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## Globalisation and Law

William Twining,  
‘The Ship’,  
Station Rd,  
Phoenix,  
Nr. Vacoas,  
Mauritius,  
Indian Ocean,  
The Southern Hemisphere,  
The World,  
The Universe etc., etc.

### Introduction

This common childish conceit suggests two things about how we think. First, that it is easy to depict our world in terms of concentric circles neatly organised in a single hierarchy – local, provincial, national, regional, global and so on. However, usually things are more complex than that. Secondly, a child may think that the centre of the universe is where one happens to be. But maybe there is no centre of our universe or our world. The literature on globalisation frequently falls into both traps.

I started to focus on the implications of so-called ‘globalisation’ for law about 1990. However, panoramic views were part of my upbringing. My colonial childhood, World War II, adolescent stamp collecting (British Empire, Stanley Gibbons World catalogue), my father’s Gibbonian tendency to set his particular thoughts in the context of world history and Llewellyn’s concern ‘to see it whole’ all predisposed me to think in terms of ‘total pictures’ and ‘whole views’.

In my early lectures in Khartoum in 1958–9 I set the Sudan Legal System in the context of a crude map of the state legal systems of the world to introduce some thoughts about colonialism, legal traditions and pluralism (Chapter 5). My Khartoum map was in effect a map of three imperialisms, British (common law), Continental European (civil law) and Soviet/Marxist (the USSR and Eastern Europe). It was rather vague about China. It served its purpose but I was left with a niggling doubt about the very idea of mapping law.

In Khartoum and Dar es Salaam in the 1960s, newly independent countries felt quite ‘central’ in that they were visited by World Leaders, foreign investors

and many other visiting 'firemen'; they were a centre of attention in international relations, not least because of the Cold War, but at that time one did not think consciously in terms of 'globalisation'. In Chicago in 1964, through Soia Mentschikoff, I was involved in the Council for the Study of Mankind, an early multidisciplinary forum that went beyond the perspectives of international law and international relations. There I met a number of academics, some already famous, who were well ahead of their time. I remember lengthy conversations with a Roman Catholic priest, Father Thomas Davitt, who was trying to prove empirically (largely through ethnographic literature) that there are universal human values. I was not persuaded.<sup>1</sup>

In the late 1960s and early 1970s most of my own work was focused on specific matters such as Evidence, Anglo-American Jurisprudence, and responses to conflict in Northern Ireland. However, in addition to the International Legal Centre (ILC) projects on Legal Education and Research, in the 1970s and 1980s I became increasingly engaged in a range of activities with several Commonwealth institutions – the Commonwealth Lawyers Association (CLA), the Commonwealth Secretariat, the Commonwealth Human Rights Initiative (CHRI) and especially the Commonwealth Legal Education Association (CLEA), of which I was an officer from 1983 to 1993.<sup>2</sup> These were almost entirely anglophone and a confusing mixture of neocolonial, anti-colonial, and post-colonial attitudes and practices, but they did move one in the direction of thinking 'globally'.

In 1985 I was made to reflect on the parochial tendencies of my own discipline. During a week-long colloquium on Law and Anthropology in Milan and Bellagio several well-known anthropologists, including Elizabeth Colson and Philip Gulliver, disavowed both the anthropological present and the idea of 'tribes' as self-contained, isolated units. Some had moved sharply in the direction of setting quite particular studies in the context of World History or international trade.<sup>3</sup> In Italy, after a couple of days, I caught out American *anthropologists* talking about 'this country' as if they were back in USA. This experience set me thinking about ethnocentrism as a powerful tendency in academic law, if looked at from a global perspective. ILC and CLEA (Chapter 17) stimulated us to adopt broad geographical perspectives, but not yet, at least consciously, to think in terms of 'globalisation' as a set of processes that seemed to be affecting almost everything. Perhaps a more important stimulus in this respect was engaging critically with ideas about 'Law and Development'.

## Law and Development

I have been interested in, concerned about and to some extent involved professionally with Eastern Africa and more generally with 'the Global South' all of my life. Colonialism, anti-colonialism, neocolonialism and post-colonialism have been part of the backdrop from which I never completely

escaped. I have sometimes listed 'Law and Development' as one of my interests, but I have always been uncomfortable with the label.<sup>4</sup>

In Chapter 11 of *General Jurisprudence* I summarised the reasons for this at length, most of which need not be repeated here.<sup>5</sup> I did not think of my professional activities in Khartoum and Dar es Salaam – teaching, research, writing, law reporting, preservation of legal records and so on – as contributions to 'development'.<sup>6</sup> The same applies to most of my later involvements – examining, consulting and advising on legal education<sup>7</sup> or my period as an officer of the Commonwealth Legal Education Association (1983–93).<sup>8</sup> These were standard activities for an English academic lawyer; other than that, they were related to 'the Global South'. There are two major exceptions to this that are directly relevant to my globalisation project. First my criticisms of 'Law and Development' theorising anticipated much of my later scepticism about globalisation theory. Secondly, I was involved in a few consultancies which were explicitly related to structural adjustment.

