§ Law in Context

WILLIAM TWINING

General Jurisprudence

Understanding Law from a Global Perspective

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General Jurisprudence

This book explores the implications of globalisation for understanding law. Adopting a broad concept of law and a global perspective, it critically reviews mainstream Western traditions of academic law, legal theory and human rights discourse. Its central thesis is that most processes of so-called 'globalisation' take place at sub-global levels and that a healthy cosmopolitan discipline of law should encompass all levels of social relations and legal ordering. It shows how the mainstream Western canon of jurisprudence should be critically reviewed and extended to take account of other legal traditions and cultures. Written by a leading scholar in the field, this important work presents an exciting alternative vision of jurisprudence. It challenges the traditional canon of legal theorists and guides the reader through a field undergoing seismic changes in the era of globalisation. This is essential reading for all students of jurisprudence, human rights, comparative law and socio-legal studies.

William Twining is Quain Professor of Jurisprudence Emeritus of University College London. He has worked extensively in Eastern Africa, the Commonwealth and the United States and is a leading proponent of broader approaches to the study of law. His recent books include *Globalisation and Legal Theory* (2000) and *The Great Juristic Bazaar* (2002) to both of which this is a successor.

General Jurisprudence

Understanding Law from a Global Perspective

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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 law[2] 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 ethnocentism (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.

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Abbreviations

ALI	American Law Institute
Bentham *CW*	*The Collected Works of Jeremy Bentham*, prepared under the supervision of the Bentham Committee, University College London
Bentham *Works*	*The Collected Works of Jeremy Bentham*, published under the superintendance of John Bowring (Edinburgh, 1838–43).
CEDAW	Convention on Elimination of Discrimination against Women
cls	critical legal studies
CPR	civil and political rights
EBRD	European Bank for Reconstruction and Development
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ESCR	economic, social, and cultural rights
EU	European Union
FIFA	Fédération Internationale de Football Association
GATT	General Agreement on Tarriffs and Trade
HFH/HABITAT	Habitat for Humanity
IBRD	International Bank for Reconstruction and Development (World Bank)
ICANN	Internet Corporation for Assigned Names and Numbers
IESBS	International Encyclopedia of Social and Behavioral Sciences
IFI	international financial institution
IMF	International Monetary Fund
IOC	International Olympic Committee
LSA	Law and Society Association (USA)
MDGs	Millennium Development Goals
NAFTA	North American Free Trade Agreement
NBER	National Bureau of Economic Research
NGO	non-governmental organisation

OECD	Organization for Economic Co-operation and Development
OIC	Organisation of the Islamic Conference
PEAP	Poverty Eradication Action Plan
PRSP	Poverty Reduction Structure Plan
SLSA	Socio-legal Studies Association (UK)
UCC	Uniform Commercial Code
UCL	University College London
UDHR	Universal Declaration of Human Rights
UNDP	United Nations Development Program
UNESCO	United Nations Educational, Scientific and Cultural Organization
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

Further abbreviations

Some of the topics and thinkers introduced in this book are discussed at greater length in earlier works by the author; these are referred to by abbreviations as follows:

BT	*Blackstone's Tower: The English Law School* (London: Sweet and Maxwell, 1994)
GJB	*The Great Juristic Bazaar: Jurists' Texts and Lawyers' Stories* (Aldershot: Ashgate, 2002)
GLT	*Globalisation and Legal Theory* (London: Butterworth, 2000; reprint Evanston, Ill.: Northwestern University Press, 2001)
HRSV	'Human Rights: Southern Voices' 11 *Review of Constitutional Studies* 203 (2005)
HTDTWR	*How to Do Things with Rules* (with David Miers) (4th edn) (London: Butterworth, 1999)
JJM	'Karl Llewellyn's Unfinished Agenda: Law in Society and the Job of Juristic Method' 48 *University of Miami Law Review* 119 and *GJB* Chapter 6
KLRM	*Karl Llewellyn and the Realist Movement* (London: Weidenfeld and Nicolson, 1973; reprint Norman, Okla.: Oklahoma University Press, 1985)
LIC	*Law in Context: Enlarging a Discipline* (Oxford: Oxford University Press, 1997)
LTCL	*Legal Theory and Common Law* (Oxford: Blackwell, 1986)
RE	*Rethinking Evidence* (2nd edn) (Cambridge: Cambridge University Press, 2006)

Part A

Chapter 1

Jurisprudence, globalisation and the discipline of law: a new general jurisprudence*

1.1 Clean water

A few years ago a team of local and foreign consultants was asked to evaluate the health of the criminal justice system (including police and prisons) in an African country that was starting to rebuild after a terrible period of human and natural disasters. Under the general rubric of promoting 'democracy, human rights and good governance', their remit was to devise a strategy and set priorities for expenditure by Government and a consortium of foreign donors. Part of this involved setting priorities for prisons. Seventy per cent of the prison population was on remand, often illegally. Despite the best efforts of the prison service, prison conditions were appalling. Money was short, and many of the problems seemed intractable, if not insoluble.

It was difficult to know where to begin. The country had a newly minted Constitution (including a Bill of Rights). Legitimated and validated by an admirably democratic constitutive process, this Constitution was a source of both national pride and strong, but not universal, public support. One member of the team suggested that the first principle should be: 'Enforce the Constitution'. Brushing aside the argument that there were no sanctions against the Government for non-enforcement, the team adopted this as their starting point.

Article 24 stated: 'No one shall be subjected to any form of torture, cruel, inhuman, or degrading treatment or punishment.' Before considering complex problems of illegal detention, mixing women with men or children with adults,[1] extreme overcrowding, and forced labour, the team turned its attention to the seemingly simpler question of providing clean water and adequate food. Someone proposed that failure to provide these basic necessities was 'inhuman' and therefore unconstitutional. This proposal met with a sceptical response.

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[1] Article 37(c) of the Convention on the Rights of the Child prescribes that 'every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so'. I am grateful to Kerstin Mechlem for this point.

The first argument was that there had been no local precedents interpreting 'inhuman': it was a category of indeterminate or illusory reference. To which the reply was that the local provision was derived from many international and regional conventions and standards, including the non-binding Standard Minimum Rules for the Treatment of Prisoners. The Government was a signatory to many of these documents. There was accordingly a vast jurisprudence upon which to draw in interpreting Article 24, including persuasive precedents and commentaries within the same region.[2] The term 'inhuman' might be vague, but it was part of a universal principle of political morality upholding basic human needs for survival and reasonable health. From this one could infer that the Government had a duty to protect the life and health of all prisoners by providing clean water, even if the Government's international obligations were backed only by the moral sanctions in the tribunal of international opinion.

The next line of argument was about local conditions: 'About half of the rural population does not have clean water. Are you proposing that prisoners should be treated better than the ordinary people should? And will the test of cleanliness take into account the fact that many locals have developed some immunity to infections found in water? What about foreign prisoners, should they be treated equally?' After some debate, the team decided by a majority that the exact standard of 'clean' should be prescribed by regulation, taking into account local conditions (including costs), but not beyond a point that the water would be deleterious to health.[3] If that meant that prisoners were being treated better than some people, that was what the Constitution, backed by international and regional jurisprudence, prescribed.

The third line of scepticism came from within the team. The economist said: 'This is sheer legalism and mischievous nonsense. What precisely are you recommending in respect of water? (Running water, purification, or boiling?) What precisely is the test of 'clean'? Standards are not self-enforcing: Who will do the testing and who will pay? How much will this cost for all prisons in the country?' 'Does the provision of clean water have a higher priority than other claims of the prison service or the criminal justice system?' 'Are you sure that this Constitution is an institution that this country can afford?' The reply from the team was: 'The Constitution is the basic law. In interpreting terms like 'inhuman' there is leeway for taking into account local conditions and values, but it is absolute in regard to the principle that the Government has a duty to treat prisoners as human beings. We are not advocating Kelsenian purity.[4] We

[2] A good summary of the international jurisprudence is to be found in Rodley (1999). However, there does not appear to be much direct authority on standards for provision of food and water, and there are unsettled questions about omissions and intent in respect of 'inhuman and degrading treatment'. Some support for the team's interpretation may be found in the Standard Minimum Rules for the Treatment of Prisoners.

[3] The Committee on Economic, Social and Cultural Rights sets a higher standard: water has to be safe and not constitute a threat to a person's health. I am grateful to Kerstin Mechlem for this point.

