# Have concepts, will travel: analytical jurisprudence in a global context[*]

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## Abstract

*Our increasingly cosmopolitan discipline needs to be underpinned by a revival of the idea of general jurisprudence, in which generalisations – conceptual, normative, empirical, legal – about legal phenomena are treated as problematic. This paper argues that, as part of this, analytical jurisprudence should broaden its focus not only geographically, but also in respect of the range of concepts, conceptual frameworks, and discourses that it considers. How far is any of our current stock of concepts adequate for talking meaningfully across legal traditions and cultures? Which concepts 'travel' relatively well or badly and why? Such questions are illustrated with reference to discourses about legal rights, the treatment of prisoners, and corruption.*

## I. Introduction

*Do 'rights' have the same meaning in Islamic law and Western law?*[2]

*To what extent does the interpretation of the precise scope of 'inhuman and degrading treatment' turn on general principles or local culture and conditions?*

*Is it possible to draft uniform insolvency or copyright laws for countries with different legal cultures and traditions or different models of insolvency regimes?*[3]

*The European Development Bank is developing 'legal indicators' of the extensiveness and effectiveness of commercial law and financial regulation in countries in transition. How can these be meaningful?*[4]

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[*]  This paper is a revised version of the second in a series of lectures on 'General Jurisprudence', delivered in Tilburg during the academic year 2000–01. It is a sequel to two books: (i) *Globalisation and Legal Theory* (Butterworths, 2000 and Northwestern UP, 2002) (hereafter Twining, 2000) (which critically explores mainstream Anglo-American jurisprudence and comparative law in relation to 'globalisation'); and (ii) *The Great Juristic Bazaar* (hereafter GJB) (Ashgate, 2002), especially Ch. 4, and 9–11. This is a collection of essays dealing with particular jurists in the same tradition. This essay builds on four further essays: (iii) 'Reviving General Jurisprudence' in M. Likosky (ed.) *Transnational Legal Processes* (Butterworth, 2002) Ch. 1 (reprinted in GJB); (iv) 'The Province of Jurisprudence Re-examined' (Stone Memorial Lecture, Sydney, 2000, published in C. Dauvergne (ed.) *Jurisprudence for an Interconnected Globe* (Ashgate, 2003) Ch. 2.; (v) 'A Post-Westphalian Conception of Law' (review article of Brian Tamanaha, *A General Jurisprudence of Law and Society* (OUP, 2001) 37 Law and Society Review 199–257 (2003)); and (vi) 'A cosmopolitan discipline? Some implications of 'globalisation' for legal education', 8 Int. Jo. Legal Profession 23–36 (2001).

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[2]  E.g. An-Na'im (1992).

[3]  Westbrook (1999).

[4]  Ramasatry (2002).

*We are told that country X has five times as many university law schools and law students per 100,000 of population as country Y. Are 'universities', 'law schools' and 'law students' comparable in this context?*[5]

*Is there a negative (or a positive) correlation between the number of lawyers in a given society and its economic health? Or is this a meaningless question?*[6]

*Transparency International, Western financial institutions (e.g. the World Bank) and aid agencies are promoting a world wide campaign against corruption. Transparency International regularly publishes a Corruption Perceptions Index in the form of league tables. Is not what counts as 'corruption' culture specific?*[7]

*What are the problems involved in constructing standardised categories for global statistics on such matters as crime (e.g. murder, theft), levels of damages for personal injuries, delay in court, prisoners on remand, legal aid and representation, or the percentage of the national budget allocated to the legal sector or to judicial administration?*[8]

As the world becomes more cosmopolitan and relations and transactions increasingly cross legal, cultural and linguistic boundaries, such questions are becoming commonplace. None of these questions is solely about words or concepts, but all of them have a conceptual dimension.[9] Concepts are important as thinking tools at all levels of practical legal activity as well as in academic law and legal philosophy. In the context of so-called 'globalisation', questions arise about the adequacy of our existing stock of concepts for a huge variety of tasks at many levels.

The purpose of this paper is to suggest that critical analysis and construction of key concepts of legal discourse is an important task for an expanded conception of analytical jurisprudence. In *Globalisation and Legal Theory* I argued that, as the discipline of law becomes more cosmopolitan, it needs to be underpinned by theorising that treats generalisations across legal families, traditions, cultures and orders as problematic (Twining, Chs. 2 and 9). A central question is: how far are we equipped to make meaningful generalisations and comparisons about legal issues and phenomena – conceptually, normatively, empirically, legally, technologically? This paper is one of a series that attempts to clarify and concretise an agenda for this kind of general jurisprudence. It is concerned with one aspect of analytical jurisprudence, analysis and elucidation of concepts. It suggests that there is a need for sustained critical analysis of the adequacy of our existing stock of concepts for transnational legal discourse, both law talk (the discourse *of* rules and its presuppositions) and talk about law (discourses *about* any legal phenomena) (Twining, (2000, pp. 344–345). Part II sets these concerns in the context of the English (and to some extent Anglo-American) tradition of analytical jurisprudence. This tradition has well-developed methods of conceptual analysis, but it has tended to apply them to a narrow range of concepts (Twining, 36, 53–54, 190–191). Part III consists of three studies that explore the theme of concepts 'travelling well' (or badly) in specific transnational contexts.

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5   Barcello and Cramton (1999), Twining (2001) at 28–31; cf. Twining (1997) Ch. 15.

6   'Do lawyers impair economic growth?' Symposium (1992) criticised in Galanter (1998, pp. 743–747) cf. Galanter (1992).

7   Leys (1965).

8   This is a random selection of topics that I have encountered in discussions of 'globalisation' and law and development. Most are topics that might in principle be subject to quantification provided that standardised categories can be constructed and the phenomena can be treated as commensurable or otherwise comparable. For a preliminary discussion, See Twining (2000, pp. 152–168). On commensuration see Espeland and Stevens (1998).

9   This paper is concerned with analysis of *both* concepts and words. They are intimately related, for one uses words to label concepts, but it is important to keep them conceptually distinct. For example, a term may 'travel', but become attached to a different concept; the same word may refer to more than one concept; I may have a concept but be unable to express it in words; words may imperfectly capture a concept. I shall follow the convention of putting words in inverted commas: e.g. torture refers to the concept, 'torture' to the word. A variant on the use of inverted commas for words are scare quotes, e.g. 'globalisation' means 'so-called globalisation'.

I shall not go over ground covered elsewhere in respect of my conception of jurisprudence and the discipline of law, or my interpretation of 'globalisation' and its implications for them (see Twining, 2000, passim and Twining 2001a). But it is worth clarifying a few preliminaries.

### (a) 'General jurisprudence'

Similar considerations apply to the term 'general jurisprudence' as to the overuse of 'global' and related words (Twining, 2001). 'General' in this context has at least four distinct, but related meanings: (a) abstract, as in *'Théorie générale du droit'*, which refers to levels of abstraction rather than to geographical spread (Van Hoecke, 1985). (It is often interpreted to refer to an intermediate level between abstract legal philosophy and particular doctrine); (b) universal, at all times and in all places; (c) widespread, geographically or over time; (d) general as opposed to particular, i.e. more than one, up to infinity (Twining, 2003, pp. 244–246). This is more flexible than 'universal' or 'global'.

Nineteenth-century proponents of general jurisprudence, influenced by scientific models of enquiry (e.g. Darwinism) and by universalism in ethics (e.g. both utilitarianism and natural law), tended to *assume* the universality of their theories. For Jeremy Bentham, as for natural lawyers, and today for Brian Tamanaha (2001), general jurisprudence is universal (b). However, John Austin and others explicitly limited their theories to 'mature' or 'advanced' societies (c). So, by implication, did Hart by treating modern state law as the paradigm case of law. The geographical reach of much contemporary juristic discourse is often unclear (Twining, 2000, Ch. 2). While some legal philosophers, such as Raz, have followed Hart in maintaining that they are doing 'general jurisprudence', much of such work is confined to modern Western-style state legal systems or seems to be geographically indeterminate or else quite parochial or even ethnocentric.[10] In treating generalisation as problematic, usage (d) may be the most useful, because of its flexibility. 'General jurisprudence' is used here to refer to theorising (at different levels of abstraction) about two or more legal traditions, cultures, or even jurisdictions (d). I do not wish to enter here into debates about the scope and value of 'legal philosophy' and its relation to 'jurisprudence', but it should be clear that the approach adopted here is both broader in respect of geographical spread and less abstract than much contemporary legal philosophy (Twining, 2003a).

### (b) Legal and cultural relativism

The fact that this paper raises questions about our capacity to generalise across legal cultures and traditions, should not be taken as the assertion of a strong particularist or relativist position (Twining, 2002, pp. 9–11). Legal anthropologists, such as Bohannan and Roberts, have emphasised the importance of 'folk concepts' in understanding the normative order of a different culture (Bohannan, 1957; Roberts, 1998); comparative lawyers have warned of the many pitfalls in attempting to compare conceptual schemes. For such reasons, functionalist approaches to comparative law have emphasised that convergence between legal systems is more often than not convergence of shared outcomes reached by different conceptual routes (e.g. Zweigert and Kötz (1998, Ch. 2), cf. Twining (2000a, p. 37)). Implicit in such perspectives is a sub-text to the effect that ordinary legal discourse tends to be highly culture-specific and lacks a vocabulary that is suitable for analytic purposes. Pushed to its limits this view suggests that lawyers are inescapably culture-bound and hence are incapable of doing valid comparative work across cultures: they cannot free themselves from their cultural blinders. Simon Roberts comes close to adopting this position when he suggests that one needs to look to the social sciences rather than to law for an analytic framework for 'the comparative project' (Roberts, 1998). This view is reminiscent of W. W. Buckland's scepticism about

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10  Most contemporary Anglo-American legal theory focuses almost exclusively on municipal state law of modern legal systems and generally excludes religious law and Chthonic (traditional, customary) law from consideration. See further Twining (2000, Ch. 6), Tamanaha (2001), Glenn (2004).

the feasibility of general analytical jurisprudence and of the position of 'difference theorists' in comparative law, such as Pierre Legrand (Buckland, 1945; Legrand, 1999; Hyland 1996; Twining, 2000, pp. 25–33).

Originating in different contexts (including analytical jurisprudence, legal anthropology, sociology and comparative law), such particularist views seem to converge on a single thesis, which may be termed 'legal relativism'. A strong version of this thesis would be that law is inherently culture-specific and legal discourse is largely confined to 'folk concepts'.[11] I personally share some of the concerns underlying this thesis and I believe that moderate versions offer some salutary warnings about the difficulties of comparison and generalisation in law. However, the strong version can be shown to be false. An obvious way to do this is to identify counter-examples – concepts and legal discourses that do 'travel well'. This is the subject of the exploratory studies reported in Part III of this paper.

The chief weakness of strong legal relativism is that it postulates a high degree of isolation of actual legal orders and legal discourses from other legal cultures and from other spheres of activity in the same culture. This seems implausible in most contexts.

First, one can hypothesise that terms of art, jargon, specifically legal concepts and other specialised legal language only form a very small part of 'law talk' in most legal orders. Legal language normally draws on and interacts with 'ordinary' and specialised 'non-legal' discourses. It is quite misleading to characterise law talk solely or mainly in terms of its uniquely legal meanings and features.

Second, legal orders rarely exist in isolation from other legal orders, systems, and cultures. For at least 20 years anthropologists have acknowledged the weaknesses and distortions of an earlier tradition that treated 'tribes' and 'societies' as isolated, self-contained, timeless units (Collier and Starr, 1989). Alan Watson's 'transplants thesis', even in its weaker and more plausible versions (Ewald, 1995) draws attention to the near-ubiquity of diffusion and transplantation of laws, a fact which goes a long way to account for significant patterns in any realistic picture of law in the world (Twining, 2000, Ch. 6). Although I am personally quite sceptical about the value and importance of large-scale efforts to unify or harmonise large bodies of law within the European Union and beyond, recent experience has shown that unification is sometimes quite feasible, at least at the level of 'law talk' and surface law (Twining, 2001, pp. 26–28). Relativism and isolationism, in law as in other fields, are matters of degree. The extent to which they are plausible options today is best explored through detailed study of particular areas.

## (c) 'Travelling well'[12]

My aim is to raise some questions about the adequacy of our stock of concepts for transnational, cross-cultural and cross-level legal discourse. I have merely started to explore what it is for a concept or group of concepts or models or frames to travel far and to travel well – i.e. so that they can be used with reasonable clarity and precision to express, describe, analyse, compare, generalise about, explain, or evaluate subject matters of our discipline across various kinds of boundary. So far my tests of travelling far and well are mainly empirical and pragmatic: Does it fit?[13] Does it work? Can

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11  'Legal relativism' as used here should be distinguished from Donald Black's only indirectly related, theory of 'legal relativity'. This asserts that, while rules of law remain the same in their content, their consequences vary with the relational structure of each case – i.e. rules of law are only one of the variables affecting case outcomes (Black, 1995; 2003).

12  There is a vast literature on transfer of knowledge and diffusion of ideas. In the present context 'travelling' should not be interpreted too literally to refer only to transfer across physical space.

