At the Montesquieu Seminars, new developments in legal theory are explored and discussed. Fundamental problems experienced in the (practices of) law are reflected critically. A broad range of disciplines contribute at these attempts of sustained critical reflection. No particular school of legal theory is preferred over another.

Tilburg Law School has an open mind for new approaches to law and does not want to limit the debate to the agenda set by some school, movement or discipline. As a result, while the seminars are conceived around urgent actual problems, the focus is interdisciplinary.

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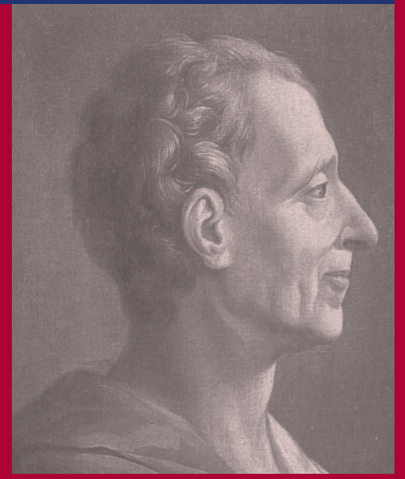
TILBURG LAW LECTURES SERIES

Globalisation and legal scholarship



TILBURG LAW LECTURES SERIES

Globalisation and legal scholarship

William Twining

MONTESQUIEU SERIES

The discipline of law, as it is institutionalized in the Anglo-American tradition, and more generally in the West, is responding in a variety of ways to the challenges of globalization. These responses are dynamic, fragmented, exciting, and threatening. One task for legal theory is to make sense of and evaluate such developments. Individual scholars need to ask: What are the implications of globalization for my specialism or this research topic or my course? The purpose of this lecture is to suggest an approach to this question through self-critical examination of one's working assumptions from a global perspective, using illustrative "ideal types" of general assumptions and tendencies underpinning (a) Western traditions of academic law; (b) the "Country and Western Tradition" of classical micro-comparative law and (c) a naïve model of legal writings about transplants/reception/diffusion. These constructions suggest that our academic culture has tended to be state-oriented, secular, positivist, "top-down", Northo-centric, ignorant of other traditions, unempirical, and universalist in respect of morals. These ideal types highlight some crucial points at which they are challenged by adopting a global perspective. The lecture draws attention to the paucity of our stock of analytic concepts that transcend legal traditions and cultures.

GLOBALISATION AND LEGAL SCHOLARSHIP

By William Twining

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- Montesquieu seminars -

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PRELIMINARY QUESTIONS FOR THE GLOBAL LAW SCHOOL

Introducing the fifth Montesquieu Seminar

Willem J. Witteveen

In 2009 the School of Law of Tilburg University celebrated its 9th lustrum. During a special edition of the Montesquieu Seminars professor William Twining delivered a lecture on *Globalisation and legal scholarship*. At that time the yearly Montesquieu lectures were already becoming a Tilburg tradition. The general idea of the lectures was and still is to invite outstanding scholars who have done interdisciplinary work with the kind of broad-minded intellectual attitude that Montesquieu fostered. In earlier editions socio-legal scholar Brian Tamanaha talked about the perils of legal instrumentalism, James Boyd White addressed the ethical problems of law through a reading of literature, Tom Tyler gave a psychologist's view of the reasons people have to obey the law, and Michael Ignatieff spoke on some of the larger issues of peace and human rights at an event co-hosted with the Nexus Institute. When global law is the issue, Professor Twining combines theory and practice, as he is both an eminent scholar and a true world citizen. He is of course known as the Quain Professor of Jurisprudence Emeritus of University College London, but he is also a world traveller who has worked extensively in Eastern Africa, the Commonwealth, the United States and also in the Netherlands. William Twining has been in Tilburg before. In the nineties, he gave a wonderful class on narrative and advocacy, related to his work on evidence. Also, he visited Tilburg to discuss the future of legal education, in respect of his investigation of the state of legal education in the Anglo-American world (*Blackstone's Tower*). And there was also a series of lectures on the challenges that increasing globalisation bring to the study and practice of law as part of a

lecture tour that was instrumental to his writing of a book on *General Jurisprudence*.

Globalisation and legal scholarship is an outgrowth of this latter undertaking. The topic is of great interest to people working in the Tilburg School of Law. The most remarkable aspect of the development of the School of Law over the last five years has been that the work done in research but also in teaching has become more transnational and international. The facts speak for themselves: publications increasingly in English, more people participating in international research networks, larger numbers of students from abroad. The School of Law is contemplating a new educational strategy envisioning students who on graduation are able to take part in legal work in various parts of the world. The ambition is to create a global law school.

These changes reflect a changing perception – not only in Tilburg by all means - of law and legal phenomena being studied. The idea that law is mainly national law, organized within the boundaries of sovereign states, is eroding. Scholars tend to think of law now as crossing borders. The European dimension is permeating all of national law. But local developments may also have significance in different parts of the world. As boundaries have blurred and comparative and transnational research has become imperative, Tilburg scholars join larger communities of scholars doing the same kind of work in other universities in foreign places. And the intellectual challenges are presented by problems and developments which similarly are not contained within the borders of national legal systems. Interestingly, this globalization of the world of law has not diminished in any way the importance of the national level, as the state is still the most powerful locus of decision-making, law-making and conflict resolution. But the old hierarchical picture has changed drastically. The relevance of national law is compatible with the relevance of local law. Indeed, some of the most important factors affecting

global developments occur below the national level. The central thesis of professor Twining's work on General Jurisprudence is precisely 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 orderings. What is called for is an adaptation of the intellectual heritage of Western jurisprudence to the new predicament of global law. This requires a paradigm shift. If there is to be a global law school, it is necessary to investigate a large range of issues, in order to be able to develop a curriculum that is free from the assumptions of legal education that are still mostly inherited from the late 19th and early 20th centuries.

Marco Polo's cosmopolitanism

So how does globalization affect the work we do as legal scholars and teachers? Before turning to professor Twining's contribution to these issues, let us think back in time to two remarkable men who affected profound changes in the reigning perspective on legal phenomena and the world: Marco Polo and Montesquieu.

Long before the era of the nation-state a Venetian trader and adventurer set sail towards the East. Marco Polo accompanied his father and uncle between 1271 and 1275 on a journey along the fabled Silk Route to Central Asia, where they reached China and the court of the Mongolian emperor Kublai Khan. Kublai Khan was very interested in his Western visitors, entrusting Marco Polo with many diplomatic missions that brought him on extensive travels through the land of the Mongols for the next 17 years. In 1295 the party sailed home, calling at Sumatra, southern India and Persia along the way, before finally reaching Venice. The story of the travels of Marco Polo would become world famous, but the story of how this story was assembled is more important for us. In 1298 the navy of Genoa, Venice's powerful rival for commercial dominance on the seas, gathered forces for an assault on the fleet

of the Serenissima Republica of Venice. In the Venetian defence fleet there was a ship bought and fitted for war by Marco Polo who himself sailed on it to lead the fight. Alas, in the battle his ship ran aground in the lagoon. The Genoese forces won the battle, taking some 8000 prisoners (which is a lot when we remember that the total population of Venice in those days numbered 100,000.) Marco Polo was among those captured. He was held in the Genoese state prison, the Palazzo di San Giorgio, for a number of years. There, as a Venetian commander, he was treated with deference. Marco Polo started telling his exotic stories of his adventures in the East. 'The whole city gathered to see him and to talk to him, not treating him as a prisoner, but as a very dear friend and greatly honoured gentleman, and showed him so much honour and affection that there was never an hour of the day that he was not visited by the most noble gentlemen of that city, and presented with everything necessary for his daily living.' This was a statement by Giambattista Ramusio, a Renaissance scholar who compiled one of the earliest accounts of Marco Polo's career. These were stories intended to amuse. This became even more marked by his unique collaboration with another prisoner, Rustichello of Pisa, a writer of Arthurian romances who had once been a favourite of King Edward I of England. Marco Polo told the tales, Rustichello wrote them down and embellished them, making them conform to the literary conventions of that time.

It was later thought that all of these travel stories were fantastical inventions. It was even doubted whether Marco Polo had really visited the court of the Mongol emperor. Only in the 19th century fresh research was done into the tales. It was discovered that while at the surface there were many literary tales, the facts referred to almost always fitted the evidence. Marco Polo had indeed been to the places he described. His information about the religion, the customs, the legal arrangements, the monetary economy, the advanced technology of the Chinese were all

remarkably accurate. Through an act of reconstruction many aspects of the Mongol empire could be found.[1]

So what we have here is an opening up of the world for the closed Western mind, showing it there was a vastly more advanced civilisation in the East, told through the fantastical tales of a traveller (not a scholar) who really knew what he was talking about, but could only tell his story according to literary conventions that obscure its factual value. As sophisticated modern researchers of processes of globalisation, we have progressed but only slightly, since nobody can visit all the places that are relevant and do in-depth research into the legal culture there. Researchers still unavoidably take a lot on hear-say and on the authority of others, though of course fantastic stories have been disparaged as a serious source of information.

Montesquieu's comparativism

With the emergence of the scientific attitude and methods in the Enlightenment, the desire to really know became stronger. When Montesquieu, the intellectual hero of these lectures, published his *Spirit of the Laws* in 1748, he was eschewing fantasy. But he was no less dependent on uncontrollable sources. He had travelled, but never been to the land of the Turks (which for him became the home of despotic regimes) and certainly not to China, a land that he knew through the eyewitness reports of Jesuit travellers mostly. Using a fascinating ensemble of research materials, some of it as fantastic as the tales of Marco Polo, Montesquieu showed himself an adventurer of the mind, someone who uses the stimulus of information about the world in order to create a conceptual framework that must make it possible to understand its social laws better. He distinguished four regimes: monarchical, aristocratic, democratic, despotic and held that there was an ideal shape for

[1] Laurence Bergreen, *Marco Polo: From Venice to Xanadu*, Quercus London 2008.

each regime that all governing activities there had to fit. This fourfold scheme of regimes was then used to tell us stories about how law works in many different situations and cultures. Montesquieu is a comparative scholar who connects insights about various places of the world.

An instructive example is his analysis of how China and ancient Sparta deal with morality laws, coming from Book 19, chapter 16. He begins with a piece of conceptual analysis in the style of general jurisprudence.

'Mores and manners are usages that laws have not established, or that they have not been able, or have not wanted, to establish. The difference between laws and mores is that, while laws regulate the actions of the citizen, mores regulate the actions of the man. The difference between mores and manners is that the first are more concerned with internal and the latter external, conduct.'[2]

Then there follows an argumentation in the style of comparative law.

> 'Sometimes in a state these things are confused with one another. Lycurgus (ruler and legislator of Sparta) made a single code, for the laws, the mores, and the manners, and the legislators of China did the same. (...) The principal object of the Chinese legislators was to have their people live in tranquillity. They wanted men to have much respect for each other; they wanted each one to feel at each instant that he owed much to the others; they wanted every citizen to depend, in some respect, on another citizen. Therefore, they extended the rules of civility to a great many people. (...)'

[2] Montesquieu, *The Spirit of the Laws*, edited by Anne Cohler, Basia Miller and Harold Stone, Cambridge University Press 1989: Book 19, Chapter 16 at 317.

After these two steps, one theoretical and one comparative, Montesquieu then reflects back on his own society, where public behaviour is not contained in laws but in unwritten customs of polite behaviour between members of the same class.