[4] This is, of course, a misuse of Kelsen.

can tolerate some impurities so long as they do not seriously threaten health. But we reject arguments of the kind: 'Prisoners have no-right to food or clean water or freedom from torture, because we cannot afford such protections.' Article 24 is part of a worldwide consensus on non-negotiable minima.'[5]

The dilemmas in this situation are real; the issues are at the heart of legal theory. Indeed this text could be read as a *roman à clef*, incorporating phrases from several jurists. My object in starting with this tale is neither to defend nor to criticise the position taken by the majority of the team. The issues are contested. Rather, in talking about very broad, often abstract matters, I do not want to give the impression that I think that jurisprudence can be divorced from urgent, real life, historically specific problems. In talking about linking social science with the study of human values, Julius Stone wrote: 'Yet it still remains basic that this concern of jurisprudence seeks detailed empirical understanding and solution of *ad hoc* practical problems, and that concern with the larger more visionary enterprises ought never to obscure this truth.'[6]

1.2 Western traditions of academic law

Jurisprudence is the theoretical part of law as a discipline. How any discipline is institutionalised varies according to time and place and tradition. Law is no different. Because of this historical contingency, there is no settled core or essence of the subject matters of our discipline or of legal knowledge.[7] I shall argue for a broad (and pluralistic) interpretation of these subject matters, but not all of my readers will agree with me. The purposes, methods, and scope of the discipline are frequently contested.

If one adopts a global perspective and a long time scale, at the risk of oversimplification, one can discern some general tendencies and biases in Western academic legal culture that are in the process of coming under sustained challenge in the context of 'globalisation'. In a crude form, these can be expressed as a series of simplistic assumptions that are constituent propositions of an ideal type:

(a) that law consists of two principal kinds of ordering: municipal state law and public international law (classically conceived as ordering the relations between states) ('the Westphalian duo');[8]
(b) that nation-states, societies, and legal systems are very largely closed, self-contained entities that can be studied in isolation;[9]

[5] This is a fictitious story based on experience in several African countries.
[6] J. Stone, 'Trends in Jurisprudence in the Second Half Century' (at p. 30), printed in Hathaway (1980). This paper was written shortly after the publication of Stone (1966).
[7] On 'the core' of law as a discipline see *BT*, Chapter 7 (1994).
[8] The Peace of Westphalia (1648) refers to two treaties, which ended the Thirty Years' War and the Eighty Years' War. These events are often taken to signal the rise of the nation state and the start of the modern international system. This interpretation of history is contested, but it serves as a convenient reminder that the predominance of municipal state law is relatively recent.
[9] On Rawls, see Chapter 5.5 below and *GLT*, 7–8, 46–49, 72–5.

(c) that modern law and modern jurisprudence are secular, now largely independent of their historical-cultural roots in the Judaeo-Christian traditions;[10]
(d) that modern state law is primarily rational–bureaucratic and instrumental, performing certain functions and serving as a means for achieving particular social ends;[11]
(e) that law is best understood through 'top-down' perspectives of rulers, officials, legislators, and elites with the points of view of users, consumers, victims and other subjects being at best marginal;[12]
(f) that the main subject-matters of the discipline of law are ideas and norms rather than the empirical study of social facts;[13]
(g) that modern state law is almost exclusively a Northern (European/Anglo-American) creation, diffused through most of the world via colonialism, imperialism, trade, and latter-day post-colonial influences;[14]
(h) that the study of non-Western legal traditions is a marginal and unimportant part of Western academic law;[15] and
(i) that the fundamental values underlying modern law are universal, although the philosophical foundations are diverse.[16]

In short, during the twentieth century and before, Western academic legal culture has tended to be state-oriented, secular, positivist, 'top-down', Northo-centric, unempirical, and universalist in respect of morals. Of course, all of these generalisations are crude and subject to exceptions – indeed none has gone unchallenged within the Western legal tradition – and issues surrounding nearly all of them constitute a high proportion of the contested agenda of modern Western jurisprudence. However, at a general level this bald 'ideal type' highlights some crucial points at which such ideas and assumptions are being increasingly challenged. For example, it has been contended that:

(a) from a global perspective, a reasonably inclusive picture of law in the world would encompass various forms of non-state law, especially different kinds of religious and customary law that fall outside 'the Westphalian duo';[17]

[10] On secularism see pp. 404–5 below. There are books, including a *magnum opus* by Charles Taylor (2007), which talk of a secular age, or of human rights as a secular liberation theology. That is quite parochial. From a global perspective the demographers of religion, like Philip Jenkins, suggest that this is an era of religious revival, not only in respect of Islam, but of Christianity, Buddism, and the Yoruba religion; and not only in the 'Global South' – consider the challenges to Kemalism in Turkey and the rising importance of Islam in most Western countries. Misztal and Shupe (eds.) (1992). On Islam, see Rahman (2000); on Christianity, see Jenkins, (2007a) (2007b); on the Yoruba religion see Abimbola and Abimbola, (2007).
[11] On instrumentalism see Chapter 16.4 below.
[12] See *GLT*, 108–35, Tamanaha (2001) pp. 239–40.
[13] On the distinction between conceptions of law as ideas and as a kind of institutionalised social practice, see pp. 30–1 below.
[14] On diffusion see Chapter 9 below. [15] On ethnocentrism see p. 129 below.
[16] For example, natural law, utilitarianism, and neo-Kantianism are all universalist in tendency. On different meanings of universalism see Chapter 5.3 below.
[17] See Chapters 4 and 12 below.

(b) sharp territorial boundaries and ideas of exclusive state sovereignty are under regular challenge;
(c) we may be living in 'a secular age' in the West, but much of the rest of the world is experiencing a religious revival;[18]
(d) while nearly all members of the United Nations and many international and transnational organisations are institutionalised in accordance with some model of bureaucracy, large parts of the world's population live in societies and communities that are differently organised;
(e) 'top-down' perspectives are being more persistently challenged by bottom-up perspectives that range from Holmes' Bad Man to user theory to various forms of post-colonial subaltern perspectives;[19]
(f) in order to understand law in the world today it is more than ever important to penetrate beneath the surface of official legal doctrine to reach the realities of all forms of law as social practices;[20]
(g) until the mid-twentieth century, imperialism and colonialism were probably the main, but not the only, engines of diffusion of law, but in the post-colonial era the processes of diffusion are more varied and there is a growing realisation that the diffusion of law does not necessarily lead to harmonisation or unification of laws;[21]
(h) the study of non-Western religious and other legal traditions is increasingly important,[22] and our juristic canon needs to be extended to include 'southern' jurists;[23] and
(i) the world today is characterised by a diversity of deep-rooted, perhaps incommensurable, belief systems; and that one of the main challenges facing the human race in a situation of increasing interdependence is how to construct institutions and processes that promote co-existence and co-operation between peoples with very different cosmologies and values. Insofar as belief pluralism is a fact, it is foolish to hope for achieving a consensus on basic values by imposition, persuasion or rational dialogue.[24]

The situation is rapidly changing and in many respects academic practice is ahead of legal theory. The object of this book is to interpret these changes, to give them some coherence, and to suggest some ways forward. As such it as much an exercise in trend-spotting as in trend-setting.[25]

[18] Misztal and Shupe (eds.) (1992). See n. 10 above.
[19] Nader (1984); Tamanaha, (2001) at pp. 239–40; *GLT*, Chapter 5; Baxi, (2002a) Preface; Rajagopal (2003).
[20] See Chapter 10 below.
[21] See Chapters 9 and 10 below.
[22] See, e.g. Glenn (2004).
[23] See Chapter 13 below.
[24] Hampshire (1989) and Chapter 7.4 below.
[25] In a friendly comment on my paper on 'General Jurisprudence' (Twining 2005/7), Brian Tamanaha (2007) suggested that my conception of general jurisprudence is impossible. This assumes that I was trying to launch a grand overarching theory. My response is that legal theorising as an *activity* is already responding to the challenges of 'globalisation'. My paper ended: 'si momentum requiris, circumspice' – in other words it is happening already.

1.3 Jurisprudence

Jurisprudence, as the theoretical part of law as a discipline, has a number of jobs or functions to perform to contribute to its health.[26] This requires some clarification. 'Jurisprudence', 'legal theory', and 'legal philosophy' do not have settled meanings in either the Anglo-American or the Continental European traditions. In order to be brief I shall stipulate how they are used here, rather than enter into controversies that are partly semantic, but also partly ideological. As we shall see, I treat jurisprudence and legal theory as synonyms and legal philosophy as one part – the most abstract part – of jurisprudence.[27]

Jurisprudence can be viewed as a heritage, as an ideology, and as the activity of theorising (i.e. posing, reposing, answering, and arguing about general questions relating to the subject matters of law as a discipline). The idea of heritage emphasises continuity. The idea of ideology, in a non-pejorative sense, links one's beliefs about law to one's more general beliefs about the world – whether or not they are systematic; and in the Marxian pejorative interpretation of the term, the notion of ideology is a healthy reminder of the close connections between belief, self-interest, prejudice and delusion.[28] All three perspectives on jurisprudence are adopted in this book.

