
An intellectual journey with William Twining: an interview

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Introduction

In December 2009 we asked William Twining to give an interview for the journal *Doxa, Cuadernos de Filosofía del Derecho*. We followed the format used with many other legal philosophers interviewed in the last decades (Bobbio, Hart, von Wright, Carrió, Bulygin, Raz, Alexy, MacCormick, Finnis. . .) and covered several aspects of his intellectual biography, as well as central problems within legal theory. We believed then, as we believe now, that an interview with William Twining would be significant for Continental and Latin American legal theorists and jurists, given his contributions to legal theory, intellectual history, legal method, legal education, evidence and globalisation. Twining accepted enthusiastically and answered all the questions in depth (with the exception of the last query, which he answered in a concise but fascinating way), providing valuable insights into several aspects of his life, work and thinking. The result was a revealing interview whose interest goes beyond our initially intended readership, extending to other audiences and contexts as well.

In May 2010, Twining went to Alicante to give a lecture on Wigmore's chart method and the logic of proof in the Legal Argumentation course of the University of Alicante. He discussed the niceties of the chart method with an audience of professors and lawyers from Spain and several Latin American countries. We all had the impression that we were attending a memorable lecture, from which one could take an important lesson: the fundamental assumptions of the method are basically the same, irrespective of whether it is a common law or a civil law system. We are very glad that the interview appears now in English as a separate chapter in this volume. As for the title of this piece, we believe that it may serve as an invitation to an intellectual journey with an outstanding legal scholar.

Interview with William Twining

1. Professor Twining, we would like to begin this interview with some biographical notes. Can you give us some information about your background?

I was born in Uganda in 1934. I sometimes say that I had a colonial childhood, an anti-colonial adolescence, a neo-colonial start to my career, and a post-colonial

middle age. This is open to more than one interpretation, but the facts are that the first ten years of my life were spent in Uganda and Mauritius; that I went to school and university in England, but spent several holidays and vacations in East Africa; that from 1958 to 1965 I taught law first in Khartoum, then in Dar-es-Salaam; and that since then I have maintained contacts and interest in several countries in Eastern Africa – Sudan, Tanzania, Kenya, Uganda and, to a lesser extent, Rwanda and Ethiopia. I have not written much about this, but it remains an important part of my background.

2. How did you decide to study Law?

I drifted into Law. I wanted to escape from a rigorous but joyless classical education. I wished to study History, but my father – a self-taught historian – dismissed it as a non-subject. Law appeased his desire for practicality and my elder brother offered me his notes.

3. We would like to ask you about your experience at Oxford. Who were the professors who most inspired you as an undergraduate and, in particular, what was your relationship with H. L. A. Hart?

I went up to Brasenose College, Oxford in 1952, the year that H. L. A. Hart was elected to the Corpus Chair of Jurisprudence. Law in Oxford was at an early stage of its post-War development. Teaching was mainly centred in individual colleges and was very uneven in intensity and rigour. I was lucky because Brasenose had a strong tradition in Law. My closest contacts as an undergraduate were with two Roman lawyers, both of whom became Professors of Comparative Law. J. B. K. M. (Barry) Nicholas was my main tutor; he was an excellent Socratic teacher. Professor F. H. Lawson was an important mentor. Ronald Maudsley taught me what little English law I learned and G. D. G. Hall stimulated my interest in Legal History. I was well taught, but within a narrow tradition that was far removed from legal practice and social reality.

Towards the end of my second year I attended Professor Hart's lectures, which became the precursors of *The Concept of Law*.¹ I was fascinated and learned for the first time that Law could be intellectually interesting. I spent much of the summer of 1954 puzzling over Hart's inaugural lecture on 'Definition and Theory in Jurisprudence',² helped by a fellow undergraduate, Michael Woods, who later became a respected philosopher. I was captivated, indeed obsessed, by what was then crudely called 'linguistic analysis'.

¹ H. L. A. Hart, *The Concept of Law* (2nd edn including Postscript). (Oxford University Press, 1961/1994).

² H. L. A. Hart, 'Definition and Theory in Jurisprudence' (Inaugural Lecture). (Oxford University Press, 1953). Reprinted in Hart, *Essays in Jurisprudence and Philosophy* (Oxford University Press, 1983), ch. 1.

It was entirely due to Hart that I became a jurist. To begin with, I was a devoted disciple. Later, our relations were ambivalent. I have always recognized the value of conceptual analysis and have greatly respected Hart's intellect – indeed I was awed by him – but from an early stage I felt that something was missing. In the 1970s and 1980s Hart and I worked closely and cordially together on the definitive edition of Bentham's *Collected Works*,³ but he was both puzzled and disappointed by my enthusiasm for Karl Llewellyn. His attitude towards me visibly cooled after 1979, when I published an article in the *Law Quarterly Review*,⁴ which diplomatically and indirectly expressed my reservations. It is difficult for a former pupil to say that his teacher is not fulfilling his potential. This was the subtext of my essay, especially in regard to Hart's failure to bridge the divide between analytical jurisprudence and socio-legal studies. My final judgement on Hart was: 'Pellucid intellect, narrow agenda'.

