

University of Miami Law School  
University of Miami School of Law Institutional Repository

---

University of Miami Inter-American Law Review

---

10-1-2000

*Globalisation & Legal Theory* by William Twining

Caroline Bradley

University of Miami School of Law, cbradley@law.miami.edu

Follow this and additional works at: <http://repository.law.miami.edu/umialr>

 Part of the [Comparative and Foreign Law Commons](#), and the [International Law Commons](#)

---

Recommended Citation

Caroline Bradley, *Globalisation & Legal Theory* by William Twining, 31 U. Miami Inter-Am. L. Rev. 463 (2000)

Available at: <http://repository.law.miami.edu/umialr/vol31/iss3/6>

This Book Review is brought to you for free and open access by University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Inter-American Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

## BOOK REVIEW

GLOBALISATION & LEGAL THEORY. BY WILLIAM  
TWINING. LONDON, ENGLAND: BUTTERWORTHS 2000.

*Reviewed by Caroline Bradley.\**

Laws, and legal systems, in the year 2000 are multi-layered, overlapping, and accessible. In these ways, law reflects globalization: largely due to developments in transportation and communications technologies, countries and people are increasingly interconnected, in multiple ways.<sup>1</sup> Globalization is economic, but it is also political and social. Technological developments make it easier for people to transact business across borders, but they also facilitate non-business travel and communications. Law's relations with globalization are reflexive: laws promote globalization, and laws are a response to globalization.

Twining's collection of essays explores "how far what has been institutionalised as belonging to the 'mainstream' in Anglo-American jurisprudence and comparative law is relevant and useful in trying to make sense of law in the modern world from a cosmopolitan perspective."<sup>2</sup> The author has a better claim than many of us to being considered cosmopolitan, although he describes himself as a rooted cosmopolitan.<sup>3</sup> The roots are English, and in some ways, the book is, consciously, very

---

\* Professor of Law, University of Miami School of Law. © Caroline Bradley 2001. All rights reserved.

1. Twining uses the term 'globalisation' to refer "to those processes which tend to create and consolidate a unified world economy, a single ecological system, and a complex network of communications that covers the whole globe, even if it does not penetrate to every part of it." William Twining, *GLOBALISATION & LEGAL THEORY* 4 (2000). Twining tends to take globalization as a given. Cf. "But globalization is not new. What is new is a globalization that is mainly American." Laura Nader, *Comments at Symposium on Comparative Law*, 46 AM. J. COMP. L. 751, 754 (1998) (arguing that the current globalization is an extension of the colonialist project).

2. Twining, *supra* note 1, at 4.

3. *Id.* at 50 (adopting Bruce Ackerman's terminology).

English.<sup>4</sup> In other ways Twining draws on his extensive experience in the United States and elsewhere.<sup>5</sup> In examining the potential usefulness of mainstream jurisprudence and comparative law for making sense of the modern world, Twining focuses on distinctions between general and particular jurisprudence, and on some of the weaknesses of traditional comparative law scholarship.<sup>6</sup> Twining argues, for example, that the work of many mainstream legal theorists, including Dworkin, Hart, Kelsen, Holmes, Llewellyn, and Bentham, is relevant to globalization.<sup>7</sup> A modern follower of Jeremy Bentham would:

[f]ight for a revival of analytical jurisprudence as part of general jurisprudence, that is the elucidation, refinement and construction of key concepts . . . there is a need for a sophisticated conceptual apparatus which can form both a meta-language for talking about laws in general and a tool-box for expressing laws with precision.<sup>8</sup>

Throughout the book, Twining raises the fascinating question of the extent to which law is culturally specific.<sup>9</sup> One significant challenge of globalization is the “construction of a conceptual framework and a meta-language of legal theory that can transcend legal cultures.”<sup>10</sup>

---

4. *Id.* at 50. “[I]n style, residence, outlook, accent and prejudices, I am irredeemably English.” See also, “My standpoint is that of an English legal theorist concerned about the health of the institutionalised discipline of law in the common law world, in Europe and beyond.” *Id.* at 175.

