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From Reaction to Agency: A 'Subaltern' Response to William Twining's Globalisation and Legal Scholarship

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In this essay, it is contended that by welcoming a cosmopolitan discipline of law that encompasses 'all levels of social relations and legal orderings' (both dominant and peripheral) as well as by suggesting that the intellectual heritage of Western jurisprudence be adapted 'to the new predicament of global law', William Twining offers a platform to the world's marginalized legal systems and formations to assert their relevance in the advancement of legal theory. In developing this argument, I will first examine what opportunities exist within Twining's theorizing to reclaim and de-marginalize non-Western understandings of the law and its social value within the context of pluralism and globalisation. Secondly, I discuss what could be the lessons and implications of his proposals for a globalised legal theory on legal education and scholarship in the less dominant or 'subaltern' legal systems. I also suggest how scholars from subaltern territories could effectively insert their voices in the diversification and pluralization of global legal theory.

Keywords:

Legal Theory, Legal Pluralism, Globalization, Africa, Legal Education, Global South

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From Reaction to Agency: A ‘Subaltern’ Response to William Twining’s *Globalisation and Legal Scholarship*

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Abstract

In this essay, it is contended that by welcoming a cosmopolitan discipline of law that encompasses ‘all levels of social relations and legal orderings’ (both dominant and peripheral) as well as by suggesting that the intellectual heritage of Western jurisprudence be adapted ‘to the new predicament of global law’, William Twining offers a platform to the world’s marginalised legal systems and formations to assert their relevance in the advancement of legal theory. In developing this argument, I will first examine what opportunities exist within Twining’s theorising to reclaim and de-marginalise non-Western understandings of the law and its social value within the context of pluralism and globalisation. Secondly, I discuss what could be the lessons and implications of his proposals for a globalised legal theory on legal education and scholarship in the less dominant or ‘subaltern’ legal systems. I also suggest how scholars from subaltern territories could effectively insert their voices in the diversification and pluralisation of global legal theory.

1. INTRODUCTION

Legal scholars from the Global South reading William Twining’s *Globalisation and Legal Scholarship*¹ for the first time will find it interesting on many levels. For a start, it builds upon his work on the broader subject of what he terms ‘general jurisprudence’.² Twining’s general jurisprudence would seem to be a departure from the often atomised and insular treatment of the subject in dominant legal thought that is driven mostly by Euro-American traditions. It also confirms a variety of canons on the relationship between

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¹ William Twining, *Globalisation and Legal Scholarship* (Wolf Legal Publishers, 2011).

² William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press, 2009).

what could be called subaltern legal formations and liberal—and what is sometimes described as parochial³—legal theory.

I do not use the subaltern concept in the context of a political category. I rather use it in a legal geographical sense as bringing within its ambit those discreet, marginalised, non-Western legal regimes and systems prevalent in different regions of what is commonly known as the ‘Global South’. The ‘subaltern’ I have in mind here is the category of legal systems and formations that could parallel the poor and disempowered in a political sense such that those legal systems are consigned to the margins and periphery of legal/cultural discourse. I mean the legal systems of ‘the Ancient World, the Orient,⁴ the Primitive World, the Third World, the Underdeveloped World, the Developing World and now the Global South.’⁵ I also have in mind the legal systems of ‘poorer and less technologically advanced societies’ in contrast to their ‘liberal, well-ordered’ or ‘hierarchical’ counterparts.⁶

This essay uses sub-Saharan Africa as an exemplar of the subaltern society that is herein suggested. While I illustrate my argument mostly by reference to that region, this should not be taken to suggest that there are monolithic subaltern or African legal systems. My initial contention is that by welcoming a cosmopolitan discipline of law which encompasses ‘all levels of social relations and legal orderings’⁷ (both dominant and peripheral), as well as by suggesting that the intellectual heritage of Western jurisprudence be adapted ‘to the new predicament of global law’⁸, Twining offers a platform to these apparently fringe legal systems and formations to assert their relevance in a world in which globalisation is fuelling debates about pluralism in normative legal orders at the domestic and international fronts.

This intervention supports the proposition that what seems to have normalised as a scholarship of reaction animating much of the Global South’s discourse on the uses and abuses of liberal jurisprudence and legal theory would not be enough under a globalised context to represent Southern, or for that matter other subaltern (peripheral),⁹ voices in this debate. What I intend to do in this contribution is examine the potential opportunities that exist within Twining’s theorising, to reclaim and de-marginalise non-Western understandings of the law and its social value within the context of globalisation. Second, I will briefly discuss what could be the implications of his proposals for globalised legal

3 *Ibid.*, 10.

4 See Edward Said, *Orientalism* (Vintage, 1978).

5 Jean Comaroff and John L Comaroff, ‘Theory from the South: Or, How Euro-America is Evolving toward Africa’ (2012) 22 *Anthropological Forum* 113.

6 John Rawls, ‘The Law of Peoples’ (1993) 20 *Critical Inquiry* 44.

7 Twining (n 1) 9.

8 *Ibid.*

9 Giovanni Marini, ‘Forward: Legal Traditions: A Critical Appraisal’ (2011) 2 *Comparative Law Review* 1; see also Mark Toufayan, ‘When British Justice (in African Colonies) Points Two Ways: On Dualism, Hybridity, and the Genealogy of Juridical Negritude in Taslim Olawale Elias’ (2008) 21 *Leiden Journal of International Law* 377.

theory on legal education and scholarship in the Global South generally and Africa more specifically.

2. THE COMPLEX FIELD OF LEGAL THEORY

Before considering Twining's specific insights which are central to my intervention, it is important to take a look, however cursory, at the general field of jurisprudence and legal theory, as this will enable a clearer understanding of the novel ideas he is bringing to the field. In doing so, I will look at two different strands of scholarship that tend to perceive both complex and dichotomous tendencies in legal theory. Michael Giudice identifies 'diverse cohabitants' associated with legal theory including moral, political, or normative, descriptive-explanatory, and social scientific theorists of various kinds.¹⁰ Notwithstanding their numbers, Giudice collapses these competing paradigms into two distinct categories: participant/internal and nonparticipant/external theorists. While the former is positivistic and takes on board the ideas of famous thinkers like HLA Hart (conceptual analysis) and Hans Kelsen (pure theory), the latter is more empirical and accommodates such legal scholars as Richard Posner (social scientific and socio-economic legal theory).¹¹ While positivism theorises that law can only be understood in terms of its own 'internal dynamic',¹² empirical (or critical, if you like) thinkers assert that 'a complex interplay of causes and effects'¹³ is essential to the understanding of law.

