

## Why global law?

This is a book about how we might fruitfully think about global law. Few terms are more topical in the transnational legal literature. Yet there has been little serious discussion – and little agreement where there has been discussion – on what is meant by ‘global law’, if, indeed, it means anything of note at all. In what follows, I suggest that we *can* nonetheless arrive at a core sense of global law as an emergent idea and practice, and that our so doing is key to any proper appreciation of the ways in which law is affected by, and is responding to, the contemporary wave of globalisation. The elucidation of that core sense will not, of course, tell us how law – global or otherwise – *should* be (re)shaped, and how it ought to be deployed to tackle the problems of global justice. Conceptual analysis and empirical inquiry alone can never solve normative problems. Yet they can help us to understand these problems more clearly, and to provide a better route map through the moral and political maze. The hope is that the reader will emerge with a sharper sense of the complexity of the global legal environment, and of the vital forces underwriting that complexity, and so with a keener appreciation of why and how the contemporary legal world has evolved as it is has and what it would take to change it.

But what of the view that, far from supplying an explanatory touchstone, stripped of its superficial glamour ‘global law’ is simply the wrong place to start in accounting for changes in the contemporary legal condition? It is with that most basic objection, and the serious concerns about ‘global’ thinking in general that stand behind it, that we begin.

### 1.1 The perils and promise of global analysis

#### 1.1.1 *Don’t mention the word*

In his voluminous writings William Twining<sup>1</sup> has been relentlessly curious and uniquely informative about the processes, practices,

<sup>1</sup> A recent predecessor as the Montesquieu Lecturer; published as *Globalisation and Legal Scholarship: Montesquieu Lecture 2009* (Nijmegen: Wolf Legal Publishers, 2011).

institutions, doctrines, values and aspirations through which law becomes less centred upon the jurisdiction and less dependent on the organs of the modern state, and instead gradually comes to assume a 'global' significance.<sup>2</sup> Yet he has little time for catch-all labels such as 'global law'. Twining has always been wary of any umbrella term that purports to capture in full the legal dimension of so-called 'globalisation', just as he prefers to hold the generic concept itself at arm's length. So much so, indeed, that he has long cultivated the habit of banning the 'g' word in all its varieties from the seminar room.<sup>3</sup> Such language, he says, has at best limited added value. It may even, in the particular case of 'global law', possess negative value; and this for two reasons.

In the first place, there is a tendency towards the indiscriminate use, and so also the *overuse*, of what remains a radically ambiguous and open-ended label.<sup>4</sup> Whether talking about a body of doctrine, an emergent conception of legal order, a set of institutional capacities, a form of professional legal practice and culture, an academic discipline, a research programme or a teaching template, or about any combination of these, we might be tempted to make vague or overstated claims about the prevalence of something that goes under the banner of 'global law'. The danger is not just that the general label will not necessarily add anything to our understanding of the richly disparate set of activities and processes through which legal doctrine and other legal phenomena are spreading further and more thickly across the globe than before. More than that, its invocation may have a misleadingly reductive effect, implying false unity, coherence or settlement. In its neat singularity, a term like 'global law' may suggest identity where there is multiplicity, uniformity where there is diversity, closure where there is opening, simplicity where there is complexity, order where there is disarray, agreement where there is conflict, achievement where there is aspiration. Most dangerously seductive of all, the notion of global law as a singular phenomenon or prospect might invite us to imagine a false normative ideal – a sense of there being 'one best way' of 'global law', or even 'one best global way' of 'law'.

In the second place, inasmuch as the global label, as Twining advises,<sup>5</sup> might tolerably be employed in a more discriminating fashion to refer to

<sup>2</sup> W. Twining, *Globalisation and Legal Theory* (Cambridge University Press, 2000); *Globalisation and Legal Scholarship*, *ibid.*; and *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press, 2009).

<sup>3</sup> Twining, *General Jurisprudence*, *ibid.*, p. 14.

