

General Jurisprudence: Then and Now. Twining's Case for a General Theory of Law From a Global Perspective

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More than ten years have gone by since, in a paper published in the *Maastricht Journal of European and Comparative Law on Globalisation and Comparative Law* (a shorter version of which has been reproduced in *Globalisation and Legal Theory*, 2000), William Twining declared his sympathy to Mr. Palomar, the lonely, disillusioned protagonist of the namesake novel by Italo Calvino.

“As a jurist”, confessed then Twining, “I often feel like Mr. Palomar. One’s efforts to master even a single legal phenomenon – to obtain a comprehensive understanding of it – seems futile. Even a single rule or concept can be as elusive as a wave or a tuft of grass. Yet, in an era of globalization, we are under increasing pressure to focus on the whole universe of legal phenomena” (175).

The story of Palomar, a character Calvino strongly identified himself with, is that of a (post)modern man getting more and more acquainted with the complexity of reality in its non-linguistic aspects, the more he feels he is just about to enter into a meaningful relationship with it. Palomar usually starts out by tackling a rather small pattern in reality, such as, e.g., to determine the motion of a single wave (I. Calvino, *Palomar* (1983), Eng. transl. Mr Palomar (1999), 3 ff.) or to ascertain the composition of his own lawn (26 ff.). Nevertheless, he cannot avoid considering multiple standpoints (and often rather bizarre ones, an experiment already successfully attempted in the *Cosmicomiche*) and larger perspectives (as even his name suggests, he wants to *extend his knowledge to the universe*, 7) and ends up every time by casting a skeptical eye on the ones he has just considered. Not surprisingly, his efforts often turn into frustration. More interesting, however, is the fact that he is eventually led to admit that “reality must succeed in transforming the model”(98); in the Chapter entitled “*The model of models*”, Calvino renders it like

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this: “Mr Palomar’s rule had gradually altered: now he needed a great variety of models, perhaps interchangeable, in a combining process, in order to find the one that would best fit a reality that, for its own part, was always made of many different realities, in time and in space” (*ibidem*).

In the current scene, legal scholars may more than ever be compared to Mr. Palomar, facing as they are important questions about the adequacy of much of their established frameworks. The emergence of several overlapping and competing normative orders associated with the processes of so-called globalization has indeed significantly increased the trend toward complexity of modern societies as well of law itself.

Along these premises, it comes as no surprise that Mr. Palomar’s story, and notably the above quoted statement, provides a suitable introduction for the discussion of some of the most salient themes explored in William Twining, *General Jurisprudence: Understanding law from a global perspective* (2009). Interestingly, Twining’s sense of affinity with what he calls the “imaginative post-modernism” of Italo Calvino is set out at a greater length in an essay published in *Globalisation and Legal Theory* (2000, 194 ff.) as well as in *The Great Juristic Bazaar* (2002, 283 ff.). *General Jurisprudence* should be considered a successor to both of these books, both chronologically and substantially. Indeed it seems to inherit from the former the emphasis on theorizing as an enquiring activity, more concerned with exploring questions than with producing reified neatly packaged ‘theories’; from the latter, the metaphor of jurisprudence as a plot of different accounts of law, conveying the idea that one can get a better understanding by using multiple lenses and approaches.

In tackling the subject of law from a global perspective, Twining does not claim to come up with a “grand theory”, nor with “a book about books” (XVIII); neither does he cease to warn against using too many “g-words” (14), as they too often involve generalizing statements about processes and phenomena that are better discussed along with the tradition of academic law and its roots in immediate, practical, sub-global problems. Rather, he grasps the bulk of the matter relying on what I shall call here *an integrative conceptual approach*, insofar as Twining’s main concern is to make a case for a revived general jurisprudence that in response to the challenges of globalization comprises a wide range of levels of understanding while nevertheless retaining a noticeable hold in the conceptual realm (21 ff.).

It is generally acknowledged that the weakest point of analytical jurisprudence, especially conceptual analysis, is its potential irrelevance to “real” problems; the strongest, its philosophical basis. As for socio-legal perspectives, the opposite has often been said. Assuming this as a matter of fact, and given Twining’s commitment to analytical jurisprudence, a fundamental question thus arises: how can one reconcile a move toward “a general descriptive

theory of law from a global perspective” (115), which is ultimately the cause Twining’s most recent book aims at contributing to, with an historical, contextual, empirical awareness (258 ff.)?

