Part A

Chapter 1

Jurisprudence, globalisation and the discipline of law: a new general jurisprudence*

1.1 Clean water

A few years ago a team of local and foreign consultants was asked to evaluate the health of the criminal justice system (including police and prisons) in an African country that was starting to rebuild after a terrible period of human and natural disasters. Under the general rubric of promoting 'democracy, human rights and good governance', their remit was to devise a strategy and set priorities for expenditure by Government and a consortium of foreign donors. Part of this involved setting priorities for prisons. Seventy per cent of the prison population was on remand, often illegally. Despite the best efforts of the prison service, prison conditions were appalling. Money was short, and many of the problems seemed intractable, if not insoluble.

It was difficult to know where to begin. The country had a newly minted Constitution (including a Bill of Rights). Legitimated and validated by an admirably democratic constitutive process, this Constitution was a source of both national pride and strong, but not universal, public support. One member of the team suggested that the first principle should be: 'Enforce the Constitution'. Brushing aside the argument that there were no sanctions against the Government for non-enforcement, the team adopted this as their starting point.

Article 24 stated: 'No one shall be subjected to any form of torture, cruel, inhuman, or degrading treatment or punishment.' Before considering complex problems of illegal detention, mixing women with men or children with adults,[1] extreme overcrowding, and forced labour, the team turned its attention to the seemingly simpler question of providing clean water and adequate food. Someone proposed that failure to provide these basic necessities was 'inhuman' and therefore unconstitutional. This proposal met with a sceptical response.

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[1] Article 37(c) of the Convention on the Rights of the Child prescribes that 'every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so'. I am grateful to Kerstin Mechlem for this point.

The first argument was that there had been no local precedents interpreting 'inhuman': it was a category of indeterminate or illusory reference. To which the reply was that the local provision was derived from many international and regional conventions and standards, including the non-binding Standard Minimum Rules for the Treatment of Prisoners. The Government was a signatory to many of these documents. There was accordingly a vast jurisprudence upon which to draw in interpreting Article 24, including persuasive precedents and commentaries within the same region.[2] The term 'inhuman' might be vague, but it was part of a universal principle of political morality upholding basic human needs for survival and reasonable health. From this one could infer that the Government had a duty to protect the life and health of all prisoners by providing clean water, even if the Government's international obligations were backed only by the moral sanctions in the tribunal of international opinion.

The next line of argument was about local conditions: 'About half of the rural population does not have clean water. Are you proposing that prisoners should be treated better than the ordinary people should? And will the test of cleanliness take into account the fact that many locals have developed some immunity to infections found in water? What about foreign prisoners, should they be treated equally?' After some debate, the team decided by a majority that the exact standard of 'clean' should be prescribed by regulation, taking into account local conditions (including costs), but not beyond a point that the water would be deleterious to health.[3] If that meant that prisoners were being treated better than some people, that was what the Constitution, backed by international and regional jurisprudence, prescribed.

The third line of scepticism came from within the team. The economist said: 'This is sheer legalism and mischievous nonsense. What precisely are you recommending in respect of water? (Running water, purification, or boiling?) What precisely is the test of 'clean'? Standards are not self-enforcing: Who will do the testing and who will pay? How much will this cost for all prisons in the country?' 'Does the provision of clean water have a higher priority than other claims of the prison service or the criminal justice system?' 'Are you sure that this Constitution is an institution that this country can afford?' The reply from the team was: 'The Constitution is the basic law. In interpreting terms like 'inhuman' there is leeway for taking into account local conditions and values, but it is absolute in regard to the principle that the Government has a duty to treat prisoners as human beings. We are not advocating Kelsenian purity.[4] We

[2] A good summary of the international jurisprudence is to be found in Rodley (1999). However, there does not appear to be much direct authority on standards for provision of food and water, and there are unsettled questions about omissions and intent in respect of 'inhuman and degrading treatment'. Some support for the team's interpretation may be found in the Standard Minimum Rules for the Treatment of Prisoners.

[3] The Committee on Economic, Social and Cultural Rights sets a higher standard: water has to be safe and not constitute a threat to a person's health. I am grateful to Kerstin Mechlem for this point.

