Montesquieu Lecture, 2009

Globalisation and legal scholarship.

William Twining

It is an honour to be invited to deliver the Montesquieu Lecture. It is also a pleasure for two specific reasons. First, I consider myself to be a Montesquieuite in spirit, if not in detail. Montesquieu was very influential on two of my gurus, Jeremy Bentham and Karl Llewellyn, though for different reasons. For Llewellyn his emphasis on empirical perspectives and on the particularities of social and political context was an inspiration. For Bentham, Montesquieu was a pioneer of clear sighted Enlightenment rationalism, challenging tradition, full of scintillating insights; but his lack of system and his interpretation of the separation of powers were also something to react against. As we shall see, Montesquieu tempered Bentham’s enthusiasm for a universal science of legislation, but he did not dent Bentham’s ambition to be “legislator of the World”. I sometimes claim, semi-seriously, to organize my life on Montesquieuite principles: Every year I spend January through April in Florida as an academic snowbird. At that time the weather is gorgeous, there is little rain and the temperature is a moderate/temperate 60—75 degrees F; then I migrate back to Oxford for Spring, Summer and Autumn, thereby fortifying my commitment to liberal democratic principles. Climate may not be all, but its importance in both law and life is widely underestimated.

My second reason for being pleased to be here today is that nearly ten years ago I gave three lectures in Tilburg on General Jurisprudence. These were in effect a rather tentative prolegomenon to my book of the same title that was published in January of this

---

1 Bentham’s general estimate of Montesquieu, is recorded in his commonplace book at 10 works 143: “Locke ___ dry, cold, languid, wearisome, will live for ever. Montesquieu ___ rapid, brilliant, glorious, enchanting, will not outlive this century.”
year. So this occasion provides me with an opportunity to report back on how my thinking has developed over the past decade.

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

The general message has not changed, but the basic approach and ideas have been refined and developed in a number of directions. Today, rather than survey a wide range of issues, I want to suggest an approach to the specific question of the relevance and implications of globalisation from the point of view of individual legal scholars and specialists. I shall start by briefly sketching the current context, then talk briefly about “globalisation” before suggesting a way in which internal critique of one’s operating assumptions about one’s subject at different levels of generality can help an individual scholar to approach the question.

Context

For nearly thirty years we have been bombarded by talk of “globalisation”. Not surprisingly, such talk has involved a great deal of hyperbole, reflected in excited titles of apocalyptic books: The Borderless World, The End of History, Our Global Neighbourhood, Jihad vs. McWorld, The Earth IS Flat, Clash of Civilizations, The End of Sovereignty.2 After a reasonable intellectual lag, academic law has responded to these developments. This is illustrated by law publishers’ catalogues, the proliferation of
journals with “global” or “international” in the title, and significant, sometimes quite radical, “rethinkings” of fields such as international law, comparative law, EU law, and human rights. However, this response has been uneven and fragmented. It has varied from country to country. For example, legal education in the United Kingdom and the United States has been slow to change, perhaps because most professional courses and examinations still focus almost entirely on domestic municipal law. But in the United Kingdom our legal culture has been more cosmopolitan that that of the United States, partly because of membership of the European Union and the Council of Europe, partly because of some relics of the colonial era, and partly because our academic legal culture has been more detached from the particularities of legal practice than in America — see, for example, the strong emphasis on Roman law in the British tradition, at least until recently.

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

“Globalisation”

For present purposes it is not necessary to enter into the debates about the meaning and significance of “globalisation”. Here it will suffice to distinguish between two primary meanings of the term: a narrow one focused on economics; and a broad one that encompasses all modern tendencies to transnationalisation. In some contexts the term “globalisation” is used to refer to economic relations within a single putative “world economy”. This usage is illustrated by “the anti-globalisation” movement, which is directed mainly against the dominance of the world economy by capitalist ideology and practices associated with a few powerful countries and institutions. This is narrow in two ways: it refers to only one set of relations, and it is mainly confined to the world treated as a whole. In this lecture I shall use “globalisation” in a broad sense, following Anthony
Giddens, to go beyond economics to include any processes that tend to make human relations economic, political, cultural, communicative etc more \textit{interdependent}. Sometimes this refers to the world as a whole, i.e. those relations and issues that are genuinely worldwide; but sometimes it refers to relations that transcend national boundaries to a greater or lesser degree.

