

Interview with Professor Neil Walker* Global Law: Another Case of the Emperor's Clothes?

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Abstract

Global law, in recent times, has seemed to have gained a life of its own: whether that be a new life or a new lease of life is certainly part of this exploration, but what is clear is that it appears to be at the forefront of the minds of many academics, especially within the legal field. This is in spite of the fact that there is still no definitive answer to what global law actually is. In this interview, Professor Neil Walker introduces us to his thoughts on the global law debate and concludes that global law is certainly more than just another case of the Emperor's clothes.

Keywords

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What is the recent shift taking place within the nature of the state and how is it related to what you have previously described as a 'newly emerging global legal configuration'?

Probably the easiest way to begin to answer this from my perspective would be from my European perspective and then the global perspective. For years I worked in the European University Institute of Florence and there I was introduced to a really quite radically Europeanised version of law. The big debate when I was there was the debate about the collision between national constitutional courts and the European Court of Justice. To some

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extent, the emphasis was on the German constitutional courts, but to some extent other constitutional courts too, such as Denmark, the House of Lords in the UK, the French Court, the Belgian Court etc. And the question was, what did sovereignty mean in the context of European integration? Did sovereignty still mean the idea that the national authority would have a monopoly on legal authority? Would it have the last word to all legal provisions relevant to the State? Or had we gone beyond that? Were we moving to a situation where authority had not only been delegated to transnational institutions like the UN (United Nations) or EU (European Union), but had actually been transferred irretrievably and irreversibly to these institutions?

Now of course the interesting thing was that there was no clear answer to that question. What was clear to me was that if you spoke to people in the national constitutional context, they tended to hang onto the old idea of national sovereignty, not just in Europe, but worldwide, which was very prevalent in the United States, but also in other continents as well. But if you talked to the new transnational centres of law, like the Court of Justice in Luxembourg or political organs of the EU and elsewhere, then they had a different perspective of the supremacy of their law. So, looking at this in a neutral way and trying to stand above that debate, as difficult as that is, what became clear was that there really was a genuine conflict of perspectives, where national authorities continued to think that they were sovereign, but supranationals were beginning to think they had a degree of sovereignty as well. So, there was no position above these that could necessarily resolve this debate.

To my understanding of this, and I coined the term 'late sovereignty' to describe this, was that late sovereignty was the situation where you could no longer talk about sites having exclusive and monopolistic legal authority, but what you could talk about was these sites having autonomous and independent legal authority. It would be overlapping legal authority and these overlaps would have to be resolved in a certain way, but we were now in a situation where previously, under the state based system, legal authorities were state based and therefore mutually exclusive, leaving aside imperialism where what you would have is hegemonic power. So you would either have hegemonic imperial power or you would have mutually exclusive power, but in the new legal order, what you had instead was overlapping authorities and all sorts of competitions at the margins.

One of my colleagues in Florence who was actually an Advocate General at the Court of Justice, Miguel Maduro, once described this very well by saying 'just imagine you're a Martian, looking down on Earth, and you look

into national constitutional courts and you hear what they're saying and then you look into Luxembourg at the Court of Justice and you hear what they're saying ... you can't make any sense of it, you can't reconcile it. They all think they're sovereign, they all think they're supreme.' So, that's the world in which we live. Competing conceptions of sovereignty over overlapping areas of jurisdiction, so I think that is one major change that has taken place.

And is that embodied in your term of 'global legal configuration'? Is this what you mean when you use this term?

Yes, it is part of what I mean. It is a negative part of what I mean, in the sense that the old configuration was the state-based sovereignty, the one which is loosely and lazily called the Westphalian tradition, going back to the 17th century Peace of Westphalia, which was an attempt to say that religious authority had been overcome by secular authority and each king was a secular authority within his own state. There was a recognition of this between the states. Part of internal sovereignty was a mutual recognition between states. Now, when that begins to breakdown with new forms of globalisation, transnationalisation of economic, cultural processes, increasing interdependence, the development of supranational authority etc, you have this overlapping mosaic of authority and when I talk about the newly emerging global legal configuration that probably makes it sound more ordered than in fact it is.

