

**THE TILBURG-WARWICK LECTURES, 2000  
GENERAL JURISPRUDENCE**

**LECTURE IV: GENERALIZING ABOUT LAW: THE CASE OF  
LEGAL TRANSPLANTS**

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DRAFT FOR COMMENT

## IV GENERALIZING ABOUT LAW: THE CASE OF LEGAL TRANSPLANTS

These lectures have centred on a single theme: to what extent is it feasible and desirable to generalize about legal phenomena across jurisdictions, levels of ordering, traditions and cultures? The first lecture set this question in the context of globalization and the tendency for the institutionalized discipline of law to become more cosmopolitan. I presented a conception of jurisprudence as the theoretical part of law as a discipline and restated the argument for reviving the idea of general jurisprudence, which crosses disciplines and cultures, but which, instead of *assuming* universality, places issues of generalizability at the centre of legal theory. In the second half of that lecture I considered the possibility of establishing a single core concept of law as a basis for general jurisprudence. After considering Brian Tamanaha's bold effort to construct such a concept, I reverted to my Llewellynesque position that the appropriateness and utility of a general definition or concept of law depend on a specific context and purpose. In the context of exploring the revival of general jurisprudence, one needs conceptions of the subject matters of our discipline that are as broad, as fluid and as multi-layered as the discipline itself. My vision of law is quite close to Tamanaha's, but rather than construct a single core concept of law, I prefer to treat "law" like Wittgenstein's "game", as a term that refers to a complex congeries of family resemblances rather than a single notion. In different contexts I am prepared to work with different conceptions of law.

The second lecture considered analytical jurisprudence in a global context, with particular reference to the question of the extent to which our existing stocks of discourses and concepts are adequate for the needs of a genuinely cosmopolitan discipline, with particular reference to the vocabularies of rights, treatment of prisoners, comparative studies of the legal profession (including legal education), and corruption. The main conclusion was that some concepts and groups of concepts travel remarkably well, while others, such as discourse about lawyers do not — the latter posing substantial, but not necessarily insurmountable, difficulties for comparison and generalization.

The third lecture dealt with normative jurisprudence, with particular reference to issues about universalism and cultural relativism in relation to the current international human rights regime. I suggested that if one adopts a positivistic interpretation of international human rights, it can be seen as a workable framework for conversations across cultures; but that the fact that this regime has changed over time and is subject to varying local interpretations casts doubts about the universality of the content of international human rights across time and space. This interpretation does not necessarily lead to an outright rejection of universalism in ethics, but it does suggest that all specific claims to universality of rights or of moral principles need to be subject to critical scrutiny and to be treated with caution, if not outright scepticism.

In each of these lectures I have tried to illustrate what a revived general jurisprudence might look like without attempting to set out a comprehensive agenda or blueprint. A central theme has been: Beware of false, misleading, exaggerated, superficial, ethnocentric, and meaningless generalizations and comparisons.

Having dealt, at least in a preliminary way, with problems of conceptual and normative generalization across legal traditions, cultures, and jurisdictions, I now turn to problems of empirical and legal comparison and generalization, this time with particular reference to the familiar debate about diffusion or transplantation of legal phenomena.

## GOWNS

Let me start, as I did in the first lecture, with a parable based on my experience in East Africa.

In 1961, a few months before Independence, I was privileged to be a founding member of University College, Dar es Salaam, which was part of a federated University of East Africa. In the first year, Law was the only Faculty and the total student population was 14. The founding members were determined to create a distinctive institution suited to local needs and aspirations that was clearly different from the elitist, traditionalist sister institutions in Kampala and Nairobi. The very first testing ground for this ambition centred on academic gowns. Before any academics arrived, the senior administrators had asked: what colour should the gowns be? What would clearly differentiate our students from those at Makerere (Kampala) (red) and Nairobi (blue)? They decided on saffron — like the robes of a Buddhist monk — on the grounds that this would be both distinctive and aesthetically pleasing. As soon as the first academics arrived, the very idea of having gowns was challenged — for a variety of reasons. The first objection came from a pragmatic Englishman (guess who?): "The climate in Dar-es-Salaam is much hotter than it is in Kampala and Nairobi — gowns are unsuited to our context." The administration retreated and proposed that gowns should be optional at lectures and at meals (other than High Table).

An American Professor objected: “Gowns are just an outmoded British idiosyncrasy — like wigs, pinstriped suits and rolled umbrellas. No American student would be seen dead in a gown — so why impose this on Africans?” The next objection came from a Swedish Professor of Economics: “Gowns exactly symbolize the kind of neo-colonialism and elitism that we are determined to avoid. They are politically incorrect.” A senior Tanzanian administrator, bemused by these squabbling expatriates, pointed out that colourful ceremonies are an important part of African tradition and that a degree ceremony without gowns would be considered very alien. In the end pragmatism trumped climatology, tradition, ideology, and local custom. The administrators said: “We have already paid for 100 gowns out of public funds and there will be a scandal if we do not use them.” The Academic Board reached a typically British compromise: “Gowns should only be worn on formal and festive occasions.”

That was not the end of the story. The first students arrived, immensely proud to be joining a real university. They accepted their gowns with delight and wore them whenever opportunity arose, including when they went to discos or shopping. The administration put a stop to that — it was too conspicuously elitist. Shortly afterwards the TANU Youth League — the junior branch of the ruling party — adopted green shirts as a form of uniform and decreed that these should be worn on all suitable occasions. This was interpreted as including lectures, shopping, movies, discos and demonstrations. The Tanzanian students conformed, but considered this uniform to be second best.

Can we say that English traditions about gowns were transplanted? If so, is this a paradigm case of transplantation?

Before addressing such questions directly, I need to clarify two points. First, what is meant in this context by “legal generalization”? Second, what is the relationship of comparative law to general jurisprudence?

## LEGAL AND EMPIRICAL GENERALIZATION

In these lectures I have followed tradition by dealing separately with analytical, normative and empirical jurisprudence. I have throughout emphasized that these broad categories are merely for convenience of exposition, that the distinctions cannot bear very much weight, and that most scholarly inquiries in law involve a combination of analytical, normative and empirical elements.

Analytical jurisprudence has been primarily, but not exclusively concerned with concepts and legal reasoning; the most stable relations have been with analytical philosophy; normative jurisprudence has been concerned with values and the closest relations have been with ethics and political theory. Other theoretical lines of enquiry concerned with interpreting, describing, and explaining actual legal phenomena in “the real world” are sometimes assigned to Historical Jurisprudence and the Sociology of Law.<sup>1</sup> Such labels can be misleading. “Historical Jurisprudence” came to be associated almost exclusively with the idea of legal evolution, and in the Anglo-American tradition with the rather odd kind of history practiced by Sir Henry Maine.<sup>2</sup> This is an important tradition, but it is only one strand in the complex relations between legal theory and historiography. General jurisprudence also needs to take account

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<sup>1</sup> “Sociology of Law” has generally replaced “Sociological Jurisprudence”, which came to be identified quite narrowly with the “social engineering” perspective of Roscoe Pound and others.

<sup>2</sup> Peter Stein (1988) gives an excellent account of the rise and decline of “the Historical School”.

of intellectual history, comparative or world history, as well as more particularistic kinds of historical enquiry.

Similarly, in some contexts terms like “Sociology of Law”, “Sociological Jurisprudence”, “Law and Society”, and “Socio-legal Studies” may suggest that the main, or even the only, important relationship between law and social science is with sociology. That is, quite obviously, wrong. For example, in the United Kingdom the term “socio-legal studies” was originally coined for bureaucratic purposes to designate those kinds of cross-disciplinary enquiries about law that qualified for support from public funds in respect of research that involved perspectives, methods or concepts from any of the social sciences, including anthropology, criminology, economics, geography, linguistics, penology, politics, psychology, social history, and some aspects of statistics. Each of these disciplines has its own complex history, culture, feuds, traditions, external relations, and fashions. Their relations to law are correspondingly complex. On the whole, such points have been well understood by those involved in socio-legal research, but this diversity has sometimes been obscured at the level of theory.<sup>3</sup>

In the present context I use “empirical jurisprudence” to cover any general questions (that are not purely analytical or normative) about legal phenomena in “the real world”. It thus covers “Historical Jurisprudence”, “Sociological Jurisprudence”, and much else besides. By using the word “empirical” I do not intend to adopt an empiricist as opposed to a phenomenological, hermeneutic or other interpretive stance; nor do I wish to restrict this to a particular epistemology.<sup>4</sup> In this context “empirical jurisprudence” is a rough category covering generalization (including

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<sup>3</sup> Of course, socio-legal studies have important normative dimensions. See, e.g., Lacey (1998) Ch.8.

assumptions) about legal phenomena in the “the real world”. “Empirical generalization” refers to any general statement about such phenomena that is not analytical or normative and that is subject to some test of verification or falsification. Here I shall side-step thorny issues about the extent to which empirical enquiries can be value free, the normative dimensions of socio-legal studies, and deep questions about legal positivism. I wish to concentrate on the empirical aspects of general juristic enquiries, recognizing that few enquiries can be “purely empirical”.

Again in order to simplify matters, I shall assume here that many propositions of law are capable of being accurate or inaccurate, true or false. Propositions that purport to be accurate statements of the legal position in more than one jurisdiction or culture, I shall call “legal generalizations”. For example, many formulations of propositions of “American law”, such as those to be found in the American Restatements, are legal generalizations about the legal position in many, all or most jurisdictions in the United States. Statements of law can be formulations of legal rules or principles, statements about legal concepts, or about their application to particular fact-situations (he is guilty/ she is liable).<sup>5</sup>

Of course, the concept of legal generalization presents some theoretical difficulties. Let us start with a simple notion that may have to be modified as we proceed. Consider the following simple examples:

- (a) The law of jurisdiction X prescribes that in order for a will to be valid three witnesses are required.

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<sup>4</sup> In so far as this is necessary, I am here prepared to take my stand on “innocent realism” as set out in Twining (2000a) Ch. 8, based on Susan Haack (1998).

<sup>5</sup> On the distinction between “law talk” and “talk about law” see Twining (1997) 233 (2000a) 190; cf. Richard Abel’s distinction between law books and books about law (Abel, 1973a).(1973a)

- (b) A spouse of the testator or a beneficiary of the will is not a competent witness for this purpose.
- (c) This is a valid will under the law of X.
- (d) The rules governing validity of wills in jurisdictions X and Y are identical.

In respect of the first three propositions, each of these statements can be true or false, or more or less accurate or inaccurate, according to the accepted procedures for verification of propositions of law in X. For example, I am confident that it is untrue to say that a valid will requires three witnesses under English law. In the case of the fourth example the truth of the proposition may depend on the respective procedures of verification of legal propositions in X and in Y.

Of course, what constitute acceptable procedures of verification, the interpretation of a rule, and its correct application may be contested. Jurists have often taken different positions on how such contests should be resolved or whether they are resolvable in principle or practice. Such issues are staples of juristic discussion of legal interpretation, application and reasoning within a single jurisdiction or more generally. Most of this theoretical discussion concentrates on “hard cases”, but some jurists question the distinction between “hard” and “easy” cases.<sup>6</sup> Similarly, there may be different views as to what constitutes a valid comparison between propositions of law in two or more jurisdictions and how one knows whether “the results” achieved by two jurisdictions on “identical facts” are, indeed, identical.