The idea of 'Law and Development' became remarkably influential in anglophone legal academic circles in the post-Independence period. It was a construction of American lawyers, mainly academics, and their funders.<sup>9</sup> It was probably at Yale in 1964–5 that I first heard the question 'What is the role of law in development?' To me it seemed a strange juxtaposition.<sup>10</sup> This reaction probably reflected the views of most English lawyers and non-lawyers interested in Africa at the time. Their working assumption was that social order is a precondition of development, but beyond that law is no more than a technical body of rules and a flexible instrument for implementing particular policies. In *General Jurisprudence* I characterised this view as 'the law and order model', one of five theories of the role of law in development, all of which I criticised as being simplistic and over-generalised. Later I adopted the same approach in treating grand theories of globalisation as dangerously reductionist.

In the late 1990s I was involved in three consultancies, one in Tanzania and two in Uganda. All were explicitly linked to 'structural adjustment', about which I was deeply suspicious. I had also been wary about foreign consultants, who often seemed arrogant, overpaid and insensitive to local particularities. However, in 1994 I agreed to lead a team on legal education and training in Tanzania, which was part of an ambitious project dealing with Financial Management and Legal sectors (FILMUP) as a whole and jointly funded by a number of foreign governments and agencies.<sup>11</sup> I accepted because this involved funders co-operating rather than competing, thinking of the legal sector as a whole was a definite advance and I had some local knowledge (though outdated) and, as important, good contacts with former students. In the event, we had a strong team, excellent support and I was rather pleased with the outcome. This led me to accept two similar assignments in Uganda in the period 1995–2000, with rather mixed results and after that I decided to refuse further invitations.<sup>12</sup> A detailed account of these fascinating, challenging and, for me,

instructive experiences must await another occasion. I used what I learned about Tanzania and Uganda in this period as detailed reference points when thinking about globalisation. But I was ambivalent about all three. Suffice to say here that I thought it rather an extravagant way of furthering my legal education.

### **Globalisation and Law Project (1990–present)**

When ‘globalisation’ came into vogue in British academic circles in the 1970s, I was predisposed to take an interest. But it was only in about 1990 that I started a specific project on ‘Globalisation and Law’. By then enthusiastic, sometimes frenetic, globalisers had invaded several adjacent disciplines, but Law seemed to have been left behind. As a start, I consciously revived my African interests. The countries of Eastern Africa, including Rwanda, Ethiopia and Sudan were experiencing a terrible period in most of their histories. They became, along with the UK, the USA and parts of Continental Europe, my main templates for testing general theories and generalisations about law in a period of accelerated interdependence.

Keeping in touch with this region impelled a rather pessimistic view of their prospects and, indeed, of human nature. It was hard to sustain one’s earlier optimism, for they included, among others, the civil war in the Sudan, the effects of the oil crisis of 1973, Amin’s and Obote’s Uganda, Mengistu’s Ethiopia, Moi’s Kenya, the Rwandan genocide, famines and the ‘dirty war’ with the Lord’s Resistance Army in Uganda. The rise of corruption and the intransigence of poverty in otherwise stable Tanzania were also part of a backdrop which hardly stimulated optimism about ‘progress’ or ‘development’. They contributed to my tendency to be sceptical of most talk about ‘globalisation’. Nevertheless, I hung on to a residue of faith in sincere versions of long-term aspirations for democracy, human rights, the Rule of Law, and good governance and in law as a potential instrument for good as well as for repression, anarchy and corruption. Like Robert Frost, I believe the world will end in either fire or ice, but I still think that it is worth soldiering on to mitigate suffering until that happens.

### **‘Globalisation’ and ‘global’**

There is a key semantic problem relating to the areas, fields or phenomena to which the term ‘globalisation’ refers. This has two aspects: first, among the many definitions and stipulations, two have quite settled but different usages. For many it is an ideological term, referring to ‘economic globalisation’, or the domination of the imagined world economy by the forces of capitalism and free-market ideology or whatever the Anti-Globalisation Movement has been against – which is many things. This is an explicitly political usage pioneered by Marx.<sup>13</sup> For Santos the world is an arena for hegemonic and counter-hegemonic struggles;<sup>14</sup> and the term is used in similar ways by many others.

This ideological usage predominates in political debates and in the media. For my purposes, this is too narrow.

Rather, if one conceives of ‘globalisation’ as a large fragmented horde of processes that tend to make human beings increasingly interdependent, it covers many phenomena in addition to economic ones: climate, pandemics, war, alliances, regional unions, trading blocs, scientific advances, cultural spread, migration, language, inventions such as mobile phones, telecommunications and so on. These spheres of interdependence are interrelated in complex ways; economics is an aspect of most of them, but it is too simple to subsume them under economic relations, and even more reductionist to treat them as consequences of capitalism or American hegemony.