In one of my papers, I actually talk about the 'disorder of orders'; the idea that what you have is not just all of these overlapping orders, but competing perspectives on the relationship between these orders. For example, international law has developed hugely in recent years. People have started talking about the constitutionalisation of international law. Why? Well, one of the reasons of doing that is that there is a recognition that there are more and more clashes between, say, international human rights law for example and state law. And peoples' sense of legal order compels them to try and find some kind of secondary principle that will resolve relationships between these different sorts of legal orders. So, they come up with new terms like global administrative law, international constitutional law: terms which presumptively try to resolve these relationships; often in favour of the higher order law, for example, some of the more pluralist approaches, which we will talk about later, also try to resolve the relationship between these, but not necessarily in favour of the higher order law.

For someone like me, who spends his life looking at this, there is a whole market of ideas for resolving the ‘disorder of orders’. Some people talk about the universal code of legality. Patrick Glenn for example talks about the new common law, which is much different from the old English common law, but which is based on the idea that every positive legal system has a reversal set of common law principles behind it. Jeremy Waldron has talked about the new *ius gentium*; going back to the law of the peoples and saying that this is a new idea which is finding its time again in the new age of international human rights law etc. So what we have is a whole new vocabulary, which is trying to make sense of the ‘newly emerging global legal configuration’ and the very diversity of that vocabulary is one of the features of that emerging configuration.

How does global law differ from terms such as transnational, international, supranational et cetera?

Let us start by defining these terms.

Supranational has always been used for these very strong regional legal regimes, which somehow stand above the state and stand in a presumptively superior relationship to the state, so European law would be the paradigm case of that. But if you look at the African Union, if you look at NAFTA, the World Trade Organisation etc, you see at least, tentative movements towards some kind of supranational law there and what you need for supranational law is like a constitutional structure above the state, you probably need a court, you probably need some notion of supremacy of the law, you probably need some kind of legislative to generate the law, you probably need some kind of executive body with some degree of discretion. So, supranational law is not an exact term, but it is saying that you are looking at the relationship between law within the state and law beyond the state. And if the law beyond the state is able to dictate the relationship with the state then you are moving towards supranational law.

International law is the old fashioned term for the law between states/sovereigns, although there is an even older version of *ius gentium*, the law of peoples, where there is a putative sense of global law. Most people today would see international law as being the cousin to the notion of constitutional law: so within the Westphalian state-based system, internally of constitutional law, externally you have international law between these different constitutional states. One of the interesting things that is happening is that international law itself is being re-made, by both public international law and private international law. Traditionally though, international law is the old fashioned term for the law between states.

Transnational law is law that crosses states, where it is not necessarily mediated by the states. International law has to be mediated by the states. Supranational law has to be accepted by the states. Both these forms of law operate within the domain of public law. Transnational law doesn't. Transnational law could be the law of the internet, *lex mercatoria*, the various tentative efforts to having unified private law codes within Europe, law of football under FIFA – sports law. So, transnational law is impervious to boundaries, it is a different kind of term. It is based on an idea that is a vertical set of relationships, which are cutting across.

So, all of that is by way of introduction to what is global law and is it a different type of law? I think global law has two sets of meanings, which have an interesting relationship to each other. One is what you might call global-level law or planetary law, what I call 'globally extensive law': an idea of law that extends across the globe. And what is true in much of the post-national legal thinking is that there is an increasing attempt to think about global-level law, whether that be general principles of international law, *ius cogens*, whether there be the idea of peak institutions perhaps in the context of a reformed UN, whether it be attempts to re-think law in terms of a global imagination of *ius gentium* or a notion of some kind of universal common law or what Klaus Günther calls it, a 'universal code of legality'. He is a Habermasian scholar who believes that beneath every legal system there is a general code which allows all legal systems to communicate with each other. So, there is no end of these sorts of ideas.

There are also more concrete ideas, such as global constitutional law, global administrative law. Think of global administrative law for a second: what it says is that if you look at any administrative system, you will find that it will respect several general principles, such as: always listen to the other party; no-one should get judged on their own cause; the duty to give reasons and so on. And what global administrative law says is that why should these be rules that are confined to the state. There are many contexts where law emerges spontaneously in certain situations, say the law of the internet, where you have a system for regulating the registration of the names and numbers on the internet. What global administrative law is saying is that regardless of the political providence of these rules, surely that given that each of these rules has a user community and a producer community, the sorts of logic that says the duty to give reasons, the duty to hear that aside, also applies to these sorts of behaviours. Then you add the dramatic adjective 'global' to this and suddenly you have the notion of a globally administrative law, so administrative law is no longer something which is locked within the state, but is something that is globally effective as well. So, even there what you have is a global dimension to it.

