Review essay

Jurisprudence for an interconnected globe
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Although the enthusiasm for the concept of globalisation has taken a darker complexion since 9/11, it still provides a convenient label for a variety of purposes. However, its attractions also make it unhelpful and misleading, not least because while it suggests increasing global unity, it is generally used to draw attention to the often competitive interactions between diverse societies and cultures. Mercifully, the editor of this collection has avoided using the term 'globalisation' in its title, although the papers result from a symposium on Globalisation and the Universalisation of Legal Norms hosted by the Julius Stone Institute of Jurisprudence at the University of Sydney, linked with William Twining's delivery of the inaugural Julius Stone Address in August 2000. The revised text of that Address provides the lead paper in this collection, and a background to the other papers, although many of them also refer to Twining's earlier work in this vein, much of which was collected in a revised version in *Globalisation and Legal Theory* (2000).

Generalisability

Collections of writings assembled around the law-and-globalisation theme are likely to suffer from the lack of a clear common understanding or theory either of globalisation, of law, or both, leading to incoherence. Attempting to avoid this trap, the editor of this collection focuses her introductory chapter, boldly entitled 'New Directions for Jurisprudence', on Twining's identification of the problem of 'generalisability': the investigation of which concepts 'travel well'. This, he suggests, is a high priority task for a revived general analytical jurisprudence, which he considers is needed in response to the challenges of globalisation. Although the essays of the other contributors understandably vary in the extent to which they address the issue of generalisability, it does provide a connecting thread for an otherwise varied collection.

Twining's paper in this collection is part of an ongoing project to develop a 'general jurisprudence' which he suggests might underpin the increasingly cosmopolitan character of law as a discipline, by 'theorising that treats generalisations across legal families, traditions, cultures and orders as problematic' (Twining, 2005, p. 6). Central to this is a revival of general analytical jurisprudence, an argument for which is made in this paper, and further developed in a paper which was apparently at that time in draft (as indicated in footnote 45), but has now been published in the first issue of this journal (Twining, 2005), and which goes over much of the same ground, although with some new material. The contribution of jurisprudential conceptual analysis is to provide 'sustained critical analysis of the adequacy of our existing stock of concepts for transnational legal discourse, both law talk (the discourse of rules and its presuppositions) and talk about law (discourses about any legal phenomena)' (Twining, 2005).

Twining seeks to establish a wider version of analytical jurisprudence than the familiar and much-criticised version associated with the linguistic analysis and logical positivism school typified

especially by Herbert Hart. To do so he builds on Julius Stone's scheme dividing jurisprudence into three parts, the analytical, the sociological and 'theories of justice', which for Twining entail analytical, empirical and normative inquiries. However, these inquiries seem to proceed in parallel, rather than in combination. He certainly seeks to explain his project in the context of current debates about globalisation, from which he draws his analysis of the challenges that it poses to 'traditional' legal theory (p. 26), which is perhaps an exercise in sociological jurisprudence. He also adopts a much broader perspective on law than that of the positivists, encompassing 'the structure, concepts, values, and practical operation of institutionalised ordering of relations between persons (human, legal, unincorporated, and other), not just relations within a single state or society or between sovereign states' (p. 23). This might result from normative inquiry, or perhaps might also be sociological.

These inquiries affect the range, scope and purpose of his analytical jurisprudence, but they do not seem to influence either its object or methodology. Twining sees the task as the *analysis of concepts*, deploying a range of tools not only from analytical philosophy but also related disciplines, and extending over a much wider range of concepts than does traditional analytical philosophy, due to his wider definition of law, and his concern not only with law talk but also talk about law (Twining, 2005, p. 12). The aim is to develop conceptual clarity and hence an understanding of which concepts 'travel well'. He states that 'So far my tests of travelling far and well are mainly empirical and pragmatic: does it fit? Does it work? Can the same concepts be used with roughly the same meaning in England and Italy, or in California, Tanzania and Japan? . . . I think that these ideas need to be refined' (p. 33; Twining, 2005, p. 9). Applied to some case studies, he finds that the term 'inhuman treatment', despite leaving room for substantial disagreements in concrete cases, does travel well 'in that, first, it provides a framework for debating such issues; second, it provides a direct link to the idea of basic human needs; but, third, it allows some flexibility in respect of its interpretation and application in different social and economic contexts'. On the other hand, the term 'corruption' (and related concepts such as bribery) –