4. In this context, what is your opinion of Nicola Lacey's biography of Hart?

Part of the key to my disappointment is to be found in Nicola Lacey's superb biography: *H. L. A. Hart: The Nightmare and the Noble Dream*.⁵ For me, this is a very sad book. It brilliantly evokes Hart's background and the contexts in which Hart's career developed, especially Oxford in the period 1945 until his death in 1992. It reveals a great deal about his troubled inner life. There has been some rather muted controversy about the question of how far an intimate biography of a respected jurist is appropriate or relevant to understanding his work. My own view is that the details of his personal life throw little light on his juristic ideas, but they go a long way to explaining the trajectory of his career: why, for example, *The Concept of Law*, which was conceived as a mere prolegomenon, came to be treated as his *magnum opus*; his obsession with only one of his many critics, Ronald Dworkin; and his relatively early abandonment of intellectual work at the frontiers of his subject in favour of public service, academic administration and editing Bentham (a task for which he was ill-suited). For me, Lacey's biography tells a tragic story of a potential unfulfilled.

³ Jeremy Bentham (1748–1832), *The Collected Works of Jeremy Bentham*. (Charlottesville, VA: InteLex Corporation; University College, London: Bentham Committee).

⁴ William Twining, 'Academic Law and Legal Philosophy: The Significance of Herbert Hart' 95 *Law Quarterly Rev.* (1979) 557 reprinted in Twining, *The Great Juristic Bazaar: Jurists' Texts and Lawyers' Stories* (Aldershot: Ashgate, 2002), ch. 4.

⁵ Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (Oxford University Press, 2004).

5. What aroused your interest in Legal Realism and what was the significance of your relationship with Karl Llewellyn? Could you describe the academic atmosphere at the University of Chicago? Did you find a lot of differences with education at Oxford?

I graduated from Oxford in 1955, shortly before I was twenty-one. I did not know what I wanted to do or be. The main options at the time seemed to be to practice at the Bar, to pursue an academic career in Law, to seek work in Africa (probably in education), or to try to become a writer. I disliked the atmosphere of the Inns of Court, I was not really interested in law, there were few jobs in 'acceptable Africa' (i.e. not South Africa or the Rhodesias) in the era of decolonization, and writing offered no means of support. Eventually I combined Africa, law teaching and writing, but for two years after graduation I in effect 'dropped out'. I did some part-time teaching in Oxford, travelled widely in Europe and Africa and pursued an intensive, eclectic course of reading and self-education in which literature, philosophy, African history, politics and anthropology featured at least as much as law and legal theory. Towards the end of this period I opted to do postgraduate work in the United States.

It was largely by chance that I went to Chicago and worked with Karl Llewellyn. Professor Lawson was responsible for placing promising Oxford graduates in leading American law schools. Knowing of my interest in Jurisprudence, he asked me: which living American jurists did I most admire? I needed notice of that question, as I was largely ignorant of American legal theory, except for caricatures of American Realism, which was treated as a form of jazz jurisprudence – easy to criticise, but not worth taking seriously. After some investigation I came back to Lawson with two names: 1. Lon Fuller at Harvard; 2. Karl Llewellyn at the University of Chicago. The latter institution offered me a Fellowship, so in September 1958, newly married, I went there.

Was I predisposed to be attracted to Llewellyn and American Legal Realism? Not consciously. There were, however, some prior influences. First, while I was an undergraduate my brother had encouraged me to read Wolfgang Friedmann's *Law and Social Change in Contemporary Britain*⁶ and similar works, including Maine's *Ancient Law*.⁷ These were attractive, but unsettling, because they seemed to have almost no connection with what I was studying for my BA in Jurisprudence at Oxford. Later I came across *The Right of Property*⁸ by a Danish jurist, Vinding Kruse, which included some rather poor photographs of houses and other buildings. A law book with *pictures* was a new and disturbing idea. Closely related to this, after graduation I

⁶ Wolfgang Friedmann, *Law and Social Change in Contemporary Britain* (London: Stevens and Sons, 1951).

⁷ Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas* (10th edn 1884) (London: J. Murray, 1861).

⁸ Vinding Kruse, *The Right of Property* (London, New York: Oxford University Press, 1939).

experienced a series of culture shocks about the divide between what I had learned at Oxford and the practice of law. To give just one example: the eleventh edition of *Salmond on Torts*⁹ was the main textbook on that subject. It was an admirable expository work – clear, succinct, even interesting. Nowhere did it mention that in negligence litigation a very high percentage of cases (today over ninety percent) are settled by negotiation out of court; that in most litigated cases at least one insurance company is in the background; that availability of legal aid influences patterns of torts litigation; and that most disputed torts claims turn on questions of fact rather than questions of law. This book was *unrealistic* in ways that are not fully captured by abstract distinctions between theory and practice or the law in books and the law in action. Throughout my academic career, getting more of the action into the books has been a central concern. Patrick Atiyah's *Accidents, Compensation and the Law* (now in its seventh edition)¹⁰ is one of the most successful attempts to integrate legal doctrine with issues of policy and the 'realities' of litigation. It provides a sharp contrast with *Salmond on Torts*.