[4] This is, of course, a misuse of Kelsen.

can tolerate some impurities so long as they do not seriously threaten health. But we reject arguments of the kind: 'Prisoners have no-right to food or clean water or freedom from torture, because we cannot afford such protections.' Article 24 is part of a worldwide consensus on non-negotiable minima.'[5]

The dilemmas in this situation are real; the issues are at the heart of legal theory. Indeed this text could be read as a *roman à clef*, incorporating phrases from several jurists. My object in starting with this tale is neither to defend nor to criticise the position taken by the majority of the team. The issues are contested. Rather, in talking about very broad, often abstract matters, I do not want to give the impression that I think that jurisprudence can be divorced from urgent, real life, historically specific problems. In talking about linking social science with the study of human values, Julius Stone wrote: 'Yet it still remains basic that this concern of jurisprudence seeks detailed empirical understanding and solution of *ad hoc* practical problems, and that concern with the larger more visionary enterprises ought never to obscure this truth.'[6]

1.2 Western traditions of academic law

Jurisprudence is the theoretical part of law as a discipline. How any discipline is institutionalised varies according to time and place and tradition. Law is no different. Because of this historical contingency, there is no settled core or essence of the subject matters of our discipline or of legal knowledge.[7] I shall argue for a broad (and pluralistic) interpretation of these subject matters, but not all of my readers will agree with me. The purposes, methods, and scope of the discipline are frequently contested.

If one adopts a global perspective and a long time scale, at the risk of oversimplification, one can discern some general tendencies and biases in Western academic legal culture that are in the process of coming under sustained challenge in the context of 'globalisation'. In a crude form, these can be expressed as a series of simplistic assumptions that are constituent propositions of an ideal type:

(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');[8]
(b) that nation-states, societies, and legal systems are very largely closed, self-contained entities that can be studied in isolation;[9]

[5] This is a fictitious story based on experience in several African countries.
[6] J. Stone, 'Trends in Jurisprudence in the Second Half Century' (at p. 30), printed in Hathaway (1980). This paper was written shortly after the publication of Stone (1966).
[7] On 'the core' of law as a discipline see *BT*, Chapter 7 (1994).
[8] The Peace of Westphalia (1648) refers to two treaties, which ended the Thirty Years' War and the Eighty Years' War. These events are often taken to signal the rise of the nation state and the start of the modern international system. This interpretation of history is contested, but it serves as a convenient reminder that the predominance of municipal state law is relatively recent.
[9] On Rawls, see Chapter 5.5 below and *GLT*, 7–8, 46–49, 72–5.

(c) that modern law and modern jurisprudence are secular, now largely independent of their historical-cultural roots in the Judaeo-Christian traditions;[10]
(d) that modern state law is primarily rational–bureaucratic and instrumental, performing certain functions and serving as a means for achieving particular social ends;[11]
(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;[12]
(f) that the main subject-matters of the discipline of law are ideas and norms rather than the empirical study of social facts;[13]
(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;[14]
(h) that the study of non-Western legal traditions is a marginal and unimportant part of Western academic law;[15] and
(i) that the fundamental values underlying modern law are universal, although the philosophical foundations are diverse.[16]

In short, during the twentieth century and before, Western academic legal culture has tended to be state-oriented, secular, positivist, 'top-down', Northo-centric, unempirical, and universalist in respect of morals. Of course, all of these generalisations are crude and subject to exceptions – indeed none has gone unchallenged within the Western legal tradition – and issues surrounding nearly all of them constitute a high proportion of the contested agenda of modern Western jurisprudence. However, at a general level this bald 'ideal type' highlights some crucial points at which such ideas and assumptions are being increasingly challenged. For example, it has been contended that:

(a) 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';[17]

[10] On securalism see pp. 404–5 below. There are books, including a *magnum opus* by Charles Taylor (2007), which talk of a secular age, or of human rights as a secular liberation theology. That is quite parochial. From a global perspective the demographers of religion, like Philip Jenkins, suggest that this is an era of religious revival, not only in respect of Islam, but of Christianity, Buddism, and the Yoruba religion; and not only in the 'Global South' – consider the challenges to Kemalism in Turkey and the rising importance of Islam in most Western countries. Misztal and Shupe (eds.) (1992). On Islam, see Rahman (2000); on Christianity, see Jenkins, (2007a) (2007b); on the Yoruba religion see Abimbola and Abimbola, (2007).
[11] On instrumentalism see Chapter 16.4 below.
[12] See *GLT*, 108–35, Tamanaha (2001) pp. 239–40.
[13] On the distinction between conceptions of law as ideas and as a kind of institutionalised social practice, see pp. 30–1 below.
[14] On diffusion see Chapter 9 below. [15] On ethnocentrism see p. 129 below.
[16] For example, natural law, utilitarianism, and neo-Kantianism are all universalist in tendency. On different meanings of universalism see Chapter 5.3 below.
[17] See Chapters 4 and 12 below.