Secondly, adapting Theresa May on Brexit: ‘Most “Global” is not global.’ My concerns and research are not limited to phenomena that are strictly worldwide, or even widespread – they relate to all kinds of social, political, economic, cultural and legal relations and their intensification. Pare away the hype and many of us are interested in significant transnational or cross-border processes – even down to relations between two or three units (e.g. countries, states, nations, multinational corporations, international sports federations, groups, extended families). Geographical or historical or linguistic or Internet proximity will tend to make such relations more intense and more frequent than genuinely or nearly global ones. The important point is that some of the most significant transnational patterns for law are *sub-global* – legal traditions, empires, diasporas, language, trade relations, conflicts, regional and other agreements, alliances, spheres of influence and so on. No empire, language, religion, diaspora, war, pandemic or legal tradition has yet covered the whole world.<sup>15</sup>

G-words like ‘global’ pose real dilemmas: they can mean genuinely worldwide, widespread or transnational; often the first is too narrow, the second is too vague and the third is too expansive. The term ‘globalisation’ interpreted literally is often much too narrow for our purposes. Yet ‘transnationalisation’ is awkward and places too much emphasis on national borders. Globalisation studies are now a recognised field. ‘Global law’ is best treated as no more than shorthand for ‘Globalisation and Law’, a field concept with almost no actual laws as referents.<sup>16</sup> Globalisation used loosely as an analytic concept tends to expand or limit the idea of ‘global’ indiscriminately.

### Globalisation theory

In the early 1990s I canvassed the general cross-disciplinary literature on ‘globalisation’ quite extensively. I found it disappointing. Much of it was excitable, exaggerated, repetitious, over-abstract and highly speculative. There was a built-in tendency to over-generalisation. In early 1995, trying to bring some order into my rather haphazard reading, I tapped the words ‘global’ and ‘globalisation’ into a union library catalogue in Boston. After I had found

over 250 books with one of those two words in the title I stopped. The vast majority dated from 1980. Many were cross-disciplinary and difficult to classify. There were hardly any focusing on law. There was a prominent movement called World Peace Through World Law and there were a few twentieth-century legal classics, especially after 1945, the most impressive of which was Philip Jessup's influential *Transnational Law* (1956); there was a vast literature on specialised transnational fields, such as Public International Law, but almost nothing that suited my purposes. For me the first major book ostensibly about globalisation and law was *Toward a New Common Sense* (1995)<sup>17</sup> by a Portuguese legal sociologist, Boaventura de Sousa Santos. At first this book seemed like a strange, learned, polemical, casserole or *caldeirada*.<sup>18</sup> It claimed to be 'post-modernist' and 'counter-hegemonic'. Fascinated, I buried my teeth into it, used it selectively in teaching and made it into a key reference point. About five years later I wrote a long discursive essay on it, trying to settle some of my own ambivalences about 'post-modernism' and macro-theorising.<sup>19</sup>

The general literature continued to proliferate. Amid a plethora of semantic disputes, wild surmises, economists' predictions and repetitious controversies I did discern a degree of consensus about a few important points: in brief, that globalisation has a very long history, but the processes had intensified and become more complex since World War II; that these processes are not one-way or unilinear; that in the past boundaries, borders and jurisdictions have tended to be treated as firm lines which justified treating nation-states, societies and 'tribes' as if they were self-contained, decontextualised units; that 'international' (a term coined by Bentham and used indiscriminately today) eclipses the many other kinds of cross-border relations that transcend simple geographical divisions; that transnational relations involve many other kinds of actors besides sovereign states, including multinational corporations, international financial institutions (IFIs) and other 'official' international organisations, non-governmental organisations, state agencies (such as USAID), voluntary associations, nations and peoples without states, large-scale migrations, social movements and even genuinely global groupings; and that processes of globalisation challenge conventional assumptions, concepts, agendas, priorities and theories in almost every discipline in the social sciences and humanities. There also seemed to be broad agreement that centralised world government was unlikely to be either feasible or desirable in the foreseeable future.

In the 1990s my first exploration of the general globalisation literature drew me towards the camp of 'globalisation sceptics', like Paul Hirst and Grahame Thompson. I was particularly resistant to grand theories of globalisation.<sup>20</sup> Recently, I was pleased to find a critical essay by William Robinson (2007), which, without claiming to be comprehensive, usefully categorised globalisation theory into five genres and pronounced a post-mortem on each, suggesting that by 2000 they had all run their course.<sup>21</sup> This expressed what I had long sensed. The main reason is that, outside a given context, 'globalisation' means

little more than increased interdependence or interaction. Interdependence is a relative matter. These phenomena take so many forms at so many levels that they cannot be satisfactorily reduced to a single comprehensive theory or squeezed into a single framework. Globalisation theory can be analogous to a reductionist theory of everything, of little use even as an aspiration. However, 'Globalisation' now is established as a broad field concept. It usefully covers most studies of the complex processes of increasing interdependence. Beyond that it is almost systematically misused.