5. *Id.* at 142-149 (describing Twining’s approaches to teaching the mapping of legal orders in Khartoum, Belfast, and Boston).

6. Twining is not alone. Annelise Riles has written about “a collective crisis of methodological confidence [as] something of a defining genre of comparative legal scholarship.” Annelise Riles, *Wigmore’s Treasure Box: Comparative Law in the Era of Information*, 40 HARV. INT’L L.J. 221, 224 (1999).

7. Twining, *supra* note 1, at 250.

8. *Id.* at 103.

9. “The problem of how far law as a phenomenon is so culture-specific as to defy detailed comparison between legal systems and cultures is itself a central, and somewhat underworked problem of legal theory.” *Id.* at 54.

10. *Id.* at 53. Cf. David J. Gerber, *System Dynamics: Toward a Language of Comparative Law?*, 46 AM. J. COMP. L. 719, 726-727 (1998)(discussing the need for “development of an analytical framework - and, eventually, a language - that can effectively detect, express and convey both commonalities and differences in the operations of legal systems.”)

A language of legal theory that could transcend legal cultures could have enormous practical value. In recent years there has been a tremendous expansion in global governance,<sup>11</sup> through traditional formal arrangements such as bilateral and multilateral treaties,<sup>12</sup> and through less formal arrangements.<sup>13</sup> Formal and informal institutional structures and processes produce harmonized legal rules.<sup>14</sup> Even informal arrangements may be reinforced by the actions of formal international institutions such as the IMF, which has begun a "series of experimental Reports on the Observance of Standards and Codes (ROSC) [which] summarize the extent to which countries observe certain internationally recognized standards, focusing primarily on the areas of direct operational concern to the IMF."<sup>15</sup> The negotiation of the content of global rules and standards may take place in fora which are primarily political or diplomatic, or which are characterized as having relevant expertise.

Many groups argue that global governance is necessary to deal with global issues.<sup>16</sup> Others argue that global governance is harmful because it serves the interests of businesses and reduces the power of nation states in ways which may harm labor.<sup>17</sup> Many commentators contend that the processes which produce

---

11. See, e.g., John Braithwaite & Peter Drahos, *GLOBAL BUSINESS REGULATION* (2000).

12. See, e.g., *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, in force Feb. 15, 1999, available at <http://www.oecd.org/daf/nocorruption/instruments.htm>.

13. Twining includes "a putative *lex mercatoria*" as an element of the transnational level of law. Twining, *supra* note 1, at 139.

14. The Basle Committee on Banking Supervision, which is composed of representatives from central banks and banking regulators from the G10 countries (Belgium, Canada, France, Germany, Italy, Japan, the Netherlands, Sweden, Switzerland, the United Kingdom and the United States) adopts principles of banking regulation. The principles are not formally binding, but they have an impact even outside these 11 countries. For the Basle committee's publications, available at <http://www.bis.org/publ/index.htm>. See also, *OECD Principles of Corporate Governance*, Apr. 19, 1999, available at <http://www.oecd.org/daf/governance/principles.htm>.

15. *Experimental Reports on an Observance of Standards and Codes (ROSC's)*, available at <http://www.imf.org/external/np/roscc/index.htm>. Cf. *IMF and World Bank, Reports on the Observance of Standards and Codes (ROSCs): An Update* (Mar. 30, 2000), at <http://www.imf.org/external/np/roscc/2000/stand.htm>.

16. See, e.g., *International Competition Policy Advisory Committee (ICPAC), Final Report to the Attorney General and Assistant Attorney General for Antitrust* (Feb. 2000) at <http://www.usdoj.gov/atr/icpac/finalreport.htm> (suggesting that economic globalization requires the development of international competition policy initiatives).