There is a third, less obvious, reason why I may have been predisposed to favour Legal Realism: my African background. I was born in Uganda, spent part of my late adolescence in East Africa, and even had some exposure to what later became known as African law. One did not need to be very alert or sensitive to realize that, despite British influence, law in East Africa (Kenya, Tanzania and Uganda were classified as 'common law countries') was radically different from law in England and Wales and that many of the differences can only be explained by reference to what is vaguely labelled 'context' – history, culture, economic conditions and politics. It is no coincidence that many of the leading members of the Law in Context movement in the United Kingdom spent part of their early careers in Africa or other colonial and post-colonial countries.

The University of Chicago, the Law School and the Windy City all provided new experiences. The University, financed largely by Rockefeller money, ruthlessly pursued Excellence; it did this in an abrasive dialectical fashion, so that one found that whenever one opened one's mouth one's assumptions were liable to be challenged, even at breakfast. The Law School fitted that culture. It was also more grown-up and professional than undergraduate Oxford. The students were older, worked harder, and were more competitive and ambitious than those I was used to. Orally, they were more articulate and forthcoming than English students, but fortunately for a bemused Oxonian they had not learned how to write. At the time I did not realize that the faculty included some of the most famous names in American academic law: Dean Edward Levi, Harry Kalven, Max Rheinstein, Kenneth Culp Davies, Walter Blum and

⁹ John William Salmond, *Salmond on the Law of Torts* (11th edn). (London: Sweet and Maxwell, 1953).

¹⁰ Patrick Atiyah, *Accidents, Compensation and the Law* (7th edn, P. Cane, 2006). (Cambridge University Press, 1970).

Malcolm Sharp, as well as Karl Llewellyn and his formidable wife, Soia Mentschikoff. I found nearly all of them friendly, approachable and not unduly concerned about their reputation. When I arrived I had simply assumed the superiority of Oxford and it took me a long time to learn otherwise.

It also took some time to grasp some profound ideological differences. In England I considered myself quite progressive, but I had often had to be on the defensive because I was not a wholehearted socialist or Marxist. In Chicago I encountered free market economics for the first time. In 1957–8 the first shoots of what became Law and Economics were sprouting. Dean Edward Levi was the impresario; Aaron Director was the vehicle, or – as I saw it – the hatchet man. Some of my encounters with Director may be of interest.

When I arrived in Chicago, I found that my faculty supervisor had put me down to do Director's course on 'The General Theory of Price'. I consulted some fellow students, who told me that this was the easiest course to pass in the Law School, provided you agreed with the instructor. Outraged, I confronted my supervisor: 'I thought that I had come to the University of Chicago, not the University of Moscow,' – this was the year of Sputnik – 'I am told that you pass Mr Director's course only if you agree with him. I disagree with him.' I won that encounter, was excused the course, and never learned any economics – a serious mistake.

The second episode occurred when a group of foreign students was taken to see a well-known programme for urban renewal. This involved replacing acres of slums with 'low cost housing'. It was clear to me that the former inhabitants could not have afforded the rents. We were not told what happened to them. At a party after this outing, I raised this question with my neighbour, who turned out to be Aaron Director. He said: 'They were not economically fit to survive.' At first, I thought this crass caricature of Darwin was intended as a joke. It was not. I never recovered from this first encounter with economic fundamentalism.

The third episode took place a few years later when I returned to Chicago to give some lectures and inspect Karl Llewellyn's papers. On my arrival from Dar-es-Salaam, jet-lagged and unshowered, I was met by Denis Cowen, the Director of the New Nations Program, who said: 'You must come to the Law School immediately; Aaron Director is giving a lecture on "Economic Development in Africa".' 'But he has never been to Africa,' I objected. I went. Director started by stating the familiar postulates of Friedmanite economics: economic development can only take place under certain rigorous conditions for a free market economy. He then proceeded to spell out the logical implications of his premises. When he finished, I got up wearily and said: 'I have not been to *all* of the African countries that Mr Director was talking about; but I have lived in some and have visited others, and I can say categorically that not a single government has in the past, does now, or is ever likely to accept his starting premises.' I sat down. 'I was talking economics, not politics,' was the succinct reply.

There is not space to give an adequate account of my experiences in Chicago, so let me move on to Karl Llewellyn. I have written about him and our relationship at great length elsewhere, so let me be brief. In 1957–8 more than half my timetable was taken up by other courses, but I took Llewellyn's course on 'Law in our Society' and spent a fair amount of time reading and researching under his direction. After his death I got to know him much better by putting his papers in order (1963–4), writing his intellectual biography and dealing guardedly, but intimately, with his widow, Soia Mentschikoff. Llewellyn and I got on very well together: he was intrigued by my interest in Africa and found my loyalty to Hartian jurisprudence a challenge. In retrospect, I recognize that his vision of law offered to fill in most of the shortcomings in my early legal education that I had sensed but not articulated. Obviously, there are specific ideas that I have assimilated, used or even refined in my own work: the law jobs theory; juristic method; styles of judging and argumentation; type fact situation; horse sense (uncommon sense based on experience); his interpretation of 'realism'. Apart from such specifics and our personal relationship, it was also a matter of attitude: he was *proud* of being a lawyer (a new idea to me); he was familiar with German law, but *loved* the common law all the more; he was *fascinated* by details of how things worked (crafts, techniques, technology); jurisprudence is about understanding law, rather than contributing to philosophy (not all questions that are jurisprudentially interesting are philosophically interesting); 'realism' was not a philosophy nor a doctrine nor a theory of law nor an epistemology, but rather a way of looking: see it fresh, see it whole, see it as it works. His philosophical underpinnings were close to classical pragmatism, especially John Dewey. He had moral and political commitments, but they were not doctrinaire. One of his favourite aphorisms was: 'Technique without ideals is a menace; ideals without technique are a mess.'