(b) sharp territorial boundaries and ideas of exclusive state sovereignty are under regular challenge;
(c) we may be living in 'a secular age' in the West, but much of the rest of the world is experiencing a religious revival;[18]
(d) while nearly all members of the United Nations and many international and transnational organisations are institutionalised in accordance with some model of bureaucracy, large parts of the world's population live in societies and communities that are differently organised;
(e) 'top-down' perspectives are being more persistently challenged by bottom-up perspectives that range from Holmes' Bad Man to user theory to various forms of post-colonial subaltern perspectives;[19]
(f) in order to understand law in the world today 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;[20]
(g) until the mid-twentieth century, imperialism and colonialism were probably the main, but not the only, engines of diffusion of law, but in the post-colonial era the processes of diffusion are more varied and there is a growing realisation that the diffusion of law does not necessarily lead to harmonisation or unification of laws;[21]
(h) the study of non-Western religious and other legal traditions is increasingly important,[22] and our juristic canon needs to be extended to include 'southern' jurists;[23] and
(i) the world today is characterised by a diversity of deep-rooted, perhaps incommensurable, belief systems; and that one of the main challenges facing the human race in a situation of increasing interdependence is how to construct institutions and processes that promote co-existence and co-operation between peoples with very different cosmologies and values. Insofar as belief pluralism is a fact, it is foolish to hope for achieving a consensus on basic values by imposition, persuasion or rational dialogue.[24]

The situation is rapidly changing and in many respects academic practice is ahead of legal theory. The object of this book is to interpret these changes, to give them some coherence, and to suggest some ways forward. As such it as much an exercise in trend-spotting as in trend-setting.[25]

[18] Misztal and Shupe (eds.) (1992). See n. 10 above.
[19] Nader (1984); Tamanaha, (2001) at pp. 239–40; *GLT*, Chapter 5; Baxi, (2002a) Preface; Rajagopal (2003).
[20] See Chapter 10 below. [21] See Chapters 9 and 10 below.
[22] See, e.g. Glenn (2004). [23] See Chapter 13 below.
[24] Hampshire (1989) and Chapter 7.4 below.
[25] In a friendly comment on my paper on 'General Jurisprudence' (Twining 2005/7), Brian Tamanaha (2007) suggested that my conception of general jurisprudence is impossible. This assumes that I was trying to launch a grand overarching theory. My response is that legal theorising as an *activity* is already responding to the challenges of 'globalisation'. My paper ended: 'si momentum requiris, circumspice' – in other words it is happening already.

1.3 Jurisprudence

Jurisprudence, as the theoretical part of law as a discipline, has a number of jobs or functions to perform to contribute to its health.[26] This requires some clarification. 'Jurisprudence', 'legal theory', and 'legal philosophy' do not have settled meanings in either the Anglo-American or the Continental European traditions. In order to be brief I shall stipulate how they are used here, rather than enter into controversies that are partly semantic, but also partly ideological. As we shall see, I treat jurisprudence and legal theory as synonyms and legal philosophy as one part – the most abstract part – of jurisprudence.[27]

Jurisprudence can be viewed as a heritage, as an ideology, and as the activity of theorising (i.e. posing, reposing, answering, and arguing about general questions relating to the subject matters of law as a discipline). The idea of heritage emphasises continuity. The idea of ideology, in a non-pejorative sense, links one's beliefs about law to one's more general beliefs about the world – whether or not they are systematic; and in the Marxian pejorative interpretation of the term, the notion of ideology is a healthy reminder of the close connections between belief, self-interest, prejudice and delusion.[28] All three perspectives on jurisprudence are adopted in this book.

(a) Jurisprudence as ideology

Ideology is important, because people's lives are ruled not only by law, but also by religion, political commitments, and other beliefs. In some contexts sharp distinctions are drawn between religion and positive law, for instance attempts to allocate separate spheres to state and religion. But in many places 'religious law' is important and is to a greater or lesser extent officially recognised. Important political activities, from social policy to terrorism, are publicly justified in the name of religion with varying degrees of sincerity. Values are imbricated into our understandings of law at all levels. At this stage in history humankind inhabits a world in which plurality of beliefs is a contingent but stubborn fact and, as we become more interdependent, issues about co-existence and co-operation are greatly sharpened. Differences in respect of cosmologies, values, political ideologies, cultures, and traditions are part of the essential background to understanding law.

