

Diffusion and Globalization Discourse

William Twining*

INTRODUCTION

Karl Llewellyn used to re-read *Treasure Island* on his birthday every year.¹ I have sometimes transposed that ritual to Christmas Day. However, on December 24, 2005, I received an unsolicited parcel containing a gift of David Westbrook's *City of Gold*.² So I decided to read that instead. *City of Gold* is far richer fare than *Treasure Island*, and I am still digesting it. However, I have at least grasped that Westbrook has presented us with an imagined world society that differs significantly from the impoverished visions of world capitalism, human rights, apocalyptic fears of global hegemony, and other inadequate imaginings.

Westbrook's paper extends his account further by outlining four ways of imagining modern authority in tomorrow's global society—imperium, fashion, system, and tribe. I understand this to be an aid to thinking about diffusion of law in three ways: First, to help us break away from spatial metaphors that link law to the territorial state; second, to present globalization not as some totalizing and homogenizing set of processes, but “as the formation of new contexts, new social spaces, and indeed, new hierarchies”;³ and third, to interpret diffusion of law as a typically benign method of bringing about adoption, adaptation, or modernization in response to changing conditions.

I am generally sympathetic to Westbrook's thesis and I find his four perspectives on authority helpful. In the time available I shall attempt to contrast his rich and bold imaginings with my own, more particularistic perspective on the discourses and metaphors of globalization and diffusion.⁴

* Quain Professor of Jurisprudence Emeritus, University College London, and Visiting Professor, University of Miami School of Law.

1. Karl Llewellyn, *Drama, Dramatics and Kids*, in WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 121 (1973).

2. DAVID A. WESTBROOK, *CITY OF GOLD: AN APOLOGY FOR GLOBAL CAPITALISM IN A TIME OF DISCONTENT* (2004).

3. David A. Westbrook, *Theorizing the Diffusion of Law: Conceptual Difficulties, Unstable Imaginations, and the Effort to Think Gracefully Nonetheless*, 47 HARV. INT'L L.J. 489, 504 (2006).

4. The themes in this Article are developed at greater length in WILLIAM TWINING, *GLOBALISATION AND LEGAL THEORY* 1–14, 136–73 (2000) [hereinafter TWINING, *GLOBALISATION*]; William Twining, *Diffusion of Law: A Global Perspective*, J. LEGAL PLURALISM & UNOFFICIAL L. 1, 1–45 (2004) [hereinafter Twining, *Diffusion of Law*]; William Twining, *Social Science and Diffusion of Law*, 32 J.L. & SOC'Y 203, 203–40 (2005) [hereinafter Twining, *Social Science*].

I. GLOBALIZATION AND G-TALK

I teach a course called “Globalization and Law.” I encourage students to adopt a global perspective; to think in terms of humankind and our physical world; and to try to construct total pictures of law in the world and to ponder the difficulties involved. However, on the first day of class, I ban the unjustified use of G-words from the classroom—“global,” “globalization,” “globalizing,” and other forms of globababble and globahype.

I do this for several reasons. The first is obvious: The currency of G-talk is debased. It too often involves exaggerated, misleading, meaningless, superficial, ethnocentric, or just plain false statements about processes and phenomena that are better discussed in less hyperbolic terms. Of course, there are genuinely global phenomena and issues—global warming and nuclear proliferation, for example—but most of what is being referred to as G-talk takes place at sub-global levels. There is a standard joke that makes the main point: It might be pedantic to cavil at talk of a World Cup of soccer; it is stretching things to talk of a World Cup of cricket involving sixteen countries; but talk of a World Series of baseball is just hype.⁵

Second, there is a tendency in G-talk to set the global and the local in counterpoint, and to move too quickly from one to the other and leave out all intermediate geographical levels, not only those that are neatly concentric—North-South, hemispheres, regions, continents, sovereign states, sub-states, provinces—but also less neat spreads—empires, alliances, religious diasporas, the Arab World, migration flows, spheres of influence, cartels, networks, legal cultures and traditions—that greatly complicate the picture, not least for law.⁶ These messy overlapping patterns make mapping law in the world difficult and place ideas of normative and legal pluralism at the center of understanding law from a global perspective.

Westbrook talks of global society, the *City of Gold*, global culture, and global politics as unities.⁷ He regularly sets the global and the local in counterpoint;⁸ he recognizes, but does not stress, that most forms of legal relations and ordering take place at sub-global levels; and he tends to see diffusion of law as something happening mainly between state legal systems and countries.⁹ I am uneasy about this totalizing tendency, despite his disclaimers. To be sure, a single world economy, a global ecosystem, and a world atlas can be

5. The World Series of baseball took its name from a newspaper, *The New York World*, but few people recall that fact. The recent baseball “World Classic” involved sixteen countries, including Italy, Australia, and South Africa, but since the main teams are the Americas, it has not quite reached the status of the World Cup of cricket. To call this initial event a classic doubles the hype. Fred Bierman, *World Baseball Classic: A Global Alternative to Spring Training*, N.Y. TIMES, Feb. 12, 2006, at TR11; Jack Curry, *Japan, and Its Fans, Embrace New Title of World Champion*, N.Y. TIMES, Mar. 21, 2006, at D1.

6. TWINING, GLOBALISATION, *supra* note 4, at 139–40.

7. See, e.g., WESTBROOK, *supra* note 2; Westbrook, *supra* note 3, at 500 (discussing global society), 504 (discussing capitalist world order).