In writing about the topic, I emphasise a distinction between 'realism' as a concept and American Legal Realism as a label for the ideas of a few individuals at a particular period in American history – mainly between 1915 and about 1940. Some of the myths about American Legal Realism just do not fit the facts: that it was only or even mainly concerned with adjudication of questions of law; that it was a philosophy or a School or a theory of law; that it was a form of skepticism; and, I would add, that strange, parochial idea, that concern with being 'realistic' is an American exclusive. Llewellyn was responsible for the label and, in part, for inviting generalisations about the ideas of some quite disparate thinkers, whose most distinctive ideas were not shared by others – Jerome Frank's fact-skepticism, Leon Green's theory of causation, Underhill Moore's 'scientific fact research', and Llewellyn's law-jobs theory.

6. Apart from Hart and Llewellyn, would you include any other philosopher or jurist that has played an important role in your intellectual development?

It is difficult to distinguish between affinity and influence, and influence is often unconscious. When I think of all the teachers, writers, collaborators, colleagues, friends and critics to whom I owe intellectual debts, I sometimes feel like a sponge assimilating any liquid that comes its way and exuding a pale, diluted, contaminated mixture when squeezed. Apart from Hart and Llewellyn, I have conversed with, taught and written about so many jurists that it is difficult to single out two or three. Bentham has been a regular sounding board, but I am not a Benthamite. R. G. Collingwood's *Autobiography*¹¹ made a striking impact when I read it shortly after I graduated – my emphasis on standpoint, the idea of reading and writing about texts as a form of self-definition, a particular approach to reading juristic texts (the historical, the analytical and the applied) and some ideas about historical reconstruction are all in part attributable to him. Jerome Frank, John Henry Wigmore, Bentham again and David Schum all feature prominently in my work on Evidence, as does thirty years of friendship and collaboration with Terry Anderson. Over a similar period, Susan Haack has been my main philosophical sounding board, especially in relation to epistemology and pragmatism. My close friend, the late Neil MacCormick is discussed below. David Miers is a long-term close collaborator. In recent years I have been entranced by the writings of Italo Calvino, who has helped me greatly in sorting out my ambivalences about 'post-modernism': I value multiple perspectives, I recognize almost infinite complexity, I believe that imagination is required for understanding, but underneath I am an old-style cognitivist who distinguishes between epistemology and ontology.

7. Before we proceed to talk about your conception of Jurisprudence, could you provide a general overview of your work? What would you say are your most important works and under what circumstances did they arise? Would you say there have been different periods in your academic work?

At first sight, my writings appear to fall into three main categories: legal theory, including intellectual history (e.g. *Karl Llewellyn and the Realist Movement*,¹² *The Great Juristic Bazaar*,¹³ *General Jurisprudence*);¹⁴ writings about law as a discipline – i.e. legal scholarship, legal theory and legal education (e.g.

¹¹ R. G. Collingwood, *An Autobiography* (Oxford University Press, 1938/2002).

¹² William Twining, *Karl Llewellyn and the Realist Movement* (2nd edn) (Cambridge University Press, 2014).

¹³ William Twining, *The Great Juristic Bazaar: Jurists' Texts and Lawyers' Stories* (Aldershot: Ashgate, 2002).

¹⁴ William Twining, *General Jurisprudence. Understanding Law from a Global Perspective* (Cambridge, New York: Cambridge University Press, 2009).

Blackstone's Tower,¹⁵ *Law in Context: Enlarging a Discipline*);¹⁶ and evidence and proof (e.g. *Analysis of Evidence*¹⁷ (with Anderson and Schum); and *Rethinking Evidence*).¹⁸ Those listed here are the most substantial; which of them are significant is for others to judge.

However, there are other patterns that cut across these categories. In particular, while some of my writings are relatively detached works of scholarship or theorising (e.g. most of the writings about Llewellyn, Bentham, and the Anglo-American tradition of evidence scholarship), others are by-products of more activist enterprises, such as campaigning for reform in legal education, advancing legal education in Africa and the Commonwealth, trying to broaden academic law publishing, or to influence policies on legal records or access to legal education. Editing the *Law in Context* series, helping in the development of law schools in Dar-es-Salaam, Warwick and elsewhere, were practical ways of advancing causes, which I also wrote about. For over fifty years I have been involved in what Americans call 'Law and Development', in a variety of capacities, but I have made only modest contributions to the scholarly literature. *Analysis of Evidence* and *How To Do Things With Rules*¹⁹ (with David Miers) are concrete manifestations of an interest in teaching intellectual skills to law students and more generally in the idea of 'legal method' broadly conceived.