13  An example of bad fit would be applying 'chiefs' as an analytic concept to an acephalous society (i.e. a society without chiefs) or applying American constitutional concepts (e.g. separation of powers) to a polity with a radically different constitutional tradition.

the same concepts be used with roughly the same meaning in England and Italy, or in California, Tanzania and Japan?[14] For example, would this category or group of concepts be suitable for use in regional or global statistics, or in an international convention intended for local application in many countries, or in a genuinely comparative transnational study of some legal field or institution or set of problems?[15]

'Travelling well' is a metaphor associated with wine. Here it is used broadly to refer to the transferability of concepts and terms across different contexts. The contexts are many and the term is deliberately vague. The concern relates both to legal concepts, such as duty, person, contract, used in the formulation of laws (law talk) and analytic concepts used in describing, analysing, explaining and evaluating legal institutions and phenomena (talk about law).[16] 'Travel' can take place across legal cultures, languages, jurisdictions, levels, and even fields of law.

The purpose of this paper is to raise some general questions about transferability and to illustrate some of the problems without claiming to provide comprehensive answers. As we shall see, the Standard Minimum Rules for the Treatment of Prisoners seem to have occasioned few conceptual or semantic difficulties when applied to prison systems in many countries around the world, even though the appropriateness of the standards and priorities when applied to very different prison situations have sometimes been questioned. I shall suggest that Hohfeld's scheme of rights and related concepts, interpreted as a set of analytical concepts, travels very well in that it can be applied to a wide range of normative systems. By contrast, terms like 'lawyer', 'law student', 'legal services' and even 'judge' have tended to travel quite badly, partly because of the enormous variety of ways in which legal and other kinds of expertise are organised, institutionalised and perceived in different legal cultures. There are notorious puzzles about the concepts and vocabularies involved in discourse relating to corruption – both in regard to analysis of the problems and in framing suitable anti-corruption measures. On the one hand, there seems to be near-universal condemnation of certain kinds of behaviour, on the other hand what is considered corrupt varies according to economic, political and cultural conditions and tradition.

I am sometimes asked whether I think that the idea of 'inhuman treatment' travels well in relation to the problem of provision of clean water in prisons in poor countries. Clearly, the term itself does not resolve the issues on its own. There is room for real disagreements about such questions as whether prisoners have a right to be given clean water when many people in the rural population do not have it; or how far economic considerations and priorities should affect the

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14  Cf. the provocative claim by James Gordley (mainly in relation to contract doctrine): 'With the enactment of the Chinese Civil Code, systems of private law modeled on those of the West will govern nearly the entire world. Western legal systems, moreover, are much alike. Both "common law" systems such as those of England and the United States and "civil law" systems such as those of France, Italy and Germany have a similar doctrinal structure based on *similar legal concepts*. They divide private law into certain large fields such as property, tort and contract, and analyze these fields in a similar way . . . *The organisation of the law and its larger concepts are alike even if particular rules are not.* Accordingly, though answers may differ, the problem of whether a boy is liable for injuring a playfellow or a seller is liable for defects in his merchandise is analyzed in much the same way in Hamburg, Montpelier, Manchester and Tucson, or for that matter in New Delhi, Tel Aviv, Tokyo, and Jakarta.' (Gordley, 1991, pp. 1 (emphasis added), discussed in Twining, 2000, pp. 26–29).

15  Another test of 'travelling well' is questionnaires. A large proportion of ambitious comparative projects has been based on questionnaires, for example Rudolph Schlesinger's project on the common core of legal systems in relation to formation of contract (Schlesinger, 1968) and, with more sophistication, the major comparative studies of precedent and interpretation of statutes led by Robert Summers and Neil MacCormick (1991, 1997).

16  My initial concern was that Bentham, Austin and other pioneers of analytical jurisprudence emphasised the importance of 'basic', 'fundamental' or 'common concepts' in universal jurisprudence, but also cautioned that the number of such concepts is quite limited (Bentham, 1970, pp. 6, 295; Austin, 1863, pp. 367–369, discussed in Twining, 2000, pp. 16–23). However, my argument applies more broadly to any important concepts employed in transnational or cross-cultural or cross-level legal discourse.

implementation of legally prescribed human rights. Is the phrase 'torture, inhuman or degrading treatment or punishment' restricted to intentional acts or does it cover negligent or reckless acts or omissions?

I think that the concept of 'inhuman and degrading treatment' does travel well in this context in that, first, it provides a framework for debating such issues; second, it provides a direct link to the idea of basic human needs; but, third, it allows some flexibility in respect of its interpretation and application in different social and economic contexts. The notion of 'degrading' similarly invokes an abstract universal principle of respect for persons or human dignity, while allowing some latitude for different cultural attitudes to respect and shame.[17]

## II. Analytical jurisprudence

Analytical jurisprudence is not a subject apart. Julius Stone divided 'the province of jurisprudence' into three broad categories: analytical, ethical and sociological (under which he included traditional historical jurisprudence) (Stone, 1956). Such broad categorisations are useful only if the distinctions are not made to carry too much weight. I shall also follow Hart's position that distinctions between different branches of jurisprudence and philosophy of law are matters of convenience, reflecting 'no very firm boundaries' (Hart, 1967; 1983).[18] In this view, the relationship of analytical jurisprudence to jurisprudence is similar to the relationship between analytical philosophy and philosophy in general: it gives an approximate indication of a style and approach that involves the application of a range of techniques of analysis to issues of legal theory.

The term 'analytical jurisprudence' is sometimes treated as co-extensive with 'linguistic analysis', or with elucidation of abstract concepts. This is too narrow.[19] It is true that elucidation of abstract concepts was the main focus of attention of some analytical jurists in the Anglo-American tradition, including Austin, Holland, Hohfeld, Kocourek and Salmond. However, it has not been their only concern. For example, Hart treated a number of other topics as part of analytical jurisprudence, including the study of the form and structure of legal systems, problems of legal reasoning, and problems of definition of law (Hart, 1967; 1983). Hart also made it clear that he considered that critical analysis of assumptions and presuppositions of legal discourse was one of the main tasks of legal philosophy (Hart, 1987, pp. 35, 40). This broader view accommodates contemporary jurists such as Raz, MacCormick and even Dworkin, who assimilated some of the techniques of conceptual analysis developed by analytical philosophers, including Hart, but moved on to deal with what they considered to be issues of substance.

Analytical jurisprudence has often been the subject of criticism and even of hostility, largely because of its associations with 'linguistic analysis' and legal positivism. This is illustrated by many critics of Herbert Hart, who served as the main conduit between Oxonian analytical school and jurisprudence in the 1950s, the heyday of the self-proclaimed 'revolution in philosophy' (Ayer, 1956).

In 1952 Hart took up the Corpus Chair of Jurisprudence at Oxford and within a short time revitalised English jurisprudence by re-establishing close links with analytical philosophy. His contributions to analytical jurisprudence included reviving the idea of general jurisprudence;

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17  Consider the practical problem of not putting men, women and children in the same cell, especially in a poor country, in which most police stations in the country have only one cell.

18  But note that Hart revived the distinction between general and particular jurisprudence to differentiate his views from those of Dworkin in the Postscript to *The Concept of Law* (1994), discussed in Twining (2001, Chs. 2–3).

19  The diversity of the lines of enquiry that tend to attract the label 'analytical jurisprudence' is illustrated by such recent books as Atria (2002), Coleman (2001), Dixon (2001), Frandberg and van Hoecke (1998), Halpin (1997), Herrestad (1996), Pintore and Jori (1997), Tamanaha (2001) and Unger (1996). This paper is written within and in reaction to the mainstream Anglo-American tradition.

adopting, refining and applying Bentham's techniques of analysis of abstract concepts; and serving as a conduit of ideas developed by the remarkable group of Oxford philosophers that included Ryle, Paul, Waismann, and above all, J.L. Austin. Hart was a member of this close circle of colleagues who claimed to have brought about a 'revolution in philosophy' through careful and sophisticated analysis of language. The central claim was that most philosophical problems could be 'solved' or 'dissolved' by careful analysis of ordinary usage.[20] Hart moved back into law in 1952 during the brief heyday of 'linguistic analysis'.

From about 1960 there was a reaction against logical positivism and 'linguistic analysis' in philosophy.[21] Within jurisprudence Hart's own work soon came under attack from several different directions. In particular, English and American heirs of secular natural law, Devlin, Fuller, and later Dworkin, attacked Hart's positivist premises.[22] Second, empirically minded jurists, beginning with Bodenheimer, criticised the abstraction and lack of 'realism' of *a priori* analysis of legal concepts (Bodenheimer, 1955–56; cf. Hart's reply, 1957). Third, rather later, critical legal scholars and post-modernists challenged the alleged neutrality of conceptual analysis and the assumptions about the relative determinacy of language exemplified by Hart's analysis of abstract terms in terms of core and penumbra. Morton Horwitz crystallised the main criticisms along the lines that analytical positivism as exemplified by Hart was unhistorical, unempirical, apolitical, uncritical and based on a false hermeneutics (Horwitz, 1997).[23] Hart and his disciples robustly defended his position against such criticisms and managed to show that at least some of them were directed at caricatures of his own views. But over time he retreated on a number of fronts, most significantly in respect of the more extravagant claims about the value of analysis of ordinary usage.[24]

I shall not enter these debates here. Suffice to say, my position is that Hart's contributions to jurisprudence, and to the discipline of law more generally, included bringing an increased awareness about the nature and limitations of language; some sharp and highly transferable techniques of conceptual analysis; some overblown expectations about what these techniques could achieve;[25] and a sense of intellectual ambition and excitement. 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.[26] I believe that Hart's techniques are still of real value, especially when applied to a wider range of concepts than he envisaged and within a broader conception of law and of its study. Herbert Hart himself often expressed the view that his kind of analysis was applicable to these broader enquiries, but in practice he very largely

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20    The claim that philosophical puzzlements could be dissolved by analysis is associated with Wittgenstein; the stronger claim that philosophical problems could be solved by such means is attributed to J.L. Austin.

21    Gellner's *Words and Things* (1959) is sometimes treated as marking the start of the reaction. For a useful account of subsequent developments through Quine to the 'naturalist turn' in philosophy, emphasising continuities between philosophical theorising and empirical enquiry see Leiter (2002).

22    Note that Fuller (1957–58), Bodenheimer (1955–56) and Devlin (1959) first challenged Hart before the publication of *The Concept of Law* in 1961.

23    For a partial dissent, see Twining (2000, p. 34).

24    See especially, the Postscript to *The Concept of Law* (1994) and discussions of it. It is sad that, in his reply to his critics, Hart concentrated on only one, Ronald Dworkin, and failed to re-assert the importance of the link between analytical jurisprudence and socio-legal studies.

25    At its height the leaders of 'the revolution in philosophy' in Oxford, associated with J.L. Austin's circle, gave the impression that they believed that most philosophical problems could be solved by careful examination of language, especially ordinary usage. Despite denials that they made any such claim, there is little doubt that in the first flush of enthusiasm some analytical tools were overused. A good example was T.D. Weldon's *The Vocabulary of Politics* (1953). Hart himself made a partial retraction (Hart, Postscript 1994) but in both England and the United States there was such a strong reaction that 'linguistic analysis' became a by-word for narrow, sterile, over-abstract logomachy (e.g. Gellner, 1959).

26    On Hart's assumptions about the scope of analytical jurisprudence see Hart (1983, Ch. 3, pp. 88–89).

confined his attention to concepts of law talk.[27] He realised that his method had potentially wide application, but his own agenda remained quite narrow (Twining, 1979).

This paper adopts a broad conception of the subject-matters of law as a discipline and proceeds on the assumption that, insofar as conceptual elucidation is important, it applies as much to discourse about law as to the more traditional 'law talk'. It is part of my general thesis that conceptual analysis has an important part to play in reviving general jurisprudence, but that what is needed is a much broader conception of what is involved than those of Hart or Raz or even Stone. The central concern is with the development of adequate 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 generalisations. What travels well/badly, when, why and how?

My conception of analytical jurisprudence builds on Anglo-American tradition in respects of methods, but differs in the following respects:

i. It is based on a wider conception of law that goes beyond municipal or state law and covers all levels of legal ordering including global, transnational, international, regional, municipal (including national and sub-national), and local non-state (Twining, 2000; 2003).

ii. It focuses on a wider range of concepts than traditional analytical jurisprudence. It includes, but is not limited to, 'fundamental'[28] or 'essentially contested' (Gallie, 1956) or 'philosophically interesting'[29] or very abstract concepts.[30] More important, it is not confined to law talk, but extends to any general discourses about legal phenomena (i.e. talk about law).

iii. It is concerned not just with individual concepts, but with *groups* of related concepts in specialised discourses, such as the discourse of public international lawyers, or about prison conditions, or contract, or corruption.

