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DIFFUSION OF LAW: A GLOBAL PERSPECTIVE

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ABSTRACT

A number of widespread, but not universal, assumptions underlying contemporary discourse about "reception", "transplants", or "transposition" of law taken together constitute "a naïve model of diffusion of law." This paper argues that, if one adopts a global perspective and a broad conception of law, each of the twelve elements in this model can be shown to be neither necessary nor even characteristic attributes of the processes of diffusion of law. This represents a first step towards renewing a conversation with the social science literatures on diffusion.

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I. MAPPING LAW

"Renewing initiatives stand as a starting point. They bring new needs and new satisfactions to the world, then spread or tend to do so through forced or spontaneous, chosen or unconscious, quick or slow imitation, always responding to a regular pace, as a light wave or a family of termites." (Gabriel Tarde)[1]

In my early years of teaching in Khartoum in the late 1950s, I used to teach a first year course called "Introduction to Law". In order to set a context for the study of the Sudan Legal System, I began by presenting my students with a map of law in the world as a whole.[2] This map suggested that almost every country belonged either to the common or civil law family. It indicated that some civil law countries were socialist (this was the period of the Cold War) and that many countries, mainly colonies and ex-colonies, recognized religious and customary law for limited purposes, mainly in respect of personal law, such as family and inheritance.

This simple map served a useful purpose in setting a broad context for the study of Sudanese law, in interpreting legal patterns in Cold War terms, and especially in emphasizing the impact of colonialism on the diffusion of law. It explained, but did not purport to justify, why we were mainly studying English-based law. It also identified the Sudan legal system as an example of state legal pluralism, and it provided a starting-point for discussing the future development of local law.

Today that map would look primitive, partly because the world has changed in forty years, but mainly because it was based on assumptions

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[1] Gabriel Tarde, *Les lois de l'imitation* (1890, 1979 p.3).
[2] For a more detailed account see Twining, (2000) at pp. 142ff.

that were dubious even then. For example, in orthodox terms, as a depiction of municipal state legal systems it could be said to have exaggerated the importance of the civil law/ common law divide; it underplayed the differences between legal systems within the common law and Romanist traditions; it had a private law bias; and it paid too little attention to hybrid systems.

My map depicted all the national legal systems of the world as belonging more or less fully to either the common law or the civil law "families", largely from the perspective of exporters. This was a picture that assumed massive transplantation. But, in addition to being naïve about what I was mapping, I accepted uncritically an equally naïve model of legal receptions. We can reconstruct this as an ideal type of a reception based on some widely held assumptions, even if the model as a whole would be recognized as much too simple by most sophisticated scholars of diffusion of law.

A standard example might take the following form: In 1868 Country A imported from Country B a statute, a code, or body of legal doctrine and this has remained in force ever since.[3] If this example is taken as a paradigm case and generalized up into an ideal type it can be shown to contain a number of questionable assumptions and some significant omissions:

(a) It assumes that there was an *identifiable exporter and importer*;

(b) It assumes that the standard case of a reception is export-import between *countries*;

[3] This is an example of a "small-scale" reception, but most of the assumptions also apply to standard accounts of "large scale" receptions. Cf. "There is agreement, however, that the phrase 'legal transplants' refers to the movement of legal norms or specific laws from one state to another during the process of law making or legal reform." L. Mistelis, "Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform __ Some Fundamental Observations" 34 The International Lawyer 1055 (2000) at p. 1067 (discussing Watson and Kahn-Freund and their protagonists).

(c) It assumes that the typical process of reception involves a *direct one-way transfer* from country A to country B;

(d) It assumes that the main *objects* of a reception are legal rules and concepts;

(e) It assumes that the main *agents* of export and import are *governments*;

(f) It assumes that reception involves *formal* enactment or adoption *at a particular moment of time*;

(g) It assumes that the object of reception *retains its identity without significant change* after the date of reception.

Other common, but by no means universal assumptions, include the following:

(h) The standard case is export by a *civil law or common law "parent"* legal system to a less developed *dependent (e.g. colonial) or adolescent (e.g. "transitional")* legal system;

(i) That most instances of reception are *technical* rather than political, typically involving "lawyers' law".[4]

(j) That the received law either *fills a legal vacuum or replaces* prior (typically outdated or traditional) law.[5]

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[4] On the somewhat shaky, but not entirely meaningless, concept of "lawyers' law" see William Twining, "Some Aspects of Reception" (1957) Sudan Law Journal and Reports 229 (my first effort to sort out some of the puzzlements generated by my map).

[5] Most of these assumptions are closely related to "the Country and Western Tradition" of comparative law, an ideal type which until recently fitted much of the discourse, but by no means all of the practice, of mainstream Western comparative law. The main elements of this ideal type of the conception of mainstream comparative law in the twentieth century were: "(i) The primary subject matter is the positive laws and "official" legal system of nation states (municipal legal systems); (ii) It focuses almost exclusively on Western capitalist societies in Europe and the United States, with little or no detailed consideration of "the East" (former and surviving socialist countries, including China), "the South" (poorer countries), and the richer countries of the Pacific Basin. (iii) It is concerned mainly with the similarities and differences between common law and civil law, as exemplified by "parent" traditions or systems, notably France and Germany for civil law, England and the United States for common law; (iv) It focuses almost entirely on legal doctrine; (v) It focuses in practice almost exclusively on private law, especially the law of obligations, which is sometimes treated as representing the "core" of a legal system or tradition; (vi) The concern is with description and analysis rather than evaluation and prescription, except that the main use of "legislative comparative law" is typically claimed to be the lessons learned from foreign solutions to shared problems __ a claim that is theoretically problematic." Twining, (2000a); see also *Globalisation* (2000) at pp. 184-9. As we shall see, by no means all leading accounts of diffusion of law belong to that tradition.

Each of these assumptions has been challenged individually in the literature, usually without reference to social science sources. Nevertheless, these assumptions are still widespread in legal thought and discourse about receptions/ transplants and they exert a constricting, and sometimes a distorting influence. To generalize about law in the world today in terms of such patterns is to indulge in generalizations that are often superficial, misleading, exaggerated, ethnocentric, or in some cases plain false.[6] Yet there clearly are patterns relating to law that can be discerned. The problem is, first, to identify patterns that are not false, superficial or misleading and, second, to explain them. This is what the study of diffusion of law sets out to do.

Since 1959 the study of diffusion of law has proceeded under many labels including reception, transplants, spread, expansion, transfer, exports and imports, imposition, circulation, transmigration, transposition, and transfrontier mobility of law.[7] In this paper I shall use the term "diffusion" to cover all of these in order to underline its potential

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[6] See further Twining, (2001a).

[7] On the various metaphors used in connection with diffusion see David Nelken in D. Nelken and J. Feest (eds.) *Adapting Legal Cultures* (2001) at pp. 15-20 and Esin Örücü, "Law as Transposition" 51 ICLQ 205 (2002). These terms are not all synonyms. In particular, some focus on the original source (export, transfer, spread, transmigration, diffusion, diaspora), while others direct attention to the recipient (reception, import, transposition). In ordinary usage "diffusion" may imply the former, but I shall use it as a generic term to cover both perspectives, as it does in standard social science discourse.: "Diffusion is the most general and abstract term we have for this sort of process, embracing contagion, mimicry, social learning, organized dissemination, and other family members." David Strang and Sarah Soule, "Diffusion in Organizations and Social Movements", 24 Annual Review of Sociology 265 (1998), at 266). However, one needs to be aware of the "exporter" bias in much of the literature. In economic analysis there has been a contrast between adoption perspectives focusing mainly on the demand side (individuals choosing to adopt) and market and infrastructure perspectives (placing more emphasis on structures, opportunities, marketing, and supply). (L. A. Brown, "Diffusion: Geographical Aspects" 6 *International Encyclopedia of the Social and Behavioral Sciences* (hereafter IESBS) 3679 (2001)). In the context of medical research, Trisha Greenhalgh et al. usefully distinguish between "diffusion" (informal spread) and "dissemination" (planned spread) as two points on a spectrum that extends from natural spread ("let it happen") to managerial change "make it happen": T. Greenhalgh, G. Robert, F. Macfarlane, P. Bate and O. Kyriakidou, "Diffusion of Innovations in Service Organizations: Systematic review and recommendations", Millbank Quarterly, December, 2004) .

connection with the study of diffusion in other social sciences. The literature contains many valuable studies and some rather unsatisfactory polemics. I shall argue that the study of diffusion of law has been handicapped by a set of widely held assumptions that are shared with my primitive map and that, in an era of globalisation, we need a broader and much more complex picture and a flexible methodology as a basis for studying processes of diffusion and their outcomes. In a sequel to this paper I shall argue that it is unfortunate that, although legal diffusion studies had shared origins in nineteenth century anthropology and sociology, they have lost touch with the massive body of literature in other social sciences dealing with diffusion of innovations and of language, religion, sport, and music. The time is ripe for contact to be renewed.[8]

Legal systems and legal traditions have interacted throughout history. Indeed, isolation has been quite exceptional.[9] So it is hardly surprising that themes concerning interaction and influence among legal systems and traditions are often dealt with as part of broader concerns within legal history, comparative law, law reform, law and development, post-conflict reconstruction, legal theory, sociology of law, and so on.[10]

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[8] William Twining, " Social science and diffusion of law" (forthcoming)

[9] Glenn suggests that there are no pure legal systems in the world (citing P. Arminjon, B. Nolde, and M. Wolff, *Traité de droit comparé* (1950) at p.49). He continues: "The mixed character of all jurisdictions is camouflaged today, however, by State institutions, taxonomic comparative law methodology which establishes distinct 'families' of law, by nationalist historiography which emphasizes that which may be distinctive in national legal systems. To say that all jurisdictions are mixed is not to accede, however, to environmentalist or diffusionist theories of cultural variety or to engage in any way in causal explanations of the phenomena." (H. Patrick Glenn, "Persuasive Authority" 32 McGill Law Jo. 261(1987) at pp. 264-65n.).