Similarly, my career falls into recognizable periods, which do not coincide neatly with my intellectual interests. Very roughly, between 1958 and 1965, I taught law in Sudan and East Africa, but I have maintained my interest in that region for much longer. Between 1963 and 1973 my main scholarly project was on Karl Llewellyn and this was mostly carried out in Chicago, New Haven and Belfast. While in Belfast (1966–72) my interests in Jeremy Bentham, legal education and 'law in context' developed significantly in addition to working on Llewellyn. My work on Evidence began at Warwick (1972–82) and continued at University College London, where I have been based since 1983, but I was also involved in a range of other activities. About 1995 I began to explore the implications of so-called 'globalisation' for legal theory and law as a discipline and I deliberately revived some of my Eastern African interests in connection with this.

Some of the main themes in my writings cut across these periods and subject matters. I am not conscious of having 'developed' in the sense of radically changing my views since the mid-1960s, but clearly my later work on evidence,

¹⁵ William Twining, *Blackstone's Tower: The English Law School* (London: Sweet and Maxwell, 1994).

¹⁶ William Twining, *Law in Context: Enlarging a Discipline* (Oxford University Press, 1997).

¹⁷ T. Anderson, D. Schum and W. Twining, *Analysis of evidence* (2nd edn) (New York: Cambridge University Press, 2008).

¹⁸ William Twining, *Rethinking Evidence: Exploratory Essays* (2nd edn) (Cambridge University Press, 2006).

¹⁹ William Twining and David Miers, *How to Do Things With Rules* (4th edn) (London, New York: Cambridge University Press, 2010).

globalisation and jurisprudence could not have been anticipated even twenty years ago. In 1972 Soia Mentschikoff, Karl Llewellyn's widow, became Dean of the University of Miami Law School. She recruited a number of Chicago graduates, including myself as a regular visitor, to assist in transforming the institution along Llewellynesque lines. For over thirty years I have continued to visit – mainly in the Spring, for I am also a Montesquieuite, who believes in the importance of climate. This arrangement has kept me in touch with Llewellyn's legacy, including collaboration and co-teaching Analysis of Evidence with Terry Anderson (also a pupil of Llewellyn's), and has given me the opportunity to develop my ideas through a seminar on 'Globalisation and Law'.

8. What is your conception of Jurisprudence and what would you say are the main tasks for a legal theorist?

The goal of an academic discipline is to advance and disseminate understanding of the subject matters of that discipline. This applies to the discipline of law. I favour a broad and open-ended interpretation of 'understanding law' in this context, involving multiple perspectives and diverse subject matters. Jurisprudence, in this view, is the theoretical part of law as a discipline. A theoretical question is a general question, one posed at a relatively high level of abstraction. Abstraction is a relative matter. 'Legal philosophy' roughly designates that aspect of Jurisprudence that deals with very abstract questions. It is an important part of Jurisprudence, but it is only one part. Some questions, such as 'What is justice?', 'What is a valid argument?', are philosophical questions. 'What constitutes a valid and cogent argument on a question of law?' is part philosophical, in part depends on the meaning of 'a question of law', which in turn depends on how that is conceived in a given legal tradition or a particular legal system. 'What constitutes a valid, cogent and appropriate argument about a question of law in the Supreme Court of the United States or the Cour de Cassation in France?' requires some local legal knowledge and sensibility. In my experience, very few jurists have made significant contributions to philosophy and only a handful of philosophers have sufficiently immersed themselves in legal materials to contribute much to understanding law. So I deplore the practice of treating legal philosophy as co-extensive with Jurisprudence – or the only interesting part. Jurists should be concerned with jurisprudentially interesting questions, not just philosophically interesting ones.

In my view, Jurisprudence can usefully be viewed as a heritage, as an ideology, and as an activity. In any given intellectual tradition there is a vast heritage of texts, debates, arguments and ideas. Much juristic activity is devoted to engaging with selected texts – interpreting, explaining, comparing, assessing, conversing with, criticizing and using them. One purpose of engaging with juristic texts is to clarify one's own ideas. An important justification for getting students to read such texts is as an exercise in self-definition, to

relate their beliefs about law to their more general beliefs – about the cosmos, morality, politics and so on – to ideology in a non-pejorative sense. Sometimes, of course, one finds that some texts are ideological in a Marxian sense, enterprises of self-interested legitimation.

For disciplined, charitable reading of juristic texts I favour a Collingwoodian approach involving three stages: the historical, the analytical and the applied. The first stage involves setting a particular text in the context of the author's time, situation and concerns (what was biting him/her?). The analytical stage involves putting the text to the question: the reader converts the author's concerns into questions: What questions does this text address? What answers does it suggest? What are the reasons for the answers? Then: Do I agree with the questions? Do I agree with the answers? Do I agree with the reasons? At the third stage, the reader explores the implications and detailed applications of answers and ideas supplied by the text. This helps to clarify the contemporary significance of the text, but also serves as a test of the validity, cogency and relevance of the text to the reader's concerns.