17. See, e.g., Ulrich Beck, *WHAT IS GLOBALIZATION?* (Patrick Camiller trans., Policy Press 2000) (1997).

international rules lack legitimacy because they are undemocratic.<sup>18</sup> But whether the processes which produce international legal rules are legitimate or not, lawyers and law students need to understand them, and the rules which they produce. In part, *Globalisation and Legal Theory* sets out some of the ways in which law teachers may teach students about globalization and law.<sup>19</sup>

Global governance employs different techniques, including the adoption of international rules administered by international bodies, and legal harmonization, which draws individual states, or standard setting bodies, into making their rules the same as, or more like, those of other states or bodies.<sup>20</sup> Legal harmonization occurs through formalized processes such as those of the EU, through treaties, and through the attention of domestic law reform bodies to developments in different jurisdictions. Legal harmonization inevitably involves exercises in comparative law, and raises questions about the relationship between the global and the local. Twining comments that the global and the local "interact in very complex, sometimes contradictory ways."<sup>21</sup> Legal harmonization also poses the question of the extent to which law (or laws) is (or are) culturally specific.

Twining proposes rethinking comparative law, involving:

[a]ll of the main tasks of legal theory including synthesis, construction and elucidation of concepts, critical development of general normative principles, developing middle order theories, both empirical and normative, and working theories providing guidance to various kinds of participants, including comparatists, intellectual history, and the critical examination of

---

18. "We gathered in Prague for an exceptionally broad, inclusive, international protest against the discriminatory and unjust policies of the IMF and the World Bank. We oppose the undemocratic and elitist character of both the institutions and the meetings they hold." *Prague Declaration of the Fifty Years is Enough Movement* (Sept. 28, 2000), at <http://www.50years.org/s26/prague.html>.

19. See, e.g., Twining, *supra* note 1, at 257-263.

20. See, e.g., Kanishka Jayasuriya, *Globalization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance*, 6 *IND. J. GLOBAL LEG. STUD.* 425 (1999)(discussing the importance of networks of regulators in global governance).

21. Twining, *supra* note 1, at 5.

assumptions and presuppositions underlying legal discourse.<sup>22</sup>

The author describes this project as “daunting.”<sup>23</sup> Indeed it is. Twining identifies a major project, surrounded by a constellation of related smaller projects.<sup>24</sup> From the outside, international harmonization often appears to be driven by practical politics rather than by the development and application of concepts and normative principles. It is therefore uncertain that a project such as the one Twining envisages would have a practical impact on harmonization processes and results (however desirable this might be). But there is some room for hope. Current discussions about the impact of the globalization of business on national authorities which implement antitrust/competition policies suggest the need for a new kind of comparative law. U.S. regulators have spoken of the need to develop a “common language” of competition,<sup>25</sup> and a “shared culture of competition.”<sup>26</sup> The EU’s Competition Commissioner has stated that competition authorities, individually and collectively, need “to globalise our thinking first, then our basic approaches, perhaps one day our instruments.”<sup>27</sup> If nothing else, the work on developing a common language of competition will provide resources for study by comparative lawyers and theorists of globalization.

---

22. *Id.* at 189.

23. *Id.* at 3.

24. *E.g.*, “The concept of legal personality, an old favourite in Austinian analytical jurisprudence, may be ripe for a revival in a global context.” *Id.* at 10.

25. “Ultimately, for global cooperation and coordination to work, we need to develop a common language even if we can’t achieve pure convergence: i.e., we all need to be doing microeconomic-based competition enforcement.” Joel I. Klein, *Time for a Global Competition Initiative?*, Speech at the EC Merger Control 10th Anniversary Conference, Brussels, Belgium (Sept. 14, 2000), at <http://www.usdoj.gov/atr/public/speeches/6486.htm>.

26. “Sound antitrust enforcement requires a deep and shared “culture of competition” that will enable prudent application of economically-based competition principles to the facts of individual cases; such enforcement cannot be achieved by agreement on formal rules.” A. Douglas Melamed, *Promoting Sound Antitrust Enforcement in the Global Economy*, Address before the Fordham Corporate Law Institute 27th Annual Conference on International Antitrust Law and Policy, N.Y. (Oct. 19, 2000), at <http://www.usdoj.gov/atr/public/speeches/6785.htm>.

27. Mario Monti, *European Competition Policy for the 21st Century*, Speech at the Fordham Corporate Law Institute Annual Conference on International Antitrust Law and Policy, N.Y. (Oct. 20, 2000).