[26] For more detailed discussions, see *LIC* (1997) Chapters 6 and 7. [27] See pp. 21–5 below.
[28] On ideology and law, see Halpin (2006a). The thesis that nearly all of our heritage of jurisprudence functions as an ideology to legitimate state coercion and violence, may have an element of truth, but is often overstated.

(b) Jurisprudence as activity

As an activity within our discipline theorising has several functions.[29] These include:

(a) Constructing whole views or total pictures (the synthesising function): this is one of the functions of both geographical and mental mapping.[30] In the present context it would include not only a total picture of law in the whole world (a notional atlas of world law), but also such constructs as a general theory of international law or comparative law or corruption or constitutionalism in the world as a whole or in some parts of it.

(b) Elucidating, constructing and refining individual concepts or, more significantly, conceptual frameworks or usable vocabularies that will travel well. This is the subject of Chapter 2. A classic example is Bentham's idea of a universal 'legislative dictionary'.[31]

(c) Developing normative theories, such as theories of justice or rights or human needs or values.[32]

(d) Constructing, developing, and testing middle order empirical hypotheses, such as Maine's famous generalisations, Alan Watson's 'transplants thesis', and Donald Black's boldest theses.[33]

(e) Developing working theories for participants (for example prescriptive theories of law making, adjudication, doctrinal exposition, advocacy or negotiation (including cross-cultural negotiation)). Much more of jurisprudence is taken up with this kind of enterprise than is generally acknowledged, especially in the Anglo-American tradition, no doubt because the culture of academic law is strongly participant oriented.[34] Some of the best known examples are particular to specific legal systems or cultures – such as Karl Llewellyn's theory of appellate judging and advocacy[35]– or else they are geographically indeterminate – such as Ronald Dworkin's theory of adjudication or standard works on negotiation such as *Getting to Yes*.[36] Participant working theories that claim to be of widespread application across jurisdictions and cultures need to be treated with caution.

(f) Finally, and probably most important, is the critical function, that is digging out, exposing to view, and evaluating important presuppositions and assumptions underlying legal discourse generally and particular phases of it.[37] Of course, this can operate in many contexts, using different methodologies; for my immediate purposes, critical examination of the assumptions and presupposition of mainstream sub-disciplines such as European Union Law, Public International Law and Comparative Law are

[29] See further, Twining (1974b). [30] *GLT*, Chapter 6. See Chapter 3 below.
[31] Mack (1962) at pp. 151–8 ('the legislator as lexicographer').
[32] The problems of generalisation in this area are the subject of Chapters 5 to 7.
[33] See below Chapter 8. [34] *LIC*, pp. 126–8, *GLT*, pp. 129ff.
[35] Llewellyn (1962). [36] *GLT*, Chapter 2.
[37] *LIC*, pp. 130, 135–8. Chapter 9 below applies this approach to writings about diffusion.

a high priority.[38] This is one of the most important tasks for developing a cosmopolitan discipline of law.

(c) Jurisprudence as heritage

If one stands back and surveys the vast heritage of Western legal theorising about law, one is reminded of two tendencies that are in tension. First, our Western heritage is vast. However, viewed from a global perspective, that same heritage can be criticised for being insular, parochial, quite narrowly focused. Nearly all of it concentrates on the municipal law of sovereign states, mainly those in advanced industrial societies; it operates within and across only two of the world's legal traditions, common law and civil law, with other major traditions marginalised or completely ignored. Our 'Country and Western Tradition' of legal theorising and comparative law is vulnerable to charges of parochialism and ethnocentrism.[39]

Students coming to Jurisprudence for the first time are often bewildered and daunted by the disorderly profusion of our heritage of legal thought. Like a huge bazaar it presents a scene of loosely organised diversity.[40] One leading British student work discusses the ideas of over 100 thinkers, yet in the Preface to the seventh edition the author apologises for not finding room for many other significant figures.[41] On examination it becomes obvious that the work is focused almost entirely on modern Western, mainly Anglo-American, theorising about law. The index does not mention Hindu, Islamic, or Jewish jurisprudence and there are only passing references to Chinese, Japanese, Latin American and African traditions. So this presents only part of the total picture of the heritage of legal theory.