Theorising as an activity, doing jurisprudence, involves posing, re-posing, arguing about and answering general questions relating to law at various levels of abstraction. Engaging with selected texts in our heritage – or from other legal or intellectual traditions – is one important way of carrying out the activity. Texts are an important, but not always indispensable, resource in this respect. There are other routes, such as reflecting on questions in the abstract, analyzing concrete examples, conversing, arguing or debating with colleagues and so on. Theorising has several functions or jobs: constructing total pictures (synthesizing); clarification and construction of individual concepts and conceptual frameworks; developing normative theories, such as theories of justice or human rights; constructing, refining and testing empirical hypotheses; developing working theories for participants (e.g. prescriptive theories of law-making or adjudication); and so on – wherever thinking at a relatively general level contributes to understanding. Perhaps the most important function is articulating, exposing to view and critically assessing important assumptions and presuppositions underlying legal discourse generally and particular aspects of it – not only issues about law in general, but also the assumptions and presuppositions of sub-disciplines, as has been happening recently in fields obviously affected by globalisation, such as comparative law and public international law. This critical function can usefully be applied to one's own work as well as to others – there is a need for a self-critical legal studies movement.

9. Do you consider yourself a positivist, and if so, in which sense?

Labelling thinkers is nearly always an inexact enterprise and, as you suggest, 'positivism' has many meanings and associations. If it means a perspective that is amoral, indifferent to morality or scientific, then clearly I am not a

positivist. I have worked in the shadow of Bentham, Hart and Llewellyn, three quite different individuals who are usually allocated to a broad positivist tradition. In some contexts, I accept versions of the separation thesis and the social sources thesis that have been attributed to Hart's *The Concept of Law*, but with reservations. I share with Hart the belief that we need a vocabulary for giving accounts of the realities of the law in action. One needs to be able to describe regimes of governance and how they operate in practice as well as having a vocabulary for evaluating them. Indeed, it is difficult to understand how one can assess a foreign or exotic legal order without first obtaining accurate information about its rules and how it operates in practice. I also broadly share Hart's view that one should not romanticize legal phenomena: '[T]he identification of the central meaning of law with what is morally legitimate, because orientated towards the common good, seems to me in view of the hideous record of the evil use of law for oppression to be an unbalanced perspective, and as great a distortion as the opposite Marxist identification of the central case of law with the pursuit of the interests of a dominant economic class'.²⁰ However, sharp distinctions between is and ought, between law and morality, are conceptually problematic and, in my view, break down in some contexts. For example, they do not hold in reasoning about questions of law in hard cases; even in fact-determination not all 'questions of fact' are value free. Similarly, while distinctions between observer and participant perspectives are helpful, they too can be problematic.

Of course, a good deal of legal theory, legal scholarship and legal education is participant-oriented. For example, in Anglo-American legal education we regularly ask our students to adopt the standpoints of, *to pretend to be*, legislators, judges, advocates, legal advisers and various kinds of users of law. For some of these participants, the idea that they should aspire to make the system 'the best it can be' is attractive. Many such roles can be conceived as having normative elements. However, even in such contexts some distinction between is and ought is needed; for example, an internal critic arguing for reform of a particular law or a legal adviser concerned to give a client realistic advice. Ronald Dworkin's conception hardly fits tax advisers, partisan advocates, dissidents, and some other users of a legal system. Most non-positivist theories, like Dworkin's, are participant oriented in this sense. In *General Jurisprudence* I explicitly adopted a positivist position in considering how to construct reasonably inclusive overviews (or mental maps) of legal phenomena from a global perspective. This was a descriptive enterprise. Understanding law involves embracing both aspiration and reality, not just one of them. So I am a positivist some of the time in some contexts, but the label is not very informative.

²⁰ H. L. A. Hart 1983, *supra* note 2 at 12.

10. Let's talk about one of your more recent books, *General Jurisprudence: Understanding Law from a Global Perspective*. To what extent do you think the challenges of globalisation have changed the way of understanding the Law?

General Jurisprudence (2009)²¹ can be read as the continuation, but not quite the culmination of a project that ostensibly began in the mid-1990s, but the roots of which can be traced back through my involvement in various supra-national activities concerning the global South or the Third World in the 1970s and 1980s, to working in Eastern Africa before that, to my colonial childhood and adolescence. The book was preceded by essays collected in two books (*Globalisation and Legal Theory* (2000)²² and *The Great Juristic Bazaar* (2002))²³ and has been succeeded by a reader on four Southern jurists (*Human Right: Southern Voices* (2009)),²⁴ and several further essays. The central question addressed in the book is: what are the implications of 'globalisation' for law as a discipline and jurisprudence as its theoretical part? The book is written from the standpoint of a Western, common law oriented jurist, concerned about the health of his discipline in his own country and more generally in the West. It is *not* an attempt to construct a global theory of law.