This would seem to indicate that Jeremy Bentham's earlier effort to 'construct a jurisprudence that applied around the world', a project which his disciple John Austin also called 'general [or universal]¹⁴ jurisprudence' or legal science, was a futile one.¹⁵ It failed apparently for two major reasons. First, it drew heavily on the positivist tradition¹⁶ described above, and second, it was ambiguous in its failure to account for the distinction

¹⁰ Michael Giudice, 'Ways of Understanding Diversity among Theories of Law' (2005) 24 *Law and Philosophy* 509.

¹¹ *Ibid*, 510.

¹² Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 *Hastings Law Journal* 814; Harold J Spaeth, 'The Attitudinal Model' in Lee Epstein (ed), *Contemplating Courts* (Congressional Quarterly Inc, 1995) 296; Jerome Frank, *Law and the Modern Mind* (Anchor, 1963) 33.

¹³ Giudice (n 10) 511; see also Richard Abel, 'Law and Society: Project and Practice' (2010) 6 *Annual Review of Law and Social Science* 1; Mariana Valverde, 'The Sociology of Law as a Means against Struggle itself' (2006) 15 *Social and Legal Studies* 591; Allan Hutchinson, 'Judges and Politics: An Essay from Canada' (2004) 24 *Legal Studies* 275.

¹⁴ See Philip Schofield, 'Jeremy Bentham and Nineteenth-Century English Jurisprudence' (1991) 12 *Journal of History* 59.

¹⁵ Brian Z Tamanaha, 'What is "General" Jurisprudence? A Critique of Universalist Claims by Philosophical Concepts of Law' *Transnational Legal Theory*, forthcoming, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2018283.

¹⁶ In fact to Austin 'General Jurisprudence' was the same as 'the Philosophy of Positive Law'. See Roger Berkowitz, 'From Justice to Justification: An Alternative Genealogy of Positive Law' (2011) 1 *University of California Irvine Law Review* 611.

between the 'general' and 'particular' in Bentham's thinking about law.¹⁷ This in turn, according to Tamanaha, gave impetus to two distinct approaches to conceptualising general jurisprudence separate from how Bentham and Austin formulated it. These approaches are far more relevant to Twining's project than the sum of all the previous complexities I have traced up to this time.

Of these two approaches, one is dominant and holds that 'the central task of general jurisprudence is to produce a universally applicable theory of the nature of law'.¹⁸ The second approach is not concerned with a single 'theory of the nature of law ... but rather on constructing a theoretical framework that addresses various manifestations of law around the globe'.¹⁹ Significantly, rather than the insular and generally imperialistic peculiarity of the first approach, the tack of the second 'brings within its compass state law, international law, transnational law, religious law, human rights law, customary law, and other instantiations of law'.²⁰ Tamanaha specifically situates Twining's idea of general jurisprudence within this paradigm.²¹

Considered against this background, it is clear that no general understanding of what the law is has ever been constructed.²² Theorists on the various sides of the debate often claimed priority for their methodological preferences and ascribed better grounding to their theoretical insights. This led to what has been termed 'imperialism' in legal theory. But imperialism here is described as the claim of 'supremacy for a particular approach, as the only or most important way to a true or accurate understanding of law'.²³ Yet this form of 'imperialism' only gave expression to a methodological turf war among theorists who all belong to a dominant Euro-American or Western tradition in legal theory. In this turf war, non-Western understandings of law, however rudimentary or undeveloped,²⁴ were completely excluded in what obviously is a different kind of imperialism, to which I now turn.

17 Tamanaha (n 15) 1.

18 *Ibid.*, 2; see also Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press, 2009) 91.

19 *Ibid.*

20 *Ibid.*

21 *Ibid.*

22 Bryan S Turner and Berna Zengin Arslan, 'Shari'a and Legal Pluralism in the West' (2011) 14 *European Journal of Social Theory* 142; Kenneth Ehrenberg, 'Law is Not (best considered) an Essentially Contested Concept' (2011) 7 *International Journal of Law in Context* 209.

23 Giudice (n 10) 510.

24 Brett Shadle, 'Changing Traditions to Meet Current Altering Conditions: Customary Law, African Courts and the Rejection of Codification in Kenya, 1930–60' (1999) 40 *Journal of African History* 411; Martin Chanock, 'Neither Customary Nor Legal: African Customary Law in an Era of Family Law Reform' (1989) 3 *International Journal of Law, Policy and the Family* 72; Sally Falk Moore, 'Treating Law as Knowledge: Telling Colonial Officers what to Say to Africans about Running "Their Own" Native Courts' (1992) 26 *Law and Society Review* 11; Basil Ugochukwu, 'Unpacking the Universal: African Human Rights Philosophy in Chinua Achebe's *Things Fall Apart*' in Oche Onazi (ed), *African Legal Theory and Contemporary Problems: Critical Essays* (Springer, forthcoming); Andrew Harding, 'Global Doctrine and Local Knowledge: Law in South East Asia' (2002) 51 *International and Comparative Law Quarterly* 35.

3. TWINING, THE SUBALTERN AND GLOBALISED LEGAL THEORY

In canvassing his ideas about how the phenomenon of globalisation should inform current legal thought, Twining recognises the divide between the dominant Euro-American traditions and subaltern/marginalised ones. It is for this very reason that his argument should appeal to proponents of subaltern legal traditions. Twining's contribution is clearly poised against the variant of legal imperialism which excludes non-Western conceptions of law from legal theory. He calls for a more global/pluralistic view of law and not just its conception as framed by dominant and hegemonistic Western thoughts, ideas and institutions.