[38] On EC law see, for example, Weiler (1999), MacCormick (1997), Walker (2003), (2005) Ward (2003a), (2003b). On comparative law see *GLT*, Chapter 7, Edge (2000), Riles (ed.) (2001), Legrand and Munday (eds.) (2003), Menski (2006), Reimann and Zimmerman (2006); Örücü and Nelken (eds.) (2007). Since the mid-1990s there has been an outburst of theorising about Public International Law: notable works include Allott (1990) (2002), Franck (1995), Harding and Lim (1999), Hathoway and Koh (2005), Rajagopal (2003), David Kennedy (2004), Téson (1998), Koskenniemi (1999) (2005) to mention just a few. A useful overview is M. Evans (2006) Part I. 'New Approaches to International Law' (NAIL) are discussed by Riles (2004). On feminist perspectives, see Charlesworth (1991). An exploration of philosophical issues is to be found in Besson and Tasioulas (eds.) (2008). The ambivalent, sometimes cavalier, attitude towards international law of the administration of George Bush Jr, has provoked an extensive critical literature, see e.g. Sands (2005), Koh (2003), Lichtblau (2008).

[39] *GLT*, pp. 184–9.

[40] On the metaphor of jurisprudence as 'The Great Juristic Bazaar' see *GJB*, Chapter 11.

[41] Freeman (2001) Preface. Another recent student reader on Jurisprudence, Penner, Schiff, and Nobles (2002) tries heroically to give a broad conspectus by adopting a historical perspective, by regularly crossing disciplinary boundaries, by moving beyond Anglo-American authors and transnational classics such as Aquinas, Kant, Kelsen and Weber, to include modern Continental Europeans, such as Derrida, Foucault, Lacan, Habermas, and Luhmann. Although it extends over 1,000 pages, like Freeman, the focus is exclusively Western and the editors lament that they have been forced to make significant omissions for reasons of space.

Even if the focus is only on Anglo-American jurists, the picture is daunting. For example, the few students who study any of Jeremy Bentham's writings in the original usually focus on a few chapters of one early work, *An Introduction to the Principles of Morals and Legislation*. This represents less than one per cent of his *Collected Works*, which will in time extend to over seventy substantial volumes. Yet Bentham is only one of almost 100 English and American thinkers represented in Lloyd and Freeman's *Introduction to Jurisprudence*. No history of Anglo-American Jurisprudence can be sensibly restricted to thinkers who were English speaking lawyers. Even quite narrow conceptions of the agenda of jurisprudence recognise that at least some of the central issues are shared with other disciplines: For example, concerns about justice and rights are shared with ethics, political theory, literary theory, theology, psychology, economics, and sociology among others.

The extent and diversity of the heritage of Anglo-American jurisprudence poses problems of selection even within that tradition for particular purposes such as legal education and more generally for communities of scholars as well as for individuals. Texts and authors become 'canonised' partly on perceived merit, but as often as not quite arbitrarily. There are no agreed criteria of selection. Inertia, fashion, ideology, power, self-promotion, and serendipity often influence the choices that are made. However, surveys of jurisprudence courses and statistics of citation tend to converge in identifying a fairly consistent shortlist of individual authors who are widely read and studied at any given time.[42] There is a mainstream and something approaching a canonical core, but the core is constantly changing and there is a rather healthy pluralism surrounding it.

Fairly orthodox accounts of the Anglo-American tradition depict it as extending over several centuries, as multi-disciplinary, and by no means confined to anglophone authors. Plato and Aristotle, Kant and Kelsen, Marx and Weber, Foucault, Habermas, and post-modernists have been at least partly assimilated into the tradition. Yet if one adopts a global perspective, this heritage is vulnerable to criticism as being quite narrow and 'parochial' on three main grounds.

First, nearly all Anglo-American legal theorists, including those who claim to be doing general jurisprudence, work exclusively within the Western legal tradition. Their perspective is generally secular and they pay little or no attention to religions other than Christianity or to non-Western cultures and traditions.[43]

[42] See, for example, the series of surveys of taught Jurisprudence in the UK by Cotterrell and Woodliffe (1974), Barnett and Yach (1985) and Barnett (1995) (which also covers Australia and Canada). Ronald Dworkin remarks that: 'Contemporary jurisprudence courses differ wildly in content….There is no single subject, technique or canon.' Dworkin (2006a) at p. 96. This may be true of some jurisprudence courses, especially in the United States, but there is a mainstream and there is far less variety in books for such courses as is illustrated by the three surveys referred to above. See below Chapter 5, n. 1.

[43] 'We do not today… speak of Christian Law, though Christianity permeates both civil and common law. Neither Christianity nor Buddhism have sought to realise themselves through law (even widely defined), though they have had influence in various legal traditions.' (Glenn (2007) at p. 81.) Today the Natural Law tradition has both a secular and a religious strand.