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## Global Situation Sense

Phillip Paiement\* and Willem Witteveen\*\*

### Abstract

William Twining has comprehensively evaluated the challenges that a contemporary context of globalisation poses on legal scholarship in his 2009 Montesquieu lecture at Tilburg Law School. This article connects this lecture to his previous work on American Legal Realist Karl Llewellyn in order to construct a notion of ‘global situation sense’ that would be appropriate for legal professionals, who face similar challenges in the globalisation context of their work. In referring to the work of ethnomusicologist Alan Lomax, Twining’s globalisation context is described as a context of opportunity arising from the variation of diverse legal systems interacting. Subsequently, six characteristics of a ‘global situation sense’ are presented, providing legal professionals with a structure for engaging with global legal developments in their local practices. The notion of ‘global situation sense’ is illustrated with reference to the ‘Accord on Fire and Building Safety in Bangladesh’.

William Twining’s lecture on “Globalisation and Legal Scholarship”, delivered as Tilburg University’s 2009 Montesquieu Law Lecture, has become a noteworthy text of legal scholarship in the 21<sup>st</sup> Century.<sup>1</sup> Although hesitant at first glance, Twining’s account of globalisation’s impact on jurisprudence and broader legal scholarship is innovative, and a beneficial development in its own manner.<sup>2</sup> In particular, his lecture lays out a description of legal globalisation that we would like to interpret as a modernised adaptation of Karl Llewellyn’s ‘situation sense’. While Twining’s hesitancy towards the term ‘global’ might be a low hanging fruit for many critics in the field of law and globalisation studies, his insistence on examining the effects of globalisation in localised, sub-global contexts can be read as a productive development of situation sense, breaking it out of its judge-centric origins and the underlying hints of natural law that Llewellyn’s original account of the concept suggests. An innovative ‘globalisation in context’ approach to legal research is the result. The consequences of this inferred revision of situation sense are drawn out below with reference to two contrasting perspectives on globalisation found in the work of the American ethnomusicologist Alan Lomax. Through comparison to Lomax, it becomes apparent that the allegedly cautious perspectives of the impact of globalisation on law and music are, in the end, more ambitious than initially suggested.

### 1. ALAN LOMAX, ETHNOMUSICOLOGIST OF AND AGAINST GLOBALISATION

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<sup>1</sup> William Twining, *Globalisation and Legal Scholarship* (Wolf Legal Publishers, 2009).

<sup>2</sup> *Ibid.*, 24. Twining’s hesitancy towards the terms ‘global’ and ‘global law’ is clear in the following passage: ‘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 manner*. A high proportion of processes loosely referred to as “global” operate at more limited sub-global levels.’

There is perhaps no name more famous in the folk music genre than Alan Lomax.<sup>3</sup> Having recorded the first and yet most extensive collections of folk music traditions in North America, Italy, Spain, and the British Isles, Lomax's life was nothing less than prolific and his role in modernising folk music traditions for their continued survival into the 21<sup>st</sup> Century was irreplaceable. Despite the extensiveness of his work, what stands out peculiarly strong in the stories captured in his recordings is a two-sided account of globalisation that proves as insightful for legal scholars as it must be for ethnomusicologists.

### **A. Preserving Tradition**

Upon his death, the *New York Times* wrote that Lomax's goal was to 'protect folk traditions from the homogenising effects of modern media.'<sup>4</sup> In the early decades of the 20<sup>th</sup> Century, record companies rose to become a major force in the music industry along with radio broadcasting. Radio and recording technologies set the stage for the eventually global 'pop' music genres, the markets that fuel them, and their 'homogenising' effects, in which diverse variations of musical traditions were channeled into pop music genres equally palatable for regional, national and international audiences. These homogenising effects also constitute the environment in which Alan Lomax's recordings were made.