The 'plot' can be briefly summarized as follows: if one interprets 'globalisation' to refer to the complex processes that are making the world more interdependent, then one needs to recognize that most of these processes are taking place at sub-global levels and that we lack adequate concepts and data for making many truly 'global' generalisations about legal phenomena. For law, some of the most significant sub-global patterns relate to such phenomena as former empires, diasporas, religions, trading blocs, regions, language spread, and legal traditions –almost none of which are global in a literal geographical sense. If one adopts a global perspective in order to construct a broad contextual overview, a jurist needs to conceptualise 'law' in a reasonably open and inclusive manner that includes some idea about non-state law, to differentiate between different levels of relations and ordering that to some extent reflect these sub-global patterns, and to recognize their complexities and our relative ignorance about most of the phenomena. This leads one not only to be suspicious of loose talk about 'global Law', 'global law firms' and 'global institutions', and confident universalist claims, but also to question some widespread, often ethnocentric, assumptions underlying Western traditions of academic law –for example, that law consists only of two forms: the municipal law of nation states and classical international law; that we live in a secular age rather than one of religious revival; that Western legal concepts fit non-Western legal orders.

²¹ William Twining 2009, supra note 14.

²² William Twining, *Globalisation and Legal Theory* (London: Butterworth and Evanston: Northwestern University Press, 2000).

²³ William Twining 2002, supra note 13.

²⁴ William Twining, ed., *Human Rights, Southern Voices* (Francis Deng, Abdullahi An-Na'im, Yash Ghai and Upendra Baxi) (New York: Cambridge University Press, 2009).

Part of my argument is that a new generation of jurists is reinterpreting some canonical Western jurists critically from a global perspective. Tamanaha starts with Hart's premises but pares away nearly all of his criteria of identification of law. Pogge, by challenging Rawls' conception of societies as self-contained units, has developed a variation of Rawls' principles of justice applied to supra-national institutions that is much more radical than Rawls' own *The Law of Peoples*.²⁵ Peter Singer has explored the implications of Benthamite utilitarianism from a global perspective. I have done something similar for Hart and Llewellyn. And Santos has developed a 'common sense' theory based on a strange mixture of Max Weber and post-modernism. This emphasises the continuities as much as the disjunctures in appraising our heritage from a global perspective. In addition, thinking about law in the world as a whole makes comparative law central to understanding law and makes some topics more salient, such as diffusion, pluralism and surface law – whether strong claims to convergence, unification or harmonization of laws apply mainly to surface phenomena. However, law as a practice-oriented discipline concerned with detailed practical problems will continue rightly to be largely focused on specific issues arising in 'local' (both geographical and intellectual) contexts at a variety of levels. The implications of globalisation vary significantly for different kinds of legal specialism and will make some supranational and transnational fields more important.

11. What would you say have been your main contributions to the study of Evidence?

I joined the University of Warwick Law School in 1972. The institution was committed to 'broadening the study of law from within' in all subjects. Before I arrived, I was asked: 'Which field of law are you going to Warwickize', meaning rethink in a broader way than its orthodox or traditional treatment. The choice soon narrowed to Land Law or Evidence. I had no specialized knowledge of either. My colleague, Patrick McAuslan, wished to approach Land Law from a Public Law perspective – and in time did so with distinction. So I took Evidence. This became my main focus of attention for fifteen years. From the start I conceived of this as a case study of the general enterprise of broadening the study of law. The first step was to construct an ideal type of orthodox Anglo-American approaches to the study of Evidence, to articulate their underlying assumptions, and to assess them critically. For example, the subject of Evidence in law was treated as co-extensive with the Law of Evidence – mainly the rules governing admissibility. The contested jury trial (a wholly exceptional event) was treated as the paradigm case for the application of the exclusionary rules. Rules constituted the whole subject matter of Evidence. The concept of 'legal reasoning' was limited to argumentation about questions of

²⁵ John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999).

law (typically in ‘hard cases’) and reasoning about questions of fact was ignored or dismissed as mere common sense. This ideal type was narrowly conceived and easy to criticize. The real challenge was to construct a coherent conception of Evidence in legal contexts to replace that orthodoxy.

As I was historically inclined, my next question was: has anyone tried to do this before? The answer was that for two hundred years after the publication of the first treatise, Chief Baron Gilbert’s *The Law of Evidence* (1754),²⁶ there had been numerous attempts to develop a ‘theory of evidence’, some of which had been quite broadly conceived. So, rather than try to ‘reinvent the wheel,’ I devoted some attention to intellectual history. I examined the assumptions underlying leading Anglo–American treatises on Evidence from 1754 to the 1970s and constructed a further ideal type of the assumptions underlying ‘The Rationalist Tradition of Evidence Scholarship’ to which the ideas of almost all common law specialists had approximated. The tradition was heavily influenced by Bentham, especially the premise that the direct end of adjudication is rectitude of decision, i.e. the correct application of rules to facts that were probably true. In short, the enterprise involved the pursuit of truth by rational means on the basis of inferential reasoning from evidence. Bentham argued that there should be no rules of evidence. This was considered too extreme, but the scope of the Law of Evidence narrowed considerably over time. Nevertheless, in the English academic tradition the assumption persisted that rules (or, more broadly, doctrine) constituted the subject matter of the discipline of law. In 1972, during a highly charged debate on reform of criminal evidence in England, the leading evidence scholar, Sir Rupert Cross, stated: ‘I am working for the day when my subject is abolished.’ This provided a splendid foil for my work, for how could scholars *abolish* the subject of Evidence in law? What would one study about Evidence if there were no rules?