In developing and situating his contribution within the pluralism/globalisation debate, Twining first notes the diffusion, reception and transplantation of legal traditions across jurisdictions, also acknowledging that imperialism and colonialism are factors that to a great degree accounted for this diffusion. 'Law spreads with Empire,' he states.²⁵ Consequently, Twining asserts that the law of the modern state is but an exclusive creation of European and Anglo-American legal traditions, which has 'spread through nearly all the world via colonialism, imperialism, trade and more recent neo-colonial influences.'²⁶ Just as significantly, in most postcolonial subaltern states questions persist as to the suitability of the imposed legal traditions in dealing with social issues that are context-specific in institutional and cultural terms.

What this makes clear is that imposing a particular legal system (complete with the theoretical ideas that undergird it) on a colonised territory is no guarantee that the imposed system and theory will achieve anywhere near the same results in the colonised territory as in the territory of the imposing power.²⁷ This is an important lesson in the spread of dominant legal theory and traditions through colonialism and imperialism. In Africa specifically, liberal construction of law that is removed from time, social context and historical circumstance has not fulfilled the ambition of social engineering.²⁸ The

²⁵ Twining (n 1) 27; see also Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge University Press, 2002) 127; Achille Mbembe, *On the Postcolony* (University of California Press, 2001) 25; Anthony Anghie, 'Colonial Origins of International Law' in Eve Darian-Smith and Peter Fitzpatrick (eds), *Laws of the Postcolonial* (University of Michigan Press, 1999); Helen Marshall Carter, 'Prospects for the Administration of Justice in Nigeria: Courts, Police, and Politics' (1981) 11 *Issue: A Journal of Opinion* 29 ('... British set out in the next century to paint the rest of the world red, and Africa offered a particularly tempting expanse of apparently blank canvas. Here courts on the English model appeared along the leading edge of colonial intrusion, often as the first institutions to impinge upon the local cultures'). On the subject of human rights, see Samuel Moyn, 'Imperialism, Self-Determination, and the Rise of Human Rights' in Akira Iriye, Petra Goedde and William Hitchcock (eds), *The Human Rights Revolution: An International History* (Oxford University Press, 2012) 162.

²⁶ Twining (n 1) 50.

²⁷ This has been described as the theory of two cultures which comprises the culture of origin of the legal system and the culture of the system into which it is transplanted or imposed. See Richard Small, 'Towards a Theory of Contextual Transplants' (2005) 19 *Emory International Law Review* 1431.

²⁸ Ronald Olufemi Badru, 'Rethinking the Colonial Legacy in the Legal Reasoning of the Contemporary African State: An Argument from African Metaphysical Epistemology', <http://umconference.um.edu.my/upload/43-1/papers/016%20BadruRonaldOlufemi.pdf>.

proper place of law in society (especially the major questions of what law, for what society, through which sources) is therefore still very much unsettled in those environments.

It has been rightly argued that the failure of imposed law in the post-colony could be a result of the theoretical reasoning that undergirded it. An example of this failure could be in the area of crime prevention and punishment of which I use the African context again for illustration. The claim is that the Western mode of legal reasoning which is still dominant in the current African systems of legal justice has been largely ineffective in dealing with what is described as 'metaphysically induced criminalities and other forms of covert wrong doing which are now rampant in the modern African society'.²⁹ It was therefore recommended that a 'methodology of African metaphysical epistemology'³⁰ be adopted to complement the Western mode of legal reasoning in order to enhance truth finding ... before legal justice is dispensed'.³¹

Ideas similar to this, as well as the impact of globalisation and the turn to legal pluralism, have sharpened the edges of these inquiries, and Twining is very much aware of this fact. As such, rather than dissensions over theoretical paradigms in a normatively liberal and conceptually unitary legal field, he guides the debate towards the recognition of differences and diversity in the range of peoples subject to the law as well as the existence of plurality in the normative sources of law. Twining says law is 'a participant-oriented discipline largely concerned with the details of immediate, practical, local problems'.³² He is keenly aware that 'globalisation may lead to legal scholarship and education becoming detached from its roots in a particular legal tradition and local legal practice' and that this could be a danger.³³ Nevertheless, therein also lies the opportunity to realise the hopes of global legal diversity or pluralism. He argues that 'legal practice in a multi-cultural society needs to some extent to be multicultural'.³⁴ Though his use of 'legal practice' in this statement might suggest a narrower, profession-related idea, I would see it as incorporating the theory within which the practice is embedded as well.

4. HARTIAN POSITIVISM AND THE MARGINALISATION OF CUSTOM

An integral part of the colonial project was the delegitimation and marginalisation of 'native' legal systems and processes.³⁵ To justify colonialism and advance its goals, it was

²⁹ *Ibid.*

³⁰ An 'African epistemology' encompasses, according to the author, four basic ways of knowing: divination, revelation, intuition, and reason, each of which could fall into the categories of the supernatural, natural and paranormal. *Ibid.*, 13.

³¹ *Ibid.*, 2.

³² Twining (n 1) 31.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ Ruth Buchanan, 'Passing through the Mirror: Dead Man, Legal Pluralism and the De-Territorialization of the West' (2010) 7 *Law, Culture and the Humanities* 289; see also Rebecca Johnson, 'Justice and the Colonial Collision: Reflections on Stories of Intercultural Encounter in Law, Literature, Sculpture and Film' (2012) 9 *NoFo* 69.

paramount to first destroy legal theories and knowledge with the potential to support or validate native social, legal and political systems and processes. For example, it is a settled fact that African societies had been governed under customary law prior to colonisation.³⁶ However, writing in 1961 at the time when decolonisation efforts were gathering momentum in much of the colonised world, Hart posited that '[c]ustom is not in the modern world a very important "source" of law ... It is usually a subordinate one.'³⁷ Besides Hart's categorisation of the world's major legal systems, Steven Vago, writing from a plain law and society framework, completely erased customary law as one of those systems.³⁸