> 'Civility is preferable, in this regard, to politeness. Politeness flatters the vices of others, and civility keeps us from displaying our own; it is a barrier that men put between themselves in order to keep from being corrupted.'

The reader who has followed Montesquieu's reasoning up to this point, sees him now turning his and our attention back to Sparta.

> 'Lycurgus, whose institutions were harsh, did not have civility as an object when he formed manners; he had in view the bellicose spirit he wanted to give his people. Always correcting or being corrected, always instructing and being instructed, as simple as they were rigid, these people practiced virtues for each other, rather than showing them regard.'

Montesquieu has in this short piece of the book performed an interesting analysis that has taken various clearly marked stages (and this pattern can be found in many places in *The Spirit of the Laws*). On what evidence is it based? The text gives us one footnote, to a description of China by Farther Jean Baptiste du Halde, a Jesuit missionary. Montesquieu was perhaps less well informed than Marco Polo who does not give us his sources but had at least done some fieldwork. Scholars in comparative law would today not be able to proceed in this way, more sources would be required, especially from Chinese authors themselves, and more empirical data. We may indeed have progressed beyond the methodology of the 18th century. But note that Montesquieu is able to do two things simultaneously. He develops a jurisprudence of general concepts

that can be used in the analysis of how law works in different cultures. At the same time, he is being informed by facts coming from descriptions of these various legal cultures to develop and refine his concepts and categories. The jurisprudence of Montesquieu is balancing theory and empirical research, developed in a clear and witty style of writing. Perhaps this combination is the reason *The Spirit of the Laws* remains a source of insights even today.

Beyond Marco Polo and Montesquieu?

Can contemporary scholars of the legal world really go far beyond Marco Polo and Montesquieu? Do not answer this question in the affirmative too quickly! With the enormous increase of available information, open to us through electronic sources, the problem of accurate selection becomes even more urgent for us than it was for Montesquieu. We still have to decide what to believe, which sources to accept, which interpretations are trustworthy, we still usually do not know how a complex legal arrangement really works. We still do not speak enough languages, overlooking the errors of translation that must be reflected in the English articles that are now the mainstay of scientific communication, often carrying greater weight than reports in the local language. The Latin of Marco Polo's days, Montesquieu's French, our English: all these are failed attempts at the universal language.

Where we have really progressed, and can make still further progress, is precisely in developing our conceptual schemes. The science of jurisprudence can be made to fit aspects of the world much better than it did in the past. It is one of William Twining's contentions that we need a general jurisprudence that encompasses the legal aspects of the world, building upon but also improving upon the concepts developed in the tradition of Anglo-American analytical jurisprudence and in the continental-European traditions in legal theory. His book *General Jurisprudence*

is a bold attempt at systematization that respects difference and variation and in this methodological aspect it is reminiscent of the ambitions of Montesquieu.

GLOBALISATION AND LEGAL SCHOLARSHIP

William Twining[3]

It is an honour to be invited to deliver the Montesquieu Lecture. It is also a pleasure for two specific reasons. First, I consider myself to be a Montesquieuite in spirit, if not in detail. Montesquieu was very influential on two of my gurus, Jeremy Bentham and Karl Llewellyn, though for different reasons. For Llewellyn his emphasis on empirical perspectives and on the particularities of social and political context was an inspiration. For Bentham, Montesquieu was a pioneer of clear sighted Enlightenment rationalism, challenging tradition, full of scintillating insights; but his lack of system and his interpretation of the separation of powers were also something to react against.[4] Montesquieu tempered Bentham's enthusiasm for a universal science of legislation, but he did not dent Bentham's ambition to be "legislator of the World".[5] I sometimes claim, semi-seriously, to

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[3] Quain Professor of Jurisprudence Emeritus, University College London and Visiting Professor, University of Miami School of Law. This is a revised and extended version of the Montesquieu Lecture delivered at the University of Tilburg in July 2009. An earlier version, entitled "Implications of 'globalisation' for law as a discipline", was published in Andrew Halpin and Volker Roeben (eds.) *Theorising the Global Legal Order* Oxford: (2009); parts are reproduced here by kind permission of the copyright-holders. I am grateful to Terry Anderson, Andrew Halpin, Volker Roeben, Mark Taylor, and participants in seminars and other discussions in Aberdeen, Dublin, Georgetown (in London), Helsinki, Miami, Princeton, Sheffield, Southampton, Swansea, and University College London for many helpful comments and suggestions.

[4] Bentham's general estimate of Montesquieu, is recorded in his commonplace book at 10 *Works* 143 (Bowring edition): "Locke - dry, cold, languid, wearisome, will live for ever. Montesquieu - rapid, brilliant, glorious, enchanting, will not outlive this century."

[5] See Appendix on "Bentham and Montesquieu".

organise my life on Montesquieuite principles: Every year I spend January through April in Florida as an academic snowbird. At that time the weather is gorgeous, there is little rain and the temperature is a moderate 12-27 degrees C. I migrate back to Oxford for Spring, Summer and Autumn, thereby fortifying my commitment to liberal democratic principles. Climate may not be all, but its importance in both law and life is widely underestimated.

My second reason for being pleased to be here today is that nearly ten years ago I gave three lectures in Tilburg on "General Jurisprudence". These were in effect a rather tentative prolegomenon to my book of the same title that was published in 2009.[6] So this occasion provides me with an opportunity to report back on how my thinking has developed over the past decade.

The central question of my Tilburg lectures and the book has remained constant: what are the implications of so-called "globalisation" for the discipline of law and for jurisprudence as its theoretical or more abstract part? At a general level, my answer has also remained constant: adopting a global perspective has important implications for our understanding of law, but at this stage in history we are not yet very well-equipped to provide an over-arching Grand Theory or even many reliable generalisations about the hugely complex phenomena of law in the world as a whole: as yet we lack concepts, data, hypotheses and models adequate for the task. Our Western academic heritage provides some promising starting-points on which to build, but the challenges are enormous. The message is anti-reductionist: it emphasises the complexity of legal phenomena and warns against

6 This lecture draws on three main works, *Globalisation and Legal Theory* (2000) (hereafter *GLT*), *The Great Juristic Bazaar* (2002) (hereafter *GJB*) and *General Jurisprudence* (2009) (hereafter *GJP*) in which nearly all of the main points in the text are explored at greater length.

simplistic, exaggerated, false, meaningless, superficial, and ethnocentric generalisations about law in the world as whole. Like Montesquieu, I have emphasised the variability of local conditions and the diversity of legal phenomena.

The general message has not changed, but the basic approach and ideas have been refined and developed in a number of directions. In this lecture, rather than survey a wide range of issues, I shall suggest an approach to the specific question of the relevance and implications of globalisation for their work from the point of view of individual legal scholars and teachers. I shall start by briefly sketching the current context, then talk briefly about the term "globalisation", before suggesting a way in which internal critique of one's operating assumptions about one's subject at different levels of generality can help an individual academic lawyer to approach the question.

Context

For nearly thirty years we have been bombarded by talk of "globalisation". Not surprisingly, such talk has involved a great deal of hyperbole, reflected in excited titles of apocalyptic books: *The Borderless World*, *The End of History*, *Our Global Neighbourhood*, *Jihad vs. McWorld*, *The World IS Flat*, *Clash of Civilizations*, *The End of Sovereignty*.[7] After a reasonable intellectual lag, academic law has responded to these developments. This is illustrated by law

7 Ken'ichi Ohmae (1991) *The Borderless World*; Francis Fukuyama (1992) *The End of History and the Last Man*; The Report of the Commission on Global Governance (1995) *Our Global Neighborhood* (The Brandt Report); Benjamin R. Barber (1995) *Jihad vs. McWorld: How Globalism and Tribalism are Reshaping the World*; Samuel Huntington (1997) *The Clash of Civilizations and the Remaking of World Order*; Thomas L. Friedman (2005) *The World IS Flat: a brief history of the twenty-first century*; David Eaton (ed.) (2006) *End of Sovereignty: A Transatlantic Perspective*.

publishers' catalogues, the proliferation of journals with "global" or "international" in the title, and significant, sometimes quite radical, "rethinkings" of fields such as international law, comparative law, EU law, and human rights.[8] However, this response has been uneven and fragmented. It has varied from country to country. For example, legal education in the United Kingdom and the United States has been slow to change, perhaps because most professional courses and examinations still focus almost entirely on domestic municipal law.[9] But in the United Kingdom our legal culture has been more cosmopolitan than that of the United States, partly because of membership of the

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8 E.g. for public international law Philip Allott, (1990) *Eunomia: new order for the world*. Thomas M. Franck (1995) *Fairness in International Law and Institutions*; Martti Koskenniemi (2005) *From Apology to Utopia: The Structure of International Legal Argument*; and Samantha Besson and John Tasioulas (eds.) (2008) *Philosophy of International Law*. For comparative law: Ian Edge (ed.) (2000) *Comparative Law in Global Perspective*; Annelise Riles (ed.) (2001) *Rethinking the Masters of Comparative Law*; Pierre Legrand and Roderick Munday (eds.) (2003) *Comparative Legal Studies: Traditions and Transitions*; Esin Őrűcű and David Nelken (eds) (2007) *Comparative Law: A Handbook* . For human rights: Upendra Baxi, (2002) *The Future of Human Rights* (2nd edn. 2006) and (2007), *Human Rights in a Posthuman World*; Marie-Bénédicte Dembour (2006) *Who Believes in Human Rights? Reflections on the European Convention*; Conor Gearty (2006) *Can Human Rights Survive?* (Hamlyn Lectures); James Nickel, *Making Sense of Human Rights* (2007); James Griffin, (2008) *On Human Rights* . For EC law Neil Walker, (ed.) (2003) *Sovereignty in Transition* and Neil Walker (2005) "Legal Theory and the European Union : A 25th Anniversary Essay" 25 Oxford Jo. Legal Studies 581; Ian Ward (1996) *A Critical Introduction to European Law* (London: Butterworth. 3rd edn, forthcoming Cambridge).

9 Courses with international, comparative, transnational and global in the title have proliferated, but the take-up seems to have been quite limited. Although Miami aspires to be a major centre for transnational legal services, the Florida bar examinations focus solely on domestic law.

European Union and the Council of Europe, partly because of some relics of the colonial era, and partly because our academic legal culture has been more detached from the particularities of legal practice than in America - see, for example, the strong emphasis on Roman law in the British tradition, at least until recently.

Today, in your country and mine, nearly all academic lawyers are specialists. Most of the responses to globalisation have come from fields that traditionally have had a significant transnational focus. There has understandably been less pressure on specialists in areas normally considered to be domestic or local, such as land law, obligations, criminal law, civil procedure, constitutional law and local government law.[10] Nevertheless there is a nagging question facing any legal scholar: What is the relevance of "globalisation" to my subject or this course or specific topic? The purpose of this lecture is to suggest an approach to such questions.

"Globalisation"

For present purposes it is not necessary to enter far into debates about the meaning and significance of "globalisation".[11] Here it

[10] However, comparative law has extended to cover most of these fields and now provides a transnational perspective and materials for the specialist in domestic law.