### Globababble

At least these forays provided some starting points for studying the implications of globalisation for the study of law. Unfortunately, however, there is no consensus about the vocabulary of globalisation and associated concepts. One difficulty, as we have seen, is that 'global' is radically ambiguous: it is used loosely to refer to genuinely worldwide or fairly widespread or merely any transnational phenomena.<sup>22</sup> One can perhaps justify some sporting examples of 'World' competitions as referring to the best teams or individuals on the planet at particular sports, but the increasing popularity and influence of global, regional and national 'league tables' damn the metaphor. There are now so many 'world class' universities and other institutions that this currency is now inflated without any criteria of scope, quality or meaning. In Law we already have 'global law schools' (teaching the laws of every state legal system and Islamic law?); global law firms (serving many, most, all countries?); global lawyers (what do they know? How many are there? Whom do they serve?) and Global Law degrees (studying what?).

The phrase 'global law' has become entrenched in the titles of institutions, courses and even theories. Some leading theorists have justifiably attached this label to their own ideas: for example, Raphael Domingo clearly uses the term to refer only to an aspirational body of law confined to issues affecting all human beings. This is genuinely worldwide, but quite limited in scope.<sup>23</sup> For Neil Walker 'global law' refers to an 'intimated' body of concepts, principles and rules that may in time achieve the status of a (nearly) worldwide body of law;<sup>24</sup> and Benoît Frydman argues that international indicators and standards are becoming a new form of global law.<sup>25</sup> Others equate the term with expanded 'international law'; some, including myself, wish to confine its use to a very vague, ill-defined focus of attention, which includes many sub-global and transnational phenomena – in short a broad, vague and ambiguous field concept with almost no analytical purchase.

### An intellectual lag

I found the general theorising on globalisation quite unhelpful. However, at less abstract levels there was an enormously rich and dynamic literature in many disciplines, and nearly all of my relevant reading on middle-order topics

such as diffusion, pluralism, poverty, migration and development was cross-disciplinary. Generally, I found this literature uneven and eclectic, but much of it more advanced than in Law. For example, in relation to 'hard data', there were numerous international agency studies and highly developed global and regional statistics in such areas as economics, poverty, agriculture, education, health and population, whereas in the early 1990s there were almost no statistics related to law as such, apart from bits and pieces regarding, for example, children, family and crime. In the 1970s one ambitious project at Stanford (SLADE)<sup>26</sup> started to pioneer statistical comparative law, but was aborted for lack of funds. There was clearly an intellectual lag between Law and some adjacent disciplines.

Since then, largely because of the activities of the World Bank, OECD, UNDP, the European Union and other such agencies, it has been suggested that Law has experienced a numerical turn.<sup>27</sup> Like it or not we are now involved in Big Data, league tables and transnational indicators and most such global and sub-global statistics and indicators relating to law need to be scrutinised carefully, especially in relation to concepts, over-simplification and dubious evidence.<sup>28</sup>

### Strategy

Over time I developed a four-pronged strategy for what became my main project for the next twenty years. First, to survey the general literature on 'globalisation'; secondly, to revisit my own Anglo-American tradition of Jurisprudence critically from a global perspective; thirdly, to concretise and ground the project through detailed case studies and some middle range theorising about a number of topics that appeared particularly relevant to the field of Globalisation and Law;<sup>29</sup> and fourthly, to draw some provisional general conclusions about the implications of adopting a global perspective on law. Out of my research and teaching in due course emerged three books: *Globalisation and Legal Theory: Exploratory Essays* (1999/2000) (GLT) which was indeed, exploratory; ten years later, the largest volume *General Jurisprudence: Understanding Law from a Global Perspective* (2009) (GJP), and then *Globalisation and Legal Scholarship* (2011) (GLS), which offered guidance to individual academic lawyers on how to think about the implications of globalisation for their own work.

### Teaching and learning about Globalisation and Law

As with other projects, I used my teaching as a vehicle for developing my ideas and setting them in broad frameworks. From the mid-1990s the main vehicle for developing my ideas was a seminar on 'Globalisation and Law' mainly in Miami.<sup>30</sup> I started with a variant on 'the Newspaper exercise' (Preface) asking each student to mark all references to foreign and transnational law in a single



weekday's edition of the *Miami Herald* or the *New York Times*. They found examples of transnational relations and laws and foreign law throughout, including on the sports, arts and financial pages. This had the desired effect in making them realise that they could not sensibly focus only on 'American law', that they had already encountered foreign law in many contexts and that how law is conceived and practised in the USA 'ain't necessarily so' elsewhere.<sup>31</sup> For each student the main task was making two presentations to the class, one relating to a substantial term paper on a topic of their choice, mainly fairly specific topics or case studies.<sup>32</sup> Supervising more than a hundred papers over a dozen or so years taught me a lot. Besides expanding my general knowledge, the course stimulated me to develop my own ideas in four specific ways: (a) 'g-words'; (b) mapping law; (c) macro-historical perspectives; and (d) standpoint again.