The major reason Hart advances as an explanation for custom's inability to ground positive legal norms is that 'the legislature may by statute deprive a customary rule of legal status'. He then mentions the predominant colonial practice of that period by which, to be fit for legal recognition, customs were subjected to 'tests', including the test of reasonableness.³⁹ These tests would require, for example, that to be rendered applicable, a rule of customary law shall 'not be repugnant to justice and morality' (in Kenya and Malawi), not be 'repugnant to natural justice and morality' (in Southern Rhodesia), not be 'repugnant to natural justice, equity and good conscience' (in Ghana, Nigeria and Sierra Leone), or not be repugnant to 'justice, morality or order' (in Sudan).⁴⁰

Hart's obviously positivist de-coupling of the customary from the range of legitimate sources of law relegated custom 'to the nether world of qualifying adjectives and unnatural synonyms: indigenous, imbricated, or informal law, systems of social control, reglementation, normative systems, or folkways'.⁴¹ However, as argued throughout this essay, in a majority of the colonised world, the positivist conception of law and society

³⁶ Jeanmarie Fenrich, Paolo Galizzi and Tracy Higgins, 'Introduction' in Fenrich, Galizzi and Higgins (eds), *The Future of African Customary Law* (Cambridge University Press, 2011) 1. 'Customary Law' in this context should not be confused with 'Customary International Law'. As used in this essay, customary law has the same meaning as under section 11(3) of the Constitution of Ghana 1992, defined as 'rules of law which by custom are applicable to particular communities in Ghana', or as in section 291 of the Nigerian Evidence Act, Chapter 112 Laws of the Federation of Nigeria 1990, as 'rule which in a particular district has from long usage obtained the force of law'. In *Oyewunmi v Ogunsesan* (1990) NWLR (Pt 137) 182 at 207 the Nigerian Supreme Court defined customary law as 'the organic or living law of the indigenous people of Nigeria regulating their lives and transactions'. See also ES Nwauche, 'The Constitutional Challenge of Integration and Interaction of Customary and the Received English Common Law in Nigeria and Ghana' (2010) 25 *Tulane European and Civil Law Forum* 40.

³⁷ HLA Hart, *The Concept of Law* (Oxford University Press, 1961) 44.

³⁸ Steven Vago, *Law and Society* (Pearson Prentice Hall, 2006) 12. While not recognised as a 'legal system', customary law is nonetheless noted as falling into legal 'tradition' described as 'Chthonic' and marked by a distinct character of 'orality'. See H Patrick Glenn, *Legal Traditions of the World* (Oxford University Press, 2004) 61.

³⁹ Hart (n 37) 44.

⁴⁰ Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press, 1996) 115.

⁴¹ HW Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth Century England* (University of Toronto Press, 1985) 3.

could not be realised in actual behaviour because people did not just accept Hartian formal laws as the primary basis for regulating their lives.⁴²

Not surprisingly, ideas like Hart's are often held accountable for the demise of the 'divine, rational, and customary insights that grounded the traditional authority of law',⁴³ whose earlier historical insights were canonised by the likes of Rudolf von Jhering when he wrote in opposition to the positive codification of German law. Jhering had a simple message: 'a nation's law, like its language and other cultural attributes, is an unconscious emanation of the *volksgeist*, the "genius" of its people.'⁴⁴ There is also a sociological dimension to this discourse, exemplified by Eugen Ehrlich's willingness to accept as law not just legal provisions meeting Hart's 'legal recognition' attributes but all forms of social ordering.⁴⁵ Yet, as colonialism raged, these non-positivist viewpoints were consigned to 'the long-exploded Law of Nature in which no scientific jurist believes anymore.'⁴⁶

5. ENDURING CUSTOM IN THE AGE OF GLOBALISATION

The impact of Hartian positivism, notwithstanding African customary law, is not dead yet. It has simply not yielded to the hegemony of unitary legal theory. Evidence of its durability abounds, for example, in the law and development literature. Moreover, just to mention a clear case in point, there is the idea that informality in the property and land-holding system is antithetical to economic emancipation through capitalism. The existence of plural informal legal orders (or legal pluralism) in such systems is therefore equated with anarchy.⁴⁷ But this theory notwithstanding, informal traditional land-holding systems continue to regulate such relationships in different parts of Africa.

42 TW Bennett, 'Re-Introducing African Customary Law to the South African Legal System' (2009) 57 *American Journal of Comparative Law* 5; Marc Galanter, 'Justice in Many Rooms: Courts, Private Ordering and Indigenous Law' (1985) 19 *Journal of Legal Pluralism and Unofficial Law* 17.

43 Berkowitz (n 16) 614.

44 William Seagle, 'Rudolf Von Jhering: Or Law as a Means to an End' (1945) 13 *University of Chicago Law Review* 74; see also Pierre Legrand, 'European Legal Systems are Not Converging' (1996) 45 *International and Comparative Law Quarterly* 52; Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences' (1998) 61 *Modern Law Review* 11.

45 Eugen Ehrlich and Nathan Isaacs, 'The Sociology of Law' (1922) 36 *Harvard Law Review* 132; see also Stefan Machura, 'German Sociology of Law: A Case of Part Dependency' (2012) 8 *International Journal of Law in Context* 506 (stating: 'Every German law student attending a lecture on the subject will invariably hear about Professor Eugen Ehrlich, who lived in the most remote corner of the Austrian Empire, in a city that now belongs to Ukraine. There, people of different ethnicity lived, entered contracts and regulated claims according to their own customary rules. For them, Austrian codified law, the topic learnt by students across the vast empire, was an irrelevant "dead" law. What mattered, according to Ehrlich, was the "living law", the rules people actually use').

46 Ehrlich and Isaacs (n 45) 131.

47 Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Basic Books, 2000) 27. See also Celestine Nyamu Musembi, 'De Soto and Land Relations in Rural Africa: Breathing Life into Dead Theories about Property Rights' (2007) 28 *Third World Quarterly* 1460.

