§ Law in Context

DAVID B. GOLDMAN

Globalisation and the Western Legal Tradition

Recurring Patterns of Law and Authority

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Globalisation and the Western Legal Tradition

What can 'globalisation' teach us about law in the Western tradition? This important new work seeks to explore that question by analysing key ideas and events in the Western legal tradition, including the Papal Revolution, the Protestant Reformations and the Enlightenment. Addressing the role of law, morality and politics, it looks at the creation of orders which offer the possibility for global harmony, in particular the United Nations and the European Union. It also considers the unification of international commercial laws in the attempt to understand Western law in a time of accelerating cultural interconnections. The title will appeal to scholars of legal history and globalisation as well as students of jurisprudence and all those trying to understand globalisation and the Western dynamic of law and authority.

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CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo

Cambridge University Press
The Edinburgh Building, Cambridge CB2 8RU, UK
Published in the United States of America by Cambridge University Press, New York

www.cambridge.org
Information on this title: www.cambridge.org/9780521688499

First published in print format 2008

ISBN-13 978-0-511-47394-4 eBook (Adobe Reader)

ISBN-13 978-0-521-68849-9 paperback

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Preface

History shows that humans attempt, with some success, to control what was previously uncontrollable. Now more than ever, globalisation and its technological manifestations attest to humans surprising older generations by increasing their control over, for example, time and space, the atom, health and food production. Yet globalisation has a history with roots deeper than the topsoil of its late twentieth-century receipt into popular language. The roots penetrate to a core reservoir of philosophical, theological and legal aspirations. Thought about in this way, these aspirations appear never to leave us even though, technologically, humans can make such incredible advances over their physical constraints (with good and bad implications).

This book explores the recurring, deeper level problems of authority underlying law in 'the West', with a sense of hopefulness for the future, but also with some anxiety about the way law is conceived and used today. The conviction emerged during the composition of this book that a major theme of the Western legal tradition is that humans invest their constitutions and legal discourses with vital visions for the future which are too easily forgotten when revolutionary urgencies are perceived to have passed. Today, it seems important to be aware of this decadent potential of law. Rights can be proclaimed as 'global', 'fundamental' or 'universal' in the service of partisan objectives without thought for the bloody signposts of their evolution. If those historical signposts are forgotten or worse still ignored, what foundation can there be for the changes which must come in the future? In making choices, what confidence can be available?

These signposts come into focus, in chapter 2, with the exploration of dualities from globalisation literature such as universality and diversity, space and time, and state sovereignty and world society. A 'Space–Time Matrix' is offered as a comparative model for attempting to understand historical patterns of law and authority, by reference to interior moral and exterior political impulses, and versions of history and visions of the future, in chapter 3. This model is then applied to Western history in order to illuminate the development of the Western legal tradition and its usefulness for understanding globalisation and its challenges to the sovereign nation-state.

Chronological discussion begins with the unrest of the original European community, in chapter 4, culminating in the Papal Revolution and the birth of

the Western legal tradition around 1100, in chapter 5. An expansive notion of a 'holy Roman empire' is adopted to describe the God-centred norms and government which grew amidst a universalist moral and political discourse maintained by a supranational Catholic church, constitutionally co-ordinated with feudal princes and their diverse realms. Territorial ideas of law and authority grew away from the Christian commonwealth, leading to the idea of the state, considered in chapter 6. Notwithstanding a universalist European legal science, states fostered their own particular legal orders after the Protestant Reformations, assisted by the 'legislative mentality', explored in chapter 7.

The emergence of a European public international law system of states in the seventeenth century was increasingly secular. Universalist moral and political authority decreased. By the eighteenth century, and the arrival of the liberal political economy, it becomes possible to see the God of the loosely defined Holy Roman empire being challenged by what might be thought of as a new god of Mammon. In the extreme, this may be associated with a 'wholly Mammon empire', although the picture is more complicated. Contemporary with the Enlightenment and the French Revolution, universal human rights and the 'codification mentality' have their origins, discussed in chapter 8, although constricted in operation to the nation-state and its particularistic notions of authority which are explored in chapter 9. The common human catastrophe of the twentieth-century 'World Revolution' of the two world wars, we see in chapter 10, has established human rights and free trade norms as morally and universally attractive although politically problematic as tenets of a pervasive new secular authority.

Two case studies of competing jurisdictions highlight, respectively, the recurring natures of public authority and private authority. Publicly, the European Union demonstrates the constitutional reversion from the European public international law model to a modernised version of the Christian commonwealth, centred less on God than on market values. This we see in chapter 11, where lessons of regional and global scope are drawn from European Union constitutionalism. Privately, international commercial law is traced historically to illustrate the change in the underlying god-concepts and to show the historical viability of law without the state, in chapter 12. The *lex mercatoria,* international arbitration and the codification of European contract law are evaluated for their elucidation of cross-border authority.

I have not been able to separate bookish tendencies from my practice as a lawyer and concern as a human being. (These latter two attributes are not necessarily mutually exclusive.) These pages endeavour to reflect more than a purely historical or conceptual approach to law. Recommendations are presented by way of conclusion, in chapter 13, for understanding and participating in law more meaningfully in our global era through a renewed historical consciousness.

Perhaps ironically, the space and time constraints inherent in writing a book have led to shortcomings in a work devoted to developing a legal theory which

promotes the relevance of space and time. At the outset, I should respond to two obvious criticisms. A book about the Western legal tradition which is based upon sources appearing only in English commits an injustice by ignoring shelves of relevant Continental writings. For this I must plead personal linguistic limitations and practical experience of only the Anglo-Australian legal system. Fortunately there are some (but not enough) books in translation which I have considered. Also inviting criticism is this book's degree of generalisation in covering such vast spaces and times, a defence of which is offered in chapter 1. Because no discipline, profession or vocation alone tells the whole story about the creation, acceptance and maintenance of authority, I have trespassed outside my own experiences of legal education and practice. Whatever criticisms may be deserving, I do hope that they will be vindicated in some measure by provoking debate about the relationship of history, globalisation and law in the quest for meaningful and just social orders at all levels.

This book has benefited immensely from the support and encouragement of the persons and institutions below, to whom I extend my deepest gratitude (of course, without implicating them in any deficiencies which remain in my text). Momentum for the thoughts in this book was sprung from a stimulating undergraduate legal education at Macquarie University Law School in the early 1990s. The book began as a Ph.D. thesis at the University of Sydney Faculty of Law, supervised by Klaus A. Ziegert, later with indispensable co-supervision by Jeremy Webber and associate supervision from Patrick Kavanagh. The law firm Deacons accommodated my need at times for flexible employment arrangements. An Australian Postgraduate Award scholarship enabled me to undertake full-time research between 1999 and 2001. William Twining has generously commented on the revised manuscript of this book, amongst other kindnesses. I have also benefited greatly from comments and kind support at various stages from Harold J. Berman, H. Patrick Glenn, Ian Lee, Heidi Libesman and James Muldoon. Anonymous reviews from Cambridge University Press were also helpful. The Julius Stone Institute of Jurisprudence at the University of Sydney and its Law Library have extended vital research facilities and collegiality. Cambridge University Press, particularly Finola O'Sullivan and Sinéad Moloney, have been patiently supportive, and provided professional production by Richard Woodham and Wendy Gater with keen-eyed copy-editing by Sally McCann.