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<sup>6</sup> Twining and Miers (1999) Ch. 6.

These debates are of both theoretical and practical importance. They underlie all serious attempts to expound, interpret, argue about, compare and generalize about propositions of law. I shall sidestep them here, not to dismiss them, but in order to focus on specific problems of generalization and comparison, that can arise even when questions of interpretation, application and reasoning are viewed as unproblematic. Any treatise-writer, comparatist, or legal commentator has to proceed on such working assumptions most of the time. My thesis is that, even if these perennial problems of legal theory are discounted, there are still many difficulties about legal generalization.

Some of these difficulties are raised in a provocative way by James Gordley in his excellent book, *The Philosophical Origins of Contract Doctrine*.<sup>7</sup>

The opening paragraph of the first chapter strikes a strong universalistic note:

“With the enactment of the Chinese Civil Code, systems of private law modeled on those of the West will govern nearly the entire world. Western legal systems, moreover, are much alike. Both ‘common law’ systems such as those of England and the United States and ‘civil law’ systems such as those of France, Italy and Germany have a similar doctrinal structure based on similar legal concepts. They divide private law into certain large fields such as property, tort and contract, and analyze these fields in a similar way....The organization of the law and its larger concepts are alike even if particular rules are not. Accordingly, though answers may differ, the problem of whether a boy is liable for injuring a playfellow or a seller is liable for defects in his merchandise is analyzed in much the same way in

Hamburg, Montpellier, Manchester and Tucson, or for that matter in New Delhi, Tel Aviv, Tokyo, and Jakarta.”<sup>8</sup>

[Note form:

- Has to be taken seriously as statement about diffusion of contract ideas since C17
- Goes v predominant functionalist, convergence theory: civil/ common law arrive at similar solutions to “shared problems” by different conceptual routes.
- But all his examples are metropolitan centres capital or commercial. May apply up to a point to transnational transactions, but and notoriously vague and indeterminate..
- Big Q: If G correct re history and diffusion of concepts, how much does this tell us about local applications and legal meanings? About extent of acceptance, use and penetration? Needs not only detailed local knowledge, but in depth empirical and interpretive research etc etc.
- Cui bono? In whose interests are these superficial similarities?]

## COMPARATIVE LAW AND GENERAL JURISPRUDENCE

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<sup>7</sup> Gordley (1991), discussed Twining (2001)

<sup>8</sup> p.1.

In *Globalisation and Legal Theory* I argued that comparative law has an important role to play in constructing a general jurisprudence, because as John Stuart Mill pointed out, comparison is an important step on the road to generalization.<sup>9</sup> Comparative law both provides the building bricks and serves as a testing ground for generalization.

Without necessarily following Mill's model of scientific inquiry, I hold that comparative work in law should play a crucial role in the process of enlarging our understandings of legal phenomena beyond national boundaries en route to exploring problems of generalizability. The idea of general jurisprudence includes study of two or more legal orders; so do comparative legal studies. Comparative law and legal theory should be conceived as interdependent. If ever there was a time when a serious legal scholar could concentrate entirely on a single jurisdiction in respect of sources and focus, that time is past. Legal orders are interdependent. Almost all legal scholarship draws on transnational sources, is informed by ideas from other disciplines and legal traditions, and even when the focus is highly local, either implicitly or explicitly makes comparisons with legal phenomena elsewhere. In short, to a significant extent we are all comparatists now

## RECEPTION, TRANSPLANTS AND DIFFUSION

I might have been tempted to lay out a blueprint for a genuinely empirical general jurisprudence, but for me this would be premature. As Lawrence Friedman and other have pointed out comparative and genuinely transnational sociological/ social study of legal phenomena are in their

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<sup>9</sup> J. S. Mill (1st edn. 1843) Book IV Of Operations Subsidiary to Induction.

infancy.<sup>10</sup> I noted in the second lecture that comparative sociology of the legal professions has so far been stalled by some elementary semantic and conceptual barriers: for terms like “lawyer”, “profession”, “legal education”, and “law student” just do not travel well and, so far, no one has come up with an adequate conceptual scheme which might form the basis for significant comparison and generalization. I have argued elsewhere that global statistics are much less developed in respect of legal phenomena than in fields such as health, education, and economics.<sup>11</sup> I have speculated why this should be so.<sup>12</sup>

There is a great deal that could and should be said about the problems and prospects for transnational social scientific studies of law. But that must await other occasions and other authors. Today I shall take the easy way out and concentrate on the least underdeveloped field of legal generalization<>: the study of reception of law or legal transplants. This is a subject which has a long, if uneven, history and which has recently gained considerable attention, first because of the work of Alan Watson and recently because of events in Eastern Europe.

From a global perspective \_\_ yes, that is allowed in this context \_\_ the subject of transplants are important for one good reason: insofar as broad general patterns regarding law in the world are discernible, or there are perceived legal similarities between two or more jurisdictions or families, the standard explanation is “transplantation” or diffusion. The main alternative explanation is “parallel” development leading to convergence. Most of you will be familiar with Alan Watson’s provocative thesis that the

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<sup>10</sup> Friedman, (1996).

<sup>11</sup> Twining (2000a) 153-7.

main engine of legal change is imitation. In his more extreme moments, Watson seems to suggest that in law there is almost nothing new under the sun. I shall return to Watson later. But before trying to explain patterns of similarity, it is important first to decide which apparent similarities are both genuine and significant. There are many pitfalls in the path of taking this first step, as is illustrated by another African anecdote.

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.<sup>13</sup> 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.

Today the map would look primitive, partly because the world has changed in forty years, but mainly because it was based on assumptions that were dubious even then. It is not difficult to see why this is so.

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<sup>12</sup> Merryman (2000)

<sup>13</sup> For a more detailed account see id. at 142ff.

First, the map exaggerated the importance of the division between common law and civil law. It is true that the municipal law of most countries can still be classified as being strongly influenced by either civil law or common law “parents” in respect of private law and the mentality of private lawyers. This distinction is of significance beyond concepts and doctrine, but it can be misleading in respect of political organization, public law, civil liberties, and increasingly many aspects of commercial law, intellectual property, regulation, and anti-corruption measures. It is now misleading to classify Japan, Israel, South Africa, Taiwan and the People’s Republic of China as “civil law” countries or to treat them as exceptional hybrids. A classification of the world’s municipal legal systems in terms of dominant political ideology, democracy, state of economic development, or regional relations would be quite different. The common law/ civil law divide is undoubtedly still significant, but in today’s world its importance is easily exaggerated.

Second, my map was misleading in confining religious and customary law to national legal systems that only recognize them for limited purposes. This is the narrow, statist, view of legal pluralism. For example, it greatly underplays the significance of Islamic law in the world today, including in the former Soviet Union and Eastern Europe, and it renders virtually invisible most kinds of religious law.<sup>14</sup> Islamic law is not only important in Islamic states or countries in which there is a Muslim majority. It is a tradition and body of ideas and practices that transcends national boundaries. Islamic law is influential, both formally and informally, in my own country, even though it is not generally recognized as a source of law. For example, Menski and Pearl’s treatise on Muslim law [in Britain] is now in its third

edition.<sup>15</sup> It shows how Parliament and the courts have had to take into account Islamic ideas and practices even when they are not recognized as a formal source of law. Furthermore, within Muslim communities in Britain, Islamic law, doctrine and practices are operative, sometimes in well-institutionalized forms. Of course, from the point of view of many of their adherents it is misleading to treat religious law as *subordinate* to state law. Similarly custom (in a broad sense) is important in the normative ordering of all societies, and at other levels of ordering, not just in those “pluralistic” legal systems that openly recognize “customary law” as part of state law.

Third, by focussing exclusively on municipal law of sovereign states and colonies, my map left out other levels of legal ordering — public international law, regional law, transnational law, and other forms of non-state law. Of course, I was aware of public international law, but I did not know how to fit it onto my map. I had only dimly conceived of the possibility of other levels of ordering. That indicates just a beginning of awareness of complexity. Law in today’s world is far too complex to be susceptible to naïve cartographic mapping.

Fourth, my map did not allow for significant transformations in the process of transplantation, for local innovation, for hybridization through interaction, and for the production of genuinely new legal creations at international, regional and transnational levels, as in much European Union law. In short, the patterns I identified were far too simplistic and in many cases were illusory or misleading.

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

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<sup>14</sup> On different meanings of “Islamic law” see id. 182, Glenn (2000) 187-99.

<sup>15</sup> Menski and Pearl (1998)

“families”. 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. I can reconstruct this as an ideal type of a reception from some widely held assumptions, even if the model as a whole would be recognized by more sophisticated scholars of reception to be much too simple:

A standard example might take the form:

In 1868 Country A imported/adopted from Country B a rule/ an institution e.g. a code/ a constitution/ the ombudsman/ and this has remained in force ever since.

If this statement is 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*;
- (c) It assumes that the typical process of reception is *bipolar*, a direct movement 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 there was *a single specific reception date*, a specific moment of time at which the reception occurred.
- (f) It assumes that the object of reception *retained its identity without significant change* after the date of reception.

Each of these assumptions has been challenged in the literature, usually without reference to social science sources. From the literature on reception we might construct a converse polar ideal type, as follows:

(a) *The sources of importation are often diverse, involving eclecticism, indirect borrowing, hybridization, compromise, and so on.*

(b) *Diffusion and transplantation may take place between many kinds of legal orders, not just between municipal legal systems.*

(c) *The pathways of reception may be complex and indirect.*

(d) *Legal rules and concepts are not the only or even the main objects of receptions.*

(e) *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.*

(f) The idea that transplants retain their identity without significant change is widely considered to be outmoded. Rather more fashionable today is Bruno Latour's dictum: "*No transportation without transformation*".<sup>16</sup>

Each of these assumptions has been challenged in the legal literature, usually without reference to social science sources or concepts. For example,

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<sup>16</sup> Latour (1996)

(a) The standard colonial and neo-colonial situation postulates a single exporter imposing a legal institution or culture on an 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.<sup>17</sup> What is imported may be an idea or model that did not originate in a single legal order, for example where an instrument of harmonization, such as the American Restatements and Model Codes, is created with a view to its being adopted by several jurisdictions. 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.

(b) States often adopt international norms as part of domestic law. For example, the European Convention on Human Rights was incorporated in the United Kingdom Human Rights Act 1998. The Standard Minimum Rules for the Treatment of Prisoners have formed the basis for a number of domestic regimes. 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.<sup>18</sup> In short, *diffusion and transplantation may take place between many kinds of legal orders, not just between municipal legal systems.*

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<sup>17</sup> Orocu (2000)

<sup>18</sup> Santos (1995) (2002) Ch.3.