Analytical method here includes not only logical, linguistic and conceptual techniques developed by analytical philosophers, but also tools of analysis such as ideal types, models, metaphors and deconstruction developed in neighbouring disciplines. It would be as foolish to try to codify the techniques of conceptual elucidation as to attempt the same for translation or comparative literature. Sophisticated analysis of language may be based on an understanding of the properties, uses and limitations of language and on certain working principles, but it is nearer to art than science. It

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27 'No very firm boundaries divide the problems confronting these various disciplines from the problems of the philosophy of law. This is especially true of the conceptual schemes of classification, definition, and division introduced by the academic study of law for the purposes of exposition and teaching; but even the historical and sociological statements about law are sufficiently general and abstract to need the attention of the philosophical critic.' (Hart, 1983, p. 89). cf. Hart (1961): 'the book may also be regarded as an essay in descriptive sociology.' I have always interpreted this to mean that good sociological work needs adequate concepts and so criticisms of Hart on the lines that he was not 'doing sociology' are misplaced. This famous sentence could be interpreted as an olive branch by Hart to socio-legal studies. If it had been accepted, a quite unnecessary chasm between analytical jurists and socio-legal scholars might have been bridged. On Hart's attitude to sociology, see Lacey (2004). However, Hart is more vulnerable to the charge that he did not deal with many of the basic concepts needed by an empirical sociology of law, such as function, dispute, process and institution. The use of the word 'descriptive' in this context is probably too modest, given Hart's sensitivity to hermeneutics.

28 On 'fundamental legal conceptions' in regard to Hohfeld and human rights, see Halpin (2003).

29 An implicit criticism of some tendencies in current legal theory is that it involves a form of intellectual snobbery that suggests that legal philosophers (a.k.a. jurists) should only concern themselves with issues and concepts that are 'philosophically interesting'. This is a different point from Dworkin's sharp attack on 'Pickwickian Positivism' in legal philosophy (Dworkin, 2002). I have some sympathy with the view that much recent analytical jurisprudence has lost touch with legal practice, but I have a broader view of what constitutes 'legal practice' than Dworkin.

30 For example, George Fletcher's excellent, but eclectic, book: *Basic Concepts of Legal Thought* (Fletcher, 1996). Fletcher's selection is intriguing.

requires sensitivity, imagination, feel, patience and detailed knowledge. Some issues of method are contested. Similar considerations apply to other relevant kinds of analysis.

However, there are some specific devices that are available and can be learned, such as:

   i. Awareness of certain cardinal features of language that pose threats to understanding (e.g. vagueness, types of ambiguity) (Hart, 1958, pp. 144–148).

   ii. Awareness of common false assumptions about language (e.g. the proper meaning fallacy, hypostatisation) (Hart, 1958).

   iii. Techniques of division and classification.

   iv. Differentiating species of definitions; stipulative definitions (Robinson, 1950).

   v. Elucidation of concepts too abstract to be susceptible of definition *per genus et differentiam* (paraphrasis and phraseoplerosis) (Hart, 1953).

   vi. Disambiguation.

   vii. Use of standard or paradigm cases and variants.[31]

   viii. Use of ideal types.[32]

   ix. Sophisticated use of analogies, models and metaphors; (Black, 1962; Haack, 1998, Ch. 4).

   x. Wittgenstein's family resemblances ('game') (Wittgenstein 1953, para 66; 1969, p. 17; Twining and Miers 1999, pp. 194–196, 398–399).

   xi. Deconstruction and immanent critique (e.g. Balkin, 1987, Binder and Weisberg, 2000, Ch. 5).

   xii. Distinguishing between analytic (etic) and folk (emic) concepts and uses of concepts.[33]

**Table 1**   Bribery: paradigm cases and variants[34]

| Paradigm | Variants |
|---|---|
| 1. An office-holder or state employee (O) | A family member, political party, corporation |
| 2. Covertly | Openly (publicly or in front of witnesses) |
| 3. Demands or accepts | |
| 4. A substantial benefit | A small token/no definite benefit |
| 5. From B (briber) | From B's agent, relative, or a third party |
| 6. As an inducement | Initiative by B |
| 7. To use his/her office | |
| 8. To secure | With no hope or expectation of success |
| 9. A substantial | Trivial |
| 10. And specific | Vague or indefinite pay-off (e.g. general goodwill) |
| 11. Future | Past/concurrent |
| 12. Financial or other benefit | |
| 13. Illegally | Not prohibited by law/the law unclear |
| 14. And improperly (according to local norms) | Positively encouraged/not disapproved/no clear norms |
| 15. To the detriment of the rights of others and | No harmful effects |
| | Only affects O & B |
| 16. Contrary to the public interest | In the public interest |
| 17. And does not report it | Reports/registers it |

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31   See the analysis of 'bribery' in Table 1.

32   Note that ideal types employ concepts that themselves may need to be elucidated. For example, Mirjan Damaska has been rightly praised for his brilliant use of three ideal types in comparing procedural systems (managerial/reactive states; hierarchical/co-ordinate systems of authority; and inquest/contest systems of procedure) (Damaska 1986). His weakest point is the overuse of binary distinctions, especially in respect of states, and his contested distinction between inquest and contest in terms of purposes (see Markovits, 1989, p. 41; Twining 1994, pp. 180–182).

One might add to this illustrative list particular ideas such as the distinction between concept and conception, 'essentially contested concepts' (Gallie, 1956) and Dworkin's notion of 'interpretive concepts' (Dworkin, 1986, Ch. 2).[35] Some, but not all, of these are dealt with in books on logic or introductions to clear thinking (e.g. Black, 1952, 1962; Walton, 1989).

## III. Case studies

### Introduction

This paper is concerned with the usability of concepts and terms in cross-cultural and transnational legal discourses. In order to develop and concretise the theme of concepts travelling well, over the past five years I have sampled the literature on five topics: (a) Hohfeld's analysis of legal rights, as an example of traditional analytical jurisprudence; (b) transnational discourse about prison conditions, as an example of a subject which, perhaps surprisingly, seems fairly amenable to generalisation; (c) corruption as a topic that is currently the subject of a transnational campaign (Transparency International, the World Bank, OECD), but which at first sight seems quite culture-bound; (d) comparative study of lawyers and legal education as an example of an area that in the past has seemed bedevilled by terms and concepts that do not seem to travel at all well; (e) concerns about the concept of law in the context of 'globalisation', with special reference to Brian Tamanaha's *A General Jurisprudence of Law and Society* (2001).

This section reports on the first three of three of these preliminary studies. It raises, but does not claim to resolve, a number of issues about the transferability of groups of concepts: which ones do or not 'travel' far or travel well? I have reported on the two other studies elsewhere. Their preliminary conclusions can be summarised as follows:

(d) Concepts associated with *legal education, legal professions, and lawyers* on the whole do not travel well, even within the same 'legal family' or between contexts in a single jurisdiction.[36] For example, who counts as a 'law student' is problematic within a single jurisdiction, England, and no definition seems to provide a sensible basis for comparison between mass university systems, like Italy, multi-stage processes of professional formation, such as England's, and professional law school programmes in the United States. If 'law student' is defined as someone registered for a 'first degree in law', there are serious doubts whether this is a sensible unit of comparison. If the definition is extended to include anyone involved in a professional training programme or in the process ending in initial certification, the problems of comparability are more complex. Any comparative statistics about numbers of law students under any of these definitions are almost meaningless, generally

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33 The debate between Gluckman and Bohannan about 'folk' and 'analytic' concepts in legal anthropology (summarised in Nader 1969) was part of a more general, rather convoluted, debate in social anthropology (especially Headland et al. 1990). I have some reservations about these distinctions (Twining 2003, pp. 229–231), especially in relation to law, but here I am mainly concerned with analytic concepts that can be used cross-culturally. For present purposes, the following working definitions by James Lett, a leading contributor to the anthropological debate are adequate:

*'Emic constructs are accounts, descriptions and analyses expressed in terms of the conceptual schemes and categories regarded as meaningful and appropriate by native members whose beliefs and behaviors are being studied. Etic constructs are accounts, descriptions and analyses expressed in terms of the conceptual schemes regarded as meaningful and appropriate by the community of scientific observers.'*

(Lett 1990, pp. 130–131) (original italics).

34 For a similar treatment of the concept of torture, See Twining and Miers (1999, pp. 185–186).

35 I do not discuss here Dworkin's characterisation of Hart as a 'semantic theorist' and Hart's reply in his Postscript to *The Concept of Law* (1994), neither of which I find convincing.

36 For preliminary discussions of the semantic difficulties, see Twining (1996, 1998, 2001). For earlier attempts to construct analytical frameworks for considering issues of legal education policy transnationally see Twining (1997, Ch. 13 (access) and Ch. 15 (law schools)).

misleading, and often false. That is only the start of the difficulties. Similar considerations apply to terms like 'lawyer', 'legal profession', 'legal services' and 'legal work'[37], and to a lesser extent to 'judge', 'court' and 'trial'. These conceptual difficulties have been a serious obstacle to the development of comparative studies in this general area.[38]

(e) *Brian Tamanaha's 'core concept' of law.* An extraordinary proportion of the energy of analytical jurists has been taken up with trying to elucidate the concept of law. In his important work, *A General Jurisprudence of Law and Society* (2001), Brian Tamanaha has boldly tried to construct a broad 'core concept of law' that fits both state law and important manifestations of 'non-state law', including international, transnational, religious, customary and even natural law. His aim is to establish an over-arching concept for socio-legal studies as part of a positivist, realist, general jurisprudence in an era of 'globalisation'. At the same time, he is concerned to avoid what he sees as the legal pluralist trap of being over-inclusive by failing to provide any criteria for differentiating law from other social institutions, such as schools, hospitals and sports' leagues. He begins by accepting the main premises of Hart's legal positivism (the separation thesis and the social sources thesis), but in a brilliantly sustained piece of analysis he pares away all 'essentialist' and 'conventionalist' criteria of identification associated with models of law, such as Hart's, that treat state law as the paradigm case of law. For example, Hart's rule of recognition, acceptance by officials, the union of primary and secondary rules, efficacy, all functionalist assumptions, and even normativity, institution and system are rejected as necessary features of a core concept of law. Tamanaha is left with the proposition that law is whatever those subject to it attach the label 'law' to.

In a lengthy critique of this bold and illuminating effort, I have argued that Tamanaha's 'labelling test' does not work for a number of reasons, including that it involves using 'folk' (emic) concepts for cross-cultural 'analytic' (etic) purposes. Tamanaha's central thesis can be interpreted as a *reductio ad absurdum* of any attempt to construct a 'core concept of law' for the world as a whole. Of special interest in the present context, is the point that Tamanaha accepts that all the concepts that he rejects as candidates for *necessary* criteria of identification – such as union of primary and secondary rules, institutionalised law enforcement – are an *important* and *useful* part of the apparatus needed for describing, interpreting and explaining legal phenomena. During the course of two books (Tamanaha 1997, 2001) he illuminates a number of important concepts, including social order,

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37  The most notorious example of the elementary pitfalls surrounding terms like 'lawyer' is the senseless debate stimulated by Vice-President Dan Quayle when, in a speech to the American Bar Association, he asked rhetorically: 'Does America really need 70% of the world's lawyers?' (Quayle, 1991). The term 'lawyer' was not defined and there was no basis in fact for this figure in respect of any of its possible meanings. In the ensuing debates Quayle's dictum was linked to the alleged 'litigation explosion', regulation of admission to the legal profession, and the economic role of lawyers. For an excellent critique of this 'debased debate', see Galanter (1998, pp. 743–747). See further Galanter (1992). Quayle's attack was taken up by economists. E.g. Symposium on 'Do Lawyers Impair Economic Growth?' (Symposium, 1992). Several of the commentators agreed that the debate was debased, that the international data were weak, and that cultural and other differences made it virtually impossible to correlate lawyer populations with economic indicators transnationally (see, e.g. Cross, *ibid.* at p. 654). For instance, Epp criticised Magee for purporting to compare figures about West German private practitioners with American figures that included government lawyers, corporate lawyers, judges and law teachers (themselves all vague categories) (Epp, *ibid.*, p. 597). For an equally dubious use of comparative statistics about judges and lawyers see Posner (1996, pp. 21–22).

38  The comparative study of legal professions is one of the most developed fields of transnational legal sociology. The extent to which it is still hampered by basic conceptual problems is clearly illustrated in the pioneering studies of Abel and Lewis (1988–89) and more recently Barcello and Cramton (1999). However, leading scholars in the field, such as Philip Lewis, Terry Halliday and John Flood, have developed sophisticated conceptual tools for surmounting or by-passing some of the more elementary problems of comparison and generalisation. Moreover, legal practice is rapidly changing, not least in respect of corporate practice and 'global' law firms, whose partners may indeed travel well. Efforts of European integrationists to 'harmonise' legal education and increase professional mobility are creating new problems, as they purport to 'solve' them.

custom, ideology and coercion, but because the focus is on the necessary criteria for identification of one concept, law, he does not deal with them systematically as a group:

> 'I, for one, would have welcomed a more extensive analysis of many other concepts, including function, group, dispute, norms, normative orders, system, institutionalization, and legal subjects ... Analytical jurisprudence needs to move beyond focusing on individual concepts to concentrate on groups of concepts, conceptual frames, and specific discourses.'
>
> (Twining, 2003, p. 254)

This is part of the thrust of the present essay.