### 'g-words'

We first considered 'globalisation' from the perspectives of several disciplines, a fairly elementary introduction to the general literature and its debased vocabulary. Incensed by globababble I banned students from using any 'g-words' in the classroom – especially global law, global lawyers, Global Law degrees and global legal pluralism – unless there was a precise and clear justification, even though the course was called 'Globalization and Law'. The students got the message and had very little difficulty in complying. I made a second exception to my ban. From time to time the class was asked to adopt 'a global perspective' and to imagine total pictures of legal phenomena in the world as a whole – especially to set a context for more particular enquiries.

### Mapping law

'Other maps are such shapes, with their islands and capes!  
But we have our brave Captain to thank'  
(So the crew would protest) 'that he has bought us the best –  
A perfect and absolute blank!'  
(Lewis Carroll, 'The Hunting of the Snark')<sup>33</sup>

For one group exercise we set out to construct imaginary maps of all 'legal phenomena' in the world which they thought significant and to explore the difficulties of doing this. The main purpose was to depict their variety and complexity. Before moving on to mental 'mapping', we started with traditional physical mapping – that is, depicting the distribution and scale of units such as state legal systems, imperial transplants and impositions, and legal traditions over space and time. Rather than stipulate a general definition of law, we first discussed which legal orders and other phenomena from a number of candidates they would include in their maps: for example, if one started with

a standard map of members of the United Nations (sovereign states) this seemed straightforward, but uninformative and uninteresting – hardly better than the Bellman’s map. Did this not leave out a great deal? For example, would one omit from a historical atlas of law in the world all mention of religious law, legal traditions, customary law, human rights, European Union law, Public International law or Native American law? What about *lex mercatoria*, which was often said to apply to many transnational commercial transactions, sometimes involving millions or even billions of dollars, but the very existence of which has been doubted by some on the ground that it has no authoritative source and no agreed content? Or what about *ius humanitatis* – the claim that all areas of land and sea that have not been appropriated by any particular state are held in trust for mankind as a whole – including most of the oceans and seabed, and large parts of Antarctica and the Arctic?<sup>34</sup> What of the law of nomads who indiscriminately wander over state boundaries? Or the Romani peoples who have their own legal language and can now communicate transnationally by email? In short, could one have a sensible, inclusive and relevant picture of law in the world if one only included state law? In this context, most would agree that we need some concept of ‘non-state law’ that is relevant to serious discussion of the implications of globalisation for our subject.<sup>35</sup>

That was only a start. How, for example, to map Islamic law?<sup>36</sup> If every devout Muslim carries the *shari’a* within them, one would probably find the phenomenon in most countries and moving around. Does it make sense to ask: *where* is Islamic law? Indeed, does it make sense to map law in spatial terms? – a question now canvassed in the emerging field of Law and Geography which has developed beyond my horizons.<sup>37</sup> And what about history? Can one ‘map’ legal traditions in terms of time and space? Is not most law traditional? Could one imagine a great historical world atlas which dealt with legal phenomena across both time and space?<sup>38</sup> How would one get the required data? What if there is little or no surviving evidence of some past legal orders or of hidden or tacit ones? Could we construct maps of our ignorance, or of injustice or distributions of power? Can a map be apolitical? There was plenty to discuss, not only in terms of physical cartography, but also in terms of mental maps. For mapping is a metaphor used in many disciplines. We started with a classic paper by Santos,<sup>39</sup> dabbled a bit in modern cartography and admired Edward Tufte’s captivating suggestions for visualising ideas and information.<sup>40</sup> I concluded that even quite traditional maps still raise interesting questions in this context.<sup>41</sup>

The mapping exercise illustrates the near-ubiquity of normative and legal orders co-existing in the same time-space contexts and a map of legal traditions illustrates how laws, legal traditions and legal devices have interacted throughout history. This brings to the fore three topics: normative and legal pluralism; diffusion/reception/transplantation; and legal traditions. Each topic illustrates the importance and complexities of sub-global patterns for

constructing overviews of law in the world.<sup>42</sup> Maps of empires go some way to explaining the importance of colonialism and imperialism in spreading law, but maps of diasporas, religion, technological innovation, language spread, trade patterns and wars can also serve to illustrate the complexities of diffusion. They all underline the point that, from this perspective, most significant patterns do not fit neat geometrical metaphors: concentric circles, vertical hierarchies, horizontals or diagonals; nor geological analogies, strata, layers or levels. Our heritage of law is much messier than that.