[10] A good example is the seminal comparative study by Pistor and Wellons of law in six Asian economies from 1960 to 1995, a period of remarkable economic growth. While the focus was on the role of law in economic development, it incidentally led to some significant observations on "transplants": "A key finding of this research project therefore is that law and legal institutions should not be viewed as technical tools that once adopted will produce the desired outcome…The finding cautions against the blind transplantation of legal institutions without due consideration for the relevant economic framework within which they shall operate. It also suggests that law reform projects should not be assessed in isolation, but within a broader context of economic policies." (K. Pistor and P. A.

In focusing on the history or characteristics of a particular legal system or tradition, concentrating on outside influence can be as sterile as a search for origins in history or for "influence" in literature or art.[11] It may also lead to too much emphasis on the exporter, or to over-concentration on particular moments of time (such as a "reception date"), and it may direct attention away from prior and subsequent events and interactions.

For example, the Otieno burial case in Kenya involved clashes of interest, perception and values between rural and urban, traditional and modern, women and patriarchy, as well as colonial v indigenous law.[12] Those who emphasized the colonial origins of state inheritance law obscured the fact that this was a struggle between Kenyans, some of whom supported imported national law because it was, in their view, more suited to modern urban life styles or because it challenged patriarchal elements in a tradition that was depicted as quintessentially African. Similarly, in "the Asian values debate", those who defend the cause of human rights and democracy in Asia typically treat the origins of the contemporary international human rights regime and discourse as irrelevant. It is one thing to oppose Western hegemony, it is quite another to decry the justification of freedom and democracy because of its "Western" associations and origins.[13]

Wellons, *The Role of Law and Legal Institutions in Asian Economic Development 1960-95* (Oxford UP, 1999) at 19.

[11] This article is in tune with the conclusion of a useful article by Edward M. Wise: "The international dimension of legal culture constitutes one of the contexts in which legal change occurs. But merely describing the itineraries of legal thought cannot be expected to explain such change." "The Transplant of Legal Patterns", 37 Am. Jo. Comp. L. 1 (1990), at p. 22.

[12] The case involved a dispute over burial rights between the widow of a leading Nairobi lawyer and members of his Luo clan in 1987. The case attracted a great deal of public attention at the time and has generated an extensive literature including J. B. Ojwang and J. N. K. Mugambi (eds.) *The S. M. Otieno Case* (Nairobi, 1989); David W. Cohen and E. S. Atieno, *Burying S. M.: the politics of knowledge and the sociology of power in Africa* (1992); John W. Van Doren, "Death African Style: The Case of S. M. Otieno" 36 American Jo. Comparative Law 329 ((1988). For further references, see A. Manji in 14 Law and Literature 963 (2002).

[13] See, e.g., Amartya Sen, "Human Rights and Asian Values: What Lee Kuan Yew and Li Peng don't understand about Asia" The New Republic, July 14&21, 1997 33-40, Yash Ghai, "Human Rights and Asian Values" 9 Public Law Review 168 (1998).

II. SOME LANDMARKS IN THE STUDY OF DIFFUSION OF LAW: A BRIEF OVERVIEW[14]

For some purposes it makes sense to focus on diffusion.[15] When that has happened the underlying concerns, the perspectives and methods adopted, and the immediate historical context have been quite diverse. The literature on diffusion of law does not belong to a single research tradition.[16] This can be illustrated by taking a brief look at some of the landmarks in the study of legal diffusion as such

Reception studies by lawyers are extensive and quite varied.[17] Historically they can be traced back to the writings of Gabriel Tarde, Sir Henry Maine, and Max Weber. To start with there was a close connection with diffusion theory in cultural anthropology, but law soon faded into the background.[18] Since World War II there have been a number of landmarks, stimulated by rather different concerns. First, there are studies of "the Reception" of Roman Law in medieval Europe, exemplified by the classic works of Koschaker[19] and Wieacker[20] and debates that these

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[14] For a longer discussion see "Diffusion of law and social science", op. cit.

[15] See above n.000

[16] Trisha Greenhalgh usefully suggests that much of the social science literature on diffusion of innovations does belong to a single research tradition, which went through several phases, despite being located in several different branches of sociology. "Meta-narrative mapping: a new approach to the systematic study of complex evidence" in B. Hurwitz, T. Greenalgh, and V. Skultans (eds.) *Narrative research in Health and Illness* (London. BMJ. 2004); cf. Greenhalgh et al., (2004) op. cit.

[17] Highlights of the legal literature are surveyed in more detail in a forthcoming paper on Social science and diffusion of law.

[18] Diffusionism represented a reaction against the prevailing nineteenth century view that there were natural laws of evolution governing human progress.

[19] Paul Koschaker's best known thesis, taken up by many subsequent writers, was that the reception of Roman law in Central Europe and the spread of the Code Napoleon were more a matter of imperial power and prestige than of superior technical quality. Paul Koschaker, *Europa und das römische Recht* (1946, 2nd edn. 1953) discussed by Zweigert and Kötz, *An Introduction to Comparative Law* (trs, Tony Weir, 3rd edn., 1998) at 100.

[20] Wieacker, Franz *Privatrechtsgeschicte der Neuzeit* (1952, revised 1967), translated by Tony Weir as *A History of Private Law in Europe, with particular reference to Germany* (1995); cf. F. Wieacker, "The Importance of Roman Law for Modern Western Civilization and Western Legal Thought", IV Boston College International and Comparative Law Review 257 (1981); " Foundations of European Legal Culture" 38 American. Jo. Comparative Law 1 (1990). See James Whitman, review of Wieacker (1995) in 17 Law and History Review 400 (1999) at p.402.

have stimulated. Second, there are accounts of the importation or imposition of the laws by colonizing powers.[21] Such studies overlap with the literature of legal pluralism and law and development. Third, a good deal of attention has been focused on largely exceptional "voluntary" receptions, especially in Japan and Turkey and to a lesser extent Ethiopia. In this regard, the work of Esin Örücü, on Turkey is outstanding.[22] Fourth, there is Alan Watson's general "transplants thesis",[23] his debate with Otto Kahn-Freund,[24] and the literature that these have provoked. And, recently there has been a pronounced revival of both academic and practical interest in relation to law reform and harmonisation as part of European integration, structural adjustment programmes in developing countries, reconstruction in "countries in transition" in Eastern Europe, and post-conflict reconstruction.[25] This interest has arisen from a variety of concerns in a variety of contexts and again, in many instances, discussion of reception or transplants has been incidental to some broader issues.

Much, but not all, of the literature has focused on relatively large scale receptions __ the reception of Roman law in medieval Europe, "the spread of the common law", the importation of a series of codes in

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[21] For example, Sandra Burman and Barbara Harrell-Bond (eds.) *The Imposition of Law* (1979). The term "imposition" is sometimes criticized as being too vague in this context, because nearly all influence takes place in the context of relative disparities of power. <Griffiths ck>

[22] See especially, Esin Örücü, in R. Jagtenberg, E. Örücü, and A. J. de Roo, *Transfrontier Mobility of Law* (1995); Esin Örücü , E. Attwooll and S. Coyle (eds.) *Studies in Legal Systems: Mixed and Mixing* (1996) at 89-111; *Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition* (1999); "Turkey Facing the European Union __ Old and New Harmonies", 25 European Law Rev. 57 (2000); "Law as Transposition" 51 International and Comparative law Qtrly. 205 (2002), See now *Enigma of Comparative Law: Variations on a Theme for the 21st Century* (Leiden: Martinus Nijhoff (Brill), 2004). .

[23] Alan Watson, *Legal Transplants* (1974, revised edn., 1993); his most recent variations on the theme include *Law Out of Context* (2000) and *Legal Transplants and European Private Law* (Ius Commune Lecture, Maastricht , 2000) (reply to Legrand).

[24] Otto Kahn-Freund, "On Uses and Misuses of Comparative Law" in *Selected Writings* (Stevens, 1978) at pp. 298-99 (originally published in 37 Modern Law Rev. 1 (1974)); Alan Watson, "Legal Transplants and Law Reform" 92 Law Qrtrly Rev. 79 (1976) at p.81

[25] For example in Rwanda, Sierra Leone, Afghanistan, Iraq and, in some ways *sui generis*, post-Apartheid South Africa.