(c) *The pathways of reception may be complex and indirect.* A simple example, is the Indian Evidence Act, 1872. This was drafted for India by James Fitzjames Stephen. It was a great simplification, but also, 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, largely through Stephen's *Digest of the Law of Evidence* on which several generations of English and Commonwealth barristers were trained at the Inns of Court.<sup>19</sup>

(d) Objects of reception can be legal methods or “mentality”, or prison technology and design, ideology, personnel (e.g. foreign judges or advisers) and so on rather than (or in addition to) rules. In short, *rules and concepts are not the only or even the main objects of receptions.*

(f) Although “reception dates” are not unknown, most accounts of legal receptions recognize that reception involved *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. 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 to 1923 and the equally long period of implementation, interpretation, adjustment, and slow and uneven acceptance since 1926. It is also

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<sup>19</sup> Stephen (1876-1948), Twining (1994) 52-7, Radzinowicz (1957).

necessary to consider a further wave of reception related to Turkey's continuing attempt to become integrated into Europe.<sup>20</sup>

(g) The idea that transplants retain their identity without significant change is widely considered to be outmoded. Rather more fashionable today is Bruno Latour's dictum that [There is] "*No transportation without transformation*".<sup>21</sup> Both extremes are too simple. Take for example, Stephen's Indian Evidence Act of 1872. It has survived for nearly 130 years in India with only a few minor legislative changes. It has been encrusted with Indian precedents and the Indian practitioners' treatises, such as *Sarkar on Evidence*, are almost as bulky as their American counterparts.<sup>22</sup> 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. I suspect the full story would be more complex than that.

Most modern students of reception would recognize these points and reject the first ideal type as too simplistic.

My return to this youthful and naïve exercise in cartography is not a form of breast-beating — indeed I think that my rough and ready map was adequate for its main purposes. Rather I think that the assumptions

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<sup>20</sup> See below 000.

<sup>21</sup> Latour (1996)

underlying this map are still widely prevalent in legal thought and discourse. 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. Yet there clearly are patterns relating to law that can be discerned in today's world. The problem is, first, to identify patterns that are not false, superficial or misleading and, second, to explain them. This is what the literature on reception or legal transplants sets out to do.

In this lecture I shall argue that this literature is rich, but at best rather uneven, and I shall explore why this is so and suggest some ways of developing a more systematic approach to the topic of legal transplants.

## HISTORICAL BACKGROUND<sup>23</sup>

The literature on transplantation or reception of law can be traced back to the work of Tarde, Maine and Weber. In the early years it had some connection with diffusion theory in cultural anthropology. The latter represented a reaction against the prevailing nineteenth century view that there were natural laws of evolution governing human progress. Critics, such as Boas, Tarde, and Retzel, pointed out contradictions in evolutionist theory and emphasized the diffusion of culture traits. This theme was taken up mainly in cultural anthropology in the early years concentrating on spatial distribution of culture traits more than on the process of diffusion. Strong

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<sup>22</sup> Sarkar (1971) Woodruffe and Amir Ali (1968)

<sup>23</sup> This historical sketch draws heavily on articles on "Diffusion" by Robert Heine-Geldern and Torsten Hagerstrand (2001). See also, Rogers (1963).

diffusionists, notably Elliot Smith and W. J. Perry,<sup>24</sup> emphasized humankind's hostility to change and the alleged lack of inventiveness of nearly all cultures; they argued that the origins of all "higher" civilizations could be traced back to Egypt. As Elliot Smith put it: "To obtain recognition of even the most trivial of innovations it is the common experience of almost every pioneer in art, science, or invention to have to fight against a solid wall of cultivated prejudice and inherent stupidity."<sup>25</sup>

Less extreme forms of diffusionist theory, such as the *Kulturkreis School*,<sup>26</sup> allowed for multiple centres of invention, but nevertheless searched for origins and played down innovation. In time strong forms of diffusion theory were discredited, to be replaced in Anglo-American anthropology by structural functionalism and the study of dynamic movements. Diffusionism went out of fashion in anthropology, but in the late 1950s there was a revival of interest within sociology which has continued to this day.<sup>27</sup> Whereas the anthropologists had concentrated on the large-scale spatial diffusion of cultural traits and a search for origins, differing among themselves about the extent of human inventiveness, the sociologists focused more on process and agency, with particular emphasis on the conditions of export and import of ideas and the channels of diffusion. This involved more detailed studies, often of relatively small

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<sup>24</sup> E.g. Perry (1923)

<sup>25</sup> Smith (1916) cited in Enc. Brit. "Civilization and Culture".

<sup>26</sup> "Kulturkreise" refers to clusters of culture traits. Leading members of this school included F. Graebner and W. Schmidt. The main focus was on establishing historical connections to original centres of invention. The school was very influential outside the English speaking world, especially in Germany, during the first half of the twentieth century, but made little impact on English or American anthropology.

<sup>27</sup> Everett Rogers (1963), Strang and Meyer (1993), Snow and Benford (1999).

items, such as telephones, manufacturing processes, or methods of protesting.<sup>28</sup>

Recently, there has been a shift to interactionist perspectives, exemplified by the microscopic work of Bruno Latour.<sup>29</sup> Given that the pioneers of the study of diffusion included Tarde, Maine, and Weber all of whom were deeply interested in law, it is ironic that there is now hardly any contact between the sociological study of diffusion and the legal literature on reception. Nevertheless, the basic themes of diffusion versus parallel development, innovation versus imitation, and other ways of explaining similarities found in different contexts are underlying concerns in both fields.

Reception studies by lawyers are extensive and quite varied. First, there are classic studies of “the Reception” of Roman Law in medieval Europe, exemplified by the classic works of Koschaker and Wieacker and debates that these have stimulated.<sup>30</sup> Second, there are accounts of the importation or imposition of the laws by colonizing powers.<sup>31</sup> 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 Orocu on Turkey is outstanding.<sup>32</sup> Fourth, there is Alan Watson’s general “transplants thesis” and the literature it has provoked. And, recently (especially since the fall of the Berlin Wall), attention has been focussed on the situation of countries in transition,

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<sup>28</sup> Molotch (forthcoming)

<sup>29</sup> Latour, (1996)

<sup>30</sup> Koschaker (1997), Wieacker (1995, 1st German edn., 1952).

<sup>31</sup> E.g. Burman and Harrell-Bond (eds.) (1979).

<sup>32</sup> Orocu (1992, 1994, 2000).

notably in connection with structural adjustment in poorer countries and the invasion of Eastern Europe by foreign consultants.

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 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.<sup>33</sup>

## THE SOCIOLOGY OF DIFFUSION OF INNOVATIONS

Modern sociological accounts of diffusion and modern discussions of reception and transplants are a rather clear example of two bodies of literature seemingly addressed to the same issues that largely ignore each other. This is strange, because law is surely one of the most important examples of transnational diffusion, and as Everett M. Rogers states in his classic work on *Diffusion of Innovations*: “[A]lthough diffusion research began as a series of scientific enclaves, it has emerged in recent years as a single, integrated body of concepts and generalizations, even though the investigations are conducted by researchers in different scientific disciplines.”<sup>34</sup> Rogers lists ten different traditions of diffusion research in the social sciences, with rural sociology, marketing and management, and

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<sup>33</sup> Arthur (1998), Snow and Benford (1999) and the economic literature on “path dependency”.

<sup>34</sup> Rogers (1995) at 94. The early anthropological literature tended to contrast diffusion and innovation, the more extreme diffusionists maintaining that there is very little that is new under the sun, thus reducing invention to a minimum — a theme that has echoes in Watson’s thesis that transplantation and imitation are the main factors in legal change. Rogers combines the two, no doubt deliberately, by defining innovation from the standpoint of the recipient: “An innovation is an idea, practice, or object perceived as new by an individual or other unit of adoption.” (id. at 35).

communication having the largest number of publications.<sup>35</sup> Law is conspicuous by its absence; so are references to the modern social science literature in legal accounts of reception. In recent times the legal and social science literatures have grown apart.

It may be helpful to begin by looking at some of the major elements in the conceptual framework of modern diffusion theory. Rogers states that “[d]iffusion is a special type of communication concerned with the spread of messages that are perceived as new ideas.”<sup>36</sup> He continues:

“The main elements in the diffusion of new ideas are: (1) an *innovation* {in the eyes of the recipients}(2) which is *communicated* through certain *channels* (3) over *time*, (4) among members of a *social system*... ....Almost all of the new ideas discussed in this book are technological innovations.... The characteristics of an innovation, as perceived by the members of a social system, determine its rate of adoption. Five attributes of innovation are (1) relative advantage, (2) compatibility, (3) complexity, (4) triability,<sup>37</sup> and (5) observability.”<sup>38</sup>

Other key elements in Rogers’ conceptual scheme are communication channels, innovation decisions, change agents, adoption, rejection, and consequences. The meaning of these is fairly obvious. The main jargon

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<sup>35</sup> Rogers makes no mention of language (which does not feature in his index), but there is an extensive literature on diffusion of language that also seems to have proceeded largely independently. I would speculate that the analogies between the spread of law and language are quite close, both because of the nature of the subject matters and because the close dependence of law on language. For example, the spread of the common law is closely associated with the spread of the English language, through colonization and colonialism and more recently American hegemony. Nearly all major large scale receptions of common law ideas and institutions have been underpinned by the English language, perhaps because the common law is perceived to be “untranslatable”. Of course, Rogers is representative of only one of several approaches to diffusion within sociology.

<sup>36</sup> at 35

<sup>37</sup> “Triability is the degree to which an innovation may be experimented with on a limited basis [before adoption]”. (id. at p. 16); “Observability is the degree to which the results of an innovation are visible to others.” (ibid.)

<sup>38</sup> Id. 35-6.

terms used by diffusion theorists refer to the extent to which change agents (exporters, importers and other participants in the process) have shared characteristics (homophily) or different characteristics (heterophily).<sup>39</sup>

The social science literature is vast and detailed accounts contain many more concepts, distinctions and terms, including a fair amount of jargon. However, Rogers' basic concepts at least give a flavour of the kind of approach that is standard in this area. At a very general level, one might codify the basic methodology as follows. In respect of any instance of diffusion one needs to ask a number of basic questions: What were the conditions of the process, and the occasion for its occurrence? What was diffused? Through what channel(s)?<sup>40</sup> Who were the main change agents? To what extent were the characteristics of the change agents and their contexts similar or different? When and for how long did the process occur? Why did it happen at that particular time? How much did the object of diffusion change in the process? What were the consequences of the process and what was the degree of penetration of the diffused objects over time?

At first sight this set of questions looks like a codification of common sense — a charge to which sociologists are notoriously vulnerable. Let us apply this to some standard examples of accounts of legal transplantation.

## RECEPTION TWO CASE STUDIES

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<sup>39</sup> Rogers defines these terms in respect of individuals: "Heterophily is the degree to which two or more individuals who interact are different in certain attributes, such as beliefs education, social status and the like. The opposite of heterophily is homophily, the degree to which two or more individuals who interact are similar in certain attributes." (36). In so far as most reception decisions in law are to some extent collective these terms apply to the contexts of the exporters and importers as well as the characteristics of the main change agents. One of Rogers' main themes is that diffusion research has sometimes placed too much emphasis on individuals as change agents.

## WIEACKER

Franz Wieacker's *A History of Private Law in Europe*<sup>41</sup> has been described as a very wise book from a very harsh time.<sup>42</sup> In the 1930s Wieacker (1908-1994) had been a member of the Nazi party and had worked to create a nationalist German law for the new Reich. This had involved removing Roman law from the curriculum and substituting a Nazi version of European and German legal history. Later Wieacker reacted strongly against Nazism and what he saw as the degeneration of positivism and the disintegration of private law. His magisterial work, first published in 1952, was explicitly a contribution to post war reconstruction. His emphasis on Roman Law, *ius commune* and legal science based on individual legal conscience represented a reaction against the nationalism and cynical positivism of the Nazi period. Wieacker's aim, in Zimmerman's words, was to provide a bridge between Roman Law and contemporary legal science, while reasserting the values of personalism, legalism, and intellectualism.<sup>43</sup> Underlying his approach is the view that a systematic body of law based on a rigorous transnational legal science serves the values of consistency, justice, and the Rule of Law against the arbitrary power of the national state.