Of course, there is a limit to the value of traditional mapping, especially of ideas. For one thing traditional maps tend to be static, but the subject matters of our discipline are not. Another important lesson is that for physical mapping one can map *practices* (given adequate data) and one can infer beliefs, norms and attitudes behind the practices – people behaving, interacting, disputing, worshipping, fighting wars, travelling, migrating, writing, carving, cooking and so on. It is less easy to map abstract ideas, but law consists of ideas as well as practices. One can try to map where Islamic law has been practised on a significant scale, but how can one map Islamic law as ideas? And, the realist question again. Can one really understand Islamic law without information about the practices? With modern technology one could extend the exercise in several directions, but one would still need to be clear about the concepts.<sup>43</sup>

If the main purpose of mapping law from a global perspective is to set a context for particular enquiries, then rough brushstrokes, not too much detail and vague boundaries may be adequate. Are there other purposes? There might be – is that not like asking what are the uses and limitations of a good atlas of world history?

### Macro-historical perspectives

I insisted that the students set their term-papers in appropriate historical contexts, but at the time I found no short historical overview that would serve as a satisfactory introduction to the course. It is plausible that World History or World Systems Theory might provide a good organising framework, or at least a starting point, for the study of Globalisation and Law.<sup>44</sup> Early in my project in the 1990s, I revisited some of these works, but decided that none was suitable as a starting point. Nevertheless, I stayed with the idea that a historical perspective is essential for approaching this field. Hence the idea of a historical atlas.<sup>45</sup>

I am too much of a particularist and a contextualist to feel at ease with ‘World History’ as a field. Insofar as it seeks to identify broad patterns it is useful as a source of bold hypotheses, provided it uses concepts which travel well and which can be tested in relation to particular times and places. But the genre is too susceptible to over-simplification, inadequate conceptualisation, reductionist tendencies and generalisations that go far beyond the available

data. Fortunately, in 2000 the first edition of Patrick Glenn's *Legal Traditions of the World* was published in time for me to draw on it. This can be read as a welcome revival of the bold tradition of Historical Jurisprudence, best exemplified by Maine.<sup>46</sup> Perhaps inevitably, Glenn's book was subject to quite a number of particular criticisms, but it was soon recognised as a major contribution to Jurisprudence as well as Comparative Law.<sup>47</sup> Its strengths are that it adopts a genuinely global historical perspective; it is centred on a sophisticated concept of tradition as the transmission of ideas (hence narrower than and distinct from 'culture', which often covers practices and attitudes as well as ideas); by treating 'tradition' as the core concept it puts history at the heart of Comparative Law; it presents a sustained argument informed by social theory; and it addresses a wide range of topics and issues that have hardly had any attention in orthodox Comparative Law, including some contemporary topics that have hardly featured in orthodox texts, at least until recently.<sup>48</sup> Although Glenn sensibly denied that he was advancing a general theory of tradition, his analysis provides a usable concept with significant explanatory power.

As 'World History' becomes more conceptually sophisticated and better-informed, it promises to be a key driver of the study of 'Globalisation and Law'. It can already serve to counterbalance ahistorical approaches to the field and even the extravagances of globalisation theory. But it promises more than that.

### Standpoint again

In thinking about the implications of globalisation it pays to start with a specific standpoint. In my Miami course neither globalisation theory nor legal theory provided a satisfactory way in for practically oriented students who were likely to be involved in specific, immediate, largely local problems in practising law in Florida or elsewhere. A broad overview of law in the world was sufficient to make them aware of potential transnational dimensions and their complexities. A more fruitful approach was to start by imagining the standpoints of a variety of individual institutions, actors and observers, including law firms, teachers, judges and scholars in specified contexts, and to get them to clarify their situation and standpoint before asking: how much of my/our work has or is likely to have transnational dimensions?

'Globalisation' touches everyone, but it affects individuals, institutions and groups in very many ways. To ask what are the implications of globalisation in the abstract is not susceptible of a general answer, because it depends on who is asking the question, in what context, for what purposes and in relation to what aspects of increased interaction or interdependence. It is usually better to begin by clarifying the context, situation, role and purposes and only then ask 'What are the implications of globalisation *for me* (or us) – for this paper, my course, my sub-discipline, this case, my job?' For some the answer might be very little; for others it might involve some radical rethinking. Some will see the

challenges as an unwelcome threat to their established ways; others may welcome these challenges. Many will be somewhere in between. For example, an English teacher of Family Law in 2017 may come up with quite different answers from her neighbour who teaches Torts or Contract or Constitutional Law, and this will be quite different again from a conveyancing practitioner in Barnstaple or the Attorney-General of Tanzania or a US Supreme Court Justice contemplating how far it is proper for her to take into account developments outside the United States. They are in different situations and their answers will depend in large part on the criteria of relevance suggested by a clarification of their standpoint. This theme became the basis for my Montesquieu Lecture at Tilburg on 'Globalisation and Legal Scholarship',<sup>49</sup> which, like this book, is addressed to all academic lawyers.