[11] *A quick guide for the unitiated.* A good way in for lawyers is Singer (2002/2004). Basic introductions to the literature on globalisation include T. Friedman (2005), Giddens and Hutton (2000), Hebron and Stack (2009), Held and McGrew (2007) and Sassen (2007b); more sophisticated accounts relevant to law include Keohane and Nye (2003), Sassen (2007a), and Slaughter (2004); a useful counter-balance to the enthusiastic globalisers is Hirst and Thompson (1999). There is a vast literature on the dangers (e.g. Gray (1999)) and benefits (e.g. Dunning (2003), Bhagwhati (2004)) of economic globalisation. Significant contributors to the discussion of the relevance of

will suffice to distinguish between two primary meanings of the term: a narrow one focused on economics; and a broad one that encompasses all modern tendencies to transnationalisation. In some contexts the term "globalisation" is used to refer to economic relations within a single putative "world economy". This usage is illustrated by "the anti-globalisation" movement, which is directed mainly against the dominance of the world economy by capitalist ideology and practices associated with a few powerful countries and institutions. This is narrow in two ways: it refers to only one set of relations, and it is mainly confined to the world treated as a whole. In this lecture I shall use "globalisation" in a broad sense, following Anthony Giddens,[12] to go beyond economics to include any processes that tend to make human relations - economic, political, cultural, communicative etc - more *interdependent*. Sometimes this refers to the world as a whole, i.e. those relations and issues that are genuinely worldwide; but sometimes it refers to sub-global relations that transcend national boundaries to a greater or lesser degree.

This doubly broad use of "globalisation" to refer to any significant transnationalising processes is appropriate here, because this is relevant to our immediate concerns. However, one needs to cast a sceptical eye on loose talk about "global law", "global lawyers", "global law firms", or "global legal culture".[13] This is not because

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globalisation to legal theory include Arthurs, H. Berman, P. Berman, Glenn, Goldman, Pogge, Santos, Slaughter, Tamanaha, and Teubner (for references see bibliography); several of these are discussed in detail in *GLT* and *GJP*.

[12] Giddens (1990) at p.64.

[13] In law "global" is indiscriminately used to mean universal, worldwide, widespread, transcending two or more legal traditions, or just transnational. On "g-words" see *GJP* at pp. 14-15. "Global law" can mean law that claims to be, aspires to be, or in fact operates universally, very widely, or just transnationally. Usually this refers to a single order or system (e.g. a [new] "world legal order") that operates or

such talk is always unjustified, but rather because so many generalisations about so-called "global" phenomena are either exaggerated ("global" means widespread)[14] or conflate aspiration

aspires to operate uniformly, or a modern equivalent of *ius gentium*, but sometimes it refers to a picture of all law *in the world*, which is very varied. Sometimes "global law" is confusingly equated with public international law: but not all international law is truly global; on some theories, international law is only one form of "global law". The standard joke is that it would be pedantic to deny that the World Cup at Association Football is "global"; to say the same of the ICC World Cup at cricket (16 nations) is stretching it; but the World Series (named after the *New York World*) or the instant Classic World series at baseball are just hyperbole. This can be met with the riposte that these competitions involve the best players or the best countries in the world in each sport. This hardly translates to law, although there is a developing practice of world rankings in respect of human rights, corruption, Rule of Law, and democracy.

To take another example of radical ambiguity: "global law firm" can mean one that offers services relating to all systems of law generally, or only in respect of some particular transnational (typically commercial or financial) fields. In this context "global" may refer to the client base, location of offices, types of specialised services offered, or just the largest law firms in the world (however they are geographically distributed) in terms of numbers of lawyers or numbers of countries in which they have offices. However, the most prominent table ("Lawyer Global 100" at http://www.thelawyer.co./global100/) ranks the world's largest law firms in order of revenue. The term "global law school" can be treated indulgently as public relations puffing, provided it does not purport to produce "global lawyers", students of all systems, mistresses/masters of none - a jibe levelled at John Austin *inter alios*.

[14] It is sometimes said that "English is the global language". It is true that, for the time being, English is probably the most used language in transnational relations (politics, finance, commerce). However, a useful map distinguishes (a) countries where English is the first and only language of most people; (b) countries where English is a native language, but there is at least one other significant native language (e.g. Canada, South Africa), and (c) English is not native, but is the only or main official language, even if a (sometimes small) minority have a working knowledge of it. (a) is largely confined to the United

and reality (the International Criminal Court aspires to be global, but it is not there yet; the same applies to the idea of humankind as a community) or they are superficial, misleading, meaningless, speculative, exaggerated, ethnocentric, false, or a combination of these.[15]

Here I shall use "global" to mean genuinely worldwide. I shall use different terms to refer to other levels of ordering and processes of increased interdependence, such as international, supra-national, transnational, regional, diasporic, and sub-national. In my view, a cosmopolitan discipline of law should be concerned with all levels of relations and legal ordering in the world as a whole, but a great many of these phenomena and processes operate at *sub-global* levels.

My argument is not only that "global" and related terms applied to legal phenomena are radically ambiguous, but that many of the most interesting patterns relating to law in the world are sub-global in significant ways. The important point is that *interdependence is a relative matter*. A high proportion of processes loosely referred to as "global" operate at more limited sub-global levels. These levels, insofar as they are spatial,[16] are not nested in a single vertical

States, the British Isles, parts of the Caribbean and most of Australasia (Zentai and Guszlev (1997)). Estimates vary considerably, but it seems unlikely that more than 15-20% of the world's population has a working knowledge of English (the percentage of Internet users is higher). These figures illustrate the difference between "top-down" and "bottom-up" perspectives. For a survey of the issues, see Crystal (2008). An under-researched question is: what percentage of the population in each country can understand the language(s) of the state courts?

15 See further *GLT* pp. 4-10, 245-9 and *GJP* pp. 13-18.

16 Many such sources of information are empirical about actual people acting, discoursing, exhibiting attitudes that can be described and mapped. E.g. it may not be appropriate to ask: where is Islamic law?,

hierarchy - galactic, global, regional, national, sub-state, local and so on. (see Table I) Interdependence is largely a function of proximity or closeness: proximity can be spatial (geographical contiguity), colonial, military, linguistic, religious, historical, or legal. In other words, a picture of patterns of law in the world needs to take account of regions, empires, diasporas, alliances, trading partners, pandemics, legal traditions and families. The British Empire, the English-speaking world, religious and ethnic diasporas, the common law world, "the Arab world", even so-called "World Wars" are all sub-global; so it is misleading to talk about them as if they apply to the world as a whole.

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but if we ask where have there been significant communities of Muslims at particular times we have at least an empirical basis for hypotheses that can be tested empirically about the existence of significant institutionalized social practices followed by Muslims at different times and different places. For there already exist maps and historical atlases depicting not only the distribution of Muslims throughout the world at given times, but also diasporas, migration routes, and networks (e.g. Chaliand and Rageau (1995), Esposito (1999). On the dangers of over-using spatial metaphors in relation to law, see Woodman (2003), and Bovnik and Woodman (2009) discussed *GJP* Ch.3.3.c.

TABLE I LEVELS OF LAW

Law is concerned with relations between subjects or persons (human, legal, unincorporated and otherwise) at a variety of levels, not just relations within a single nation state or society. One way of characterising such levels is essentially geographical:

global	as with some environmental issues, a possible *ius humanitatis*) and, by extension, space law (*e.g* mineral rights on the moon);
international	in the classic sense of relations between sovereign states and more broadly relations governed, for example, by human rights or refugee law;
regional	for example, the European Union, European Convention on Human Rights, and the African Union
transnational	for example, Islamic, Hindu, Jewish law, Gypsy law, transnational arbitration, a putative *lex mercatoria,* INTERNET law, and, more controversially, the internal governance of multi-national corporations, the Catholic Church, or institutions of organised crime;
inter-communal	as in normative orders governing relations between religious communities, or Christian Churches, or different ethnic groups;
territorial state	including the legal systems of nation states, and sub-national jurisdictions, such as Florida, Greenland, Quebec, and Northern Ireland;
sub-state	e.g. subordinate legislation, (such as bye-laws of the Borough of Camden) or religious law officially recognised for limited purposes in a plural legal system; and
non-state	including laws of subordinated peoples, such as native North Americans, or Maoris, or gypsies[17] or illegal legal orders such as Santos's Pasagarda law, the Southern People's Liberation Army's legal regime in Southern Sudan, and the "common law movement" of militias in the United States.
Which of these orders should be classified as "law" or "legal" is essentially contested within legal theory and also depends on the context and purposes of the discourse.	

[17] Adapted from *GLT* Ch. 6 at 139. Recent studies of Romani (Gypsy) law have been pioneered by Walter Weyrauch, see Symposium (Spring, 1997). On the Common Law Movement see Koniak (1996) and (1997). On Pasagarda see Santos (1995), discussed *GJP* at pp. 69-74.

These sub-global patterns are crucial - especially for lawyers. Treating all human rights law, and even public international law, as genuinely global in most respects is an exaggeration. It conflates universal, regional, multilateral and bilateral arrangements and regimes. It also blurs distinctions between aspiration and reality. It is difficult to generalise about legal phenomena across traditions and cultures, but insofar as there are reasonably clear patterns, most of them tend to follow sub-global arrangements: former empires, the European Union, the Hispanic-speaking world, the civil law tradition, the former Soviet bloc, alliances, trading blocs, religious and ethnic diasporas. For example, the spread of the common law is to be explained largely in terms of colonisation, imperialism, and recent American hegemony. The spread of Islamic law is more to do with patterns of migration. The transnational drug trade follows yet other patterns.

Increased interest in "globalisation" in relation to law has already made the topic of diffusion/reception/ transplantation salient in comparative law and, more generally in our discipline. One of the factors explaining diffusion has been imperialism and colonialism. Law spreads with Empire. All of the great empires in history from Genghis Khan, the Roman Empire to the European empires of the nineteenth and twentieth centuries have been sub-global, occupying large swathes of territory, but never the whole planet. One has only to look at elementary maps of the Roman Empire, the Holy Roman Empire, the Ottoman Empire, the British Empire in their heydays to see that this is true. Similar points can be made about migration and the spread of language, religion, technology, legal traditions, all of which are relevant to law.

We already have historical atlases, statistical tables, data bases and the like developed in other fields of enquiry that can provide at least broad overviews of significant sub-global patterns relating to legal phenomena. In the case of empires there is a vast body of

more detailed and more nuanced literature exploring stable patterns, dynamic processes and significant ruptures in detail and in depth. We can piggy-back on literature in history, political science, economics, geography, statistics, and several other social sciences in building up overviews and more detailed pictures and stories relating to law viewed from a global perspective. Law has lagged behind other disciplines in thinking globally, but we are not starting from scratch. [18]

It is important to be cautious about the use of "g-words" and to distinguish between different levels and spheres of relations and of ordering. However, it is sometimes useful to adopt *a global perspective* - to think in terms of the world as a whole, and to try to construct total pictures of legal phenomena and their distribution. This does not involve making any strong assumptions about uniformities or convergence. A global perspective involves looking at the world and humankind as a whole and setting accounts of particular phenomena in the context of broad geographical pictures and long historical time-frames. The world *is* becoming more interdependent and one needs to adopt a global perspective to understand these processes in relation to law. Our world still has relatively finite boundaries in a way that societies and nation states increasingly do not. Adopting a global perspective is mainly useful for setting a context for more particular, typically local or specialised, studies, which will still continue to be the main focus of our discipline. It also suggests fresh perspectives on familiar subjects.

[18] See *GJP* at pp. 75-76.