You also have global legal pluralism, which we will come back to, where the emphasis is on the interface of norms, the oil which keeps the chain of global legality together. It is more about connecting the parts than it is about having a hierarchy and looking all the way down. We also have the new hybrid law, where authors think that some of the old terminology, even like international law, is inappropriate. For example, Ruti Teitel is well known for her work on transnational justice and has recently written a book on the law of humanity. What she is saying is that there is a shift from security as a hard physical concept to a notion of human security. In the end, even with areas as diverse as international criminal law and humanitarian law, there is a new merging towards a new law of humanity.

Christine Bell is talking about a new law of peace, where there is a relationship between international law and constitutional law, backing each other up in a transitional justice context to developing new global rules of peace. So what you have there are not just different candidates for global law, but very different ways of thinking of how you even come up with an idea of global law to start with. The one thing they have in common though is a notion of there being some kind of global level to legal principles.

Now, alongside that is another notion where global law becomes a three dimensional, rather than two dimensional, concept, where it is not just the surface of the planet, but the idea that global law is something holistic, something which includes the whole. Now that is probably the other, more contentious use of the idea of global law. People can cope with thinking about global law as two dimensional, but when you say you have to look at law as something three dimensional, as something that takes in the entirety of the globe and relates to all different levels of global law together, I think people would be more concerned about it. They would say, where does this coherence come from? Is this a normative project? Is it a Western project? Is it a project of elites? Is it a project of the United Nations? What might this be? My sense is that in so far as we can think about it, it is something less than that. It is a new paradigm of thought. It is not a new concept. Global law isn't something we can find which will carve its way through everything else and shows how everything relates to each other. It's a good way of naming a new paradigm of thought, a new orientation, where there is partly reference to these global level laws, but also to the intricacies of relationships to other things. People increasingly think of the global whole as a global whole.

My lecture is called 'intimations of global law' and part of that is to try to suggest that this is something which is very unrealised. It is in a process of becoming and probably will always be in a process of becoming. But today,

we live in a world, where just because of the interconnectedness that I mentioned earlier in the European context and elsewhere, we cannot pretend that national laws are mutually protected and compartmentalised. We know there is a global dimension to law. We know that global humanity and intervention, such as it may be, is a global issue. We know that the Arab Springs is a global issue. We know that the sovereign debt crisis is a global issue. We know that the solution to these things has global permutations. Someone talked about the fact that we live in an age of the global imaginary. We imagine ourselves not just as national subjects, but global ones. Many of the political movements of the last 40 years have been global movements: feminism; environmentalism. You cannot say that these started in one country, or even developed a lot of their resonance in one country. These are ideas that, almost by their nature, circulate globally. Also, many of the ideas that scare people in the modern age, such as global imperialism, global jihad, are ideas that people view as global. So there is a sense in which our mentality, our starting position, is one which is quite global. And this is a point which is quite underestimated.

The current generation takes this for granted. My generation has lived through it, probably more so. But if I think about what I think about law now, as someone who has been doing this on and off for 30 years, it is very different. I am a very different person from the guy that did a law degree in Scotland over 30 years ago, who studied Scots law, Scottish Constitutional law, English Constitutional law, who had a vague idea of something called Europe and something called international law, who then went to work in Florence and then discovered the intensity of European law, who then started thinking about global law. At the same time, the world was changing, the global polity was evolving in a much much more interconnected way. Just as if you grow old with people you don't see the changes, you grow old with yourself you don't see the changes, but there have been profound changes in my lifetime.

I know that Tilburg is going to start a new Bachelors degree in global law. This would have been unthinkable 30 years ago. Today, it seems interesting, innovative, certainly not ridiculous and very much part of the *zeitgeist*.

What are the challenges of the changes you have described and how can we overcome them?