Turkey or Latin America. This may partly explain the lack of interdisciplinary contact, for much of the modern sociological literature has been concerned with more detailed examination of the pathways and processes of diffusion of particular products, techniques or ideas.[26]

If these are some of the main landmarks of scholarly and theoretical work that has made diffusion of law a special focus of attention, there clearly is not one single, continuous research tradition. Rather the historical context of each of these disparate examples belongs to the largely separate histories of loosely related academic specialisms: cultural anthropology (diffusionism); Roman law and legal history (Wieaker); comparative law (Kahn-Freund, Örücü, Legrand) and legal pluralism (Chiba)[27]; recently major academic contributions have come via systems theory (Teubner)[28], sociology of law (Cotterrell and Nelken)[29], historical jurisprudence (Glenn)[30], European integration (Allison, Legrand)[31] and law and development (Dezalay and Garth,[32] Pistor and Wellons[33]). In this context, Alan Watson seems like a wild card defying categorisation.

Whereas the concerns of the early diffusionists and legal scholars such as Wieacker, Watson, Glenn and Örücü have been almost entirely academic, some of these recent developments raise questions of

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[26] Everett M. Rogers, *Diffusion of Innovations* (4th edn., 1995).
[27] M. Chiba (ed.) *Asian indigenous law in interaction with received law* (1986); M. Chiba, *Legal Pluralism: Towards a general theory through Japanese legal culture* (1989); "Legal Pluralism in the Contemporary World" 11 Ratio Juris 228 (1998).
[28] Guenther Teubner, "The Two Faces of Janus: Rethinking Legal Pluralism" 13 Cardozo Law Rev. 1443 (1992); "'Global Bukinawa': Legal Pluralism in World Society" in G. Teubner (ed.) *Global Law Without the State* (1996).
[29] David Nelken and Johannes Feest (eds.) *Adapting Legal Cultures* (2001).
[30] H. Patrick Glenn, *Legal Traditions of the World* (2000/ 2004).
[31] E.g. J. Allison, *A Continental Distinction in the Common Law* (1996); Pierre Legrand, *Fragments on Law-as-Culture* (1999); "The Impossibility of Legal Transplants", 4 Maastricht Jo. Of European and Comparative Law 111 (1997).
[32] Yves Dezalay and Bryant Garth, *Dealing in Virtue* (1996), *The Internationalization of Palace Wars* (2002)
[33] K. Pistor and P. A. Wellons (1999) op. cit.

immediate practicality: policy makers in international financial institutions want to know why "transplants" have regularly been perceived to have failed and what are the conditions for, and how to measure, "success" of reforms involving importation or imposition of foreign models;[34] local reformers want to know what factors to take into account in choosing between alternative models (when they are given a choice); judges want guidance on when it is appropriate to treat foreign precedents and other sources as persuasive authority;[35] resisters want to learn about the most effective strategies and techniques for lessening the impact or adapting unwelcome imports to local conditions and so on. One feature of some of these developments is that an increasing number of reform efforts have been put out to tender to private organisations that have little interest in the academic debates, especially where they emphasise the uniqueness of local cultures and long time-scales.[36]

There is now a huge amount of information, case studies, and fresh perspectives that are too important to ignore. All of these developments have put the assumptions in the naïve model under increasing strain. Not surprisingly, nearly all of the practical reform efforts focus on municipal law. Some of the more theoretical work of Teubner, Glenn, Chiba, and others ranges more widely. Individual assumptions have been challenged, but not in a systematic way.

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[34] Discussed below 000

[35] Glenn, op. cit (2001) at 230n; Anne-Marie Slaughter, "A Typology of Transjudicial Communication" 29 U. Richmond Law Rev. 99 (1994); David Fontana, "Refined Comparativism in Constitutional Law" 49 U.C.L.A. L.Rev. 539 (2001).

[36] Veronica Taylor, "The Law Reform Olympics: Measuring the Effects of Law Reform in Transition Economies" in Timothy Lindsay (ed.) *Law Reform in Developing States* (Federation Press, Sydney, forthcoming).

III. A GLOBAL PERSPECTIVE: DIFFUSION, LEVELS OF LAW, AND INTERLEGALITY

When I constructed my map in the late 1950s, I unthinkingly adopted a global perspective. As part of post-War reconstruction, there was at the time a good deal of talk of "World Peace through World Law", "the Common Law of Mankind", "world citizenship", and even "transnational law". However, sustained focus on "globalisation" was still some way off.[37] Since then the world has changed, law has changed, and so have our perceptions of both. Looking at diffusion of law from a global perspective inevitably assumes some mental map or total picture of law in the world. But clearly we need something a bit more sophisticated than my first effort in Khartoum.

Recently I have revisited the idea of mapping law, not so much in order to construct a map or maps or a historical atlas of world law __ an enterprise likely to be of limited value __ but rather to identify some of the difficulties in the way of such an enterprise.[38] Without rehearsing the arguments, I shall summarise my own position, which suggests one way of thinking about diffusion of law from a global perspective.

In law, it is especially important to distinguish between different geographical levels of human relations and of legal ordering of these relations __ from outer space to the very local, including intermediate levels, such as regions, empires, diasporas, alliances, and other

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[37] Significant works of the period include C. Wilfred Jenks, *The Common Law of Mankind* (Stevens, 1958), Philip C. Jessup, *Transnational Law*, (Yale UP, 1956), F. S. C Northrop, *The Meeting of East and West* (NY MacMillan, 1960); L. Jonathan Cohen, *The Principles of World Citizenship* (1954) In the early nineteen-sixties I attended some meetings organized in Chicago by the Council for the Study of Mankind. During the early years of the Cold War the International Commission of Jurists promoted the Rule of Law and civil and political rights (e.g The Act of Athens 1955,) in counterpoint with the International Association of Democratic Lawyers, who supported anti-imperialist movements and social and economic rights.

[38] "Mapping Law" in Twining (2000) Ch. 6. [Gordon Woodman in a recent paper has attacked "the assumption that the world of law consists of well delimited 'fields', each representing one legal system or discrete body of law" __ especially if these are conceived territorially. ("Why There can Be No Map of Law" (forthcoming, 2005). This raises interesting questions about the individuation of legal orders, legal systems etc. , but falls outside the scope of this paper.]

multinational entities and groupings. These levels are not neatly nested in concentric circles nor in hierarchies, nor are they static nor clearly defined.[39] A reasonably inclusive cosmopolitan discipline of law needs to encompass all levels of legal ordering, relations between these levels, and all important forms of law including supra-state (e.g. international, regional) and non-state law (e.g. religious law, transnational law, chthonic law i.e. tradition/custom)[40] and various forms of "soft law". A picture of law in the world that focuses only on the municipal law of nation states and public international law ("the Westphalian duo")[41] would for most purposes be much too narrow. For example, it is difficult to justify omitting Islamic law or other major traditions of religious law from such a picture.[42] Yet, to include only those examples of religious law or custom officially recognized by sovereign states (state legal pluralism) would be seriously misleading. To try to subsume European Union Law or *lex mercatoria* or international commercial arbitration or all examples of human rights law under "public international law" similarly stretches that concept to breaking point, without any corresponding gains.

I am not here concerned to debate questions about the criteria of identification for inclusion in a broad conception of law, how to distinguish between legal and other social institutions and practices under such a conception, the problem of individuation of normative and legal orders, and what count as borderline cases of "law".[43] Suffice to say that a

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[39] Id. at pp. 245-47. On the problem of individuation of legal and normative orders see below n.000.
[40] Glenn (2004) Ch. 3.
[41] Twining (2003), cf. Allen Buchanan, "Rawls's Law of Peoples: Rules for a Vanished Westphalian World" 110 Ethics 697-721 (2000)
[42] On the difficulties surrounding the concept of "religious law" see Andrew Huxley (ed.) *Religion, Law and Tradition* (2002). On the misperception of Hindu law as "religious law" by British officials in India see J. D. M. Derrett, "The Ministration of Hindu Law by the British", 4 Comparative Studies in Society and History 10-52 (1961-62)
[43] These issues are canvassed in Twining (2003) op. cit. . There is room for disagreement about the value of specifying general criteria of identification of law in the abstract, as Brian Tamanaha tries to

broad conception of "law" which includes important forms of "non-state" and "soft law" inevitably leads to taking normative and legal pluralism seriously.[44] If one adopts a broad conception of law and treats levels of law and strong legal pluralism as significant ideas, this has important implications for the study of diffusion.

Nearly all accounts of reception or transplantation of law focus on municipal law __ legal phenomena originating in one nation state or jurisdiction being imposed on, imported to, or adapted by another. The reception of Roman law in medieval Europe is a significant exception. Of course, there are contexts in which it is reasonable to focus on interactions between two or more systems of municipal law (country-country relations). But if one is concerned with legal ordering at all levels from the very local to the intergalactic, including non-state local, regional, transnational, and diasporic then clearly borrowing, blending, and other forms of interaction can take place at all levels and between different levels; interaction can be vertical, horizontal, diagonal, or involve more complex pathways.

