William Twining:

The Man Who Radicalized the Middle Ground

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William Twining: The Man Who Radicalized the Middle Ground.[1]

I

William Twining is one of the most influential figures in academic law and legal education. His trailblazing contribution to the broadening of legal education and scholarship has been pivotal. He has served as an exceptional mentor, role model and friend to many from Australia to Zimbabwe, an international leader in fields as diverse as jurisprudence, evidence, globalization and legal education, and an activist reformer. The publication of his intellectual memoir (Twining, 2019, hereafter 'JIC') is therefore especially welcome not only for the light it sheds of the development of his ideas, how he came to be at the centre of it all and the obstacles he encountered, but also for what it tells us about where we have come from, why we are as we are, and what might and should be achieved in the future.

JIC may also represent something of a milestone in the growing recognition of legal academics within and beyond academia. It is probably the first life-long autobiography of a British law professor. Judges and lawyers have hitherto monopolized the field of legal memoirs, although the reasons for this are not simply

[1] This essay draws on conversations, interviews and email exchanges with William Twining over many years. All interpretations of his life and work are mine alone.

that their lives are more interesting and important than those of legal academics.[2] Rather, it stems from the ways in which, historically, England's legal profession have enjoyed, and sought to preserve, greater autonomy than any other comparable profession (legal or otherwise), including a monopoly over legal education.[3]

The dominant form of legal training and education in England c.1700-1980 – apprenticeship – was well suited to the needs of a profession as traditionally conceived. It resisted, despite some notable exceptions, university legal education. Under this optic, university legal education was a lower level 'vocational' activity, akin to university degrees in plumbing; and evoking much the same status, skepticism and ridicule (Simpson, 2011, p. 65). Despite the intellectual poverty of much training for legal practice, most English lawyers, and virtually all superior court judges, did not study law at university. Indeed, those who practiced often regarded university law teachers as self-defined failures, unable to make it in practice. There were only a few exceptions to the condescension with which England's legal community frequently

[2] Of the leading British jurists, only Pollock published anything like an autobiography: Pollock, (1933). Occasionally, someone might prepare a memoir after the deceased's death. Also, a legal academic might prepare autobiographical material for their family and close friends; but this was not for public consumption: as with Gower, unpub. For a recent memoir (but not of the cradle-to-late-life sort), see Simpson, (2011) - on which see, Sugarman, (2012).

[3] See, further, and references cited there: Sugarman, (1986), (2009), (2011).

regarded academic lawyers.[4] Legal academics have been complicit in this state of affairs in so far as they have tended to be in thrall to the profession and its notions of hierarchy, relevance and excellence.

William has spent much of his professional career challenging these perceptions of legal academia. JIC bears rich and valuable testimony to the considerable changes since the 1960s and '70s. However, I believe JIC also raises major questions about the success of this movement, the efficacy of some its axiomatic assumptions and the continuing confines (intellectual, political etc.) within which law schools and legal academics operate. These are issues to which I return.

II

JIC recounts William's adventures in academe and the ideas, principles, people and circumstances that have shaped his thinking and career. It addresses topics which have been central to his life and research - including his rejection of the doctrinal textbooks that dominated his legal studies at Oxford, the influence of HLA Hart and other gurus, various American interludes, the importance of Africa and his experience of teaching law in African law schools, teaching at Belfast during the troubles, the contextual turn in legal studies, rethinking evidence, and law and globalisation. This

[4] Frederic Pollock, A.L Goodhart and J.C. Smith, for example, enjoyed a high reputation among the judiciary and the Bar.

is more than an overview of previously published work. Rather, it restates and elaborates some of William's principal theories on law, his *mea culpae* and changes of mind, whilst also offering an indication of those areas he would like to have developed in greater detail.

As I read it, JIC argues that '…much legal scholarship is normative and opiniated' and that this is partly because it is weak contextually, empirically and theoretically (Twining, 2019, p. 105); that theorization is centrally important to the health of the discipline of Law and socio-legal studies, and needs refinement on matters such as legal reasoning. William's theoretical originality and importance stems partly from the ways he has harnessed and brought to bear some of the best facets of analytical jurisprudence, Llewelyn-inspired legal realism, legal pluralism and perspectives that eschew insularity and Eurocentric universalism. In effect, JIC makes the case for the added value that this mix would bring to socio-legal research and the discipline of Law and their ability to respond to the new challenges posed by globalization and the like. This is directly related to William's long-standing crusade to widen and deepen Oxford-style analytical jurisprudence, and to build a bridgehead between it and socio-legal studies, bringing benefit to both sides.