Wieacker's *magnum opus* is a learned, subtle, complex, magisterial history of the development of private law ideas in Europe over several centuries. If he over-emphasized the influence of Roman law on the *ius*

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<sup>40</sup> One of the most promising perspectives within diffusion studies is "path analysis" borrowed from economics; see the influential article by W. Brian Arthur (1988)

<sup>41</sup> Wieacker (1952, trs. Weir, 1995); cf. Wieacker (1981)

<sup>42</sup> Whitman (1999) at 402.

<sup>43</sup> Zimmerman (2001).

*commune*, this is understandable given his basic concern. But his central thesis has generally stood the test of time and has formed the starting-point of much European legal historiography since its publication.<sup>44</sup>

How does Wieacker's work appear from the perspective of sociological diffusion analysis. Provided that it is recognized that it is primarily a work of intellectual history that says little about either doctrinal detail or the law in action, I think that it stands up rather well. First, Wieacker avoids the pitfalls of the naive model of legal reception. "'Prolific misunderstanding' is a typical, and perhaps a necessary feature in the process of appropriating another civilization."<sup>45</sup> Second, Wieacker deals with the what, why, when, who, and how of the process and of its impact, with sensitivity to the complexities. His account could be translated without too much difficulty into the conceptual framework of sociological analysis. For example, he gives a clear account of the *occasion and conditions* for the reception, he identifies the main *change agents* and their characteristics, he emphasizes the importance of Bologna and later other centres of learning as vital *channels* of communication, he explains *why* the main events in the story occurred *when* they did, he indicates in what respects the received Roman Law *changed* yet retained its basic *identity*, and he gives a clear, if rather abstract account, of the *impact* of Roman Law on modern civil law systems. If he does not give a very full account of the social and economic consequences of the reception in the short and medium term, that was not part of his aim. His central theme is strongly Weberian, that the

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<sup>44</sup> Ibid. Wieacker's is a story of a long-drawn out, complex process of diffusion of a particular approach to Justinian's Institutes, over time and space, involving the steady intellectualisation of law, especially in Germany, resulting in particular form of "legal science" The details have been filled in (and sometimes corrected) (e.g. by Coing) but Wieacker's structure and concepts are largely unchallenged.

<sup>45</sup> Wieacker (1981)

characteristic of the process was one of rationalization by legal *honoratiores* who occupied key judicial and administrative posts.<sup>46</sup>

## TURKEY

One of the most-discussed examples of a reception is Atatürk's reforms of 1926 in Turkey. These are famous because this is perceived as a rather clear example of a large-scale "voluntary" reception, which included an attempt to use law to bring about radical social change in important areas of personal law — the converse of the "mirror" idea. In fact Atatürk's reforms were but one large step in a process that began early in the nineteenth century and continues to this day. Orucu summarizes the incremental and eclectic nature of the formal process of importation:

"..the early efforts of reform rested solely on import from the major continental jurisdictions as Turkey went through a process of total and global modernization, westernization, secularization, democratization, and constitutionalism. She thereby reshaped her private law, administrative law, the constitution, criminal law, civil and criminal procedures, commercial law, maritime law and the law of bankruptcy. Later, other laws such as labour law and social security law were passed, again based on foreign models. Later still, significant developments in the field of democracy and fundamental rights and freedoms and review of constitutionality found their way into Turkish law, the last by the 1961 Constitution. In the preparation of this Constitution wide use was made of the West German and Italian models,

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<sup>46</sup> The core of Wieacker's thesis is that the history of modern private law in Europe starts with the rise of jurists trained in the Bolognese legal method of the *studium civile* acquiring key positions in the judicial and administrative branches of government: "Their dominance in public affairs ensured for ever the peculiarly legalistic character of Western society, its habit of seeing problems as legal and discussing them rationally, a habit which stamped society, the state, and the economy, even contemporary administrative

the provisions on economic development being inspired by the Indian model of 1949. The present Constitution, which greatly increased the powers of the President, was inspired by the 1958 French Constitution and the American Constitution. The impact of the early reforms of the Republic was not just on the legal system but also on the social system since they were accompanied and complemented by a series of social reform laws aimed at changing people. These laws are still protected by the 1982 Constitution. ‘Modernity’ was imported on a major scale.”<sup>47</sup>

My purpose here is not to give another account of the Turkish “reception”, but rather to see how far some available accounts fit the basics of sociological diffusion analysis even though they do not explicitly refer to them. My conclusion is that by and large they do fit this kind of analysis rather well.

Although no account of this reception explicitly adopts this method of analysis, it is possible to piece together from standard accounts a profile of the process that answers nearly all of the key questions, at least in general terms. In brief, *the occasion* for this reception was a steady movement towards modernization and secularization in an underdeveloped country the vast majority of whose population was Muslim. Ataturk’s revolution represented the culmination of a long process of piecemeal reform; in turn the process continued and weathered resistance largely because the legal system was dominated by an elite that was committed to Ataturk’s principles. The *conditions* for the reforms of 1926-9 included Ataturk’s control of power, the existence of a small elite cadre of lawyers trained in civil, especially Swiss, law, and by no means least a lengthy prior process of

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technology, in such a way that life would be unimaginable without it. It distinguishes western society from all other cultures known to us.” (1995 at .7)

piecemeal secularization of law and legal institutions dating back to 1829. (*The Tanzimat*). Most commentators agree that these were a necessary precondition for Ataturk's reforms, which were the most radical and substantial step in a long process that is still continuing. The *timing* of this phase is explained by Ataturk's accession to power (1923) and his programme of reform. The timing of developments since 1963 is closely connected to Turkey's relations with the European Union.<sup>48</sup>

*What* was received? Standard accounts of Ataturk's reforms refer mainly to a series of codes borrowed eclectically from several European civil law countries with a minimum of formal change. But European, especially Swiss, legal culture was also imported by key personnel who had been trained in Europe and by the establishment of a new Law Faculty at Ankara, deliberately based on European models, to train judges and lawyers in the new law and its methodology. Almost as interesting is the fact that the codes were translated into Turkish (itself a newly created national language **ck**) and so were largely cut off from the secondary literature of the exporting countries. Moreover, unlike other large-scale receptions relatively little use was made of foreign experts and consultants in the process of adoption and assimilation. However, in the early years Swiss, German, and Austrian academics contributed to the training of the legal elite and later in the thirties some Professors were given sanctuary from Hitler.<sup>49</sup>

The main *formal channel of initial reception* was, first, the legislature, which enacted the codes wholesale and the various officials who were involved in their implementation. Similarly the main *change agents* at the start were a small legal elite of Ataturk's supporters led by the Minister of

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<sup>47</sup> Orucu, (2000).

<sup>48</sup> See above n. 000

Justice Mahmout Es'ad Bey, who has studied law in Lausanne. He is quoted as saying:

“We are badly in want of a good scientific Code. Why waste our time trying to produce something new when quite good Codes are to be found ready made? Moreover, what is the use of a Code without good commentaries to guide the application of it? Are we in a position to write such commentaries on a new Code? We dispose neither of the necessary time nor of the necessary precedents in practice. The only thing to do is to take a good ready-made Code to which good commentaries exist, and to translate them wholesale. The Swiss Code is a good Code. I am going to have it adopted and I shall ask the assembly to proceed to a vote en bloc, as Napoleon has his Code voted. If it had to be discussed article by article, we should never get it through.”<sup>50</sup>

After 1926-9 the range of *change agents* expanded. Many commentators emphasize the important role played by the courts (especially the High Court) in implementing and interpreting the codes in ways which harmonized the secular aspirations of the reforms with the realities of Turkish conditions and attitudes.<sup>51</sup> Others who played a key role in implementation included officials concerned with performing civil marriage ceremonies and registration of marriage (for example, as literacy spread, more and more headmen of villages in rural areas were authorized to perform the civil ceremony);<sup>52</sup> the professors of law who were the main agents for importing and disseminating civilian legal culture; even doctors,

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<sup>49</sup> Orucu at 45.

<sup>50</sup> Quoted by Starr (1992) at 16. This is a rather clear example of presenting reception as merely technological, see below.

<sup>51</sup> See especially Zwalen (1981), Starr (1992) and Orucu (2000).

well aware of traditional sensibilities, helped the process of acceptance by issuing medical certificates after perfunctory or *pro forma* medical examinations;<sup>53</sup> no doubt, the most important agents of change were ordinary people.

Not surprisingly, family law has attracted the most attention because the importation of the Swiss Civil Code was an extreme example of differences in culture and conditions between the exporters and the importers — i.e. of *heterophily*.<sup>54</sup> The story of the marriage laws is of a slow trend towards acceptance over more than half a century. Incentives to satisfy the requirements of civil marriage included income tax and social benefits; for example, during the Korean War wives and widows of serving soldiers were only able to claim pensions and other benefits on the production of a valid marriage certificate. Not surprisingly conformity with the marriage law developed more quickly in urban areas than in rural ones and the extent of conformity correlated quite closely with levels of poverty, literacy and remoteness from urban centres. The figures about conformity relate to such matters as how many people chose to go through a civil marriage ceremony in addition to or instead of a religious one; the incidence of bigamous (i.e. polygynous) marriage; and the decline of abduction.<sup>55</sup> More important still, are less easily quantified changes in attitudes, for example in regard to equality of the sexes. Between 1933 and 1991 the Turkish Parliament passed seven amnesty laws that enabled the

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<sup>52</sup> Magnarella (1988) at 512-13.

<sup>53</sup> Magnarella (1988) at 513.

<sup>54</sup> This analysis of the literature is based on the following sources: *Symposium on The Reception of Foreign Law in Turkey*, *Annales de la Faculte de Droit d'Istanbul* No.6, 1956; *Symposium in 9 Int. Social Science Bulletin* (1957); Stirling, (1965) <and in *ISSBN* (1957)> Starr and Pool (1974); Starr, (1990 and 1992); Ehrhan Adal, *Fundamentals of Turkish Private Law* (1991); Zwalen (1981) and above all the writings of Esin Orucu from 1987 to the present, listed in the bibliography. Starr, Sterling and Magnarella are social scientists.

legitimization of children of consensual unions that had not conformed to the requirements of the civil code.<sup>56</sup>

Starr's studies of Bodrum in the 1960s and her follow up study in the 1980s confirm an overall picture of the gradual success of this attempt to create a secular system in an unpromising environment. There was some adaptation and compromise, but overall we are presented with an unusual story of traditional practices, customs and attitudes gradually falling into line with a relatively stable body of essentially alien law. This appears to have been achieved largely by rejecting overt legal pluralism for a centralized system that was legalistic, positivist and "top-down". Similar patterns appear in the larger picture. It would require a very detailed study of the history of legal change in Turkey during the twentieth century to trace in what respects the imported laws and ideas changed in their new environment. What is striking to the outsider is the stability of the basic radical scheme backed by Constitutional imperatives and political will over a long period of time.<sup>57</sup>

As Zweigert and Kotz suggest: "Nowhere else in the world can one so well study how in the reception of a foreign law there is a natural interaction between the interpretation of the foreign text and the actual traditions and usages of the country which adopted it, with the consequent gradual development of a new law of an independent nature."<sup>58</sup>

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<sup>55</sup> 2710 in 1979 to 654 convictions in 1977 <reported cases unreliable>

<sup>56</sup> Orucu (1994) n. 3.