The differential significance of "globalisation" for specialised fields of expertise

Globalisation is already having, and will continue to have, a major impact on the landscape of specialised legal fields. But this is happening in varied ways. Some clear trends are already apparent. First, greater emphasis is being placed on established transnational fields, such as public international law, regional law, environmental law, international trade and finance (including *lex mercatoria* and Islamic banking and finance). New transnational fields are emerging, such as Internet law,[19] procurement,[20] international taxation, and transitional justice.[21] Since 9/11 international criminal law and procedure have been given a boost, emergency and ant-terrorism laws have diffused and proliferated.[22] From a global perspective the North-South divide is of crucial importance, and this makes issues of world poverty and "law and development" (however characterised) much more central for the discipline of law and legal theory than they have been in the past.[23] As was noted above, since about 1990 there has seen a spate of "rethinkings" in several transnational fields.[24]

A second obvious development is an increased recognition of the legal dimensions of issues and phenomena that are genuinely global, such as climate change, other environmental issues, radical poverty, the common heritage of mankind, migration, war, international crime, terrorism, pandemics, and the media.

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19 E.g. Froomkin (2002) Christopher Reed (2004); Polanski (2007).

20 McCrudden, (2007a).

21 E.g. Teitel (2000), Bell et al. (2007) See also the webpage of the Transitional Justice Institute (University of Ulster). http:www//transitional justice.Ulster.ac.uk.

22 Scheppele (2010 and forthcoming).

23 On different conceptions and histories of "Law and Development" see McAuslan (2004) and *GJP* at pp. 324-29.

24 See above n. 8.

Third, and less obvious, there is a growing emphasis on the transnational dimensions of subjects previously perceived as domestic, such as contract, criminal law, family law, intellectual property, and labour law. For example, in family law, issues relating to the interests and rights of children in respect of labour, custody, adoption, abduction across national borders, and the sex trade.[25] In 2005 a Workshop at Pacific McGeorge Law School on "Globalizing the Law Curriculum" led to the launch of a series of short readers "designed to facilitate the introduction of international and comparative law issues into basic law school courses in the United States."[26]

Fourth, increasing attention is being paid to diffusion of law generally, and specifically of religious and customary practices through migration, their interface with municipal state law in Northern countries, and the fact that religious and ethnic minority communities have institutionalised social practices that are not officially recognised or are recognised only intermittently.[27]

Finally, today no scholar, or even student, of law can focus solely on the domestic law of a single jurisdiction. Every law student in the United Kingdom - and, no doubt, in most of Continental

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[25] E.g. the cover of Estin and Stark (2007).

[26] The initiative was spearheaded by Professor Franklin Gevurtz and the series is published by Thomson/West, St Paul, Minnesota. See for example, John Spranklin, Raymond Coletta, and M.C. Mirow *Global Issues in Property Law* (2006) and Julie A. Davies and Paul T. Hayden (2008) *Global Issues in Tort Law*, and Estin and Stark (2007). By early 2008 ten short books had been published in the series. A similar initiative is under consideration by the UK Centre for Legal Education in respect of Islamic law. The point is to provide materials that can be integrated into mainstream "domestic" law courses.

[27] E.g. Pearl and Menski, (1998) Ch. 3; Ballard (ed.) (1994) and (2006); Yilmaz (2005) Bano (2007a and b) On religious minorities in Europe see *GJP* Ch. 13, n. 110.

Europe - encounters European Community Law and, directly or indirectly, the European Convention on Human Rights. Our academic literature on the municipal law of England and Wales draws heavily, though unevenly, on sources from the United States, the Commonwealth and beyond. So transnational and cross-level comparison is already embedded in our local academic legal cultures.[28] We are in an important sense all comparatists now, even if most of us lack sophistication in comparative method. Comparative law is increasingly more like a way of life than a marginal subject for a few specialists. The processes of transnationalisation significantly increase this trend.

Law is a participant-oriented discipline largely concerned with the details of immediate, practical, local problems. There are fears that enthusiastic responses to globalisation may lead to legal scholarship and education becoming detached from its roots in a particular legal tradition and local legal practice. This may, indeed, be a danger.[29] But legal practice in a multi-cultural society needs to some extent to be multicultural; concern with civil liberties and human rights cannot in its nature be purely local; and, of course, we are citizens of the European Union and the Council of Europe. Our academic cultures have never been entirely parochial (remember Roman Law and Grotius!), and they are steadily becoming more cosmopolitan. Any legal scholar needs to be aware of the changing scene and has to make difficult judgements about

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[28] The extensive American debate on citation of foreign authorities in American Federal Courts is tangential to this point. There are symbolic reasons for not citing foreign sources as authority and practical reasons for limiting the range of sources that may be explicitly referred to in arguments in court, but American legal culture - despite some tendencies to parochialism - is not, and never has been, immune from foreign influences. For a balanced discussion of an overblown issue see McCrudden (2007b).

[29] Such concerns are discussed in GJP Ch.12.2 (b).

balancing the local and particular with broader concerns and contexts.

Some jobs for jurisprudence

One can spot the kinds of trends outlined in the last section without much help from theory, but can jurisprudence add anything to these common-sense observations? That depends on one's conception of jurisprudence. In my view jurisprudence is the general or more abstract part of law as a discipline. It is usefully conceived as both a heritage and an activity. [30]

As an activity it can perform a wide range of functions, including elucidating concepts, formulating hypotheses, addressing fundamental philosophical issues ('high theory'), intellectual history, exploring connections with neighbouring disciplines, and constructing syntheses and overarching theories. While all of these are relevant to thinking about the implications of globalisation for understanding law, two functions of theorising are more immediately relevant to the central question of this lecture. Firstly, one can identify particular theorists or texts that are most directly

[30] Ibid at ch 1.3. "General" in the term "general jurisprudence" is used in several different senses to mean (a) universal, (b) transcending legal cultures and traditions; (c) in some parts of Continental Europe as a form of middle order theory between doctrinal analysis and abstract legal philosophy (théorie génèrale du droit) or (d) the most abstract part of legal theory, i.e. legal philosophy. The term is used here in sense (b), i.e. any theorising that significantly traverses legal traditions, cultures or even jurisdictions. This is much more extensive than "global" jurisprudence as it covers intermediate levels of ordering and theorising whose reach is sub-global (e.g. much of Western jurisprudence). Some analytical legal philosophers have appropriated the term to refer abstract theorising to all possible legal systems (e.g. Green (2005)), but this is both very narrow and involves a misreading of history. See *GLT* Ch. 2.

relevant to interpreting the present scene. Secondly, one can ask: to what extent are standard, taken-for-granted assumptions underlying our received tradition of academic law, or my specialism, or this topic, being challenged by globalisation?

To deal with the first point briefly:[31] here I can only talk with confidence about the Anglo-American tradition. Surveys in UK, Australia and Canada suggest that taught jurisprudence has a discernible mainstream or canon:[32] Dworkin, Hart, Kelsen, Natural Law (e.g. Finnis), Rawls and Raz feature on nearly all lists, with Austin, Bentham, Fuller, Holmes, Llewellyn, MacCormick, Posner, critical legal studies, autopoiesis and feminist jurisprudence forming a second, but significant, tier. Whatever their differences, almost all of these thinkers have treated the domestic legal systems of sovereign nation states as their central, sometimes exclusive, concern. Some, with varying degrees of unease, have tried to accommodate public international law and European Community law. Almost none have treated religious law, or other forms of non-state law, as central to their concerns.[33]

Recently, largely in response to globalisation several notable theorists have climbed on the shoulders of their predecessors and explored how far their ideas need adjusting to fit a global

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[31] This is a major theme in *GJP*, see especially Chapters 1.3, 4, 5 and 13.

[32] This "canon" is based on surveys by Cotterrell and Woodliffe (1974), Barnett and Yach (1985) (both UK) and Barnett (1995) (extended to Australia and Canada). They need updating. American courses are more eclectic, but the standard students' works suggest a similar pattern, with more emphasis on trends in American Jurisprudence. Generally, Continental European thought, especially critical theory, has gained ground in some Anglophone courses since 1995.

[33] Llewellyn's 'law jobs' theory can be interpreted as a partial exception. See *GJP*, at Ch 4.2-3.

perspective.[34] Brian Tamanaha has accepted Hart's positivist premises - the separation thesis and the social sources thesis - but pared away all of Hart's criteria of identification in order to construct a broadened conception of law that would include several forms of non-state and religious law, but which differentiates it from other social rules and institutions, such as those involved in the governance of hospitals, schools, and sports leagues.[35] Thomas Pogge, a former pupil of Rawls, has followed and refined most elements of Rawls' theory of justice. However, rejecting the notion of nation states or societies as self-contained units, he has produced a radically different theory of global justice than that outlined in Rawls' *The Law of Peoples*.[36] Peter Singer has done something similar for Benthamite utilitarianism, applying it to current issues in international ethics.[37] I have tried to do much the same for Karl Llewellyn.[38] Working more in a tradition of world history than historical jurisprudence, Patrick Glenn's *Legal Traditions of the World* provides a theoretically sophisticated, if not uncontroversial, overview of the major legal traditions.[39] Boaventura de Sousa Santos, building on a mixture of Marx, Weber, and post-modernism, has produced a striking account of 'a new legal common sense'.[40] Thus a new generation of jurists - notably Tamanaha, Santos, and Glenn, - and some philosophers, for example, Pogge, and Singer - are producing a stock of globally

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34 Cf. Kipling's poem "The Disciple" which ends "But his own disciple shall wound him worst of all".

35 Tamanaha, (2001), discussed in *GJP*, at ch. 4.1.

36 Pogge (1989) and (2002). (2002); Rawls (1999). These are discussed in *GJP* at Chap. 5.7.

37 See, e.g. Singer, (2004) and (1993) discussed in *GJP* at ch 5. 6. In writing about human rights Singer is more "ecumenical" than Bentham (id. at p. 145).

38 *GJP* Chapter 4.

39 Glenn (2nd edn, 2004), discussed in a Symposium edited by N Foster (2006). See now Glenn (2010).

40 Santos (1995) and (2002) discussed in *GLT*, at ch 8 and *GJB*, at ch 9.

oriented theories about aspects of law while maintaining discernible continuities with our general jurisprudential heritage.

One of the main functions of legal theory is internal critique, that is articulating and subjecting to critical scrutiny assumptions and presuppositions of our academic legal culture, or of specialised enclaves within it, or even the received wisdom on particular topics. This, I suggest, is one useful approach for a specialist legal scholar reflecting on the implications of globalisation for her own field or topics of specialised interest.

The individual specialist

Apart from being aware of these general trends, how can the individual scholar approach the question: what are the implications of increased transnationalisation and interdependence for my work as a specialist? I suggest that one way is to adopt the methods of internal critique, that is critical examination of one's own working assumptions. Tables II-IV contain three examples of this kind of approach in descending order of generality. Each sets up an "ideal type" of general assumptions and tendencies in given areas of study and invites consideration of how it is being challenged in a new context. These examples apply to three different levels: Table II is an ideal type of some widespread tendencies in Western traditions of academic law; Table III is an ideal type of, a field, viz. traditional mainstream micro-comparative law; Table IV constructs and criticises a naïve model of legal writings about reception/ transplants/ diffusion, a topic of increasing importance within comparative law.

