WILLIAM TWINING, *GENERAL JURISPRUDENCE: UNDERSTANDING LAW FROM A GLOBAL PERSPECTIVE* (CAMBRIDGE: UNIVERSITY PRESS, 2009)

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William Twining claims that it is time for a radical rethink of the way jurisprudence is taught. Adopting a global and pluralistic perspective can point the way to what is wrong and how things may be changed. Twining's earliest intellectual experiences concerning law were garnered at Oxford under the influence of HLA Hart. These experiences were plainly powerful and long lasting, for his argument rests on an engagement with and radical resetting of the role of legal positivism in legal theory. Jurisprudence (is it just force of habit that maintains this label?) can be divided into analytical, normative and empirical enquiries, and most interesting theoretical work will mix these up. "General jurisprudence" must be treated as broadly as possible to include enquiries about law that transcend legal traditions and cultures, but the opening up of jurisprudence to empirical study (amongst other things) should not be at the cost of denying the significance of conceptual analysis. The "philosophy of law" is just one part, though an important one, of jurisprudence, so legal positivism or analytical jurisprudence needs to be part of a much wider set of enquiries. Jurisprudence needs further to be pushed into non-state based forms of legal phenomena, and this pluralistic injunction entails that how the line on what is "law" is "most sensibly drawn should depend largely on context."¹ A globalised and pluralised account of law will accordingly push one to "differentiate different levels of relations and of ordering such relations," providing "a framework of analytical concepts that can be useful in interpreting, describing, comparing, and generalising about legal phenomena."² It will be open to debates about universalism and relativism, about the compatibility of Western values with those of other traditions, and the possibility of cross cultural dialogue. It will continue to absorb the lessons of legal realism, law in context and socio-legal perspectives, as well as reflecting on the developments of feminist, human rights, critical and "law and development" theory.

This is a great book revealing a lifetime of learning in law and legal theory as well as a huge energy and passion for its subject. Its scope, as the above brief survey of its main themes indicates, is enormous. It provides a huge challenge to any complacent attachment to the established canon of Anglo-American jurisprudence, and it is to be hoped, but not necessarily expected, that purveyors of that canon will sit up and take notice. At the same time, the book does have a major lacuna, for it is essentially silent on a range of critical or social theorists that one would associate with a broad and open understanding of the nature of legal phenomena. Missing from the work is any mention of, for example, either Hegelian-influenced or Frankfurt School approaches, or French poststructural

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1 William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge: University Press, 2009) at xix.

2 *Ibid.*

theory. The later Habermas is there for his discourse ethics, but by then, he is of course already part of the more traditional Western canon Twining would like to transcend. From the point of view of social theory more narrowly construed, Marx is only a part of the scenery, as are Weber and Durkheim, so that the work as a whole is essentially blind as to a whole corpus of critical theorising about law. My object in this review will be to question this lacuna in *Global Jurisprudence*. My comments are going to be threefold. First, I will say something about the relationship it describes between analytical and what Twining calls empirical studies of law. Here, I will ask whether its continued commitment to legal positivist protocols is defensible. Second, I am going to raise a question about its relationship to the social theory of law, and ask whether its silence in this area may be related to its continuing endorsement of such protocols. Third, I will consider the relationship it posits between law and development in light of the first and second comments. My hope will be that, through making these comments, it becomes possible to see how we might expand the range of a "law in context" approach to include the contributions of social theory of law for, as I shall argue, this work can be seen as centrally involved in promoting such an approach.

Twining's overall project is, as I have indicated, personally synthetic, in that it describes a consistent line of intellectual development that takes him from his early education with HLA Hart in Oxford through to his interest in an understanding of law that is general and accommodates to the global and the many different forms of law that are to be found in the world today. One criticism of legal positivism is that it has only described something of the nature of a national legal system along western lines ("Country and Western" as he describes it), but what is needed is a much broader approach that can take into account the non-western, the non-national and the non-formal.