One of the things that I would say there is the way that I think of globalisation and global law as not that they are a good thing or a bad thing, they're bigger than that, they're just things that are happening. Of course human

agency is involved in all of these things. Lets face it, global law comes from so many different motives. It comes from the motive of transnational capital trying to facilitate itself. Many of the critiques at the WTO for example are that it's simply the hand maiden for a certain type of neo-liberal transnational order, which is a bit unfair. Of course the reality is that it is a political debate within the WTO about what it is. But many of the other transnational institutes that we talk about are precisely ways of trying to overcome or deal with or inhibit forms of private power, which would otherwise easily escape from public authority into transnational no-mans land.

So, global law stands at a very complex dialectical relationship with a whole range of global movements and that whole range of global movements is really something which you have to describe as the emergence of a kind of global polity, not state, but as a global polity, where the same kinds of huge fault-line debates, which we've always had in the state, say between free markets, solidaristic re-distribution between right and left or identity debates between cosmopolitanism and communitarianism or the emphasis upon cultural particularity. These two major faultlines of modern politics are now replicated, complicated at a global level. So global law, globalisation, isn't a good thing or a bad thing, its a description of the way in which these things are taking place.

Now clearly there are challenges here, there is a huge challenge of democratic deficit. The only supranational organisation which even comes close to making any kind of democratic claim is probably the EU, except that we know that it is constantly criticised for its democratic deficit. One answer to that is that there is a huge democratic deficit within states: people don't vote; people aren't interested in politics; people realise that other states are deciding their fate, so the state itself isn't enough for your democratic voice to be vindicated. The fact that states themselves aren't the perfect situation doesn't mean that we shouldn't worry about the lack of transnational democracy, so that is one major issue.

Another major issue is cultural universalism versus cultural relativism. If you look at the debate over international human rights, there is a tremendous clash between those who see the universality of human rights as being a very good thing about global law and those who see it as being the hegemon of the West, imposing their idea on them. We are used to universality, particularity debates within states. Take France for example, it has a history of trying to impose some abstract universal notion of citizenship upon a multicultural community; the whole idea of the state being neutral. Now that has been very controversial, but you multiply that to the global level

and it becomes all the more controversial. The stakes are much higher on all sides. So there are all sorts of issues there.

There is also the issue of the very idea of some kind of general authority and I don't mean a world government, but one of the features of our modern understanding of law is – and it is very much a modern understanding of law – coinciding it with the development of the nation state in the 17th, 18th and 19th century. It is a post-medieval understanding of law; an understanding which says that the world is something we can make over in our own terms. We are effectively in charge of our own destiny, which is a secular destiny. People might still have their religious faiths, but nevertheless, the game of politics is effectively people taking charge of their own destiny and deciding what that destiny might be.

Now under the Westphalian system, that worked for some people at least. There is a notion of mutually exclusive orders you get to make your world within its own space. Obviously, it doesn't work if you are in that part of the world where you are the victims of imperialism of the Westphalian order, which is always the dark side of the order. It was never about every state in the world, it tended to be about European states, but nevertheless, there is a notion there that for some people that modernist idea makes sense. The problem with globalism and globalisation is that no one writes the script anymore within the global legal order and there is no way therefore that we can imagine that we are collective writers of a single script. Thank god some people are of the secular equivalent, but the danger then is that it is seen as something that is out of control, that people are buffeted by all sorts of forces including legal forces which they are not necessarily controlled by. So, again one of the challenges of global law is how do we reconcile its diversity with some notion that law is still something that we are collective controllers of. So these are incredible challenges and they are not going away.

Could you describe the idea of constitutional pluralism and how it could benefit the debate on global law?

Constitutional pluralism is a notion which I have been associated with in my work and again it is one which originated in the European context and I think what is central to the notion of constitutional pluralism is a mixture of a recognition, on the one hand that states continue to have a high degree of investment in the control of their own law and the recognition on the other hand that they have to sometimes listen to external authorities, who may on certain subjects have a greater degree of legitimacy. The idea of

constitutional pluralism isn't just about states, it is about any regime – it could be a state regime, it could be a transnational regime, it could be a global regime – and it is about them showing each other mutual respect, accepting the inevitability of an overlap between different legal systems and trying to find some kind of meta rules or rules in the margins which can resolve this.