Cross-level diffusion deserves more attention. Consider, for example, the paths through which one would need to trace the origins of the UK

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do (Tamanaha, 2001), or whether it is better to leave the drawing of boundaries and settling borderline cases to a specific context (as I have argued, Twining, 2003). In the context of establishing a coherent perspective on diffusion of law, it is reasonable to include major legal traditions, such as those recognized by Patrick Glenn, and institutionalised practices of ordering which are judged to be worthy of attention as being politically, economically or intellectually significant. Again precise criteria of inclusion of borderline cases are best left to be settled in more specific contexts, such as a study of some particular story of a diffusion process and its outcomes or the local history of a particular legal system or legal order. For present purposes, it is enough to stipulate that a legal order can be said to exist where one can identify an institutionalised system, agglomeration or group of social practices and norms that are oriented towards ordering relations between persons (legal subjects) at one or more levels of relations ad of ordering. This is almost as wide as Tamanaha's broad conceptualisation, but differs from it in four key respects: (i) it is an analytic concept that applies independently of "folk" conceptions of law; (ii) "ordering" is broader than Tamanaha's conception of social order; (iii) it adopts a "thin functionalist" element, but "function" here refers to purpose or point rather than to actual effects; (iv) this is not intended as a *general* definition or set of criteria of identification. See further Twining (2003).

[44] Twining (2000) especially at pp. 82-88.

Human Rights Act, 1998. It is a story of complex borrowing from theories of human rights, public international law, national laws, and the specific ideas of a British draftsman (David Maxwell Fyfe) followed by fifty years in Strasbourg, then back to London, Edinburgh and Belfast.[45] Similarly, Santos' account of Pasagarda law shows how the internal regime of a squatter settlement in Rio adopted and adapted some of the legal forms and legal vocabulary of the "asphalt law" (i.e. the official state law of Brazil).[46] The Vienna Sales Convention of 1980 and other international instruments draw from a variety of national laws, blend them with other materials, and then in turn have influenced municipal laws.[47]

Such examples highlight the close link between normative and legal pluralism on the one hand and diffusion on the other. When normative and legal orders co-exist in the same context of time and space there is always the prospect of more or less sustained interaction between them. Diffusion is generally considered to take place when one legal order, system or tradition *influences* another in some significant way. "Influence" __ a notoriously vague notion __ is only one kind of interaction or of what Santos usefully refers to as "interlegality".[48] So it may be illuminating to conceive of diffusion of law as one aspect of interlegality.[49]

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[45] A. W. B. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (2001).

[46] Boaventura de Sousa Santos, *Toward a New Legal Common Sense* (2nd ed,, 2002) Ch.3

[47] E.g Roy Goode, *Commercial Law in the Next Millennium* (Hamlyn Lectures, Sweet and Maxwell, 1995) Ch.4. II.

[48] Santos (2002) 437 and 90-91. Of course, talk of interlegality, interaction, and influence between legal orders raises difficult issues of individuation, on which see Sally Falk Moore ("semi-autonomous legal fields") (Moore, *Law as Process*, 1978, 54-81) and Brian Tamanaha, op. cit. (2001) pp. 206-8. Suffice to say here that it is often helpful to conceive of normative and legal orders as often being more like waves or clouds than billiard balls.

[49] For present purposes, it is useful to adopt a fairly standard social science definition: "The diffusion of social practices, beliefs, technologies or moral rules is a subject of interest for both sociologists and anthropologists. In both cases, diffusion process analysis points out how individuals, groups or communities may incorporate, reject, or adapt practices, rules, or social representations designed by

In the early days of the study of legal pluralism there was a tendency to think of co-existing legal orders in oppositional terms __ as conflicting or competing.[50] But that is a mistake. Rather, the possible kinds of relations between co-existing legal orders can be extraordinarily diverse: they may complement each other; the relationship may be one of co-operation, co-optation, competition, subordination, or stable symbiosis; the orders may converge, assimilate, merge, repress, imitate, echo, or avoid each other. To take just one example: Santos' account of Pasagarda law at first sight looks like an account of an illegal legal system, usurping or subverting or competing with the official law of the state. On closer examination the relationship was much more complex than that: unofficial peaceful ordering of relations and settlement of disputes may complement rather than challenge official modes of ordering. Santos describes relations between the Pasagarda Residents Association and state agencies as constantly shifting and "a model of ambiguity". The relations with the police were especially complex: on the whole the community avoided the police; the police offered their "good services" to the Residents Association, who, anxious not to become closely identified with them, acknowledged the offer, occasionally used the police as a threat, but only exceptionally actually cooperated with them. From the point of view of the state authorities the existence of an alternative locus

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others," (L. A. Brown, Diffusion: Sociology of" (6 IESBS at p. 3681) (2001). Cf. "In anthropology , diffusion has been taken to be the process by which material and immaterial cultural and social forms spread in space." (R. Stade) 6 IESBS at 3673.). Most accounts of diffusion emphasise movement of ideas across space; the emphasis of studies of normative and legal pluralism is somewhat different in that they are concerned with the interaction of different normative and legal orders co-existing in the same time-space context. No sharp lines can be drawn between the two.

[50] E.g. Anthony Allott interpreted the interaction between customary law and imported law in Africa mainly in terms of "internal conflicts of law" (i.e. choice of law) on an analogy with private international law. *New Essays in African Law* (1970) Part II.

of power and authority may be interpreted as a threat, a challenge, or a convenience.[51]

IV BEYOND THE NAÏVE MODEL: SOME COUNTER ASSUMPTIONS.

In discussing my early map, I suggested that it presupposed a naïve model of reception that included some dubious assumptions and treated something like the following as a simple paradigm case of a small-scale reception:

In 1868 Country A imported from Country B a statute, a code, or body of legal doctrine and this has remained in force ever since.[52]

This example involves a *bipolar* relationship between *two countries* involving a *direct one-way* transfer of *legal rules or institutions* through the agency of *governments* involving *formal enactment or adoption* at a particular moment of time (*a reception date*) *without major change*. Although not explicitly stated in this example, it is commonly assumed that the standard case involves *transfer from an advanced (parent) civil or common law system to a less developed one*, in order to bring about *technological change* ("to modernise") by *filling in gaps or replacing* prior local law. There is also considerable vagueness about the criteria for "success" of a reception __ one common assumption seems to be that if it has survived for a significant period *"it works"*.

If one constructs these elements into an "ideal type", we can see that the mainstream literature on diffusion of law allows for some

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[51] Santos 2002 Ch 4. Cf. "No-go areas" in Belfast and other cities. John Griffiths rightly warns against reifying levels and relations when discussing interlegaity: from a sociological point of view, the focus should be concretely on people doing things. (communication to author, Sept., 2004).
[52] Above p.ooo.

deviations from this model and makes some important distinctions between types of reception and of transplants.[53] Nevertheless, all of these assumptions are widespread. In particular, nearly all of the literature treats diffusion of law as involving relations between municipal legal systems through the agency of governments. If one adopts a global perspective and a broad conception of law operating at different levels of relations and of ordering, and if one conceives of diffusion of law as an aspect of interlegality, one can construct a systematic challenge to each of these elements as a necessary or even a characteristic feature of diffusion of law. This suggests that a much more varied and complex picture of diffusion of law and interlegality needs to be constructed. The alternative picture that emerges cannot be captured by a single polar "ideal type"; rather it is a series of possible variants to each of the elements in the simple model. Table 1 illustrates this without claiming to be comprehensive:

INSERT TABLE 1

[53] Within the mainstream literature a number of important distinctions are fairly standard: (i) large scale/ small scale receptions; (ii) voluntary/ imposed receptions (see above n. 000); (iii) socio-cultural affinity or diversity between exporter and importer (cf. Rogers' (1995) distinction between homophily/ hetereophily); (iv) receptions of lawyers' law and of personal law (above n.000); (v) Some scholars, in particular Esin Örücü, have introduced a further range of distinctions, but largely within the framework of assumptions about state law (see below). Several of these distinctions were anticipated in 1936 by Albert Kocourek, "Factors in the Reception of Law", 10 Tulane Law Rev. 209 (1936). See further Patrick Glenn's potentially controversial distinction between reception as alliance and reception as construction (denying that receptions are "imposed") (Glenn (1987) at p. 265) and Jonathan Miller, "A Typology of Legal Transplants" 51 Am. Jo. Comparative Law 839 (2003) especially a typology based on importers' motives).

In order to clarify and to illustrate this table, it may be useful to comment on each of the elements and to provide some examples. Some are familiar and can be dealt with briefly, but others require more extended treatment. Three preliminary points deserve emphasis: first, my purpose is to illustrate some of the complexities of diffusion of law and to suggest a method of analysis of the processes involved; it is not to set up a single alternative model. The subject is too complex for that. Second, much of this analysis applies even if one adopts a narrower conception of law than I have suggested or if one is mainly concerned with diffusion of state law. Third, taken singly, most of the points are not new and I shall use examples that are to be found in the mainstream literature to illustrate them. My object is to construct a systematic picture of the complexities.

(a) *The sources of importation are often diverse*.