At a deeper level, however, *Global Jurisprudence* remains a positivist work. Twining accepts the two core propositions of legal positivism: the separation thesis ("there is no necessary connection between law as it is and ought to be") and the social sources thesis ("the existence of law is a matter of social fact"). Now what either thesis means is the subject of much debate, but on a rough account, I would suggest that, from a critical point of view, the first thesis needs to be fundamentally questioned, and the second thesis needs to be pushed to the point where its value runs out. As regards the split between law and ethics in the separation thesis, there is a superficial, factitious, sense in which it makes some kind of sense. We can intelligibly ask the question "what is the law on x?" But there is a deeper sense in which it does not. If one thinks about it, it is hard not to see law in its intrinsic character as a moral as well as a factual phenomenon. Human beings are inherently social and normative creatures. We live in societies and we live as "ought creators." Accordingly any system of rules that we establish must be seen not just in their facticity but also in their intrinsic normativity. For human beings as agents any split between is and ought, whether in law or more generally, must be regarded as problematic. So a basic question might be how we come to split the world up into "is" and "ought," why a particular kind of society acts in this way, how something that is implausible becomes plausible: how does the false separation and *hypostatisation* of "is" and "ought" occur from the time

of Hume onwards? The basic starting point for the separation thesis, which was not accepted in western societies before the Enlightenment gang came along, and is not accepted in other societies past or present, needs to be questioned. That is not to deny the “phenomenal” presence of the split, or its political effects, or that it may have some value (itself a normative question); but it wants a deeper kind of theoretical examination than positivistic assertion gives it.

What of the social sources thesis? The question for me here is what happens if you take this to its logical conclusion. If law is genuinely a social institution, how does that affect how we study it? Twining acknowledges that Hart’s account of law in these terms was for a long time something that he saw as an opening of legal positivism to the sociology of law, though more recently he has come to accept that it was really not so and that Hart shared Oxford prejudices against sociology (*plus ça change!*) Perhaps he now sees it as involving a misunderstanding of what sociology would entail as scientific method, but one with significant positive effects for positivist method itself. Hart’s misrecognition works to keep the show on the road. I am inclined to this view, but I wonder what is left of positivism if one takes seriously law’s social nature. In *General Jurisprudence*, Twining considers the positions of Brian Tamanaha and Karl Llewellyn, who are both reacting to the problems of positivism. With Tamanaha, the need is to open positivism up to all the possibilities that exist for law as a social form, and the result is a minimalist, and therefore maximally capacious, account of law that might be said to be the *reductio ad absurdum* of positivist claims: “Law is whatever people identify and treat through their social practices as ‘law.’”³ Legal positivism becomes in this view no more than a methodological preparation for scientific enquiry, a bit like archaeologists collecting shards and flints, but not random stones. If this is what legal positivism amounts to under the onslaught of the social, then surely, there is only in truth an injunction to go out and see what people have to say as proximally law talk – there is no theory here at all, just an assemblage of materials to be studied. As for Llewellyn and his account of law jobs,⁴ it seems to me that what Twining describes as Llewellyn’s thin functionalism concerning the need for social groups to have rules is not really a positivist thesis at all. Rather it is an operative assumption for someone who is faced with investigating something like law in a society other than his own. It is a legal anthropologist’s, not a legal positivist’s, standpoint. Doubtless, a story could be told of Llewellyn’s ambivalence on such matters as himself a lawyer from a different culture, but when faced with a different social reality, one simply has to find a way of explaining a context and what looks like law phenomena within it. Anything else is extraneous. Twining’s own formulation reflects Llewellyn’s, and focuses on legal practices, relations and contexts, but where does this leave his interest in legal positivism as a theory, as opposed to preparations for other kinds of theoretical endeavour?

This is not to say that we can avoid talking about what law is, for we need to name the thing we are studying. It is to say that the initial impulse for studying law if it is a social “fact” would be to look to the social field and participants

³ *Ibid.* at 95.