Whilst recognizably a continuation of William's earlier work, rather than being a mere Twining smorgasbord, JIC has a distinct identity. It is unified by a particular tone that is at once valedictory, self-critical and personal. Its central theme is that all academic lawyers should be concerned with, and take responsibility for, the health of our

discipline; and that our discipline needs to adjust to the complex pressures of increasing interdependence and interaction that are summed up in the overworked term 'globalisation'. The aim is to introduce new audiences to William's ideas and to enlist them to the cause of turning the discipline of Law into humanistic discipline, thereby, fulfilling its exciting and important potential.

III

JIC was published hard on the heels of a memoir by Harry Arthurs, Canada's foremost architect and champion of progressive university legal education, a public intellectual who has made a considerable contribution to legal scholarship (Arthurs, 2019). There are many parallels between Harry and William's career trajectories, their motivations, their views on legal education and their key roles as academics and would-be institutional reformers. But their memoirs also point-up some interesting differences in views, not least with respect to the agency of legal academics in reforming and radicalising law schools – namely, the transformative potential of law, legal systems, lawyers and legal academics and, hence, their relative importance in society. Arthurs addresses this head-on:

'The optimists amongst us assume that human hands – our hands – shape legal education, that legal education shapes the law, and that law shapes the world. The pessimists contend that the process works in reverse, that the forces of political economy ultimately have their way with law as a system of social ordering, as a

cultural phenomenon and an intellectual enterprise, and as the subject or object of study in law schools.' (Arthurs, 2019, p. 138).[5]

At issue here is not merely the relative weight we attach to agency vis-á-vis structure; it is the underlying assumptions of law in context. It is here that JIC, like law in context in general, might be found wanting. William is more optimistic than Harry about the capacity of legal academics to change legal education, the legal system and so forth. JIC includes many declarations about the importance of legal education and the discipline of Law, the pervasiveness and centrality of law in society, and by implication, the transformative potential of law and legal education. Harry, by contrast, explains how his '…convictions about the incapacity of law to transform societies' have intensified over time, and that legal systems cannot escape from 'the effects of unequal power' (Arthurs, 2019, p.129).

The assumptions that I attribute to William sit uneasily with the fact that law schools and legal scholarship are still overwhelmingly preoccupied with doctrine, case law, and the judge-centred model of the legal process, albeit, in an attenuated form, to the relative neglect of legislation, administration, the operation of law in practice, and study of the policies, politics, values and ethics underpinning legal practice (Collier, (2005); Bartie, (2010); Mertz, (2007). The core subjects in the curriculum are

[5] See, further, Galanter (1974) and Scheingold, (2004), both 'pessimists'; versus McCann, (1994), an 'optimist'.

still greatly over-represented. And this is even though most legal scholars would probably claim that they believe in the importance of policy, politics, context and indeterminacy in understanding law (Sandomierski, 2020).

Despite the importance of the changes of the 1960s and beyond – and they were momentous – it is nonetheless true that for many commentators (this one included) not that much has changed. Law schools remain hierarchical, ethnocentric preserves. Importantly, the conditions that sustain university legal education have remained constant: notably, sufficient student demand and finance; the cost of education; and the fact that legal education has to be sufficiently harmonious with the status and economic interests of the legal profession, of lawyers' principal clients, and of the university and government. Innovation in legal education operates within these confines (Gordon (2002); and most are beyond the control of legal academics. If we are to exercise greater agency and fulfil JIC's larger aspirations, we will need a better understanding of why legal doctrinalism predominates? What, exactly, is it that we do that maintains this *status quo*? What scope do we have to further broaden legal education and scholarship? What sorts of politics are likely to prove most effective? I would suggest that the problems and possibilities arising from the institutionalisation of the discipline of Law, law in context and socio-legal studies – of living in the belly of the whale (so to speak) - need to be addressed. Also relevant is the consequences of the transformation of universities, the legal profession, economic life, communications, democracy, politics, populism and the state during the last several decades on legal scholarship's high-minded work of legal improvement, 'which

despite its record of undeniable success is often… just an intellectuals' dream fantasy of rationalist authority and influence…that no longer exists, a play enacted to an empty theatre.' (Gordon, 1992-1993, p. 2112).