<sup>57</sup> The constitutionality of the principal reform measures still cannot be challenged. "The Turkish ruling elite was interested in modernisation and national integration. The aim was to become European legally, socially and culturally. To this end, eight principal reform laws established secular education and civil marriage, adopted international numerals, the Turkish alphabet and the new calendar, introduced the hat, closed the dervish convents, abolished certain titles and prohibited the wearing of certain garments. The goal, which also has symbolic value in Turkey, is still very much alive." (Orucu, 2000) at 70.

## CONCLUSION:

None of the accounts of the reception in Turkey that I have read conforms exactly to the basics of social science diffusion analysis, such as that of Everett Rogers, indicated above. No doubt, a sociologist using the perspective of Rogers (or of Latour) would produce further insights. However, it is possible to piece together answers to almost all the basic questions suggested by this framework, especially in relation to the rather dramatic example of family law.

The examples of Wieacker's account of the diffusion of Roman law and modern treatments of the famous "reception" in Turkey suggest that there is no fundamental incompatibility between more sophisticated legal studies of reception and the sociological literature on diffusion. Nor do scholars such as Wieacker and Orucu fall into the traps lurking in my naïve model of "reception." However, the assumptions underlying that model are still quite widespread. The sociological literature exemplified by Rogers and Snow provides both a useful framework for systematic analysis of diffusion and a rich body of detailed studies of other social phenomena. There are sophisticated perspectives, such as path analysis or that of Latour, which could readily be applied to legal contexts. I am left with a strong feeling that this is a field ripe for more sustained interdisciplinary conversation.

## ALAN WATSON

When we turn to Alan Watson we seem to move into a different world. I do not have time today to do justice to Alan Watson's transplants

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<sup>58</sup> Zweigert and Kotz (1987) 184.

thesis and the controversy that it has provoked. It is an important debate, but a deeply unsatisfying one.

During the 1970s and 1980s Watson's work provoked the worst kind of academic debate in which each side caricatured the other and rarely joined issue. Watson attacked the belief that law "mirrors" society (strong mirror theses) but we shall see later that it is difficult to find any serious scholar who holds a strong version of this thesis. Conversely, Watson's critics focused on some of his more extreme statements and accused him of claiming that legal change takes place largely independently of social conditions. One commentator, William Evan, even suggested that the corpus of Watson's work may be interpreted as undermining the rationale for developing a theory of law and society.<sup>59</sup> In fact, Watson explicitly claims to be advancing a theory about the distant nature of the relationship between law and society — one, which emphasizes the relative autonomy of law. There is a quite close convergence between Max Weber's thesis that a legal culture is given distinctiveness by the mentality of its legal elite (the legal *honoratiros*) who according to Watson are the main agents of transplantation, change and inertia.

One way out of the morass of false polemics is provided by William Ewald.<sup>60</sup> He has usefully analyzed the logical structure of Watson's theory, distinguishing two versions, one strong and ultimately self-destructive, the other weaker, but sufficient to achieve the main task. Ewald suggests that Watson advances five separate theses, each of which has a strong and a weak version. Let me briefly summarize the three that are most immediately relevant:

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<sup>59</sup> Evan (1993) at 35.

<sup>60</sup> Ewald (1995b)

(iii) *The Transplants Thesis*: “that borrowing has been the most fruitful source of legal change in the Western world”.<sup>61</sup>

(iv) *The Insulation Thesis*: that the development of the civil law and of differences between civil and common law can be explained largely “without reference to” social, political, economic or other factors external to law.<sup>62</sup>

(v) *The Inefficiency thesis*: that legal rules are frequently inefficient and dysfunctional, in that they benefit nobody, harm many, are ill-adapted to the needs and desires of society at large or some powerful group within it, yet they are allowed to persist over long periods of time.<sup>63</sup>

On their face, such statements are highly provocative; many comparatists and sociologists of law have been provoked. But Ewald has shown that each thesis can be interpreted in a weak sense — and, indeed, Watson himself has glossed his original thesis with many caveats and concessions.<sup>64</sup>

A detailed evaluation of Watson’s theses must await another occasion. Here I shall confine myself to a few general points.

(i) Like Sir Henry Maine, Alan Watson has played an important role as an *agent provocateur* in launching bold hypotheses that have focused attention on important questions about legal change. Unlike Maine who was an evolutionist, Watson is a diffusionist. In many respects he is like the early diffusionists in focusing on the spread of traits and de-emphasizing the role of innovation. Watson gives numerous examples of rules, institutions, concepts, and structures that have been

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<sup>61</sup> Ewald (1995b) 498.

<sup>62</sup> Id. 500. (note on “purely legal history”)

<sup>63</sup> Ewald (1995b) 502

<sup>64</sup> e.g. Watson (2000b).

transplanted, but like the early diffusionists he says rather less about the processes of diffusion and the pathways that they have followed, or their subsequent impact. In short, Watson's approach is a long way from the detailed analysis of process and agency typical of the modern sociology of diffusion, still less of the ironic micro-analysis of Bruno Latour. In response to critics Watson has acknowledged that it is not only rules that are transplanted, that the same rule may be interpreted differently in different settings,<sup>65</sup> and that transplantation may involve adaptation and change. He has continued to emphasize the semi-autonomy of law, the pervasiveness of borrowing, and that this inevitably promotes convergence.

- (ii) Watson works within "the Country and Western tradition of comparative law".<sup>66</sup> His thesis is largely confined to Roman law and modern Western municipal law;<sup>67</sup> he is mainly interested in private law; and his principal concern is the differences and relationships between civil and common law. So his central claims are limited in respect of subject matter and geography and, apart from his interest in classical Roman law, in respect of time.
- (iii) One can extract from Watson's writings a number of bold generalizations similar to Sir Henry Maine's thesis that "the movement of progressive societies has hitherto been from status to

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<sup>65</sup> Responding to Legrand he agrees that "pain" and "brot" have different cultural meanings in France and Germany. But "pain" also has different meanings for a poor village housewife and a wealthy Paris businessman. "[T]he same is true of law within a single country, even within a single town. The possession of cocaine is, let us imagine, illegal. This means one thing to the petty dealer who sees it as his sole hope of escaping from his ghetto, quite another for the recreational user, quite another to non criminals who live in the same street as the gangs, quite another to law enforcement officers. It is banal to notice that the same legal rule operates differently in two countries; it operates to different effect even within one." Alan Watson (2000b) at .

<sup>66</sup> Twining (2000a) Ch. 7.

<sup>67</sup> On Turkey see Watson (2000b)

contract.”<sup>68</sup> Indeed, I was tempted to produce a list of such propositions rather like the list of generalizations about prisons that I extracted from Vivien Stern’s book about imprisonment in the world in my second lecture.<sup>69</sup> However, like Maine’s generalizations, many of Watson’s general assertions are rather vague or are open to several interpretations, so that they are not in a form that makes them readily susceptible to detailed verification and falsification. In particular, insofar as Watson focuses on similarities in respects of codes, texts, rules, and vocabularies, it is unclear to what extent these similarities are merely superficial, given that he accepts that transplants can change their meanings in the course of traveling. <less so mentality? > And when Watson talks of the “success” of a transplant, or of a body of doctrine “working well” it is unclear what he means. One is left with the feeling that Watson’s theory, rather like my map of law in the world in Khartoum, deals mainly with surface appearances. Watson essentially treats law as a superficial gloss on society; perhaps his generalizations about law are similarly superficial.<sup>70</sup>

- (iv) Isaiah Berlin reminds us that the fox knows many things, but the hedgehog knows one big thing. Watson is a juristic hedgehog. He has stuck persistently to the theme that there are enormous apparent similarities between legal systems around the world, that these similarities are a result of imitation, and that most law exists largely independent of local social, economic, and cultural conditions. He has done a great service as an agent provocateur, but one is left wondering

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<sup>68</sup> Maine (1901) at 170.

<sup>69</sup> Stern (1998)

how his thesis can be translated, refined, or adapted into a form that is capable of detailed empirical testing.

#### THE SAME AND NOT THE SAME: THE HALF FULL CUP AGAIN?<sup>71</sup>

If hardly anyone subscribes to the strong mirror thesis, if “Weak Watson” is a fair reading of Alan Watson’s views, if difference theorists like Legrand are advocating little more than privileging differences over similarities in making comparisons, we seem to be back to the banalities of the half full cup, in which the only differences are ones of emphasis. Borrowing is important, mentality is important, context and culture are important. Watson is right in emphasizing that borrowing is a major factor in legal change; contextualists are right in maintaining that insofar as they take root in a new context, transplants may change and adapt, as Watson readily concedes.<sup>72</sup> Such generalities may be broadly true, but they are banal, and I would suggest that they are far too simple and too general. Here, as elsewhere, there is no substitute for detailed study of particular examples. But, of course, one needs adequate tools to guide such studies.

In the time available let me suggest two ways in which the transplants debate can be reoriented away from abstract polemics in the direction of more fruitful enquiries. The first involves substituting a more complex matrix for the rather artificial idea of “mirror theories”. The second involves looking again at the connected ideas of levels of ordering and of normative

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<sup>70</sup> cf. Ewald's brilliant critique of the idea that a Roman law student from the age of Justinian would not be greatly astonished by the substance of a modern civil code ("The ignorance of Romulus", Ewald (1995b at 2095-2104).

<sup>71</sup> See lecture I and II.

<sup>72</sup> Watson (2000b)

and legal pluralism and suggesting that transplantation and diffusion may not be a good way of categorizing a field of inquiry.

## WIDGETS, HOUSES, OR POLITICAL BRAINWASHING?

### TECHNOLOGICAL, CONTEXTUAL-EXPRESSIVE, AND . IDEOLOGICAL PERSPECTIVES.

Throughout the legal literature on transplants and reception there runs a tension between three underlying conceptions of the process and of the objects of diffusion or transplantation — i.e. what is received. These might be labeled the, instrumentalist, the expressive/contextual, and the ideological views.

The first 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, 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 engineering, even hardware and software.<sup>73</sup> 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

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<sup>73</sup> Rogers (1995); on metaphors relating to legal transplants see Nelken (2001) Ch.1.

rationalism and ideas of economic efficiency. The emphasis is on technical means to taken-for-granted ends.<sup>74</sup>

The second view is ideological. What is important in a reception is 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.<sup>75</sup> In colonial times imported law was primarily 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 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.<sup>76</sup> Ewald stresses the relevance of constitutional theory in understanding the German BGB and its profound differences from classical Roman law.<sup>77</sup> From an ideological perspective, treating imported law as no more than a series of technical solutions to shared problems — for example

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<sup>74</sup> On technology and technical prejudice see Twining (1993) 28-34, (reprinted in Twining (2002) at 176-82).

<sup>75</sup> E.g. Kennedy (1997).