<sup>4</sup> Twining, *Globalisation and Legal Scholarship*, n. 1 above, pp. 17–28. <sup>5</sup> *Ibid.*, p. 24.

legal institutions organised on a global level and legal activity occurring on a worldwide scale, this may nevertheless be too narrow a perspective, and too mean a dividend, where the first-mentioned reference of ‘global law’ is too broad and too generous. For a focus on global law as the spatially specific category of planetary law, he argues, misses out a lot of what is most interesting about the intense contemporary flow of legal phenomena beyond the confines of the state.<sup>6</sup> Instead, much of that movement actually takes place at more limited levels, whether international, private transnational, regional or sub-state. What is more, the resulting dense layering and interweaving of regulatory activity is far from being ‘nested in a single vertical hierarchy’<sup>7</sup> in which the planetary level has pride of place at the authoritative apex.

We must acknowledge the force of William Twining’s scepticism. So much so, indeed, that we should begin our exploration of the case for a more central understanding of the place of something called ‘global law’ in the scheme of legal things by investigating the more general methodological concerns that underlie his own reservations. For unless and until certain basic difficulties with the keystone concept of ‘globalisation’ are addressed – difficulties signalled by the breadth of his terminological embargo – we cannot hope to make headway with the particular case of global law. These methodological concerns go to the very question of the kind of explanatory activity we are engaged in when we use the generic ‘g’ word. Indeed, they even challenge whether and on what terms the study of something called ‘globalisation’, still less global law, might be a coherent undertaking at all. Yet, as I will argue, an exploration of these concerns can also point us towards a more productive way of thinking about global law.

### 1.1.2 *Globalisation as process*

Whatever our mature theoretical misgivings, our gut fascination with the notion of globalisation is neither surprising nor misconceived. It derives from, and is sustained by, the widespread belief that there is a strong trend away from ‘the local’ and the territorially confined, and in particular the state-confined, as the main point of reference for many areas of human organisation, and that this trend represents a defining and deepening feature of the contemporary age. Naturally enough, we are also interested in the deep roots and preconditions of globalisation so understood. If

<sup>6</sup> *Ibid.*, p. 24.    <sup>7</sup> *Ibid.*, pp. 24–5.

globalisation is such a definitive feature of today, how, we are bound to ask ourselves, did it come about, and how did we get to this point?

The inquiry into causes yields different answers, and supplies countless shades of emphasis. For some, globalisation is a movement that has extended or recurred across the ages: from the economic and cultural pull of Ancient Greece, through various ‘archaic’<sup>8</sup> phases of imperial influence – Roman, Islamic and Mongol – to the so-called ‘proto-globalisation’<sup>9</sup> of the first European overseas empires of the fifteenth and sixteenth centuries. For others, globalisation is essentially a modern phenomenon: beginning with early nineteenth-century industrialisation, rapid population growth and the development of new consumer markets, and with the mutual encouragement of these trends through deepening channels of trade and investment and accelerating avenues of communication between Europe’s competing imperial powers, their colonies and the United States. And while the two World Wars of the first half of the twentieth century interrupted the long march of nineteenth-century globalisation, the years since 1945 have undoubtedly witnessed a new globalising wave. Yet beneath the basic consensus of that modern narrative, much disagreement persists. Opinions differ sharply over the distinctiveness, phasing and intensity of the dynamic triggered by the new political and economic institutions of the post-war years – in particular, the United Nations system and the so-called Bretton Woods institutions<sup>10</sup> – and, later, by the end of Cold War bipolarity in 1989.<sup>11</sup>

However, while excavation of historical roots remains an important – and much contested – part of any account of contemporary globalisation, it can by no means be the whole story. What is more, it may even compromise or curtail efforts to seek out and tell the rest of the story. This danger arises because an inquiry into underlying causes implies that we already have a firm grasp of what the ‘it’ is that is in need of explanation. That impression, in turn, may contribute to the *reification* of our object of inquiry. For to the extent that efforts are concentrated on

<sup>8</sup> See e.g. L. Martell, *The Sociology of Globalization* (Cambridge: Polity Press, 2010) p. 45; and A. G. Frank, *ReOrient: Global Economy in the Asian Age* (Berkeley: University of California Press, 1998).

<sup>9</sup> See e.g. A. G. Hopkins (ed.), *Globalization in World History*, 2nd edn (London: Pimlico, 2011) p. 6.

<sup>10</sup> Namely, the World Bank and the International Monetary Fund; both set up at a meeting of forty-three states in Bretton Woods, New Hampshire in July 1944.