My mother, Rhonda, and sister, Jane, have been encouraging of this enterprise and tolerant of my distractedness; in addition to which my father, Alec, has assisted with current affairs observations from his many subscriptions. Especially to my wife Yvonne, and infant sons, Benjamin and Jeremy: thank you for your patience and for being a voice of measure for this book and in life – it is now time for an overdue holiday and much more play.

Christmas Eve 2006
Sydney, Australia

1

Introduction

Children often wonder why things are the way they are. Although a child appears to enjoy what can become a never-ending game of asking 'but why?' after every answer given by an adult, the child is innocent enough to be dissatisfied with what the adult is forced by experience to take for granted. Children are naturally curious and question what the adult has become accustomed not to question. The child's logic challenges the adult's custom. So might the curious social observer challenge the legal status quo. In this vein, I seek to investigate what globalisation can teach us about law in the Western tradition, and what the Western legal tradition can teach us about globalisation. The subtitle of this book anticipates my conclusion that globalisation demonstrates recurring patterns of law and authority. Recognising these patterns is crucial to advancing law in the third millennium. To appreciate these patterns requires the child's sustained wonder, and the uncommon sense that the world we see today began long, long before the adult's lifetime.

Philosophy has its origin in simple wonderment perhaps akin to that of the child. Such simple wonder at things being the way they are is captured in the Ancient Greek concept of *thaumazein*, for example in the dialogue of Socrates with the perceptive youth Theaetetus.[1] This curiosity is a 'playful looking about when one's quite immediate vital needs are satisfied', which, if unchecked, develops into the philosophy of philosophers.[2] An enquiry which proceeds explicitly under this banner may hazard being childish, especially when the enquirer has worked long enough in the legal profession to be considered an adult or at least a youth who knows his way about. I believe this risk to be worth taking. The prevailing, unquestioning acceptance of law as a tool of the state for achieving social goals with which one may or may not agree as a matter of

[1] Plato, *Theaetetus*, in B. Jowett (ed. and trans.), *The Dialogues of Plato*, 5 vols. (Oxford: Oxford University Press, 1892), vol. IV, 155c–d, p. 210: '[W]onder is the feeling of a philosopher, and philosophy begins in wonder. He was not a bad genealogist who said that Iris (the messenger of heaven) is the child of Thaumas (wonder).'

[2] Edmund Husserl, 'The Vienna Lecture: Philosophy and the Crisis of European Humanity' appearing as Appendix 2, in *The Crisis of European Sciences and Transcendental Phenomenology*, trans. David Carr (Evanston: Northwestern University Press, 1970), p. 285. Husserl was critical of this purely theoretical attitude. His criticism can be deflected if better questions can be formulated independently of staid answers.

convenience (as opposed to being a measure, say, of virtue or redemption with ethical significance) demands the asking of basic questions in the quest to shed light on what is happening to law today in this time of 'globalisation'.

Adopting the stance of the inquisitive and inadvertently philosophical child, enquiry about law might proceed with the adult as follows (and this is not so far from contemporary, mainstream jurisprudential thought):

Question 1: Why is something law?
Answer 1: Because the state says so.

Question 2: Why does it say so?
Answer 2: Because people must listen to the state.

Question 3: Why must they listen to the state?
Answer 3: Because the state has power over them.

Question 4: Why does the state have power over them?
Answer 4: Because the people gave it the power.

Question 5: Why did the people give it the power?
Answer 5: Because people want to live orderly lives.

Question 6: Why is this orderly?
Answer 6: Because the people said so.

Question 7: Why did they say so?
Answer 7: Because that's what's best for people.

Question 8: Why is that best for people?
Answer 8: Because they want to get on with their lives.

Question 9: Why do they want to get on with their lives?
Answer 9: Because they've got to earn money.

Question 10: Why do they want to earn money?
Answer 10: To feed children. You do want to eat, don't you?

In this context – and other paths of frustrating logic can be contemplated – the present book seeks to make a contribution. The 'how?' instead of 'why?' question will instead be asked in the hope that better questions should lead to better answers. 'How is something law?' is the better question. Although a little semantic at first glance, the 'why?' question assumes that there is a cause. Maybe there are causes or even one cause; however those causes would be so imbued with ideology and contention that there could never be widespread agreement as to those causes let alone one single cause. Rather, in asking 'how is something law?', the opportunity presents to examine the meaning underlying the social order. Social order and social change are, above all, testaments to meaning and humans' understandings of their relationships to their environment and ultimate reality and meaning. The 'how?' question provides greater scope to

appreciate law throughout history (time) and across cultures (space) even within just one tradition – the Western tradition – enabling lessons to be learned from the social manifestations of changes in patterns of thought.[3] Enquiries into 'how?' changes occurred at different times, and in different places and spaces, yield more helpful answers than speculation merely as to 'why?' they occurred. 'How?' is linked to the processes of accomplishing change by reference to what can be argued to be legitimate; whereas 'why?' guesses at causation. By approaching the enquiry into the modern legal condition as a study in the achievement of authority, the temptation of a precocious child to answer the questions of the world with little life experience can be balanced with the answers dictated by the less critical experiences of an adult.

Detailed enquiry into the word 'globalisation' will proceed in chapter 2. For the time being, the simple definition of it as 'the accelerated interconnections amongst things that happen in the world' will suffice. Globalisation presents a timely opportunity to appreciate law for something it has always been, as the sovereign nation-state visibly declines as the monopoly law creator and maintainer. A major contention of this book is that law in the West has never come only from one place; it has never, for any extended period of time, been validated by only one system of doctrine and belief; and it has never required territorial exclusivity for its essence. Such recurring themes will be seen in the selective chronological analysis of the Western legal tradition. Chapter by chapter, a secular, economics-grounded authority, which might be caricatured as a 'wholly Mammon empire', emerged from the medieval Christian commonwealth, which can conveniently be thought of as a 'holy Roman empire'.[4]

1.1 The Western legal tradition

Before exploring 'globalisation' in the next chapter, in the detail befitting such a ubiquitous buzz word, the 'Western legal tradition' presents its own conceptual challenges. The phrase as it is used in this book derives from the subtitle of Harold J. Berman's first volume of *Law and Revolution – 'The Formation of the Western Legal Tradition'*.[5] Arguably the term 'Western legal tradition' has a life of its own, popularised if not coined by that author.[6] The term has come to carry a set of specific attributes identified by Berman, which are considered below in

[3] For other approaches which take this question seriously, see Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983), pp. 336, 361; G. R. Elton, *English Law in the Sixteenth and Seventeenth Century: Reform in an Age of Change* (London: Selden Society, 1979), p. 4; and William Twining, *Globalisation and Legal Theory* (London: Butterworths, 2000), pp. 76–81 (proposing Karl Llewellyn as 'the jurist of the How'). See too chapter 3, section 3.2, pp. 58–9 below for reference to Husserl's philosophy of 'how'.

[4] On these nuanced notions, see chapter 4, section 4.1, pp. 80–1 below.

[5] Berman, *Law and Revolution.*

[6] John Witte Jr, 'From Homer to Hegel: Ideas of Law and Culture in the West' (1991) 89 *Michigan Law Review* 1618–36, 1619.

section 1.5. The components of the term do warrant some basic elaboration in the meantime: the words 'Western', 'legal' and 'tradition' may all mean different things to different people.