Although this aim might appear to be somewhat far-fetched, it is well known that Twining represents a very distinctive voice within legal theory. The agenda he poses to jurisprudence is not only strongly related to the evolution toward ‘interdependence’ and ‘complexity’ which occurs in today’s globalized settings; it is indeed the result of more than 15 years of research and experience, during which sharp distinctions between different levels of understanding, disciplines and discourses have been regularly excluded as acceptable options. Twining himself proudly refers to what is probably the most noteworthy part of it (XXI) as follows: “During 2000-1, I was a Fellow at Center for Advanced Study of the Behavioral Sciences at Stanford – as near as one can get to academic heaven. I was the only jurist among a community of forty-five scholars, nearly all of whom were social scientists or socially oriented historians” (258).

Briefly put, it would be misleading and unfair to look at *General jurisprudence* as another ‘essentialist’ analysis of law delimiting a bright-line boundary for legal concepts. As I shall show below, some definitions are themselves offered to elucidate legal phenomena by their main or typical features. In most cases, however, they do not aim at setting forth necessary and sufficient conditions for inclusion in the label being defined. One of the main suggestions is that “jurists should be concerned with ‘jurisprudentially interesting questions’, not just with ‘philosophically interesting questions’” (XIX).

Accordingly, Twining treats “jurisprudence and legal theory as synonyms” (8 and 21) and expects the reader to face the value of some salient ideas of a number of jurists deemed as canonical in the Anglo-American jurisprudential tradition (among whom Bentham, Raz, Dworkin, Rawls, Hart) as well as to recognize their limitations in dealing with issues raised by globalization and interdependence. So, striking analogies with Mr. Palomar’s approach are immediately to be found, as surveyed standpoints are deeply investigated and discussed throughout the book, rather than assumed (XVIII).

Acquainted as she is with the metaphor of travelling, a scholar of comparative law may perhaps not be surprised to read that in order to evaluate chances jurisprudence has to succeed in meeting the challenges of globalization, Twining establishes the following text, explicitly drawn on such metaphor: does its stock of concepts “travel well” across legal orders, jurisdictions, levels, traditions, and cultures? (43 ff.). It is also worthy noticing that in respect of comparison, Twining’s central thesis is that it represents a “crucial step on the road to generalization and an empirically grounded comparative

law will have a crucial role to play in the development of a healthy cosmopolitan discipline of law” (XX).

One should however bear in mind that a current major fear of some comparative lawyers is that the increasing emphasis placed on their discipline as a well established transnational field will result in it becoming detached from both its roots and its traditional audience and perspectives. A striking effect of such emphasis is indeed that scholarly heritage of comparative law has been largely by-passed. Of course this is not the place for an examination of the present-day tendency to regard comparison more like as a way of life, so to say, than as a subject for a few specialists; suffice to observe, this tendency is reflected in a certain number of statements throughout the book. The following is especially significant: “Like it or not, we are all comparatists now” (447).

In any case, what matters here is that the travelling test has been established by Twining mainly in the spirit of putting claims to universality and generality made by classic predecessors in the tradition of general jurisprudence into question (20) while nevertheless maintaining some discernible continuities with them. A crucial suggestion made throughout the metaphor of travelling is indeed that the general jurisprudential heritage is more relevant to a global perspective and a revived general jurisprudence than it might be expected, given the long standing charges of narrowness against it. Twining’s focus, as he notes himself, is broad in that it is concerned with all legal discourses (both “law talk” and “talk about law”: XIX and 39) and all problems of transferability (conceptual, normative, legal, interpretive, and empirical) in a wide geographical context. On the other hand, it might seem narrow in that in setting out a high priority for general jurisprudence, that is, developing satisfactory ways of “expressing law and talking about law across legal orders, jurisdictions, levels, traditions, and cultures – ranging from comparison of two or more contexts to genuinely global generalizations”(39), it ultimately demands attention for the Western traditions of academic law (444) and particularly for its positivist strand along the lines of Hart’s jurisprudence (32 ff).

