

⁴ Compare the recent broadening of the concept of poverty in the context of development in the Human Development Index, discussed at Chapter 11.1 below.

⁵ They include professional schools (as in the United States), primary schools providing the academic stage of multi-stage process of professional formation (as in England, at least until recently), multi-functional centres of learning, Islamic law colleges, (e.g. Malat (1993) Chapter 1), institutions of mass legal education (in some countries serving as cheap depositories for excess demand for higher education), and specialised institutions, such as judicial training colleges. Legal scholarship reflects this variety.

⁶ This attitude is captured by the title of a well-known article: ‘The Law Teacher: A Man Divided Against Himself’ (Bergin (1968)).

⁷ This is a summary of views developed at length elsewhere. On the variety of law schools around the world and different conceptions of legal scholarship, see *Blackstone’s Tower (BT) passim*; on controversies in legal education, see *BT* and *Law in Context (LIC)*. On different perceptions of the importance of law see Chapter 11.3 below.

In the present context, which is concerned mainly with legal theory and legal scholarship, the discipline of law can be treated as being on the edge of the social sciences, but less 'scientistic' than some, with close ties to the humanities, especially history, philosophy, and literature. It is also subject to demands from a powerful practical profession. In many countries the trend over the past fifty years has been for law to become integrated into the university, with legal scholars sharing the basic academic ethic of being concerned with the advancement and dissemination of learning.

In my view, jurisprudence is the theoretical part of law as a discipline. The mission of an institutionalised discipline is the advancement and dissemination of knowledge and critical understanding about the subject matters of the discipline. Legal scholarship is concerned with the advancement of knowledge and critical understanding of and about law. Legal education is concerned with dissemination of knowledge and critical understanding – including the know-what, know-how, and know-why of its subject matters and operations. *General Jurisprudence* is concerned in first instance with legal scholarship and legal theory – with what is involved in advancing the understanding of law from a global or transnational perspective and only secondarily with the implications of this for the teaching of law.⁸

This book can be interpreted as a plea for a less parochial jurisprudence. It might even be read as a polemic that suggests that in recent years Anglo-American jurisprudence has been narrow in its concerns, abysmally ignorant of other legal traditions, and ethnocentric in its biases. This is partly correct. However, when talking of 'parochialism' it is useful to distinguish between provenance, sources, audience, focus, perspectives, and significance.⁹ My argument does indeed suggest that we should pay more attention to other legal traditions, that the agenda of issues for jurisprudence needs to be reviewed and broadened, that the juristic canon should be revised and extended, and that there is much to be learned from adopting a global perspective. However, in some respects the perspective is also self-consciously quite parochial, reflecting my own biases and limited knowledge and the fact that I am addressing a very largely Western audience about the discipline of law as it is institutionalised in the West, especially in common law countries.

It may help to say something about where I am coming from. I was born in Uganda in 1934. I sometimes say that I had a colonial childhood, an

⁸ At this stage in history, most forms of international and transnational legal practice are quite specialised. On the one hand, few law students and legal scholars can focus exclusively on a single jurisdiction; on the other hand, we are some way from a situation in which primary legal education can sensibly be geared to the production of global lawyers or Euro-lawyers, or even specialists in international law. A cosmopolitan discipline does not imply neglect of local knowledge. But law students can generally benefit from being presented with broad perspectives and from being made aware of different levels of legal ordering and their interactions. (Twining 2001, 2002a). They also need to be aware of the religious and customary doctrines and practices of ethnic minorities in their own country as they bear on different branches of law.

