MARTINUS NIJHOFF PUBLISHERS

Tilburg Law Review 17 (2012) 217–221

Tilburg Law Review

brill.com/tilr

Jurisprudence for Global Law?

Willem J. Witteveen
Professor, Tilburg Law School, The Netherlands
w.j.witteveen@tilburguniversity.edu

Abstract
In developing a jurisprudence for global law, we have to move beyond the paradigms of the Western legal tradition. A crucial issue is how legal professionals will be able to deal with complex interdependencies involving cultural notions from a non-western legal tradition. A dialogue is then called for, as the example of Amartya Sen's analysis of the Indian concepts of niti (somewhat like organizational propriety) and nyaya (somewhat like living law) demonstrates. Accordingly, global legal scholarship must not only become post-national, inter-disciplinary and empirical (as Pierre Larouche argues elsewhere in this issue) but it must also concern itself with cultural issues of justice and injustice.

Keywords
global law; legal traditions; injustice

The challenges the shift towards global law poses for jurisprudence have been extensively discussed by William Twining, in two books: *General Jurisprudence* and *Globalisation and Legal Scholarship*. He gives a splendid overview of the many developments that urgently call for a re-orientation of my field of study, jurisprudence. I agree with almost all of his conclusions, summarized in the second book in a list of 7 propositions that I will summarize in my turn. Transnational fields of study deserve a lot of attention; traditional topics of domestic law acquire a transnational dimension; within a national context there will be more awareness of pluralism and multiculturalism; the interrelationship between various fields will have to be re-thought; we must pay attention to forgotten jurists in the Western canon and we must inquire which jurists and schools of thought from other legal traditions demand our attention as we try to cope with the problems of an increasingly interdependent world. His last conclusion is:

We cannot but work largely within our received tradition and law is a practical subject that on the whole requires particular detailed local knowledge. We should not abandon our heritage, but rather set our scholarship in

DOI 10.1163/22112596-01702009

a global context and have at least a general working knowledge of other traditions.[1]

The traditions referred to in this passage are those of analytical jurisprudence. This is a branch of knowledge developed mostly within the common law world. Bentham, Austin, and Hart are its household names. While I agree it is prudent to work within the tradition you know, I think more is needed in relation to other significant traditions. Within the broad stream of Western traditions relating to law there is more on offer than analytical jurisprudence, much more. But we should also find a response to other legal traditions that are non-Western ones and it is here where the greatest challenge lies. So my emphasis here is a little different, but in the same line of thinking as that developed by Twining who in his other book shows himself to be an informed and empathetic observer of what goes on in a number of other legal traditions.[2]

It is not easy to develop as a scholar the kind of informed and empathetic attitude Twining exhibits towards the diverse phenomena loosely described as affecting the globalization of law. And maybe the inherited traditional ways of viewing law in the world are making this even harder. Let us as a thought experiment – if only for a moment - step out of the boundaries of the tradition of analytical jurisprudence itself.

This tradition is very sophisticated in its classification of kinds of law and its investigation of the institutions that create, shape and apply law in Western societies. But it does not seem to be quite adequate in channeling the information coming at it which does not fit the Western definitions and theories of law. How can we get the facts of the new global reality right? What is globalism and how does it affect law? There is bound to be an uneasy feeling.

Interdependence must be the key word, but it appears to offer opportunities while it also bodes dangers. The cause of unease is – for me, anyway - captured in a terrible jargon word, *glocalization.* The term suggests that globalization starts at home, in one's immediate environment. Rather than use the g-word I will paraphrase some perceptive remarks by the German philosopher Rüdiger Safranski (*How much globalization can a person handle?*) on what it does to one's perception of one's position in relation to what happens out there in the world:

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[1] William Twining, 'Globalisation and Legal Scholarship, Montesquieu Seminars' in *Montesquieu Seminars* (Wolf Legal Publisher 2011).

[2] William Twining, *General Jurisprudence* (Cambridge University Press 2009).

In the globalism of today, politics and economics function as reductions of the perception of the whole. Small wonder today you can only think about the global order with a feeling of constriction and nausea. Economism produces a view of a monotonous universe, consisting of the workplace, the market, money streams and traffic of goods. Politicization narrows thinking to the dimension of strategy and counter-strategy. The global order is reduced to an object of calculation in terms of power and powerlessness. Thought turns in circles around the basic questions: how can you control or manage the global? Some ask. How can you save it? Others ask.

Our imagination is caught in the same trap, remaining stuck in the television images that have been watched over and over a thousand times of terrible poverty and embarrassing riches, violence and entertainment, deserts and megacities. For the global consciousness that rests on media images the spaces become too cramped, there is no feeling of open space. Everything looks familiar and yet you do not know it. It is surprising and also frightening. There is the strange sensation that everything on a global scale is diminishing. Even the bad news is a familiar presence. There are imperative calls to action from all parts of the globe. In the flood of information, the sense of helplessness and powerlessness is delivered right away. Globalization appears as one vast systematic interrelationship that functions so powerfully and so much without acting subjects that it is almost obscene to point at the meaning of the individual as a conscious agent.[3]

For the individual, read: the person trained in law. Safranski eloquently raises an issue that we can rework into this question: how to deal as a legal professional or a scholar or a student of law with all those situations where it is brought to your attention that what you are doing in the setting in which you work has ramifications far away and beyond your control and how to respond to developments coming from far away that transform the actual setting in which you find yourself? How to grab the chances and achieve some aim, how to avoid the danger of powerlessness or of being in some sense involved and responsible for events beyond your reach?