### (a) Hohfeld's fundamental legal conceptions

The most significant figure in American analytical jurisprudence, Wesley Newcomb Hohfeld, drew almost entirely on Anglo-American sources, focused on fundamental legal conceptions as applied in judicial reasoning in the Anglo-American tradition, and explicitly addressed an American audience (Hohfeld, 1913).[39] In short, his sources, audience and focus were quite local, even parochial, but his contribution had a potentially broad significance.[40] I shall suggest below that his analysis of rights is broadly applicable to legal discourse in other cultures, at other times, and to at least some other contexts.[41] Hohfeld died young. In the United States his work was taken up by early Yale Realists, notably Corbin, Cook and Llewellyn, first to criticise the over-use of abstract concepts in law talk (the narrower categories theme)[42] and later, usually quite quietly, to use it as a foundation for exposition in such projects as the Restatement on Contracts, the Revised Uniform Sales Act and the Uniform Commercial Code.

Hohfeld's analytical scheme has been the subject of widespread misunderstanding, different interpretations, criticism, refinements and extensions. Questions have been raised about his choice of terms, about particular aspects of the scheme, the relationship between the two boxes (claim-right – power), its completeness, its limitations and its utility (Halpin, 1997). For present purposes, I shall assume that the basic scheme is valid, that it can be interpreted in a way that meets all the basic criticisms, and that it is useful in showing up confusions and ambiguities in many kinds of law talk, including judicial reasoning, legislative arguments, legislative rules, and expositions of doctrine. The question here is: how well does the basic scheme travel?

A robust interpretation of the scheme can be summarised as follows:[43] The scheme decomposes all legal relations into their basic components, like atoms as they were conceived in Hohfeld's day.[44]

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39 Hohfeld (1914) believed that American students should be exposed to general jurisprudence. His broad vision is set out in his address to the AALS 'A Vital School of Jurisprudence and Law'.

40 On particularity and 'parochialism' in respect of audience, sources, focus and significance see Twining (2000, Ch. 5).
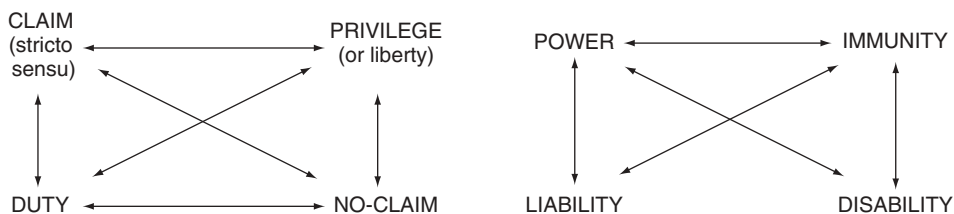
41 I shall not deal here with matters that might limit the applicability of Hohfeld's scheme, for example, whether it presupposes binary rules or whether it involves an ideological bias towards individualism.

42 See Llewellyn's 'common points of departure of Legal Realism', No. 7: 'The belief in the worthwhileness of grouping cases and legal situations together into narrower categories than has been the practice in the past. This is connected with the distrust of verbally simple rules – which so often cover dissimilar and non-simple fact-situations ...' (Llewellyn 1962, pp. 27–28, 56–59, 413, discussed in Twining, 1973, pp. 137–138, 330–333).

43 This is my interpretation, but it is quite close to John Finnis (1972).

44 Hohfeld had studied chemistry and Cook, his promoter, physics before moving into law. They both were given to using analogies from the physical sciences.

1. The word 'right' is ambiguous. In legal usage it has four primary meanings: claim (another ought or must); privilege (I may); power (I can [alter the position of another]); immunity (another cannot).

2. These four concepts denote relations between legal persons.[45] A statement of the kind 'A has a claim-right vis-à-vis B in respect of Z' denotes the relation between *two* persons (A and B) in respect of *one* subject (Z – activity, typically an act or omission) and *one* legal rule. Failure to recognise this is one of the most common sources of misunderstanding of the scheme.

3. Each of the four terms has a correlative and an opposite, as follows:

   - claim-right is the correlative of duty and the opposite of no-claim;
   - privilege is the correlative of no-claim and the opposite of duty (i.e. no-duty [not]);
   - power is the correlative of liability and the opposite of disability;
   - immunity is the correlative of disability and the opposite of liability.[46]

CLAIM (stricto sensu) ↔ PRIVILEGE (or liberty)

DUTY ↔ NO-CLAIM

POWER ↔ IMMUNITY

LIABILITY ↔ DISABILITY

4. Because each of the terms in each box can be defined in relation to each other, only two of the terms are strictly necessary within the scheme:

   A's claim vis-à-vis B = B's duty to A
   A's privilege vis-à-vis B = B's no-claim against A = A's no-duty (not) to B

   Thus in the first box, the three other terms can be expressed by duty or its absence. Similarly, in the second box the four terms can be expressed by power/no-power. The extra terms are convenient to avoid circumlocution. I shall follow convention in treating duty and power as the main concepts, but this is for reasons external to Hohfeld's scheme.[47]

5. The noun-form terms can be replaced by verbs without any change of meaning, for example:

   - A has a claim-right against B = B ought
   - A has a duty = A ought
   - A has a privilege = A may (not-ought)
   - A has a power = A can
   - A has a disability = A cannot
   - A has an immunity = B (others) cannot

   The substitution of verbs for nouns has the advantage of removing the danger of reifying noun-forms (hypostatisation) and provides a useful link to the Bentham-Hart techniques of elucidation, for it is difficult to elucidate words like 'may' and 'ought' outside standard sentences of the kind 'A may', 'I can' (Hart, 1953).

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45  Naffine (2003) usefully revisits the complexities of the idea of legal personhood.

46  As subsequent commentators have emphasised, Hohfeld's specific choice of terms is unimportant as the meaning of each term is stipulated in this context. For example, I have substituted 'claim' and 'no-claim' for Hohfeld's 'right' and 'no-right'.

47  For example, if one accepts a distinction between absolute (e.g. a duty not to be cruel to animals) and relative duties, then some duties have no correlative claim-rights, but – in Hohfeld's interpretation – all claim-rights are relative.

6. 'The relevance of "legal remedies" to the defining of terms in his scheme is left undetermined by Hohfeld' (Finnis, 1972, pp. 380–381).

7. A natural language may or may not have a word or words with more or less equivalent meanings to Hohfeld's terms. Or it may have several approximate synonyms for one term. For example, Hohfeld's 'privilege' can be rendered by 'liberty' or 'licence', provided that it is defined in the same way. The English language distinguishes between 'ought', 'must', 'should' and 'shall'. When used to express norms these words usually suggest different degrees of emphasis or strength, but in Hohfeld's scheme they are all rendered by 'duty'. They are different kinds of 'ought'. Conversely, Hohfeld invented the term 'no-right' (= 'no-claim') and used 'power', 'disability' and 'immunity' differently from ordinary usage.[48] Thus, if one identifies a culture that has no words for expressing any of Hohfeld's terms, this does not mean that Hohfeld's scheme cannot be applied to that culture, any more than the fact that the Tiv may not have had terms or concepts equivalent to latent function or phoneme or bilharzia does not mean that such analytical concepts cannot be applied to them. However, if there is a difficulty in rendering 'ought', 'may' or 'can' in a local language, this should set some lights flashing, suggesting that how the culture copes without them may be significant.[49]

On this interpretation, Hohfeld's scheme is best interpreted as an analytic scheme designed for scholarly use. It is a set of tools for decomposing 'law talk' into its basic elements. Some confusion has arisen as to whether or not it would be a good idea to use the scheme as part of the 'folk' concepts of English and American law, that is as concepts for expressing the content of legal rules. This point was discussed in relation to some of the early Restatements and the Uniform Commercial Code. The prevailing view was that Hohfeldian analysis should be used *sub silentio*; the draftsmen should check that their texts were consistent with the basic conceptual scheme, but the more awkward or less familiar terms should be avoided. Karl Llewellyn was also keen wherever possible to use verb forms rather than abstract nouns in drafting the UCC.[50]

Assuming that this interpretation is broadly correct and that the scheme, so interpreted, is valid, how well does it travel? There is some evidence to support the thesis that it travels rather well across fields of law, geographical space, time and even some other disciplines. For example, Hohfeld's own analysis showed quite convincingly that it transcended different fields of substantive Anglo-American law. Others have extended this to other common law countries,[51] to civil law systems (Belvedere, 1997; Van Hoecke, 2002) to the European Union (Hilson and Downes, 1999), and to

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48    I do not discuss here some of the difficulties related to the second box over and above the choice of terms, nor criticisms of Hohfeld's use of 'opposites'. For a critical re-examination of Hohfeld's scheme, see Halpin (1997). In a recent article Halpin has argued that Hohfeld's 'square of opposition' should be replaced by 'a triangle of possibilities' (Halpin, 2003).

49    One example might be attempts by Western scholars rationally to reconstruct or 'restate' the norms of a group that is inarticulate or reticent about its rules or seems not to think in such terms e.g. Hoebel's attempt to reconstruct the basic postulates of Cheyenne culture (Hoebel, 1954, pp. 142–143) or the controversy surrounding the Restatement of African Law project (Allott, 2000, Twining, 1963; 2003, pp. 231–237). A reluctance to articulate general rules does not preclude the use of 'ought', 'may' and 'can' in respect of particular situations.

50    For example, Corbin reports that when Williston was made Reporter on Contracts for the American Law Institute he told Corbin that he accepted Hohfeld's analysis, but not his terminology, and he asked Williston and Oliphant to check that the drafts were consistent with Hohfeld's concepts (quoted in Twining, 1973, p. 397) Corbin reported that Bigelow adopted Hohfeld's analysis in his preliminary work on the Restatement of the Law of Property. On the UCC see Twining, 1973, pp. 97–98, 137, 416. Compare the European Communities Act 1972, s. 2(1).

51    For example, it is a favourite of older Indian and Australian textbooks on Jurisprudence, e.g. G. Paton (1946), M.M. Nair (1986). Salmond's *Jurisprudence* continued to be used in India as a standard text long after it had been largely superseded in the United Kingdom. Sarkar (1973, 1981) speaks of it as having 'been with students, the Bench and Bar for the last seven decades' (Preface).

English legal history (Paton, 1954; Hallis, 1930). Hohfeld himself was cautious about its extension to non-legal contexts, but others have applied it to moral and political discourse. John Finnis has claimed that 'clear-headed familiarity with Hohfeld's scheme can bring with it awareness of the questions regularly begged when 'claims of right' are raised in law, politics and moral debate' (Finnis, 1972, p. 377). More controversially, Hoebel used it in his *The Law of Primitive Man* (Hoebel, 1954). Some anthropologists have reported that they found it helpful, but it would require further investigation to test out its applicability to 'radically different cultures'.[52]

One way into probing its general applicability is to ask whether it fits all normative systems. To put this in simple terms: Can all normative systems be reconstructed in the language of 'must', 'may' and 'can'? On my interpretation of Hohfeld, I believe that the answer could be in the affirmative; at least it has a very wide application. This is a complex issue, which depends in part on how the term 'normative system' is used, for the question may be tautologous. I shall not pursue it at length here, but it may be useful to give a simple example. You and I are playing chess. Towards the end of the game, you only have your king left. I see that if I move my knight to QB4 in accordance with the rules you will be in check. I *may* move my knight, I *can* by doing so put you in check (i.e. change your situation). As a result of this move you *must* move the king. I *may not* move my pawn backwards. I *cannot* mate you in one. And so on. My students sometimes object that it is odd to talk of a duty to move your king and of my claim-right that you move it. I reply that one does regularly use 'must', 'may' and 'can' in relation to chess moves and more important, one can reconstruct chess moves into this language. To be sure, it is an extension of ordinary usage to use 'duty' here, but analytically it is correct. Law, morals, politics and chess may have different kinds of 'oughts', but if 'I ought' = 'I have a duty' then a chess 'ought' = a chess 'duty'.[53] Thus relations under several normative systems can be decomposed into basic Hohfeldian units.

This argument is not dispositive. For we might identify a normative system that does not fit Hohfeld's scheme.[54] A different counter-example would be a culture or social system whose ways of social ordering do not depend on a normative system. This is ethnographically interesting in relation to debates about the extent to which 'customary law' can be appropriately articulated in terms of substantive rules without some distortion.[55]

A common objection to Hohfeld's scheme is that it is 'reductionist': he reduces all legal (perhaps all normative) relations to eight (or even two – see above) basic concepts. This is true, but some would take that as a compliment. It would be a criticism, if it can be shown that some legal relations are not reducible in this way. If the point is that Hohfeld's account of 'rights' is not comprehensive, this is correct and suggests a limitation. His analysis is only the beginning of wisdom on rights. As Hart and others have shown (quite apart from any faults in the scheme itself), Hohfeld did not address such questions as: is there a common thread running through the four different meanings of 'right'? Are there significantly different kinds of duty, power, liability and so on? What is the relation between rights and other related concepts such as interests, benefits, entitlements and needs? (Sen, 1981; Hart, 1982; 1983; Martin, 1993).[56]

These are complex issues that require sustained investigation, interpretation and analysis – just the kind of issues that should be addressed by general analytical jurisprudence. For my immediate

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52  The phrase is borrowed from J. Barton et al. (1983).