⁹ *Globalisation and Legal Theory*, (GLT) 127–9.

anti-colonial adolescence, a neo-colonial start to my career, and a post-colonial middle age and beyond. Such a claim is open to several interpretations, as is the claim that we are living in a post-colonial era. I am based in Oxford and Florida, but I have travelled widely and have worked in several countries, mainly in Eastern Africa, the United States, the Commonwealth, and latterly the Netherlands. My background, experience, and outlook are quite cosmopolitan, but my biases and culture are British, my training is in the common law, and my main language is English. My perspective on jurisprudence straddles the analytical and socio-legal traditions: I was taught by Herbert Hart in Oxford and Karl Llewellyn in Chicago; at University College London I have been in regular conversation with Jeremy Bentham and his editors; my African experience stimulated an interest in legal anthropology and law and development, and a concern for radical poverty.¹⁰

In this book, my standpoint is that of an English jurist, who is concerned about the health of the institutionalised discipline of law, especially in common law countries, during the next fifteen to twenty years in the face of 'globalisation'. The aim is to develop and illustrate a vision of general jurisprudence for Western jurists in the early years of this Millennium. A jurist from a different tradition, or with a different personal background, would almost inevitably present a significantly different picture. Few of us can break away very far from our intellectual roots.

A cosmopolitan discipline of law must be concerned with all legal phenomena considered to be significant in the whole world throughout history. This is a collective enterprise. Given constraints of expertise, language, and time, any single scholar has to be selective even in presenting an overview. This book does not present a masterly synthesis or a Grand Theory. It suggests and illustrates some ways of studying legal phenomena and presents a particular vision of our discipline, but there are many other ways and visions. It emphasises theorising as an enquiring activity, more concerned with exploring questions than producing neatly packaged 'theories'.¹¹ If there is one single message it is a message of complexity.

About this book

General Jurisprudence is a sequel to *Globalisation and Legal Theory* (2000), which considered the significance of globalisation for Anglo-American Jurisprudence from an historical and analytical perspective. It also builds on Part A of *The Great Juristic Bazaar* (2002), a collection of more detailed studies of some leading jurists in the Anglo-American tradition, especially Jeremy Bentham, Oliver Wendell Holmes, Herbert Hart, and Karl Llewellyn together with some less obvious figures, including R.G. Collingwood, Boaventura Santos, Italo Calvino, and Susan Haack. Extensive cross-references are made

¹⁰ See further *LIC*, Chapter 1. ¹¹ See further *LIC*, Chapter 6, especially pp. 110–13, 129–30.

to these two books, which provide a more detailed background to some of the themes developed here.¹²

The book is divided into three parts. Part A (Chapters 1–8) presents a critical overview of jurisprudence from a global perspective. The chapters suggest that classic Western jurists, including Kant, Bentham, Rawls, Llewellyn, and Hart, need to be reappraised in the context of globalisation and that the juristic canon should be revised, reinterpreted and extended to include a new generation of Western jurists, including Patrick Glenn, Boaventura Santos, Brian Tamanaha, Thomas Pogge, and John Tasioulas, as well as thinkers who throw light on non-Western ideas and interests. Part B (Chapters 9–14) develops and illustrates earlier themes by exploring in detail the implications of adopting a global perspective for a number of specific topics including diffusion of law, surface law, the roles of law in ‘development’ (with special reference to poverty reduction strategies), and extending the juristic canon to non-Western jurists. The website attached to this book makes available a series of self-standing essays (Chapters 15–17) and appendices that further concretise the general themes.

The chapters in outline

Chapter 1 presents an overview of Western traditions of academic law, a specific conception of legal theory as a heritage and an activity, and a cautionary view of ‘globalisation’ as a complex amalgam of processes that are making the world more interdependent. These processes present a series of challenges to our discipline and to jurisprudence as its theoretical part at different levels of human relations. The chapter sets out reasons for preferring the term ‘general’ to ‘global’ or ‘universal’ in relation to jurisprudence, and it introduces a particular positivist perspective.

Chapter 2 considers analytical jurisprudence, especially conceptual analysis, in light of these challenges and suggests that there are important tasks awaiting analytical jurists to develop a richer framework of analytic concepts that can be used to describe, analyse, compare and generalise about legal phenomena across different legal traditions and cultures.