Part of the problem is that law in context has paid insufficient attention to why the development of progressive legal education and scholarship is difficult and has been limited, as well as other fundamental questions about what legal education and scholarship should be for, and in whose interests.

I suspect William would agree with much of this. He has long insisted that law in context is not an analytical concept or a 'theory' of or about law. Nor, he contends, '…is it an ideology or a political programme; it merely provides a flexible framework for diverse ways of breaking out from a narrow tradition' (Twining, 2019, p. 164). Law in context has become a 'brand' signifying opposition to conventional doctrinal legal education and the textbook tradition that reflects and sustains it. While its utility and inclusivity are admirable, advocates of this approach share some underlying assumptions; and these foundational presuppositions need more interrogation than is found in JIC (Nelken, 2009; Tomlins, 2007). Has Law in Context, both the book series and the movement, adequately challenged the dominant doctrinal mindset? Has it been insufficiently critical, for example, giving too little weight to the

connections between law, power, gender and domination; and to questions of law, political economy and distribution?[6]

On these and allied issues, William seems reluctant to undertake a frank assessment of law in context scholarship. Similarly, the treatment of professional and personal competition, divisions and tensions is limited. Insofar as the University of Dar-es-Salaam and Warwick Law School became arenas within which Marxism and socialism did battle with liberalism and so on, how William dealt with these conflicts and what impact (if any) they had on him is unaddressed. The personal and professional costs involved remain tantalisingly out of sight. We see little of the struggles and setbacks that must surely have occurred, and, consequently, William's early and almost meteoric professional advancement appears linear and inexorable.

None of this, however, challenges the importance of JIC. It is an exceptional piece of critical self-reflection, one that enables us to understand William's perspective and manifold contributions within and beyond the law school so much better. It demonstrates that he was never a dedicated follower of fashion, and that he remains as restless as ever, finding new projects and arguments to pursue while also encouraging others to complete his unfinished business (Twining, 2018).

IV

[6] In JIC, William devotes only scant attention to power and does not address issues relating to gender and the treatment of students. See, further, Twining and Sugarman (2020).

Since William is generally reluctant to discuss and analyse at length his core values and politics, JIC provides some valuable, albeit limited, illumination. For example, it reveals that in Belfast he latterly became involved in public debates on emergency powers and torture during the troubles, and this experience, along with his growing interest in Bentham's utilitarianism in relation to rights, justice and policy, was important to his thinking about normative jurisprudence, that is, questions about values such as law and morality, justice, rights, legitimacy etc. We also learn that William believes normative jurisprudence to be 'a central part of understanding law'; but that for personal reasons he has not added much significant to this field:

'I am personally a moderate sceptic or agnostic about values…; I have a working assumption that reflection, reasoned debate, conversation and negotiation can help to advance understanding and build…reasonable accommodations up to a point. But I accept that entrenched beliefs are not susceptible to rational persuasion…Belief pluralism is a fact that we have to live with…I end up a modified utilitarian, a democratic liberal (in the John Stuart Mill sense) and a kind of legal positivist' (Twining, 2019, p. 105).

Whilst I believe that this does not do William justice, it is not hard to identify his underlying approach. Tolerance, open-mindedness, the accommodation of a wide spectrum of political opinions, inclusivity, promoting intellectual freedom and engagement are key values. So is his resistance to overly stark dualisms (of the

'them' and 'us' variety) that allow for no middle ground, oversimplification, simple labels and pigeon-holing (not least with respect to his politics) and other polarising tendencies, sectarianism and unnecessary divisiveness. His is the politics of principled pragmatism, dialogue and rapport that seeks to avoid self-marginalisation and the abandonment of sustained dialogue with counterparts in law and other disciplines; that eschews grand-unitary theories claiming to have the answer to everything, grand-revolutionary politics and visions of society. He has embraced middle-range theory (integrating theory and empirical research), theoretical and value pluralism, intellectual and pedagogical eclecticism coupled with a certain diplomatic restraint. JIC is testimony to the ways William has strived to enact these in his own practice.