(a) Jurisprudence as ideology

Ideology is important, because people's lives are ruled not only by law, but also by religion, political commitments, and other beliefs. In some contexts sharp distinctions are drawn between religion and positive law, for instance attempts to allocate separate spheres to state and religion. But in many places 'religious law' is important and is to a greater or lesser extent officially recognised. Important political activities, from social policy to terrorism, are publicly justified in the name of religion with varying degrees of sincerity. Values are imbricated into our understandings of law at all levels. At this stage in history humankind inhabits a world in which plurality of beliefs is a contingent but stubborn fact and, as we become more interdependent, issues about co-existence and co-operation are greatly sharpened. Differences in respect of cosmologies, values, political ideologies, cultures, and traditions are part of the essential background to understanding law.

[26] For more detailed discussions, see *LIC* (1997) Chapters 6 and 7. [27] See pp. 21–5 below.

[28] On ideology and law, see Halpin (2006a). The thesis that nearly all of our heritage of jurisprudence functions as an ideology to legitimate state coercion and violence, may have an element of truth, but is often overstated.

(b) Jurisprudence as activity

As an activity within our discipline theorising has several functions.[29] These include:

(a) Constructing whole views or total pictures (the synthesising function): this is one of the functions of both geographical and mental mapping.[30] In the present context it would include not only a total picture of law in the whole world (a notional atlas of world law), but also such constructs as a general theory of international law or comparative law or corruption or constitutionalism in the world as a whole or in some parts of it.

(b) Elucidating, constructing and refining individual concepts or, more significantly, conceptual frameworks or usable vocabularies that will travel well. This is the subject of Chapter 2. A classic example is Bentham's idea of a universal 'legislative dictionary'.[31]

(c) Developing normative theories, such as theories of justice or rights or human needs or values.[32]

(d) Constructing, developing, and testing middle order empirical hypotheses, such as Maine's famous generalisations, Alan Watson's 'transplants thesis', and Donald Black's boldest theses.[33]

(e) Developing working theories for participants (for example prescriptive theories of law making, adjudication, doctrinal exposition, advocacy or negotiation (including cross-cultural negotiation)). Much more of jurisprudence is taken up with this kind of enterprise than is generally acknowledged, especially in the Anglo-American tradition, no doubt because the culture of academic law is strongly participant oriented.[34] Some of the best known examples are particular to specific legal systems or cultures – such as Karl Llewellyn's theory of appellate judging and advocacy[35]– or else they are geographically indeterminate – such as Ronald Dworkin's theory of adjudication or standard works on negotiation such as *Getting to Yes*.[36] Participant working theories that claim to be of widespread application across jurisdictions and cultures need to be treated with caution.

(f) Finally, and probably most important, is the critical function, that is digging out, exposing to view, and evaluating important presuppositions and assumptions underlying legal discourse generally and particular phases of it.[37] Of course, this can operate in many contexts, using different methodologies; for my immediate purposes, critical examination of the assumptions and presupposition of mainstream sub-disciplines such as European Union Law, Public International Law and Comparative Law are

[29] See further, Twining (1974b). [30] *GLT*, Chapter 6. See Chapter 3 below.
[31] Mack (1962) at pp. 151–8 ('the legislator as lexicographer').
[32] The problems of generalisation in this area are the subject of Chapters 5 to 7.
[33] See below Chapter 8. [34] *LIC*, pp. 126–8, *GLT*, pp. 129ff.
[35] Llewellyn (1962). [36] *GLT*, Chapter 2.
[37] *LIC*, pp. 130, 135–8. Chapter 9 below applies this approach to writings about diffusion.

a high priority.[38] This is one of the most important tasks for developing a cosmopolitan discipline of law.

(c) Jurisprudence as heritage

If one stands back and surveys the vast heritage of Western legal theorising about law, one is reminded of two tendencies that are in tension. First, our Western heritage is vast. However, viewed from a global perspective, that same heritage can be criticised for being insular, parochial, quite narrowly focused. Nearly all of it concentrates on the municipal law of sovereign states, mainly those in advanced industrial societies; it operates within and across only two of the world's legal traditions, common law and civil law, with other major traditions marginalised or completely ignored. Our 'Country and Western Tradition' of legal theorising and comparative law is vulnerable to charges of parochialism and ethnocentrism.[39]

Students coming to Jurisprudence for the first time are often bewildered and daunted by the disorderly profusion of our heritage of legal thought. Like a huge bazaar it presents a scene of loosely organised diversity.[40] One leading British student work discusses the ideas of over 100 thinkers, yet in the Preface to the seventh edition the author apologises for not finding room for many other significant figures.[41] On examination it becomes obvious that the work is focused almost entirely on modern Western, mainly Anglo-American, theorising about law. The index does not mention Hindu, Islamic, or Jewish jurisprudence and there are only passing references to Chinese, Japanese, Latin American and African traditions. So this presents only part of the total picture of the heritage of legal theory.

[38] On EC law see, for example, Weiler (1999), MacCormick (1997), Walker (2003), (2005) Ward (2003a), (2003b). On comparative law see *GLT*, Chapter 7, Edge (2000), Riles (ed.) (2001), Legrand and Munday (eds.) (2003), Menski (2006), Reimann and Zimmerman (2006); Örücü and Nelken (eds.) (2007). Since the mid-1990s there has been an outburst of theorising about Public International Law: notable works include Allott (1990) (2002), Franck (1995), Harding and Lim (1999), Hathoway and Koh (2005), Rajagopal (2003), David Kennedy (2004), Téson (1998), Koskenniemi (1999) (2005) to mention just a few. A useful overview is M. Evans (2006) Part I. 'New Approaches to International Law' (NAIL) are discussed by Riles (2004). On feminist perspectives, see Charlesworth (1991). An exploration of philosophical issues is to be found in Besson and Tasioulas (eds.) (2008). The ambivalent, sometimes cavalier, attitude towards international law of the administration of George Bush Jr, has provoked an extensive critical literature, see e.g. Sands (2005), Koh (2003), Lichtblau (2008).

[39] *GLT*, pp. 184–9.

[40] On the metaphor of jurisprudence as 'The Great Juristic Bazaar' see *GJB*, Chapter 11.

[41] Freeman (2001) Preface. Another recent student reader on Jurisprudence, Penner, Schiff, and Nobles (2002) tries heroically to give a broad conspectus by adopting a historical perspective, by regularly crossing disciplinary boundaries, by moving beyond Anglo-American authors and transnational classics such as Aquinas, Kant, Kelsen and Weber, to include modern Continental Europeans, such as Derrida, Foucault, Lacan, Habermas, and Luhmann. Although it extends over 1,000 pages, like Freeman, the focus is exclusively Western and the editors lament that they have been forced to make significant omissions for reasons of space.

Even if the focus is only on Anglo-American jurists, the picture is daunting. For example, the few students who study any of Jeremy Bentham's writings in the original usually focus on a few chapters of one early work, *An Introduction to the Principles of Morals and Legislation*. This represents less than one per cent of his *Collected Works*, which will in time extend to over seventy substantial volumes. Yet Bentham is only one of almost 100 English and American thinkers represented in Lloyd and Freeman's *Introduction to Jurisprudence*. No history of Anglo-American Jurisprudence can be sensibly restricted to thinkers who were English speaking lawyers. Even quite narrow conceptions of the agenda of jurisprudence recognise that at least some of the central issues are shared with other disciplines: For example, concerns about justice and rights are shared with ethics, political theory, literary theory, theology, psychology, economics, and sociology among others.

The extent and diversity of the heritage of Anglo-American jurisprudence poses problems of selection even within that tradition for particular purposes such as legal education and more generally for communities of scholars as well as for individuals. Texts and authors become 'canonised' partly on perceived merit, but as often as not quite arbitrarily. There are no agreed criteria of selection. Inertia, fashion, ideology, power, self-promotion, and serendipity often influence the choices that are made. However, surveys of jurisprudence courses and statistics of citation tend to converge in identifying a fairly consistent shortlist of individual authors who are widely read and studied at any given time.[42] There is a mainstream and something approaching a canonical core, but the core is constantly changing and there is a rather healthy pluralism surrounding it.

Fairly orthodox accounts of the Anglo-American tradition depict it as extending over several centuries, as multi-disciplinary, and by no means confined to anglophone authors. Plato and Aristotle, Kant and Kelsen, Marx and Weber, Foucault, Habermas, and post-modernists have been at least partly assimilated into the tradition. Yet if one adopts a global perspective, this heritage is vulnerable to criticism as being quite narrow and 'parochial' on three main grounds.

First, nearly all Anglo-American legal theorists, including those who claim to be doing general jurisprudence, work exclusively within the Western legal tradition. Their perspective is generally secular and they pay little or no attention to religions other than Christianity or to non-Western cultures and traditions.[43]

[42] See, for example, the series of surveys of taught Jurisprudence in the UK by Cotterrell and Woodliffe (1974), Barnett and Yach (1985) and Barnett (1995) (which also covers Australia and Canada). Ronald Dworkin remarks that: 'Contemporary jurisprudence courses differ wildly in content….There is no single subject, technique or canon.' Dworkin (2006a) at p. 96. This may be true of some jurisprudence courses, especially in the United States, but there is a mainstream and there is far less variety in books for such courses as is illustrated by the three surveys referred to above. See below Chapter 5, n. 1.