The standard colonial and neo-colonial situation postulates a single exporting country imposing legal rules or institutions on a single importer. But the process is often more complex than that. For example, an importer may choose eclectically from several foreign sources, as Turkey did deliberately in the case of its various codes so as not to be beholden to any one European country. What is imported may be an idea or model that did not originate in a single legal order: for example, when instruments of harmonization, such as the as the American Restatements, Uniform Laws and Model Codes, are created with a view to their being adopted by multiple jurisdictions within the same country; or in many countries, as in the case of the Vienna Sales Convention or the UNCITRAL Model Law on International Commercial Arbitration. Conversely, an exporter, such as a colonial or neo-colonial power, may

produce standard form instruments for export to many destinations, as happened with the Indian Evidence Act, the Indian and Queensland Penal Codes, and many other measures. Often the processes of interaction are more diffuse or complex, as when a generation of students has been sent to study abroad in several different countries and return home bringing aspects of different legal cultures with them as part of their intellectual capital. This is an important part of the story of the reception of Roman law in medieval Europe. Many regional and international instruments are new creations drawing in part from a variety of national sources, but also involving important new elements. Simple binary interaction between legal orders and traditions cannot be assumed. Often, Örücü's culinary metaphors __ mixing bowl, salad bowl, salad plate, and purée __ may be more appropriate.[54]

(b) *Cross-level interaction*. Cross-level diffusion is an important and relatively neglected phenomenon. The standard example postulates a direct one-way transfer between municipal legal systems. Diffusion can occur horizontally at other levels than the national (e.g regional-regional or sub-state local-local). More important, it takes place *across* levels of ordering.[55] For example, states often adopt international norms as part of domestic law. The European Convention on Human Rights was given "further effect" by the United Kingdom Human Rights Act 1998.[56] The Standard Minimum Rules for the Treatment of Prisoners have formed the basis for much regional and domestic regulation, as well as being used as

[54] Örücü, (1995) op. cit.

[55] For example, international-national, sub-national-national, national-transnational or national/ international/ transnational-non-state local and so on. See the useful critique of "Compartmentalization of political space" by Julie Mertus, "Mapping Civil Society Transplants: A Preliminary Comparison Between Eastern Europe and Latin America" 53 U. Miami Law Rev. 921 (1999) at pp. 930-33.

[56] On the cross-level aspects of the Human Rights Act, see Twining (2002) at pp. 99-100.

a template for evaluating particular prison regimes.[57] Consider further the recent transnational networking by NGOs concerned with women's rights and their impact on the law in South Africa.[58] Similarly, Santos has shown clearly how the internal regime of the squatter settlements in Brazil imitated "the asphalt law" of the state, a fairly standard situation in the anthropological literature.[59] Glenn gives many examples of influence between religious traditions or between local custom and religious law.[60] In short, *diffusion may take place between many kinds of legal orders at and across different geographical levels, not just horizontally between municipal legal systems*.

(c) *The pathways of diffusion may be complex and indirect*.[61] A nice example, is the Indian Evidence Act, 1872. This was drafted for India by James Fitzjames Stephen. It was a great simplification, but also an idealization of the English law of evidence. After its enactment in India it was used as a model in many other parts of the British Empire. It also had some influence on evidence in England: when Fitzjames Stephen failed to get his Evidence Bill adopted by Parliament, he used the Indian Evidence Act as the basis for his influential *Digest of the Law of Evidence* on which several generations of English and Commonwealth barristers were trained

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[57] Vivien Stern, *A Sin Against the Future: Imprisonment in the World* (1998) at pp. 195-97; Human Rights Watch, *Global Report on Prisons* (1993).

[58] A. Griffiths, *In the Shadow of Marriage: Gender and Justice in an African Community* (U. Chicago Press, 1997), Lisa Fishbayn, "Litigating the Right to Culture: Family Law in the New South Africa", 13 Int. Jo. Of Law, Policy, and the Family, 147 (1999).

[59] Santos (2002) op. cit. Ch.3. Similar mimicking and adapting of municipal law concepts (e.g. lien, equity, sovereign) is an important part of the discourse the Common Law Movement (the almost invisible "legal" off-shoot of the militias in the United States), see Susan Koniak, "When Law Meets Madness" 8 Cardozo Studies in Law and Literature, 65 (1996).

[60] Glenn (2004) *passim*. On the "irreducible continuum" between Islamic law and local custom see Lawrence Rosen, *The Justice of Islam* (2000), especially Ch. 5.

[61] On "influence research" [(Einflu*B*forschung)] see J. D. M. Derrett, "An Indian Metaphor in St. John's Gospel", 9 Jo. Royal Asiatic Society 271-86 (1999**)** cited in W. Menski, *Comparative Law in a Global Context* (2000) at p.52.

at the Inns of Court.[62] Of course, *reciprocal influence* is not uncommon even at state level, for example, the mutual interaction between American states, between England and Scotland, and between the United States, the United Kingdom, and Australia. Reciprocal influences between religious, customary, and municipal legal orders are well documented.[63]

(d) The paradigm example of reception involves a *formal act of adoption or enactment*, for instance by enacting a statute, adopting a constitution, the creation of an Independence Constitution by the decolonising power, or the enactment of a "reception clause" in local legislation. It may take place somewhat less formally, by a specific executive or judicial decision. However, much diffusion is *informal* and protracted as when legal ideas are carried by colonists, missionaries or merchants or spread by influential legal or other writings.[64]

Formal acts of reception may differentiate law from most other objects of reception. But there are, of course, degrees of formality and even where the main agents are the government or particular officials a great deal of influence may operate more or less informally.[65] Where the agents are individuals or non-governmental groups formal acts of reception are likely to be exceptional.

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[62] J. F. Stephen, *A Digest of the Law of Evidence* (1st edn., 1876; 12th edn., 1948). On Stephen (1876-1948) and the Indian Evidence Act, see William Twining, *Rethinking Evidence* (1994) 52-7, L. Radzinowicz *Sir James Fitzjames Stephen* (Selden Society Lecture, 1957).

[63] See e.g. Glenn (2004) at pp. 356-57, Martin Chanock, *Law, Custom and Social Order* (1985), Lauren Benton, *Law and Colonial Cultures* (2002).

[64] See (f) below.

[65] Pistor and Wellons (1999) op. cit., report that: "Despite the absence of major formal law reform in most [of the six Asian] economies, the legal systems changed significantly between 1960 and 1995. This change cannot be captured by focusing only on the enactment or amendment of major codes. Legal change over the 35 years was less visible because it often took place at the level of administrative rule making or practice rather than the enactment of new major codes." (op. cit. at p.4).

(e) Any "legal" phenomena or ideas can be the objects of diffusion. In short, *rules and concepts and legal institutions, such as courts, are not the only or even the main objects of receptions*. This is generally acknowledged in the mainstream literature on diffusion of law. Some objects are quite visible such as institutional designs, or formal procedures, or dress, symbols and rituals, or literary genres (e.g. law reports, journals), or structures, methods and practices of legal education and training, or personnel (e.g. foreign judges or advisers). or documentary forms[66]; others may be less obvious, such as styles of drafting or of judicial opinions or of argumentation, or prison technology or architecture, or prescribed alternatives to imprisonment. Some are more elusive such as "mentality", concepts, conventions, unspoken assumptions, ideology, or even principles.[67] Rogers usefully reminds us that "a set of innovations diffusing about the same system are interdependent." It may be easier to study the diffusion of each finite item as if it is an isolated event, but in reality diffusion tends to operate in "technology clusters".[68]

(f) While the most visible agents of import and export are governments, there have been many other *agents of diffusion*. Weber, Watson and

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[66] A largely invisible form of diffusion relates to legal instruments __ for example, standard forms for the numerous types of agreement and transaction involved in transnational trade, investment, and finance. To take but one example: the "Conditions of Contract for Works of Civil Engineering Construction" (informally known as "The Red Book") is a standard form contract drawn up by the Fédération Internationale des Ingénieurs-Conseils (FIDIC). It is an important element in the emerging transnational *lex constructionis*, which can be interpreted as part of the *lex mercatoria*. See www.l.fidic.org/resources/engineeringourfuture/ (May, 2004). I am grateful to Michael Douglas for this example,

[67] Compare the following list of objects studied from a geographical perspective: "Hence, diffusion phenomena cover a wide range that includes transportation modes, such as the automobile, farming techniques, family planning, credit cards, broadcast and cable television, shopping centers, production practices, such as assembly line and just-in-time inventorying, political movements, cultural practices, frontier development, modernization in Third World settings, epidemics, urban ghettoes, and urban areas themselves." (L. A.. Brown IESBS (2001) op. cit. at p. 3676)

[68] Rogers (1995) op. cit. at 14-15. on the limits of a technological perspective on law, see below 000.

others have identified legal élites (the *honoratiores*) as often playing key roles in diffusion. Colonists, missionaries, and merchants have throughout history "carried their law with them". So have slaves, refugees, believers, and jurists.[69] Law is spread as much by literature as by legislation. Commerce, education and religion may be as important conduits as governmental action in bringing about legal change. Where colonists or merchants or immigrants "bring their law with them" the process of diffusion may be more closely analogous to the spread of a language, involving thousands or even millions of unrecorded individual choices over long periods of time without necessarily having any historic moments or defining events.[70] There are grounds for believing that in law, as in other spheres, persuasion at grass roots and other levels is likely to be more effective than top-down law-making, but this hypothesis needs to be explored by further empirical research.[71]

(g) *Reception usually involves a long drawn out process* which, even if there were some critical moments, cannot be understood without reference to events prior and subsequent to such moments.[72] Even the more sophisticated accounts of famous receptions of state law that involved one or more specific reception dates, such as the Turkish story,[73]

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[69] David Nelken has suggested (communication to the author) that detailed empirical study of jurists as change agents could be a particularly rich field. I agree. On change agents the social science literature is particularly suggestive, see Rogers (1995) Ch. 9.