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

I have written polemics against the over-use and abuse of “g-words” global, globalising, and other globababble. I shall not repeat them here. One needs to cast a sceptical eye on talk about “global law”, “global lawyers”, “global law firms”, or “global legal culture”. This is not because such talk is always unjustified, but rather because so many generalisations about so-called “global” phenomena are either exaggerated (“global” means widespread) or conflate aspiration and reality (the International Criminal Court aspires to be global, but it is not there yet; the same applies to the idea of humankind as a community) or they are superficial, misleading, meaningless, speculative, exaggerated, ethnocentric, false, or a combination of these.

The important point is that interdependence is a relative matter. A high proportion of processes referred to as “global” operate at more limited sub-global levels. These levels, insofar as they are spatial, are not nested in a single vertical hierarchy galactic, global, regional, national, sub-state, local and so on. (see Table I) Interdependence is largely a function of proximity or closeness: proximity can be spatial (geographical contiguity), colonial, military, linguistic, religious, historical, or legal. In other words, a picture of patterns of law in the world needs to take account of regions, empires, diasporas, alliances, trading partners, pandemics, legal traditions and families and so on. The British Empire, the English-speaking world, religious and ethnic diasporas, the common law world, “the Arab world” even so-called “World Wars” are all sub-global; so it is misleading to talk about them as if they apply to the world as a whole. These sub-
global patterns are crucial especially for lawyers. Treating all human rights law, and even public international law as genuinely global in most respects is an exaggeration. It also blurs distinctions between aspiration and reality. It is difficult to generalise about legal phenomena across traditions and cultures, but insofar as there are reasonably clear patterns, most of them tend to follow sub-global arrangements: former empires, the European Union, the Hispanic-speaking world, the civil law tradition, the former Soviet bloc, alliances, trading blocs, religious and ethnic diasporas. For example, the spread of the common law is to be explained largely in terms of colonisation, imperialism, and recent American hegemony. The spread of Islamic law is more to do with patterns of migration. The transnational drug trade follows yet other patterns.

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

The differential significance of “globalisation” for specialised fields of expertise

Globalisation is already having, and will continue to have, a major impact on the landscape of specialised legal fields. But this is happening in varied ways. Some clear trends are already apparent. First, greater emphasis is being placed on established transnational fields, such as public international law, regional law, environmental law, international trade and finance (including lex mercatoria and Islamic banking and
finance). New transnational fields are emerging, such as Internet law,^7 procurement,^8 international taxation, and transitional justice.\textsuperscript{9} Since 9/11 international criminal law and procedure have been given a boost. From a global perspective the North-South divide is of crucial importance, and this makes issues of world poverty and “law and development” (however characterised) much more central for the discipline of law and legal theory than they have been in the past.\textsuperscript{10} As was noted above, since about 1990 there has seen a spate of “rethinkings” in several transnational fields.\textsuperscript{11}

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

Third, and less obvious, there is a growing emphasis on the transnational dimensions of subjects previously perceived as domestic, such as contract, criminal law, family law, intellectual property, and labour law. For example, in family law, issues relating to the interests and rights of children in respect of labour, custody, adoption and abduction across national borders, and the sex trade.\textsuperscript{12} In 2005 a Workshop at Pacific McGeorge Law School on “Globalizing the Law Curriculum” led to the launch of a series of ten (so far) short readers “designed to facilitate the introduction of international and comparative law issues into basic law school courses in the United States.”\textsuperscript{13}

Fourth, increasing attention is being paid to diffusion of law generally, and specifically of religious and customary practices through migration, their interface with municipal state law in Northern countries, and the fact that religious and ethnic minority communities have institutionalised social practices that are not officially recognized or are recognized only intermittently.\textsuperscript{14}