<sup>11</sup> See e.g. D. Held and A. McGrew (eds.), *Globalisation Theory: Approaches and Controversy* (Cambridge: Polity Press, 2007).

working out how and why globalisation came about, this may reflect assumptions about globalisation's concretely self-evident quality; or, at least, it may nurture the proclivity to try to 'pin it down' and label it as an identifiable 'thing'. Here, then, Twining's concern about the compromised quality of the very language of globalisation finds its mark. For we can see how the 'g' *signifier*, in its seductive singularity, reflects and may come to reinforce an understanding of what *is signified* in equally singular terms.

The sustained prominence of the globalisation agenda of debate over the last quarter century reinforces the reifying tendency. The sheer intensity and persistence of our contemporary preoccupation with globalisation creates its own atmosphere of distortion. The saturation coverage that globalisation has received in the academy and in media commentary, think tanks, government policy units and other key contexts of public opinion formation in recent decades itself helps to foster or reinforce a perception of the subject matter of our curiosity as somehow palpable – its very familiarity lending it a certain tangibility and sense of distinct identity.<sup>12</sup>

The reifying inclination gives rise to a twofold methodological danger, anticipating Twining's more specific concerns about 'global law'. On the one hand, we might surmise, as many commentators do,<sup>13</sup> that globalisation has a wide referential range, embracing a complex, mutually dependent mix of economic, technological, cultural and political factors. The deployment of a capsule term to grasp our explanatory object may nevertheless reflect and encourage a readiness to impute to these diverse phenomena a discrete and distinctive quality-in-the-round they do not possess. We may be led to assume that whatever the 'it' of globalisation is, it possesses a definitive character – referring to an 'achieved' condition that is reducible to a singular abstract form and clearly distinguishable from what came before. On the other hand, we might, as other commentators do, take a more substantial, and so more obvious, approach to the apparently 'thing-like' quality of globalisation. We may focus on only one particular feature within the broader menu of candidate factors and treat that feature as globalisation's key dimension of cause and effect.

<sup>12</sup> See e.g. T. Bewes, *Reification, or the Anxiety of Late Capitalism* (London: Verso, 2002).

<sup>13</sup> See e.g. A. Giddens, *The Consequences of Modernity* (Stanford University Press, 1990); and D. Held (ed.), *Global Transformations: Politics, Economics and Culture* (Stanford University Press, 1999).

This may be, and often is, ‘economic liberalisation’, or, in a more cultural vein, it may be ‘Westernisation’ or ‘Americanisation’, or, in a technological vein, the ‘Internet Revolution’.<sup>14</sup> In our pursuit of globalisation’s hard core by any of these narrow means, however, we are bound to exclude or downgrade other aspects of the wider mix by definitional fiat.

Any and all such seductive tendencies should give us cause for concern because, however we understand its origins, and whether and in whatever fashion we might seek to organise the elements of globalisation into core and peripheral, it is clear that much of what is of *continuing* significance in globalisation requires us to look elsewhere. For globalisation refers not – or not merely – to a discrete and settled historical accomplishment – whether multidimensional or dominated by a single dimension – and its causal preconditions, but also to an ongoing and widely ramified process. Whatever else remains at issue, much thinking on globalisation rightly tends to emphasise consequences as well as foundations, incremental as well as exponential change, ripple effects as much as discrete causal chains, flow as much as accomplishment. Crudely put, if globalisation is a defining feature of the contemporary age, it is not a state of affairs preserved in aspic, but something that is constantly evolving.

What are the telling features of this other slant of inquiry, with its focus upon currents rather than – or in addition to – causes and effects? To begin with, a common theme in much of this literature is its concentration on those manifestations or indices of globalisation that refer less to distinct episodes and events or to disjunctive movements and more to the gradual accumulation of various forces and tendencies in an unfinished dynamic stretching back to the early modern period. In particular, we see this more fluid understanding of globalisation in the repeated emphasis on the gradual deterritorialisation and disembedding of the basic setting of social organisation,<sup>15</sup> from the telegram to the video-link and from the exceptional Congress of Vienna of 1815 to the permanent United Nations after 1945; or in the stress upon the cumulative growth and intensification of social interconnectedness across previous geographical divisions, from the bilateral trade routes and reciprocal patterns of seasonal migration of the nineteenth century to the global reach

<sup>14</sup> W. Scheuerman, ‘Globalization’, *Stanford Encyclopedia of Philosophy*, available at <http://plato.stanford.edu/entries/globalization/>.