Besides, globalisation and Twining's shade of general jurisprudence are breathing new life into that system of social regulation. Along similar lines, it has been argued, there might be a big lesson for globalisation as presently understood to learn from the literature on law and colonialism.⁴⁸ Significantly, all over Africa, customary laws continue to 'govern civil and criminal affairs including family relations, traditional authority, property rights, and succession'.⁴⁹ In recent practice, rules of custom and local legal processes are beginning to be favoured over and above formal legal institutions conceived under liberal notions and positivist thinking in justice delivery mechanisms.⁵⁰

That customary law remains a strong means of social regulation in Africa and elsewhere in the Global South in spite of colonial and postcolonial influences⁵¹ confirms an all too familiar fact: law is not totally abstract or acontextual. It must be understood within a specific social and cultural setting. Theorising law in terms of legal doctrine, meaning the 'rules, principles, concepts ... values and the modes of interpreting and reasoning'⁵² of a hegemonic system, departs from this contextual approach. As Twining asserts, globalisation and the pluralism that comes with it are challenging 'standard, taken-for-granted assumptions underlying [the] received tradition of academic law'.⁵³

This challenge is significantly more crucial for subaltern legal systems, their scholars and policy makers. It is not in doubt that the dominant legal ideas, systems and institutions transplanted through colonialism in the subaltern regions have not had the same impact in the postcolonial environments as they did for the regions from which they originated.⁵⁴ There could be a range of reasons for this. For one, it could be that the receiving environments had neither equivalent institutional support as in the colonising formations nor relevant contextual practices and were therefore ill suited to the systems being transplanted. Yet this was apparently ignored in the hope perhaps that with time the challenges of socially constructed peculiarities would be overcome. This has not quite happened. Instead, mutual tension continues to define the relationship

48 Martin Chanock, *Custom, and Social Order: The Colonial Experience in Malawi and Zambia* (Heinemann, 1998); Sally Engle Merry, 'From Law and Colonialism to Law and Globalization' (2003) 28 *Law and Social Inquiry* 570.

49 Fenrich, Galizzi and Higgins (n 36) 2.

50 See Tanja Chopra, 'Dispensing Elusive Justice: The Kenyan Judiciary amongst Pastoralist Societies' (2010) 2 *Hague Journal on the Rule of Law* 95; Peter Uvin and Charles Mironko, 'Western and Local Approaches to Justice in Rwanda' (2003) 9 *Global Governance* 219; Phil Clark, 'Hybridity, Holism, and "Traditional" Justice: The Case of the GACACA Courts in Post-Genocide Rwanda' (2007) 39 *George Washington International Law Review* 765; Varun Gauri, 'Customary Law and Economic Outcomes in Indonesia' (2010) 2 *Hague Journal on the Rule of Law* 75.

51 Uche Ewelukwa, 'Posthumous Children, Hegemonic Human Rights, and the Dilemma of Reform: Conversations across Cultures' (2008) 19 *Hastings Law Journal* 211; TW Bennett, 'The Compatibility of African Customary Law and Human Rights' (1991) *Acta Juridica* 18; Fidelis Okafor, 'From Praxis to Theory: A Discourse on the Philosophy of African Law' (2006) 37 *Cambrian Law Review* 37.

52 Roger Cotterrell, 'Community as a Legal Concept? Some Uses of a Law-and-Community Approach in Legal Theory' (2006) 2 *NoFo* 16.

53 Twining (n 1) 33.

54 See eg Boaventura de Sousa Santos, 'The Heterogeneous State and Legal Pluralism in Mozambique' (2006) 40 *Law & Society Review* 39.

between the recipient systems and the traditional forms of social organisation post-colonisation.⁵⁵ Globalisation and pluralism, it would seem, enjoin an understanding of this phenomenon of tension as a pathway to producing more inclusive legal knowledge useful to a diversity of social communities.

It could be argued that transplanted colonial law did not fail in colonised territories since it was very useful in creating an environment conducive for the extraction of labour and resources. The question could also be asked whether subaltern colonial societies actually needed to have equivalent institutional and practical social support for law to achieve its purpose. These two concerns are at the heart of Twining's analysis as well as this intervention. We have to note that a globalised understanding of legal knowledge, as Twining pursues it, does not just seek to pluralise the idea of law but also welcomes new theories alternative to the dominant liberal Euro-American traditions. Why are the theories developed by 'modern European sages'⁵⁶ considered relevant to 'other' societies (especially the subaltern) of which these Euro-sages 'were empirically ignorant?'⁵⁷ Twining seems to argue (and Chakrabarty supports) that because of globalisation or pluralism it might be time for practitioners of the marginalised legal systems to 'once again return the gaze'.⁵⁸

But they cannot return the gaze if all they ever do is react to or reproduce the same theories developed in Europe and elsewhere in the West. It is therefore useful to recognise that while the law under conditions of violence and physical oppression seemed to have aided the realisation of colonial goals, this sense of order completely unravelled once colonialism ended. Why did this happen even when it was the case that the local elite that took over power in the post-colony only increased law's violence as a tool of oppression? The answer to this question could very well lie in the differing understandings of the role of law in the colony on the one hand and the post-colony on the other. It has been argued that colonial/imperial power provided only the scripts for governance.⁵⁹ It was more a rule by law than of law; not only was it a stranger to the idea of rights but in addition its pretension to separation of powers and decentralisation only masked the fact that the

55 To resolve this tension, the powers of the dominant legal system through colonialism subordinated the traditional legal forms to the imposed one. See Virtus Chitoo Igbokwe, 'The Law of Customary Arbitration in Nigeria: *Agu v Ikewibe* and Applicable Law Issues Revisited' (1997) 41 *Journal of African Law* 201; Derek Asiedu-Akrofi, 'Judicial Recognition and Adoption of Customary Law in Nigeria' (1989) 37 *American Journal of Comparative Law* 571; AN Allott, 'What is to be Done with African Customary Law? The Experience of Problems and Reforms in Anglophone Africa from 1950' (1984) 28 *Journal of African Law* 56; EI Nwogwugwu, 'Abolition of Customary Courts: The Nigerian Experiment' (1976) 20 *Journal of African Law* 1.

56 Dipesh Chakrabarty, *Provincialising Europe: Postcolonial Thought and Historical Difference* (Princeton University Press, 2000) 29.