Finally, today no scholar, or even student, of law can focus solely on the domestic law of a single jurisdiction. Every law student in the United Kingdom ___ and, no doubt, in most of Europe, encounters European Community Law and, directly or indirectly, the European Convention on Human Rights. Our academic literature on the municipal law of England and Wales draws heavily, though unevenly, on sources from the United States, the Commonwealth and beyond. So transnational and cross-level comparison is already embedded in our local academic legal cultures. We are in important sense all
comparatists now, even if most of us lack sophistication in comparative method. Comparative law is increasingly more like a way of life than a marginal subject for a few specialists. The processes of transnationalisation significantly increase this trend.

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

Is there a role for theory in interpreting the current scene?

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

As an activity it can perform a wide range of functions, including elucidating concepts, formulating hypotheses, addressing fundamental philosophical issues (‘high theory’), intellectual history, exploring connections with neighbouring disciplines, and constructing syntheses and overarching theories. While all of these are relevant to thinking about the implications of globalisation for understanding law, two functions of theorising are more immediately relevant to the central question of this lecture. Firstly, one can identify particular theorists or texts that are most directly relevant to interpreting the present scene. Secondly, one can ask: to what extent are standard taken-for-granted
I shall deal with the first point quite briefly: here I can only talk with confidence about the Anglo-American tradition. Surveys in UK, Australia and Canada suggest that taught jurisprudence has a discernible mainstream or canon: Dworkin, Hart, Kelsen, Natural Law (e.g. Finnis), Rawls and Raz feature on nearly all lists, with Austin, Bentham, Fuller, Holmes, Llewellyn, MacCormick, Posner, critical legal studies, autopoiesis and feminist jurisprudence forming a second, but significant, tier. Whatever their differences, almost all of these thinkers have treated the domestic legal systems of sovereign nation states as their central, sometimes exclusive, concern. Some, with varying degrees of unease, have tried to accommodate public international law and European Community law. Almost none have treated religious law, or other forms of non-state law, as central to their concerns. Recently, largely in response to globalisation a new generation of theorists has climbed on the shoulders of their predecessors and explored how far their ideas need adjusting to fit a global perspective. Brian Tamanaha has accepted Hart’s positivist premises __ the separation thesis and the social sources thesis __ but pared away all Hart’s criteria of identification in order to construct a broadened conception of law that would include several forms of non-state and religious law, but which differentiates it from other social rules and institutions, such as those involved in the governance of hospitals, schools, and sports leagues. Thomas Pogge, a former pupil of Rawls, has followed and refined most elements of Rawls’ theory of justice. However, rejecting the notion of nation states or societies as self-contained units, he has produced a radically different theory of global justice than that outlined in Rawls’ *The Law of Peoples*. Peter Singer has done something similar for Benthamite utilitarianism, applying it to current issues in international ethics and I have tried to do the same for Karl Llewellyn. Working more in a tradition of world history than historical jurisprudence, Patrick Glenn’s *Legal Traditions of the World* provides a theoretically sophisticated, if not uncontroversial, overview of the major legal traditions. Boaventura de Sousa Santos, building on a mixture of Marx, Weber, and post-modernism has produced a striking account of ‘a new legal common sense’.
new generation of jurists — notably Tamanaha, Santos, Glenn, ___ and some philosophers, for example, Pogge, and Singer ___ are producing a stock of globally oriented theories about law while maintaining discernible continuities with our general jurisprudential heritage.

One of the main functions of legal theory is internal critique, that is articulating and subjecting to critical scrutiny assumptions and presuppositions of our academic legal culture, or of specialised enclaves within it, or even the received wisdom on particular topics. This, I suggest, is one useful approach for a specialist legal scholar reflecting on the implications of globalisation for her own field or topics of specialised interest. I propose to adopt this approach by articulating some widespread assumptions underlying our Western legal traditions of academic law and considering how they are challenged by adopting a global perspective. *En passant* I shall briefly use the same approach in relation to one field, comparative law, traditionally perceived as a preserve of specialists, and the literature on legal transplants (diffusion), a topic which is now regarded as central to comparative law.