⁴ *Ibid.* at 106-116.

therein. If we are interested in a social account of law, just as we might be interested in an account of education, the family, health, etc, then our approach should start with broad social scientific, empirical, criteria for identifying and understanding what exists and not saddle ourselves with a priorisms. (If we were interested in literature, we would need to know what, for example, a book is, but only in order to investigate it according to its meaning, means of production, social function, aesthetic effect, etc. A definition of a book per se would hardly take us very far.) Twining is very sensitive to these issues, as seen for example in his powerful engagement with Dworkin's philosophical imperialism in *General Jurisprudence*, but I wonder if he is not himself still trying to play a game that should not be abandoned, because its value on his own premises has run out. For example, if we were to say that law is a social fact, we might interrogate Hart critically as someone who wants to, but cannot ultimately deny that that is the case. In which case, we would then see the positivist wish to autonomise law as itself a social phenomenon worthy of investigation, and as saying something important about law. Why does the law wish to have a formal existence, as Stanley Fish asked quite recently,⁵ and Weber a longer time ago? Its importance rests in its social functionality in a particular kind of society, not its intrinsic validity as a mode of intellectual enquiry.

If the core protocols of legal positivism remain in place in Twining's account, does this have an effect on its overall structure? Significantly lacking in the work is any discussion of social or critical theory of law. It is mentioned in a couple of pages in chapter 8, but only to say that it exists and to give some names. There is no real discussion of this work, far less consideration of some of the legal issues raised by it. The intellectual tradition that includes Hegel, Marx, Nietzsche, Weber, Schmitt, Adorno, Arendt, Habermas, Foucault and Derrida is very quiet in *General Jurisprudence*, and I wonder why. Perhaps it is a matter of individual interest, and it is unfair to expect any author to do everything, but I propose that it may be in part to do with the logic of the positivist standpoint that informs the text.

Broadly, the critical or social theoretical tradition focuses on the problematic relationship between ethical and historical development in modern society. Starting with Kant's attempts to establish "regulatory ideals" for modern conditions, there unfolds after Hegel what Theodor Adorno and Max Horkheimer called the "dialectic of enlightenment"⁶ in which the theoretical principles of enlightenment are shown to become embedded in decidedly unenlightened social relations, structures and practices. Marx, Nietzsche, Weber and Foucault amongst others can be said to be a part of this dialectic. And what is true of ethics in general can be said to be true of law and legal principles in particular. Liberal legality and its promise of freedom is immersed in and undercut by decidedly socially compulsive, unfree, contexts. The "ideal" which had emerged from and been applied against the "actual" in Kant ("the ideal in the actual") becomes

5 S. Fish, "The Law Wishes to Have a Formal Existence" in A. Norrie, *Closure or Critique: New Directions in Legal Theory* (Edinburgh: Edinburgh University Press, 1993).

6 T.W. Adorno and M. Horkheimer, *Dialectic of Enlightenment* (London: Verso, 1997).

subsumed under and cancelled by the actual (“the ideal under the actual”)⁷ in Marx, Nietzsche, Arendt, Adorno and Derrida – *mutatis mutandis*. Law as the expression of a sense of freedom maintains a degree of separation from the general sense of subsumption in some writers – Hegel, Weber (?), Habermas. Even Adorno, the late Foucault and Derrida bear witness to this possibility, albeit by way of a Utopian gesture in the case of Adorno and, in a way, in Derrida. Broadly, however, what this tradition is doing is considering the legal moment in modernity as a social and ethical phenomenon in the context of the broader social and historical developments of modern capitalist societies with which it is entwined. It is a tradition that looks to the social, historical and ethical nature of modern law, and that is therefore both alert to the role of history and society in shaping legal form and to its diminished (some would say extinguished) ethical promise. It is a classic “law in context” move *avant la lettre*. If you want an early account of the “gap” between theory and practice, much discussed in socio-legal theory, go back to Kant or to the young Marx writing specifically on law in “On the Jewish Question,” where it is already prefigured as a crucial historical figure in the Enlightenment and post-Enlightenment period.