[43] 'We do not today… speak of Christian Law, though Christianity permeates both civil and common law. Neither Christianity nor Buddhism have sought to realise themselves through law (even widely defined), though they have had influence in various legal traditions.' (Glenn (2007) at p. 81.) Today the Natural Law tradition has both a secular and a religious strand.

Second, and related to this, almost all of Western jurisprudence has focused on state law, especially the domestic (municipal) law of sovereign, industrialised nation states. Herbert Hart's *The Concept of Law* (1961) dominated the foreground of Anglo-American Jurisprudence, with some justification, for forty or so years, until the advent of globalisation challenged the assumption that the law of sovereign states is for all intents and purposes the only proper focus of the discipline of law. Hart's picture of law as a system combining primary and secondary rules deriving their validity from a 'rule of recognition' is still useful in analysing the predominant legal orders of modern nation states, but it sits uneasily with various forms of regional law (e.g European Community Law); nor does it fit situations where custom or religious law or normative orderings emerging from self-regulation or commercial practice are important; nor does it capture the complexities of the interactions between national, transnational and supranational legal orders.[44]

Third, and most important from a global perspective, the *agenda* of mainstream Anglo-American jurisprudence seems quite limited. It has concentrated, sometimes obsessively, on a narrow range of issues most of which seem generally remote from the concerns of world leaders and 'Southern' peoples. From a global perspective, questions need to be asked about the actual and potential contribution of law and legal theory to the pressing problems of the age, such as the North–South divide, war, genocide, and environment, or those identified at the Millennium Summit including hunger, poverty, basic education, health, international and national security, colonialism, displaced persons, fair trade, or corruption.[45] From this point of view our heritage can look rather narrow and sterile, narrow in its concerns, ignorant of other traditions, and ethnocentric in its biases. In short, despite the richness and complexity of our heritage, from a global perspective, we are collectively open to charges of myopia, ignorance, parochialism, and irrelevance. The central argument of this book is that both the practices and discipline of law are in fact becoming more cosmopolitan and that jurisprudence as the theoretical part of law as a discipline needs to face these challenges. One of the tasks of *General Jurisprudence* is to evaluate, revise, and extend the inherited canon of juristic texts, both within our own tradition and beyond it.

(d) Domains of jurisprudence

In the Anglo-American tradition the heritage and the activity are sometimes classified into broadly defined, but overlapping, fields: Julius Stone categorised them as analytical jurisprudence, sociological (or functional) jurisprudence, and theories of human law and justice (censorial, critical, or ethical).[46] I prefer

[44] These issues are explored at length in Chapters 4 and 9 below.
[45] On possible agendas see Chapter 14 below.
[46] Stone (1946) Chapter 1 (discussed in Twining (2003a)).

to talk rather more broadly of analytical, normative, and empirical (or socio-legal) jurisprudence. Such classifications serve a modest purpose provided that two points are borne in mind: first, the boundaries between these activities are not precise; and, second, most practical questions about law involve a combination of analytical, empirical, and normative elements. So any classification of these broad fields or activities should not be expected to bear much weight.[47] Continuities between these domains of jurisprudence are a central theme of this book.

Anglo-American analytical jurisprudence has been primarily, but not exclusively, concerned with concepts and legal reasoning; the most stable relations have been with analytical philosophy. Normative jurisprudence deals with values and the closest relations have been with ethics and political theory. Other theoretical lines of enquiry concerned with interpreting, describing, and explaining actual legal phenomena in 'the real world' are sometimes assigned to Historical Jurisprudence and the Sociology of Law. Such labels can be misleading.[48] In the present context 'empirical jurisprudence' covers any general questions (that are not purely analytical or normative) about legal phenomena in 'the real world'. It thus includes 'Historical Jurisprudence', 'Sociological Jurisprudence', and much else besides. By using the word 'empirical' I do not intend to adopt an empiricist as opposed to a phenomenological, hermeneutic or other interpretive stance; nor do I wish to restrict this to a particular epistemology.[49] In this context 'empirical jurisprudence' is a rough category covering generalisation (including assumptions) about legal phenomena in the 'the real world'.[50]

1.4 The significance of 'globalisation'

Words like 'globalisation' and 'global' are used very loosely. Here, it is useful to distinguish between two primary uses. First, 'globalisation' is sometimes used to refer to certain recent tendencies in political economy – the domination of the world economy by a group of interrelated ideologies and practices, commonly referred to as 'The Washington Consensus'.[51] This is clearly illustrated by 'the anti-globalisation' movement, which has rather diffuse targets, including American hegemony, Western dominated international financial institutions, free market ideology, and capitalism in general. The issues are important, not

[47] Hart (1983) at pp. 88–9.

[48] On misleading uses of 'sociology' to cover all social sciences see Chapter 8.2 below.

[49] In so far as this is necessary, I am here prepared to take my stand on 'innocent realism' as set out in *GLT*, Chapter 8, based on Susan Haack (1998). On empiricism, see Chapter 8.2 below.

[50] I shall use the term 'legal generalisations' to refer to generalisations about legal doctrine – for example, interpretive or quasi-empirical claims that the basic concepts and principles of the law of contract are uniform throughout most of the world. See Chapter 10.2(c) below.

[51] See below p. 337.

least in respect of poverty and environmental matters, but this usage is too narrow in the present context. I shall use the term 'globalisation', following Anthony Giddens, in a much broader, less politically fraught sense, to refer to those processes that increase interaction and interdependence in respect not only of economy and trade, but also communications, science, technology, language, travel, migration, ecology, climate, disease, war and peace, security and so on.[52]

This second broader meaning can be quite useful, but it too is problematic. I teach a course called 'Globalisation and Law'. At our first meeting I usually ban all 'g-words' from the classroom – 'global', 'globalising', 'globalisation' etc.. There are two exceptions to this rule: first, for most of the course we adopt a global perspective; second, a student may use a 'g-word' provided its use can be justified in that particular context and that it is being used with clarity and precision.

There are two reasons for the rule. The first is obvious: 'g-words' are ambiguous and tend to be used very loosely. They are abused and over-used in many ways, often as part of generalisations that are false, exaggerated, misleading, meaningless, superficial, ethnocentric, or a combination of all these.[53] This can clearly be seen in much of the loose talk about global law, global governance, global law firms, global lawyers, and global jurisprudence.[54]

The second reason is especially important for lawyers: the literature on globalisation tends to move from the very local (or the national) straight to the global, leaving out all intermediate levels.[55] It is also tempting to assume that different levels of relations and of ordering are neatly nested in a hierarchy of concentric circles ranging from the very local, through sub-state, regional, continental, North–South, global, and beyond to outer space. But the picture is much more complicated than that: it includes empires, alliances, coalitions, diasporas, networks, trade routes, and movements; 'sub-worlds' such as the common law world, the Arab world, the Islamic world, and Christendom; special groupings of power such as the G7, the G8, NATO, the European

[52] Giddens, (1990) at p. 64. Cf. Giddens and Hutton (2000). See further *GLT*, Chapter 1, at pp. 4–10.

[53] Twining (2001) at pp. 24–6. Holiday Inns and CNN may circle the world and in that sense may be 'global'. But most global generalisations refer to surface phenomena, which may conceal more than they reveal. This theme is developed in Chapter 10 below.

[54] Not all such talk is inflated. For example, Harold Berman makes a sustained case for developing 'world law' underpinning global society along the lines of Wilfred Jenks's vision of a common law of mankind or a new *ius commune*. (Berman (1995), Jenks (1958)). While I place much greater stress on sub-global processes and institutions, the argument deserves to be taken seriously. Similarly, the New York University Law School's programme and concerns are sufficiently extensive that it may be pedantic to mock its claim to be 'a' or 'the' 'Global Law School'. However, a law firm with offices in less than ten metropolitan centres and many books, journals, and articles with 'global' in the title illustrate the general point.

[55] This is very common. See Westbrook (2006). Even Santos, who emphasises the complexities of 'globalisation', tends only to use four levels: global, regional, national, and local. See Santos (2002) at pp. 162–82 (placing the global and the local in counterpoint); See also p. 371 (showing a more flexible chart).

Union, the Commonwealth, multi-national corporations, crime syndicates, and other non-governmental organisations and networks. Talking in terms of vertical hierarchies obscures such complexities. It is especially important for lawyers to be sensitive to the significance of boundaries, borders, jurisdictions, treaty relations, and legal traditions.[56]

Even with these crude geographical categorisations, and even without reference to history, a ban on g-words sends a simple message of complexity. It also emphasises the point that in regard to the complex processes that are making human beings, groups, and peoples more interdependent, much of the transnationalisation of law and legal relations is taking place at sub-global levels. Furthermore there are also local and transnational relations and processes that to a greater or lesser extent bypass the state such as the Internet, networks of non-governmental organisations (NGOs), many of the internal and external relations of large corporations, and so on.