In Twining’s words, indeed, “Hart made an enormous impact by rejoining jurisprudence and philosophy in respect of method, but he barely changed the agenda he had inherited from his predecessors in the English positivist tradition. [...] we can recognize the value of Hart’s and other techniques of conceptual elucidation in constructing abstract concepts and extend them to empirical legal concepts to which he did not devote much attention, such as function, institution, dispute, order, process, and group” (38 and 116).

In this vein, Twining roots the theme of concepts travelling well in a somewhat under-exploited link between talk of law as rules explicitly at the core of the theories of Hart on one hand, and Karl Llewellyn’s law-job theory

on the other. As a result, “continuities between legal and other social phenomena” (115) become a central ground for constructing “a broad overview or mental map of legal phenomena and [...] for describing, interpreting, analyzing, explaining, and comparing legal phenomena” (117). For these purposes the following formulation is offered: “from a global perspective it is illuminating to conceive of law as a species of institutionalized social practice that is oriented to ordering relations between subjects at one or more levels or relations and or ordering” (ivi).

Devising this formulation, Twining eventually turns to deal with a wide number of theoretical issues that the formulation itself hopes to illuminate. I shall not delve into the details here (118 ff.); rather, I wish to focus on the fact that his basic line of the travelling argument suggests that to develop a reasonably inclusive conception of law and legal phenomena is not an optional aspect of studying law from a global perspective; rather it becomes an essential step once the narrowest assumptions of general jurisprudence are abandoned and a greater variety of legal phenomena is considered so to achieve an inter-disciplinary, cross-cultural legal discourse.

Having conceived law as a species of *social practice* organized in response to one or more perceived group needs or *functions*, Twining poses the challenge to maintain the main premises of Hart’s legal positivism, that is the separation thesis and the social sources thesis, which are still held to be valuable (38 e 115), while at the same time avoiding the trap of reducing jurisprudence to a monist, unhistorical, poorly empirically-grounded account of law. In doing so, he also points out that a “crude” fact conception of law is as well to be avoided (105) and that there is perspective from which *function* can be referred to in the aspirational sense rather than in that of the actual impact: accordingly, he calls such a view a “thin functionalism” (102).

Of course Twining’s approach developed through a close reading of Hart’s concept of law and Llewellyn’s law-job theory is not the only one that takes up socio-legal issues and the challenges posed by globalization to come up with case for a general jurisprudence. Twining himself shows that this form of reflective criticism is an integral part of the Western tradition of academic law. As a result, different ways to look at the package of received ideas and make them as much equipped as possible to travel toward the future are deeply discussed throughout the book (Part. A: Chapters 1-8).

Not surprisingly, commitment to the *Westphalian duo*, that is the dualism municipal law-public international law, as well to heavily built Western cultural bias turns out to be the main reason why a vast heritage of jurisprudential writing has being challenged by globalization, for its underlying assumptions have one way or another foreclosed the opportunity to take notice of the several forms of non-state law, both within and across state borders (362 ff.).

In this context, one of the concerns Twining expresses is about the problem of “taking non-state law seriously”, for it inevitably leads to dealing with the difficulties involved in constructing a reasonably comprehensive overview of legal phenomena: that is, broad enough to embrace “all levels of relations and of ordering, relations between these levels, and all important forms of law including supra-state (e.g. international, regional) and non-state law (e.g. religious law, transnational law, chthonic law i.e. tradition/custom) and various forms of ‘soft law’”, but not as much as to exclude some means of differentiating between distinguish between legal and other social institutions and practices (362 ff.). Ideally, by switching from the English positivist tradition or more broadly Western accounts of law to a global perspective, one would have a conception of law incorporating the main phenomena accordingly labeled as legal. The broader one’s conception of law, the wider the range of situations characterized as examples of legal pluralism. Twining’s feeling in this context is that “if one opens the door to some examples of non-state law, then we are left with no clear basis for differentiating legal norms from other social norms, legal institutions and practices from other social institutions and practices, legal traditions from religious or other general intellectual traditions and so on” (369). Once again, the point made is that while a global perspective does suggest that state centralism in legal theory is no longer tenable, it does not suggest disregard for the key questions addressed by general theories of law and particularly for the problem of the so-called “definitional stop” (ivi).