Let me first make some general comments on these:

First these are *not* general descriptions of traditions and tendencies, they are ideal types or models. There are, of course,

many exceptions and variants. The ideas are recognisable, but not universal or uncontested. The argument in the present context is that *insofar as such assumptions are in fact made* they are under challenge in the context of the complex processes we loosely refer to as globalisation.

Second, this use of ideal types is a flexible tool. There is nothing fixed about the particular points and formulations in these examples. I used different methods for constructing each of these examples. For example, "the naïve model of diffusion" (Table IV) takes as its starting-point the first article I ever wrote - I asked: what did I assume and how well do these assumptions characterise diffusion processes? It was a (so far unsuccessful) attempt to launch a new movement: the Self-critical Legal Studies Movement. Table III is based on a literature survey of what mainstream comparative lawyers had said about their subject up to about 1995 - i.e. just before there was a burst of self-criticism within the sub-discipline.

The model of Western Traditions of academic law (Table II) stems from thinking about a global perspective i.e. it works back from thinking about globalisation. It is a summation of points of challenge that I have identified inductively in over ten years of thinking about globalisation and law and general jurisprudence.[41] The central argument identifies five main themes:

[41] Table II follows the text in *GJP*. Each of these topics is discussed in *GJP* and the list follows the structure of the book, in which Part A gives a broad overview of the domains of General Jurisprudence, following the traditional broad categorisations of analytical, normative and empirical jurisprudence. Parts B and C deal selectively with topics that illustrate and concretize the general approach. So, of course, the list could be extended considerably - e.g. well-worn topics, such as the fragmentation of international law or neglected topics, such as problems of law in multi-lingual societies or transnational contexts. On some other possible agendas see GJP pp. 446-9.

- the whole Western tradition of academic law is based on several kinds of assumptions that need to be critically examined in a changing context;
- we lack concepts and data to generalise about legal phenomena in the world as a whole: analytic concepts that can transcend, at least to some extent, different legal traditions and cultures;
- comparison is the first step to generalisation and more sophisticated and expansive approaches to comparative law are critical for the development of a healthy discipline of law
- we need more sophisticated normative theories that are well-informed and sensitive to pluralism of beliefs and differences between value systems; and,
- especially, we need improved empirical understandings of how legal doctrines, institutions, and practices operate in "the real world".

Fourth, this is not a negative critique. I belong to the Western tradition of academic law; I was taught by and admire some of the pioneers of classical comparative law - Max Rheinstein, Harry Lawson, Barry Nicholas; - and I think that there is much of value in the legal literature on transplants/reception. Indeed, it is almost as much a pity that social scientists interested in diffusion have ignored the legal literature as that legal scholars have largely ignored the vast and varied social science literature on diffusion. Two bodies of literature have been talking past each other.[42] A large part of my own work rests on assumptions that approximate to my ideal type of Western traditions - for example, when I write about evidence or legal education or legal archives, I usually work within a model of countries as discrete units and of

[42] See Twining (2005).

municipal/state law as the main kind of law.[43] We cannot break away very far from our intellectual roots, but we can subject them to critical examination.

Let us look more closely at my Table II - standard assumptions underlying the mainstream of Western traditions of academic law.[44] My thesis is that insofar as an individual scholar holds these assumptions, she needs to ask whether they are under serious challenge in respect of her specialised area of expertise. This list does not claim to be comprehensive and can be extended. It refers to some general ideas that are recognisable and widespread, but by no means universal, within our traditions. None has gone unquestioned and some have been the subject of extensive contestation. They are loosely related and together constitute an "ideal type" to which our inherited assumptions and attitudes broadly approximate. This is no more than a device or sounding-board for taking stock of "the state of the art" in a given field. An individual scholar can ask how far these ideas are important and operative in her particular field of interest and in her own attitudes and practices. The suggestion is that, insofar as they are important, adopting a global perspective puts them into question.

43 However, interest in globalisation has influenced my work in these areas, see, for example, in relation to legal education, Twining (1996) and (2001).

44 Adapted from GJP Ch.1.

TABLE II WESTERN TRADITIONS OF ACADEMIC LAW: SOME SIMPLISTIC ASSUMPTIONS

(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");
(b) that nation-states, societies, and legal systems are very largely closed, self-contained entities that can be studied in isolation;
(c) that modern law and modern jurisprudence are secular, now largely independent of their historical-cultural roots in the Judaeo-Christian traditions;
(d) That modern state law is primarily rational-bureaucratic and instrumental, performing certain functions and serving as a means for achieving particular social ends;
(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;
(f) that the main subject-matters of the discipline of law are ideas and norms rather than the empirical study of social facts;
(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;
(h) that the study of non-Western legal traditions is a marginal and unimportant part of Western academic law;
(i) that the fundamental values underlying modern law are universal, although the philosophical foundations are diverse.

A lot of these are familiar and are not or should not be controversial. Academic law has been changing rapidly for some years. For example, it is now commonplace that sovereignty, the territoriality of law, legal and normative pluralism, the fragmentation of international law, regionalism, diffusion, human rights, and aspects of environmental law are becoming more salient as topics deserving attention. So this is as much trend-spotting as trend-setting. Table II suggests some further points of challenge – about secularism, bottom-up perspectives, the purpose, nature and scope of comparative law for example. All of these

topics are discussed at length in *General Jurisprudence*. Here I shall confine myself to some brief remarks about the inter-related topics of non-state law, pluralism, "surface law", and ethnocentrism.

a) Conceptions of law: The Westphalian Duo

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' of state (municipal) law and classical public international law dealing with relations between states.[45] A map of law in the world that leaves out religious law, important forms of indigenous, customary or Cthonic law, emerging forms such as *lex mercatoria* and other examples of "soft law" at sub-, supra- and international levels, just leaves out too much. There are of course problems of conceptualisation and strong claims about the importance and distinctiveness of state law, but it is difficult to believe that anyone seriously maintains that such phenomena do not exist or should not be a concern of legal scholarship. Non-state law is not important only in the Global South or non-Western countries. In Western countries with significant migrant communities it is an increasingly salient phenomenon, not only in respect of interaction with national law, but also in its own right. Can a teacher of municipal law in UK or the Netherlands concerned with housing finance, or consumer credit, or small businesses today justifiably ignore Islamic banking and finance? *Riba* is now part of the picture both in respect of municipal law and of institutionalised social practices that may or may not be recognised as having legal effect by the state.[46] The same applies to

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45 *GJP* Ch 3 and 12.

46 The skewed public debate on recognition of "shari'a" for limited purposes proposed by the Archbishop of Canterbury in February, 2008 (on which see Bano, (2008) obscured the fact that the judiciary of England and Wales has for many years been given guidance on how to

family law, criminal law, administrative law and so on, but in quite complex ways.[47] That may be obvious to this audience, but to what extent is it reflected in our practices of legal education?

b) Monism and normative and legal pluralism

In this context, legal monism, sometimes referred to as "state centralism", maintains that sovereign states claim and exercise a monopoly of legal authority and legitimate force within the territory over which they have jurisdiction.[48] However, if one accepts some conception of non-state law this opens the way to recognition of situations of legal pluralism, that is the co-existence of two or more legal orders in the same time-space context.

A great deal of controversy, much of it unnecessary, surrounds the topic of legal pluralism.[49] First, there is a matter of terminology. It is important to distinguish between (a) "state legal pluralism" (recognition *within* a state legal system of different bodies of law,

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take account of and inform themselves about practices, customs and beliefs of ethnic and religious minorities: see Judicial Studies Board, *Handbook on Ethnic Minority Issues* (1999-) www.jsboard.co.uk.

47 In England it is recognised that religious and customary norms of minorities impinge on a wide range of legal fields, not only, or even mainly, family law. See Judicial Studies Board (1999-), and Ballard (2006).

48 "Part of the ideological baggage of the modern nation-state is the idea that the state is the source of all law, properly so called, and that law is (or at least ought to be) exclusive of other forms of regulation and is uniform for all persons". Griffiths (2001), cf. Griffiths (2003).

49 I have argued elsewhere that legal pluralism is usefully conceived as a species of normative pluralism, that it exists as a social fact, that from a global perspective legal pluralism is an important phenomenon, and that some of the puzzlements and controversies are either unnecessary or relate to wider issues, about epistemology or the concept of law, or the nature of rules and rule-systems. (*GLT* 82-88, 224-33). See now *GJP* Ch.17 and Twining (2010).

such as religious or customary law, applying to members of particular groups for given purposes); [50] (b) "legal polycentricity" (the eclectic use of sources in different sectors of a state legal system);[51] and (c) empirical legal pluralism, as the co-existence in fact of discrete or semi-autonomous legal orders in the same time-space context.

Here we are mainly concerned with (c). The problem of "the definitional stop" - where to draw a line between legal and non-legal, if one adopts a broad conception of law - has re-surfaced in the context of debates about legal pluralism.[52] This is not a specific puzzle about legal pluralism as such, but is part of the perennial topic of how best to conceptualise law. For the individual scholar whether a particular normative order or other phenomenon is categorised as "legal" is usually of secondary importance. The question for her is: what normative orders or social practices or social norms in addition to state law are important for understanding my particular field? For example, it is commonplace in diffusion studies that imported state law almost inevitably interacts with pre-existing local normative orders and practices, including state law, so-called "unofficial law", various customary practices and the culture(s) of the local legal

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[50] E.g. Kenya recognizes *shari'a*, some other forms of religious law, and customary law as part of state law for certain purposes. The epic Otieno burial case vividly illustrates some of the tensions and complexities of state legal pluralism. See van Doren (1988). The classic text on state legal pluralism is Hooker (1975). Griffiths (2001) refers to this as "juridical legal pluralism", which he contrasts with "empirical legal pluralism", the idea developed mainly in legal anthropology and socio-legal studies.

[51] See, e.g. Petersen and Zahle (eds.) (1995) (exploring the varying uses of sources of law in different branches of administration of a single state).

[52] This is a particular concern of Tamanaha (1993), (2001), and (2008).

profession.[53] The important fact is the interaction, not how these various normative orders, rules or practices are categorised. What is of more theoretical interest is to what extent a given normative order can be treated as a discrete unit (the problem of individuation) and how different kinds of interaction can be described (differentiation of modes of "interlegality").[54]

From a global perspective, legal pluralism is a very important phenomenon at all levels of ordering, both within and across levels. If one separates out broader issues that belong to the general theory of norms, or problems of conceptualising law, or ideological issues about "the state", it is relatively straightforward to conceive of legal pluralism as a social fact. Its scope depends in large part on what conception of law one adopts in this context. Once the broader theoretical issues are distinguished, most of the interesting questions about legal pluralism are either empirical or concerned with policy questions about the relationship between the state and non-state law.[55] They need to be set in some broader intellectual framework, including that of orthodox jurisprudence.[56] Legal and normative pluralism is now quite widely recognised as a significant phenomenon in most transnational subjects. In multicultural societies - which today means most societies - it is

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53 A nice example is recounted by Brian Tamanaha. When he was Assistant Attorney-General of Yap (in Melanesia), there was an "official" state legal system but it was almost completely ignored by the general population, who followed their own customary practices. Tamanaha's superior suggested that as he did not seem to have much to do, he might draft a new Banking law. The point of the story is that banking law *precedes* banks. In Yap this might have been an example of a nearly "blank slate" - although the locals may well have had norms relating to credit; however, if this had arisen in a predominantly Muslim country, *riba* might have become a major issue.