> 'seem to travel reasonably well in respect of the modern public sector of nation states, especially state bureaucracies, but are more problematic outside this specific context. The strongly emotive language of this discourse is more suited to individual ethics than large-scale systemic practices, is often tendentious and probably hampers detached analysis and comparison.' (p. 41)

This analysis is certainly 'contextual', in that it takes account of how the terms are used by various actors and in different social contexts (Chinua Achebe, the World Bank, Transparency International). However, this context is simply background: no theory is used to try to understand the social nature or function of the concepts analysed, or the social practices within which they are developed and deployed. The term 'corruption' is found to be less generalisable than 'inhuman treatment', because it tends to be used in contexts which are emotive and for expressing concerns about individual morality, which makes the discourse about corruption unsuitable for 'relatively detached analysis and comparison' (p. 40). Hence the differences lie not in the character of the concepts themselves, but perhaps in the broader discourses and social contexts in which they are used, about which, presumably, analytical jurisprudence cannot say much. Twining's pragmatism is in many ways a strength: his critical and sceptical approach, and personal experience of some of the social contexts he considers, allow him to make some interesting observations. However, he considers law in its social context, but not law as a social process.

This is perhaps surprising, since Twining has been strongly influenced by Karl Llewellyn's Realist approach to 'law jobs', and in the past couple of decades many helpful insights from social theory have helped shape our understanding of how law works and what lawyers do. Especially relevant to his concern with analysing concepts has been the work on lawyering as an interpretive practice, and lawyers as conceptual ideologists. This goes beyond some of the earlier structuralist approaches to the

law and lawyers, which tended to a rather static view, and the intrepretivist approach suggests that lawyering should be seen as part of a broader ensemble of processes which help create the social world (McCahery and Picciotto, 1995). Similarly, Pierre Bourdieu has discussed the practices of interpretation of legal texts, involving the appropriation of the 'symbolic power which is potentially contained within the text', in terms of competitive struggles to 'control' the legal text (Bourdieu, 1987, p. 818). However, he suggests that coherence emerges, partly because to succeed competing interpretations must be presented 'as the necessary result of a principled interpretation of unanimously accepted texts', and partly through the social organisation of the field (Bourdieu, 1987, p. 818).

Law in global governance

Rather than taking globalisation simply as the context, it might be more interesting and fruitful to consider the role that law and lawyers are playing in helping to construct new forms of what is now described as global governance. Indeed, this role does seem significant, and there is no shortage either of advocates of or explanations for this. In evaluating the trend towards the legalisation of world politics, an influential group of commentators has suggested that law contributes three features: rules which are regarded as binding, which are precise, and the interpretation of which can therefore be delegated to a judicial body (Abbott et al., 2003). However, this view of legalisation, which rests on an essentially Weberian perspective, has been criticised as taking a narrow view of law.[1] It focuses essentially on law between states (traditional public international law), and rests on the idea that law can constrain power by helping to ensure that states are held to the bargains they make, if these agreements can take the form of 'credible commitments'.

In contrast, William Twining's broader view of law encompasses 'the global, international, transnational, regional, inter-communal, municipal (nation, state and subsidiary jurisdictions), sub-state local and non-state local', and he understands that they 'interact, overlap, and sometimes conflict in extremely complex ways' (p. 23). This was much less so in the classical liberal international system, which rested on the sovereignty of the nation-state, and a legal hierarchy which, at least in principle, was much clearer. This was essentially dualist, with the state's government acting as the hinge: the horizontal plane of international law, created by and binding only states, and the vertical dimension of the internal law of states, which applies to individual legal persons. State law could also tolerate, or even encourage, a variety of private normative orders, while reserving to itself the monopoly of legitimate coercion. However, as the centrality of state law has become substantially eroded, there has been a blurring of the distinctions between formally binding law and other normative orders, as well as the growth of complexity in interactions between the various legal arenas that Twining notes.