The two outstanding figures in the Anglo-American tradition were Jeremy Bentham and John Henry Wigmore. So I wrote a book about them (*Theories of Evidence: Bentham and Wigmore* (1985))²⁷ and used each of them as a reference point for developing my own ideas. Bentham inspired the model for the Rationalist Tradition. His proposals for reform were considered to be too radical, but almost every change over the next two centuries has moved in the direction that he indicated, but at a slower pace. Bentham also provided a foil for considering non-utilitarian and various skeptical perspectives. Wigmore divided the subject of Evidence in law into two parts: the Principles of Proof and the Trial Rules. Although he was revered for over fifty years as a scholar in respect of the latter, hardly anyone had paid much attention to his Principles of Proof, including his ‘chart method’ of structuring and constructing arguments about disputed questions of fact in complex cases.

²⁶ Jeffrey Gilbert, *The Law of Evidence* (Dublin, 3rd edn, 1769) (London, 1754).

²⁷ William Twining, *Theories of Evidence: Bentham and Wigmore* (London and Stanford, CA: Stanford University Press, 1985).

I developed my theoretical ideas about Evidence over 30 years mainly through a series of essays, many of which are collected in *Rethinking Evidence*.²⁸

My interest in Evidence started at roughly the same time as the development of ‘the New Evidence Scholarship’ in the United States. In the early years this was mainly concerned with issues about probabilities and proof, with quite sharp divisions between Baconians (inductivists) and Pascalians (who believe that all probabilistic reasoning is in principle mathematical – with further divisions between Bayesians, frequentists and other schools of statistics). I joined in these debates, as I did in relation to later concerns about the relationship between narrative and argument in legal fact-finding, but my main concerns were broader.

Ironically, having set out on a seemingly radical programme, I found myself reviving and defending some key aspects of the Anglo-American tradition that had been forgotten: Bentham’s view of the ends of adjudication, Thayer’s vision of the Law of Evidence as a series of disparate exceptions to a principle of free proof, and Wigmore’s chart method. All of these go beyond conceiving of the subject of Evidence in law solely or mainly in terms of rules. In retrospect, I mildly regret not having devoted more attention to the details of the surviving rules of Evidence, which still remain the main focus of professional examinations in the United States and of most specialists in the field. My argument that the exclusionary rules are an important, but only a small, part of the subject might have been more persuasive. Instead, in recent years I have devoted more attention to the idea of Evidence as an evolving multi-disciplinary field. This has been the subject of an ambitious programme at University College London since 2003 (*Evidence, Inference and Inquiry*).²⁹

12. You had a close relationship with Neil MacCormick. If you were asked to write a paper in his honour, what aspects of his personality and work would you emphasise?

Neil MacCormick was an outstanding jurist, a close friend, and in many respects a kindred spirit. We mourn his death at a relatively young age. It is some consolation that he was able to complete the quartet of books which encapsulated his ideas and will be perceived as his monument. He was admired, praised and loved by a wide range of diverse people for a number of different things: as a teacher; as a public intellectual; as a democrat; as a committed Scottish nationalist and European; and, to use one of his favourite expressions, one who contributed to the gaiety of nations. I greatly valued his friendship and learned much from his jurisprudence. I regret that, despite planning to do so, we only collaborated on one published essay.

²⁸ William Twining 2006, *supra* note 17.

²⁹ P. Dawid, M. Vasilaki and W. Twining (eds), *Evidence, Inference and Inquiry* (Oxford University Press, 2011).

Intellectually, we were quite different, but complemented each other. His main interests beyond law were in philosophy, politics and Scotland; mine were more in history, literature, anthropology and Africa. If I admitted to having a general theory of law it would be quite close to his conception of an institutional normative order. He was an excellent philosopher, but unlike some contemporary analytical jurists his conception of philosophy was in the spirit of the Scottish Enlightenment rather than a more narrowly conceived form of conceptual analysis. This meant that he was genuinely concerned to bridge the gap between analytical and social scientific perspectives on law, not only at the abstract level of philosophy.

In his later writings, MacCormick seemed to have deserted his earlier legal positivism. In my view, this should be interpreted as a shift of emphasis rather than as a radical departure. MacCormick's shift reflected his passionate, activist commitment to certain liberal democratic values; it did not involve a rejection of the need for relative detachment on the part of scholars. But he was concerned to emphasise that expositors, teachers and jurists are often second-order participants in their own legal systems and that in these roles it is incumbent on them to make a system's aspirations guide their activities. As indicated above, I have no objection to this view, but it is not appropriate for more detached or 'external' perspectives. Comparative lawyers, historians and empirical researchers into law should be committed to the values of scholarship, but need a more detached stance towards the phenomena they study, for most law is a product of other people's power.

13. To finish this interview we would like to ask you to give a piece of advice to people who are starting their academic careers in legal theory. What would be your message for young legal theorists?

Think!