The purpose of this ban on 'g-words' is not to suggest that the processes that are loosely subsumed under 'globalisation' are unimportant; rather it emphasises that, if we adopt a global perspective in studying and theorising about law, our attention needs to be focused on all levels of relations and ordering, not just the obvious trilogy of global, regional, and nation state, important as these may be. There are, of course, genuinely global phenomena and issues (e.g global warming, the Internet, and nuclear proliferation).

Since World War II, a significant number of supra-national and transnational regimes and orders have developed and are a very important part of the legal landscape. It is reasonable to treat the World Bank, the International Monetary Fund, and the World Trade Organization as 'global' institutions, even if their geographical reach is uneven. The same applies to institutions and orderings such as UNESCO, the International Olympic Committee (IOC), FIFA, the Catholic Church, Amnesty International, or the law firm, Baker and Mackenzie.[57] However, at least as important are regional bodies and regimes, such as the European Union and the Council of Europe, the North American Free Trade Association (NAFTA), and the African Union. Most obligations under public international law are derived from multilateral and

[56] On levels of law see Chapter 3.3 below.

[57] Which of these various regimes, orders, and orderings counts as a 'legal order' depends on one's criteria of identification of law in a given context. See especially Chapters 3 and 4. Developing regimes for the Internet, corporate self-regulation, *lex mercatoria*, are all candidates for recognition as 'non-state' legal orders. Whether the system of internal governance of an institution such as Baker and Mackenzie, a law firm with over 3,000 lawyers and offices in over seventy cities (Bauman, 1999), counts as 'a legal order' depends on context. Similarly, given that in 2002 Baker and Mackenzie did not have offices in Africa, the Caribbean, the Indian sub-continent, and most of the Pacific (including New Zealand), and does set some geographical limits on the work it undertakes, raises the question of whether it is genuinely 'global'. This is a trivial question for most purposes, except perhaps to make the point that this is the law firm with the best claim to the label. Of course, some of these transnational fields have become highly specialised: for example, on WTO Law see Howse (2007), Palmeter (2003), Petersmann (2005) and Bermann and Mavroidis (2007).

bilateral treaties with very variable geographical application.[58] Hirst and Thompson point out that the bulk of the work of most multi-national companies is sub-global, often confined to two or three continents.[59] It can be useful to talk of 'the world economy', provided that one recognises that there are many sub-global economies, including unofficial and informal ones. Similar points apply to 'the world banking system'. How a recession in the United States or a decision to lower interest rates in the European Union affects other economies is an empirical question – one should not just assume changes at the global level. There are degrees of interdependence.[60]

Commonsense suggests that the extent of interdependence and interaction is likely to be greater where there is proximity in terms of space or such factors as historical association (ex-colonies, trade routes, traditional alliances) or language (English, Chinese, Kisawahili) or legal tradition (the common law, civil law, religious law) or patterns of migration (religious and other diasporas), or complex combinations of these. Legal patterns are closely related to other patterns of proximity. The important point here is that most institutions, regimes, orders, and orderings with which we are concerned operate largely at sub-global levels and in studying such phenomena it pays to have a reasonably realistic demographic picture of their scale and distribution across space and time.

This book is concerned with implications of 'globalisation' (broadly conceived) for legal theory. Here it is relevant to make two points relating to law as an academic discipline as it has been institutionalised in what is loosely called 'the West'. First, in the past 150 years or so the primary focus of academic law, legal scholarship, legal education, and legal theory has been on the municipal law of nation states. This is true not only of substantive and procedural law, but also of satellite subjects. Comparative law, at least until recently, has been almost entirely dominated by 'the Country and Western Tradition' which has been largely concerned with comparisons of private municipal law in 'parent' common law and civil law systems.[61] The more expansive 'Grandes Systèmes' tradition has often been dismissed as unscholarly or simplistic. In legal theory, only exceptionally have Western jurists looked beyond municipal law: in the Anglo-American tradition nearly all canonical jurists, positivists and non-positivists alike, from Bentham and Austin through to Dworkin, Raz, and Duncan Kennedy, have been almost entirely concerned with domestic

[58] On mild scepticism about the 'universality' of the international human rights regime see Chapter 6.3 and Chapter 10.2 below.

[59] Hirst and Thompson (1999).

[60] Some writers, accepting this point, use 'globalisation' to refer to any process that intensifies relations across national borders (e.g. the authors discussed in Woodman *et al.* (2004) at pp. 20–3). Similarly Goldman (2007 at p. 15) uses 'globalist' and 'universalist' to denote tendencies towards universality. Unfortunately, the magnetic pull of 'g-words' encourages tendencies to generalise and to over-simplify.

[61] Twining (2000a), *GLT*, Chapter 7.

state law. The few exceptions, such as Ehrlich, Maine, and Llewellyn,[62] are generally treated as marginal. In recent times, leading normative theorists, notably Rawls and Dworkin, have explicitly retreated into a peculiar kind of particularism. Dworkin states that 'interpretive theories are by their nature addressed to a particular legal culture, generally the culture to which their authors belong'.[63] Rawls makes a similar restriction to liberal or at least decent societies;[64] even empirical legal studies and sociology of law have, for most of their history, focused almost entirely on the municipal law of their own 'societies'.[65] The major exceptions to this tendency are public international law, human rights law and, recently, transnational commercial law.[66]

Similar patterns are discernible in Continental Europe. The phenomenon is familiar, well documented, unsurprising, and for the most part quite easily explained. One general reason is that, especially in the common law tradition, the culture of academic law is 'participant-oriented' and, at least until recently, professional legal training and practice (by judges, government lawyers, as well as private practitioners) have been almost entirely focused on local municipal law. In the present context, an important implication of this is that nearly all of our stock of concepts and theories has similarly been relatively local, or at least geared to a single legal tradition. Indeed, nearly all legal concepts, including many 'fundamental legal conceptions', that have been the focus of attention of analytical jurists are 'folk concepts'.[67] One of the main challenges to general analytical jurisprudence is the elucidation and construction of analytical concepts that 'travel well' across legal traditions and cultures.[68]

A second point is that adopting a global perspective may encourage reductionist tendencies – a search for universals, the construction of grand overarching theories, and a tendency to emphasise similarity rather than difference. Such tendencies are particularly visible in the movement to harmonise, standardise and unify laws.[69] In 1977 the World Congress on Philosophy of Law and Social Philosophy was launched under the grand rubric of 'A General Theory of Law for the Modern Age'. No such theory resulted. My contribution, entitled 'The Great Juristic Bazaar', was taken as satirising this title and emphasised the richness, pluralism, and complexity of the global heritage of theorising

[62] American commentators tend to focus on Llewellyn as a Legal Realist and commercial lawyer, but play down the significance of 'the law-jobs theory', which is treated by European jurists as perhaps his most significant contribution. See Drobnig and Rehbinder (eds.) (1994).

[63] E.g. Dworkin (1986) at p. 102. See Chapter 5, p. 162 below.

[64] 'The aims of political philosophy depend on the society it addresses' (Rawls (1999b) at p. 421, *ibid* at pp. 306–7).

[65] See Chapter 8.5 below.

[66] See generally, Braithwaite and Drahos (2000).

[67] On the shortness of the list of concepts dealt with by nineteenth-century analytical jurists as part of general jurisprudence see *GLT*, Chapter 2.

[68] This is the central argument of Chapter 2 below. On some of the methodological difficulties see Glenn (2004) at pp. 44–51.

[69] A powerful and eloquent critique of the tendency to privilege the similar over the different is presented by Pierre Legrand (2003).

about law.[70] I am not an extreme particuralist,[71] but problems of generalising about legal phenomena – conceptually, normatively, empirically, and legally – are a central concern of this book.

I make one general exception to the ban on 'g-words'. I encourage students to adopt a global perspective as a starting point for considering particular topics in the course. Thinking in terms of total pictures is mainly useful for setting a context for more particular studies. Grand synthesising theories, such as Glenn's account of legal traditions, or organising theories such as Tamanaha's, also have their uses.[72] They are examples of the synthesising function of legal theory. There may even be value in trying to construct a historical atlas of law in the world as a whole – although my own efforts in this direction have done little more than illustrate some of the obstacles in the way of such an enterprise: the multiplicity of levels of human relations and ordering, the problems of individuating normative and legal orders, the complexity and the variety of the phenomena that are the subject matters of our discipline, and the relatively undeveloped state of the stock of concepts and data that would be needed to produce such an overview.[73] Adopting a global perspective also helps to map the extent of our collective ignorance of other traditions. Despite progress towards a more cosmopolitan discipline, attention will remain primarily focused on particular enquiries and local details. Jurists and legal scholars cannot live by abstractions alone.