[70] But law, like language, "is a group-oriented innovation par excellence". Robert L. Cooper (ed.), *Language Spread: Studies in Diffusion and Social Change* (1982) at p. 20.

[71] For a strong version of this view, see H. Patrick Glenn, op. cit. (1987) ; " {R]eception is the obvious instance of adherence, on a large scale to persuasive authority…It is…inappropriate to consider reception as either imposed, following conquest, or voluntary, since all reception which occurs is necessarily voluntary". (at pp. 264-65) (above n. ooo) This seemingly goes against major trends in the literature on the colonial experience. However, Glenn's conception of "reception" includes some idea of acceptance and persuasion __ law is not "received" unless it is accepted. Nevertheless, this position is debatable. See, for example, Burman and Harrell-Bond (1979) op. cit.

[72] During the period of British colonial rule in Africa, Sudan (a condominium) was exceptional in not having a specified reception date. See further, A. N. Allott, *New Essays in African Law* (1970) Ch.2.

[73] Ataturk's reforms in Turkey were introduced within a relatively short time span, but to understand them, it is necessary to consider both the long period of gradual modernization and secularization prior

emphasise the historical continuities over long periods of time. Conventional wisdom has it that one cannot understand the story of the McArthur Constitution without reference to the prior tradition of constitutionalism in Japan before World War II and the subsequent history of its interpretation and development to the present day.[74] The later chapters of stories of diffusion tend to be accounts of local importers' history, but that can also be misleading.

(h) There is a tendency in the literature to assume that most diffusion, at least in modern times, involves movement from the imperial or other powerful centre to a colonial or less developed periphery. The paradigm example is export by a *"parent" common law or civil law system* to a less developed dependent (e.g. colonial) or adolescent (e.g. "transitional") system.[75] To be sure imperialism, and neo-imperialism form an important part of the picture. But this patronising view hardly fits the story of the spread of law as part of the baggage of colonists, migrants, refugees, and others or of the great religious diasporas throughout history, nor of interaction within countries, regions or alliances. Exclusive concentration on the spread of state law tends to go hand-in–hand with a formalistic and technocratic top-down perspective that underestimates the importance of informal processes of interaction.

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to 1923 and the equally long period of implementation, interpretation, adjustment, and slow and uneven acceptance since 1926. It is also necessary to consider further waves of reception related to religious revival, participation in the world economy, and Turkey's continuing attempt to become integrated into Europe.

[74] See, for example, Frank K. Upham, *Law and Social Change in Postwar Japan* (1987); Kyoko Inoue, *MacArthur's Japanese Constitution* (1991); Lawrence W. Beer and Hiroshi Itoh, *The Constitutional Case Law of Japan, 1970 through 1990* (1996) **;** Ray A. Moore and Donald L. Robinson*, Partners for Democracy* (2004).

[75] See the discussion in Zweigert and Kötz (1998), op. cit., at pp. 41-42.

(i) Bruno Latour's dictum "No transportation without transformation"[76] may be an overstatement if applied to legal phenomena, but no serious student of diffusion can assume that what is borrowed, imposed or imported *remains the same*.[77] This is not just a matter of the interpretation and application of received law, but also of its use or neglect, impact, and local political, economic and social significance. Sometimes, it is true, a particular legal institution may remain in force and operative because it is part of the intellectual capital of a legal elite,[78] but most stories of reception are at least in part stories of interaction between the "imported law" and "local conditions", How and to what extent any particular "import" retains its identity or is accepted, ignored, used, assimilated, adapted, rooted, resisted, rejected, interpreted, enforced selectively, and so on depends largely on local conditions. Such accounts at least allow for interaction between imported law and local conditions, including local law. But that is still adopting the standpoint of the exporter who seems to be asking in effect: what happened to our law?

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[76] Bruno Latour, *Aramis or the Love of Technology* (trs. Catherine Porter, Harvard UP, 1996). In cultural geography "a basic notion is that the diffusing item is both a stimulus to a new innovation and itself subject to modification as it spreads. The relation between diffusion, the item being diffused, and the human landscape is therefore complex and subject to continual change." (L. A Brown (2001) op. cit. at 3677). Cf. Alter (2001) op. cit at p. 3684.

[77] In social science accounts of diffusion the term "reinvention" is sometimes preferred to "adaptation", emphasizing the idea that local people often employ creative problem-solving in which borrowing or imitation is only one aspect. (Rogers (1995) 17, 174-80).

[78] Take for example, Stephen's Indian Evidence Act of 1872. It has survived for over 130 years in India with only a few minor legislative changes. It has been encrusted with Indian precedents. The Indian practitioners' treatises, such as *Sarkar on Evidence*, are almost as bulky as their American counterparts. (*Sarkar on Evidence* (1st edn. 1913; 12th edn. 1971- ed. P.C. and S. Sarkar); cf. J. G. Woodruffe, and Ameer Ali (1979-81) *The Law of Evidence* (14th edn. 1979-81) Students' works stay close to the text and the Indian precedents by and large do not seem to deviate very far from the spirit of the draftsman. The Indian Evidence Act might be cited as an example of Alan Watson's thesis that many transplants survive for long periods almost unchanged and without any significant relation to local social economic and political changes and conditions, but it has clearly been integrated into the professional life of generations of the Bar in India and elsewhere and has become a stable part of their intellectual capital. I suspect the full story would be more complex than that, but to date there seems to have been little empirical study of its use in practice.

Things can look very different from local points of view, whether these are members of a political elite, their opponents, minority groups, or individual citizens confronted in daily life with a variety of regulatory orders. A leading critic of the top-down bias in most Western accounts of reception, the Japanese scholar Masaji Chiba, goes so far as to say: "The whole structure of law in a non-Western society is, seen from a cultural point of view, formed in the interaction between received law and indigenous law."[79] Chiba's detailed studies of legal pluralism in Japan, Sri Lanka, and elsewhere from a non-Western perspective are a useful counter-weight to the exporters' bias in many Western scholars' accounts of diffusion. Another important theme relates to how importation of and resistance to foreign legal ideas, laws, and institutions often forms part of some broader local political struggle.[80]

(j) *Filling a vacuum*

It is often assumed that law has been imported to fill a vacuum or to fill in gaps or to replace pre-existing laws[81]: either there was nothing to replace or else legal change was a straightforward matter. Where exporters have been ignorant of, indifferent or hostile to indigenous or other pre-existing law they have often treated it as invisible or insignificant. They have tended to underestimate what Merry calls "the

[79] M. Chiba op. cit. (1986) at p.7. This perspective is developed in Chiba (1989). In recent writings Chiba has moved beyond focusing solely on countries and sub-state forms of law to include "trans-state law" (which encompasses both international law and world law) Chiba (1998).

[80] Compare, for example, Amy Chua, *World on Fire* (New York: Doubleday, 2003) (arguing that the impact of economic globalisation fuels a backlash against market-dominant ethnic minorities in whose interests commercial law reforms are perceived to be) with Dezalay and Garth's account of "palace wars" in Latin America, *The Internationalization of Palace Wars* (2002).

[81] This is referred to in the social science literature as "the empty vessels fallacy" (Rogers (1995) at 240-42). Mistelis, op. cit. (2000) at p. 1065 characterizes much foreign technical legal assistance in Eastern Europe as "legal surgery", with foreign concepts being introduced "as if they were legal transplants to replace malfunctioning organs".

forms of resistance to the penetration of state law"[82] Nearly all modern detailed studies of reception recognize that it usually involves interaction with pre-existing normative orders, even if their main concern is with state law; whether or not these are designated as "legal", "informal", "traditional" or "customary" by particular writers is a secondary matter.[83] A good example is Dezalay and Garth's' detailed study of the interaction of imported American ideas about legal education and judicial reform with local, practices, attitudes and power structures in Latin America.[84] As with earlier points, the important thing is that processes of diffusion are nearly always mediated through local actors.

(k) *Technological, contextual-expressive, and ideological perspectives.* Throughout the legal literature on diffusion of law there runs a tension between three underlying conceptions of the objects and processes of diffusion. These might be labelled the, instrumentalist, the expressive/contextual, and the ideological views of law.

Enthusiastic diffusionists tend to assume that laws are generally discrete technological products, as transferable as widgets or other innovations, to be imported as instruments of legal and social modernisation. The instrumentalist view sees the process as being essentially one of problem solving in which solutions developed elsewhere are imported to solve local problems. In this view legal rules,

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[82] Sally Merry, "Legal Pluralism", 22 Law and Society Rev. 869, at p.882. An important example of revisionist history in this regard is the discrediting of Pound's account of "the formative era of American law", which suggested that after the Revolution the common law was received to displace unsophisticated colonial law. Recent historiography suggests that colonial law was not unsophisticated, there was no moment of reception of common law, but rather a long-drawn out complex process of assimilation and development which varied between colonies and in which imported ideas were but one element in each local story. (Edward Wise (1990) op. cit. at pp. 7-10.)