During the 1965 Newport Folk Festival when Bob Dylan (in)famously 'went electric', Lomax was involved in a scuffle with Dylan's manager, who was offended by Lomax's opposition to the growing tendency toward folk-rock rather than the traditional folk music to which Lomax devoted himself.<sup>5</sup> While merely symbolic, this confrontation illustrates Lomax's fear of globalisation and its consequences on historic musical traditions. As he stated,

We now have cultural machines so powerful that one singer can reach everybody in the world, and make all the other singers feel inferior because they're not like him. Once that gets started, he gets backed by so much cash and so much power that he becomes a monstrous invader from outer space, crushing the life out of all the other human possibilities. My life has been devoted to opposing that tendency.<sup>6</sup>

In this first perspective, globalisation is described as a homogenising threat to the historic music traditions trying to be preserved. It operates at a new global level and 'invades'—monstrously—local music traditions. In short, Lomax was working to preserve folk traditions from globalisation.

### **B. Recording Globalisation in Context**

There is, however, a second understanding of globalisation found in Lomax's work which contrasts with the first by suggesting that such a clear line between the before and after periods of globalisation does not do justice to historical fact, a position that Twining also maintains in his lecture.<sup>7</sup> It suggests that the folk music traditions which Lomax so meticulously studied and

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<sup>3</sup> John Szwed, *Alan Lomax: The Man Who Recorded the World* (Penguin, 2010).

<sup>4</sup> Jon Pareles, 'Alan Lomax, Who Raised Voice of Folk Music in U.S., Dies at 87' *New York Times* (New York, 20 July 2002).

<sup>5</sup> Alan Lomax, *Alan Lomax: selected writings 1934–1997* (Ronald D Cohen ed, Routledge, 2005) 191; Szwed (n 3) particularly Chapter 16.

<sup>6</sup> Pareles (n 4).

<sup>7</sup> See Peer Zumbansen's description of the impacts of thinking in before/after globalisation terms in legal theory. Peer Zumbansen, 'Transnational Legal Pluralism' (2010) 1 *Transnational Legal Theory* 141; Twining describes the map of state law as, 'a continuous story of interaction and diffusion. Legal traditions have interacted with each other throughout history.' Twining (n 1) 50.

recorded were themselves a product of previous exchanges, influences and imitations of musical traditions across the globe. Quite simply stated, none of Lomax's recordings of American folk traditions 'preserve'—as was his intention—a musical tradition, which existed before European and African immigration to North America; they were themselves a product of previous inter-cultural and international influencing. If one sets aside the before and after distinction, the musical traditions that Lomax recorded become assemblages of imitations, transplants (or more accurately 'diffusions'<sup>8</sup>) and adaptations beyond boundaries.<sup>9</sup> By changing perspectives on globalisation, a line of continuity arises in which folk music traditions are seen as adaptive, opportunistic ventures that experiment in imitating, borrowing, and transforming the many other musical traditions and technologies that they encounter.

Lomax's work engages with globalisation not only as a homogenising force to be feared, but also as the necessary 'context'—the term Twining prefers to depict globalisation—from which to observe the very diversity of traditions he was trying to preserve.<sup>10</sup> The stories of the 'voiceless' that he recorded are inscribed with moments of cross-genre and cross-cultural influencing and imitation that create a localised culmination of globalisation's impacts.<sup>11</sup> In turn, Lomax's own work took its place in this process, implementing the revival of folk music and sharing previously unheard musical styles across continents. It is this second, ambitious, perspective which strikes a chord in Twining's writings, suggesting the need to investigate the fragmented and diverse responses of legal systems to the forces of globalisation, and, in doing so, participate in the process of evolution.<sup>12</sup>

The comparison of Lomax's work with Twining's also has its limitations. One should not ignore that formalised and institutionalised character of law's languages, texts and procedures differ starkly from the character of musical arts that lack centralised authorities. The character of law may have consequences on how foreign legal artifacts are utilised in legal systems, resulting in perhaps more explicit processes than would be the case for foreign musical artifacts in musical cultures. However, in attempting to mark out important differences in this comparison, one cannot help but notice that this privileges a particular understanding of legal systems—as formal institutions—that ignores much of the insights from legal pluralism and legal globalisation scholarship.<sup>13</sup> In any case, limitations in comparing normative and aesthetic systems are

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<sup>8</sup> Twining rightfully notes that 'diffusion' is perhaps a more appropriate term than transplant and reception for studying the movement of legal concepts from system to system. Twining (n 1) 51–52.