There is more than a hint of radical progressivism about William's ideas and activism. There is his advocacy of the freedom of adopting the methods and subject-matter from other disciplines, the writings of non-Western jurists and de-parochializing the Western juristic canon, and the integrated reform of both the academic and professional stages of legal education; whilst also arguing that law is intrinsically a part of the university, a liberal art that marks a return to a broader and more intellectually optimistic sense of the discipline. He argues that legal academics ought to 'take much more responsibility for the health of their national system of 'legal education'' including the way that the general public understands the law 'from cradle to grave' and their role as public intellectuals (Twining, 2009 and 2019 p.221).

Taken seriously, the challenge would lead to a remarkable metamorphosis: the academic lawyer as Periclean plumber (cf. Twining, 1967).

While JIC helps us to understand William's values and politics, it does not provide a full account. Perhaps this is partly because of the author's modesty and reticence. JIC is carefully billed as an intellectual, and not a full, biography. While the intellectual context(s) are often fascinating, their treatment is limited, no doubt necessitated by the need to keep the book within reasonable confines. Given the lack of publicly available evidence, trying to fill in the gaps is inevitably a matter of conjecture that involves skiing on thin ice. Nonetheless, I will point to two facets of William's intellectual 'context' that, without wishing to be overly reductive, may help us to understand his underlying values and politics.

Firstly, William's stance is perhaps partly a manifestation of the traits and assumptions associated with the higher reaches of intellectual life in 1950s England, especially Oxford.[7] His tendency to distance himself from 'politics', 'ideology', and 'reductionism' (and by implication, illiberal) approaches to scholarship ('the poverty of historicism'), was part of the common currency of the world that helped to shape his intellectual and philosophical furniture. His experience of studying at Oxford occurred at a time when the Cold War was the major political concern in the West and there was a widespread preoccupation with the nature of 'totalitarianism'. Positivism, empiricism and 'value-free' science reigned supreme. Hence, William's

[7] This paragraph and the next draws on Sugarman (2002) p.119-120, 125-126.

tendency to position himself as a neutral or objective umpire or observer. Similarly, a certain 'English reserve' or 'stiff upper lip' may be part of the explanation. 'No emotions. We're English!'. Detailing what he really felt was not part of his enterprise.

In these respects, he is strikingly like his mentor, HLA Hart, and his Oxford contemporaries, Sir Neil MacCormick and AW Brian Simpson (amongst others). They all had a love of and belief in the importance of analytical and linguistic precision, demonstrating, in a quintessentially English and Oxford way, a commitment to positivism (and, in the case of Hart and Simpson, a suspicion of sociology). They were also critical of unquestioning acceptance, and distrustful of absolute statements. They wrestled with being positivists and liberal pluralists in a post-Cold War world, and increasingly engaged in moral criticism. They were all critical of university legal education. They were not just academics, but were also involved in university and law reform, undertaking various forms of political activism that was in part an escape from the humdrum of academia and a vehicle for their progressive politics. They were liberal pluralists who (in case of Hart and Simpson) claimed that they moved leftwards politically in later life – something that we might possibly also see in William? They were in many ways 'insiders', the products of an academic culture that was socially secure, intellectually confident and, to an extent, politically liberal. Despite this, most of them (including William) felt 'outsiders' in important respects for much of their lives.

Secondly, one might inquire whether William's John Stuart Mill type of liberalism was connected to his Quaker temperament. I suspect that he appreciates the Quakers aversion to confrontation, their emphasis on conciliation, readiness to sit together and exchange views (community) and values of peace and equality (that all human beings are equal and equally worthy of respect). Seen in this light, William is both a legal academic and a moralist, someone who has engaged with one of the most profound tensions within the discipline of Law and socio-legal studies - the relationship between idealism and realism/utopia and immediate progressive reforms.

V

The Labour politician Ney Bevan famously remarked that the fate of the 'man in the middle of the road' was to be run over (Bevan, 1953). William is indeed a man who has worked in the intellectual middle ground, although he has certainly not been 'run over'. He is also a radical, a hybrid who has elaborated positions and advanced ideas far beyond the centre. Whilst social, political and economic times are different from when William started his career, the values that he has cherished remain as relevant and challenging today as they were in the past.

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