54 See *GLT* Ch.17. 1.

55 See now Twining (2010).

56 Von Benda-Beckmann (2002) at p. 74.

increasingly relevant to the study of domestic law, but in different ways for different fields.[57]

c) *Doctrinal and institutional perspectives on law: the issue of surface law*

In the Anglo-American legal tradition rivalry between doctrinal and institutional conceptions of law and between 'black letter' (expository) and socio-legal approaches to legal studies is of long-standing. On the whole, the mainstream has been dominated by doctrinal conceptions and approaches, but not to the complete exclusion of empirical legal studies. There is widespread sympathy for the idea of law as institutionalised normative order[58] or as institutionalised social practice[59] even from those whose main concern is with doctrine. To date empirical comparative law and other kinds of transnational socio-legal work are not well-developed.[60] However, as comparative law, diffusion, and issues about convergence, harmonisation and unification of laws become more salient, 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. To what extent are Alan Watson's generalisations, or claims that legal systems are converging, or projects for unification or harmonisation or judicial reform only dealing with *'surface law'* - that is with formal texts that tell us little or nothing about how they are or will be interpreted, adapted, applied, implemented, enforced, used, or ignored?[61] In short, from information provided merely by legal texts and expositions of doctrine, we do not know to what extent they make any difference

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57 On the Global Issues series edited by Professor Gevurtz, see above n. 26.
58 MacCormick (2008).
59 *GJP,* at ch 4.
60 Ibid at ch 8.
61 Ibid at ch 10.

in practice, let alone transform, economic, social or other relations and behaviour.

'Surface law' does not mean law that is *only* on the surface. Rather our discipline has not been very good at penetrating behind the official texts and doctrine to find out how they operate in practice in given contexts. And to what extent, if we adopt a conception of non-state law, are there significant arcane, unnoticed or invisible legal orders that so far have escaped the attention of legal scholars?[62] In short, concern with the realities of 'law in action' is as important from a global perspective as it is for more traditional understandings of law.

d) Ethnocentrism, parochialism and ignorance of other traditions

Ethnocentrism means 'culturally biased judgement'[63] or 'a tendency to look at other cultures through the filter of one's own cultural presuppositions'.[64] Our academic tradition has tended to be ignorant, even ethnocentric, about other legal traditions and belief systems. Their study has been treated as marginal at best. As with other branches of jurisprudence, Western normative jurisprudence has been quite insular. Yet Western Jurisprudence has a long tradition of universalism in ethics - witness, for example, Natural law, classical utilitarianism, Kantianism and modern theories of human rights.[65] Nearly all such theories have been developed and debated with at most only tangential reference

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[62] Romani (or 'Gypsy') law and the Common Law Movement are examples of previously unnoticed normative orders that have only been recently caught the attention of legal scholars. See, e.g., Weyrauch (ed.) (1997); Koniak,(1996) and (1997).

[63] Levine (2001).

[64] Barfield (ed.) (1997) 55. See also *GJP*, at ch 5 n 25.

[65] On different meanings of 'universalism' see *GJP,* at ch 5.2. Here it refers to claims that a given moral principle applies to all humans at all times and in all places.

to and in almost complete ignorance of or indifference to the religious and moral beliefs and traditions of the rest of humankind. When differing cultural values are discussed, even the agenda of issues has a stereotypically Western bias.[66]

As the discipline of law becomes more cosmopolitan we need to become better acquainted with the leading thinkers and salient ideas and controversies in other legal traditions and to extend our orthodox canon of juristic texts. Until now non-Western law and jurisprudence has been considered the province of specialists. Despite criticisms of 'orientalism',[67] there has been some excellent work by Western scholars on Islamic, Hindu, Bhuddist and Chinese legal thought.[68] To a lesser extent, there are accessible writings by contemporary 'Southern' writers. As a modest first step in that direction I have undertaken a study of the general approaches to human rights of four 'Southern jurists': Francis Deng, Abdullahi An Na'im, Yash Ghai and Upendra Baxi.[69] All four deserve to be better known, but this is a limited exercise as these particular individuals were all trained in the common law, write in English, and belong to the immediate post-Independence generation. They provide a useful bridge to other viewpoints, but there are many others, including not least Southern feminists and prominent jurists whose work has not been translated into

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66 For example, in discussions of Islam focusing on Islamic punishments, the veil, and even female genital mutilation (not an Islamic idea), rather than commercial morality (eg, *riba*) or the relief of poverty (eg, *zakah*) or international law (*siyar*), from which the West might learn from Islam.

67 On 'orientalism' see Edward Said, *Orientalism*, (1994); for a robust, but selective defence, see Irwin, (2006), cf. Perrin (1999).

68 There are useful select bibliographies in Glenn (2010), Menski (2006) and Huxley (2002).

69 *GJP*, at ch 13 and Twining, (ed.), (2010) *Human Rights, Southern Voices* (a Reader) (Cambridge University Press).

English. Again the relevance of this kind of development will vary between specialisms.

TABLE III THE COUNTRY AND WESTERN MODEL OF COMPARATIVE LAW, 1945-1990[70]

(ii) The primary subject-matter is the positive laws and 'official' legal systems of nation states *(municipal legal systems)*.

(iii) It focuses almost exclusively on *Western capitalist societies* in Europe and the United States, with little or no detailed consideration of 'the East' (former and surviving socialist countries, including China), the 'South' (poorer countries) and richer countries of the Pacific Basin.[71]

(iv) It is concerned mainly with the similarities and differences between *common law and civil law,* as exemplified by '*parent*' traditions or systems, notably France and Germany for civil law, England and the United States for common law.

(v) It focuses almost entirely on *legal doctrine*.

(vi) It focuses in practice largely on *private law,* especially the law of obligations, which is often treated as representing 'the core' of a legal system or tradition

(vii) The concern is with *description and analysis* rather than evaluation and prescription, except that one of the main uses of 'legislative comparative law' is typically claimed to be the lessons to be learned from foreign solutions to 'shared problems' – a claim that is theoretically problematic.[72]

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70 This section is a condensed version of several papers, especially Twining (2000b), *GLT* Ch. 7, and Twining (2007). For an interesting critique of my views on comparative law from a Nietzchean perspective see Salman (2009).

71 During the period of the Cold War, a major exception to (ii) was Soviet or Socialist law, which was treated as belonging to 'Comparative Law' in a way in which African, Indian, Islamic and Hindu law were not.

72 On 'functionalist' comparative law see Örücü and Nelken (2007), *passim*.

In an earlier study, conducted in the mid-1990s, I used a similar approach to identify the underlying assumptions about a single field, comparative law.[73] I analysed what leading comparatists had *said* about their subject in the period 1945-1990, emphasising that in practice comparative work was very much richer and broader. This analysis resulted in a similar ideal type of mainstream conceptualisations of the field, which, for obvious reasons, I labelled 'The Country and Western Tradition' (see Table III). The purpose was to show that the *focus* of mainstream comparative law had been narrow in several respects. In a period of agonised introspection internal critics (for example, Watson,[74] Ewald[75] and Legrand[76]) had raised important questions about the philosophical underpinnings, the methods, the purposes and the biases of traditional comparative law, but they themselves worked *within* the confines of the Country and Western Tradition, largely restricted to municipal law (especially private law) of modern Western states within only two legal traditions, common law and civil law.

The result of this narrow conceptualisation of the field was that large areas of existing scholarly concern, including religious law, African law, human rights, and "law and development", were not recognised as belonging to "comparative law", and that nearly all examples of supra-state, sub-state, and non-state law were similarly ignored. There was some justification for this in the pioneering days after World War II, when a relatively new subject had to establish its relevance, its respectability, and its utility within mainstream academic law, but this artificially narrow model did not seem appropriate in an era of globalisation.

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73 Twining, 'Comparative Law and Legal Theory, The Country and Western Tradition' in Edge (2000); cf *GLT,* at ch 7. Although first published in 2000, the basic work was done in 1995-97.

74 Watson (1974/1993).

75 Ewald (1995a) and (1995b).

76 Legrand (1995) and (2003).

Since 1990 the field of comparative has expressly expanded to include a much wider range of legal fields (e.g. constitutional law, civil rights, responses to terrorism), comparisons at supra-state levels (e.g. comparative international law, regional human rights regimes), cross-level comparison (e.g tribunals at different levels of ordering), comparison within legal traditions (e.g. comparative common law and civil law) and interactions between state and non-state law.[77] In the same period, multiple perspectives have been brought to bear - economic analysis, diffusion theory, critical legal theory, feminism, for example - and, as legal scholarship has generally become more transnational, the claim has been made that "we are all comparatists now".[78]

It would not be surprising if this bewildering combination of internal critique, rapid diversification, and a possible loss of special status has provoked a crisis of identity and a possible loss of confidence among comparatists. Clearly considerable adjustments are needed and are being made. However, my own view is that there is still room for specialists in comparative law for several reasons: First, while every legal scholar needs to be aware of elementary pitfalls in making comparisons - this should be part of basic legal method - to become a skilled comparatist requires a long apprenticeship and special expertise and sensibilities.[79] It also requires some sophistication in respect of theory. Second, only a few scholars can be expected to be genuinely learned in two or more different legal traditions, or even legal systems - there is still room for specialised knowledge of different kinds. Third, as our discipline becomes more cosmopolitan, comparative law as a

77 The expansion of the focus of comparative law is lavishly illustrated by Legrand and Munday (2003) and Örücü and Nelken (2007).

78 I have made such a claim (e.g. Twining (2000a), but it has sometimes been misunderstood to mean that there is no room for specialist courses, organisations or literature on comparative law.

79 Rheinstein (1968).

method, perspective or even a way of life, becomes central to the task of understanding law. One crucial reason is that, as John Stuart Mill put it, comparison is one step on the road to generalisation;[80] and, as I have argued above, our discipline is as yet ill-equipped to make many sensible generalisations about legal phenomena across legal traditions and other patterns, let alone world-wide. There is accordingly more room than ever for specialists who can claim to be "comparative lawyers".[81]

In the present context, the purpose of this section is to illustrate how the approach advocated here can be applied to critically examining any specialised field as it is conceived and practised in a particular time and place. Of course, this is quite common in "re-thinking" a field from the point of view of a fresh perspective, such as feminism, economic analysis or deconstruction. So far as globalisation is concerned this kind of internal critique is especially important in respect of asking about the appropriate geographical scope and criteria of relevance for one's enquiry.

From a global perspective a map of state law in the world inevitably depicts a continuous story of interaction and diffusion. Legal traditions have interacted with each other throughout history.[82] Until the mid-twentieth century, imperialism and colonialism were probably the main, but not the only, engines of diffusion of state law. In comparative law it has sometimes been assumed that modern state law is almost exclusively a Northern (European/ Anglo-American) creation, spread through nearly all the world via colonialism, imperialism, trade and more recent neo-colonial influences. This provided one justification for concentrating largely

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80 Mill (1843).

81 It does not follow from this that comparative law needs to be conceived as an autonomous sub-discipline, any more than this is sensible for jurisprudence or legal theory (see Twining (2000b) at pp. 69-71.

82 Glenn (2010).

on 'parent' legal systems. In the post-colonial era the processes of diffusion have been perceived to be more varied and there is a growing realisation that diffusion of law does not necessarily lead to convergence, harmonisation, or unification of laws.[83] Moreover, if one includes important examples of non-state law, the picture becomes very much more complex.