<sup>9</sup> For example, the banjo, essential to the Scotch-Irish bluegrass traditions of the Appalachians, was an adaptation of similar instruments brought by West African slaves and servants, and its prior absence in Irish folk music is still apparent in Ireland. For a brief history of the banjo, see Metro Voloshin, 'The Banjo, from its Roots to the Ragtime Era' (1998) 6 *Musical Reference Services Quarterly* 1.

<sup>10</sup> As Twining states, '[a]dopting 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.' Twining (n 1) 28.

<sup>11</sup> Pareles (n 4); Note that Twining is also adamant in remaining focused on local, particular situations when studying the globalisation of law. Twining (n 1) 31.

<sup>12</sup> This does not imply that the diversity of legal responses to forces of globalisation is inherently valuable, and thus there is no inherent value in its preservation. Rather, such a view would apply to the first perspective of globalisation which fears globalisation as a homogenising force. The authors' perspective on globalisation is similar to Ulrich Beck's work on globalisation and world society. He writes that, 'world society is thus not a mega-national society containing and dissolving all national societies within itself, but a world horizon characterized by multiplicity and non-integration which opens out when it is produced and preserved in communication and action.' See Ulrich Beck, *What is Globalization?* (Patrick Camiller tr, Polity 2000) 12.

<sup>13</sup> This characterisation of law shares similarities with the Western simplistic assumptions towards which Twining is skeptical. Twining (n 1) 39.

apparent.<sup>14</sup> Yet it is safe to conclude that the globalised context—visible in Lomax’s work—presents a similar challenge that Twining presents to legal scholars, namely the need to combine one’s awareness of global developments and influencing while simultaneously remaining focused on localised, particular situations while studying either music or law.

Though Twining focuses primarily on legal scholarship in his Montesquieu lecture, the context of globalisation also has consequences for the legal profession. In returning to his writings on Karl Llewellyn—one of Twining’s ‘gurus’<sup>15</sup>—the remainder of this article constructs a globalised notion of ‘situation sense’ that might prove helpful for legal professionals who equally face the challenge of legal globalisation.

## 2. GLOBAL SITUATION SENSE

It is tempting to extend this view of Lomax’ work as in two ways concerned with global music—one as a practice of preservation against outside threats, the other as making available materials that would interact and create new musical genres—to the current debate about global law. When we look at law across the world, we see many genres or traditions of law, some of which are thoroughly analysed and culturally dominant (civil law and common law), some of which are less clearly in view to Western legal scholars (aboriginal law, Hindu law). Patrick Glenn, in his masterful *Legal Traditions of the World*, attempts to uncover these traditions that are hidden from Western eyes and to give them an equal place under the sun of global justice.<sup>16</sup> He is in a way doing to legal discourse what Lomax was doing to folk music. There is also the same duality of motivations: preservation of what is of value and creation of some new shape of law. Glenn, contrary to Lomax’s Newport statement, believes that there is no way in which a tradition can ever seal itself off completely from outside influence or interference and that all legal traditions interact. Indeed, they are seen as ‘epistemic communities (...) linked by modern means of communication, which allows them to transcend existing communities, notably states.’<sup>17</sup> The interactions between legal traditions, their exchange of information, will lead to new concepts, principles and practices that perhaps, in a very distant future, will even be seen as a long series of steps towards an ideal of global justice.

Whether we will ever get there depends in part on what legal professionals can do to develop meaningful legal practices of that reflect awareness of their globalisation context. That is, how they can perform their professional work in such a way that maintains awareness of local, social contexts while simultaneously innovating discursive materials from various legal traditions as these happen to be locally involved in a case pending in a court, or in a regulation scheme being proposed or enforced, or in a memorandum to a firm pondering some legal action. The global manifests itself locally and, in turn, out of local practices emerge globally significant patterns. The knowledge, skills, attitudes and commitments of legal professionals are needed to make a difference in these new local settings of global law. The professional view should perhaps as

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<sup>14</sup> Luhmann’s social systems theory provides an example of the extent to which aesthetic and normative systems can be described using the same analytic structures and language. See Niklas Luhmann, *Law as a Social System* (Oxford University Press, 2004); Niklas Luhmann, *Art as a Social System* (Stanford University Press, 2000).

<sup>15</sup> Twining (n 1) 17. Llewellyn is a particularly useful jurisprudential theorist to connect to legal globalisation. As Twining notes, he was exceptional for his focus on both state and non-state legal systems. Twining (n 1) fn 33.