However, these changes are not just part of an external 'context' impinging on law. Many of them have been wrought by and through legal transformations, and lawyers have themselves played an important role in these processes. The concept of 'transnational law' was developed in U.S. law schools at the height of the Cold War, when the theory and practice of international relations were still firmly based on realist power-politics, and it laid the basis for the emergence of a generation of lawyers equipped to export U.S.-style business lawyering around the world.[2] 'Supranational law' was

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1   This issue is discussed in greater detail, taking the example of the World Trade Organization, in Picciotto (2005).

2   Philip Jessup's Storrs lectures at Yale (Jessup, 1956) established the concept, which was developed through law school courses, notably at Harvard by Henry Steiner and Detlev Vagts, as well as at Chicago, taught in the early 1960s (when William Twining and I were both there) by Kenneth Dam, who later served as Deputy Secretary of State under Reagan and Deputy Secretary to the Treasury under George W. Bush, before returning to Chicago.

largely created by the activist jurisprudence, exploiting the concept of 'direct effect', of the European Court of Justice, operating within a broader network of academic and practising lawyers and judges at every level. More broadly, lawyers have been active in developing a competitive interaction between legal arenas or jurisdictions, which both results from and facilitates strategies of forum-selection and forum-shifting. Examples include mass disaster or large-scale liability litigation, such as the Bhopal or Cape Asbestos cases, and the lobbying in various forums for strengthening and extension of intellectual property protection. Even more radically, new legal arenas have been created, perhaps most strikingly in the development of 'offshore' jurisdictions offering facilities as tax or regulatory 'havens' (Hampton and Abbott, 1999; Palan, 2003). The resulting system of offshore finance has played a key part in the global economy, allowing those able to exploit the facilities they offer to build enormous finance-based empires. Another example is the creation of the new *lex mercatoria*, which has also been described as 'a sort of offshore justice' (Dezalay and Garth, 1995, p. 54), developed by the competition between national centres for commercial arbitration.

Philip Alston, in a paper suggesting that international lawyers should rethink their discipline in the light of changes in the form of state sovereignty, suggests that their failure to do so is a surprising myopia in view of their role as 'handmaidens of the changes wrought by globalisation' (Alston, 1997). William Twining's focus on the problem of generalisability is, in my view, very helpful in identifying the dilemmas posed by the changing role of law in contemporary global governance. However, this is not just a matter of a challenge to law created by external forces. Since, as I have argued, lawyers play an active part in shaping these changes, the choices we make in reformulating both the law and our understanding of it will significantly affect the direction of broader social changes.

This is especially important, since a central function of law is to help provide legitimacy, which is both urgent and problematic in a period of global social change and political destabilisation such as the present. For some, such as the commentators referred to at the beginning of this section, legitimacy is thought to be provided by law because it offers a logical application of precise or unambiguous rules prescribing obligatory conduct, to implement politically-determined aims (Abbott et al., 2000). This implies a formalist view of law, as a process for decision-making which is technical-rational. However, this technicist legitimacy is undermined by the shift away from classical liberal internationalism, since its assumption that political accountability is provided essentially through national state governments becomes harder to maintain.

This is perhaps the challenge to law from globalisation that William Twining has in mind. The decentered, heterarchical and interactive character of the new forms of governance suggests a different explanation for the increased role of law in global governance: that it is precisely the flexibility of the process of formulation and application of rules through interpretative practices that is law's strength. This gives lawyers a key role in managing the multiple interactions of regulatory networks (which indeed they help to create), and enables law to offer both the promise of universality and the possibility of adaptation to specific and local circumstances. Law provides a basis for accommodating the diversity of local and national social and cultural particularities to the increasingly globally integrated world market, and to manage conflicts resulting from power disparities (Picciotto, 1997, p. 266).