57 *Ibid.*

58 *Ibid.*

59 Upendra Baxi, 'Postcolonial Legality' in Henry Shwarz and Sangeeta Ray (eds), *Blackwell Companion to Postcolonial Studies* (Blackwell, 2000) 541.

centralised nature of colonial state power greatly minimised the possibility of even the mildest risk.⁶⁰

On the contrary, law had a different justification in the postcolonial subaltern state. At least in theory, and unlike during colonialism, law's justification thereafter transcended the mere objective of resource and labour extraction.⁶¹ In the postcolonial context, it needed to be more development-centred and also connected to the question of fundamental rights; none of which was the case in the prior era as earlier argued. Law also had to become useful in managing multiple layers of ethnic, religious and other frictions arising primarily from the centralised nature of colonial power. How possible was it then that these altered objectives of the law could be realised when its rationale had changed in the postcolonial setting at the same time that the undergirding legal institutions operating this altered understanding remained rooted in the dominant colonial ideology?

To further explain this point, it is particularly important to borrow the parallel that is drawn between states where colonialism had been very intense and those states where it was less so. While in the former states colonialism led to the transplantation of legal ideas and significant displacement of the traditional forms of order and dispute resolution,⁶² in the latter states, some effort was made to retain those local forms of order and dispute management. This difference would seem to have impacted the role of law in the postcolonial developmental experience.

By way of illustration, Botswana has been put forward as one such state where the 'effect of British colonialism ... was minimal, and did not destroy inclusive pre-colonial institutions.'⁶³ It is often projected as an African success story and by some accounts was the 'fastest growing country in the world' from 1965 to 1995.⁶⁴ This contrasts sharply with the experience of other contiguous former British African post-colonies like Zambia and Zimbabwe.⁶⁵ When matched against Botswana, these latter countries hardly come up to scratch.

⁶⁰ *Ibid.*

⁶¹ Some scholars have paid attention to how colonialism transformed the developmental trajectories of nearly all regions of the world. 'They divide colonialism into two broad categories – settlement and extractive. Settlement colonies were created in areas with relatively benign disease environments yet without large indigenous populations. According to these authors, because settlers both demanded and helped to construct institutions that protected property rights, settlement colonies had relative effective legal systems, institutions that persisted and thereby benefited postcolonial development. Alternatively, where large-scale European settlement did not occur, colonial state officials were not constrained by European settlers, focused simply on expropriating wealth from the colonised, and therefore failed to provide the same legal protection of property as in settler colonies.' See Matthew Lange, 'British Colonial Legacies and Political Development' (2004) 32 *World Development* 905; Daron Acemoglu, Simon Johnson and James Robinson, 'Colonial Origins of Comparative Development: An Empirical Investigation' (2001) 91 *American Economic Review* 1369.

⁶² Moore (n 24) 17.

⁶³ Scott Beaulier, 'Explaining Botswana's Success: The Critical Role of Post-Colonial Policy' (2003–4) 23 *Cato Journal* 231.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*, 232.

Some scholars have argued that the apparent disparity between these countries in developmental terms can be explained in part by the intensity of colonial rule and the reasoning behind its legal and institutional platform.⁶⁶ While Botswana was a settler colony, the other two were basically extractive. Law was used in a fashion that suited specific colonial agendas. While in extractive colonies the objective was principally 'to expropriate rents as quickly as possible rather than thinking of the long run,'⁶⁷ in settler colonies, the colonial powers had more long-term goals. This had implications for the application of the law as a neo-liberal idea as well as the basic theoretical planks supporting it. Sadly, the particular formulation of law, in its extractive incarnation, has persisted well beyond colonialism and with mixed, mostly less than positive, results for the postcolonial subaltern state.

There is therefore a growing recognition that the Eurocentric conception of legal knowledge and theory is open to critique, and this has been noticeable in the legal scholarship from subaltern legal traditions.⁶⁸ In the area of constitutional law, a recently published edited volume was devoted to answering the question whether the time had come for the development of a constitutional theory of the Global South in general.⁶⁹ In Africa, Shivji argues that the continent-wide liberal democracy and the constitutional order upon which it is based have become far too fragile and unsustainable.⁷⁰ Instead, he suggests that Africa needs to 'construct a political and constitutional order rooted in alternative forms of state and democracy based on popular livelihoods, popular participation and popular power.'⁷¹ This argument has also been extended to the human rights field. One scholar suggests that in order to promote local capacity for improved human rights conditions in Africa, for example, the process 'must build on what actually exists on the ground because attempting to impose norms and models

⁶⁶ See Daron Acemoglu, Simon Johnson and James Robinson, 'Reversal of Fortune: Geography and Institutions in the Making of the Modern World Income Distribution' (2002) 117 *Quarterly Journal of Economics* 1264 (stating: 'The historical evidence supports the notion that colonization introduced relatively better institutions in previously sparsely settled and less prosperous areas. While in a number of colonies such as the United States, Canada, Australia, New Zealand, Hong Kong, and Singapore, Europeans established institutions of private property, in many others they set up or took over already existing extractive institutions in order to directly extract resources, to develop plantation and mining networks, or to collect taxes. Notice that what is important for our story is not the "plunder" or the direct extraction of resources by the European powers, but the long-run consequences of the institutions that they set up to support extraction. The distinguishing feature of these institutions was a high concentration of political power in the hands of a few who extracted resources from the rest of the population').

⁶⁷ See Beaulier (n 63) 227.

⁶⁸ See eg HP Lee, 'Judiciaries in Crisis: Some Comparative Perspectives' (2010) 38 *Federal Law Review* 371; Pham Duy Nghia, 'Confucianism and the Concept of the Law in Vietnam' in John Gillespie and Pip Nicholson (eds), *Asian Legal Socialism & Legal Change: The Dynamics of Vietnamese and Chinese Reform* (ANU E Press and Asia Pacific Press, 2005) 76.

⁶⁹ Daniel Bonilla Maldonado (ed), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (Cambridge University Press, 2013).

⁷⁰ Issa Shivji, *Where is Uhuru: Reflections on the Struggle for Democracy in Africa* (Fahamu Books, 2009) 62.