[83] For example, Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard, "The Transplant Effect", 51 American Jo. Comparative Law 163 (2003) are concerned with transplantation of state law, but acknowledge that "{M]ost societies today have both formal and informal legal systems" (at p. 175). A central part of their argument is that imported formal law typically has to interact with pre-existing informal legal (or other normative) orders.

[84] Dezalay and Garth (2002) op. cit.

institutions, and practices are essentially a form of technology. Typically, in the process of modernization less developed countries import inventions and devices produced in more developed "parent" or "metropolitan" countries, especially modern industrialized societies. The imports are technically more advanced and suited to modern conditions. The standard metaphors are revealing: import, export, invention, adaptation, transfer, imitation, machinery, and even engineering, hardware, and software.[85] There is even talk of competition between exporting countries to obtain market share or niches for their legal products. The values and orientation are consonant with bureaucratic rationalism and ideas of economic efficiency. The emphasis is on technical means to taken-for-granted ends.[86]

The second view is ideological. The most important factors in a reception are the underlying values, principles and political interests that motivate it rather than the details of particular rules or provisions. In this view, legal materials are pervasively imbricated with political values and beliefs.[87] In colonial times imported law was primarily seen as an instrument of social control and exploitation by the colonial power. But it was also presented as part of the "civilizing" mission of colonialism __ "We bequeathed you the Rule of Law". In post-colonial times "democracy, human rights, and good governance" and "the Rule of Law" are exported as part of a market driven ideology. Critical legal scholars denounce this ideology as "liberal legalism".

Ataturk's reforms were as much ideological as technological: they were part of his overall strategy to secularize, democratize, modernize, and above all, Westernize Turkey. In recent years a great amount of

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[85] On metaphors relating to legal transplants see above n.000.
[86] On technology and "the technical prejudice" see William Twining, *The Great Juristic Bazaar* (2002) at pp. 176-82.
[87] E.g. Duncan Kennedy, *A Critique of Adjudication* (1997).

activity has centred round the efforts to use law to move a country from a command or managerial economy to a free market system and to reform legal systems to encourage foreign direct investment. Such structural adjustment and modernising programmes combine the ideology of the free market with a set of assumptions that are instrumental and technological.

In a quite different context, comparative lawyers, such as Gordley and Ewald, have stressed the importance of grasping "philosophical" underpinnings as a necessary part of making sense of legal doctrine. Gordley's account of the origins of contract doctrine is a story of how the basic structure of concepts and principles of contract doctrine got cut off from its roots in neo-Thomist moral theory and became incoherent.[88] Ewald stresses the relevance of constitutional theory in understanding the German BGB and its profound differences from classical Roman law.[89] From an ideological perspective, treating imported law as no more than a series of technical solutions to shared problems __ for example talking of "lawyers' law" as apolitical[90] __ or choosing one system over another because of its technical superiority, obfuscates the underlying purpose and pretends that the ends are uncontentious.[91]

An alternative view is more romantic.[92] Law is mainly an outgrowth of local society, values and traditions and in large part expresses or reflects local society.[93] Law is embedded holistically in local

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[88] James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford UP, 1991)
[89] Ewald (1995a), op. cit.
[90] On the difficulties surrounding the concept of "lawyers' law", see above n. 000.
[91] It is a mistake to treat the instrumental and romantic views as mutually exclusive rivals. For example, Bruno Latour presents the processes of technology in a romantic light. See especially Latour op. cit. n. (1996). Similarly, not all problem-solving is conscious and rational (William Twining and David Miers, *How To Do Things With Rules* (4th edn., Butterworth, 1999), Ch.2).
[92] An excellent analysis and sympathetic critique of the "Neo-Romantic turn" is James Whitman, in R. Munday and P. Legrand (eds.) *Comparative Legal Studies: Traditions and Transitions* (Cambridge UP, 2003). Ch. 10.
[93] A strong version of the expressive view is the "mirror thesis" __ the view or assumption that law reflects or "mirrors" society. This is usually put in opposition to Alan Watson's transplants thesis, viz.

culture. This makes reception and assimilation of foreign ideas problematic. Of course, legal systems interact and influence each other, but the processes tend to be slow and complex. Here, the discourse employs analogies and metaphors that congregate around natural phenomena and organisms: the seamless web, transplants, assimilation, digestion, contagion, irritation, rejection, even penetration.[94] Transplant sceptics tend to treat laws as expressive of and rooted in local culture, context, history and tradition. Rather than see particular concepts, laws, or institutions as discrete units, they tend to treat them as integral parts of organic, coherent systems.[95]

There may be some truth in each of these views. When Kahn-Freund contrasted the "transplantation" of a kidney and a carburettor, he was making the point that technical areas of law, such as contract and commercial law, may transfer more readily than areas that may be more closely related to political and social context, such as much of public and family law. His general point was that legal phenomena are very varied and exist along a continuum of transferability. A similar contrast is sometimes made between "lawyers' law", which is generally thought to

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that the main agent of legal change is imitation. I think that there is some value in this juxtaposition, but that the contrasts tend to be painted in over sharp colours. (See Twining 2003 op. cit. n. at 206-13).

[94] A more sophisticated version of the romantic view as an aspiration can be depicted in terms of an analogy with the architectural vision of Frank Lloyd Wright. In this view, like Wright's "natural house", a legal system should be made of local materials sensitively used; it should become part of the landscape rather than appear as an alien imposition; and it should embody and express local values in a coherent fashion. In short it should be in harmony with its context. The natural house merges into the landscape, but it does not merely mirror it. Although Wright was a self-proclaimed romantic, his vision of the art of building did not involve rejection of ideas of function, technology, and utility. Some commentators link it to a particular ideology __ the frontier spirit __ upholding freedom, democracy, and robust individualism. (Donald Hoffman, *Understanding Frank Lloyd Wright's Architecture* (Dover, 1995)). At first sight this analogy may seem somewhat fanciful. But it has strong echoes in quite varied enclaves of legal theory: for example, Savigny's idea of law as the expression of the spirit of the people; in Karl Llewellyn's idea of crafts and period style, in Nonet and Selznick's responsive law, and even in Ronald Dworkin's idea of law as integrity. In this view, a house must be in harmony with its context; so must law.

[95] A good example is Allison, op. cit. (1996). This is a detailed study of the public law/ private law distinction in English law as an unsuccessful transplant. A central theme of the work is: "Because of the coherence of legal and political system, transplantation is hazardous." (at p. 236). Cf Teubner, op. cit. (1992).

travel well, and "personal law", which does not. The reason why the Kemalist reception in Turkey has generally been treated as exceptional is just because it included marriage and other important areas of personal law. There is some value in these distinctions, but they need to be treated with caution.

The problem goes deeper than that. Which metaphor best fits the processes of diffusion or transplantation __ technology, ideology, or architecture? This is about as sensible as asking whether a law is more like a widget, a house or a belief-system.[96] Law is too vast and varied to fit any such reductionist move; so too are the processes of diffusion. The problem-solving, expressive and ideological views are useful reference points for considering the processes of diffusion of law. They represent three different, but related, perspectives for viewing particular phenomena. But legal phenomena, the motives of the agents of diffusion, and the inter-relations between legal orders and cultures are so diverse and complex that it is absurd to expect one or other perspective to fit all examples. One cannot proceed far in law without considering underlying beliefs, values and purposes. It sometimes makes sense to see particular legal rules, devices or institutions in terms of inventions that usefully solved discrete problems. Conversely, there is much more to understanding processes of most kinds of legal change than asking whether a particular solution fits a particular problem.

One of the reasons why the continuing debates about transplantation are so unsatisfactory is that they tend to be presented either as confrontations between extremists ("strong Watson" versus "strong mirror theories",[97] technologists versus contextualists) or else as discussions between moderates, like Kahn-Freund, who treat

[96] Kahn-Freund (1978) op. cit. Ch. 12 esp. 300-305.
[97] Discussed Twining (2003) at 206-13.

transferability as a relative matter and who make so many concessions that they do not seem to be disagreeing __ one side emphasising difference, the other side similarity __ the familiar problem of the half-full cup. One way out of this dilemma is to recognise that there is a limit to discussing such a complex picture at such high levels of generality.[98]

(xii) *Evaluating impact: "success" and "failure"*

There is a tendency in the diffusion literature to talk of receptions "working" or "failing". Only recently have attempts been made to evaluate and measure impact empirically. Many of the instruments that have been developed are suspect, but this is an area that needs serious academic attention.