Diffusion is now widely recognised as a central topic in comparative law.[85] Adopting the method of internal critique, I have tried to show that until recently much of the legal literature on legal transplants/reception, which contains some excellent studies, has been based on some simplistic assumptions.[86] Taking one of my own early publications I demonstrated that my account was based on a naïve model of reception that postulates a paradigm case with the following characteristic assumptions:

> [A] *bipolar* relationship between *two countries* involving a *direct one-way* transfer of *legal rules or institutions* through the agency of *governments* involving *formal enactment or adoption* at a particular moment of time (*a reception date*) *without major change* .... [I]t is commonly assumed that the standard case involves *transfer from an advanced (parent) civil or common law system to a less developed one*,

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[83] See *GJP*, at ch 9 and 10.

[84] Most of the legal literature uses such terms as reception, transplantation, or transposition to refer to legal systems influencing or imitating each other. However, I prefer 'diffusion' because, although the word is misleading in suggesting movement from a single point, this is the standard term in the vast and rich social science literature that has been largely ignored by legal scholars. Twining (2005).

[85] Alan Watson can take credit for developing this insight over many years, starting with A Watson, *Legal Transplants* (1974/1993).

[86] *GJP*, at ch 9.

in order to bring about *technological change* ('to modernise') by *filling in gaps or replacing* prior local law.

It is not difficult to show that none of these elements is necessary or even characteristic of actual processes of diffusion of law, broadly conceived. These processes are much more diverse and complex than the 'naïve model' suggests. This complexity is best illustrated not by setting up a contrapuntal model, but rather by indicating possible deviations from each of the elements in the paradigm case. In the present context this is relevant not only because of the importance of diffusion as a subject, but also because a similar method can be used to explore how adopting a global perspective may challenge standard assumptions in the orthodox or mainstream literature on a particular topic. (See Table IV.)

At first sight Table IV, by emphasising the variety and complexity of processes of diffusion, can seem rather daunting. Indeed, more than one person has commented to me that this analysis makes the subject of diffusion unmanageable. This is to confuse the method of analysis, which is quite straightforward, with the phenomena of diffusion, which are indeed complex. In fact the table provides a quite simple tool for analysing particular instances of diffusion. Based on standard concepts in social science diffusion theory, it suggests a series of questions that a scholar can apply to any example.

TABLE IV: TRANSPLANTATION, RECEPTION, DIFFUSION[84]

	Standard Case	**Some Variants**
a.Source-destination	Bipolar: single exporter to single importer	Single exporter to multiple destinations. Single importer from multiple sources. Multiple sources to multiple destinations etc.
b. Levels	Municipal legal system-municipal legal system	Cross-level transfers. Horizontal transfers at other levels (e.g. regional, sub-state, non-state transnational)
c. Pathways	Direct one-way transfer	Complex paths. Reciprocal influence. Re-export
d. Formal / informal	Formal enactment or adoption	Informal, semi-formal or mixed
e. Objects	Legal rules and concepts; Institutions	Any legal phenomena or ideas, including ideology, theories, personnel, "mentality", methods, structures, practices (official, private practitioners', educational etc.), literary genres, documentary forms, symbols, rituals etc. etc.
f. Agency	Government-government	Commercial and other non-governmental organizations. Armies. Individuals and groups: e.g. colonists, merchants, missionaries, slaves, refugees, believers etc who "bring their law with them". Writers, teachers, activists, lobbyists etc.
g. Timing	One or more specific reception dates	Continuing, typically lengthy process
h. Power and prestige	Parent civil or common law >> less developed	Reciprocal interaction
i. Change in object	Unchanged Minor adjustments	"No transportation without transformation"
j. Relation to pre-existing law	Blank slate. Fill vacuum, gaps. Replace entirely.	Struggle, resistance. Layering. Assimilation. Surface law
k. Technical /ideological /cultural	Technical	Ideology, culture, technology
l. Impact	"It works"	Performance measures. Empirical research. Monitoring. Enforcement

Thus the intriguing story of James Fitzjames Stephen's Indian Evidence Act, 1872 can be told in terms of a process of export and adaptation of a branch of English law by a legal entrepreneur, its re-export via official channels to other jurisdictions and its informal and influential re-importation into England and its re-exportation overseas by barristers trained in the Inns of Court via a students' textbook.[87] The original *source* was an enterprising young English lawyer and reformer (*change agent*) who having failed to achieve reforms of the law of evidence in his own country had the opportunity to impose his (almost) ideal law on India - a fairly typical colonial story (*level: municipal law*). Stephen's aim was to simplify and systematise the common law *rules* of evidence rather than to *change* them. He drafted a Bill that was *formally enacted* in 1872 and he prepared a lengthy introduction and commentary which set out his *general theory* of the Law of Evidence.[88] The Act, in Stephen's words was 'little more than an attempt to reduce the English law of evidence to the form of express propositions arranged in their natural order, with some modifications rendered necessary by the peculiar circumstances of India'. (*minor adaptation*). The Indian Evidence Act was much admired and became the standard model for almost identical legislation in many dependencies, largely through official channels (*re-exportation by various pathways*). In India it has remained in force ever since, with only minor amendments since 1872, a nice example of Alan Watson's thesis that many "transplants" survive for long periods almost unchanged and without any discernible relationship to local conditions or developments.[89] However, over time Indian precedents have accumulated, the citation of English

[87] For a more detailed account See Twining (2006) at pp. 56-61.

[88] J.F. Stephen (1872). The Introduction ran to 134 pages and, although somewhat discursive, remains one of the classic contributions to the theory of evidence. On the Indian Evidence Act, see Gledhill (1964), 241-5.

[89] Watson (1974/1993).

precedents declined, substantial local practitioners' treatises and slender student aids were published, so that Stephen's version of the law of evidence is now part of the intellectual capital of the Indian Bar - *a continuing story* spread over nearly 140 years. While these points suggest that Stephen's Act has been influential in India (and beyond) there is almost no systematic empirical evidence about how it affects the practices of trial courts, especially lower courts (*impact*).

Stephen was also very influential on the theory and practice of the law of evidence in England. In 1873, at the invitation of the Attorney-General (Sir John Coleridge), he drafted an Evidence Bill based on the Indian Act. However, having presented the Bill on the last day of the Parliamentary session, Coleridge was elevated to the House of Lords and the Bill was never officially published. In the words of Radzinowicz, '[Stephen] not discouraged, and in a truly Benthamite spirit, embarked upon the business of codification as a private enterprise'.[90] Appointed as Professor of Common Law at the Inns of Court, Stephen lectured on the Law of Evidence on the basis of his prior work and in 1876 he published the first edition of his *Digest of the Law of Evidence*. This was a blackletter text which followed closely the wording of his Act and Bill and which was backed by the theory of evidence that he had developed in India. The *Digest* was a conspicuous success in three ways: first, it was immensely popular not only in England, but throughout the common law world, because it gave a compact, systematic and accessible treatment of a subject that had been perceived to be a jumble of technicalities. Its closeness to the Indian Evidence Act increased its influence in countries that had used it as a model (*widespread informal diffusion by a juristic text*). Second, it survived for over seventy years in England as the leading student text on the

[90] Radzinowicz (1957) at 9. On the American Restatements as a form of private legislation, designed to circumvent the state legislatures, see *GJP* pp. 306-12.

subject - the twelfth edition was published in 1948 (*continuing influence*). Third, not only English barristers, but students who came to the Inns of Court from all over the Commonwealth and Empire, acquired their basic knowledge of the law of evidence from Stephen's teaching and text. Thus Stephen's *basic theory, ideas and rules were re-exported informally by various pathways to many countries over a long period of time*. This short case study illustrates how Table IV can be applied in a quite straightforward way to almost any example of diffusion of law. It is a matter of asking questions about sources, levels, pathways, objects, agency, timing, power, change, impact and so on in an orderly way.[91]

Globalisation not only has implications for our detailed understanding of particular subjects, it also suggests possible challenges to the standard assumptions with which we approach them.

Conclusion

The main purpose of this lecture is to suggest an approach for any individual scholar to reflect on the implications of globalisation for their specialism, course, or specific research topic. The key is to adopt a wide interpretation of globalisation, to identify one's normal working assumptions when dealing with one's specialism, and to identify points at which any or all of these assumptions are challenged by adopting a genuinely global perspective. One can set

[91] For an application of this approach to the large scale and complex reception of law in Turkey see Twining (2005). As I claimed that my analysis in terms of standard social science concepts painted a similar picture to that to be found in the best accounts in the extensive literature on Turkey, Esin Őrűcű - the doyenne of the subject - has suggested that the method adds nothing. On the contrary, it is a tool that systematises best practice, especially for a non-expert starting-out on the study of a particular example of diffusion/reception.

that against some perceptible trends in academic law as it has already responded, largely in a piece-meal way, to these challenges.

This kind of perspective suggests some likely directions in which our discipline may move in response to the changing situation. Again this is as much trend-spotting as trend-setting.
First in respect of fields of law one can expect that:

(i) Established transnational fields command increased attention:
(ii) New subjects with a strong transnational orientation emerge;
(iii) Traditional subjects formerly perceived as domestic will acquire new transnational dimensions:
(iv) There will be an increased awarenerss of pluralism and multiculturalism in the domestic context.
(v) These developments will require systematic rethinkings of particular fields and their relations to each other.
(vi) So far as legal theory is concerned we need to review the Western canon and ask: are there forgotten jurists in the Western tradition who now deserve more attention? That has happened with Kant's *Perpetual Peace* and to some extent with Vico, Grotius, and Leibniz. We also need to re-interpret the mainstream, as has already been done by Tamanaha on Hart, Pogge on Rawls, Twining on Llewellyn, and in a different way, Singer on Bentham. And, most important, we need to ask are there not jurists and schools of thought in other legal traditions that demand our attention as we try to cope with the problems of an increasingly interdependent world?
(vii) We cannot but work largely within our received tradition and law is a practical subject that on the whole require particularistic detailed local knowledge. We should not abandon our heritage, but rather set our scholarship in a

global context and have at least a working general knowledge of other traditions.

APPENDIX

Bentham and Montesquieu

Jeremy Bentham was inspired by Montesquieu in his youth and regularly used him as a reference point. He admired Montesquieu as a forerunner of utilitarianism and for his vision and intellectual ambition, but his general attitude was more ambivalent. For example, Bentham thought that Montesquieu exaggerated the importance of the influence of climate on legislation, he rejected his doctrines of the separation of powers and the balance of powers, and he thought that he was not scientific enough: his generalisations were impressionistic and fanciful rather than based on evidence.[92] Both men admired Bacon. Montesquieu tried to bridge the gap between is and ought, but he sometimes "confounded the question of fact with the question of fitness".[93] Montesquieu, a forerunner of the sociology of law and cultural relativism, was mainly concerned with description; Bentham was more concerned with prescription.

Nowhere is this ambivalence more apparent than in Bentham's treatment of transplantation of laws.[94] Diffusion/ transplantation is now a topic of central concern in comparative law and legal theory, especially in the wake of "globalisation". To what extent law is or should be context- and culture-specific is a central issue in the study and practice of transnational diffusion, harmonisation and unification of law and in local law reform, where foreign models and the experience of other countries are under consideration. The publication of a definitive version of Bentham's essay on place and

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92 Mack (1962) 113-14.