Chapter 3 addresses the difficulties of constructing broad overviews of law that are not too simplistic. It examines past attempts to ‘map’ law in the world in terms of legal families, traditions, cultures, and state legal systems. Chapter 4, building on the work of Hart, Tamanaha, and Llewellyn, but going beyond them, constructs a flexible conception of law as an organising concept for

¹² In particular *GLT* deals more extensively with ‘globalisation’, legal and normative pluralism, post-modernism, comparative law, and problems of generalisation about legal phenomena. Part A of the present book consists of a complete reworking and updating of lectures given in Tilburg and Warwick in 2000–1 as a sequel to *GLT*. Parts B and C bring together in revised form a sequence of self-standing but linked essays, several of which have been previously published in widely scattered places.

viewing law in the world as a whole and for developing a framework of related analytical concepts.

Chapter 5 approaches normative jurisprudence through a detailed exploration of the implications of adopting a global perspective for classical utilitarianism and Rawls' theory of justice and considers the attempts of Singer and Pogge to move liberal theories onto a world stage.

Chapter 6 deals with human rights as moral, political, and legal rights. Here globalisation has stimulated a revival of debates about universalism and relativism and concerns about ethnocentrism.

Chapter 7 considers the main contemporary challenges to human rights theory in relation to three recent attempts (by Griffin, Tasioulas, and Sen) to provide a universalist justification for belief in human rights as moral rights.

Chapter 8 considers the challenges of globalisation to social-theoretical perspectives on law and justice with particular reference to empirical legal studies and comparative law.

The next four chapters (Part B) develop particular themes in more detail. From a global perspective diffusion of law – the spread of legal ideas and laws around the world is especially significant. Chapter 9 considers critically some assumptions underlying the literature on 'reception' and 'transplantation' of law and presents a new framework for the study of diffusion.

Chapter 10, 'Surface Law', critically explores alleged 'gaps' between the law in books and the law in action, aspiration and reality, appearance and reality, and theory and practice in a number of legal contexts and examines what it means to say that Alan Watson's 'transplants' thesis, convergence theories in comparative law, and attempts at unification and harmonisation of laws relate only to surface phenomena. Chapter 11 examines different perceptions of the role of law in 'development' with particular reference to the Millennium Development Goals and poverty reduction strategies, using Uganda as a case study.

Chapter 12 explores resistance to the idea of non-state law and shows that this is mostly based on fears that can easily be allayed. It illustrates how state-centric perspectives can lead to marginalising, ignoring, or even rendering 'invisible' normative and legal orders that are often as important to their subjects as official state law and that are particularly relevant in respect of diffusion, law reform, and confronting problems of multi-cultural societies.

Chapter 13, 'Human Rights: Southern Voices', considers the different perspectives and ideas of four 'Southern' jurists about contemporary political and legal approaches to human rights.

Chapter 14 draws together the main themes in Parts A and B.

Part C

The self-standing essays that are made available on the website linked to this book (www.cambridge.org/twining) also develop themes that are touched on in Chapters 1–14. The chapters are numbered sequentially from those in the text.

Chapter 15, 'Some basic concepts', is an exercise in applied analytical jurisprudence. It considers three sets of concepts: (a) relations, persons and subjects; (b) group, community, and society; and (c) the ideas of normative and legal orders, systems, and codes.

Chapter 16 considers four elusive 'isms' – realism, instrumentalism, pluralism, and scientism – as examples of the kind of conceptual elucidation that can be undertaken by a broadened and more relevant view of applied analytical jurisprudence.

Chapter 17, 'Law teaching as a vocation', revisits the International Legal Center's 1972 Report on *Legal Education in a Changing World* and presents a vision of the demands and expectations on scholar-teachers of law in today's world.

Audiences: how to read this book

This is a work of legal theory, but its perspective and approach are multidisciplinary and, it is hoped, it will be of interest to scholars in several other disciplines. It is addressed to three main legal audiences: legal theorists, academic lawyers concerned with the health of their discipline, and undergraduate and postgraduate students.