*The individual specialist*

Apart from being aware of these general trends, how can the individual scholar approach the question: what are the implications of increased transnationalisation and interdependence for my work as a specialist? I want to suggest that one way is to adopt the methods of internal critique, that is critical examination of one’s own working assumptions. The *handout* that you have contains three examples of this kind of approach. Each sets up “ideal types” of general assumptions and tendencies in given areas of study and invites consideration of how they are being challenged in a new context. These examples apply to three different levels: A is an ideal type of the prevailing Western traditions of academic law; B is an ideal type of traditional mainstream micro-comparative law; C constructs a naïve model of legal writings about reception/transplants/diffusion.

Let me first make some general comments on these:
First these are NOT general descriptions of traditions and tendencies, they are ideal types or models. There are, of course, many exceptions and variants. The ideas are recognizable, but not universal or uncontested. The argument in the present context is that *insofar as such assumptions are in fact made* they are under challenge in the context of the complex processes we loosely refer to as globalization.

Second, this use of ideal types is a flexible tool. There is nothing fixed about the particular points and formulations in these examples. I used different methods for constructing each of these examples. For example, “the naïve model of diffusion” takes as its starting-point the first article I ever wrote __ I asked: what did I assume and how well do these assumptions characterise diffusion processes? It was a (so far unsuccessful) attempt to launch a new movement: the Self-critical Legal Studies Movement.

The second example is based on a literature survey of what mainstream comparative lawyers had said about their subject up to about 1995 __ i.e. just before there was a burst of self-criticism within the sub-discipline.

The model of Western Traditions of academic law stems from thinking about a global perspective i.e works back from thinking about globalisation.

Third, these examples are not random. I believe that

- the whole Western tradition of academic law is based on kinds of assumptions that need to be critically examined in a changing context;
- comparison is the first step to generalisation and that more sophisticated and expansive approaches to comparative law are critical for the development of a healthy discipline of law
- we lack concepts and data to generalise about legal phenomena in the world as whole: analytic concepts that can transcend, at least to some extent, different legal traditions and cultures;
- we need more sophisticated normative theories that are well-informed and sensitive to pluralism of beliefs and differences between value systems; and,
- especially, we need improved empirical understandings of how legal doctrines, institutions, and practices operate in “the real world”.
Fourth, this is NOT negative critique. I belong to the Western tradition of academic law; I was taught by and admire some of the pioneers of classical comparative law — Rheinstein, Lawson, Nicholas; and I think that there is much of value in the legal literature on transplants/reception. Indeed, it is almost as much a pity that social scientists interested in diffusion have ignored the legal literature as that legal scholars have largely ignored the vast and varied social science literature on diffusion. Two bodies of literature have been talking past each other. A large part of my own work rests on assumptions that approximate to my ideal type of Western traditions. We cannot break away very far from our intellectual roots.

Western traditions of academic law

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

A lot of these are familiar and some of this is not or should not be controversial. Academic law has been changing rapidly for some years. For example, it is now commonplace that sovereignty, the territoriality of law, legal and normative pluralism, regionalism, diffusion, human rights, and aspects of environmental law are becoming more salient as topics deserving attention. So this is as much trend-spotting as trend-setting. If we look at the first ideal type it suggests some further points of challenge — about secularism, bottom-up perspectives, the purpose, nature and scope of comparative
law for example. However, in the time available I must be selective. So let me confine myself to some brief remarks about the inter-related topics of the idea of non-state law, pluralism, diffusion and ethnocentrism.