<sup>16</sup> H Patrick Glenn, *Legal Traditions of the World* (Oxford University Press, 4th edn 2010).

<sup>17</sup> *Ibid*, 43.

always still be focused on the case or issue at stake but then will have to move outwards and inwards, expanding and bending its perception in many directions. Is it possible to say more than this and actually develop a cognitive model for the kind of activity envisaged here?

Twining does not mention this in his Montesquieu Lecture, but in other writings he has paid a lot of attention to the work of one of the fathers of American legal realism, Karl Llewellyn. In Llewellyn's work on the cognitive operations of both Cheyenne Chiefs and Appellate Courts a concept is found that can be borrowed for our purposes: the notion of 'situation sense'. This notion was actually part of a reconstruction of what Llewellyn saw as a very successful style of legal reasoning which he later termed the Grand Style (opposed to the Formal Style).<sup>18</sup> The Cheyenne Indian Chiefs managed to decide their trouble cases in such a way as to make use of the collective wisdom of the tribe, while simultaneously innovating the language used, developing principles from cases and feeding those back into later cases.<sup>19</sup> In the vastly different cultural context of modern American law, Llewellyn detected the same combination of relying on wisdom and innovating language. This required a very broad and thorough consideration of the relevant social facts rather than a more limited consideration of only legal facts. And this is where situation sense comes in. Llewellyn was not all too clear about what he meant with the concept, but in his book on Llewellyn, Twining managed a very convincing reconstruction. We present the process of situation sense with our own comments attached, translating the notion to our context of having to deal with global law questions.

#### **A. See All That Is There**

Situation sense begins with consideration of the 'facts'. Twining puts it thus, 'Start by studying the facts as a layman familiar with their general context might see them. Try to grasp what would have happened if things had been working smoothly and what it was that brought the dispute about. Analyse what interests are in conflict and formulate statements of policy that may be relevant.'<sup>20</sup> Llewellyn here advocates a way of working that is not limited to the work of the judge, but equally encompasses what a legislator, or a manager, or a decision-maker in general could take as her starting point. The expansion of the concept beyond the judge is particularly important for newly emerging fields of transnational law, constitutionalism, and global

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<sup>18</sup> Llewellyn's distinction between Grand Style and Formal Style—two forms of judicial reasoning in his study of the Appellate Courts—appears long after his work with the Cheyenne, though he notes the affinity between the Grand Style and the situation sense of the Cheyenne chiefs: 'Apart from our early nineteenth century, I have come across the Grand Style only twice: in Cheyenne Indian law and in the classical Roman period.' The 'situation sense' was thus considered the essential component of the Grand Style reasoning. See footnote 40 on p 45, p 64, and more generally the first three chapters in Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown and Co 1960).

<sup>19</sup> Twining and Llewellyn shared an interest in non-Western legal traditions, Llewellyn with his study of the Cheyenne legal tradition and Twining with his upbringing and continued interest in East African legal traditions. Karl Llewellyn & Edward Adamson Hoebel, *The Cheyenne Way: Conflict and case law in primitive jurisprudence* (University of Oklahoma Press, 1941); see also an insightful interview with William Twining in which he discusses his friendship with Llewellyn: Raymunda Gama, Interview with William Twining (Alicante, 10 January 2010).

<sup>20</sup> William Twining, *Karl Llewellyn and the Realist Movement* (Cambridge University Press, 2nd edn 2012) 216–27.

administrative law, where the role of judges is significantly reduced and reallocated among new, transnational actors.<sup>21</sup>

## **B. Re-categorise**

The next step is an act of explicit re-categorisation. Twining outlines this step as follows, Try to fit the facts into some socially significant category or pattern, separating clearly irrelevant “fireside equities” peculiar to this case from potentially relevant elements in the situation. In seeking appropriate categories, the following guidelines should be observed: (i) in categorising the facts choose “situational concepts”—i.e. categories which clearly refer to facts of situations only and do not straddle facts and legal consequences; (ii) terms used and distinctions drawn by persons familiar with the context of the dispute (as experts, observers or participants) may provide appropriate categories; (iii) the practices and expectations of such persons may also be of use; (iv) one aspect of the problem is to characterise the facts at an appropriate level of generality.<sup>22</sup>