53  This formulation is intended to be neutral about the relationships between law, morals and politics.

54  A borderline case is a system of prudential rules of thumb (Twining and Miers, 1999, pp. 14–15, 124–125, 136–138; Schauer 1991, pp. 104–111).

55  See above n. 49.

56  The reductionist argument is reminiscent of the exchange in Calvino's *Invisible Cities* between Kublai Khan (a prototypical reductionist) and Marco Polo (a post-modernist (?), opposed to closure). The Great Khan sees a game of chess, like his conquests, being reduced to nothingness: '... black square or a white one. By

purpose, it is sufficient to make a weaker claim that, if one accepts one or other version of it as valid, the Hohfeldian scheme is a powerful analytical tool that travels some distance across space, time, cultures and disciplines.

## (b) Airports and prisons[57]
### *'Only the name of the airport changes.' (Calvino)*

Are prisons like airports? Airports are an example of a modern institution that has a basic uniformity transnationally, for fairly obvious functional reasons. Safe take-offs and landings, ensuring a smooth flow of passengers and goods, and other aspects of security contribute to a high degree of uniformity in respect of the basics. International and national standards tend to reflect such uniformities more than they explain them. Of course, airports vary in details from the point of view of pilots, managers, airport officials, regulators, passengers, their families, smugglers and other users. Airport communities may vary. Airport technology and architecture have a history. Nevertheless, there is a sufficient similarity in respect of basics to make comparison and generalisation relatively easy.[58] So too 'airport' and related concepts are relatively unproblematic for most purposes. There will be some borderline cases and a few deviants: among international airports, Lagos airport is regularly cited as a deviant, but no one doubts that it is an airport.

Are prisons as uniform as airports? At first sight, there are several reasons for doubting this. For example, penal philosophies differ significantly. There seem to be more borderline cases than with airports (e.g. labour camps, custodial mental hospitals, borstals, open prisons, privatised institutions, juvenile facilities). While incarceration has been known throughout the ages, it is standard to talk of 'the modern prison' as a relatively recent invention, historically contingent rather than a necessary or natural form of punishment (Foucault, 1979; Ignatieff, 1978; Bender, 1987). It is not functionally related to basic human needs, except through the values of dignity and liberty. Its functions are contested. For such reasons one might expect that comparison and generalisation would be much more problematic in respect of prisons than of airports. But a brief foray into prison literature suggests to me that the conceptual difficulties can easily be exaggerated. I shall illustrate this briefly with two examples: The UN Standard Minimum Rules for Treatment of Prisoners (1955) and Vivien Stern's powerful book, *A Sin Against the Future: Imprisonment in the World* (1998).

The Standard Minimum Rules (hereafter SMR) were promulgated by the UN in 1955 and have been signed by a large number of member states of the UN.[59] They have been influential on other international instruments[60] and on a fair number of national and domestic regulations and

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disembodying his conquests to reduce them to the essential, Kublai had arrived at the extreme operation . . . it was reduced to a square of planed wood.' But Polo sees the same square as the start for an endless enquiry starting with the history of the tree from which it was cut (Calvino, 1974, p. 131).

57  This section draws heavily on Rodley (1999), Human Rights Watch (1993), Morris and Rothman (1995) and Stern (1998). This case study is limited to semantic issues relating to prison conditions. More ambitious attempts at comparative analysis include Weiss and South (1998) and Matthews and Francis (1996).

58  See, for example, the entry on 'Airport' in 1 *Encyclopedia Britannica* (1973).

59  In 1977 the SMR were extended to cover persons arrested or imprisoned without charge (art. 95). The SMR, although earlier in time, can be read as a concretisation of Article 10 of the International Covenant on Civil and Political Rights (1966), which provides that 'All persons deprived of their liberty shall be treated with humanity and with respect for their inherent dignity of the human person'. By 1998 the Covenant had been ratified by 140 countries and 93 had become parties to the optional Protocol (1966) (Rodley, 1999, p. 64).

60  In particular, the European Prison Rules (Council of Europe, 1987) are very close to the SMR, but more detailed. It fitted the conditions of Western Europe, but after the expansion of the Council to include former Soviet bloc countries, questions have arisen about their applicability (Stern, 1998, pp, 196–197). The SMR is just one of an extensive accumulation of international and regional documents relevant to treatment of prisoners, only some of which are binding (perhaps the most important are the Torture Conventions). Some of them are more detailed than the SMR.

standards. They are frequently used as a template by official monitors, campaigning NGOs (e.g. Human Rights Watch[61], Penal Reform International). In my experience, they are a very convenient reference point for consultants working for the World Bank or other Western donor agencies in reviewing criminal justice systems in African countries. They feature in many training programmes for prison officers and in some countries prisoners have a right of access to SMR (Human Rights Watch, 1993). The United Nations has promoted them as a model for local regulation of prisons. In short, the SMR is a not insignificant document, even though few prison systems in the world in fact meet all of its minimum standards and the United States, China and Japan have largely ignored them (Stern, 1998, p. 196).[62] It is important as an aspirational document, as a guide, and as a basis for comparing and evaluating prison conditions transnationally.

The SMR contains 91 articles articulated in over 5,000 words. It lays down principles of impartiality and non-discrimination and covers most basic aspects of prison conditions and regimes. It contains no definition section and is expressed in relatively non-technical language.[63] It anticipates problems of over-generalisation by a series of devices. 'Prisoners Under Sentence' are treated as the paradigm case and the Rules extend, so far as applicable, to four other categories: Mentally Abnormal Prisoners; Prisoners Under Arrest or Awaiting Trial; Civil Prisoners; and, by later amendment, Persons Arrested or Detained Without Charge.[64] The language of the rules is generally more abstract and less precise than would be appropriate for local regulations. This allows for local variations within a reasonably clear and coherent framework (cf. Twining, 2003a, pp. 13–15).

The main concessions to the difficulties of generalisation are three express disclaimers set out in the Preliminary Observations. First, the rules 'seek, only on the basis of the general consensus of contemporary thought and the essential elements of the most adequate systems of today, to set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions' (Art.1).

Secondly, it acknowledges that:

> 'In view of the great variety of legal, social, economic, and geographical conditions of the world, it is evident that not all of the rules are capable of application in all places and at all times. They should, however, serve to stimulate constant endeavour to overcome practical difficulties in the way of their application, in the knowledge that they represent, as a whole, the minimum conditions accepted as suitable by the United Nations.' (Art. 2)

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61   See especially, Human Rights Watch, *Global Report on Prisons* (1993), which in turn is based on 18 prior national reports.

62   Advances in improvement of prison conditions in the U.S. (and the recent retreat under the Prison Litigation Reform Act 1995) seem to have proceeded with almost no direct reference to the SMR, perhaps because the natural starting-point was the U.S. Constitution (especially the 8th Amendment, which has different wording from most international documents). After Federal Courts abandoned their 'hands off' approach in the 1960s, it was probably inexpedient to refer openly to foreign sources (Feeley, 1996, p. 47). However, insofar as these advances were strongly influenced by senior correction professionals who were involved in transnational networks the SMR and American developments have to some extent a shared basis in a 'master idea' of rehabilitation (Feeley, *ibid*). However, the United States has reported to the UN within the framework of SMR (e.g. ABA, 1974).

63   The headings include the following terms: 'prisoners', 'medical services', 'discipline and punishment', 'instruments of restraint', 'information to and complaints by prisoners', 'contact with the outside world', 'institutional personnel', 'inspection', all of which avoid specificity and technical precision. A few terms approach legal terms of art, especially 'cruel, inhuman or degrading punishments', 'prisoners under sentence', 'untried prisoners' (defined in 84(1)), but these are exceptional. It would be interesting to know how far this terminology at the time reflected language used by prison professionals in talking with each other transnationally.

64   All of these categories raise questions of transnational transferability, for example criteria regarding 'insanity', 'mental abnormality' and imprisonment 'by order of a court under any non-criminal process' are left undefined.

Thirdly, it allows for experiment and practices, 'provided these are in harmony with the principles and seek to further the purposes which derive from the text of the rules as a whole' (Art. 3).

Despite these caveats, or perhaps facilitated by them, the rules deal in a fair amount of detail with such matters as registration, separation of categories of prisoners, accommodation, hygiene, clothing and bedding, medical services, information, contact with the outside world, books, discipline, and so on.

The SMR have been criticised for being too vague, for being based on unrealistic Eurocentric economic assumptions, for dealing inadequately with some important topics (e.g. in relation to women and juveniles), and for giving too much discretion to prison authorities, for example, restricting prisoners' contacts to family and 'reputable friends' (Art. 37; Stern, 1998, p. 196). No doubt some think that they go too far, others not far enough. The text is based on a contested philosophy of rehabilitation.[65] However, to an outsider it seems remarkable that after almost 50 years the SMR still retains a fair degree of credibility as an aspirational document that has been applied to nearly all of the world's prison systems. It raises few conceptual difficulties ('cruel, inhuman, or degrading' is an exception) (Twining, 2003a, pp. 13–15, 33–34) and a leading international lawyer confidently claims near-universal validity for them:

> 'Regulation of prison conditions is quite properly the province of domestic legislation, not least because familiarity with local custom, cultural traditions, and standards of life will be an important factor in determining what conditions are acceptable to humane society and what are not. There are some issues not susceptible to relative interpretation, however, and it is against these excesses that the international community has set its face; in particular in the drawing up of the UN Standard Minimum Rules for the Treatment of Prisoners.'  (Rodley, 1999, p. 14)

Vivien Stern's *A Sin Against the Future* is a powerful book by a leading campaigner for prison reform worldwide. It is a polemic that argues that prisons everywhere are outdated institutions, which fail to meet the needs of societies in the modern world, and which are especially harmful in poorer countries. She uses the Standard Minimum Rules as the starting-point for a devastating critique of existing conditions in nearly all countries. She examines the successes and failures of attempts to implement the kind of standards that they uphold and she advances proposals for rethinking alternatives to imprisonment. The interest of the book, in the present context, is the extent to which someone who is quite sensitive to cultural and ideological differences, as well as to problems of funding, feels able to base her argument that prison is an outdated concept not only on general normative principles but also on bold empirical generalisations (see Table 2).

I do not have the expertise to judge how far there is evidence that supports Stern's assertions of patterns and trends that are worldwide or very widespread. What is interesting in this context is that she has at the very least provided a whole raft of plausible global generalisations or hypotheses that, with only minor refinements, could be tested empirically. Insofar as they are broadly true they seem to give powerful support for her argument that prison is an outdated concept 'that does not work' (Stern 1998, pp. 28off). This suggests that conceptually and empirically prisons are more readily the subject of comparison and generalisation than many other legal institutions. This is not to say that comparative prison research is easy, for there are, of course, real problems of access to reliable data, interpretation and explanation.[66] Nor does it mean that there is a consensus about values, still less that one can expect agreement about reform. But it does suggest that there is a basis for sustained comparative study and debate across cultures and for the compilation of transnational statistics based on standardised categories.

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65   Jonathan Simon has suggested that the treatment of prisoners cannot be separated from the prevailing ideology of imprisonment. However, basic principles of humane treatment are supported by the international regime of human rights quite separately from the ideology of rehabilitation.

66   On the difficulties of comparing penal policies in England and the Netherlands see Downes (1988).

**Table 2** Stern's generalisations[a]

**Examples of global patterns**

'Rio de Janeiro, Bishkek, Harare and Brixton are miles apart, separated by geographical distance, culture and history, yet prisoners and prison staff from any of the four would instantly recognise the activity going on in the other three. They would know at once the rules of survival . . . They would recognise the buildings from the outside and at a distance as prisons . . . the prison smell . . . the problems caused by bodily functions . . . the 'boss-man' of the room.

Some things are not the same . . . Yet in spite of the differences, it is the sameness of imprisonment that stands out, the features that are common across countries and cultures, irrespective of the level of economic development or form of government.' (pp. 5–7)

- About nineteen out of twenty prisoners will be male, mostly young men. (p. 7)
- 'A large proportion of the world's prisoners are in prison for stealing and breaking into houses.' (p. 8)
- Madness, suicides, drug addiction, mortality rates are above the national average.
- 'Developing countries all have imprisonment as the cornerstone of their penal systems, even though it makes less sense than it does in the rich world.' (p. 12)
- There are great variations between countries in imprisonment rates. (pp. 29–31). The use of imprisonment is high and rising throughout the world. (p. 11) Imprisonment and fines are the main punishment.
- 'Nearly all women to be found in prisons around the world are poor, exploited and abused.' (p. 7)
- Prisons contain disproportionate numbers of minorities and/or foreigners and persons from poor, violent or deprived backgrounds.
- Illegal drugs have a disproportionate effect on prison numbers, and prison life. A high proportion of prisoners are there for drug-related offences. More drug addicts are created by the prison environment. However, beliefs about the scale of drug addiction in prisons is not borne out by research (US and Sweden). (pp. 121–122)
- 'Prisons are, of necessity, rule-bound.' (p. 194)
- In many countries the status and morale of most prison staff are low. (p. 130)
- Prisoners' codes tend towards immediate gratification.
- Most surveys show that people consistently underestimate the severity of sentencing. (pp. 313–314)

Normative generalisation (for those in prison) (ch. 10)

- Observe the basic principles underlying the SMR.
- 'Men come to prison *as* a punishment, not *for* punishment'. (p. 197)
- Give prisoners the same legal protections as other citizens.
- Respect the dignity and humanity of prisoners.