For jurists it presents an alternative view of the nature and tasks of legal theorising that diverges from predominant fashions in legal theory. This conception of legal theorising as an activity claims to be more coherent, more directly related to specialised scholarship, and more immediately relevant to current pressing issues such as human rights, poverty reduction, diffusion, harmonisation of laws, and corruption.

For academic lawyers generally, and for comparatists and human rights lawyers in particular, it provides a vision of what a genuinely cosmopolitan discipline of law might become and it sets a general context for more particular enquiries. Part A presents a general overview, Part B concretises this perspective at the level of middle order theory and Part C addresses a series of specific topics that will be of interest to different specialists.

General Jurisprudence is also designed for use in undergraduate and postgraduate courses in Jurisprudence or Globalisation and Law (by whatever name) or as general background reading. Part A attempts to give an overview of the implications of globalisation for analytical, normative, and social or empirical jurisprudence by considering both classic mainstream jurists from this perspective and by introducing the ideas of thinkers who have begun to develop different conceptions of general jurisprudence for the new Millennium. It also provides a basic introduction to the work of contemporary liberal philosophers who have tried to construct a philosophical justification for universal human rights as moral rights that avoids the pitfalls of ethnocentrism (Griffin, Tasioulas, and Sen) and of contemporary 'Southern' jurists whose

ideas deserve to be better known. The essays in Parts B and C are self-standing and can be read selectively in any convenient order. They deal more concretely with a range of specific topics and concepts that are of central concern to a global perspective on law.

The time is ripe for a radical rethink of taught jurisprudence. In addition to exploring the implications of ‘globalisation’ with a quite sceptical eye, *General Jurisprudence* presents an alternative conception of legal theory, extends the canon of thinkers worth studying, and establishes closer connections with contemporary issues and specialisms. The text sets out to be accessible, lively, and readable for students, with detailed references and more recondite points confined to the footnotes. It aims to contribute to the cause of making legal theory courses more directly relevant to understanding law in the twenty-first century.

Some general themes

The first ten chapters proceed on two axes. First, they examine critically the ideas of a number of ‘canonical’ jurists from a global perspective and introduce some other thinkers, who might be included in an expanded canon for general jurisprudence. The notes contain select references to a wide range of sources.¹³ But this is not just ‘a book about books’. While not advancing a ‘grand theory’, this book presents and defends a number of theses including the following:

- That most processes of so-called ‘globalisation’ take place at sub-global levels.
- That over-use and abuse of words such as ‘global’ and ‘globalising’ (‘g-words’) fosters a tendency to make generalisations that are exaggerated, false, meaningless, superficial, or ethnocentric. However, for some purposes adopting a global perspective is illuminating.
- That claims to ‘universality’ or ‘generality’ in respect of concepts, norms or empirical facts should be treated with caution if they are based on familiarity with only one legal tradition.
- That jurisprudence can usefully be viewed as the theoretical (more abstract) part of law as a discipline, and that a healthy cosmopolitan discipline of law needs to be underpinned by a conception of theorising as both a heritage and an activity that performs a number of intellectual functions.
- That the spheres of jurisprudence as activity can be conveniently divided into analytical, normative and empirical enquiries, but too much weight should not be placed on these distinctions, because most theoretical enquiries involve conceptual, normative and empirical dimensions.

¹³ The notes and bibliography provide a starting-point for exploring a varied and rapidly developing literature. The bulk of the text was completed in July 2007. The notes contain references to a number of significant works published since then.