1.1.1 'Western'

The idea of the 'West' is used in this book to locate, culturally, multiplex legal phenomena occurring at a generalised level in Western Europe and in its colonial offspring (for example, Australia, Canada, New Zealand and the United States of America). Variations on the 'West' will be used alternately with 'Europe'. England, whilst geographically separated from the Continent, is undoubtedly part of this description, given its Romanist legal influences and reciprocal intellectual and religious contributions. R. C. van Caenegem's 'First Europe' of the eighth- and ninth-century Carolingian dynasty – present-day France, western Germany, Belgium, the Netherlands, Luxembourg, Switzerland, north-east Spain and northern and papal Italy – are clearly within the Western and European purview.[7] Ancient Greek philosophy, Jewish spirituality and Roman law, whilst outside this territory and time frame, made their way into the West of my concern, by way of adoption, transformation and reconciliation.[8]

Since the heartland of the 'Roman' Empire shifted to Byzantium in the fourth century, Greece and more eastern European countries have periodically parted ways with certain trends in the West (the main political significance of which was the 'Caesaropapism' of the Orthodox Church fusion with Empire, which was different from the Western constitutional separation of the spiritual and secular powers). Associated Eastern European legal history is therefore not included in my notion of the Western legal tradition. For the past 500 years, Russia has teetered on the verge of Europe, although more lately its twentieth-century Marxist Revolution was directly inspired by European thought,[9] and its main constitutional developments have taken place in the European part of its territory.[10] Distinctive features of Western civilisation, such as Catholicism, the fifteenth-century Renaissance, the Protestant Reformation and the Enlightenment are mostly absent from the Russian experience.[11] For lack of direct relevance to the task at hand, although not lack of importance to understanding law and globalisation (especially in respect of their movement to market economies), these territories have generally been omitted from my discussion.

There were Arabic influences on the West, particularly in philosophy (including Aristotelian natural law) and science in the early second millennium. The presence of Arab communities in the Mediterranean basin may have helped to

[7] R. C. van Caenegem, *An Historical Introduction to Western Constitutional Law* (Cambridge: Cambridge University Press, 1995), p. 43.
[8] Berman, *Law and Revolution*, p. 3.
[9] See Norman Davies, *Europe: A History* (London: Pimlico, 1997), pp. 11–13.
[10] van Caenegem, *Western Constitutional Law*, p. 6.
[11] See Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon & Schuster, 1996), p. 139 and pp. 144–62 on Greece.

provoke the profound Western developments in law of the late eleventh century. The Western legal tradition may have been influenced doctrinally in a relatively minor way by Islam.[12] Constitutionally, nonetheless, the legal science and systematisation of legal doctrines associated with the emergence of the Western legal tradition appear to be a peculiarly Western phenomenon.

1.1.2 'Legal'

Enquiry into the meaning of 'legal' is to ask the question: 'what is law?' Books on the philosophy of law and conventional jurisprudence attempt to deal with this question. A brief statement from a number of schools of thought is all that is required for deriving an idea of 'legal' for present purposes. The popular, positivist definition of law by H. L. A. Hart holds law to be generally obeyed rules of behaviour, valid according to rules of recognition (such as a constitution) accepted by public officials.[13] Natural law exponent John Finnis might add to this definition the requirement that law aspire to practical reasonableness.[14] These positivist and naturalist theories are both somewhat dependent upon each other: Hart's rule of recognition (and the similar idea of Hans Kelsen's *Grundnorm*)[15] requires a naturalistic norm to establish the validity of the legal system; whilst Finnis's natural law is dependent upon a positive legal system being in place. Ronald Dworkin, responding to Hart, has maintained that legal authority comes from the history of the political community and the individual's rights against the state.[16] Roscoe Pound, a founder of sociological jurisprudence, viewed law as a social institution for satisfying social wants in a civilised society.[17] This latter definition of law seems to encompass the present, predominant legal mentality, as opposed to the more metaphysical and means-driven (as opposed to ends-driven) philosophy of Finnis.

Definitions of law – of what law is and is not – continue almost *ad infinitum*. As William Twining has argued, the continuities and discontinuities between law and different types of ordering can be obscured by trying to define law too precisely.[18] It is possible in this regard to have some sympathy with Richard

[12] See chapter 5, section 5.4, pp. 108–9 below.

[13] See H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 2nd edn 1994), p. 116.

[14] See John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980 reprinted 1992), esp. pp. 276–7. 'Natural law' for Finnis can be conveyed in three 'rather bald assertions' encompassing: (1) practical principles for human flourishing used by all; (2) requirements of practical reasonableness leading to morally right and wrong acts; enabling (3) 'a set of general moral standards' (p. 23).

[15] There is though a significant difference between the positivisms of Hart and Kelsen: Kelsen is satisfied that there is a single global normative order, whereas Hart admits the possibility that different orders can overlap with fundamental validity depending upon point of view (e.g., as an English person or as an international diplomat). See Neil MacCormick, 'Beyond the Sovereign State' (1993) 56 *Modern Law Review* 1–18, 8–9.

[16] See generally Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977).

[17] See Roscoe Pound, *Introduction to the Philosophy of Law* (New Haven: Yale University Press, 1954), p. 47.

[18] Twining, *Globalization and Legal Theory*, p. 244.

Posner's criticism of enquiries in the manner of Hart and Dworkin, which have attempted to define what law 'is' rather than what law 'does'.[19] The pitfall should be avoided, however, of succumbing to what law 'does' as opposed to the richness of what law 'might be' in light of that which it 'has been', across cultures and through time. Legal authority may come from the state, the tribe, the international organisation or myriad other organisations. Usually there will be some manner of hierarchy for resolving conflicts where they occur amongst these legal systems, in a stable society. Sovereignty may then be said to reside in this hierarchy (rather than necessarily centrally), and it may be shared, for example, between church and state or between state and international bodies.

Bearing in mind the historical development of the Western legal tradition in later chapters, it should be accepted that law can be thought about as 'norms which, for one reason or another, achieve authority or receive allegiance', without the necessity for the centralised sovereign state of the theorists above. Every society has a constitution, not necessarily written. Not every society is a state. A neighbourhood association, tennis club, no less than the Group of Eight, has a constitution, because 'to be a society', as Philip Bobbitt observes, 'is to be constituted in some particular way'.[20] The model of law I advance in chapter 3 aims to progress beyond stereotypical and historically contingent ideas of law by showing the social construction of authoritative norms in terms of space and time. The resulting reliance of law upon intuitive moral and cultural allegiance together with more intellectual political and rational allegiance will then aid the exploration of authority which continues to be constructed in traditional ways in our time of globalisation.

1.1.3 'Tradition'

To have a tradition means to have a history and a framework for the future. That is not necessarily something grandiose, abstract or tautological, such as the satirical school motto, 'A Heritage of Tradition', appearing on an episode of the television cartoon 'The Simpsons'. According to H. Patrick Glenn, a tradition is composed of cultural information brought from the past into the present. A large and great tradition becomes so because it has 'an over-arching means of reconciling different views'.[21] Attempts to close traditions (especially legal traditions) from change fail. Witness God (believed to have been via Moses)[22] and others including Emperor Justinian, Frederick the Great and French

[19] See Richard Posner, *Law and Legal Theory in England and America* (Oxford: Clarendon Press, 1996), pp. 1–37.

[20] Philip Bobbitt, *The Shield of Achilles: War, Peace and the Course of History* (London: Penguin, 2003), p. xxiii.

[21] H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford: Oxford University Press, 2nd edn 2004), pp. 13, 50.