To sum up: We may not be able entirely to expunge g-words from our vocabulary – indeed there are some genuinely global issues and phenomena, and a global perspective may be useful for setting a broad context and presenting overviews. However, whenever 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?

1.5 'General jurisprudence'

Similar considerations apply to the term 'general jurisprudence' as to the overuse of 'global'. 'General' in this context has at least four different meanings: (a) abstract, as in '*théorie génèrale du droit*'; (b) universal, at all times in all places; (c) widespread, geographically or over time; (d) more than one, up to infinity.[74]

[70] Twining (1979) reprinted in *GJB*, Chapter 11.

[71] My caution relates to facile and misleading transnational comparisons and generalisations about law. This does not imply that there are no patterns, rather that they are not easily discerned and interpreted – see R. Hoffman (1998) on the theme of 'the same and not the same'.

[72] Discussed in Chapters 3 and 4 below.

[73] *GLT*, Chapter 6, and Chapter 3.3 below.

[74] Leslie Green's account of 'General Jurisprudence' (2005) is confined to contemporary analytical legal philosophy (general jurisprudence as the most abstract part of jurisprudence/legal theory) and does not quite fit any of these categories. The article contains some interesting insights, but ignores all broader discussions of the concept. On 'legal philosophy' as one part of jurisprudence, see Chapter 1.6 below.

The English distinction between general and particular jurisprudence is not quite the same as one common usage in Continental Europe. In his useful book *What is Legal Theory?*, Mark van Hoecke traces the history of civilian conceptions of 'general jurisprudence' (*théorie génèrale du droit, algemeine rechtslehre*) in terms of the ups and downs of a sub-discipline that has tried to establish itself between abstract legal philosophy and legal dogmatics.[75] This kind of legal theory reached its heyday before World War II in the *Revue Internationale de la théorie du droit* edited by Kelsen, Duguit and Weyr. In this interpretation 'legal philosophy' is abstract and metaphysical, removed from the details of actual legal systems. 'General jurisprudence' was empirical, concerned with analysing actual legal systems at a relatively high level of generality. 'General' in this context refers to level of abstraction rather than to geographical reach and 'general jurisprudence' is interpreted as a kind of middle order theory. In the English analytical tradition, on the other hand, 'general' referred to extension in point of space: Bentham, for example, distinguished between universal and local jurisprudence; Austin between the general theory of law common to maturer systems and the theory of law underlying a particular legal system.

Accordingly we need to distinguish between 'generality' in respect of levels of abstraction, in respect of geographical reach, and in respect of extent. Mobile phones or the Internet have a wide geographical reach without being very abstract; mobile phones are numerous; the Dutch concept of 'bileid', as I dimly understand it, is quite abstract but rather local.[76] Often, however, generalisation involves abstraction.

During the nineteenth century English jurists normally assumed that jurisprudence was general. The Natural Law Tradition was universalistic. Bentham developed a universal science of legislation. Austin, more cautiously, developed a general analytical jurisprudence for mature nations. Holland claimed that jurisprudence was a science and therefore must be general. Leaders of the Historical School, such as Maine, advanced sweeping Darwinian generalisations about law and social change.[77] However, during the early days of academic law in both England and the United States the focus became more particular. One reason for this was that the study of the fundamental legal conceptions of one's own legal system was seen to be more practical and

[75] Van Hoecke (1986).

[76] Blankenburg and Bruinsma (1994) at pp. 63–73. '"Bileid" is 'a very Dutch legal term', which has no English equivalent.' It is considered a key to understanding Dutch legal culture. 'It is generally used to describe the policies of a public body' in terms of intentions, guidelines, ethos, or standards by which its actions may be judged. It is used here as an example of an abstract term which has a limited geographical reach.

[77] For details see *GLT*, Chapter 2. '[Maine's] model was geology and he compared primitive ideas of law with the primary crusts of the earth, but his readers related his theory of legal evolution to the doctrine of biological evolution which became fashionable through Darwin's *Origin of the Species* (1859).' (Stein (1984) at p. 344).

relevant to the rest of the curriculum. Austin, Pollock, Gray, and others explicitly emphasised practicality.[78]

Nineteenth century proponents of general jurisprudence, influenced by scientific models of enquiry (e.g. Darwinism) and by universalism in ethics (e.g. both utilitarianism and natural law), tended to *assume* the universality of their theories. Today, however, claims to universality and generality need to be treated as problematic. A central issue of a revived general jurisprudence should be: how far is it meaningful, feasible, and desirable to generalise – conceptually, normatively, empirically, legally – across legal traditions and cultures? To what extent are legal phenomena context- and culture-specific? In treating generalisation as problematic, usage (d) from our list may be the most useful, because of its flexibility.

While Bentham and some nineteenth century jurists equated 'general' with 'universal' (b),[79] Austin and others explicitly limited their theories to 'mature' or 'advanced' societies (c). So by implication do Hart and his followers who treat modern state law as the paradigm case of law.[80] The geographical reach of much contemporary juristic discourse is strikingly indeterminate.[81] 'General' in senses (c), and (d) is a flexible, relative category in a way that 'global' and 'universal' are not.[82]

In the nineteenth century the term particular jurisprudence referred to the study of the concepts and presuppositions of a single legal system; general jurisprudence referred to the study of two or more legal systems and was quite often confined to advanced or 'civilised' systems. Universal jurisprudence was more like global jurisprudence, but was often restricted to the law of sovereign nation states. Generality and particularity are relative matters. Globalisation has implications for law and its study. It does not follow that what is needed is a global jurisprudence, if that means looking at law solely or mainly from a global perspective. That is too narrow. The old term 'General Jurisprudence' is broader and more flexible than 'global'. Here I shall use 'general jurisprudence' to refer to the theoretical study of two or more legal traditions, cultures, or

[78] Austin (1863); Pollock (1882) at pp. 1–41; Gray (1909) at pp. 128–44. There were also signs of a tacit legal relativism, exemplified by W.W. Buckland (1890) and (1945), discussed in *GLT*, pp. 24–35.

[79] Tamanaha's conception of 'general jurisprudence' is universalistic in tendency: 'The ability to gather information on *all* kinds of social arenas, on *all* state legal systems as well as on other kinds of law, is precisely what qualifies this proposal as general jurisprudence.' (Tamanaha, 2001, at p. 233).

[80] Galligan (2007) explicitly confines his focus to modern societies and argues strongly for treating state law as distinctive (*Ibid.* at pp. 21–2).

[81] *GLT*, Chapter 2. For example, it is sometimes difficult to be sure whether Dworkin's theory of adjudication is about American Federal Law, US law, Anglo-American law, 'the common law' generally, or extends to all liberal democracies or even beyond that.

[82] *GJB*, pp. 338–41.

orders (including ones within the same legal tradition or family)[83] from the micro-comparative to the universal.[84]

Why do I talk of 'reviving' general jurisprudence, when some prominent modern jurists, for example Hart and Raz, have claimed to have been doing 'general jurisprudence'?[85] A brief answer is that, while much of their work can be treated as *examples* of general jurisprudence, their *conception* of 'general jurisprudence' is quite narrow in being largely confined to state law viewed from what is a essentially a Western perspective. My conception is much broader than theirs and harks back to a time when jurists as different as Bentham, Austin, Maine, Holland, and followers of Natural Law were all conceived as pursuing different aspects of 'general jurisprudence'. The label itself is unimportant, although it has sometimes been misused. Furthermore, contemporary jurists who consistently do general jurisprudence are exceptional, for the great bulk of legal theorising in the Anglo-American tradition is confined to modern Western state legal systems, often very largely to the United States and the United Kingdom. Finally, my conception of general jurisprudence is intended to challenge tendencies (often latent) to project parochial preconceptions onto non-Western legal orders, cultures, and traditions.[86]

1.6 Jurisprudence, legal philosophy, and empirical legal studies

'Jurisprudence', 'legal theory', and 'legal philosophy' do not have settled meanings in either the Anglo-American or the Continental European traditions.[87] Here, I shall treat jurisprudence and legal theory as synonyms and legal philosophy as one part – the most abstract part – of jurisprudence. In this view, jurisprudence is the theoretical part of law as a discipline with a number of jobs or functions to perform to contribute to its health. A theoretical question is no more and no less than a question posed at a relatively high level of abstraction. Some topics, such as theories of justice, questions of metaphysics, epistemology, or meta-ethics, belong to legal philosophy in this restricted sense. Some questions, such as 'what constitutes a valid and cogent argument on a question of law in the context of adjudication?' are in part philosophical, as they are concerned with the nature of reasoning; but they also involve elements

[83] This chapter is mainly concerned with theorising across legal traditions and cultures. However, comparison and generalisation *within* a given legal tradition or culture can also be problematic and has tended be neglected by comparative lawyers. (On comparative common law see *GLT*, pp. 145–8).