93 1 Works 180 (Bowring).

94 Bentham used the metaphor of "transplantation" in several places in "Place and Time". In the Bowring version of the essay, three of the chapter headings use the phrase "transplanting laws", but this seems to be an editorial change.

time in matters of legislation is therefore opportune/of special interest.[95] For Montesquieu and Bentham deserve to be viewed as classic forerunners of contemporary discussions on transplantation of laws. At first sight they represent two extremes: Montesquieu, the contextualist, emphasising the intimate connections between law and local history, geography, and manners; Bentham gives the impression of being a near-universalist in legislation, the "Legislator of the World", peddling his pannomion as if "one size fits all", a technocrat largely indifferent to local conditions and culture.[96] The relationship is more complex than that.[97]

Some of Bentham's best -known writings support this image. He was a universalist in ethics; and he believed human nature to be universal. In "Place and Time" he wrote:

> "[I]s the catalogue of pains and pleasures different in one country from what it is in another? Have different countries different catalogues of pleasures and pains? The affirmative, I think, will hardly be maintained: in this point at least human nature may be pronounced to be everywhere the same."[98]

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95 P. Schofield (ed.) "Place and Time", first published in Engelmann (2011) (hereafter PT). In the Bowring edition, the essay is entitled "Of the Influence of Place and Time in Matters of Legislation".

96 One exception is Oren Ben Dor, who advances an interpretation which emphasises place, time and culture in Bentham's constitutional thought (Ben Dor (2000) Ch.6). On the extent of the bowdlerisation of the manuscript by Dumont, Bowring, and Smith see Engelmann and Pitts (2011).

97 Bentham is here concerned with one-way transfer of state law, legislator to legislator. On other patterns of diffusion of law see above p.46 (Table IV).

98 Id. at 155.

The conditions which require adaptation of laws to context all pertain to *circumstances influencing sensibility* - how people in fact experience pleasures and pains.[99] These can be divided into "universally applying circumstances" and "exclusively applying circumstances". In his *Codification Proposal*, a late work, Bentham argued that for codification a single foreign draftsman is preferable to a local individual or committee, because he will have greater moral aptitude (he will be less influenced by sinister interests and affections) and that the process will be more transparent.[100] His lack of local knowledge can be remedied by the provision of documents about local conditions and, in any case, "the deficiency is not so great as it will be apt to appear"[101]:

> "In comparison of the *universally-applying*, the extent of the *exclusively-applying circumstances* will be found to be very inconsiderable. Moreover, throughout the whole of the field, the exclusively applying circumstances will be found to be circumscribed as it were by, and included in, the universally applying circumstances. The great *outlines*, which require to be drawn, will be found to be the same for every *territory*, for every *race*, and for every *time*. "

Bentham's argument is that the end for all is the greatest happiness of the greatest number, and adaptation of the technically best code only requires that special local deviations from a standard case be taken into account in order to attain that goal. Bentham gives extensive examples of cultural and other differences that need to be considered, and he emphasises that many such differences are morally neutral, but he implies that by and large these are

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99 Ibid.

100 "Codification Proposal" in *'Legislator of the World': Writings on Codification, Law and Education* (ed. P. Schofield and J. Harris (CW, 1998) at 279-81.

101 Id. at 291.

exceptions that can be accommodated by local draftsmen working through particular laws in great detail and making needed adjustments. Human nature, the principle of utility and the structure, concepts and organization of the codes remain constant.

Allowance should be made for the point that in *Codification Proposal* and other late writings, Bentham was trying to sell his services as a scientific expert to a variety of potential clients. Even so, taken on their own, such views appear to fit exactly the image of the Victorian liberal utilitarian imperialist bringing "the blessings of civilization" in the form of English law to backward or even "barbarian" peoples.[102] It also fits the image of the contemporary foreign expert touting modern, technologically superior laws, "good governance", and the Rule of law to "developing countries" and countries in transition. In short, Bentham's pannomion looks like an imperialist project.

A careful reading of the full text of "Time and Place" suggests that this image needs to be reconsidered. First, recent volumes in *The Collected Works* confirm that Bentham held strong anti-colonial views fairly consistently for most of his life.[103] He may have been convinced by the Mills that there were some benefits to India of British rule, but he was always clear about the costs to both colonisers and colonised.[104] Second, Bentham's pannomion was not an imperial project. He did have a technological attitude to legislation, but it was not based on ideas of racial or cultural superiority - indeed, he de-emphasised culture in contrast to

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[102] Bentham did not accept John Stuart Mill's easy distinction between barbarians and civilized peoples, see Pitts (2011) 481-2.

[103] Especially, *Rid Yourselves of Ultramaria* in P. Schofield (ed.) *Colonies, Commerce and Constitutional Law* (CW 1995).

[104] Pitts (2011) at 480-88 (emphasizing inter alia Bentham's concern with happiness in the circumstances rather than "national character" and the sense of insecurity felt by the Indian subjects of colonial misrule).

material conditions[105]- and he did not wish to impose his ideas on anyone, especially not people in far away places. The only question with regard to a particular proposal for reform was: would it maximize utility? Third, he distinguished quite clearly between the general framework and more abstract parts of his codes and the particular provisions which needed to be worked out in detail according to local conditions of time and place. How far he changed his views as he got older about the importance local circumstances influencing sensibility is a matter of interpretation. Fourth, the full text of "Place and Time", an early work, reinstates the powerful criticisms of British rule in India and of English law that were edited out in the Bowring edition. When Bentham compares the circumstances of England and Bengal and postulates that he takes his own country for the standard, he is being ironic.[106] His argument is that even a law that is ideally suited to country X, will probably be unsuitable to country Y and that it is highly probable that a law unsuited to country X will be even more unsuitable to country Y. Much of English law was unsuited to England.[107]

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[105] Cf. the scepticism of Yash Ghai about the relative importance of "culture" rather than material interests in modern constitutional negotiations in multi-ethnic societies (Ghai, 2010 at 113-115, 135-7).

[106] In subsequent writings Bentham uses the pannomion as the standard and so the question of its suitability to the conditions of any particular country does not arise.

[107] Given Bentham's antipathy to the common law there is a further irony that the lack of overt influence in Latin America (except at a very abstract level) is attributed to a difference in legal traditions: "Bentham's view of himself was that of a world legislator. He offered his services to all states and believed that his proposals suited every political community regardless of time and place. Local peculiarities were to be taken care of by marginal adaptation. In reality, his proposals were that of an English mind reacting to common law, and it is quite natural that his real influence on Latin American law remained scant in the end." (Samtleben (1986) 481-2).

In an excellent article on "Empire in Bentham's thought", Jennifer Pitts nicely contrasts the attitudes of Bentham and Montesquieu:
"The critical conversation with Montesquieu that runs through 'Place and Time' shows Bentham to be far more suspicious than Montesquieu had been of European pretensions to superiority over, and even reliable knowledge of, non-European societies. The essay includes a number of subtle efforts to de-exoticize non-European societies and to turn a critical eye on European practices whose familiarity left them widely unscrutinized. Many of these were purged from the Bowring edition and are only now recovered from the manuscripts for publication. Bentham chides Montesquieu for describing certain unpalatable practices such as infanticide and the selling of daughters as distinctively Asian, without mentioning the existence of the same practices in Greece and Rome, and indeed (in the case of selling daughters) in attenuated form in modern Europe. He rejects Montesquieu's credulous references to reports of outlandish customs among foreign peoples, such as a supposed Formosan abortion practice that he calls 'too foolish and too atrocious to have the force of law in any country under the sun.'"[108]
Bentham's treatment of transplantation is an attempt at systematic theorising as part of his general theory of legislation.[109] Bentham posed the issue sharply:

> "To give the question at once universal form, what is the influence of the circumstances of place and time in matters of legislation? What are the coincidences and what the

[108] Jennifer Pitts, "Great and Distant Crimes: Empire in Bentham's thought" in Engelmann (2011) at 478-499, at 486 (footnotes omitted).

[109] The main sources are "Place and Time" and a short section in *The Theory of Legislation* Ch. IX Circumstances which affect sensibility s.4 Practical application of the theory at 44 et seq (C.K.Ogden (ed.) 1931, translated from *Traités de legislation civile et pénale* edited by Dumont by Richard Hildreth (1802).

> diversities that ought to subsist between laws established in different countries and at different periods, supposing them in each instance the best to be established?"[110]

Bentham's suggested approach was to make a detailed analysis of the laws of the exporting country and of the laws of the importing country and then to compare the differences in the circumstances influencing sensibility. This would require very detailed analysis, involving "little more than manual labour".[111] To assist in this task, two sets of tables would be required. The first set would exhibit in detail the particulars of the body of laws treated as the standard, the second set a general table of the circumstances influencing sensibility in the receiving country. For the second set Bentham followed Montesquieu fairly closely and in a note remarked:

> "Before Montesquieu, a man who had a distant country given to him to make laws for would make short work of it. Name to me the people, he would have said, reach down my bible and the business is done at once.... Since Montesquieu, the number of documents which a legislator would require is considerably enlarged. Send the people (he will say) to me or me to the people: lay open to me the whole tenor of their life and their conversation: paint to me the face and geography of the country: give me as close and minute a view as possible of their present laws, their manner and their religion."

Bentham differed from Montesquieu in emphasising material conditions more than manners, in being prepared to change manners by direct or indirect legislation if utility required it[112], and

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[110] PT 152. The wording is only slightly different in 1 *works* 171.

[111] PT 156.

[112] Bentham criticised Montesquieu for asserting dogmatically that laws should not be used to change customs and manners (PT 177).

in believing that legislation can be scientific. He may also, especially in his later writings, have played down the differences between societies - but this was a matter of emphasis. He was at one with Montesquieu in believing that the laws most conducive to promoting happiness had to be in harmony with local circumstances affecting sensibility and that studying these conditions in detail was a necessary precondition for good law-making. He gave some weight to Montesquieu's ideas on the importance of history, geography, and culture on the development of law, and advocated a quite moderate and gradualist approach to transplantation of laws. He argued that local sensibilities should be heeded and humoured, but that they should not be treated as insurmountable by the utilitarian legislator, who might need to rely more on "indirect legislation" than direct imposition of new codes, at least in the short-term.

The essay on "Place and Time" was an early work, which Bentham probably considered to be incomplete. It is not very well-constructed. Although not overtly exhibiting an attitude of imperial superiority, it contains some passages that appear racist or Islamophobic to modern eyes. Nevertheless, it repays study both as

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However, he went some way to agreeing that generally such change should be brought about by persuasion or indirect legislation. For example, in his instructions ("rules..given for the purpose of information) he included the following: "1. No law shall be changed, no prevailing usage should be abolished, without special reason: without some specific assignable benefit [which] can be shewn to be likely as the result of such a change. 2.The changing of a custom repugnant to our own manners and sentiments, for no other reason than such repugnancy, is not to be reputed a benefit. 3. In all matters of indifference, let the political sanction remain neuter: and let the authority of the moral sanction takes its course. 4. The easiest innovation to introduce is that effected merely by refusing to a coercive custom the sanction of the law, especially where the coercion imposed upon one individual is not attended with any profit to another". (PT 173-4).

an early example of a systematic approach to the methods of transplanting laws and because it shows Bentham as being more sensitive to local conditions and the importance of local knowledge than he has usually been credited with. The gap between Bentham and Montesquieu is not so great.

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