[22] Deuteronomy 4: 1–2. '. . . You shall not add to the word which I command you, nor take from it . . .' (New King James Version, NKJV).

revolutionaries trying to state the law in one place, for all time.[23] Tradition can also evoke emotion, pride and inspiration – for example, church historian Jaroslav Pelikan defines *tradition* as the living faith of the dead (as opposed to *traditionalism* being the dead faith of the living).[24] For present purposes, it is unnecessary to adopt such evocations. It suffices to note that legal if not textual traditions encompass both continuity and change.[25]

Eric Hobsbawm's essay 'Inventing Traditions'[26] is frequently deployed in the social sciences to undermine the notion of tradition. For example, he contends that nationalism has seen some traditions invented 'comparatively recently', typically involving anthems and images. To answer Hobsbawm's notions, the Western legal tradition is not 'recent'; it is not based upon an 'invariant' vision of social life with 'novel situations as anathema'; nor is it pragmatically invalid. 'Invented traditions' are different from 'genuine traditions', according to Hobsbawm, 'where the old ways are alive'.[27] On these criteria, the Western legal tradition is energetically alive, although not without the usual challenges for survival and influence which all traditions face.

1.1.4 A world legal tradition?

The above should not be taken to suggest that the Western legal tradition is the only tradition relevant to globalisation. Nor should it suggest that the Western social experience has not suffered famine, injustice, pestilence, absolutism and inhumanity, which still have the ability to reappear. The Western narrative has not been an inexorable journey of progress 'from Plato to NATO'.[28] On the contrary, exciting prospects arise for a plurality of legal traditions to exist side by side, to enrich each other through the sharing of information. The Western legal tradition as, in effect, the first legal tradition on the scene with a global reach if not grasp in some fields may have the constitutional resources to respond to this challenge through its historical emanation from competing legal systems in Europe. In mixing with the traditions of other cultures of greater difference, it may be transformed. In time it may then be possible and desirable to speak of a world legal tradition.[29] Any such tradition would be loose and, if at all possible,

[23] Martin Krygier, 'The Traditionality of Statutes' (1988) 1 *Ratio Juris* 20–39, section 7.

[24] Jaroslav Pelikan, *The Vindication of Tradition: The 1983 Jefferson Lecture in the Humanities* (New Haven: Yale University Press, 1984), p. 65.

[25] See Martin Krygier, 'Law as Tradition' (1986) 5 *Law and Philosophy* 137–62, 251–4. See too William Twining, 'Glenn on Tradition: An Overview' (2005) 1 *Journal of Comparative Law* 107–15.

[26] See Eric Hobsbawm, 'Introduction: Inventing Traditions' in Eric Hobsbawm and Terence Ranger (eds.), *The Invention of Tradition* (Cambridge: Cambridge University Press, 1983).

[27] Hobsbawm, 'Inventing Traditions', pp. 1–13.

[28] This is shown in David Gress, *From Plato to NATO: The Idea of the West and its Opponents* (New York: The Free Press, 1998).

[29] The major proponent of – if not founder of – the term 'Western legal tradition', welcomes this possibility: Harold J. Berman, 'The Western Legal Tradition in a Millennial Perspective: Past and Future' (2000) 60 *Louisiana Law Review* 739–63, Section II C, D.

something of a collection of approaches to the idea of tradition.[30] The Western heritage might still be visible, amidst valuable doctrines and ways of thinking about law from other traditions. It is to be hoped the result will be a richer conception of law, less reliant upon the normative monopoly of the state in the Western fashion of the past two or three centuries.

The prospect for something enduringly new to come from the melting pot of cultures and traditions heralded by globalisation is not without precedent from the Western legal tradition. Roman law, Hebrew theology and Greek philosophy are often thought to be hallmarks of the Western cultural achievement. Yet each in its historical time, taken in isolation, was antagonistic to the other. It was only in their adoption by a later culture we know as 'Western' that they became reconciled and merged in a way of living and thinking.[31] A global or world legal tradition may one day, with the appropriate attitudes, synthesise now disparate ideas and practices into a discourse which may maintain stability whilst accommodating change within manageable, consistent parameters of normativity and meaning. This may already be within the Western collective experience. Cultural relativism and understandable fears of Western imperialism must first be addressed with appropriate sensitivity, the pursuit of which is embarked upon in chapter 10.

1.2 Patterns of law and authority: from the celestial to the terrestrial

Whereas once the Judeo-Christian God was the source of meaning at the core of legality in the Western legal tradition, economics appears now to be emerging as the significant discourse. A universal discourse, be it of God or economics or human rights, or a mixture of such discourses, has been necessary to legitimate all Western constitutional law, including decisions of legislatures. Just how these *actual* sources of authority changed, yet the *patterns* of authority underlying Western constitutionalism have recurred, serves to plot the trajectory of my historical discussion and the questions to be asked.

As will be explored in more detail later in chapter 3, all law requires legitimacy from discourses of authority purporting to describe some manner of ultimate reality and meaning. By way of introduction and for conceptual ease, sources of legal authority may be illustrated by reference to the depiction of fundamental law in certain artworks.

In the ninth century, the Ten Commandments were portrayed, in an illustration in the Bible of Montier-Grandval,[32] as being literally handed to Moses from

[30] On traditions of traditions, see Krygier, 'Traditionality', section 7, referring to Karl Popper.

[31] See Berman, *Law and Revolution*, p. 3. This emergence was not smooth, contrary to what chauvinistic and perhaps nationalistic writers about the idea of 'the West' have sometimes propounded, as observes Gress in *Plato to NATO*.

[32] *Moses Receives the Tables of the Law; Moses Presents Them to the People*, from the Bible of Montier-Grandval, mid-ninth century, miniature on parchment, British Museum, London, in Sara Robbins (ed.), *Law: A Treasury of Art and Literature* (New York: Hugh Levin, 1990), p. 34.

a hand penetrating from a heavenly ceiling with two angelic beings hanging upside-down in the top of the scene. In the lower part of the drawing, in a separate scene, Moses is portrayed as presenting that law to the people. Papal authority was similarly thought to be directly, divinely ordained at that time, as will be seen in chapter 4.

In the seventeenth century, Rembrandt depicted the same biblical event very differently.[33] Pensively, Moses carries the Decalogue above his forehead. He stands in front of Mt Sinai, with realistically drawn cloud settled on the mountain. There is the hint in the Rembrandt that the seventeenth-century interpretation of Moses had him invested with more personal agency in the carriage of the laws; neither God nor the angels are to be seen. In chapter 7, we shall witness a coeval rise of a 'legislative mentality' possessed by less inhibited kings freed from papal law, with a differently conceived divine right and ability to create law.

A depiction of the authority of the Declaration of the Rights of Man and Citizen, in the late eighteenth century, features different symbols of authority.[34] Two tablets, slightly resembling those carried by Rembrandt's Moses, are set into a Romanesque sandstone monument. A capstone features the French title of the document, with a smaller reference attributing it to the human agency of the National Assembly. In keeping with this agency and coeval revolutionary ideals, a woman crouches, holding a broken shackle. Yet, to the right of the capstone, an angel sits leaning against it, pointing above towards the Enlightenment symbol of the all-seeing eye in the triangle – a (perhaps Trinitarian) symbol of God adopted on the United States Great Seal.

Further ambivalence towards the source of constitutional authority features in a nineteenth-century oil painting. J. B. Mauzaisse depicts the French Civil Code,[35] the Code Napoléon, held by Napoleon with his pen poised. Yet this human legal creation is surrounded with images of historical and divine authority. Floating on a cloud sitting only marginally higher than Napoleon, an angelic if not God-like figure representing Time sits over what looks like the Grim Reaper's scythe, crowning Napoleon with a Roman laurel. Napoleon's foot rests on the outstretched wing of an eagle. He sits over further Roman imperial imagery in the form of the senatorial mace at the top of which perches an ornamental gold eagle. Mauzaisse ascribes divine and deeply historical symbolism to Napoleon's law. The 'codification mentality' of this era, associated with the deistic belief that God had invented but abandoned the world, is explored in chapter 8.