In fact, this is a very old issue. In the *Digest* we find the famous maxim about the duties of the jurist and his art, his unique qualification as a priest of the law: *Ars aequi et boni*. To give everyone their due and to contribute to the good life are still the aspirations of jurists, and the condition of global law is yet another challenging one that requires adaptation from legal

[3] Rüdiger Safranski, *Hoeveel globalisering verdraagt de mens?* (Atlas 2003) 77,78,84.

professionals in order to do useful and meaningful work.[4] We may also refer further back in time still to Socrates who in a number of Platonic dialogues defends the thesis that it is better to suffer an injustice than to commit one and that an ethical life carries the duty of acting in such a way as not to commit an injustice. That ethical way of life is complicated considerably under conditions of global law.

As legally trained people participating in the practices that occupy our attention, we are even confronted with this twice over. We have to deal with the balancing act between empowerment and helplessness that regards us and with that undergone or experienced by our clients or the people affected by our actions. Jurists are becoming mediators and translators and their art of justice as translation becomes more difficult and urgent under global conditions but it remains still an identifiable concern.[5] Already this early in our elementary thought experiment we can reach the conclusion that instead of focusing too intensely on the myriad forms of regulation under conditions of globalization, we should ask what the people of the law can or cannot do and what they must or must not do in the new predicament we are all in, from trained lawyers to untrained civilians.

Fortunately, there is a lot of material in the Western legal and political tradition that becomes relevant again in the context of global law. But there is another resource as well, and that derives from the insight offered by Patrick Glenn in his great study of the legal traditions of the world. His thesis is that other legal traditions have developed meaningful ways of reasoning to deal with their problems that are increasingly becoming relevant for the adherents of the Western legal traditions as well. Dialogues within traditions extend outwardly to engage the dialogues going on in other traditions. In the global world, these traditions will meet more often and out of these meetings and interactions the Western style law person may enrich her repertoire.[6]

A good example of this is found in Amartya Sen's seminal book on *The Idea of Justice*, where he makes use of concepts from Indian jurisprudence in order to highlight the limitations that he finds in Rawlsian political philosophy, such as the distinction between *niti* and *nyaya.* (With *niti* relating to organizational propriety and behavioral correctness and *nyaya* being

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[4] The locus classicus of this view of the ethics of the legal profession, as well as of the office of politicians, is still Marcus Tullius Cicero, *On obligations* (PG Walsh tran, ed, Oxford University Press 2000).

[5] James Boyd White, *Justice as Translation* (Chicago University Press 1990).

[6] Patrick Glenn, *Legal Traditions of the World* (Oxford University Press 2010).

concerned with what emerges from the lives people are actually able to lead.) Institutional design and practice of established ways falls under *niti*, empirical openness to the problems as actually experienced under *nyaya*, and while these concepts are richer than I manage to suggest in summary, Sen strikes a familiar note in this conclusion:

In the inclusive perspective of *nyaya*, we can never simply hand over the task of justice to some niti of social institutions and social rules that we see as exactly right, and then rest there, and be free from further social assessment. To ask how things are going and whether they can be improved is a constant and inescapable part of the pursuit of justice.[7]

Pierre Larouche argues, elsewhere in this issue, that global legal scholarship has to satisfy three conditions. It must be post-national, inter-disciplinary and empirical, on top of all it already was. I add the ancient and actual concern with justice and injustice to the list. In closing, I wonder what the effects of global law as a development that is already taking place will have on the concept of law itself (noting that I am then returning, once more, to one of the perennial questions of the tradition of Western jurisprudence).

During the historical period of the sovereign states which is perhaps ending, the bounded fields of law, the division of labor on the basis of recognized fields of law, in short the heyday of legal positivism, the law took a number of standard forms that were duly studied, such as the contract, the treaty, the statute et cetera. These standard forms, of which we know a lot thanks to their ancient lineage and the rich heritage of the Western legal tradition, will surely not disappear. But new and hybrid kinds of regulation such as soft law have been added to them, as a result of social processes which have made law more instrumental than value-oriented.

Under the regimes of the new global law I expect there to appear large variations in legal forms, and no doubt also bastard forms and new mutations that we might find strange at first. Cultural, religious and political differences and the discursive weight of other legal traditions will also make themselves manifest in the forms of law. Thus I can only underscore the appeal towards inter-disciplinarity and an empirical orientation, since we will have to approach these phenomena with an open mind.

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[7] Amartya Sen, *The Idea of Justice* (Allen Lane 2009) 86.