What is recommended here is a kind of perspectivist method: the judge, or other actors, must imaginatively enter into the points of view of experts, observers and participants in order to organise her knowledge in such a way as to reflect different viewpoints. Here, Llewellyn draws on a rhetorical method deeply ingrained in the legal tradition which uses the dynamics of opposing arguments to reach balanced judgments containing sufficient relevant information. From Twining’s global perspective this step is made all the more important as additional categories and distinctions are contributed from ‘new transnational dimensions’, demanding a greater awareness among legal professionals of the multitude of normative voices in a given field.<sup>23</sup>

## **C. Generate Agreement**

The next phase of the method of situation sense deals with ‘values’. ‘Sometimes it will be found that after the facts have been categorised, there may be a consensus within the affected group or within society as a whole respecting applicable policies or principles. In such cases the selection of an appropriate situational concept may be sufficient to resolve the problem.’<sup>24</sup> In this potential for the generation of consensus, there is an important ground rule: the consensus is not theoretically or normatively presupposed; it emanates from careful consideration of all the facts and only after all relevant perspectives have been activated to generate information. This is an ethical injunction, open-ended, pointing to all of the contexts and situations in which global law manifests itself.

## **D. Acknowledge and Limit the Areas of Conflict**

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<sup>21</sup> Twining (n 1) 29–32, 57; Philip Jessup, *Transnational Law* (Yale University Press, 1956); Petra Dobner & Martin Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press, 2010); Benedict Kingsbury, Nico Krisch & Richard B Stewart, ‘The Emergence of Global Administrative Law’ (2005) 68 *Law and Contemporary Problems* 15.

<sup>22</sup> Twining (n 20) 226–7.

<sup>23</sup> Twining (n 1) 57.

<sup>24</sup> Twining (n 20) 227.

The consideration of values may lead to complications, however. Twining states,

In other instances, a conflict of principles or policies may be found. In such cases the process of categorisation should have assisted in identification of the issues of policy, etc., but will not in itself resolve such conflict. However, even if reasonable men might disagree on the choice of conflicting policies, they might share common ground in limiting the range of choices.<sup>25</sup>

It is becoming clear that the method of situation sense offers the prospect of agreement on a meta-level of discourse where the field of argument is limited to a small number of well-developed positions; for instance, between separation of powers and balance of powers as relevant constructive interpretations of the rule of law held as common ground between different legal orders. Agreement on a meta-level of discourse may be a ground on which the debate about conflicting interpretations may be more productive. However, this step does not imply that conflict resolution is always possible; it depicts a strategy for identifying and delimiting the fundamental aspects of a conflict from peripheral issues.

#### **E. Allow the Political Element in Your Decision to Be Seen**

The final step in the method of situation sense, concerns the ‘measures’ taken in judgment. Twining succinctly summarises this aspect as follows. ‘Determine what you consider to be the most appropriate line or direction of treatment and only then decide on what specific prescription is appropriate.’<sup>26</sup> Llewellyn demands, at this stage in the reasoning, a conscious choice about the long-term line of development to precede the actual decision about the issue to be resolved. In applying this step to the context of global law, a new and clearly in some sense political element here enters into the process, reminding us that global law is a politically sensitive and relevant concept—that there is politically something ‘at stake’ in these choices.<sup>27</sup> This entails that the use of a particular legal concept, tool or argument instead of alternatives cannot be justified within legal argumentation alone; to a degree it is also a political choice.<sup>28</sup>

#### **F. Deny the Illusion of a Right Answer**

As an afterthought, Twining provides an important caveat. ‘This procedure provides no cure-all for finding “appropriate” categories or choosing between competing values.’<sup>29</sup> The Grand Style promises a pragmatic way of dealing with trouble cases, but this promise does not include the legal certainty of the ‘right answer’.<sup>30</sup> It remains important to acknowledge the fundamental fact that there will never be full agreement on anything and that perfect solutions for intractable

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<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> Zumbansen (n 7) 149.

<sup>28</sup> Koskenniemi describes this situation with respect to indeterminacy in international public law. See Martti Koskenniemi, *From Apology to Utopia* (Cambridge University Press, 2nd edn 2005) 590–6.