⁷¹ *Ibid.*

developed elsewhere is both objectionable as a colonial exercise in cultural imperialism, and unlikely to be workable in a sustainable manner in practice.⁷²

6. GLOBALISED LEGAL THEORY AND THE SUBALTERN CHALLENGE

Based on a close reading of the interaction between the dominant Euro-American legal tradition and the subaltern systems upon which that tradition was imposed through colonialism, two major propositions can be presented. One is that this dominant legal academic discourse, according to Twining, 'has tended to be ignorant, even ethnocentric, about other legal traditions and belief systems'.⁷³ Second, it is obviously not in doubt that the theories of this dominant tradition (and this is not discounting its merits) have not quite served the legal needs of subaltern societies and is literally facing a push-back within the context of globalisation, multiculturalism and pluralism.⁷⁴ In some instances, those who practise the traditions of marginalised legal systems are bearding the lion of unitary legal production in its den.⁷⁵ The question that arises then is how this evidence can inform legal theory and scholarship in the subaltern regions going forward. Twining asserts that as the legal discipline becomes more cosmopolitan, there is a need for scholars from the dominant traditions to 'become better acquainted with the leading thinkers and salient ideas and controversies in other legal traditions and to extend [the] orthodox canon of juristic texts'.⁷⁶

But while this suggestion might be a useful one, it has to be placed in its correct context. The marginalisation of non-Western legal ideas is not so much due to the failure of the Western legal establishment to recognise those subaltern paradigms. To be sure, my critique of this marginalisation is in no way intended to question the usefulness of Western ideas of law to the West. Those ideas have served the West to a great extent as Western modernity has been built essentially on those theoretical formulations. My concern is how and to what extent this essentially Western knowledge could be adapted to subaltern settings in such a way that other non-Western notions of law are

72 Abdullahi Ahmed An-Na'im, 'Expanding Legal Protection of Human Rights in African Contexts' in Abdullahi Ahmed An-Na'im (ed), *Human Rights under African Constitutions: Realising the Promise for Ourselves* (University of Pennsylvania Press, 2002) 3; see also Thaddeus Metz, 'African Conceptions of Human Dignity: Vitality and Community as the Ground of Human Rights' (2012) 13 *Human Rights Review* 19; Makau wa Mutua, 'The Ideology of Human Rights' (1996) 36 *Virginia Journal of International Law* 589.

73 Twining (n 1) 45.

74 See Nghia (n 68) 76 where he argues that 'Legal ideas adopted from the West face difficulties when implemented into a society where traditional forces resist change'.

75 See eg Mark Duell, 'Divorce cases could be settled by Sharia and religious courts after landmark High Court ruling over Jewish couple's dispute', www.dailymail.co.uk/news/article-2271682/Divorce-cases-settled-Sharia-religious-courts-landmark-High-Court-ruling.html.

76 Twining (n 1) 46.

strengthened rather than erased. Twining makes a similar point when he asserts that as cosmopolitanism pushes the boundaries of law as a discipline, 'we need to be better acquainted with the leading thinkers and salient ideas and controversies in other legal traditions and to extend our orthodox canon of juristic texts.'⁷⁷ This places the ball in the court of subaltern thinkers and scholars to show the 'ideas and controversies' of their legal systems at the theoretical level.

They seem not to have done so in my view, for two main reasons. The first reason is that Southern scholars tend mostly to react to knowledge produced by the dominant culture, either because this is the only course open in the circumstances⁷⁸ or because such liberal ideas are 'impossible to *think* of anywhere in the world without invoking certain categories and concepts, the genealogies of which go deep into the intellectual and even theological traditions of Europe.'⁷⁹ The second reason is that there seems to be a mismatch between knowledge produced in the Global South and the actual practices of their societies in contrast to the synergy that seems to exist between the two, that is, knowledge and practice, in the West. I will discuss these factors in sequence.

There is some evidence in the literature of a tendency for Southern (subaltern) scholars to only react to or apply theoretical knowledge from the dominant tradition. In 1993, for example, the volume *Nigerian Essays in Jurisprudence* edited by TO Elias and MI Jegede was published. It was intended, as one of the editors stated, to 'put forward ... ideas and thoughts on jurisprudence and legal theory as ... [a] contribution to the current problems in law and action for the world.'⁸⁰ Two contributions from that volume are particularly relevant to the claims I make. First is Elias's 'Legal Theory: A Nigerian Perspective'⁸¹ and, second, Chukwurah's 'Reflections on the Crises in Jurisprudence in Nigeria.'⁸² Though introduced as a Nigerian perspective, Elias's contribution turned out to be anything but. Every single idea discussed came from the dominant legal tradition of Europe, including Salmond on Jurisprudence,⁸³ Dicey on the rule of law,⁸⁴ as well as Austin⁸⁵ and Duguit⁸⁶ on the definition of law. The rest consisted of a sprinkling of English and Nigerian cases that supplied little evidence of the advertised 'Nigerian perspective'.

Chukwurah's contribution followed a similar trajectory even when it was more critical of the impact of foreign or received knowledge on the country's legal identity.

77 *Ibid.*

78 Abdullahi Ahmed An-Na'im, 'Law and Development: The Rule of Law in Developing Countries' (1986) *Third World Legal Studies* 34.

79 See Chakrabarty (n 56) 4.

80 TO Elias and MI Jegede, *Nigerian Essays in Jurisprudence* (MIJ Publishers, 1993).

81 *Ibid.*, 1.

82 *Ibid.*, 77.

83 *Ibid.*, 1.

84 *Ibid.*

85 *Ibid.*, 13.

86 *Ibid.*, 14.