So let's take an example, let's take the famous *Kadi* case. I will say something about it because your audience probably doesn't know about it. It has been a famous case over the last few years. It was a case which came before the European Court of Justice and what *Kadi* was about was what the relation should be between European law and United Nation resolutions when it came to confiscating assets of people who were on the lists as terrorist suspects after 9/11. So what we had were all these UN rules which were very strong about the confiscation of assets and which sought to impose these regulations upon both national and regional authorities for security purposes and the question was whether the EU had any autonomy simply to say that we are not going to accept the position of the UN rules here.

How it was resolved was by the EU saying that we are a polity in our own right, we believe in something called European values, we have our own notion of democracy, we have our own notion of integrity and we also have our own fundamental rules about freedom of property, freedom of information etc etc, so we do not accept this blanket resolution from the UN. So that is an example of what I would call constitutional pluralism, where the European Court did not disregard the global authority of the UN, they recognised that the UN was involved in some kind of global security situation, it did not say that it was pointless and nameless. But what they said was what we have to do as a European Court is not just think about what we want to do but think about the relationship between our constitutional values and other constitutional values and we may find ourselves in some kind of clash.

So what you are asking courts to do, I am trying to think of a way of describing this, what you are asking a court to do in that situation is somehow standing outside itself and say: 'I am not just a guardian of this legal order, I am also an interlocutor in a global legal order where we have to think about the relationship between what we do and what others do.'

Let's take another example, the German Constitutional Court, which over the last six months has had to resolve all sorts of cases about the authority of Germany to be involved in financial restructuring plans around Greece, Spain and so on. There are all sorts of quotations within the German constitution which safeguard the federal principle, the democratic principle. And

the German Constitutional Court has said, in these sorts of situations that if the Executive is going to sign Germany up for arrangements, which will involve a significant transfer of fiscal resources of the state, then these things have to go through the national parliament: even though that might be politically impossible. What it has to do is it has to find some kind of balance between respecting that idea that is fundamental to the idea of German constitutional authority, is the democratic will of the German people with the notion that the European Union cannot survive unless there is some idea of fiscal solidarity between the states. So you are asking courts to be both custodians and mediators at the same time. And that might seem an impossible thing to do but I think increasingly this is what we do ask courts to do.

Let me take one final example. The Canadian Constitutional Court years ago had to look at the question of the secession of Quebec from Canada. The Constitutional Court in that case ruled - its job partly as a custodian of the constitution - under the constitutional rules that Quebec had no unilateral right to secede. Quebec's argument was partly the historical argument about the legality of the Canadian Constitution, but there was also an argument that said if you are the unhappy part of the Federation, and one of the things you might be unhappy about are the very rules of the breakup of the Federation. So if the people of Quebec unilaterally get to the situation to decide to be a part of another constitutional entity then surely you have to take that seriously, notwithstanding what the rules of the game actually are.

What the Canadian Constitutional Court said was, yes, we have to think of ourselves as the custodians of the Canadian Constitution, but we also have to think of ourselves as implicated in a plural situation, where this relation is between the Canadian people and some other category of people, putatively the Quebec people. So what we are introducing is a new expectation, a new duty, a new obligation on the part of the Canadian government, to negotiate in good faith the prospects and the possibility of independence. In other words, they should not set their stall against this, they should not use narrow legalistic objections against Quebec referendum etc. So that is a very good example of a court standing outside its role as custodian of a particular constitutional order, recognising the existing situation of constitutional overlap and constitutional plurality and taking on this additional mediating role.

So I have given you a few examples of how that might work, but to anticipate your next question of: 'how do you actually generalise what these principles should be?' Well, that is a very difficult thing to do because if there were another set of general principles above the constitutional rules then

you would be getting globalism in that kind of top down way. What we are talking about here is just an openness of constitutional courts to the fact that there are other constitutional entities that there are other polities with their constitutional bodies as well and it is no longer the role of a supreme court within a legal order to have the last word, to batten down the hatches, to say it is this legal order against all other legal orders ('the world'). Increasingly, it is the role of the last and the top court to actually mediate the relationship between its legal order and other legal orders. That, in a nutshell, is what constitutional pluralism offers.

How are the developments that are taking place changing our legal education? How is it changing for our future students?