<sup>29</sup> Twining (n 20) 227.

<sup>30</sup> For Llewellyn’s view on certainty see Llewellyn (n 18) 17–18. For a description of the relationship between Grand Style and the ‘situation sense’ see n 18 above.



problems are illusory. This is a necessary consequence of fragmented social system rationalities that elude unifying meta-narratives.<sup>31</sup>

### G. Demonstrating a Global Situation Sense in the Bangladesh's Textile Factories

The six steps of situation sense, adapted for the context of globalisation, can be seen in action in recent developments concerning the governance of fire and workplace safety in Dhaka, Bangladesh's textile producing region. The corporate governance initiatives of major Western retailers (Gap, Walmart, H&M, etc.) were heavily scrutinised following a series of devastating factory fires in 2012-2013. Following international outcry, international labor unions and worker representatives were able to illustrate that (a) previous governance mechanisms were not seeing the full problem; they were primarily concerned with relationships between factory management and corporate retailers and largely ignored the perspectives of laborers.<sup>32</sup> The legally binding 'Accord on Fire and Building Safety in Bangladesh' was a noteworthy development from May 2013, constituting a collective agreement between hundreds of corporate retailers, international and national labor unions and representatives, and non-governmental interest groups (as 'witness signatories'). The primary contribution of this Accord is its (b) re-categorisation of the problem into a governance issue between retailers, factory management *and* laborers. This re-categorisation takes shape, for instance, in 'the right of workers to refuse work that he or she has reasonable justification to believe is unsafe, without suffering discrimination or loss of pay...'<sup>33</sup> Furthermore, the Accord is (c) a broad, general agreement about necessary, guaranteed minimal standards for textile factories in Bangladesh.

Importantly, however, the developments surrounding the Accord do not suggest that all conflict has been resolved.<sup>34</sup> At the core of the issue sits a fundamental conflict between profit- and efficiency-maximising interests of factory management and retailers, and safety interests of workers and benevolent third parties, such as consumers. Through inspections, monitoring, and most importantly a worker's complaint procedure, this governance mechanism doesn't pretend to solve the conflict, but rather (d) monitor it and limit the consequences. Furthermore, it has (e) a clear political dimension as a mechanism more favorable for workers than previous governance arrangements—thus the broad involvement of labor unions. Lastly, and related to the emphasis on complaint procedures, it is clear that the Accord does not provide (f) the only solution to the problem. It is temporary, beginning with a five-year binding commitment, and thereafter

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<sup>31</sup> Niklas Luhmann, 'Why Does Society Describe Itself as Postmodern?' (1995) 30 *Cultural Critique* 176, 184; see generally, Niklas Luhmann, *Die Gesellschaft der Gesellschaft* (Suhrkamp Verlag, 1998).

<sup>32</sup> For example, Walmart's Factory Assessment audit process limits laborer input to an interview with individuals that auditors themselves select. See pg. 28, 'Standards for Suppliers Manual' available at <[http://cdn.corporate.walmart.com/0e/ca/52eda3d84f828f82da0e9a02f021/standards-for-suppliers-manual\\_129833075555266802.pdf](http://cdn.corporate.walmart.com/0e/ca/52eda3d84f828f82da0e9a02f021/standards-for-suppliers-manual_129833075555266802.pdf)> accessed January 6<sup>th</sup>, 2014. Furthermore, Walmart's 'Standards for Suppliers' do not recognize laborers' rights to refuse work in dangerous conditions. See 'Standards for Suppliers' available at <http://corporate.walmart.com/global-responsibility/ethical-sourcing/standards-for-suppliers>> accessed January 6<sup>th</sup>, 2014.

<sup>33</sup> See paragraph 15, 'Accord on Fire and Building Safety in Bangladesh' (May 13<sup>th</sup>, 2013) available at <[www.bangladeshaccord.org/wp-content/uploads/2013/10/the\\_accord.pdf](http://www.bangladeshaccord.org/wp-content/uploads/2013/10/the_accord.pdf)> accessed January 6<sup>th</sup>, 2013.