[33] Rembrandt, *Moses with the Tables of the Law*, 1659, oil on canvas, Gemäldegalerie Staatilche Museen Preussischer Kulturbesitz, Berlin, in Robbins, *Law*, p. 35.

[34] *Declaration of the Rights of Man and Citizen*, c. 1789, Musée Carnavalet, Paris, in Robbins, *Law*, p. 139.

[35] J. B. Mauzaisse, *Le Code Napoléon Coronne par le Temps* (The Napoleonic Code Crowned by Time), 1833, oil on canvas, Le Musée National de Château de Malmaison, Rueil, France, in Robbins, *Law*, p. 201.

These are the observations of no art critic or *aficionado*. The selection is drawn from one book. No art in that book celebrates the tables of the United Nations Charter or the treaties of the European Union. If such art exists, it might not feature supernatural imagery. To reflect the new sources which inspire law, one might expect to find in this art an emphasis on human agency, industry and affluence, reflecting a fundamental transformation from celestial to terrestrial legal authority in the second millennium.[36]

Although the artworks described above do not amount to a scientific demonstration of the constitution of legal authority, they literally if not artistically illustrate the point that, at least according to these artists in their times, law is connected to sources of authority outside contemporary time and space, and these sources are open to change and reinterpretation. Whether law can continue to be inspired by the profoundest perceived sources of authority will depend upon the richness of the social philosophies which inspire and are relied upon by the legal imagination today. The conclusion to emerge in chapter 10 is that although sources of authority may have changed, the patterns of legal authority in the West have not. Law is dependent upon perceptions of ultimate reality and meaning.

1.3 Grand theory in the human sciences

Attempting to write about the Western legal tradition, in the qualified sense suggested, might appear ambitious enough. Yet globalisation must be brought into the analysis, too. This venture is not as overconfident as it might at first seem. The title is 'Globalisation *and* the Western Legal Tradition'. One might know something of the Western legal tradition or something of globalisation. The 'and' could cause some problems by introducing additional scope, although this conjunctive word can also add much needed refinement. This book is neither an exhaustive treatment of the Western legal tradition nor of globalisation. My concern is with the Western legal tradition as it can be elucidated by reference to globalisation, and vice versa. The Western legal tradition is explored by reference to the supra-territorial interconnections which suggest globalisation is a challenge less radical to the legal tradition than might otherwise be expected. Globalisation is explored for associated and recurring legal themes – namely, competing legal systems and jurisdictions, and universal patterns of authority comprising cultural and rational allegiances. This underlies my guiding aim: to investigate the phenomenon of law from my Western (specifically Australian) location and dawning third millennium time, and to enquire into its nature by reference to its history and perhaps its most obvious challenge, globalisation.

An aspiration of this book is to present, more generally, a meaningful framework for viewing the role of law in the social order, and the role of the social order in constructing law. The purpose behind doing so is to attempt to

[36] But see the background to the EU flag, in chapter 11, section 11.5, p. 270 below.

understand the reality of law and what constitutes law; to attempt to fathom, where possible, the limits and potentials of attitudes towards the social order and law; and to formulate a strategy for pursuing meaningful social order and law.

Each chapter and many sub-headings of this book could perhaps justify a dedicated Ph.D. or book from one of a number of social science and humanities disciplines. Analytical depth has been of particular concern to historians. Into how much depth should one delve? How many pages must be written, and how very many more pages read, about how many numerous topics, before one can make assertions about the discipline of study within which one writes? Norman Davies broaches this concern in the introduction to his book *Europe: A History*. He makes the critical remark that the magnification of historical detail into very short time periods 'is an example of the modern compulsion to know more and more about less and less'. Against this, the *Annales* school of history, from 1929, attempted to encourage 'specialists, whilst carefully tending to their own gardens, to take the trouble to study the work of their neighbours' in not only economics and sociology, but also psychology, demography, statistics, geography, climatology, anthropology, linguistics and medical science.[37]

Broad enquiry must be balanced with the potential to be too eclectic with insufficient supporting detail. A 'big-picture' approach must still, though, have its place in the attempt to make one's discipline relevant to contemporary developments and the wider community. In law, these connections are easy to make and difficult to contain. In the preface to his thoroughgoing theoretical investigation of, and recommendations for, world order, Philip Allott highlights this plight by remarking that his 400-page book required fifteen years of tenured academic appointment. It was

> difficult to sustain psychologically, as one area of study led on to another and there seemed no prospect of ever reaching an overall view of a kind which could be communicated to others. It is a ramshackle castle of self-reflection which the human mind has constructed over the last four or five thousand years . . . It is a place of interconnecting rooms, echoing with discordant voices, rooms with more or less arbitrary names on their half-open doors – Theology, Metaphysics, Epistemology, Moral Philosophy, Aesthetics, Philosophy of Science, Political Theory, Social Theory, Economic Philosophy, Legal Philosophy, Constitutional History, Economic History, Social History, Diplomatic History, and so on and strangely on.[38]

Specifically in the context of globalisation, after nearly ten years of research into globalisation and legal theory, William Twining felt able to provide only an 'interim report'. Fortunately, according to the job description he applies to the jurist, he is 'a licensed dilettante as well as a hired subversive'.[39] In making

[37] Davies, *Europe*, pp. 1, 955–6.

[38] Philip Allott, *Eunomia: New Order for a New World* (Oxford: Oxford University Press, 1990), p. xvi.

[39] Twining, *Globalisation and Legal Theory*, pp. 2–3, 90.

references to 'Grand Theory' or 'big-picture' approaches, not only the difficulties[40] but also the legitimacy attaching to such interdisciplinary study within the field of law may be appreciated.

More intuitively, the present age and that which is to come are overly concerned with particulars, at the cost of general themes which can bring understanding and fulfilment. The particularistic mentality was captured in Aldous Huxley's prophetically satirical *Brave New World*. 'For particulars, as every one knows, make for virtue and happiness; generalities are intellectually necessary evils. Not philosophers, but fret-sawyers and stamp collectors compose the backbone of society', according to Huxley's Director of Hatcheries and Conditioning.[41] For an unchallenged, strait-jacketed, predictable society, that may be alright. For our globally challenged society, excessive concentration upon particulars without reference to overall, general meanings and directions is seriously detrimental not only to personal fulfilment and self-awareness, but also to the economy which relies for efficiency upon individuals with a sense of purpose.

As such, the present book may well fall into the category of a renascent genre of legal scholarship, 'general jurisprudence'.

1.4 General jurisprudence

General jurisprudence is a notion which has been around for some time. It describes a 'big-picture' attempt to understand the nature of law in different social contexts or legal systems – that is, with some level of generality. The concern of Aristotle to separate universally held natural law propositions from particular positive laws varying from place to place (such as a goat and not two sheep shall be sacrificed)[42] was a type of general jurisprudence. The term developed currency in the eighteenth and nineteenth centuries. In this recent discourse, discussion begins with Jeremy Bentham.[43] In England (the Continental notion of 'general jurisprudence' was different),[44] perhaps surprisingly, in view of their fixation on sovereigns resembling states, John Austin[45]

[40] In addition to the scholarly difficulties of grand theory, many 'postmodernists' are cynical of the human ability to know and to generalise. According to Quentin Skinner, that very scepticism, when expanded, itself becomes a big picture view of the world, even if that picture is one of disorder or the need for enquiry into the concepts themselves: Quentin Skinner, 'Introduction: The Return of Grand Theory' in Quentin Skinner (ed.), *The Return of Grand Theory in the Human Sciences* (Cambridge: Cambridge University Press, 1985 reprinted 1997), p. 3.