(a) *Conceptions of law: The Westphalian Duo.* From a global perspective a reasonably inclusive picture of law in the world would encompass various forms of *non-state law*, especially different kinds of religious and customary law that fall outside ‘the Westphalian duo’ of nation state law and classical public international dealing with relations between states. A map of law in the world that leaves out religious law, important forms of indigenous, customary or Cthonic law, emerging forms such as *lex mercatoria* and other examples of “soft law” at supra- and international levels, just leaves out too much. There are of course problems of conceptualisation and strong claims about the importance and distinctiveness of state law, but it is difficult to believe that anyone seriously maintains that such phenomena do not exist or should not be a concern of legal scholarship. Non-state law is not important only in the Global South or non-Western countries. In Western countries with significant migrant communities it is an increasingly salient phenomenon, not only in respect of interaction with national law, but also in its own right. How can a teacher of municipal law in UK or the Netherlands concerned with housing finance, or consumer credit, or small businesses today ignore Islamic banking and finance? *Riba* is now part of the picture both in respect of municipal law and of institutionalised social practices that may or may not be recognized as having legal effect by the state. The same applies to family law, criminal law and so on, but in quite complex ways. That may be obvious to this audience, but to what extent is it reflected in our practices of legal education?

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

A great deal of controversy, much of it unnecessary, surrounds the topic of legal pluralism. First, there is a matter of terminology. It is important to distinguish between (a) “state legal pluralism” (recognition within a state legal system of different bodies of law, such as religious or customary law, applying to members of particular groups for given purposes); (b) “legal polycentricity” (the eclectic use of sources in different sectors of a state legal system); and (c) empirical legal pluralism, as the co-existence in fact of discrete or semi-autonomous legal orders in the same time-space context.

Here we are concerned with (c). The problem of “the definitional stop” — where to draw a line between legal and non-legal, if one adopts a broad conception of law — has re-surfaced in the context of debates about legal pluralism. This is not a specific puzzle about legal pluralism as such, but is part of the perennial topic of how best to conceptualise law. For the individual scholar whether a particular normative order or other phenomenon is categorised as “legal” is usually of secondary importance. The question for her is: what normative orders in addition to state law are important for understanding my particular field? For example, it is commonplace in diffusion studies that imported state law almost inevitably interacts with pre-existing local normative orders, including state law, so-called “unofficial law”, various customary practices and the culture(s) of the local legal profession. The important fact is the interaction, not how these various normative orders are categorised. What is of more theoretical interest is to what extent a given normative order can be treated as a discrete unit (the problem of individuation) and how different kinds of interaction can be described (differentiation of modes of “interlegality”).

From a global perspective, legal pluralism is a very important phenomenon at all levels of ordering, both within and across levels. If one separates out broader issues that belong to the general theory of norms, or problems of conceptualising law, or ideological
issues about “the state”, it is relatively straightforward to conceive of legal pluralism as a social fact. Its scope depends in large part on one’s conception of law. Once the broader theoretical issues are distinguished, most of the interesting questions about legal pluralism are either empirical or concerned with policy questions about the relationship between the state and non-state law.\(^2\) They need to be set in some broader intellectual framework, including that of orthodox jurisprudence.\(^{35}\) Legal and normative pluralism is now quite widely recognized as a significant phenomenon in most transnational subjects. In multicultural societies __ which today means most societies __ it is increasingly relevant to the study of domestic law, but in different ways for different fields.\(^3\)

v. Transplantation, reception, diffusion\(^{36}\)

From a global perspective a map of state law in the world inevitably depicts a continuous story of interaction and diffusion. Legal traditions have interacted with each other throughout history.\(^{37}\) Until the mid-twentieth century, imperialism and colonialism were probably the main, but not the only, engines of diffusion of state law. In comparative law it has sometimes been assumed that modern state law is almost exclusively a Northern (European/ Anglo-American) creation, spread through nearly all of the world via colonialism, imperialism, trade and more recent neo-colonial influences. This provided one justification for concentrating largely on ‘parent’ legal systems. In the post-colonial era the processes of diffusion have been perceived to be more varied and there is a growing realisation that diffusion of law does not necessarily lead to convergence, harmonisation, or unification of laws.\(^{38}\) Moreover, if one includes important examples of non-state law, the picture becomes very much more complex.