<sup>76</sup> Gordley (1991)

talking of “lawyers’ law” as apolitical<sup>78</sup> — or choosing one system over another because of its technical superiority, obfuscates the underlying purpose and pretends that the ends are self-evident.<sup>79</sup>

An alternative view is more romantic. Law is mainly an outgrowth of local society, values and tradition and in large part expresses or reflects local society. Law is embedded holistically in local 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, rejection, even penetration.

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. that the main agent of legal change is imitation. And “mirror theories” are one of his prime targets. I think that there is some value in this juxtaposition, but that the contrasts tend to be painted in over sharp colours.

Brian Tamanaha has convincingly shown that “the mirror is one of the most powerful and pervasively applied metaphors of the last two thousand years, central in philosophy,<sup>80</sup> in literature and art,<sup>81</sup> and in the social

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<sup>77</sup> Ewald (1995a)

<sup>78</sup> On the difficulties surrounding the concept of “lawyers’ law”, see Twining (1957).

<sup>79</sup> 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 (1996). Similarly, not all problem-solving is conscious and rational (Twining and Miers, 1999) Ch.2).

<sup>80</sup> Citing Rorty (1979).

<sup>81</sup> Citing Torti, (1991) and Grabes, (1982).

sciences.<sup>82</sup> In law, its predominant use has been to provide a reassuring representation of the place that law holds in society.”<sup>83</sup>

Tamanaha cites six specific examples concerning law, including statements by H. L. A. Hart and Oliver Wendell Holmes.<sup>84</sup> For example, Lawrence Friedman is quoted as saying:

“Legal systems do not float in some cultural void, free of space and time and social context; necessarily, they reflect what is happening in their own societies. In the long run, they assume the shape of these societies, like a glove that molds itself to the shape of a person’s hand.”<sup>85</sup>

The examples that Tamanaha cites are best interpreted as emphatic, rhetorical statements, for it is doubtful whether a strong mirror theory can be attributed to any of the cited authors.<sup>86</sup> Nor do I know of any well-developed mirror theory. Nevertheless, the metaphor is both powerful and widespread:

“So strong is the grip of this assumption that it is routinely asserted by social and legal theorists without supportive evidence or argument, with a sense of the self-evident.”<sup>87</sup>

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<sup>82</sup> Citing Haglund, (1996).

<sup>83</sup> Tamanaha (2001) at p. 2.

<sup>84</sup> S. Vago, W. Ullman, Kent Greenawalt, HLA Hart, Lawrence Friedman, Oliver Wendell Holmes. Tamanaha also cites Karl Llewellyn as subscribing to an aspirational mirror theory, on the basis of the following quotation: “There is, amid the welter of self-serving groups, clamoring and struggling over this machine that will give power over others, the recurrent emergence of wholeness, some sense of responsibility which outruns enlightened self-interest, and results in action apparently headed (often purposefully) for the common good.” Llewellyn (1962) p.37 In the context Llewellyn was marveling at the idea that people could identify with "society" as a whole and support the public interest, given their divergent interests. This hardly amounts to a mirror theory.

<sup>85</sup> Friedman (1996) at 73. In a footnote, Friedman explicitly acknowledges the importance of debates about the autonomy of law and its limits citing Cotterrell (1992).

<sup>86</sup> Ewald (1995b)

<sup>87</sup> Tamanaha (at 2) Tamanaha argues that challenges to the mirror thesis also undermine claims to the efficacy and functionality of law. See further Twining (2002/3 LSR)

The fact that few, if any, jurists subscribe to strong mirror theories and that “weak” Watson makes some concessions to connections between law and society makes the sharpness of the debate between Watson and his critics seem to be rather artificial. The differences are more a matter of emphasis than profound disagreement among sophisticated theorists.

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.<sup>88</sup> 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. 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.<sup>89</sup> The starting-point for a house is to serve the basic functions of providing shelter, light and air. The art of building requires clear objectives, good technique, craftsmanship, and understanding of materials. Wright’s art is based on general principles, including the engineering concept of the cantilever, which made it possible to project the roof on a horizontal plane beyond the walls, to free the walls from a rigid connection with the roof, and to project a sense of space and freedom. The natural house merges into the landscape, but it does not merely mirror it. Wright’s designs were self-consciously modernist; indeed he welcomed the challenges of the machine age. But a house is more than just a machine.

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<sup>88</sup> Wright’s work has been the subject of different interpretations. This account is based on Donald Hoffman, (1995).

Good architecture goes beyond these to express the spirit of the time and place in a building as a work of art.

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;<sup>90</sup> in Karl Llewellyn's idea of crafts and period style,<sup>91</sup> in Nonet and Selznick's responsive law,<sup>92</sup> and even in Ronald Dworkin's idea of law as integrity.<sup>93</sup> A house must be in harmony with its context; so must law.

On this view a romantic view of the applied arts of architecture and law incorporates rather than rejects ideas of function, technique, problem-solving, and engineering, but insists on going beyond them to express the spirit of time and place and community in a coherent and harmonious fashion.

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.<sup>94</sup> Law is too vast and varied to fit any such general frame; 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. Legal phenomena are so varied and the inter-relations between legal orders and cultures are so extensive, diverse, and complex that it is

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<sup>89</sup> Hoffman (1995) 94-100.

<sup>90</sup> Savigny (1831)

<sup>91</sup> e.g. Llewellyn (1962), cf. Twining (1993)

<sup>92</sup> Nonet and Selznick, 1(978).

<sup>93</sup> Dworkin (1986)

<sup>94</sup> Kahn-Freund argues that legal rules and institutions can be located on a continuum ranging from the organic to the mechanical, but that where any example fits on the continuum depends as much on the power

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 a lot of sense to see particular legal rules, devices or institutions in terms of inventions that usefully solved discrete problems. Conversely, there is much more to the processes of most kinds of legal change than asking whether a particular solution fits a particular problem.

## LEVELS AND INTERLEGALITY

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, of course, a significant exception. However, in earlier lectures I have argued that general jurisprudence needs to be concerned with legal ordering at all levels from the very local to the intergalactic, including non-state local, regional, transnational and so on. Clearly borrowing, blending, and other forms of interaction can take place at all levels and between different levels; it can be vertical, horizontal, diagonal, or involve more complex pathways. Consider, for example, paths through which one would need to trace the origins of the UK Human Rights Act. It is a story of complex borrowing from public international law, national laws, and the ideas of a British draftsman (David Maxwell Fyfe) followed by fifty years in Strasbourg, then back to London, Edinburgh and

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structure behind the process of "transplantation" as on the nature of the rules or institutions involved. (Kahn-Freund (1978) Ch. 12 esp. 300-305).

Belfast.<sup>95</sup> Consider further the recent transnational networking by NGOs concerned with women's rights and their impact on the law in South Africa, for example.<sup>96</sup> 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).<sup>97</sup> 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.<sup>98</sup>

Such examples highlight the close link between normative and legal pluralism on the one hand and transplantation 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. This is what Santos calls "interlegality". As he points out, it is mistake to see such interaction solely in terms of conflict or competition. Rather, the possible kinds of relations between co-existing legal orders can be extraordinarily diverse: they may complement each other, co-operate, converge, assimilate, merge, repress, ..... To take just one simple 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 relation 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

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<sup>95</sup> Simpson (2001)

<sup>96</sup> A. Griffiths (1997), Fishbayn (1999 )

<sup>97</sup> Santos (2002) Ch.3.

<sup>98</sup> Goode (1995)

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.<sup>99</sup> From the point of view of the authorities/officials the existence of an alternative locus of power and authority may be at once a threat, a challenge, and a convenience.

These examples highlight a further point: that focusing on the processes of reception or transplantation may often be an artificially narrow way of looking at things: it may have similar limitations to a search for origins in history. It may 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 subsequent events and interactions.<sup>100</sup> 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. Those who emphasized the colonial origins of state inheritance law obscured the fact that this was a struggle between Kenyans, some of whom supported national law because it was, in their view, more suited to modern urban life styles or because it challenged patriarchal elements in traditions that were depicted as quintessentially African.<sup>101</sup> We saw in the third lecture that emphasis on the Western origins of human rights may divert attention from questions about their legitimacy and validity in today’s

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<sup>99</sup> Santos 2002 <.old.162-4>. Cf. No-go areas in Belfast and many cities.

<sup>100</sup> 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.

<sup>101</sup> Ojwang and Mugambi (1989), van Doren (1986).

world \_\_ as happened in the “Asian values” debate.<sup>102</sup> 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 provenance. In the case of Pasagarda the fact of some imitation of “asphalt law” is best understood in the context of the complex interactions between a non-state “legal” order and state authorities \_\_ it is only one part of a complex picture. To put this in general terms: it will often be appropriate to treat reception or transplantation just as one aspect of interlegality.<sup>103</sup>

## CONCLUSION

The topic of transplantation and diffusion is vast. One does not need to go quite as far as Alan Watson in saying that it is co-extensive with comparative law,<sup>104</sup> but it is a pervasive aspect of legal experience. In this lecture I have only been able to present a few snapshots. Looked at from the perspective of these lectures, my account differs from the bulk of the reception literature in a few significant respects:

First, it underlines the point that transplantation or reception can operate at all levels of legal ordering, not just at the country to country level.

Second, it warns against taking surface similarities between legal orders at face value. Before using diffusion to explain legal change and patterns of similarity, it is important to identify which apparent similarities are both genuine and significant.

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<sup>102</sup> E.g Ghai (1988, 2000).

<sup>103</sup> A country adopting foreign legal models to meet conditionalities of World Bank or WTO, which may be “window dressing” with the question of which foreign model being secondary. Or a state law reform body in US citing solutions from another state to justify a measure they wish to adopt anyway along the lines: “It has been tried in Maine and it works.”

<sup>104</sup> Watson (1993) Ch.1.

Third, most standard accounts of diffusion of law are concerned with origins and influences on legal change. I suggest that the processes of diffusion usually need to be viewed as just one aspect of interlegality, that is the processes of interaction between legal orders. These processes can be extremely intricate. They can, for example, include competition, conflict, complementation, and absorption as well as influence. Often any influence may be reciprocal rather than one way; interaction may result in new creations, rather than mere replication of existing phenomena and so on. Isolating borrowing and imitation from other aspects of interlegality may be quite misleading — just as it is misleading to consider historical enquiry to be solely or mainly a search for origins.

Finally, there are occasions when making diffusion or transplantation a particular focus of attention is justified. When this is so, it is striking that the modern legal literature on reception and transplantation has proceeded almost without reference to sociological studies of diffusion. Conversely, law hardly features in the sociological literature. The more sophisticated accounts of reception, such as those of Wieacker and Orocu, adopt approaches that converge with diffusion studies in sociology, although they may be less systematic. Less sophisticated accounts often proceed on dubious or simplistic assumptions illustrated by my naïve model of reception. This is a rather clear example of two bodies of literature dealing with essentially the same phenomenon talking past each other. It is time that the conversation was renewed.