Big question! It changes all sorts of ways. If we go back to that distinction between global level and globally holistic: there is a difference between programmes which think about global law as a single entity - I'll come to that in a moment - but also what you might call global level, that is new global networks. So this week, think of this idea of the Global College of Law Schools, which has been launched at Tilburg. There are other network ideas, like old European ideas such as Erasmus, which were not global, but European. The idea of multi centred legal, either institutions of professional practice or institutions of education, so that is one way.

The more interesting question is the actual object of the education itself and in what sense that might be global. What I would say to that is that what you have to do in any legal education, I think, is somehow be aware of the fact that calling something global is not mutually exclusive with recognising that everyone still operates within a national jurisdiction.

So for example, one of the best global law journals is something called the German Law Journal, which is an online journal, run by a friend of mine, called Peer Zumbansen. It is a wonderful idea because it is not about German law; it is about how German law meets the world. It is about how law looks like from the perspective of Germany, which is a very different thing from German law. So what it says is that from a perspective of Germany, German domestic law is important, but just as if not more important is the relation between German domestic law and European law, German domestic law and ECHR law, German domestic law and WTO law. Also, no interested legal German could be uninterested in other relationships, say between British and Dutch constitutional law and EU law and ECHR law because that would impact upon them and this interconnected world as well.

So there is a sense that globality is about deep interconnectedness, but it can still come from a particular perspective. In other words, what makes law global from that perspective is not that there is some view from nowhere - for instance a global view as opposed to a national view - it is that all of the national views and all of the regional views now incorporate the global dimension. So, I think that is very, very important.

Now that means, I think, that probably there is still going to be a better future or an easier future for global law programmes, which see themselves as looking both at domestic legal systems and looking from a perspective of that domestic legal system at the world (looking at things globally) than there would be for programmes which are purely global. I know that Tilburg, for example, is going to develop a global Bachelors degree and that global Bachelor will not qualify these people as Dutch lawyers. Now, that is alright; provided that there is a recognition that the totality of legal education will continue to incorporate both a domestic dimension and a global dimension. What I think probably, in a normal way, what is most likely to happen is that a larger percentage of people's legal education will, in the model of the German Law Journal, be looking at things beyond the state: international or transnational law; aspects of private law, whether it would be contract or tort, whatever which are more international in nature, often without even naming it as such because often these things are just kind of deeply implicated in the changing practice of these different sorts of subjects.

One other thing which I think is important here is that its probably linked to certain ways in which we are changing the way that we think about legal education. I think legal education, probably, increasingly, is not so much about people learning a canonical body of knowledge. When I was educated, you had to know 230 contract cases which were vital, 70 criminal law cases etc and obviously that remains important, but one of the reasons why you had to have such knowledge at your fingertips was because we did not live in a computerised age, so you actually did have to internalise knowledge in many ways because it wasn't right away accessible. Now I think one of the things that legal academics are most better at, including young legal academics, is simply knowing how to access information. So an awful lot about education is now about the combination of understanding general principles and understanding methodologies of accessing information. If you do that, if you shift legal education in that direction, I think it allows you to have a wider horizon, a wider perspective, on the sorts of subjects you can do because you don't have to spend all your time learning all the

rules. That might be controversial to some people, but I think to some extent that is how it might change.

But once you still have national law as a starting point from which you look at other relevant fields of law, doesn't your national perspective then still limit you? Or would it be better then to have more knowledge about all kinds of systems, rather than the other way around? What would you say about that?

I am not against that. It is a complicated point. Part of the global awareness is an awareness of both transnationality and other systems, so it is both comparative and transnational. So if you look at online journals like *global jurists*, it still very much describes itself as a comparative law journal, interestingly, it doesn't describe itself as a transnational journal. And I think one of the reasons it does that, is that there is a recognition that in practice you are going to be a good lawyer than you actually have to go about national systems, it is not just about transnational law, but also there is a recognition that self-understanding comes from being able to situate yourself in a comparative continuum, in a comparative context. I understand an awful lot more about what it is to be a Scottish lawyer or even a UK lawyer through having had a lot of access, exposure, to continental legal systems. I understand the significance of common law precedent, custom, parliamentary sovereignty, far more, by seeing it in sharp relief against the alternatives. So I think it is important to understand our systems.