Diffusion is now widely recognised as a central topic in comparative law.\(^{39}\) Adopting the method of internal critique, I have tried to show that until recently much of the legal literature on legal transplants/reception, which contains some excellent studies, has been based on some simplistic assumptions.\(^{40}\) Taking one of my own early


\(^3\) On the Global Issues series edited by Professor Gevurtz, see above n. 000
publications I demonstrated that my account was based on a naïve model of reception that postulates a paradigm case with the following characteristic assumptions:

[A] bipolar relationship between two countries involving a direct one-way transfer of legal rules or institutions through the agency of governments involving formal enactment or adoption at a particular moment of time (a reception date) without major change …. [I]t is commonly assumed that the standard case involves transfer from an advanced (parent) civil or common law system to a less developed one, in order to bring about technological change (‘to modernise’) by filling in gaps or replacing prior local law.

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

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

There is an interesting connection between Bentham and Montesquieu on the topic of transplants/diffusion. In his later years Bentham aspired to be Legislator of the World. In some of his later writings on codification, he gave the impression of being a near-universalist in legislation, a technocrat largely indifferent to local conditions and culture.4 However, in Essay on the Influence of Place and Time, [new version edited by P Schofield] he took seriously Montesquieu’s ideas on the importance of history,

---

4 Bentham, Legislator of the World (CW 1998) <keep title>. This volume is concerned with late works and does not include the early essay on place and time.
geography, and culture on the development of law, and advocated a quite moderate and gradualist approach to transplantation of laws. He argued that local sensibilities should be heeded and humoured, but that they should not be treated as insurmountable by the utilitarian legislator, who might need to rely more on “indirect legislation” than direct imposition of new codes, at least in the short-term. In the end Bentham, like most modern exporters of law, concluded that “universally applying circumstances” were much more important than “exclusively applying circumstances”, but at least he conceded that Montesquieu had a point.

Doctrinal and institutional perspectives on law: the issue of surface law

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

5 Id. at 291-2.
‘Surface law’ does not mean law that is only on the surface. Rather our discipline has not been very good at penetrating behind the official texts and doctrine to find out how they operate in practice in given contexts. And to what extent, if we adopt a conception of non-state law, are there significant arcane, unnoticed or invisible legal orders that so far have escaped the attention of legal scholars? In short, concern with the realities of ‘law in action’ is as important from a global perspective as it is for more traditional understandings of law.

xi. Ethnocentrism, parochialism and ignorance of other traditions

Ethnocentrism means ‘culturally biased judgement’ or ‘a tendency to look at other cultures through the filter of one’s own cultural presuppositions’. Our academic tradition has tended to be ignorant, even ethnocentric, about other legal traditions and belief systems. Their study has been treated as marginal at best. As with other branches of jurisprudence, Western normative jurisprudence has been quite insular. Yet Western Jurisprudence has a long tradition of universalism in ethics — witness, for example, Natural law, classical utilitarianism, Kantianism and modern theories of human rights. Nearly all such theories have been developed and debated with at most only tangential reference to and in almost complete ignorance of or indifference to the religious and moral beliefs and traditions of the rest of humankind. When differing cultural values are discussed, even the agenda of issues has a stereotypically Western bias.

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

Conclusion

The main purpose of this lecture is to suggest an approach for any individual scholar to reflect on the implications of globalisation for their specialism or specific research topic. The key is to adopt a wide interpretation of globalisation, to identify one’s normal working assumptions when dealing with one’s specialism, and to identify points at which any or all of these assumptions are challenged by adopting a genuinely global perspective. One can set that against some perceptible trends in academic law as it has already responded, largely in a piece-meal way, to these challenges.

Likely future directions: this kind of perspective suggests some likely directions in which our discipline may move in response to the changing situation. Again this is as much trend-spotting as trend-setting.

First in respect of fields of law one can expect that:

(i) established transnational fields command increased attention:

(ii) New subjects with a strong transnational orientation emerge;

(iii) Traditional subjects formerly perceived as domestic will acquire new transnational dimensions:

(iv) There will be an increased awareness of pluralism and multiculturalism in the domestic context.