[41] Aldous Huxley, *Brave New World* [1932] (Essex: Longman Group UK, 1989), p. 2.

[42] Aristotle, *The Nicomachean Ethics*, trans. David Ross (Oxford: Oxford University Press, reprinted 1980), V, 7, p. 124.

[43] See Twining, *Globalisation and Legal Theory*, ch. 3.

[44] A Continental sub-discipline of general jurisprudence sought to establish itself somewhere between the abstraction of legal philosophy and the practicality of legal dogmatics, in the first half of the twentieth century: William Twining, 'General Jurisprudence' in Manuel Escamilla and Modesto Savedra (eds.), *Law and Justice in a Global Society* (Granada: International Association for Philosophy of Law and Social Sociology, 2005), section IIb, referring to Van Hoecke.

[45] See John Austin, *The Uses of the Study of Jurisprudence* (London: Weidenfeld & Nicolson, 1954).

and H. L. A. Hart[46] considered themselves to be involved in the project of a general jurisprudence. That was so because they sought to lay down the principles of a theory of law which they believed was universally applicable to all law. In the global age, with these older concepts of centralised law muddied by jurisdictions of all shapes, sizes and locales, the need for attention to a general jurisprudence is returning to contemporary thought and legal practice.

Three contemporary theorists have taken the challenge of general jurisprudence seriously. William Twining and Brian Tamanaha use the specific phrase 'general jurisprudence' in their writings, and Harold J. Berman uses the term 'integrative jurisprudence' in similar terms and for the same goal of developing a general approach to law in the context of particular theories which do not singularly capture the complexity and diversity of law. Other authors implicitly suggest the need for a general jurisprudence, significant contenders perhaps being Boaventura de Sousa Santos,[47] Philip Allott,[48] H. Patrick Glenn[49] and Niklas Luhmann.[50] Tamanaha, Twining and Berman deal squarely with the concept of a general jurisprudence for our global era.

Tamanaha develops the notion of a general jurisprudence in what he calls a 'socio-legal positivist' fashion, reviewing law-type phenomena and reducing them to a universalist, 'core concept' of law – namely, 'whatever people identify and treat through their social practices as law'.[51] The excellence of his theory is to call for investigation of whatever people identify and treat through their social practices as law, in different 'social arenas',[52] by reversing the usual assumptions about law into questions which treat critically rather than take for granted the essence and function of law.[53] Arguably this answers only the 'what?'

[46] See Hart, *Concept of Law*. This view of the enterprise of general jurisprudence persists in Leslie Green, 'General Jurisprudence: A 25th Anniversary Essay' (2005) 25 *Oxford Journal of Legal Studies* 565–80.

[47] See Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization and Emancipation* (London: Butterworths, 2nd edn 2002), esp. p. 371 for his map of capitalist law into domestic law, production law, exchange law, community law, territorial (state) law and systemic (world) law.

[48] See Philip Allott, *Eunomia: New Order for a New World* (Oxford: Oxford University Press, 1990), for his unreferenced attempt to construct, from first principles, a new theory of law for a peaceful and uniquely 'world' society; and his more orthodox *The Health of Nations: Society and Law Beyond the State* (Cambridge: Cambridge University Press, 2002).

[49] See Glenn, *Legal Traditions*, for an evaluation of structural aspects of the major legal traditions of the world and an attempt to appreciate comparative commonalities and diversity.

[50] See Niklas Luhmann, *Law as a Social System*, trans. K. A. Ziegert (Oxford: Oxford University Press, 2004), for perhaps the most advanced scientific attempt to describe and understand the phenomenon of law in modern societies.

[51] Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford: Oxford University Press, 2001), p. 166. Social systems specifically accepted by Tamanaha as law are state law, customary law, religious law, international law, transnational law, indigenous law and natural law (pp. 224–30).

[52] Tamanaha, *General Jurisprudence*, pp. 206–8. The social arena is used to identify boundaries for the study of a particular legal enquiry, such as a nation-state, a village, a local business community, the international merchant community, etc.

[53] Tamanaha, *General Jurisprudence*, p. 231.

question – that is, what law is. That approach may be useful for those theorists or practitioners who are happy to adopt a broad view of law and who feel challenged to compare the natures of different legal orders by reference to assumed qualities such as law's social mirroring[54] and social control functions. Tamanaha's theory does little, however, to illuminate how it is that the law achieves its authority and effectiveness through the changing tides of time.

Twining's notion of a general jurisprudence calls for a more open enquiry without the universalist ambition. Inviting a 'broader approach to law',[55] he is concerned 'about the health of the institutionalized discipline of law for the next ten to twenty years in the face of "globalization" '.[56] Twining seeks to 'enlarge the discipline'.[57] His general jurisprudence may be interpreted as a caution against the precipitate use of the term 'global jurisprudence' and 'global' especially. '[W]henever we hear a g-word we should pause and ask: is it being used precisely, or in this context is it exaggerated, superficial, misleading, simplistic, ethnocentric, false or just plain meaningless?'[58] Similarly, caution is required before using the word 'universal', which all too often will reflect a particular way of thinking, neither universally held nor applicable throughout the world. For present purposes, of further significance is Twining's call for a normative and historical jurisprudence to add to our understanding, inviting consideration of the construction of law and authority over time.

Berman's jurisprudence appears to offer a viable way forward in this latter respect, presciently responding to Twining's later call. Berman's notion of an integrative jurisprudence[59] infuses a normative agenda into the study and practice of law through the programme of 'historical jurisprudence', to be reconciled with the positive law and natural law schools which maintained a virtual duopoly over twentieth-century legal theory. Berman's suggestive model for a general jurisprudence is a corollary of his excursus into Western legal history.[60]

A purpose of the present book is to contribute to the current discourse of general jurisprudence by attempting to build a normatively and historically rich general jurisprudence relevant to the global age. That it purports to do so primarily by comparing cultures and orders within the Western legal tradition,

[54] That is, the way law reflects (or is supposed to reflect) the consensus of society.

[55] Twining, *Globalisation and Legal Theory*, p. 36; 'A Post-Westphalian Conception of Law' (2003) 37 *Law & Society Review* 199–257, 202.

[56] See William Twining, 'Reviving General Jurisprudence' in Michael Likosky (ed.), *Transnational Legal Processes* (London: Butterworths, 2002), p. 4; *Globalisation and Legal Theory*, pp. 175, 243.

[57] William Twining, *Law in Context: Enlarging a Discipline* (Oxford: Clarendon Press, 1997).

[58] Twining, 'General Jurisprudence', section IIa; and see his 'Globalisation and Comparative Law' in David Nelkin and Elsin Orucu (eds.), *Comparative Law: A Hart Handbook* (Oxford: Hart Publishing, forthcoming).

[59] See Harold J. Berman, *Faith and Order: The Reconciliation of Law and Religion* (Atlanta: Scholars Press, 1993), ch. 13.

[60] See Berman, *Law and Revolution*; and more recently, his *Law and Revolution, II: the Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 2003).

across time, still qualifies it as a work of general jurisprudence.[61] Marginalised and forgotten texts and ideas in the Western legal tradition have lessons to teach our globalist age and mentality.