My question would be why this tradition does not play a part in *General Jurisprudence*, and I wonder if it might be linked to the continuing endorsement of positivist theses at the core of the book. Social theory would not separate out the legal and the ethical (the “separation thesis”), indeed it relies on their conjunction and critiques their separation. Nor would it maintain a sense of the independent validity of the analytical or conceptual in the light of the dialectical connectedness and socio-historicity of the positive, but Twining does both. Accordingly, I wonder if the bedrock positivism in *General Jurisprudence* conducts its own marginalisation, just as does the analytical and philosophical a priorism of traditional jurisprudence Twining so effectively attacks.

Finally, let me say something about Twining’s important discussion of Law and Development in the light of the above. This is a tradition that has undertaken a number of turns in its life, and it is crucial to any turn to the global in legal theory. I want to contrast the discussion of Law and Development in Chapter 11 with Chapter 13, on Southern Voices. The former maintains the possibility that law can play a significant role in achieving development and it takes as its focus the Millennium Development Goals – to eradicate extreme poverty and hunger, achieve universal primary education, promote gender equality, reduce child mortality, improve maternal health, and combat HIV/ AIDS.⁸ These are all of course profoundly important goals, and Twining both supports them, and sees law as important, though not necessarily central, to their achievement. He emphasises also the role of non-state law in helping to bring them about. In this chapter, it seems to me that Twining’s optimistic, essentially Benthamite background, the political accompaniment to his legal positivism, comes out. Societies internationally set goals and then set out to achieve them. There is no straight line between policy setting and achievement, of course. Twining is a realist in these matters, but broadly one can see how governmental strategies,

7 A. Norrie, *Dialectic and Difference* (Abingdon: Routledge, 2010) at 144–56.

8 Twining, *supra* note 1 at 349.

buttressed by good government and law, can set “non-ideological” targets and seek to achieve them.

This is, I think Twining would agree, a “northern” vision. How does such a process look from the point of view of what he calls “southern voices”? In Chapter 13, William considers the work of four southern scholars – Francis Mading Deng, Abdullahi Ahmed An-Na’im, Yash Ghai and Upendra Baxi. The different views of these four represent just one of the fascinating aspects of *General Jurisprudence*, and I do not have space to consider them in depth, but if we take Ghai and Baxi as examples, I think they would provide a much more “difficult” account of the relationship between development, government and law than Twining. Whatever their thoughts on the MDGs, the essence of their positions is to consider either how, within a broadly materialist frame of analysis, law can be used pragmatically to achieve certain constitutional or human rights arrangements (Ghai), or how the voice of the most impoverished sectors of society is excluded and needs to be heard in human rights talk (Baxi). Now from either position, there is I think an interesting contrast with Twining’s more optimistic account of law and the possibility of development. The possibility of, but more importantly the structural limits on, practical legal reform of law based action in an often hostile environment, or of redressing systematic, *structural* exclusion operates as a stern warning to Benthamite reformism. It suggests a world where unintended consequences and deflected purposes are the norm rather than the departure from it, and where successful reform is the historical equivalent of moral luck.

What accounts for the difference in approaches? Surely personal experience and background play their part, but a deeper difference might return us to the question of social theory. Both Ghai and Baxi are rooted in the social theory tradition, and I think this provides a more tentative, provisional and critical understanding of how law is related to development. It emphasises the overall structural context in which legal forms, freedoms and possibilities play their part. If I am right that Twining’s work reflects a basic positivist and reformist optimism as to the possibility of social development, one might say that law in a social theoretical vein is at the same time more and less cautious. More in that it sees a sense of human freedom and ethics as intrinsic to law and legal principle, albeit one that is at best prone to, at worst swallowed up by, social context; and less in that such freedom is only partially or obliquely (at best) present in law as it is contained and deflected, giving rise to the bitter human comedy that seems humankind’s lot today.

In considering the work of these “southern voices,” the basic claims and concerns of a critical and social theoretical approach to law begin to make their way into *General Jurisprudence*. This is where they belong, but my main suggestion is that the preoccupations of these works are also to be found in the critical social theory and jurisprudence of “the north.” A fully generalised jurisprudence should seek to include and integrate such work; whether so doing would involve a more radical attack on orthodox legal theory is also a question that has been raised.

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