Gloomy prognostications

- It is impossible to train people for freedom in conditions of captivity. (p. xvi)
- semble: nearly all efforts at rehabilitation have failed in the long run (p. 198)
- There is no such thing as a good prison. (p. 248)
- Prison reform reports 'say more or less the same thing and normally they are not implemented.' (p. 254)
- Around the world the prison-industrial complex will increase pressure for 'barbed wire, prefabricated cells, and electronic door-locking equipment'. (p. 301)

**Prescriptions**

- Reduce the use of prison to a minimum.
- '[T]wo fundamental and deeply reasonable requirements, first a recognition of the harm suffered by the victim, and secondly protection from violence and abuse, might form the basis for a new set of purposes for dealing with criminal acts.' (p. 336)

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[a] Reconstructed from Vivien Stern, *A Sin Against the Future: Imprisonment in the World* (1998).

It is beyond my competence to explain why prison and related concepts appear to travel rather well. I suspect that much of the explanation lies in diffusion, which is likely to involve a complicated story. The *Encyclopedia Britannica* entry in 1973 boldly stated:

'Few persons realize that the prison system as it operates in nearly all parts of the world is largely an American development having its main origins late in the 18th century. The evolution of the prison system was primarily the consequence of the growth of new philosophies of human conduct. Prominent in this connection was the decay of faith in earlier methods of retributive vengeance designed to eliminate the criminal offender, ostracize him, or permanently stigmatize him. Concurrent with the decline of vengeance there developed a conception of rational man which assumed that criminal behavior can be regulated by a system of lesser punishments administered in an objective and impersonal manner by specialized agencies of government.'

(Enc. Brit. 1973, p. 556)

While this statement may be correct in linking the growth and spread of modern prison systems with Enlightenment rationalism and the rise of bureaucracy, it is strange that no mention is made of European Enlightenment thinkers such as Beccaria and Bentham, colonialism as an instrument of diffusion, and two important networks for the diffusion of ideas: the transnational contacts between corrections professionals, which started in the mid-nineteenth century; and the international human rights movement's concern with prisoners after World War II, in the wake of the Holocaust and experiences of concentration camps. Malcolm Feeley has suggested to me that the International Congress of Prison Administration and the American Correctional Association pioneered national (and possibly transnational) standard-setting quite early. If so, this may have been an early example of the internationalisation of bureaucracies. Thus relative uniformity of modern prison design in respect of both architecture and regimes may have been in part a result of sustained exchange of ideas in the formative period – an early multi-national creation (O'Brien, 1995, pp. 214–215). Feeley has also argued in respect of the United States that there was a fundamental identity of interest in bureaucratisation between modernising prison professionals, who sought greater efficiency and effectiveness (and hence greater control), and advocates of prisoners' rights who sought the protections offered by uniform standards and the rule of law (Feeley, 1996). If these two ideas are correct then Feeley's argument about the United States might be extended geographically. Be that as it may, the fundamental reason for a high degree of uniformity in ideas about prisons probably lies in ideas of modernity, bureaucracy and diffusion.

The SMR provides a set of workable international norms, which can also serve as comparators (Twining, 2000, pp. 164–145, 192). Stern advances some bold generalisations, which appear to be based on the best available data.[67] If these are treated as widespread generalisations about modern conditions and trends, subject to exceptions, they seem plausible. At the very least they can serve as hypotheses, which, with only some refinements, are probably empirically testable in principle. What might our particularist sceptic say to these broad transnational and cross-cultural normative and empirical generalisations?

For purposes of comparison and assessment of state prisons according to international norms, the first question is: Are these generalisations meaningful? It seems to me that both the SMR and Stern's generalisations can be applied and tested against the state prison system of almost any country.[68] The standards may not be achieved (or even accepted) and not all of the generalisations will be confirmed in particular cases, but it is not because they do not 'fit' conceptually.

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67  Of course, availability and access to reliable data are acknowledged to be major problems of prison research in many countries (Rodley 1999, pp. 7–14; Stern 1998, pp. 28–34).

68  Stern acknowledges her account does not fit China or Japan as well as most, but does not explain why.

In short, my thesis is that for purposes of comparison and appraisal of the health of prison systems according to international norms, the basic concepts of this kind of discourse about prisons 'travel well' in ways that discourse about legal professions, lawyers and legal education does not. [69]

The next question for the sceptic is: are the generalisations empirically true? Both Stern and Rodley emphasise the gap between aspiration and reality: the SMR provides a standard, the generalisations suggest how far actual conditions fall short of that standard. Suppose that the particularist sceptic accepts for the sake of argument that the discourse is meaningful and Stern's generalisations are empirically broadly true, but she remains dubious. There may be three different kinds of grounds for this: First, what one would learn about prisons in any country from such generalities would at best be superficial. One cannot 'understand' a prison system without reference to context: one needs local knowledge of history, culture, politics and so on. From the point of view of a historian or an anthropologist, Stern's account may be quite inadequate. To some extent this reflects differences in enterprises and concerns. Historians and anthropologists tend to emphasise uniqueness, difference, granularity and complexity. International lawyers and reformers, and quantitatively oriented social scientists are concerned to generalise, even if this involves some sacrifice of specificity. They complement each other. If understanding of a social institution normally requires both emics and etics, it could be said that the local historian or ethnographer of a prison system needs both workable analytic concepts and some knowledge of other prison systems as much as the generalist needs local knowledge.

A second objection, invoking the same argument about context, is that the description may be accurate, but *explanations* for particular deviations from international norms may be largely local – though not necessarily so. The reasons why Uganda and Japan diverge from SMR, even where divergence is similar, may be quite different. Again, the in depth study of local institutions may need to draw on general understandings as well as local knowledge to explain local phenomena (for example, most prison systems are under-funded; 'total institutions' tend to have particular dynamics; 'the dustbins of society' theme).

Third, Stern's broad account may be correct, the standards may be acceptable, but one needs local knowledge to know about the conditions for, and obstacles and constraints in the way of reform and the potential acceptability of particular measures. This seems to me to bite deeper into Stern's analysis than the first two objections. Her diagnosis and description of the situation in prisons worldwide is powerful and convincing, her prescriptions rather less so.

## (c) Corruption

### '*Gifts in Village Tradition*': a personal experience

*I had to see the Chief. I was seeking permission for a geophysics experiment in Northern Ghana for which we needed to dig four holes in the ground, a hundred metres or so apart, place copper tubes in them and connect them with wires to record small electric currents thought to image properties in the ionosphere. My local adviser and interpreter insisted I gave the Chief a bottle of whisky. I took it with reluctance, hiding it carefully in a brown paper bag. We sat on benches outside the Chief's hut with the people of the village gathered round. I paid my respects and explained my request as best I could. My advisor whispered, 'Give him the whisky'. 'Now', I asked, 'with all these people here?' 'Yes.' I tried to pass it unobtrusively in its paper bag but my adviser*

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69  There seem to be some good reasons why this is so: allowance is made in the SMR for differences in terminology and technical detail (e.g. SMR refers to prison personnel, officials, rather than specific designations such as warder or governor); Many of the terms relate to basic human conditions (e.g. gender, death, health, age) or to abstract values that are part of the established discourse of international law (inhuman, degrading, torture) or that the international community claims as universal (though they may be contested) such as liberty, dignity and non-discrimination. Others relate to standard features of modern bureaucracy.

*protested: it had to come out of the bag and be given so that all could see. There was a murmur of appreciation from the people, and very happy smiles on the faces of the Chief's counsellors who sat nearby.*

*On reflection I recognised that the transaction was the equivalent of a licence fee in a pre-literate society that kept no accounts. It differed from bribes in three ways. It was done so that all could see, not in secret. It was a benefit the Chief would share with his colleagues who were involved in the decision. It was modest in scale and did not make one person or group so wealthy as to be the envy of others. Village customs can be corrupted, but they provide no valid precedent or justification for bribery in the city (Osborne, 1997, p. 17).*

## Changing attitudes

I started my exploration of the literature on corruption in the expectation that the concepts and discourse in this area would not travel well. In the 1960s in East Africa it was commonplace that words such as 'corruption', 'bribery' and 'nepotism' when applied to African contexts were ethno-centric, sententious and neo-colonialist. Many African societies, the argument went, were communitarian and personalist, characterised by face-to-face relations involving reciprocity. One's primary loyalty was to family, clan, village or people rather than to one's employer or the state. This was not just individual loyalty, but rather part of communal membership and identity. In Ghana, for example, the practice of 'dash', the giving of small gifts to a chief or other person in authority, was a mark of respect and a duty. Similarly, 'dashing' a taxi-driver, waiter or servant was analogous to Western practices of tipping. The Arabic word 'baksheesh' made no distinction between gift, bribe, or tip.[70] Accordingly, to condemn such practices was a paradigmatic example of imposing Western values on African tradition. Any suggestion that African societies were corrupt, but Western societies were not, was dismissed as sheer hypocrisy.[71]

At that time, Western social scientists tended to interpret bribery and corruption in similar terms, without actually defending it. For example, Joseph Nye, in a much-cited article, argued that corruption can sometimes be useful for a country's economy (Nye, 1967). James Bayley balanced the harmful and beneficial effects of corrupt acts, suggesting, inter alia, that corruption may sometimes be beneficial as a substitute for a public works system, or by reducing the alienation of excluded groups, or 'by making the new system human in traditional terms' (Bayley, 1966). Colin Leys, criticised one of the first substantial studies of the subject relating to Africa (Wraith and Simpkins, 1963) for adopting a moralising approach, which treated British *mores* and British history as providing the model for dealing with the problem of corruption in Africa. Like the other commentators, Leys acknowledged that there was cause for concern, but attacked moralistic and universalistic approaches to the subject (Leys, 1961).[72]

Such attitudes did not involve condoning or justifying what they interpreted as clear examples of bribery and dishonesty – for example, a Minister demanding a large payment in relation to a competitive tender – rather they relativised the issues and warned against over-simplifying problems in this area.

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70  'The purely negative terms, 'bribe', 'briber', 'bribery', 'corrupt' and 'corruption' have no verbal counterparts in the ancient Near East. At the same time the concept of impartial judgment and the concept of a subordinate's offering which should be rejected by a judge have been formed' (Noonan, 1984, p. 14).

71  On later developments see Padideh Ala'i (2000) (linking Western discourse about corruption to different phases of colonial and post-colonial history). On the convoluted history of the idea of corruption in England, see Noonan (1984, Chs. 11–14).

72  Leys suggests that their 'formulation of the problem: "Why does the public morality of African states not conform to the British?" . . . contains an obvious enough answer: because they have a different social, economic and political system, and a different historical experience.' Leys (1965). See Noonan (1984, pp. 685–702) for a review and strong critique of the arguments. Early commentators who took a different, typically more macroscopic, tack included Samuel Huntington (1968) and Gunnar Myrdal (1968).

Since 1990 the general tone has changed dramatically,[73] as is illustrated by a report of an international conference in Uganda in 1996:

'The participants re-emphasized with dismay that some Europeans claim that "corruption is a matter of 'culture'" in developing countries, and that it would be culturally wrong for Europeans to "impose" their standards on the developing world. Participants described this argument as "totally misleading", as a gross distortion of traditions of modest hospitality and gift giving.[74]

The participants drawn from all five continents reiterated that the misuse of public power for private profit does not form part of any "culture". The criminal laws of all countries reflect their cultural norms in outlawing such conduct. In contrast, the practice of international corruption continued to be officially supported by some governments and business leaders in the north. It was a phenomenon found in trade within the developed world itself, '"but the effects there were far less devastating than they are in the south".'                    (Transparency International, 1996)

Activists engaged in the worldwide fight against corruption made this strong condemnation. Such views are widely supported. In 1997 Dr Ibrahim Shihata, then Senior Vice President and General Counsel of the World Bank, could write confidently: 'Practically all people who publicly address corruption condemn it, even though it would not exist at a wide scale without the participation of many.' (Shihata, 1997, p. 259). The extent of corruption and the seriousness of efforts to combat it are now a central indicator of 'good governance' as the World Bank, the OECD and Western aid agencies use the concept.[75] A survey of the literature suggests that Shihata's statement is essentially correct and is not confined to supporters of the World Bank. For example, Transparency International (TI), a non-governmental organisation founded in Berlin in 1993, has spearheaded a worldwide campaign against corruption and in support of national integrity systems. John Noonan's magisterial *Bribes* (1984) is especially harsh on the apologists. A widespread consensus seems to have gained sway among economists, lawyers, sociologists, political scientists and public administrators that, generally speaking, and especially in the long-term, the costs of corruption outweigh any benefits to the public interest, whether this is identified with economic growth, efficiency in government, democracy, fairness, or public confidence in the legitimacy of government. African commentators who in the 1960s might have complained about neo-colonial imposition of alien values, now condemn corrupt practices, but accuse the former colonial powers of hypocrisy in suggesting that corruption has been a specifically African or third world phenomenon. (e.g. Ruzindana, 1998, p. 51). Amartya Sen, in the past one of the foremost critics of the World Bank, treats corruption unequivocally 'as one of the major stumbling blocks in the path to successful economic progress' (Sen, 1999, pp. 275–278).