<sup>15</sup> See e.g. J.A. Scholte, *Globalization: A Critical Introduction*, 2nd edn (New York: Palgrave Macmillan, 2005).

of the multinational corporation, the worldwide financial market and the budget airline;<sup>16</sup> and, to take a final key index, in the increased velocity of many of our circuits of social action and exchange, from the high-speed railway and the cinema newsreel to the internet and the twenty-four-hour news cycle, and the sense these bring of a global environment of simultaneous worldwide action and reception.<sup>17</sup>

Secondly, for all that these globalising appearances and tendencies are attended by many forms of resistance and counter-tendency – to which we return shortly – the overall graph of the evolutionary process indicates acceleration, concentration and augmentation. This can be widely illustrated. International capital finds new forms of collaboration and new routes of mobility, which supply a platform for yet more versatile forms of flow. New modes of virtual communication proliferate and prompt further technological innovation. Global access to local markets and local cultural sensibilities and preferences fosters the formation of global cultural sensibilities and preferences, which reinforces global access to local markets. New transnational political institutions attract transnational clients with transnational agendas and foster a transnational political class, all of which feeds the development of a denser institutional architecture. Global social movements in one policy area provide both a practical example and a legitimating backdrop for the development of global social movements in other policy areas.

Thirdly, this dynamic of intensification also operates across and between different domains. Again, examples are legion. Technological development enables economic growth and facilitates widespread cultural dissemination; cultural convergence stimulates new global markets, and so on. Economic development provokes new institutional and regulatory responses by coalitions of winners and losers alike; new institutional capacity frames new forms of common political culture and attracts new types of social movements, and so forth.

Fourthly, the increasing cross-domain intensity of processes of social disembedding, of the generation of new forms of interconnectedness, and of the compression of time and space, creates new alignments of capacities, interests and values as well as new cleavages, tensions and oppositions associated with these new alignments. On the one hand, the

<sup>16</sup> See e.g. Held, n. 13 above, ch. 1.

<sup>17</sup> See T. H. Eriksen, *Tyranny of the Moment: Fast and Slow Time in the Information Age* (London: Pluto Press, 2001); and D. Harvey, *Justice, Nature, and the Geography of Difference* (Oxford: Blackwell, 1996).

practices of globalisation reflect and reinforce the material conditions under which economically, militarily and politically powerful global actors and structures can exert greater transnational influence, thereby reinforcing existing differences and creating and pursuing new conflicts of interest as well as facilitating – or imposing – new kinds of commonalities of expectations, appetites, experiences and values. On the other hand, these objective changes supply the conditions under which, on the cultural level, territorially concentrated societies across the globe as well as new transnationally connected communities of interest and practice become more exposed to, and more aware of, both their mutual differences and their mutual similarities. Crudely, then, in the ‘compression chamber’ of globalisation similarities and differences of life-chances and experiences alike are amplified, as are perceptions of what is valuable or otherwise in the common standards to which we aspire and the different conceptions of the good life we inherit and pursue. Newly dispersed forms and newly dislocated lines of concurrence and antagonism of interest, of co-operation and conflict, of association and dissociation, of identity and difference, of social solidarity and tension, all proliferate, each the condition, consequence and reinforcing cause of the other.<sup>18</sup>

Globalisation, therefore, on this process-centred understanding, is an inclination with its own momentum, its own self-explanatory dynamic, its own multi-domain and open-ended remit, and – highly pertinent to our later discussion of the different species of global law<sup>19</sup> – its own ceaseless mutual production and stimulation of new forms of convergence and divergence of interests, outlooks and affinities. And – crucial to the case for the distinctiveness of global law within the ‘global’ lexicon – the trajectory of globalisation involves not only a dense set of connections between the various sectors or dimensions, but also a significant degree of autonomy within each. For our very sense of the irreducibility of globalisation to any particular key, or to any particular set of historical causes or drives, demands that no one sector or dimension should be seen as entirely dominant and that none should be seen as merely subordinate. Instead, each dimension should possess its own developmental logic, and each its own trajectory, with all connected through circuits of mutual influence rather than lines of unilateral determination.

<sup>18</sup> See e.g. R. Robertson, *Globalization: Social Theory and Global Culture* (London: Sage, 1992).