What I would insist upon, though, is that people are still primarily located within a particular system. That doesn't mean that they have to somehow unproblematically inhabit the worldview of that system. It just means that people are rooted somewhere. And it may well be that 80% of what you are doing as a contract lawyer in America is the same as 80% of what you are doing as a contract lawyer in Germany, but you are still rooted somewhere else, there is still a different set of perspectives there.

Related to that, I think maybe another implicit in your point, is that one of the features of the globalisation of law is the differentiation or segmentalisation; it becomes more important to be a contract lawyer than to be a German lawyer. And that is true to some extent. That is part of what the globalisation of legal education actually does. Edinburgh, for example, is very strong in intellectual property law and I see my intellectual property colleagues and they don't think of themselves as Scottish lawyers, they think of themselves as IP lawyers, particularly in the Internet age. An awful lot of their examples, their thinking is drawn from the transnational

context. They don't show that; it is taken for granted, it is just done naturally. So there is that aspect as well and that is in recognition of the fact that probably more and more lawyers will be people who specialise in particular areas.

However, I think there is a balance there. I think both practically there will always be an awful lot of people who see themselves as general practitioners so to speak. So they need to have that holistic understanding of their own legal system. For them too, it becomes increasingly important that they understand how their system operates within the world. It is also important that you have people who understand the national system as a whole as well because at the end of the day law is also a political object, it is also a political product, of a national system. People should not see themselves as just happening to be locally situated lawyers of some sort of transnational practice.

A lot of my friends are criminal lawyers and many of them are very good transnational criminal lawyers. But the very best of them, I think, still have a very close understanding of what is distinctive about their national order, historically, but also in a contemporary way. How their national criminal law fits into, say, notions of fault, which you might find in civil law etc. So still an awful lot of legal understanding is nationally based as well. That is why I want to insist that a global lawyer is someone who sees it as a merger of a national perspective and a global perspective.

Do you think global law is a product of western thought and perspective?

Who am I to answer that question? Clearly, there is always a double bind, there is a paradox in these sorts of debates, both in the general global law debate, but also say in something like global human rights, which I have been writing about recently because either you treat these as western concepts, which may have the virtue of some kind of honesty, but also have a terrible arrogance; these western concepts nevertheless are treated as the master concepts, which define everything else. Or you genuinely put them forward as global concepts, which has the danger of being a fraud - something which is actually western, but dressed up as global - but has a virtue of at least aspiring to be global.

Now if you look at the global human rights debate, for example, you look at some of the different positions on the universality of human rights. Russia says for example, human rights is a genuine global discourse and the important thing is not to bang on about cultural differences, but to understand that if you are an Asian talking about this then it is incredibly

important to pursue certain sorts of rights - economic and social rights - which have never been at the centre of the western canon, but which are compatible with and which have been at least contentious parts of the western canon: if you go back to 1948 and the USSR saying social and economic rights should come before first generation classic liberal freedom rights. Saying that any tradition is more open to struggle than you think it is. So rather say: 'give up on that tradition, it is an unreconstructed western tradition', see the tradition itself as being something very open, and something which can be participated in, added to, become genuinely globalised. That is one view.

There is another view. Someone like Upendra Baxi for example would say that some of these traditions are deeply hardwired, it is in their DNA that they put the individual first. There is a deep celebration of the global autonomous individual within this. It is not about changing human rights, it is about needing a new vocabulary.

Now my view is more the first view. I don't think that any of these concepts is so unreconstructable. I don't think that. I think we all have a moral duty to say what is the least worst way of proceeding. For me the least worst way of proceeding is always to start with the imaginable and the imaginable for me are the better more progressive discourses that we have transnationally, including discourses of global human rights but also discourses of say global parliamentarism, in terms of the UN etc. I am not a huge advocate of a global parliament. I am just saying that for me the more constructive debates are the ones which are often inaugurated by the global south, which precisely try to come to terms with concepts which may know their history in the west. The point I would make is that often the western history is more a history of struggle, is more of an open history and is often conceded by those who are critical of western hegemony within these debates.

Can global law really be attained? Is it just another case of the Emperor's clothes?