TILBURG IV BIBLIOGRAPHY 18 July 02 (Fishbayn added but disc is master)

Abel, Richard (1973a) "Law Books and Books about Law" 26 *Stanford L. Rev.* 175

Abel, Richard (1973b) "A Comparative Theory about Dispute Institutions in Society", 8 *Law and Soc. Rev.* 217

Adal, Ehrhan (1991) *Fundamentals of Turkish Private Law* (Istanbul: Beta)

Aguda, T. Akinola (1980) *Law and Practice Relating to Evidence in Nigeria* (London: Sweet and Maxwell)

Albrow, Martin (1996) *The Global Age: State and Society Beyond Modernity*, (Stanford: Stanford UP)

Aldon, Morris and Carol M. Mueller (eds.) (1992) *Frontiers in Social Movement Theory* (New Haven: Yale University Press)

Anderson, Philip W., Kenneth J. Arrow, and David Pines (eds.) (1988), *The Economy as an Evolving Complex System* (Addison-Wesley, Menlo Park, Ca.)

Arjani, Gianmaria (1995) "By Chance and Prestige: Legal Transplants in Russia and Eastern Europe" 43 *Am. Jo. Comp. L* 93-117

Arthur, W. Brian, "Self-reinforcing Mechanisms in Economics", in Philip W. Anderson, Kenneth J. Arrow, and David Pines (eds.) 1988)

Bainham A. (ed.) *The International Survey of Family Law* (1994)

Banaker, Reza (2002) forthcoming

Beatson, Jack and Takis Tridimas (eds.) (1998) *New Directions in European Public Law* (Oxford: Hart)

Beckstrom, John H. (1973) "Transplantation of Legal Systems: An Early Report on the Reception of Western Laws in Ethiopia" 21 Am Jo. Comp. L. 557-83

Bob, Clifford (1996) "Transferring Legal Institutions: Governance Theory and the Rule of Law in Developing Societies" (unpub LSA)

Brudner, Alan (1995) *The Unity of the Common Law: Studies in Hegelian Jurisprudence* (Berkeley: University of California Press)

Burman, Sandra and Barbara Harrell-Bond (eds.) *The Imposition of Law* (New York, Academic Press, 1979)

Colaiaco, James A. (1983) *James Fitzjames Stephen and the Crisis of Victorian Thought* (London: MacMillan)

Collier, Jane and June Starr (eds.) (1989) *History and Power in the Study of Law: New Directions in Legal Anthropology* (Ithaca: Cornell University Press).

Cotterrell, Roger (1984) *The Sociology of Law* (2nd edn., London: Butterworth)

Cotterrell, Roger (2001) "Is there a Logic of Legal Transplants?" in Nelken and Feest (eds) (2001) Ch.3

Crystal, David (1995) *The Cambridge Encyclopedia of the English Language* (Cambridge: Cambridge University Press)

Dauvergne, Catherine (ed.) (2002) *Jurisprudence in an Interdependent Globe* (Aldershot: Ashgate, forthcoming).

David, R. and J. E. C. Brierley (1968, 1985) *Major Legal Systems in the World Today* (London: Stevens, 1st edn. 1968, 3rd edn. 1985).

David, R.\* (1964, 1992) *Les Grands Systemes du Droit Contemporain* (Paris: Dalloz, 1st edn. 1964, 10th edn. by C. Jauffrey-Spinosi, 1992) acc

della Porta, Donatella, Hanspeter Kriesi, and Dieter Rucht (eds.) (1999) *Social Movements in a Globalizing World* (London: MacMillan)

Dworkin, Ronald (1986) *Law's Empire* (London: Fontana)

Dwyer, D. (ed) *Law and Islam in the Middle East* (Bergin and Garvey, Westport, Ct., 1990)

Edge, Ian (2000) *Comparative Law in Global Perspective* (New York: Transaction Publishers)

Enc. Brit. "Civilization and Culture" <ck ref.>

Evan, William M. (1998) *Social Structure and Law* (Newbury Park: Sage)

Ewald, William (1995a) "Comparative Jurisprudence I: What was it Like to Try a Rat?" 143 U. Pennsylvania L. Rev. 1889-2149 ck.

Ewald, William (1995b) "Comparative Jurisprudence II: The Logic of Legal Transplants", 43 Am. Jo. Comp. Law. 489-510

Ferrari, Franco (1995) *The Sphere of application of the Vienna Sales Convention* (The Hague: Kluwer Law International)

Fishbayn, Lisa (1999) "Litigating the Right to Culture: Family Law in the New South Africa" 13 Int. Jo. of Law, Policy, and the Family 147-73.

Friedman, Lawrence (1996) "Borders: On the Emerging Sociology of Transnational Law", 32 Stanford Jo. Int. Law 65-90

Friedman, Lawrence (2001) "Some Comments on Cotterrell and Transplants" in Nelken and Feest (eds) (2001) 93-8

Gessner, V. (1994) "Global Legal Interaction and Legal Cultures" 7 Ratio Juris 132\*

Ghai, Yash P. (1998) "Human Rights and Asian Values" 9 Public Law Review 168

Ghai, Yash P. (2000) "Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims", 21 Cardozo L. Rev. 1095

Glenn, H. Patrick, (1987) "Persuasive Authority", 32 McGill Law Jo. 261-297

Glenn, H. Patrick (1996) "Mixite and Monism" in Orocú, Attwooll, and Coyle 1-15 acc.

Glenn, H. Patrick (2000) *Legal Traditions of the World* (Oxford: Oxford University Press)

Goldstein, Stephen (1996) "Israel: Creating a New Legal System from Different Sources by Jurists of Different Backgrounds" in Orocú, Attwooll, and Coyle 147-164

Goode, Roy (1995) *Commercial Law* (Harmondsworth: Penguin)

Goodhart, A. L. (ed.) "Migration of the Common Law" (symposium) 76 L. Q. R. 39 (1960)

Gordley, James (1991) *The Philosophical Origins of Modern Contract Doctrine* (Oxford: Oxford University Press)

Grabes, H. (1982) *The Mutable Glass: Mirror-imagery in Titles and Texts of the Middle Ages and English Renaissance* (Cambridge: Cambridge University Press)

Grande, E (ed.) (1995) *Transplants, Innovation and Legal Tradition in the Horn of Africa* (Trento: L'Harmattan Italia)\*

Gray, Charles W. and William W. Jarosz, (1995) "Law and Regulation of Foreign Direct Investment: The Experience from Central and Eastern Europe" 33 *Columbia Jo. Transnational Law* 3-40

Griffiths, Anne (1997) *In the Shadow of Marriage: Gender and Justice in an African Community* (Chicago: University of Chicago Press)

Griffiths, Anne (2002) in (Banaker, R. 2002)

Gulliver, Philip (1963) *Social Control in an African Society* (London: Routledge and Kegan Paul)

Haack, Susan (1998) *Manifesto of a Passionate Moderate* (Chicago: University of Chicago Press)

Hagerstrand, Torsten (1967) *Innovation Diffusion as a Spatial Process* (trs. Allan Pred, Chicago: University of Chicago Press)\*

Haglund, P. (1996) "A Clear and Equal Glass: Reflections on the Metaphor of the Mirror", 13 *Psychoanalytic Psychology*, 225-45.

Heine-Geldern, Robert and Torsten Hagerstrand, (1968) "Diffusion" in *Int. 4 Enc Soc Sci*.

Hendley, Kathryn (1996) *Trying to Make Law Matter: Legal Reform and Labor Law in the Soviet Union* (Ann Arbor: University of Michigan Press)

Hirsch, Paul M. (1986) "From Ambushes to Golden Parachutes: Corporate Takeovers as an Instance of Cultural Framing and Institutional Integration", 91 *Am. Jo. Sociology* 800-37

Hoffman, Donald *Understanding Frank Lloyd Wright's Architecture* (Dover, New York, 1995)

Honore, Tony (1999) On Fitting Trusts into Civil Law Jurisdictions (HKU conf.) acc

Hooker, M. B. (1985) *Legal Pluralism: An Introduction to Colonial and Non-Colonial Laws* (Oxford: Clarendon Press)

Jagtenberg, R., E. Orocu, and A. J. de Roo (eds) (1995) *Transfrontier Mobility of Law* (The Hague: Kluwer Law International)\* (articles by Orocu, Wedekind, de Roo, X Lewis, Legrand, Jagtenberg)

Kahn-Freund, Otto (1978) *Selected Writings* (London: Stevens)

Kennedy, Duncan (1997) *A Critique of Adjudication* (Cambridge, Ma.: Harvard University Press)

Kerckhoff, Alan C. and Kurt W. Back (1968) *The June Bug: A Study of Hysterical Contagion* (New York: Appleton-Crofts)\*x

Kocourek, Albert (1936) "Factors in the Reception of Law", 10 *Tulane L. Rev.* 209-30

Koschaker, Paul (1947) *Europa und das Romische Recht* (Munich: Biederstein) acc

Kuol, Monyluak Alor, (1997) *Administration of Justice in the (SPLA/ M) Liberated Areas: Court Cases in War-torn Southern Sudan* (Oxford: Refugee Studies Programme)

Lacey, Nicola *Unspeakable Subjects* (Oxford, Hart, 1998)

Latour, Bruno (1996) *Aramis or the Love of Technology* (Cambridge, Mass.: Harvard University Press, trs. Catherine Porter).

Legrand, Pierre (1996) "Against a European Civil Code" 60 *M. L. R.* 44-61

Legrand, Pierre (1997) "The Impossibility of Legal Transplants", 4 *Maastricht Jo. of European and Comparative Law* 111-

Legrand, Pierre (1996) "How to Compare Now" 16 *Legal Studies* 232-42

Legrand, Pierre (1999) *Fragments on Law-as-Culture* (Deventer: Willink)

Likosky, Michael (ed.) (2002) *Transnational Legal Processes* (London: Butterworth)

Llewellyn, Karl N. (1962) *Jurisprudence: Realism in Theory and Practice* (Chicago: University of Chicago Press)

Llewellyn, Karl N. and E. Adamson Hoebel (1941) *The Cheyenne Way* (Norman: University of Oklahoma Press)

Magnarella, Paul J. "Kanun ve Aile" [Law and Family] *The World and I* (June, 1988) 502

Maine, Sir Henry (1901) *Ancient Law* (London: John Murray)

Markesenis, Basil (1997) *Foreign Law and Comparative Methodology: A Subject and a Thesis* (Oxford: Hart)

Mattei, Ugo (1994) "Efficiency in Legal Transplants: An Essay on Comparative Law and Economics" 14 *Int. Review of Law and Economics* 3-19

Markesenis, Basil

Medjad, Karim (2000) "Legal Transplants in Central and Eastern Europe: An Analysis of Some Distortions Available on the Supply side" (unpub LSA)

Menski, Werner and David Pearl (1998) *Muslim Family Law* (3rd edn., London: Sweet and Maxwell)

Merryman, John (2000) "Law and Development Memoirs II: SLADE" 48 Am. Jo. Comp. L. 713-

Meyer, John W., Francisco O. Ramirez, Yasemin N. Soysal (1992) "World Expansion of Higher Education 1870-1980" 65 *Sociology of Education* 128-49\*x

Mill, J. S. *A System of Logic Ratiocinative and Inductive* (1st edn. 1843, J. M. Robson, Toronto, date)

Miller, David Carey (1996) "South Africa: A Mixed System Subject to Transcending Forces" in Orocu, Attwooll, and Coyle 165-91

Molotch, Harvey

Mommsen, W. J. and A. De Moor (eds.) *European Expansion and the Law* (Oxford, Berg, 1992)

Moore, Sally Falk (1978)\* *Law as Process: An Anthropological Approach*  
(Boston: Routledge and Kegan Paul)

Nelken, David and Johannes Feest (eds ) (2001) *Adapting Legal Cultures*  
(Hart: Oxford)

Nonet, Philippe and Philip Selznick (1978) *Law and Society in Transition:  
Toward Responsive Law* (New York:Harper, Colophon).