Yet Twining is right to be sceptical as to the ability of law to deliver on these promises. However, I suggest that the answer lies not in jurisprudential analysis of the legal concepts themselves, but in a consideration of the practices within which they are generated and deployed. It may well be possible for a legal principle to 'travel well' if its articulation and interpretation are confined to a relatively closed community of specialists, who can generate and maintain a shared understanding of how it should be applied. This is what Bourdieu means by suggesting that conceptual coherence can result from the social organisation of the field (which he also refers to as 'habitus'). Others have argued that global governance is facilitated by the work of 'epistemic communities', who are seen as experts with

a shared world-view derived from their technical specialism, insulating them at least partially from the short-term and special interest pressures generated in both the political and economic spheres. The growing influence of such experts especially in relation to global governance issues is seen to result from the increasing complexity of policy decisions and ontological uncertainty (Haas, 1992). Clearly, however, the closed and elitist nature of such specialist communities tends to exclude any broader popular or democratic participation in their work.

Hence, the increased power of such groups, deriving from their specialised knowledge which enables them to define agendas, set boundaries and define solutions, also brings responsibilities. Perhaps most important among these, as I have argued elsewhere (Picciotto, 2001, pp. 349–51) is the obligation to operate reflexively and with an awareness of how their professional or scientific practices and contributions impact on the quality of public debate. This entails avoiding a technicist rationality, which can operate in an autocratic way if it claims spurious authority (Wynne, 1992), by acknowledging the ways in which their techniques rest on formalist assumptions allowing them to build generalisations and models based on abstractions from messy reality. Thus, they should accept that the conclusions they reach are of only partial or conditional validity, and not determinative of policy decisions but contributions to public debates. This suggests that the objectivism of a closed, technicist and instrumental rationality should be replaced by a more open, discursive rationality, akin to Habermas's communicative rationality, which may facilitate democratic deliberation (Dryzek, 1990, 1999).

Case studies

The remaining chapters in this book mostly consist of interesting explorations of specific issues, grouped around three headings, money, people and cultures, although inevitably there is some overlap. First, however, David Goldman contributes a paper which ranges over the last millennium to provide some historical background which certainly gives a different perspective on some of the contemporary febrile globalisation talk.

Sundhya Pahuja goes beyond formal law to examine the regulatory practices of international economic institutions, especially the International Monetary Fund and the World Trade Organization. She finds that both of these operate through discursive practices in which economic concepts play a normative role, and she emphasises the power contained in these discourses. Hence, to Twining's scepticism about the possibilities of generalisation she adds a strong warning that both generalisable concepts and any general jurisprudence developed to analyse them must pay 'attention to the discursive power of the narratives in which those conceptual tools are embedded' (p. 82).

Dimity Kingsford Smith contributes a characteristically thorough study of globalised securities regulation, deploying theories of legal pluralism as well as Boa de Sousa Santos' concept of 'interlegality' to analyse the relationship between the principles developed by IOSCO (the International Organization of Securities Commissions) and the regulation of securities markets through national law and national and local regulators. Interestingly, she finds that '[b]roadly expressed principles like those of IOSCO are excellent vehicles for the specification of interests and values. They are much less good for the technical or precise jobs of law such as specifying the passage of title or risk' (p. 119). Thus, she finds that in a sense IOSCO principles probably do travel well, by promoting imitation, incorporation and convergence towards the interests and values they express, which are those of the dominant parties in the specialist community. However, by taking insufficient account of the needs and circumstances of weaker parties, the principles may lack both efficacy and legitimacy. As an example she cites the preference of IOSCO for a more permissive disclosure-based regime, which allows securities to be issued provided adequate information is given, and is perhaps more suited to more developed markets with sophisticated investors, rather than regulation based on prior approval, which might be cheaper and more appropriate to

emerging markets. Thus she, like Pahuja, warns that generalisable rules may lack legitimacy, in the sense both of wide acceptability and effectiveness.