Immediately, I must qualify my use of words such as 'global' and 'universal'. Twining's circumspection about using such words is justified. Often the word 'global' is used to describe processes which occur at multiple local or regional levels. Despite straddling territories if not continents, such allegedly 'global' processes may affect certain types of people in a society and leave other societies out completely. Literally, such processes are not 'global' in the sense of touching everyone or even nearly everyone on the globe. Similarly, 'universal' norms are often universal merely at regional levels or amongst particular peoples. Imprecision and exaggeration characteristically accompany these 'u-words' and 'g-words'. My own preference is to accept that, in popular parlance, these words are misused. A more readily comprehensible response requires using the words under dispute but using them more sensitively. With this intention, an '-ist' suffix is adopted in this book.[62] This is to suggest tendencies or purport rather than an absolute state of affairs connoted by the words 'global' and 'universal'. In each chapter, the prospects for 'universal*ist*' and 'global*ist*' norms are evaluated in different places and times. I believe it is helpful to consider these prospects, with appropriate sensitivity and realism. Provided that diversity and the possibilities for meaningful norm-making at the levels most affected by those norms are not precluded, improved peace and social flourishing are a prospect of learning to think along universalist and globalist lines. Looking in this manner beyond the immediacy of oneself and one's immediate society with a view to the 'welfare of the world' or 'humanity in general' is not foreign to Western social and legal history, as we shall see. There is much still to be done, to be pursued with alertness to the associated errors (at least to the modern mind) of the past such as those associated with imperialism, colonisation and intolerance. Heightened and new sensitivities are required. That is why this book resorts to terms such as 'global*ist*', 'universal*ist*' and '*purportedly* global', and dares only to venture a quest '*towards* a global*ist* jurisprudence' rather than to have the hubris to write of an unqualified 'global jurisprudence'.

So may one wonder what options there are for settling tensions between global concerns such as human rights, free trade, poverty, overproduction of consumer items, terrorism and American imperialism. Beholden to that wonder is the possibility that something bigger than we can imagine today will settle these tensions characteristic of the globalising society, through a reconciling

[61] On the permissibility of these criteria, see Twining, 'General Jurisprudence', sections IIb and III.

[62] Grammatically, I arrive at 'globalist' and 'universalist' as agent-nouns (used adjectivally) from the verbs 'globalise' and 'universalise', suggesting the attempt or purport of the act of globalising and universalising, falling short of the achievement of the actual end of this action. Such a use of the word 'globalist' is consistent with its definition in *The Shorter Oxford English Dictionary* (5th edn), as '*advocating* a global *approach* to economic etc. issues' [my italics].

discourse of world traditions and experiences.[63] That will not come through people thinking only of their current political and economic needs in the context of their current ethical and rational predilections towards what is right and wrong. It will come only through speaking about all of these things, with other peoples, in the context of a history which gives meaning to all of these precepts with the possibility for their reinterpretation to meet the present and future needs of our interconnected age.

1.5 Danger and opportunity

In 1983, Harold Berman wrote of his belief that the Western legal tradition was experiencing a crisis. In his opinion, only four out of the ten characteristics of the Western legal tradition remained:

1 law is different from politics and religion;
2 law is entrusted to a profession with its own discipline;
3 law is still systematised and conceptualised; and
4 this legal learning is something outside the laws on paper which allow the legal institutions and law to be understood.[64]

Despite these continuations, the other six characteristics of the tradition were no longer thought by Berman to remain:

5 the hierarchy of sources of law has been lost (that is, the conflict has been lost, for example, between feudal, royal, manorial, urban and canon law and with it the possibility of a constitutional synthesis of a solution for a given situation involving a plurality of jurisdictions), replaced by anti-formal techniques to justify rules and 'a new kind of cynicism' about legal discourse;
6 there has been a weakening in the belief that law is subject to ongoing development with the emergence of generations, such that the development of law is now seen as being simply ideological;
7 changes in the law, both historically and in the present, are thought to be due to pressure from forces outside the law;
8 in place of the distinction between law and politics, law is viewed as an instrument of the state and politics;
9 instead of a plurality of jurisdictions more recently including independent professions and trades but formerly including, for example, canon and urban law, there is a programme of swallowing up jurisdictions 'in a single central program of legislation and administrative regulation'; and
10 rather than law being reinterpreted and adapted to the future during times of revolution or great social change, there is the view that a new political regime spawned by revolution brings in a wholly new law, or old forms with new content.[65]

[63] Insights into this project, and the difficulties it faces, are to found in Glenn, *Legal Traditions*.
[64] Berman, *Law and Revolution*, p. 37. [65] Berman, *Law and Revolution*, pp. 38–9.

Perhaps this is overly pessimistic. In the attempt to find a way out of the present predicament, Berman confessed his existential need to look back on the fading Western legal tradition like a drowning man seeing his life flash before his eyes, whilst not bemoaning the changes. Somewhat ambivalently he admitted that the changes may even be 'a good thing', posing the question 'how do we go forward?'[66] In later publications his position is clearer. The 'crisis' of the Western legal tradition is a crisis in the true, translatable sense of the word. For the Greeks, *krisis* means a choosing, a time when choices must be made; in Chinese, 'crisis' is described as *wei-ji* – danger and opportunity.[67]

The choice for the individual is primarily one of attitude. How law is thought about and talked about will be crucial. The broad lesson I shall attempt to draw from the Western legal tradition for guidance value is the historical reliance of law upon logical and cultural allegiance for effectiveness and meaning amidst changing circumstances. My aim, perhaps similar to that of Berman, is to demonstrate that a consciousness of legal and social history is the only way to avoid relegating law to the anomie of faceless, ends-driven, majoritarian politics. Law should not just be thought of as a tool for getting things done – particularly during a time of great change.[68]

Many will argue over the particular lessons of history. In so doing, however, the belief in the guidance value of history must be conceded as a 'good thing', the more so if the context is the attempt to understand an analogous but uncharted present state of affairs. The present time is seeing to the performance of modern adaptations of scenes from medieval constitutional theatre which premiered at the formation of the Western legal tradition almost a millennium ago. Perhaps we can 'go forward' by revisiting some of the points of Berman's characterisation of the Western legal tradition.

5 & 9 It is now apparent that the number of viable jurisdictions is increasing, and the purported nation-state monopoly of authoritative norms is declining. The laws of the European Union, international trade laws including the World Trade Organization and human rights committees (both national and international) attest to this.

6 Arguably law has always been subject to criticism as an ideological institution, if 'ideology' is understood to mean the dominant, self-perpetuating social reality.[69] Those grounds in other times have been theological, philosophical and, perhaps characteristic of the twentieth century, political

[66] Ibid., pp. v–vi. [67] Berman, 'Integrative Jurisprudence', p. 309.

[68] 'A social reality in which law is seen, not as the source, the limit and the judge of social power but as merely an incidental by-product of social power, is an illegitimate social reality': Allott, *Health of Nations*, [3.52]. An instrumentalist conception of law discredits law by associating it with special interests. It runs the risk of franchising judges to decide cases according to personally desired objectives, particularly in the US: see Brian Z. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge: Cambridge University Press, 2006).

[69] This notion of ideology is derived from Valerie Kerruish, *Jurisprudence as Ideology* (London: Routledge, 1991), pp. 34–42.