- That ‘philosophy of law’ is just one part of jurisprudence, which includes a variety of kinds of theorising at different levels of abstraction. Jurists should be concerned with ‘jurisprudentially interesting questions’, not just with ‘philosophically interesting questions’.
- That the concept of ‘general jurisprudence’ should be interpreted broadly to include any general enquiries about law that transcend legal traditions and cultures. In this context, the idea of ‘global’ jurisprudence is too restricted.
- That the ‘naturalistic turn’ in jurisprudence, which emphasises the continuity of conceptual and empirical enquiries, is to be welcomed in its moderate forms, but not in extreme versions that suggest that there is no place for conceptual analysis.
- That one of the primary tasks of analytical jurisprudence is the elucidation and construction of concepts. In the past Anglo-American analytical jurisprudence has focused primarily on basic concepts of ‘law talk’ (legal doctrine and its presuppositions), usually within a single legal tradition. From a global perspective there is a need for the techniques of conceptual elucidation to be applied to a wider range of discourses (including empirical and normative ‘talk about law’), especially analytical concepts that can be used to transcend legal traditions and cultures.
- Conceptions of law that are confined to state law leave out too many significant phenomena that deserve to be included in a total picture of law from a global perspective. General jurisprudence needs to work with a number of reasonably inclusive and flexible conceptions of law rather than attempt one master definition or concept. In particular, it is useful to conceive of law in terms of ideas (including rules) and of institutionalised social practices (involving actual behaviour and attitudes as well as ideas). A distinction between legal traditions and legal cultures usefully captures this dichotomy.
- Adopting a conception of law that includes ‘non-state law’ should not be interpreted as downplaying the importance of state law, nor should it be taken to imply that it is never legitimate to concentrate mainly on state law and to emphasise the distinctive characteristics of this form of law. Such a broad conception raises difficult issues about how to differentiate legal norms and practices from non-legal norms and practices (‘the problem of the definitional stop’). My position is that where the line is most sensibly drawn should depend largely on context.
- In constructing a broad overview or map of legal phenomena in the world as a whole it is useful to differentiate different levels of relations and of ordering such relations. Such an overview can use law as a flexible organising concept, which provides a framework of analytical concepts that can be useful in interpreting, describing, comparing, and generalising about legal phenomena.
- Modern Western normative jurisprudence has been universalist and secular in tendency, as is illustrated by theories of natural law, utilitarianism, and

human rights. This is challenged by pluralism of beliefs, recent religious revivals, and various forms of scepticism. Globalisation has stimulated fresh debates about universalism and relativism, about the compatibility of Western values with those of other traditions, and the prospects for cross-cultural dialogue and workable agreements on the conditions for co-existence and co-operation in the context of belief pluralism.

- There have been some valuable recent attempts to provide a philosophical justification for human rights as moral rights as part of liberal-democratic theory, but to date these have not paid serious attention to values rooted in other belief systems.
- That broader and more empirically oriented approaches to the study of law, exemplified by realism, law in context, and socio-legal perspectives have been absorbed into the mainstream of legal studies in a few countries. This is an important first step in the direction of increasing awareness of the empirical dimensions of law and justice, but we are a long way from making knowledge and understanding of law evidence-based, cumulative and explanatory, let alone 'scientific' in any strong sense.
- Feminism, human rights, critical theory, and other movements that cut across traditional classifications of legal theory and fields of law present further challenges to the development of our discipline in the context of globalisation.
- Diffusion, pluralism, multi-culturalism, and 'law and development' are among the general topics that become more salient when one adopts a global perspective.
- Comparison is a crucial first step on the road to generalisation and an empirically grounded comparative law will have a crucial role to play in the development of a healthy cosmopolitan discipline of law.¹⁴

Some of these themes are further concretised by the chapters in Part C (on the web). It is obvious that globalisation mandates the institutionalised discipline of law to broaden its geographical and intellectual horizons. My purpose here is to illustrate how this can be done within the common law tradition and beyond.

W L T

Coral Gables April 2008

¹⁴ This theme is developed in *GLT*, Chapter 7 and at pp. 255–6.

general jurisprudence does not reflect well on the philosophical interest of the latter. I want to remain entirely open-minded about the possibility that jurisprudence is interesting philosophically and otherwise in other ways. Indeed, a possible conclusion of my discussion is precisely that philosophers interested in the law should stop obsessing about the parts of jurisprudence that seem to be the pale shadows of metaethics, and focus on other things instead. I get back to this thought in the concluding section.