(v) These developments will require systematic rethinkings of particular fields and their relations to each other

(vi) So far as legal theory is concerned we need to review the Western canon and ask: are there forgotten jurists in the Western tradition who now deserve more
attention? that has happened with Kant’s Perpetual Peace and to some extent with Vico, Grotius, and Leibniz. We also need to re-interpret the mainstream, as has already been done by Tamanaha on Hart, Pogge on Rawls, and in a different way, Singer on Bentham. And, most important, we need to ask are there not jurists and schools of thought in other legal traditions that demand our attention as we try to cope with the problems of an increasingly interdependent world?

We cannot but work largely within our received tradition and law is a practical subject that on the whole require particularistic detailed local knowledge. We should not abandon our heritage, but rather set our scholarship in a global context and have at least a working general knowledge of other traditions.
APPENDIX

Three ideal types

A. Western traditions of academic law: some simplistic assumptions;

(a) that law consists of two principal kinds of ordering: municipal state law and public international law (classically conceived as ordering the relations between states) (“the Westphalian duo”);
(b) that nation-states, societies, and legal systems are very largely closed, self-contained entities that can be studied in isolation;
(c) that modern law and modern jurisprudence are secular, now largely independent of their historical-cultural roots in the Judaeo-Christian traditions;
(d) That modern state law is primarily rational-bureaucratic and instrumental, performing certain functions and serving as a means for achieving particular social ends;
(e) that law is best understood through “top-down” perspectives of rulers, officials, legislators, and elites with the points of view of users, consumers, victims and other subjects being at best marginal;
(f) that the main subject-matters of the discipline of law are ideas and norms rather than the empirical study of social facts;
(g) that modern state law is almost exclusively a Northern (European/ Anglo-American) creation, diffused through most of the world via colonialism, imperialism, trade, and latter-day post-colonial influences;
(h) that the study of non-Western legal traditions is a marginal and unimportant part of Western academic law;
(i) that the fundamental values underlying modern law are universal, although the philosophical foundations are diverse.

B. The Country and Western Tradition of Comparative Law

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

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

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

(iv) It focuses almost entirely on legal doctrine;

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

(vi) The concern is with description and analysis rather than evaluation and prescription, except that one of the main uses of 'legislative comparative law' is typically claimed to be the lessons to be learned from foreign solutions to 'shared problems' - a claim that is theoretically problematic.
C. Diffusion: a naïve model and variants: [A] bipolar relationship between two countries involving a direct one-way transfer of legal rules or institutions through the agency of governments involving formal enactment or adoption at a particular moment of time (a reception date) without major change …. [I]t is commonly assumed that the standard case involves transfer from an advanced (parent) civil or common law system to a less developed one, in order to bring about technological change ("to modernize") by filling in gaps or replacing prior local law. (Twining (2005)

<table>
<thead>
<tr>
<th>Standard Case</th>
<th>Some Variants</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Source-destination</td>
<td>Bipolar: single exporter to single importer</td>
</tr>
<tr>
<td>b. Levels</td>
<td>Municipal legal system-municipal legal system</td>
</tr>
<tr>
<td>c. Pathways</td>
<td>Direct one-way transfer</td>
</tr>
<tr>
<td>d. Formal / informal</td>
<td>Formal enactment or adoption</td>
</tr>
<tr>
<td>e. Objects</td>
<td>Legal rules and concepts; Institutions</td>
</tr>
<tr>
<td>f. Agency</td>
<td>Government-government</td>
</tr>
<tr>
<td>g. Timing</td>
<td>One or more specific reception dates</td>
</tr>
<tr>
<td>h. Power and prestige</td>
<td>Parent civil or common law &gt;&gt; less developed</td>
</tr>
<tr>
<td>i. Change in object</td>
<td>Unchanged Minor adjustments</td>
</tr>
<tr>
<td>--------------------------------</td>
<td>-------------------------------------------------</td>
</tr>
<tr>
<td>k. Technical/ideological/cultural</td>
<td>Technical Ideology, culture, technology</td>
</tr>
</tbody>
</table>

ENDNOTES

1 This is an adaptation and development of a paper entitled “Implications of “globalisation” for law as a discipline” in Andrew Halpin and Volker Roeben (eds.) Theorising the Global Legal Order Oxford: R. Hart, 2009


E.g. Ruti Teitel (2000) *Transitional Justice* (Oxford: Oxford University Press); Christine Bell and others (2007) Special Issue on Transitional Justice, 3 Int. Jo. Law in Context No.2; See also the webpage of the Transitional Justice Institute (University of Ulster) http:www//transitionaljustice.Ulster.ac.uk.