(liberalism versus communism). Western revolutionaries always attack the ideology of the predecessor. That law may now be thought to operate in the service of free trade or human rights may reflect, as is suggested later in this book, an emerging secular theology of our time with its own cultural resources and complexities. The challenge is to explore those complexities, and to keep attempting to reconcile them to an older legal discourse.

7 & 8 The perception that legal change occurs, for example, through politics as a result of pressure from outside the law, does indeed appear to underestimate the case-based innovation effected by judges in the common law fashion (sometimes referred to as judicial activism). Even judges are, though, responding to outside arguments about norms which are put to them. The outside arguments are filtered by advocates into legal terminology from their source in the outside world, in which change is ongoing. At revolutionary times, law is forced to take on the concerns which cannot be dissipated outside the filter of the court process or through remedial legislation. Nonetheless, there appears to be an increasing trend for law and legal process to be viewed by the government executive as a means to a political end, with traditional separation of powers doctrine under challenge.

10 The popular perception that laws are simply uprooted and replaced at times of revolution remains current. Although thoughts of revolution are far from the minds of most individuals born in common law countries, occasional remarks by professional colleagues to me about the topic of this book have drawn comments along the lines of 'I think we are headed for a world government with a world legal system'. The singularity of such a government and legal system should stretch the bounds of credulity for at least another two centuries. Such an overthrow of law appears unlikely.

Where they touch on globalisation, these themes will be explored in later chapters by reference to the historical precedents of interconnected and non-state societies with their underlying discourses of authority.

Returning to his question 'how do we go forward?', the solution proffered by Berman is to integrate the theories of positive law and natural law (mentioned above in section 1.1.2), and to add a third school: that of historical jurisprudence, which instils 'the national character, the culture, and the historical ideals and traditions of the people or society whose law it is'.[70] This consciousness need not be national, but it must be felt as a matter of group attachment to something outside oneself. Historical consciousness is crucial to the enterprise of maintaining and improving upon a sense of legality which attracts allegiance through, for example, an appreciation of parliamentary sovereignty as opposed to royal tyranny, or a common horror such as the World Revolution of the two world wars.

[70] Berman, 'Integrative Jurisprudence', p. 290.

In chapter 3, I will suggest a revised analytical scheme to apply to the task of understanding authority and formulating better law. Notions of positive law, natural law and historical jurisprudence will be considered in the more historically and socially transportable terms of 'custom' (*nomos*) and 'reason' (*logos*). Possibly these terms are transportable across traditions, too. To be effective, law must be able to appeal from these foundations to the individual, morally and culturally (*nomos*), as well as exert a more objective impulsion supported by reason, maintained politically (*logos*). This is the science of law, or 'nomology', as it is obscurely known. This 'Space–Time Matrix' will be used in the balance of the book to explore the patterns of law and authority in the millennium of the Western legal tradition.

1.6 Key issues in globalisation and legal theory

Although historical parallels do not prove anything of themselves, they will aid investigation into the extent to which jurisprudential thought needs to be amended to accommodate globalisation and the normative challenges of technology. To advance the general jurisprudence foreshadowed in the foregoing pages to understand law in the world today, the following signal themes will be employed to evaluate the recurring patterns of law and authority in the second millennium in the context of the historical changes.

- Paradigmatic aspects of the Western legal tradition, such as competing jurisdictions and transnational legal science, are recurring. Twentieth-century technology and industry have thrown the state back into the boxing ring with other jurisdictions. Law and legal authority have never, in the West, come from only one place, contrary to the popular fixation on the state as the only legitimate source of either.
- The modern fixation upon law as a political tool of the state for achieving present social goals, without necessarily and consciously deferring to deeper principles of ultimate reality and meaning, is a historically contingent trend. It is derivable particularly from the twentieth century and the focus on legislation which emerged. This instrumentalist tradition is a symptom of the modern fallacy in the point above (that law comes from one place – the state). For example, human rights and free-trade developments can be viewed as novel universalistic, natural law discourses with functional commonalities shared with medieval religious natural law. Reference to these discourses in law demonstrates the social requirement to ground law in an authority subject to sophisticated claims for legitimacy expressed in a legal science. Legal norms and social authority do not come from one place. Although a proposition may ultimately be 'legal' or 'illegal', it will be so by reference to different legal or normative systems which compete for priority in the prevailing discourse of authoritative norms.
- Commonly perceived themes in the globalisation literature, such as universality versus particularity and diversity, space and time, sovereignty versus

world society, and cultural forms of community versus political community, are manifested in the history of Western law and authority. These patterns may be said to be recurring. In older times, 'empire' was the preferred term or concept for purporting to maintain if not impose order of geographical magnitude amidst diversity. In more recent times, the idea of 'union' predominates. This is demonstrated, for example, by the appellations '*United* Kingdom of Great Britain and Northern Ireland', '*United* States of America' and, most recently, European *Union*. Easily forgotten, semantically, is that the oldest surviving Western political institution is the Roman *Catholic* (or *Universal*) Church.

- Thinking about the authority of law in terms of the Space–Time Matrix expounded in chapter 3 (interior, culturally acquired morality versus exterior, politically coerced rationality; and retrospection versus radicalism as horizons of social thought) enables us to contemplate, comparatively, the inadequacies and benefits of different approaches to the authority of law at different times. The chief pattern of authority is the requirement to have a core legitimating principle at the centre of the normative system. At the beginning of the Western legal tradition in the late eleventh century, God was at the centre of legitimacy (and markets dispersed), whereas today, markets are towards the centre of legitimacy (and spiritual communities dispersed). The inflexion of this pattern occurred about the time of the Protestant Reformations.
- Peace and co-operation at the national and international levels will not be accomplished by cold legal systems and formalities. Inquisitions and world wars bespeak the passions and shifting spiritualities and ultimate concerns which underlie fundamental legal challenges. Legal systems which ignore these allegiances do so at the peril of missing out on the increased effectiveness of laws which are believed in, rather than simply coerced.
- Western history shows that humans invest their constitutions with vital visions for the future which are all too easily forgotten when revolutionary urgencies are perceived to have passed. Treaties associated with globalisation, establishing the United Nations, the European Union, the Bretton Woods economics institutions and the International Criminal Court, should all be regarded as constitutional documents responding to the World Revolution of the two world wars in the twentieth century.[71]

At present, there is a widespread need to contemplate, deeply and critically, just what the challenges of globalisation mean to the way we think about law and social order in the West, and what are the historical continuities and discontinuities in the Western legal tradition which can be illuminated by globalisation studies. What is of value in the Western legal tradition? What should, or indeed can, be retained in a time of change? Answers to these questions may best be

[71] See ch. 10, section 10.3, pp. 220–6 below.

pursued by reference to the historical, philosophical and normative struggles of Western societies for the constitution of authoritative social orders.

These are not just matters for legal or social philosophers. Hopefully, in considering these questions, teachers and their students, writers, curious practitioners and policy-makers grappling with their own particular areas of legal doctrine in the face of globalisation, may ground their pedagogy, practice and research, both strategically and normatively. That is, strategically, they may contemplate what might be conceptually new about particular doctrinal and social challenges occupying their attention. Thoughts on legal strategies for dealing with these 'globalisation and law' challenges, such as legislative regulation, codification or encouragement of customary norms, may be stirred. Normatively, these teachers, writers, practitioners and policy-makers may appreciate the limits and the potential of law, by reference to the moral, political, conservative and radical dimensions inherent in the discourses of authority which have constituted the Western legal tradition.

The balance of this book attempts to address these key issues. For now, an exploration of the challenge of our time as it intersects with law – globalisation – can be postponed no longer.