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73  'Only ten years ago, any mention of bribery and corruption at international meetings would have been brushed aside. It was viewed as too sensitive, too value laden, too culture bound, too vague to be the subject of international debate. Not any longer. The rapid proliferation of kleptocracies around the world has shed new light on the issue and on the perils of inaction. What is more, one of the outcomes of globalization has been to make apparent the need for international cooperation in fighting the pandemic' (Argyriades, 2001).

74  Standard distinctions between 'gifts' and 'bribes' emphasise amount, openness, and absence of a quid pro quo as characteristics of gifts. Covert or underhand behaviour is a good indicator that a particular practice is considered corrupt, despite the rationalisations of the perpetrators (Rose-Ackerman, 1999, pp. 92ff; Osborne, 1997, quoted above).

75  The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions extended the principles of the American Foreign Corrupt Practices Act to international businesses (came into effect Feb., 1999). See Rose-Ackerman (2002). See also, Council of Europe, Criminal Law Convention on Corruption (ETS No. 173, 1999), The E.U.'s Corruption Convention (OJ C 195, 1997). The main thrust of these measures is to extend extra-territorial jurisdiction to nationals involved in corruption offences relating to foreign public officials. Some limited provisions relating to bribery of foreign officials were sneaked in to the United Kingdom Anti-terrorism, Crime and Security Act 2001 (Part XII) on the basis of dubious arguments about links between corruption and terrorism (Walker, 2002, pp. 285–286).

Chinua Achebe has been one of the most eloquent critics of corruption in Nigeria. In 1984, in a blistering attack he wrote:

'Corruption in Nigeria has passed the alarming and entered the fatal stage; and Nigeria will die if we keep pretending that she is only slightly indisposed.' (Achebe, 1984, p. 38)

Yet in the 1960s Achebe, the novelist, was famous for exploring the destructive impact of colonialism on traditional African culture and values, using corruption as one of his central themes (e.g. Achebe, 1960).[76]

There is an enormous literature on the subject of corruption, and naturally there are differences of emphasis and disagreements about the epidemiology, causes, extent, impact and remedies for this 'disease'. Nevertheless, there appears now to be a very widespread prevailing view, which might be rendered as follows:

1. Bribery and corruption are universal phenomena, which have been condemned through the ages in all major cultures: Hebrew, Buddhist, Confucian, Hindu, Greek, Christian, Islamic and medieval as well as modern Western writings can all be cited against bribery and like practices (e.g. Noonan, 1984, Osborne, 1997).
2. Precise legal definitions of specific offences may vary, and there can be variations in the tolerance of particular practices,[77] but all cultures draw distinctions between appropriate and inappropriate behaviour by officials and other functionaries (e.g. Rose-Ackerman, 1999). For some time, TI defined corruption generally as 'The misuse of public power for private profit.' (Pope, 1998). Similar definitions are to be found in leadership codes, policy documents, and legislation in many countries, as well as in the academic literature. However, the scope has recently sometimes been extended in some instruments to criminalise bribery of officials by businessmen and even to some kinds of corruption involving private sector agents entrusted with power.[78]
3. Corruption is one of the biggest obstacles to sustainable development. It is inimical to effective, fair and efficient government. Rose-Ackerman summarises the perceived evils as follows:

'Corruption may have its roots in culture and history, but it is nevertheless an economic and political problem. It produces inefficiency and unfairness in the distribution of public benefits and costs. It is a symptom that the political system is operating with little concern for the broader public interest. It indicates that the structure of government does not channel private interests effectively. Political legitimacy is undermined if government permits some to obtain disproportionate gains at the expense of others.' (Rose-Ackerman, 1999, p. 226)

Even if corruption may sometimes have beneficial effects, all are agreed that it is harmful in the long-term and the costs outweigh the benefits. Today almost no one is prepared to defend corruption publicly (Shihata, 1997).

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76  The question arises whether there is a dislocation between Achebe's novels of the 1960s and his recent political writings about Nigeria. I suggest that there has been a shift of emphasis, but no substantial change of mind.

77  The TI *Sourcebook* (Pope, 2000, Ch. 2) contains a useful set of concrete examples of activities by public officials generally condemned as 'corrupt'. Compare the longer list in Caiden (2001, p. 17).

78  The 2000 edition of the TI *Sourcebook* extends the definition to cover the private sector: 'While corruption is defined as 'the misuse of entrusted power for private benefit', it can also be described as representing non-compliance with 'the arms-length' principle, under which no personal family relationship should play any role in economic decision-making, be it by private agents or by government officials' (Pope, 2000, Ch. 2). This meets some of the objections raised to the earlier definition discussed in the text. However, the issues raised in relation to bribery of private economic agents are more complex than those relating to state officials, where there is more likely to be a clear set of standards about appropriate behaviour.

4. Clear norms, limitation of discretion, and cutting down of opportunities (e.g. through deregulation) are necessary, but not sufficient conditions for combating corruption. The problem is widely recognised to be complex and intractable, but TI's *Source Book* suggests, there is a standard battery of tools for analysing the situation, attacking the problem, and building a national integrity system in any country (Pope, 2000).[79]

5. Public opinion is generally strongly opposed to clear examples of corruption. Where it appears to be widely tolerated this is more often than not due to resigned acceptance or deep political cynicism rather than approval. Even where certain corrupt practices are approved, the costs are such that public opinion needs to be educated about their damaging effects (Pope, 2000).

The international campaign against corruption is impressive. It is supported by forceful arguments derived from several disciplines, sometimes based on solid research, and it reflects a consensus that is a good deal wider than the free-market ideology of the World Bank and 'the Washington consensus'. It is probably too early to judge its effectiveness over the long run. Not all the supporters of the campaign would necessarily agree with some of the proposed remedies, such as deregulation, privatisation, and restructuring. I, for one, generally admire much of Transparency International's efforts and I am persuaded that much of what is being criticised is indeed very harmful to sustainable development. But I am left with some niggling doubts about some aspects of the ideal type. I shall try to probe these a bit further in relation to the subject of this paper, the concepts and underpinnings of discourse about corruption.

### Discourse about corruption: conceptions and assumptions[80]

#### (i) A BROAD CONCEPTION

A very broad conception of political corruption is to be found in Jeremy Bentham's recently published Constitutional writings.[81] For Bentham any self-interested or 'sinister sacrifice' of the public interest, any action, however trivial, which promoted the happiness of the few to the detriment of the many was political corruption. Far from being exceptional, he argued, corruption is an essential feature of representative government, because in the nature of things the interest of the rulers is in constant opposition to the interest of the ruled, except insofar as constitutional arrangements can bring about an artificial harmonisation of interests. I am personally sceptical of the universalist tendency of Bentham's analysis and of some of his particular proposals, but his analysis deserves attention not least because it is based on a more coherent concept of corruption than those used in the current international campaign. Of course, it would not be realistic to expect an effective transnational anti-corruption campaign to target any and every 'sinister practice'. Similar objections apply to John Noonan's essentialist and universalist analysis of corruption as a moral concept, which on close examination appears to be rooted in a specifically Judaeo-Christian idea of the imitation of a God who does not takes bribes (Noonan, 1984, pp. 702–706). This idea seems both theologically controversial and unsuited to transnational, multi-cultural and predominantly secular contexts of modern anti-corruption campaigns. From the point of view of analysing 'political

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79   On the obstacles to effective enforcement of anti-corruption measures see Levi and Nelken (1996). Most such analyses re-establish the link with local culture and history. Anti-corruption measures can have unintended side-effects: for example, in Uganda, in the mid-1990s, when a campaign against corruption was being waged by Government and Press, with World Bank encouragement, one effect seemed to be that magistrates and judges were fearful of granting bail or using alternatives to imprisonment in sentencing for fear of being accused of corruption in a rather overheated atmosphere.

80   I agree with Mark Philp (1997), who argues that the central puzzlements about 'corruption' are not semantic – nearly all usages of the term involve the idea of deviation from a sound condition; rather, it is what constitutes a sound or normal condition in politics or public life that is contested.

81   This section is based mainly on Bentham (1989) and Philip Schofield's excellent analysis of Bentham's views on political corruption and their contemporary significance (Schofield, 1989; 1996).

corruption' one of the main difficulties is establishing workable distinctions between practices that are appropriate targets for a transnational campaign and practices that may or may not be acceptable by local standards.

## (ii) A NARROW CONCEPTION

As we have seen, in 1998 TI pithily defined 'corruption' as 'the misuse of public power for private profit'.[82] TI has since modified it,[83] but this definition is still widely used in other contexts. Taken by itself it has three questionable features:

a. It focuses on the behaviour of public office-holders (O) (in bribes, on the bribees) and implies the exclusion of, or at least is silent about, the behaviour of bribers and other corrupters. Yet bribery and like activities involve reciprocal relations with great variations as to who takes the initiative, the balance of power, and other aspects of such relationships. Other definitions clearly include both briber and bribee.[84]

b. 'Private profit' (sometimes 'private ends') suggests direct or indirect gain to the office-holder. This seemingly excludes gifts to third parties in return for a quid pro quo supplied by O. For example, gifts to political party funds, or a university, or a relation of O. Similarly, 'private profit' hardly covers standard cases of nepotism or patronage when O may be behaving out of loyalty to family or friends or may be securing his or her position in office by appointing loyal supporters (e.g. Blair's 'cronies') or merely 'doing one's job' (e.g. a university President offering the prospect of an honorary degree to a potential (anonymous) donor).[85]

c. This definition assumes a sharp 'public'/'private' divide. At first sight this seems to restrict corruption to government officials, and The TI *Sourcebook* was initially confined in this way. But in other contexts the scope is extended to 'Persons in Positions of Responsibility' including 'representatives of the people, officers of the government in the legislatures and public service, and those with authority in political, economic and civil organisations' (Pope, 2000) – a much wider coverage. The public/private distinction is notoriously fragile and variable. What counts as 'public power or office'? What of situations in which there is no clear distinction between public and private, such as when a former public utility is privatised? And what of cultures that have no bureaucracy or officials or where no distinction is perceived between a leader and the people?[86]

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82  Cf. the broader definition by Alatas (1990, Ch. 1): '[C]orruption is the abuse of trust in the interest of private gain.' The *TI Sourcebook* (1998) continued: 'One cannot assume that corruption always means the same thing or has the same impact or motivation. Normative statements about corruption require a point of view, a standard of "goodness", and a model of how corruption works in particular instances' (Pope, 1998, Ch. 1). The passage stresses that the focus is here on the behaviour of public officials. However, the focus gets quietly extended later in the same document.

83  See above n. 78.

84  For example, the English Law Commission's draft Corruption Bill covers both a person conferring an advantage and a person obtaining an advantage. The Law Commission, *Legislating the Criminal Code* (1998, Law Com. No. 248, HC 524).

85  Alatas (1990, Ch. 1) distinguishes between 'personal corruption' (for private or family gain) and 'institutional corruption' (e.g. for the benefit of a political party or corporation). This chapter contains an ambitious attempt to produce a taxonomy of types of corruption based on the definition above.

86  The English Law Commission recommended in 1998 that, in the context of legislating against corruption, the old distinction between public and non-public bodies should be discarded as no longer having much practical significance. The Law Commission (1998: para. 4.78). This was linked with abolishing the presumption of corruption as no longer being important since the Criminal Justice and Public Order Act 1994 (allowing the court or jury to draw adverse inferences from refusal to answer questions or give evidence at trial) and because it might be held to contravene Art. 6(2) of the European Convention on Human Rights. On other measures under consideration in the U.K. see Walker (2002, pp. 185–186).

d. More fundamentally, this narrow conception focuses on deviance or formal infraction of settled standards by office holders, rather than broader contested conceptions of public interest or civic virtue (Philp, 1997).

On closer scrutiny, it appears that government officials in modern state bureaucracies are indeed the primary focus of the campaigns against 'corruption' spearheaded by TI, The World Bank, and other agencies. The main target is certain kinds of financial dealing that undermine efficiency and effectiveness and deplete public funds. So too the arguments of economists like Rose-Ackerman (1999) refer mainly to public sector corruption within 'modern' government and stress the harm done to economic development. The focus is almost entirely on bribery and extortion. Here the predominating view outlined above has a strong basis.