Yet, the trouble is that while there is no dispute over the fact that time is ripe for critically reconsidering black box theories that have treated nation-states or geographically bounded societies or legal systems as enclosed units that can be studied in isolation either internally or at the international level, how to interpret the current changes and whether is sensible to admit a possible collapse of the concept of law itself are still an open issue. Furthermore, one might wonder how far taking seriously the “problem of the definitional stop” can fit Mr. Palomar’s approach in facing the complexity of reality. One is reminded that much of Mr. Palomar’s “realism” lives in the relationship between an albino gorilla at the zoo and a tire, and particularly in the following description: “just as the gorilla has his tire, which serves as tangible support for a raving, wordless speech, [...] so I have this image of a great white ape. We all turn in our hands an old, empty tire through which we would like to reach the final meaning, at which words do not arrive” (75).

Moving away from the metaphor, Twining undoubtedly provides some examples of conceptual analysis at its best. Without avoiding the complexities and subtleties of the current scene, he argues however that there is likely to be a great work for conceptual analysis, for insofar as present-day societies bring

out the emergence of many candidates for the designation “legal orders”, theoretical basis of claims for-and-against labeling them as such are to be treated as a central topic, particularly in the context of global mapping law (362 ff): “taking non-state law seriously [...] involves significant deployment of attention and resources, and [...] this re-orientation of our discipline raises fundamental problems of comparison and generalization across legal traditions, cultures and other boundaries that we may not yet be equipped to tackle” (p. 363 s.). Elsewhere he also points out that while his conception of law “focuses on social practices, [...] for the purposes of ‘mapping’ law, the main units to be mapped are state legal systems and other legal orders” (121). Moreover, in a stand-alone essay made available on the website linked to the book (Chapter 16, available on www.us.cambridge.org), the elusiveness of the term “legal pluralism” is among others addressed, and an attempt at conceptual elucidation is once again made. The starting point here lies in three sets of questions: “First, internal questions about how a particular legal order deals with the co-existence of other legal and normative orders (The monist’s questions). Second, the relative importance of different legal orders within a given context. Third, how the relationships and interactions between co-existing legal orders can best be characterized (interlegality)” (p. 6).

One might argue that insofar as he poses questions like these, Twining implicitly makes a case for abandoning the quest for workable worldwide legal concepts and for focusing attention on a whole group of contextual/local puzzles at a somewhat lower level of abstraction. After all, we have seen that he invites the reader to face many cautionary warnings against making simple generalization and leaves open the possibility of drawing on different definitions of law for different purposes. In addition, it is worthy noticing that Twining’s concerns about the problems of generalization, quite interestingly experienced by Mr. Palomar along with his research, usefully apply to the “diffusion and convergence talks” as well as to the “human rights and universalism talks”, for in both cases he sees the mainstream accounts as too often confined on surface phenomena (297 ff. and 301 ff.), the focus on which make them typically uninformative about interlegality (320).

According to me Twining’s plea for a revival of the general jurisprudence can be fairly interpreted both as an attempt at bringing concerns about conceptual elucidation alive and as an effort to accommodate them to some of the phenomena that socio-legal scholars have traditionally been more concerned with. Thus, if his continuous emphasis on the complexity and potential elusiveness of the current scene is to evoke any single storybook statement, this is likely to be the one quoted at the beginning of these notes, excerpted from Mr. Palomar. Instead of starting out by tackling small, local problems, though, he has preferred the strategy of starting with some quite abstract

themes (for example, concepts travelling well), taking stock of the Anglo-American heritage and broadening its canons at a number of levels. In doing so, a significant move toward a combinatorial model of conceptual and empirical analysis, large scale as well as small scale enquiries, is undoubtedly made.

Given, however, that Twining's travelling argument is more about shortening the distance from what is left behind us (the general jurisprudential heritage) than moving towards what might lie ahead in the future, a closer look might reveal that the readers are expected to experience the same discover reported by Marco Polo in Italo Calvino's *Le città invisibili*: "[T]he more one was lost in unfamiliar quarters of distant cities, the more one understood the other cities he had crossed to arrive there, and he retraced the stages of his journeys. And he came to know the port from which he had set sail. And the familiar places of his youth. And the surroundings of home." [I. Calvino, *Invisible cities* (1972), 28 (1997)].