Out of this course and my more focused research emerged three books and many articles, some of which were absorbed into the books. I will revisit *Globalisation and Legal Scholarship* in the next chapter. Here I deal briefly with the two other volumes that represent my most substantial writings in this area so far.

### **Globalisation and Legal Theory (2000)**

For my project the literature from other disciplines was too extensive to be manageable except as background or for specific enquiries. I found our Western traditions had been too narrow to be a good starting point for exploring the implications of 'globalisation' for the discipline of Law. Our Western heritage has, at least until recently, been largely mono-jurisdictional, doctrinal and ignorant of other traditions and cultures. The second prong of my strategy was to revisit in detail an area in which I had some expertise, the Anglo-American tradition of Jurisprudence. I set out to study in depth some intellectual antecedents of my project within my own tradition, once again asking the question: 'Done before?'

Rather to my surprise I found that several canonical Anglo-US thinkers were more relevant to understanding law from a global perspective than I had expected. By and large they were state-centric, mono-jurisdictional, rooted in doctrinalism, uninterested in other traditions and cultures, with a tendency to ethnocentrism, paradoxically reflected in a tendency to universalism in ethics. With the exception of some American jurists, such as Pound and Llewellyn, they were generally not empirically oriented.

Nevertheless, they had some ideas worth preserving, and their limitations provided useful foils for a younger generation of revisionist thinkers.<sup>50</sup> Some relevant neglected texts were being rediscovered such as Kant's *Perpetual Peace* (1795) and Bentham's essay on 'Place and Time in Legislation'.<sup>51</sup> Over ten years I wrote a series of exploratory essays from this perspective, dealing mainly with individual jurists in the Anglo-American tradition, including Bentham, Austin, Holland, Buckland, Hart, Dworkin, Holmes, Rawls,

Llewellyn, Santos and Haack. A selection of these essays was republished in *Globalisation and Legal Theory* (1999/2000).

Focusing on one part of the vast heritage of legal theory had some rewards. First, some of the members of the canon were generalists: Bentham promoted Universal Jurisprudence; Austin the General Jurisprudence of 'maturer' systems; Holland (1906) conceived of Jurisprudence as a 'science', like Geology. There followed a period of emphasis on 'particular jurisprudence' that I experienced in Oxford as an undergraduate on the cusp of the change-over from Goodhart to Hart in the 1950s (Chapter 3). Particular Jurisprudence was mainly focused on basic concepts of English (or common law) claim-rights, obligations, persons, possession and so on until Herbert Hart reconnected the subject to abstract analytical philosophy under the rubric of 'General Jurisprudence' to which he gave a new meaning.<sup>52</sup> Hart launched a general descriptive jurisprudence. Although neither he nor his followers did much describing, they can claim to have provided some quite sophisticated tools for description. Ronald Dworkin, despite never breaking free from American obsessions with appellate adjudication, provided powerful tools and arguments for viewing law as essentially a moral and argumentative enterprise in some local contexts. Finnis's *Natural Law and Natural Rights* (2011 [1980]) still stands as a nuanced and cogent exposition of one version of Natural Law. I included Holmes in my explorations because, despite being nearly All-American (his correspondence with Laski and Pollock extends his range to London), he provided the launching-pad for standpoint analysis and bottom-up perspectives in Jurisprudence (Chapter 10). Each of these posed questions about the geographical reach of their ideas. I tried to show how Llewellyn's version of legal realism helps to fill a gap in our juristic heritage and I argued that in some contexts his law jobs theory, suitably refined, can provide one reasonably inclusive organising framework for constructing a broad overview of legal phenomena in the world as a whole while illustrating the variety and complexity of these phenomena.<sup>53</sup>

In *Globalisation and Legal Theory* I concluded that there is a good deal to build on and react to in the legacies of the Anglo-American tradition of legal theorising supplemented by some Continental European classics and revivals.<sup>54</sup> Moreover, there was a new generation of thinkers who were breaking away, including some disciples who had jumped on the shoulders of their guru, modifying him or stabbing him in the back: Pogge on Rawls; Tamanaha on Hart; Singer on Bentham; and maybe Twining on Hart and Llewellyn. Not all followed Kipling's conclusion:

But his own disciple  
Shall wound Him worst of all.<sup>55</sup>

For example, Peter Singer, a formidable philosopher and an accomplished populariser, is a clear follower of classical Benthamite utilitarianism. He has applied his practical ethics to issues of world poverty, famine, and human

rights as well as giving an elegant analysis of many global issues in his lectures on *One World*.<sup>56</sup> This in turn has provoked significant responses, for example by Onora O'Neill, and has linked juristic concerns to the developing field of International Ethics. John Rawls belatedly tried to extend his theory of justice to the world stage.<sup>57</sup> I am among those who found this thoroughly unconvincing, but at least it stimulated important critiques, not least from former followers, including Thomas Pogge and Amartya Sen. Patrick Glenn launched a new version of Historical Jurisprudence and *Grands Systèmes* theory, based on more sophisticated conceptions of tradition and of world history. Santos did something similar with Marx and Weber. Martha Nussbaum collaborated with Amartya Sen in developing the capabilities approach and led a movement to introduce feminist concerns into 'Development'.<sup>58</sup> More controversially, Brian Tamanaha, starting from Hartian positivist premises and legal realism, has tried to construct an ambitious general social theory of law as part of a genuinely global jurisprudence. His first efforts, especially his criteria for identification of law (the labelling test), diverted attention from his important contribution to elucidating less abstract concepts, drawing on social science and his own interests in law and development.<sup>59</sup> Since then he has argued powerfully for a 'Third Pillar' of Legal Theory, representing a socio-historical version of realism, which I shall touch on in Chapter 20.<sup>60</sup> These are just a few contemporaries within the Anglo-American tradition who have advanced the study of law and justice from a global perspective on the backs of their predecessors.

*Globalisation and Legal Theory*, while emphasising some clear continuities in our tradition, was more subversive than it looked.

### General Jurisprudence (2009)

During the first decade of the Millennium I published a series of specific studies on diffusion, pluralism, 'surface law', rethinking Comparative Law and, most important, a piece called 'Have Concepts, Will Travel' which urged analytical jurists to switch their attention to constructing and elucidating concepts that could 'travel well' across legal traditions and cultures, or even jurisdictions such as England and France.<sup>61</sup> I will deal with these topics in the next chapter along with different usages of the of the term 'General Jurisprudence'. These were precursors to my most substantial contribution to theorising about Globalisation and Law, *General Jurisprudence: Understanding Law from a Global Perspective* (2009). This book is divided into two parts, broadly representing high- and middle-order theory respectively. Part A is a relatively systematic statement of my approach to Jurisprudence presented in a form that could be used as an introduction to the general field in the context of globalisation. Set in the context of a reaffirmation of a liberal view of the mission of academic disciplines,<sup>62</sup> it begins with a restatement of my view of Jurisprudence as the theoretical part of

the discipline of Law.<sup>63</sup> In this view, any relatively abstract questions and ideas about law are ‘theoretical’ and therefore part of Jurisprudence. I had developed most of these views before I took up the study of Globalisation and Law as a subject.<sup>64</sup>

Chapters 2–4 are mainly about Analytical Jurisprudence.<sup>65</sup> Chapters 5–7 are about Normative Jurisprudence, especially utilitarianism, justice and human rights (the only really original sections were about human rights scepticism). Chapter 6 on ‘Empirical Dimensions of Law and Justice’ takes a fresh look at the transnationalisation of such enquiries and considered, rather cautiously, the idea of an ‘Empirical Science of Law’.

Part B of the book consists of more detailed consideration of less abstract topics that was aimed to concretise the general ideas in Part A in more specific contexts and to illustrate the importance of middle-order theorising. Some of the relevant topics are discussed in the next chapter. They include chapters on diffusion, surface law, Law and Development, the idea of ‘non-state law’<sup>66</sup> and a study of four ‘Southern Voices’ in relation to human rights. I shall deal with all of these under the rubric of middle-order theorising.<sup>67</sup> Finally, there is a concluding chapter mainly oriented to the future.

Since 2008, when I finished *General Jurisprudence*, I have continued to think and write within the broad field of ‘Globalisation and Law’. *Globalisation and Legal Scholarship* (discussed above) applied my general approach to provide guidance to individual scholars. All of these added at least incrementally to my project, which still continues at a stately pace. Since then I have published essays on realism, normative and legal pluralism, and several other topics.<sup>68</sup>

## Conclusion

Globalisation is not one thing; law is not one thing. Almost everyone involved with law needs to take globalisation seriously, but in different degrees, in different ways, in different contexts. Accordingly, most explorations of the implications of globalisation for law are appropriately approached at quite specific levels or at least through middle-range lenses rather than via general theories of law, despite the strong magnetic pull of universalism and Grand Theory.<sup>69</sup> That is why in my own work in this area I have focused on topics such as diffusion, Comparative Law and normative and legal pluralism, which will be considered in the next chapter. Broad working total pictures of law in the world from a global perspective can be useful for setting a context for more particular enquiries because such mental maps provide a broad sense of scale, distribution and proximities across space and time – what I call ‘demographic realism’. But they need to signal complexity. A really good historical world atlas of law would have its uses, but also considerable limitations. For these reasons, I am reluctant to give general answers to the question: ‘What are the implications of globalisation for law and its study?’<sup>70</sup>