However, his entire analysis of this apparent loss of legal identity then rested on the ideas of Frederick Charles Von Savigny, the historical school of jurisprudence and in particular the concept of the *Volksgeist*. He asserted that the idea of the *Volksgeist* 'is readily understandable to any people involved in the political struggle for national rediscovery or self-determination, especially after a lengthy spell of foreign colonial tutelage which ... creates [a] crisis of identity for the legal order of ... colonial peoples'.⁸⁷

More recently, Idowu sought to interrogate the ways in which the historical and cultural heritage of Africa is reproduced, projected and represented in contemporary philosophical disquisition.⁸⁸ He first noted responses to the 'unrepresentative' nature of the import and substance of African theory of law in general jurisprudence and argued that 'beneath the absence of an Afrocentric approach in mainstream, general jurisprudence is the view that mainstream jurisprudence subscribes to a Eurocentric historiography defined essentially in skeptical and racial terms'.⁸⁹ In addition to an admirable effort to unearth what this Afrocentric contribution to general jurisprudence could be, Idowu's analysis quickly dissolved into a response to David Hume and Georg Wilhelm Friedrich Hegel on their views of Africans as a people, which, Idowu says, are coloured by 'racial prejudice'.⁹⁰ Similar to this is the great intellectual ink expended by three African scholars on the impact of legal positivism on African legal tradition that dwelt on elements of legal positivist theory as understood from the writings of Western scholars including Thomas Hobbes, John Austin and HLA Hart.⁹¹

The second factor is that there is an apparent disconnect between ideas generated in the South and the social and political practices of these ideas within that environment. While it is evident that the socio-political practices of the West enabling their prosperity were substantially based on the knowledge produced by their major theorists and thinkers,⁹² the same, it seems, may not be said of the Global South. When not reacting to the dominant theoretical ideas,⁹³ subaltern thinkers seem to run on empty because there is little linkage (if at all) between their theorising and the actual practices of their social and political systems. This is a major challenge.

87 *Ibid*, 82.

88 William Idowu, 'Scepticism, Racism and African Jurisprudence: Questioning the Problematique of Relevance' (2005) 17 *Quest: An African Journal of Philosophy* 63.

89 *Ibid*.

90 *Ibid*, 82.

91 See FU Okafor, 'Legal Positivism and the African Legal Tradition' (1984) 2 *International Philosophical Quarterly* 157. See also Olufemi Taiwo, 'Legal Positivism and the African Legal Tradition: A Reply' (1985) 2 *International Philosophical Quarterly* 197; PC Nwakeze, 'A Critique of Olufemi Taiwo's Criticism of "Legal Positivism and African Legal Tradition"' (1987) 27 *International Philosophical Quarterly* 101.

92 See John Cairns, 'Blackstone, and English Institutist: Legal Literature and the Rise of the Nation State' (1984) 4 *Oxford Journal of Legal Studies* 318; Henry Manne, 'The Judiciary and Free Markets' (1997) 21 *Harvard Journal of Law and Public Policy* 21; Karl Klare, 'Legal Theory and Democratic Reconstruction: Reflections on Zacher' (1991) 25 *University of British Columbia Law Review* 69.

93 See eg Philip Zachernuk, *Colonial Subjects: An African Intelligentsia and Atlantic Ideas* (University Press of Virginia, 2000) 6.

There is apparently no shortage of authentic and relevant theory and knowledge that could serve the developmental needs of the Global South produced by Southern scholars.⁹⁴ It is less clear how many of those ideas actually inform public policy at official and unofficial levels in those regions. As such, to earn their stripes, in my view, scholars from the Global South would do well to impress their theories on policies that will produce prosperity for their regions rather than only react to dominant ideas or seek validation from the traditions they criticise. This is at the level of producing useful, fit-for-purpose legal knowledge. However, its success is not solely dependent on the practices of the scholars. Southern policy makers must also be willing to apply the knowledge produced to drive effective public policy. Therefore, there would have to be synergy between the knowledge produced and sound practices and results on the ground.

But as important as it is to generate alternative theoretical paradigms, this will still be insufficient unless such knowledge is diffused through education and practice. Such knowledge must be sold on its own merits and worth, and not out of concern for its source. This makes the task of teaching, sharing and embedding these alternatives in the legal and political processes of the Global South equally as crucial. The construction and dissemination of legal theory based on alternative knowledge must as such form the fulcrum of legal education in the Global South. If the argument is that subaltern justice systems would better serve the environments that practise them, this would have to be adequately theorised and the utility of those systems exemplified in practical terms. This follows Twining's counsel 'not [to] abandon our heritage, but rather [to] set our scholarship in a global context'.⁹⁵ If we are talking about customary law, for example, it would no longer be sufficient to simply say 'this is how we lived'. It must be shown how its practice advances development and ameliorates human suffering.

7. CONCLUSION

This essay sees possibilities for the pluralisation and globalisation of legal theory from the perspective of William Twining's monograph on *Globalisation and Legal Scholarship*. As globalisation furthers transnational interaction in ways that were not imaginable just a few decades ago, Twining suggests that its impact is pushing the boundaries of Western-inspired dominant legal thought towards the recognition of diversity in the normative sources of law. I have argued that Twining's thinking and insights similar to his are reviving interest in the legal knowledge systems and institutions of subaltern territories upon which the dominant Western notions were imposed through colonialism.

⁹⁴ See eg Oche Onazi (ed), *African Legal Theory and Contemporary Problems: Critical Essays* (Springer, 2014); see also Godwin Sogolo, *Foundations of African Philosophy: A Definitive Analysis of Conceptual Issues in African Thought* (Ibadan University Press, 1993) 186.

⁹⁵ Twining (n 1) 57–58.

I looked at previous attempts to universalise legal theory through the writings of major Western legal theorists and thinkers. I noted how they did this in a fashion that clearly marginalised and subordinated non-Western understandings and ideas of law. Yet, the very concept of law and its socio-political characteristics are still essentially contested. This is as much the case in the West as in previously colonised subaltern regions of the world. In the latter territories, law's positivist incarnation has apparently not been as effective as in the colonising societies from which its concepts and theory were transplanted.

Borrowing from Twining's insights, I have argued that globalisation and pluralism as contemporary ideas are offering an opportunity to marginalised or subaltern legal systems to contribute towards the development of a legal theory which accounts for a diversity of traditions. But in utilising this opportunity, it has been suggested that scholars from the regions where the subaltern traditions are still very much in practice must move away from a place of reaction to a place of agency. In constructing theory from the standpoint of the subaltern systems, not only would it be required that specific theoretical ideas be placed on the table, but they must also be demonstrably fit for purpose in practice. It should be clear how the legal knowledge generated in those systems informs social and political policy choices as well as advances progress in those regions. Finally, such alternative knowledge must also provide the foundation for legal education in those regions.