<sup>19</sup> See Chapter 3 below.



If we bring these insights back to the use-value of the global law concept, we gain a deeper appreciation of Twining's misgivings. His reservations about global law as a closed category derive from and reflect a more general set of reservations about globalisation as a closed category. Just as the combination of globalising forces produces a shifting, unresolved and unpredictable state of affairs, so too each dimension within that combination displays the same open horizon of development. In particular, we can see how the idea that each sector, in the absence of any overarching logic of convergence or of causal priority, must follow its own *relatively autonomous*,<sup>20</sup> uncharted course, informs Twining's research agenda. It supports his conclusion that any consideration of the field of global law in the broadest (and, from his perspective, loosest and 'best left unnamed') sense, should begin in critical and inquiring mode. Its point of departure should be the inadequacy of the received model of modern law – the state-centred law-world – to our circumstances of intensifying 'global' interdependence, rather than any definitive attempt to capture or foretell what is taking its place.<sup>21</sup> It should, therefore, start from a conviction of the increasing inappropriateness of the high modern view of legal statehood as a largely self-contained and so largely globally insulated 'black box'<sup>22</sup> of doctrine, institutions, culture and education. And it should proceed under a general commitment to re-situate the state on a multipolar and densely connected legal map in a complex relationship with other economic, political and cultural globalising forces, and not from any firm preconception or narrow conviction about the shape of things emergent or to come.

## 1.2 Reconceptualising global law

While I endorse the general tenor of Twining's research agenda, and take heed of his warning as to the distractions and distortions of 'g' speak, let me reiterate my intention to pursue a different tack. Rather than dismiss the use of the 'global law' label for the analytical sloppiness or normative presumption of an over-inclusive global-as-everything-post-national reading, or caution against the one-dimensional literalism and misleading focus of an under-inclusive global-as-planetary reading, I

<sup>20</sup> We return to and explore a key aspect of the relative autonomy of global law in Chapter 6.4 below.

<sup>21</sup> Twining, *General Jurisprudence*, n. 2 above, ch. 1.

<sup>22</sup> Twining, *Globalisation and Legal Theory*, n. 2 above, p. 8.

want to make stronger claims for the term, now endowed with a somewhat different meaning to those of which Twining is critical. The dangers of which Twining speaks are genuine, but they do not provide a definitive case against the use of the language of global law. On the contrary, if we are prepared to acknowledge the methodological hazards discussed above, then the importance of recognising and of exploring the relative autonomy of law in the process of globalisation can work in favour of the retention and development of a domain-specific conceptual language of legal globalisation. For if we succeed in fashioning a sense of global law that illuminates rather than denies the open horizons of the legal domain, and clarifies rather than obscures law's distinctive trajectory in the overall flow of global forces, then we will have turned a potential liability into an asset.

Our case for pursuing the idea of global law against the sceptical grain rests upon three arguments. Or rather, it is based upon one argument comprising three layers – rhetorical, structural and epistemic. In a nutshell, we should take the idea of global law seriously: first, because of the increased ‘real world’ currency of global law talk; secondly, because such talk echoes an underlying series of changes in the pattern of formation, distribution and circulation of law; and, thirdly, because that objective trend, and the language in which it is articulated, both reflects and encourages an important shift at the margins in the very way that we think about legal authority and strive to refashion law on the basis of that knowledge.

### 1.2.1 *Taking ‘global law’ talk seriously*

As our cue, and at the outer layer of inquiry, there is the bare question of language and its use, and of the pattern of thought and conceptualisation that this expresses. However tempting it might be to seek refuge, with Twining, from the cacophony of global talk, we cannot simply assume that no cost to our understanding is incurred by ignoring or sidelining it. We should not lightly disregard the crude fact that ‘global law’,<sup>23</sup> along with kindred terms such as ‘world law’,<sup>24</sup>

<sup>23</sup> The special issue of the *Tilburg Law Review* on ‘Global Law’ provides an excellent snapshot of the sheer variety of contemporary uses of the ‘global law’ concept, containing twenty-four articles each exploring a different disciplinary theme or theoretical perspective. See *Tilburg Law Review* vol. 17, no. 2, 2012.

<sup>24</sup> H. Berman, ‘World Law: An Ecumenical Jurisprudence of the Holy Spirit’ 63 *Theology Today* 365 (2006).