Since 1990 enormous sums have been spent by foreign agencies on law reform in "transitional countries", especially in Eastern Europe, and in post-conflict societies, such as Afghanistan and Iraq.[99] International financial institutions,[100] Western aid agencies (for example, USAID) have supported law-related projects and programmes in the name of "the Rule of Law", "good governance", "legislative reform", "judicial reform", and "institution capacity-building". The funds are channelled through large bureaucracies that need to "show results" and are themselves subject to modern procedures of accountability. This in turn has led to the development of tools for diagnosing "the health" of a legal system,

[98] This theme will be dealt with in "Social science and diffusion of law" (forthcoming).
[99] I am grateful to Veronica Taylor and Terry Halliday for instructing me about some of these developments. See Veronica Taylor, "The Law Reform Olympics", op. cit. (forthcoming).
[100] By no means only the World Bank (IBRD) and the IMF. For example, the European Bank for Reconstruction and Development has played a pioneering role in developing assessment measures in relation to Eastern Europe. The Asian Development Bank sponsored, inter alia, the seminal study of Pistor and Wellons, op. cit., 1999.

assessing the effectiveness, efficiency and sustainability of reforms, and evaluating "the success" of particular projects and programmes. These tools are under continuous review and refinement.[101]

This audit culture is far removed from the vague references in the academic literature to the "success" or "failure" of transplants and receptions.[102] Performance indicators, efficiency criteria, benchmarks, compliance assessments, and even league tables have been and are being developed by various agencies and have been used in the allocation of funds. When, as has happened on a large scale, some of these law reform and evaluation tasks are contracted out to private sector organizations, who are often under further pressures to produce standardised, packaged, cost-effective proposals and evaluations within a strictly limited time-scale. And some of these processes lack the transparency that they are meant to be promoting.[103]

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[101] For example, the USAID Commercial Law and Legal Institutions Reform Project in Eastern Europe and Eurasia (C-LIR) made the following self-assessment of its previous efforts: "The success of ...early efforts _ referred to here as *1st generation* commercial legal and institutional reform (C-LIR) _ were mixed. New laws were drafted (sometimes copied verbatim from advanced market economies) and enacted, but with little lasting change… During the second phase, practitioners' attention turned to rationalizing and strengthening the institutional framework for implementation and enforcement of commercial and other laws. This led to important advances in institutional and operational analysis, regulatory design, and capacity building… While significant gains were achieved in certain substantive areas (e.g. GATT/WTO accession, customs administration, collateral registries, and capital markets), there was little progress in others __ notably the enforcement of bankruptcy, antitrust, and intellectual property laws…. 'third generation' C-LIR [focuses on} the implementation-enforcement gap" [and] achieving sustainability in implementation and enforcement of legal and institutional reforms." (C-LIR Handbook, 1999) quoted by Veronica Taylor (above pp 18-19), who comments "The vision of law encapsulated in these 'three generations' of USAID law reform is still predominantly the formalist view … and the ultimate aim is instrumentalist __ to deliver a technique for evaluating and ranking legal systems." (Ibid). [repet One might add that the shift from legislation to enforcement to concern with sustainability represent significant moves away from surface law to increasingly realistic concern with the law in action.] **DFID**

[102] For example, Watson (*Transplants* at pp. 88-94) and Allison op. cit (1996 at pp. 15-16, 236) talk airily about success and hazards without specifying any criteria for evaluation. Berkowitz et al. usefully canvass recent empirical studies of the impact of legal change on economic development. They conclude their article with a broad generalization: "Yet, *after two hundred years of for the most part unsuccessful legal transplants*, more patience with the development of legal institutions needs to be in order." (Daniel Berkowitz et al., op. cit, (2003) at p. 190. (Italics added)

[103] The EBRD has been more open about this, for example, through its bulletin, *Law in Transition*. See especially Anita Ramasastry, "What Local Lawyers Think: A Retrospective on the EBRD's Legal Indicator Surveys", *Law in Transition* (Autumn 2002) 14.

A striking feature of some of these relatively new activities is that the law schools have been largely by-passed. In the development of performance measures, economists and other non-lawyers seem to have been involved with practising lawyers, largely unaware of or uninterested in the controversies and accumulated learning, such as it is, of the scholarly heritage of comparative law, law and development, regulation, compliance, and transplantation. This is especially the case where academics emphasise the uniqueness of local histories and long time-scales. The assumptions underlying these measures tend to be technocratic, formalist, and strongly instrumentalist, paying scant regard to culture, context, and tradition.[104]

It is tempting for academic lawyers __ especially comparative lawyers and socio-legal researchers __ to dismiss these developments as crude, insensitive "fairy tales" unworthy of the attention of serious scholars.[105] Some may refuse to have anything to do with them on the ground that they are ideologically unacceptable. Many academics are averse to both audit and soundbites, especially when they are combined in league tables. All of the standard objections to educational league tables are immediately suggested: hard variables push out soft variables; they quantify the unquantifiable; they compare the incommensurable; their weightings are arbitrary; they often involve dubious or simplistic assumptions, false precision, hidden biases in weighting and "that one size fits all".[106]

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[104] Taylor op. cit.
[105] id.
[106] Twining (2000) at pp. 161-65. Onora O'Neill, *A Question of Trust* (Reith Lectures, 2002) argued that many criticisms of target setting, performance indicators and some forms of "transparency" were justified in that they tend to foster a culture of blame rather than to mitigate the "crisis of trust" they were supposed to remedy.

The trouble is that these new developments are very influential and they are here to stay.[107] Some of the early efforts may have been crude, but the methods are being continuously refined.[108] At the very least, these influential attempts to measure and evaluate programmes of law reform deserve to be subjected to sustained theoretical critique. Economic analysis, the "New Institutionalism", and the imperatives of audit, however controversial they may be, are introducing genuinely new ways of profiling and analysing state legal systems.[109] One might add that the shift from legislation to enforcement to concern with sustainability represent significant moves away from surface law to increasingly realistic concern with the law in action. In future comparative law will have to adjust to proliferating data banks, increased quantification, the concepts and paraphernalia of bureaucratic rationalism, and fundamental problems of incommensurability.[110] There is a huge amount of information, fresh perspectives and new concepts that are too important to ignore.

These developments have put the assumptions in the naïve model under increasing strain. Not surprisingly, nearly all of the practical reform efforts focus on municipal law. Some of the more theoretical writings of Teubner, Glenn, Chiba, and others range more widely. Individual

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[107] Many of these developments relate to commercial law and are relatively new. Academic attention has been directed to such matters as democratic audit and the use of statistics in human rights evaluation for rather longer. See, for example, publications on the Democratic Audit of the United Kingdom, David Beetham, *Auditing Democracy in Britain* (Democratic Audit Paper No. 1, 1993)), Franseca Klug, Keith Starmer, and Stuart Weir, *The Three Pillars of Liberty: Political Rights and Freedoms in the United Kingdom* (Routledge, 1996).).

[108] A bold attempt to apply macro-economic analysis to legal transplants is Daniel Berkowitz et al., op. cit. (2003).

[109] Twining (2000) at 161-65.

[110] On incommensurability, see Wendy Espeland and Mitchell L. Stevens, "Commensuration as a Social Process" 24 Ann. Review of Sociology 313-43 (1998), Fred D'Agostino, *Incommensurability and Commensuration* (Ashgate, 2003); Ruth Chang (ed.) *Incommensurability, Incomparability, and Practical Reason* (1997). On theoretical problems of commensurability in comparative law, see Patrick Glenn, "Are Legal Traditions Incommensurable?" 49 American Jo. Comparative Law 133 (2001); *Legal Traditions of the World* (2004) at 44-58, 354-55.

assumptions have been challenged, but not in a systematic way. No alternative framework has emerged.

V. CONCLUSION

To sum up: Diffusion processes as an aspect of interlegality are far too varied and too complex to be reduced to a single model or ideal type. However, the above analysis suggests some cautionary warnings against making simplistic assumptions:

(i) Relations between exporters and importers are not necessarily bipolar, involving only one exporter and one importer. The sources of a reception are often diverse.

(ii) Diffusion may take place between many kinds of legal orders at and across different geographical levels, not just horizontally between municipal legal systems.

(iii) The pathways of diffusion may be complex and indirect and influences may be reciprocal.

(vi) Diffusion may take place through informal interaction without involving formal adoption or enactment.

(v) Legal rules and concepts are not the only or even the main objects of diffusion.

(vi) Governments are not the only, and may not be the main, agents of diffusion.

(vii). Do not assume one or more specific reception dates. Diffusion often involves a long drawn out process, which, even if there were some critical moments, cannot be understood without reference to events prior and subsequent to such moments.

(viii) Diffusion of law often involves movement from an imperial or other powerful centre to a colonial, dependent, or less developed periphery. But there are also other patterns.

(ix) The idea that transplants retain their identity without significant change is widely recognized to be outmoded.

(x) Imported law rarely fill a vacuum or wholly replaces prior local law.

(xi) Diffusion of law is often assumed to be instrumental, technological, and modernising. But there is a constant tension between technological, contextual-expressive, and ideological perspectives on law.

(xii) *There is a tendency in the diffusion literature to talk of receptions "working" or "failing". Only recently have attempts been made to evaluate and measure impact empirically. Many of the instruments that have been developed are suspect, but this is an area that needs serious academic attention.*

These general propositions can serve as warnings of complexity. But such warnings should not stop at the big picture. There is a need for many kinds of detailed study of the phenomena. In a second paper I shall explore the gap between the legal literature on reception/ legal transplants and the social scientific literature on diffusion and consider what might be learned from this more sophisticated and strongly empirical tradition that might be helpful or suggestive for detailed case studies of processes of diffusion of law.