[84] This conception has some affinity with nineteenth century usage, but differs from it in three important respects: (i) it treats generalising about legal phenomena as problematic; (ii) it deals with all levels of legal ordering, not just municipal and public international law; and (iii) it treats the phenomena of normative and legal pluralism as central to jurisprudence.

[85] See n. 74 above (Green 2005).

[86] On the concepts of order, culture, and tradition see Chapter 3 below.

[87] For a fuller treatment, see Twining (2005e).

about which philosophers have no special expertise – such as the distinction between questions of law and questions of fact, and the nature of adjudication.[88] One just cannot take for granted that courts and judges are institutionalised in the same ways in the Netherlands and England, let alone in the world as a whole.[89] One does not expect philosophers to contribute very much to clarifying such matters, yet theories of adjudication and legislation are an important part of the agenda of jurisprudence.

Herbert Hart wrote that 'no very firm boundaries divide the problems confronting [different branches of legal science] from the problems of the philosophy of law'.[90] He continued: 'Little, however, is to be gained from elaborating the traditional distinctions between the philosophy of law, jurisprudence (general and particular), and legal theory.'[91] I agree with the first statement, but dissent from the second for several reasons. First, there has been a tendency in recent times to treat legal philosophy and jurisprudence as co-extensive, but this is associated with a tendency to focus only on the most abstract questions and to neglect other important, but less abstract, issues. Similarly there has been a tendency to criticise all jurists at the level of philosophy.[92] However, by no means all questions in legal theory are solely or mainly philosophical questions and not all jurists are philosophers.

The idea of 'philosophically interesting' questions and concepts can build bridges between law and philosophy by pointing to shared concerns; but it can also divert attention from concepts and issues that are jurisprudentially significant.[93] Justice, rights, rules, causation, and reasons are familiar examples of concepts that are both important in jurisprudence and philosophically interesting; tradition, culture, institution, corruption, and torture, may be potentially philosophically interesting, but have not received the attention they deserve within jurisprudence. There are other concepts that could benefit from the methods of conceptual elucidation developed by analytical philosophers even if they do not raise issues of philosophical significance (e.g. lawyer, dispute, court,

[88] As we descend a ladder of abstraction, the need for local knowledge increases. For example: 'What constitutes a valid, cogent, and appropriate argument in common law/UK/English adjudication?' requires detailed knowledge of the institutional and cultural contexts, even more so if the question refers to a specific court (the House of Lords/ Crown Courts) or an individual judge or a particular case.

[89] Courts, adjudication, judges are all problematic as analytic concepts (*GLT*, p. 65). For a brave attempt to develop a general account of adjudication see Shapiro (1981). For an even bolder attempt to construct a general model of third-party intervention in conflicts of others see Black (1993) Chapter 6 (with M.P. Baumgartner).

[90] Hart (1967).

[91] *Ibid*. In the Postscript to *The Concept of Law* (1994), Hart revived the distinction between particular and general jurisprudence in order to differentiate his enterprise from that of Dworkin. In my view, he did not succeed (*GLT*, Chapter 2).

[92] See Leiter (1997) (review of Neil Duxbury *Patterns of American Jurisprudence* (1995)).

[93] *GJB*, pp. 81–3.

jurisdiction, unmet legal needs).[94] In the enterprise of understanding law, it is neither necessary nor sufficient for an issue to be philosophically interesting for it to be jurisprudentially interesting.[95]

The revival of close contacts between jurisprudence and analytical philosophy in the 1950s, for which Herbert Hart has been given much of the credit, has led to a range of work that has contributed much to the enterprise of understanding law. In addition to Hart's own work in both general and particular (or special) jurisprudence, his immediate successors included several substantial figures, of whom Dworkin, Finnis, MacCormick, and Raz are the best known. Although some of the debates about positivism seem to have verged on obsession and have recently descended into unseemly wrangling, Brian Leiter has reminded us of the contributions of the next generation of analytical philosophers to a wide range of topics.[96]

In the fifty years since Hart's seminal inaugural lecture there is much to celebrate, not only in terms of an extensive and sophisticated literature, but also because there is now a lively, loosely-knit inter-disciplinary community that includes philosophers interested in law, jurists interested in one or more areas of philosophy, scholars trained in both disciplines, and philosophers who have worked to acquire sufficient local legal knowledge to be accepted as honorary jurists. There is thus a large and quite varied pool of talent that is well-equipped to tackle a fresh range of issues.

Despite its many achievements, there has in recent years been a growing sense of dissatisfaction with the dominant mode of analytical legal philosophy both within and outside its somewhat closed circles. This is a complex matter because the criticisms come from different quarters, the reasons are varied, and

[94] For example, problems of constructing suitable analytic categories for comparing legal professions and legal education have bedevilled discussions of these subjects. At a more mundane level it seems likely that the underdevelopment of global and international statistics about legal phenomena is in part due to lack of stable concepts suitable for this purpose. See *GLT*, pp. 153–7. See further Chapter 2.3(b), and Chapter 8.7(a).

[95] For a recent example of the use of 'philosophically interesting' that is criticised here, see Dworkin (2006a). Compare a shift of tone in Dworkin (2006b) at p. 228: 'the [sociological] concept is not sufficiently precise to yield philosophically interesting "essential features". ...[T]he sociological concept, like the concepts of marriage, meritocracy, boxing, and other criterial concepts we use to describe social arrangements, has too much leeway for that: its boundaries are too malleable to support an essential feature philosophical investigation.' Arguing against Raz, Dworkin maintains that concepts relating to social institutions are not 'natural kind concepts' that have essential features.(*ibid*., at p. 229) I agree with him on this, but differ on the judgement that enquiries about social institutions are neither important nor intellectually interesting. On 'essentialism' see Chapter 4 below.

[96] Leiter (2004). Leiter lists criminal law theory, the conceptual and moral foundations of private law, the elucidation of central concepts of abstract legal theory (such as authority, reasons, rules and conventions); the revival of natural law theory; and the exploration of the implications of philosophy of language, metaphysics, and epistemology for both traditional issues of legal philosophy and for fresh explorations of the foundations of various fields of substantive and adjective law (*ibid*., pp. 166–70). One might add a wealth of literature on the borderland of legal and political theory, especially in theorising liberal democracy and justice, and some outstanding contributions to intellectual history, not least in relation to Bentham.

some of the more heated polemics have taken the form of personal attacks.[97] There are two main complaints: (i) that legal philosophy has become too detached from ordinary legal scholarship and legal practice; and (ii) that the agenda of issues addressed by mainstream analytical philosophers is too narrow. I believe that there is some merit in these criticisms, but there are encouraging signs that we are entering a new era.

The charge that analytical legal philosophy is out of touch with legal scholarship and legal practice relates mainly to the continuing debates about positivism – especially the Hart–Dworkin debate and discussions provoked by Hart's Postscript to *The Concept of Law*. For some years many law students have complained that there seems to be little or no connection between this kind of jurisprudence and other subjects in the curriculum. Similarly, many legal scholars feel that they find little illumination for their particular studies from such theorising. In this view, much legal philosophy has become too abstract, too esoteric, and perhaps too sophisticated to contribute much to the health of the discipline. In short, analytical legal philosophy has become a subject apart.[98]

Charges of narrowness against analytical jurisprudence are of long standing. They can refer to focus, or conception of law, or geographical reach. All three are relevant in the present context. The central thesis of this book is that as the discipline of law becomes more cosmopolitan, jurisprudence as its theoretical part needs to broaden its reach to take more account of non-Western legal traditions, a wider range of legal phenomena, and different levels of normative and legal relations and ordering.

For many years I have argued that Herbert Hart and his followers revolutionised the methods of analytical jurisprudence, but they tended to accept uncritically the agenda of questions they inherited, which in turn was based on a narrow conception of law that centred on legal doctrine and its presuppositions.[99] Although they treated law as a social phenomenon, their work proceeded 'in almost complete isolation from contemporary social theory and from work in socio-legal studies, with little overt concern for the law in action'.[100] As an example of this, Hart himself continued to focus almost entirely on concepts of legal doctrine or its presuppositions ('law talk') but paid almost no attention to concepts of 'talk about law', such as dispute, function, institution, and order,

[97] The recent round of public polemics involved Coleman (2001) criticising Dworkin, who in a long review responded with a fierce attack on recent debates about positivism, which he characterised as insular, ascetic, Ptolemaic, sterile and unworldly and analogous to Scholastic philosophy. (Dworkin, 2002). Leiter (2004) then dismissed Dworkin as wrong-headed, deeply implausible, and largely irrelevant to both legal practice and areas of legal philosophy ignored by Dworkin. In a thoughtful essay Halpin (2006b) argued that all the protagonists in these exchanges, and Joseph Raz, who stayed clear of the polemics, were out of touch with legal practice, as he interprets it. For a brief comment see Twining (2006d).

[98] See MacCormick and Twining (1986).

[99] Twining (1979) (reprinted in *GJB*, pp. 69–92).