GJP Ch.11.

See above n.000 <n.2>


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


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

Ibid at ch 1.3.

American courses are more eclectic, but the standard students works suggest a similar patter, with more emphasis on trends in American Jurisprudence.

Llewellyn’s ‘law jobs’ theory can be interpreted as a partial exception. See GJP, at ch 4.2-3. I have written about this phenomenon at length elsewhere. See, eg, ibid at ch 1-8.


See, eg, P Singer, *One World, the ethics of globalization*, 2nd edn (New Haven, Yale University Press, 2004) and *Practical Ethics* (Cambridge, Cambridge University Press, 1993). These are discussed in GJP at ch 5. 6.

GJP Chapter 4.


ALT I do not intend, now or ever, to launch a grand theory of global law __ indeed I am quite sceptical about such theories. I have a quite complex view of the nature and roles of legal theorising as an activity, but today I wish to focus on only one aspect: the role of legal theorist in examining assumptions and presuppositions of our academic legal culture, of specialised enclaves of it and of legal discourse generally. This, if you like, is the role of theorising as internal critique.
27 Adapted from GJP Ch.1.
28 See below Ch.3 and <SNSL>.
29 “Part of the ideological baggage of the modern nation-state is the idea that the state is the source of all law, properly so called, and that law is (or at least ought to be) exclusive of other forms of regulation and is uniform for all persons”. (John Griffiths (2001) “Legal Pluralism” 13 IESBS 8650-1)
30 I have argued elsewhere that legal pluralism is usefully conceived as a species of normative pluralism, that it exists as a social fact, that from a global perspective legal pluralism is an important phenomenon, and that some of the puzzles and controversies are either unnecessary or relate to wider issues, about epistemology or the concept of law, or the nature of rules and rule-systems. (GLT 82-88, 224-33). See now GJP Ch.17.
33 This is a particular concern of Tamanaha (1993) “The Folly of the ‘Social Scientific’ Concept of Legal Pluralism”, 20 Jo. Law and Society 192 and (2001) op. cit. n. <12>..
34 See GLT Ch.17. 1.<>
36 Most of the legal literature uses such terms as reception, transplantation, or transposition to refer to legal systems influencing or imitating each other. However, I prefer ‘diffusion’ because, although the word is misleading in suggesting movement from a single point, this is the standard term in the vast and rich social science literature that has been largely ignored by legal scholars. W Twining, ‘Social Science and Diffusion of Law’ (2005) 32 Journal of Law and Society 203.
38 See GJP, at ch 9 and 10.
39 Alan Watson can take credit for developing this insight over many years, starting with A Watson, Legal Transplants (Edinburgh, Scottish Academic Press, 1974; revised edn 1993).
40 GJP, at ch 9 and Twining, above n 54.
41 MacCormick, above n 46.
42 GJP, at ch 4.
43 Ibid at ch 8.
44 Ibid at ch 10.
45 Romani (or ‘Gypsy’) law and the Common Law Movement are examples of previously unnoticed normative orders that have only been recently caught the attention of legal scholars. See, eg, W Weyrauch (ed), Symposium on Gypsy Law (Romania) (1997) 45 American Journal of Comparative Law; S Koniak, ‘When Law Risks Madness’ (1996) 8 Cardozo Studies in Law and Literature 65 and ‘The Chosen People in our Wilderness’ (1997) 95 Michigan Law Review 1761.

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

49 MOVE TO n69For example, in discussions of Islam focusing on Islamic punishments, the veil, and even female genital mutilation (not an Islamic idea), rather than commercial morality (eg, *riba*) or the relief of poverty (eg, *zakah*) or international law (*siyar*), from which the West might learn from Islam.