The chapter by Jill Murray considers the international diffusion of labour standards, which has been the aim of the International Labour Organization (ILO) for nearly a century. Although the ILO has developed some innovative features, it has essentially relied on a top-down or 'command-and-control' model, suitable for the liberal international system in which it was founded. More recently, however, new possibilities have opened up, as a result of consumer awareness and activist pressures on transnational corporations (TNCs) and their global supply chains, especially those reliant on reputation symbolised by brand-names (Klein, 2000). This has resulted in the growth of a plethora of corporate and industry-based codes of conduct, which mostly operate as 'soft law' standards (Jenkins, 2002). Murray critically examines the analysis of some authors who have argued that this approach offers the possibility of ratcheting up labour standards, although within a strengthened framework for enforcement rather than the voluntary self-regulation normal with such codes. She suggests that to focus on TNCs as well as on excessive abuses such as child labour reproduces an older paternalist model, and might neglect the importance of establishing standards applicable to all workers through national legislation, co-ordinated through a representative international organisation such as the ILO. However, I suggest that the two approaches may not be exclusionary (Picciotto, 2003). Indeed, some of the international activist campaigns aim both to use codes to spread ILO standards and strengthen national law, as well as combining consumer activism and labour organisation.[3]

The remaining papers are rather more loosely linked to the issue of generalisability, and focus rather on the impact of changes described as globalisation. Kim Rubinstein's chapter considers the concepts of citizenship and nationality, and argues that the element of social cohesion represented by the concept of citizenship has become attenuated in an increasingly fragmented world. However, she argues that the development of a principle of effective rather than merely formal nationality in international law, linked with a progressive citizenship project which accepts the possibility of multiple allegiances, would be more consonant with a cosmopolitan and rights-based international law.

The editor herself contributes another interesting essay, which applies an analysis of changes in migration laws and controls on illegal migration to examine some aspects of globalisation theories, especially about sovereignty. Although she suggests that the tightening of immigration controls and the demonisation of illegal immigrants reinforce the nation-state, this is clearly a contradictory process. The drive for tighter controls on movement of people is in many ways ineffective: as she points out (fn. 53), even the United States admits that almost 2% of its population are 'illegals'. A closer examination of the actual enforcement of these controls would also show, I suggest, that national authorities must operate through international networks which combine public and private actors, for examples airlines.

Adam Czarnota's chapter considers the transplantation to the countries of eastern Europe of rule-of-law institutions, which has accompanied their abrupt post-communist exposure to the capitalist world market. His preliminary assessment is that this has produced a 'limping' rule of law, since it was imposed from above, unaccompanied by any changes in social values especially of the elites.

Finally, Mark Findlay considers the global changes in the nature of crime and its control. He argues that the universalisation of crime problems, such as narcotic drugs, terrorism and corruption, and the construction of globalised and politicised control strategies, are largely symbolic. Thus, he seems to echo Dimity Kingsford Smith's view that co-ordination in global governance is mainly a matter of attempting to foster convergence through concepts which embody values. His enigmatic

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3   Notably, the Clean Clothes Campaign: www.cleanclothes.org.

conclusion is that the paradox of globalisation lies in the way in which 'it makes harmony a mask for diversity, and difference a concealment of fusion' (p. 247, citing Findlay, 1999).

Interconnections?

The many and diverse issues explored in these papers certainly confirm William Twining's intuition that generalisability is problematic. However, they perhaps shed a different light on the nature of the problems. Conceptual coherence may well result from the cohesion of specialist groups who formulate global regulatory principles, but this may not suffice to ensure either their broader acceptability or their effectiveness. Although legal or normative principles may offer both the articulation of universal values and the flexibility for adaptation to local circumstances through interpretation, they may still lack legitimacy. At the same time, the fragmentation of the classical liberal international system has also undermined political accountability through representative democracy in the national state. All these factors suggest, as a number of commentators have argued, a need for new forms of democratic deliberation. An important element of this, which is essential to avoid the dangers of rule by technocratic elites, is to foster a more discursive rationality. This applies equally to legal practices and analyses of them. If a general jurisprudence can contribute to this, then so much the better.

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@inproceedings{Picciotto2005JurisprudenceFA, title={Jurisprudence for an interconnected globe Edited by Catherine Dauvergne. Aldershot and Burlington: Ashgate, 2003. 253 pp. Â However, its attractions also make it unhelpful and misleading, not least because while it suggests increasing global unity, it is generally used to draw attention to the often competitive interactions between diverse societies and cultures.