Ojwang, J. B. and J. N. K. Mugambi (eds.) (1989) *The S. M. Otieno Case:  
Death and Burial in Modern Kenya* ( Nairobi: Nairobi University Press)

Orucu, Esin (1987) "An Exercise on the Internal Logic of Legal Systems", 7  
Legal Studies 310-318

Orucu, Esin (1992) "The Impact of European Law on the Ottoman Empire  
and Turkey" in W. J. Mommsen and A. De Moor (eds) (1992)

Orucu, E. (1994) "Diverse Issues, Continuing Debates", in A. Bainham  
(ed.) (1994);

Orucu, Esin, E. Attwooll and S. Coyle (eds.) (1996) *Studies in Legal  
Systems: Mixed and Mixing* (London: Kluwer Law International) <3  
accents)

Orucu, Esin (1996) "Turkey: Change Under Pressure", in Orucu, Attwool, and Coyle (eds) 89-111

Orucu, Esin (1999) *Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition* (Nederlandse Vereniging Voor Rechtsvergelijking No. 59 (Deventer: Kluwer)

Orucu, Esin (2000) "Turkey Facing the European Union \_\_ Old and New Harmonies", 25 E. L. Rev. 57-71

Orucu, Esin (2002) "Law as Transposition" 51 Int. Comp. L. Q. 205-23.

ACCENTS

Peiris, G. L. (1987) *The Law of Evidence in Sri Lanka* (3rd revised edn., Colombo: Lake House Investments)

Perry, W. J. (1923) *Children of the Sun* (London, Methuen)

Pickering, Andrew (1995) *The Mangle of Practice: Time, Agency, and Science* (Chicago: University of Chicago Press)\*

Pospisil, Leo (1967) "Legal Levels and Multiplicity of Legal Systems" 2 Journal of Conflict Resolution 2-26\*

Pound, Roscoe (1959) *Jurisprudence* (St Paul. Minn: West Publishing Co.)  
5 vols.

Powell, Walter W. and Paul J. DiMaggio (1991) *The New Institutionalism in Organizational Analysis* (Chicago: Chicago University Press)\*

Radzinowicz, Leon (1957) *Sir James Fitzjames Stephen* (London: Selden Society)

Ratzel, Friedrich (1882) [IESBS if needed]

Reich, Norbert (1992) "Competition Between Legal Orders: A New Paradigm of EC Law?" 29 *Common Market L. Rev.* 861-896

Reimann, Mathias (ed.) (1993) *The reception of Continental Ideas in the Common Law* (Berlin: Duncker and Humblot)

Rogers, Everett M. (1963, 1995) *Diffusion of Innovations* (4th edn., 1995, New York: Free Press)

Rorty, Richard (1979) *Philosophy and the Mirror of Nature* (Princeton: Princeton University Press)

Rubin, Paul H. (1994) "Growing a Legal System in the Post-colonial Economies" 27 *Cornell Int'l L. Jo* 1-47 (contract)\*

Santos, Boaventura de Sousa (1995) *Toward a New Common Sense: Law, Science and Politics in Paradigmatic Transition* (London: Routledge)

Santos, Boaventura de Sousa (2002) *Toward a New Legal Common Sense: Law, Globalisation and Emancipation* (London: forthcoming, Butterworth, 2002)

Sarkar, S. C. (1913, 1971) *Sarkar on Evidence* (1st edn. 1913; 12th edn. 1971- ed. P.C. and S. Sarkar, Calcutta: Sarkar and Sons)

Savigny, F. C. von (1831) *The Vocation of our Age for Legislation and Jurisprudence* (2nd edn., trs. A. Hayward, London: LITTLEWOOD and Co.) ck

Scruton, Roger (1991) "The Reform of Law in eastern Europe" 1 *Tilburg Foreign L. rev.* 7-14

Schlesinger, Rudolph, Hans W. Baade, Peter E. Herzog, and Edward M. Wise (1998) *Comparative Law* (New York: Foundation Press, 6th edn.)

Sharlet, Robert (1998) "Legal Transplants and Political Mutations: The Reception of Constitutional Law in Russia and the Newly Independent States", .. *East European Constitutional Rev.* 59-68

Simon, Jonathan (1999) "Law after Society" (review article) ...*Law and Social Inquiry* 143-194

Simpson, A. W. Brian (2001) *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford: Oxford University Press)

Slaughter, Anne-Marie (1994) "A Typology of Transjudicial Communication" 29 U. Richmond L. Rev. 99-137\*

Smelser, Neil and Paul B. Baltes, (2001) *International Encyclopedia of the Social and Behavioral Sciences* (Kidlington, Oxford: Elsevier) 26 vols. (IESBS)

Smith, Elliott (1916) "The Influence of Ancient Egyptian Civilization on the East and America", Bulletin of the John Rylands Library, Jan.-March)

Smith, K. J. M. (1988) *James Fitzjames Stephen: Portrait of a Victorian Rationalist* (Cambridge: Cambridge University Press)

Snow, David and Robert D. Benford, (1999) "Alternative Types of Cross-national Diffusion in the Social Movement Arena", in Donatella della Porta, Hanspeter Kriesi, and Dieter Rucht (eds.) (1999) *Social Movements in a Globalizing World* (London: MacMillan)

Starr, June and Jonathan Pool (1974) "The Impact of a Legal Revolution in Rural Turkey", 8 Law and Society Rev. 533-60

Starr, June (1978) *Dispute and Settlement in Rural Turkey: An Ethnography of Law* (Leiden: EJ Brill)

Starr, June (1990) "Islam and the Struggle over State Law in Turkey" in D. Dwyer (ed) (1990)

Starr, June (1992) *Law as Metaphor: From Islamic Courts to the Palace of Justice* (Albany: SUNY Press)

Stein, Peter (1988) *Legal Evolution: The Story of an Idea* (Cambridge: Cambridge University Press)

Stephen, James Fitzjames (1872) *The Indian Evidence Act, With an Introduction on the Principles of Judicial Evidence* (Calcutta: Thacker, Spink and Co.)

Stephen, James Fitzjames (1876, 1948) *A Digest of the Law of Evidence* (1st edn., 1876, 12 edn. 1948, London: MacMillan)

Stephen, Leslie (1895) *The Life of Sir James Fitzjames Stephen* (2nd edn., London: Smith, Elder, and Co.)

Stern, Vivien (1998) *A Sin Against the Future: Imprisonment in the World* (London: Penguin)

Stirling, Paul (1965) *Turkish Village* (Weidenfeld and Nicolson, 1965) <and in ISSN>

Strang, David and John W. Meyer (1993) "Institutional Conditions for Diffusion" 22 *Theory and Society* 487-511\*x

Strang, David and Sarah A. Soule (1998) "Diffusion in Organizations and social Movements: From Hybrid Corns to Poison Pills" 24 Annual Review of Sociology 265-90\*

Symposium in 9 Int. Social Science Bulletin (1957);

*Symposium* on The Reception of Foreign Law in Turkey, Annales de la Faculte de Droit d'Istanbul No.6, 1956;

Tamanaha, Brian (1993)\* *Understanding Law in Micronesia: An Interpretive Approach to Transplanted Law* (Oxford: Oxford University Press)

Tamanaha, Brian (2001) *A General Jurisprudence of Law and Society* (Oxford; Oxford University Press)

Teubner, Guenther (1998) "Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergencies", 61 M. L. R. 11-32

Torti, A, (1991) *The Glass of Form: Mirroring Structures from Chaucer to Skelton* (Rochester, NY: D. S. Brewer)

Twining, William (1957) "Some Aspects of Reception", Sudan Law Jo. and Reports 229-52

Twining, William (1973, 1985) *Karl Llewellyn and the Realist Movement* (London: Weidenfeld and Nicolson; Norman: University of Oklahoma Press)

Twining, William (1993) *Karl Llewellyn's Unfinished Agenda: Law in Society and the Job of Juristic Method* (Chicago: University of Chicago Law School, reprinted in Twining (2002))

Twining, William (1994) *Rethinking Evidence* (Evanston: Northwestern University Press)

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

Twining, William (2000a) *Globalisation and Legal Theory* (London: Butterworth) (hereafter *GLT*)

Twining, William (2000b) "Comparative Law and Legal Theory: The Country and Western Tradition in I. Edge (2000) 21-76

Twining, William (2001) "A Cosmopolitan Discipline?" 1 Jo. Commonwealth Law and Legal Education 13-29 (Also 8 Int. Jo. the Legal Profession 23-36)

Twining, William (2002a) *The Great Juristic Bazaar* (Aldershot: Ashgate)

Twining, William (2002b) "Reviving General Jurisprudence" in Likosky (2002)

Twining, William (2002c) "The Province of Jurisprudence Re-examined" (Julius Stone Lecture) in Dauvergne (ed.) (2002) forthcoming

Twining, William (2002d) "Cosmopolitan Legal Studies" 9 Int. Jo. Legal Profession 1-10

Twining, William (2002/3) "A Post-Westphalian Conception of Law" Law and Society Review forthcoming

Twining, William and David Miers (1999) *How to Do Things With Rules* (London: Butterworth, 4th edn.)

Van Doren, J. (1986) "Death African Style: The Case of S. M. Otieno" 36 Am. Jo. Comp. L. 329-50

Watson, Alan (1977) *Society and Legal Change* (Edinburgh: Scottish Academic Press)

Watson, Alan (1988) *Failures of the Legal Imagination* (Edinburgh: Scottish Academic Press)

Watson, Alan (1993) *Legal Transplants: An Approach to Comparative Law* (Athens, Ga: University of Georgia Press, revised edn.)

Watson, Alan (2000) *Law Out of Context* (Athens, Ga.: University of Georgia Press)

Watson, Alan (2000b) *Legal Transplants and European Private Law* (Ius Commune Lecture, Maastricht, Metro 2000)

Whitman, James (1999) Review of Wieacker (1995) in 17 *Law and History* review 400.

Wieacker, Franz (1981) "The Importance of Roman Law for Modern Western Civilization and Western Legal Thought", IV *Boston College International and Comparative Law Review* 257

Wieacker, Franz *Privatrechtsgeschichte der Neuzeit* (1952, revised 1967), translated by Tony Weir as *A History of Private Law in Europe, with particular reference to Germany* (Oxford; Clarendon Press, 1995)

Wieacker, Franz (1990) "Foundations of European Legal Culture" 38 *Am. Jo. Comp. L.* 1-29

Wise, Edward M. (1990) "The Transplant of Legal Patterns" 38 *Am. Jo. Comp. L.* 1-22 (Supp)\*

Woodruffe, J. G. and Ameer Ali (1979-81) *The Law of Evidence* (1st edn. 14th edn. 1979-81, Allahabad: Law Book Co.)

Zimmerman, R (2001) *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today* (Oxford: Oxford University Press)

Zwalen, Mary (1981) *La Divorce en Turquie* (Lib. Droz, Geneva, 1981)

Zweigert, Konrad and Hein Kotz (1987) *An Introduction to Comparative Law* (trs. Tony Weir, Oxford: Oxford University Press, 3rd edn., 1998)