However, the terminology is misleading in two important respects. First, 'corruption' is here used in a much narrower sense than ordinary usage. The apologists and cultural relativists who are so sweepingly dismissed typically are using the term in a broader sense with particular reference to nepotism, patronage and social practices in traditional sectors of society. Patronage, nepotism, campaign finance and lobbying are ingrained in the political cultures of some countries that are leading the campaign against corruption. Not surprisingly, they have not been central targets in this campaign. Furthermore, this narrow view of corruption as a form of deviance assumes certain conditions that are by no means universal. It assumes the existence of public officials, a consensus about the responsibilities of office, a dominant view about what behaviours by officials should be treated as unacceptable, and underlying that a particular view of politics (Philp, 1997). All of these vary by time and place. A general campaign against corruption, transnationally and in particular contexts, may attract widespread support in respect of quite specific targets that may be considered outrageous by most standards – for example, embezzlement by a salaried civil servant, judges accepting bribes, or diversion of large sums of foreign aid into the pockets of political leaders. However, beyond such relatively clear cases ideological and cultural differences will tend to rise to the surface. Much of the economists' case against corruption is based on assumptions about a free market, foreign direct investment, sustainable development, and ideas of the public interest that are contested.

Secondly, while the main focus of TI's efforts is on the public service in a 'modern' bureaucracy, it has moved beyond the narrow definition (for example, the extension to 'persons in positions of responsibility' cited above). Similarly, TI's notorious world 'Corruption Perceptions Index' is based on the perceptions of foreign businessmen about the extent to which they need to 'oil the wheels' in any sector, not just the public sector (Transparency International, 2002/03).[87] One of TI's main targets is tax deductibility of foreign bribes by businesses. For example, some countries openly allow tax deductions for bribes or extortion as part of business expenses; others turn a blind eye to 'useful expenditures'.[88] Here the focus shifts from the bribee to the briber and is not consistently confined to bribery of public officials. Such extensions may be perfectly reasonable, but it is by no means clear that arguments about 'public interest' apply in the same way.

## (iii) EMOTIVE TERMS

The literature on corruption is pervaded by an array of strongly emotive terms: 'corruption' itself, 'bribery', 'extortion', 'racketeering', 'sleaze', 'nepotism', 'graft', 'favouritism', 'kickback', 'slush fund', 'barratry' (barreteria). Others are neutral or morally ambiguous, depending on context: 'gift', 'patronage', 'favour', 'tip', 'loan'. Some are generally neutral: 'reciprocity', 'exchange', 'access payment', 'fee',

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87    On the methodology of the Corruption Perceptions Index see Lambsdorff (2001).

88    E.g. the *Wall Street Journal*, 3–4 January 1997. See now the OECD Bribery Convention.

'influence', 'premium', 'contact'. A few may be positive (or euphemistic): 'take care of', 'look after', 'benefaction', 'subsidy', 'informal sector', 'networking', 'render one's dues', 'indulgence'.[89]

The word 'corruption' is strong on condemnation, but vague in respect of description. In some legal contexts the use of strongly emotive words has a function: torture, bribe, racketeering used in legislation or as part of some political campaign carry a strong note of condemnation that may be appropriate. But emotive terms have some dangerous tendencies: to use such terms prejudges a situation before it has been fully described and analysed; it assumes that the scope of the term and the reasons for condemning it are both clear. There may be pressures to extend or restrict the scope of the term because of the strong emotive charge: for instance, the European Court of Human Rights restricted the use of 'torture' to extreme forms of inhuman and degrading treatment, and held that the 'Compton techniques' of interrogation used in Northern Ireland (hooding, wall-standing, noise, deprivation of sleep and food etc.) were inhuman treatment but not torture under the European Convention on Human Rights.[90]

It is in practice often difficult to separate the descriptive from the condemnatory elements in words like 'bribery' or 'corruption'. Strongly emotive terms tend to over-inclusion[91] or under-inclusion in interpretation of their scope. Anti-corruption campaigns and scandals often involve scapegoating and exploitation of discontents that may have other roots. For such reasons it is doubtful whether the standard language for discourse about corruption is suitable for relatively detached analysis and comparison. I suspect that the literature on corruption has suffered because of the strong emotive associations of its terms. But the vocabulary of this discourse is so strongly entrenched in campaigns and in laws that one doubts whether it is feasible to construct a useful vocabulary for more detached analysis that has much hope of widespread acceptance.

### (iv) INDIVIDUAL AND SYSTEMIC CORRUPTION

Closely related to the emotive vocabulary is the point that much of the language used is derived from the sphere of individual morality, yet many commentators agree that the most harmful situations of corruption are systemic.[92] Again and again the campaigners against corruption are met with the defence: 'I had no option.' The foreign businessman who reluctantly 'oiled the wheels', claims that he would have lost the contract;[93] the underpaid and unpaid schoolteacher in a poor country who charges for marking written work; the English or American student who uses 'contacts' to gain an advantage in obtaining a job – all tend to use the same argument: 'Its not me, it's the system.'

Bentham saw very clearly that there is an important distinction between personal and systemic corruption and argued forcefully that the only solution for the latter evil is redesigning the system. (Bentham, 1989). He even argued that in that context laws punishing individual offenders were likely to be both ineffective and unjust. This is recognised in the actions of campaigners against corruption, but not in their rhetoric, for words like 'corrupt' are rooted in individual ethics.[94] A very clear example of this is the First Report of the Nolan Committee on Standards in Public Life in Britain

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89   Noonan (1984) is a superb source of insights into nuances in the vocabulary of bribes.

90   *Ireland v United Kingdom* (1976) 19 Yearbook of EHCR 512, 750.

91   See, for example, Caiden (2001, p. 17) whose list of 'Most Commonly Recognized Forms of Official Corruption' includes treason, abuse and misuse of power, intimidation, torture, unlawful detention, illegal surveillance, tax evasion, and even criminal behaviour.

92   The *locus classicus* is Myrdal (1944).

93   For an interesting account of the justificatory arguments used by company officers in the Lockheed Bribery Scandal (1975) see Noonan (1984, pp. 656–663).

94   Cf. P. Schofield on Bentham: 'Having recognized the systematic nature of corruption, Bentham was sufficiently realistic to see that attempting to punish individual transgressors by legal means was likely to be inadequate and unjust.' (Schofield 1996, p. 407).

which has been sharply criticised for adopting the stance that the maintenance of 'standards' in regard to MPs financial and other relations with outside bodies is essentially a matter of 'personal integrity' – a view that Bentham had devastatingly attacked nearly 200 years before (Nolan, 1995).[95]

*A job for analytical jurisprudence*

To sum up: corruption, bribery and related concepts used to be considered strongly culture-specific. Since the early 1990s, a broadly based transnational campaign against 'corruption' has gained ground. Both diagnosis and prescription are based largely, but not entirely, on the ideology of the Washington consensus concerning democracy, good governance, and human rights and on free market and related ideologies concerning 'development'. The main target of this campaign is various kinds of deviation from bureaucratic norms of impartiality, efficiency and 'service', especially financial dealings. The focus is primarily on 'public servants' of state bureaucracies (administrative corruption'), but is rapidly being extended to the private sector. When the campaign is expanded to deal with such matters as patronage and honours or 'traditional' contexts or business cultures that place heavy emphasis on personal relationships it encounters many more grey areas, for instance in respect of nepotism, and more generally, issues of loyalty that tend to be more local and culture-specific. Thus corruption and related concepts seem to travel reasonably well in respect of the modern public sector of nation states, especially state bureaucracies, but are more problematic outside this specific context. The strongly emotive language of this discourse is more suited to individual ethics than large-scale systemic practices, is often tendentious, and probably hampers detached analysis and comparison.

It is not my purpose to criticise the efforts of bodies such as Transparency International, although all such campaigns should be subject to critical scrutiny and scepticism about confident generalisation. Rather, it is to suggest that discourse on bribery and corruption is just the kind of area that requires the attention of a new kind of general analytical jurisprudence: corruption is perceived to be an important transnational problem; it relates to all levels of legal ordering, it involves interdisciplinary analysis and cross-cultural sensitivity; to talk about it in general terms requires precise concepts and coherent underlying assumptions. Here analysis involves focusing not on single abstract concepts, but rather on complex discourses or conceptual schemes; and it raises very puzzling questions about generalisability that challenge *both* universalists *and* cultural relativists. Conceptual clarity is often a precondition for other kinds of analysis. Analytical jurisprudence should not be confined to the most abstract concepts of legal and political philosophy, important as these may be. The problem whether prisoners have a right to clean water in a poor country is complex enough, but at least it has a clear relationship to basic human needs for survival and reasonable health. The so-called 'problem of corruption' is more complex, but no less pressing. It is an area which, to echo Holmes, has too little theory rather than too much.

## IV. Conclusion

A more cosmopolitan discipline of law needs to confront problems of generalisation – conceptual, normative, legal, interpretive and empirical – across jurisdictions, levels of ordering, legal cultures, and traditions. This is a task for general analytical jurisprudence. This paper is a preliminary exploration of one aspect of analytical jurisprudence in this context, viz., analysis of the concepts

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95    The Nolan Committee suggested that there were seven principles applying to holders of public office: Selflessness, Integrity, Objectivity, Accountability, Openness, Honesty and Leadership. All of these are expressed in terms of individual ethics, but some – especially accountability and openness – are part of Bentham's securities against misrule. The best criticism is by Schofield (1996), arguing that the problem was first defined too narrowly and then misdiagnosed.

and presuppositions of legal discourse. It starts from the premise that globalisation raises questions about the adequacy of much of the present conceptual framework of legal discourse for discussing legal phenomena across jurisdictions, traditions and cultures. It is concerned with the usability of concepts and terms in cross-cultural and transnational legal discourses. It raises, but does not claim to resolve, a number of issues about the transferability of groups of concepts: which do or do not 'travel' far or travel well? It is broad in that it is concerned with all legal discourse (both law talk and talk about law) in widening geographical contexts. It is narrow in that it focuses on clarification of concepts, which is only one aspect of most enquiries. It suggests that the heritage of techniques of analysis in the Anglo-American tradition of analytical jurisprudence is worth building on, but that such techniques need to be applied to a much wider range of issues and concepts than has been done by leading analytical jurists. In short, it is a plea for more middle order, general analytical jurisprudence.

Part III reports on three preliminary case studies of groups of concepts in this regard: Hohfeld's analytical scheme represents one of the highlights of traditional analytical jurisprudence and has a high degree of transferability. In an earlier study I concluded that concepts associated with legal education, legal professions, and lawyers on the whole do not travel well, even within the same 'legal family' or between contexts in a single jurisdiction. The reasons for this are complex and have yet to be adequately explored. Transnational discourse about prisons, especially in relation to conditions and treatment of prisoners, was selected as an example of a body of concepts that seems on examination to travel surprisingly well. Corruption was chosen as an example of a topic that was thought to be quite culture-specific, but on reflection this turned out to be over-simple. These initial forays are quite suggestive, but it would be premature to draw any general conclusions from them at this stage.

These pilot studies illustrate the artificiality of trying to maintain sharp distinctions between different branches of jurisprudence. Any transnational study of prison conditions or anti-corruption measures or legal education is likely to involve conceptual, normative, interpretive and empirical dimensions. In the case of prisons and corruption the discourses have travelled as part of complex processes of diffusion. Hohfeld provided some powerful analytical tools for studying normative orders, but how well they fit 'radically different cultures' or all normative systems are questions that require further empirical and interpretive investigation.

These enquiries started from concerns about the health of law as an academic discipline as it is rapidly becoming more cosmopolitan. These concerns were initially theoretical, but this does not mean that the argument has no practical implications. In a period of accelerated diffusion of legal ideas, a good deal of academic attention has been paid to abstract, often contested, concepts such as development, human rights, democracy, good governance and the Rule of Law. Rather less attention has been paid to the conceptual aspects of more specific programmes and measures by which these proclaimed values are meant to be implemented – such as constitution making, judicial reform, anti-corruption measures, penal reform, harmonisation of laws, and measures for promoting free and fair trade. Such activities reach a peak of intensity in situations involving reconstruction (as in Afghanistan and Iraq), structural adjustment, or systematic reform in 'countries in transition'. They are also an almost inevitable part of legal life as the world becomes more legally interdependent.

Whatever one's political views, these are important activities deserving critical scrutiny. A common criticism of transnational reform programmes has been that they are often driven by people who are ignorant of local conditions, traditions and cultures. Assumptions that 'one size fits all' are a common target of the critics. I suggest that there is a conceptual aspect to these concerns. Where concepts such as court or constitution or corruption or lawyer have deep roots in local history or have acquired strong cultural or ideological baggage, the dangers of ethnocentric projection are obvious. So it is worth asking, how much of our stock of concepts is local and context-specific?

This paper has been written not so much in the spirit of Jeremy Bentham's universal legislative dictionary as of Clifford Geertz's cautions. Writing of international law, Geertz says: 'Whatever the uses certain features of such law . . . may or may not sometimes have in ordering relations between states, they are, those features, neither lowest common denominators of the world's catalogue of legal outlooks nor universal premises underlying all of them, but projections of aspects of our own onto the world stage. This as such is no bad thing (better, by my local lights, Jeffersonian notions of rights than Leninist ones), except perhaps as it leads us to imagine there is more commonality of mind in the world than there is or to mistake convergence of vocabularies for convergence of views' (Geertz, 1983, p. 221).

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