<sup>34</sup> The 'Alliance for Bangladesh Worker Safety'—a North American led alternative to the Accord with allegedly less stringent standards—was created in light of the liability concerns that the Accord has created among primarily US-based corporations. See Steven Greenhouse, 'U.S. Retailers See Big Risk in Safety Plan for Factories in Bangladesh' *New York Times* (New York, 22 May 2013).

susceptible to amending. Additionally, there are other private governance alternatives, as well as public safety regulations of the Bangladeshi government, which may have different political dimensions, and have selected different procedures to address a different understanding of the problem. Regardless, in this brief example it is clear that those involved with the creation of the accord used a global situation sense.

### 3. EXTENDING THE SITUATION SENSE TO GLOBAL LEGAL DEVELOPMENTS

Taking Twining's work with the concept of situation sense into account, we would like to suggest that by extending it into a global situation sense we can do justice to the two opposed mechanisms of interpretation appearing in the confrontation between local practices and globalised contexts. Global situation sense forces us to be aware, in an inclusive way, of all that is relevant locally, while in the same movement relating all this to global tendencies, interpreted through a particular lens. This avoids treating the global legal developments as the foreign intruders that Lomax fought with his recordings, allowing us to work past globalisation in law as a homogenising force to be feared. Instead, a global situation sense focuses on evaluating the importance and embeddedness of global legal developments in local contexts.<sup>35</sup> It can be a way to respect what is there and yet to keep an open eye towards the future, a technique of 'opportunistic innovating' that shares similarities to development of folk music traditions.

Utilising global situation sense creates opportunities for legal professionals, not just judges, to anticipate potential paths of legal development and to simultaneously participate in these developments. Whether developments come through indirect irritations between autonomous systems,<sup>36</sup> or through directly transplanting legal developments from elsewhere,<sup>37</sup> the important consideration according to global situation sense is the appropriateness of the development in the particular context. Likewise, when faced with a new problem legal professionals need to consider how borrowing, imitating, transplanting, or inventing will provide a solution in their context. Ultimately, a global perspective of law will be channeled into a localised, specific situation, and opening awareness to ongoing global legal developments can enhance the problem-solving in that situation.<sup>38</sup>

Lastly, a global situation sense opens to analysis the political consequences attached to the negotiation of conflicting legal systems and societal rationalities. Legal professionals are faced with having to create an order from multitudes of overlapping and competing legal and regulatory voices, and in doing so they are partaking in a process with broader political consequences. This becomes a particularly important awareness in light of deregulation, self-regulation and private regulation discourses, where boundaries between legal and non-legal regulation collapse. The

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<sup>35</sup> There are parallels between this formulated global situation sense and the work of socio-legal scholars focusing on local manifestations of global legal developments, and importantly, the reactions to these developments in local spaces. Bonaventura de Sousa & César A. Rodríguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge University Press, 2005); Julia Eckert, Brian Donahoe, Christian Strümpell & Zerrin Özlem Biner (eds) *Law Against the State: Ethnographic Forays into Law's Transformations* (Cambridge University Press, 2012).

<sup>36</sup> Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *Modern Law Review* 11.

<sup>37</sup> Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press, 2nd edn 1993).

<sup>38</sup> See quote from fn 10.

global situation sense model is a reminder that the choice of legal and regulatory solutions is also political in so far as it impacts qualities of transparency, accountability, legitimacy and fundamental rights protection of the resulting governance mechanisms. Ignoring this element prevents one from truly 'acknowledging the conflict'.

To conclude, Twining's innovation of Llewellyn's situation sense alongside his description of globalisation's effects on legal scholarship provide a useful model for thinking about decision-making and evolution of law across borders. It does this in a pragmatic fashion, avoiding rhetorical digressions about the danger of a homogenising global law, and focusing on the problem solving process of legal professionals working in transboundary activities. Ultimately, however, the model acknowledges its own limitations by noting the underlying political nature of choosing between legal and regulatory solutions as well as the difficult fact that, in a time of societal fragmentation, there likely will not be a 'right' answer. Instead, one will likely find a plethora of localised legal responses to particular problems that rise partially as a consequence of the context of globalisation, much as Lomax found a plethora of folk music traditions across the United States, which all experienced different diffusions of musical culture from the Old World to the New World. In the end, the context of globalisation requires one to find opportunity in variation.