Let me come back to some of the things I was saying at the beginning, this distinction between two dimensional global law and three dimensional global law. We cannot deny that today there is more globally extensive law, either at the hard level doctrine world order treaties etc or in terms of the way that people are thinking about it breaking ideas of global administrative law etc, which aren't just academic inventions. They are attempts to come to terms with hiatuses, certain gaps within global legality. So there is

a global level. Now with the notion of a global law, what I am saying is that we should neither think that it is an aim to have a single global law or a single global legal system, nor should we think that it stands there as some kind of legislative ideal against which we can criticise actual practice. What I am saying though, is that increasingly in the world there is a paradigm shift: people are thinking, situating themselves as legal scholars, legal thinkers and even legal practitioners in a world which is globally connected. That idea is not going to go away.

The way in which that is contested, the way in which these matters are resolved and not resolved. For example, it is hard to imagine that anyone in my lifetime and your lifetime who is interested in human rights, for example, who will not have to constantly revisit the very subject that I just talked about there, which is what is the relationship between the universal and the particular, how seriously do we take group rights, how seriously do we take race hate law, how seriously do we take religious hate law, what is the relationship between dignity and the freedom of expression; questions about reproductive freedom? These questions are not going to go away and anytime that we will address these questions we are not just going to be asking ourselves moral questions about what is the right answer, we are going to ask ourselves meta-moral questions about who gets to decide what the right answer is. These questions are not going to go away, they are not easily going to resolve themselves, but these are questions which necessarily impose themselves upon us because of the new global horizons of law. That is all I mean by law having a global paradigm. You can't get away from these sorts of things and it is a good thing that people can't get away from that.

It comes back to some of the things that I was saying about constitutional pluralism. Lawyers have to see themselves increasingly as people who inhabit the in-between spaces between different systems, between different cultures. They don't just have to defend, they are not just custodians, they are also mediators. They are also people between these different sorts of orders. That may sound very big and it is, but I think that is the inevitability of the global horizon that people have to continuously situate themselves in. And there are some very positive things about that as well: the attempt, for example, to think about global administrative rules. So what you do there is you start with some ideas and say okay can we push the envelope? Can we actually get any agreement for the applicability of these rules at a global level? Maybe not. You have got to start from somewhere. You have to start with these sorts of ideas. And knowing that what you are doing is not simply evoking traditional authority anymore. It is more a form

of a kind of entrepreneurship of ideas, you are pushing a set of ideas and seeing how successful they might be, how adaptable they might be to new global contexts.

Of course there is a downside to this as well. There is a whole rhetoric around globalism and global law and everyone jumps on the bandwagon. The well-known scholar John Alston once talked about what he called the ‘civilising effect of hypocrisy’. What he meant by that was that often we have ideas imposed upon us because it becomes part of our culture. Take European law for example, here are two notions: European citizenship and subsidiarity; two notions which are central to European Law. At the time they were coined, no one really knew what they meant. What does subsidiarity mean? This is something that comes from church law, what does it mean? What is European citizenship? Seems like an oxymoron. We are national citizens, what does it mean?

Within that debate you would have people who would take it seriously, who genuinely were interested in these as coin breaking ideas. There were people that were saying that this is the rhetoric of the day, we have to deal with it. But all these people have to operate within a public debate. So if you are operating with new notions, then whatever your motivation might be, the very fact that you want to be a plausible contributor to the debate has a civilising effect.

So I am not one of these people who say, that the emperor has no clothes and that global law can’t mean anything because people are just jumping on the bandwagon. They are not. They are jumping on the debate which has more or less cynical input from all sorts of different parties and if they want to be seen as participants of that debate, they have to participate in it at its highest level otherwise they will not be effective participants within that debate. So, if someone started a global law programme tomorrow, which was 95 % domestic law and 5% foreign law, then no one would think that that is what we mean with global law anymore. Or if someone would start a global law program, which simply was about the global transposition of western values, then there would be major objections because people are tuned to the sensitivities, the subtleties surrounding the subject that perhaps once they weren’t.

So yes, global law is to some extent still a shot in the dark. It is about people entering a field, sometimes opportunistically, sometimes not; trying to make a fast buck; trying to make an intellectual reputation quickly, sometimes not. But I think many, many debates in law are like that and in a sense I think the debate has its own momentum and has its own development and I think many genuine positive things can be achieved through this.