[100] *Ibid*., p. 561 (*GJB* at p. 73).

which were as susceptible to, and in need of, the same kind of conceptual elucidation.[101]

The effect of these recent sharp exchanges is more revealing than their intellectual content. They can be interpreted as symptomatic of a growing feeling that some enclaves of legal philosophy have got into a rut and there is a need to branch out in new directions. Part of my argument is that the challenges of globalisation present many opportunities to do just that. Rather than prolonging these polemics, I shall return at the end of this chapter to Dworkin's recent discussion of positivism in which he makes an important distinction that is quite close to the distinction between law as ideas and law as institutionalised social practice that is developed in Chapter 4.

1.7 Legal positivism

In academic law the terms 'positivist' and 'positivism' are sometimes used loosely, as terms of abuse, to refer to formalist or 'black-letter approaches', to someone who is uncritical or indifferent to questions of value, or to spurious claims to neutrality in enquiries that can be shown to be value laden.[102] Behind such charges lies the idea that 'positivism' involves a sharp distinction between fact and value (or between law as it is and law as it ought to be) and a claim that legal scholarship is or should be only concerned with the law as it is. Such attitudes are epitomised by a well-known professor who is reported to have thundered at beginning law students in University College London: 'This is *not* a Faculty of Justice; this is *not* a Faculty of Law; it is *the* Faculty of Laws.' I do not share that attitude.

In this book I adopt the standpoint of a legal positivist who has regularly been critical of 'black letter' approaches; who believes that questions of political morality and evaluation of legal institutions and rules are both central to the discipline of law, who frequently adopts a critical stance, and who, as a scholar, aspires to relative detachment without making any strong claims to neutrality or to being scientific.

'Positivism' in the present context involves no more and no less than two well-known propositions:

(1) that there is no necessary connection between law as it is and law as it ought to be (the separation thesis);[103] and
(2) that the existence of law is a matter of social fact (the social sources thesis).[104]

[101] *Ibid*., at pp. 578–9 (*GJB*, pp. 90–1). See Chapter 2 below.
[102] 'The now pejorative term "Legal Positivism" like most terms that are used as missiles in intellectual battles, has come to stand for a baffling array of different sins.' (Hart (1983) pp. 50–1).
[103] Classic texts include Bentham (1776/1977) *A Fragment on Government* Preface (*CW*, 1977 Burns and Hart, pp. 397–8); Austin, *The Province of Jurisprudence Determined* (1832/1954) at pp. 184–5; Hart (1958) reprinted; Hart (1983) Chapter 2. Hart (1961) Chapter 9.
[104] Hart (1961) Chapter 9; Raz (1979) pp. 38–52.

This is not the place to justify a positivist position generally.[105] My reasons for adopting these positivist assumptions in this context are as follows:

First, for most of my professional life I have worked within the Anglo-American tradition of legal positivism, exemplified by Bentham, Hart and Llewellyn. When real issues have divided positivists and non-positivists, I have tended to side with Hart against Dworkin and Fuller, while considering that the significance of the issues that divide them is overblown.[106] In considering legal phenomena from a global perspective, I shall continue in this tradition by trying to build on, refine and go beyond some of the basic ideas of Hart, Llewellyn, and Tamanaha.

Second, the separation thesis is particularly important in looking at legal orders and phenomena from the outside (while taking into account the internal point of view of participants). Describing, and where appropriate evaluating, legal orders other than one's own, considering them as the product of 'other people's power', comparing legal phenomena from two or more legal orders, and mapping law in the world are activities that require relative detachment so far as is feasible. On the other hand, if one is participating in one's own legal system as citizen, lawyer, judge, reformer or critic, one's concern may indeed be to make the system 'the best it can be', to emphasise aspirations such as respect for rights or the Rule of Law or fidelity to law. There are some contexts in which the is/ought distinction breaks down, for example in presenting an argument or

[105] See *GLT*, Chapter 5, esp. pp. 119–21.

[106] My position on this point is close to Neil MacCormick: 'The best forms of positivism lead to conclusions similar in important ways to those derivable from the more credible modes of natural law thought, when we pursue rigorously the matters in hand. That is not to say no important matters are in dispute…Our conclusion ought to be, not that these important issues may safely be ignored by jurisprudence, but they ought to become the focal point of discussion in place of mock-battles over the question whether unjust laws can enjoy formal validity' (MacCormick (1981b) at p. 145). Recently MaCormick has moved from a gentle form of positivism to a position that: 'law is necessarily geared to some conception of justice, taking account of distributive, retributive, and corrective justice, to all of which respect for the rule of law is in the context of the state's capability for coercion, essential.' But he makes it clear that he is mainly talking about the point of law from the standpoint of participants in a particular state legal system: 'Hence you cannot sincerely participate in this enterprise without a serious orientation to these values, and you cannot intelligibly participate in it without at least pretending to have such an orientation' (MacCormick, (2007) at p. 264). MacCormick's arguments are subtle and persuasive, but they do not apply to the standpoint of a comparative lawyer or a member of Amnesty International considering the human rights record (its legal provisions as well as specific 'violations') of a foreign country or a jurist trying to construct an overview of legal phenomena from a global perspective. From such standpoints Hart's position is more persuasive: 'The contrary positivist stress on the elucidation of the concept of law, without reference to the moral values which it may be used to promote, seems to me to offer better guarantees of clear thought. But apart from this, the identification of law as morally legitimate, because oriented towards the common good, seems to me in view of the hideous record of the evil use of law for oppression to be an unbalanced perspective, and as great a distortion as the opposite Marxist identification of the central case of law with the pursuit of the interests of a dominant economic class.' (Hart (1983) at p. 12.) For a more detailed discussion see Twining (forthcoming Del Mar (2009)).

justifying a decision on a disputed point of law, but that is not the present context.[107]

Third, critics of positivism who argue that such a stance leads to an amoral, impoverished, even dangerous conception of law caricature the kind of positivism to which I subscribe. In this context, constructing overviews of legal phenomena in the world as a whole or substantial parts of it, it is useful to draw a clear distinction between describing, explaining and interpreting legal phenomena as they are and evaluating, criticising, recommending, and prescribing conditions for legitimating such phenomena.

Many of the concerns about the separation thesis relate to issues about legitimation, evaluation, constructive interpretation, and criticism of law – issues that in my view can be addressed as well within positivism as outside it.[108] A positivist of this kind is not amoral or indifferent to issues of morality and evaluation. Indeed Bentham, and to a lesser extent Hart, distinguished the 'is' and the 'ought' for the sake of the ought.

The closeness between this version of positivism and the position of Ronald Dworkin is illustrated by the distinction that is developed in Chapters 3 and 4 between law as ideas and law as a species of institutionalised social practice as part of the thesis that understanding law involves both conceptions. In his recent writings Dworkin[109] distinguishes between a sociological and a doctrinal concept of law:[110]

> We must take care to distinguish two questions both of which might be questions about the very nature of law. The first is sociological: what makes a particular structure of governance a legal system rather than some other form of social

[107] I am a weak positivist in that I consider that the is/ought distinction depends on context and standpoint. Hart was more emphatic about the distinction. (Twining (2006d)). Hart told me that he was a stronger positivist than MacCormick made out in MacCormick (1981a). (See now MacCormick (2008)). Recently the terms 'hard' (exclusive) and 'soft' (inclusive) positivism have acquired a technical meaning in a separate debate about the meaning of the 'rule of recognition'. (In this debate Raz and Leiter are clearly 'hard', but there is disagreement as to whether Hart was 'hard' or 'soft' (Leiter (2007) at pp. 121–2). The main concern of Hart's positivism was to set up a concept of law that involved no pre-judgement about its morality, social utility or other value. Description should be kept quite separate from prescription, evaluation and legitimation. For the jurist concerned with understanding law – including other people's law – it is important to attain relative detachment as far as is feasible, even if this involves disenchantment with the law. Dworkin (2006b) and MacCormick (2007) are right that for legal actors as participants in certain kinds of polity, law is and should be linked to justice and other aspirations.

[108] Raz (1979) at pp. 233–49.

[109] Dworkin (2006a). See a different formulation in Dworkin (2006b) at pp. 1–5.

[110] Dworkin also introduces a third concept, which is not in issue here. '[W]hat we might call an *aspirational* concept of law, which we often refer to as the ideal of legality or the rule of law. For us this aspirational concept is a contested concept: we agree that the rule of law is desirable, but disagree about what, at least precisely, is the best statement of the ideal.' (Dworkin (2006b) at p. 5) I agree with Dworkin that what is the best conception of the aspirational concept is a question of political and personal morality and that 'the central concepts of political morality – the concepts of justice, liberty, equality, democracy, right, wrong, cruel, and insensitivity – function for us as interpretive concepts as well' (*Ibid*., p. 11). On formal and substantive conceptions of the rule of law, see Chapter 11.3(b).