8. Westbrook, *supra* note 3, at 504.

9. *Id.* at 493–96.

useful constructs in some contexts. Adopting a global perspective is mainly useful, in my view, for setting a broad context with unusually clear outer boundaries. But to think of humankind as a community in any strong sense is at best an optimistic aspiration that we are a long way from achieving.¹⁰ To talk of global law, global governance, or global ideology as if these concepts have any precise meaning is simplistic and potentially threatening.

It is especially important for lawyers to differentiate between levels of relations and of ordering,¹¹ and with respect to diffusion to break away from the assumption that diffusion of law takes place wholly or mainly between countries and municipal legal systems. It takes place among, between, and across all levels—in particular, cross-level diffusion is generally neglected in the legal literature.

Westbrook rightly warns against thinking too much in geographical terms. It is important to recognize that talk of levels of law and of ordering is a spatial metaphor that is not always appropriate. Gordon Woodman has forcefully made the point that state law is typically defined in terms of relatively determinate territory, but many laws and legal orders are not.¹² In the standard situation of legal pluralism, “in which a population observes more than one body of law,” there may not be settled choice-of-law rules, the population may be dispersed, membership of the population may be ambiguous, there may be variations and inconsistencies within a single “system” or body of law, and an individual may observe different laws for different purposes, even in relation to a single transaction or relationship.¹³ This is especially the case with personal and religious laws. The point is well taken. However, if we conceive of law as a form of institutionalised social practice and if we are concerned with the law in action, then we are dealing with actual behavior that does take place at particular times in particular places. For example, if we agree that Shari’a travels with every devout Muslim, a good map of Islamic diasporas can at least give a general indication of where Islamic law is likely to exist at a given time as an institutionalized social practice.¹⁴ We need to guard against overusing spatial metaphors, but there is still scope for legal geography.¹⁵

10. The spontaneous response to the tsunami tragedy of December 26, 2004 exemplifies the point: It was heartwarming, but only momentary; it was widespread, but hardly worldwide.

11. The distinction between levels of relations and levels of ordering should be familiar to lawyers, but is often overlooked.

12. Gordon Woodman, *Why There Can Be No Map of Law*, 3 PAPERS OF THE XIIITH INT’L CONGRESS: LEGAL PLURALISM & UNOFFICIAL L. IN SOC., ECON. & POL. DEV. 383 (2002). The practice of relating laws to countries, societies, fields, or localities is, he suggests, a hangover from “legal centralism,” which treats state law as the paradigm.

13. Woodman illustrates these points by reference to the Luo on the Kenya/Tanzania border. *Id.* at 387–88.

14. On the development of Islamic law in the form of anglicized local custom (*angrezi shariat*), see DAVID PEARL & WERNER MENSKI, *MUSLIM FAMILY LAW* 51–83 (3rd ed. 1998).

15. See, e.g., NICHOLAS BLOMLEY, *LAW, SPACE AND THE GEOGRAPHIES OF POWER* (1994); Kim Economides, *Law and Geography: New Frontiers*, in *LEGAL FRONTIERS* 180 (Philip Thomas ed., 1996).

A third reason for lawyers to be skeptical of G-talk in relation to law is our collective ignorance of other traditions and cultures. Our intellectual traditions in law have tended to be quite parochial and inward-looking. Most legal scholarship is particular and most legal concepts are culture-bound. So on the whole, we lack adequate analytic concepts and reliable data for giving general accounts of law in the world that include and transcend different legal traditions and cultures. At present, a very high proportion of Western or Anglo-American attempts to generalize or construct general statements about law in the world are based on ignorance and run the danger of being exaggerated, misleading, false, superficial, ethnocentric, or a combination of these. We are not yet well-equipped to talk globally about law.¹⁶

For these reasons, I suggest that it may sometimes be useful to adopt a global perspective, but with respect to diffusion we need to think of processes that occur mainly within and across a variety of sub-global levels.

II. DIFFUSION AS A LABEL

There has been a good deal of discussion about what concepts, labels, and metaphors may be appropriate for the topic that the organizers of this symposium have labelled as diffusion.¹⁷ Transplantation, transposition, spread, transfer, import/export, reception, circulation, mixing, and transfrontier mobility are just a few of the terms that have been suggested, used or bandied about.

I have some hesitations about diffusion as an organizing concept, but I prefer it to others for two pragmatic reasons. First, diffusion is a standard concept in the social sciences. It is high time for closer connections to be made between the vast, largely empirical, social scientific literature on the diffusion of innovations, language, social movements, etc. and the largely unempirical, under-theorised literature of transplantation and reception of law.¹⁸

Second, diffusion refers to process and it is as process that there is some justification for making it a subject of special attention. On its own, diffusion is as abstract and far-reaching as “change” or “influence” or “interaction.” Concern with influences from the outside or of the results of diffusion is more often than not one aspect of a specific subject, such as a history of local law, or a study of the mechanisms of legal change or the culture of a municipal legal system or the impact of a structural adjustment program.¹⁹ In some con-

16. William Twining, *Have Concepts, Will Travel: Analytical Jurisprudence in a Global Context*, 1 INT'L J.L. IN CONTEXT 5, 5–14 (2005).

17. DAVID NELKEN & JOHANNES FEEST, ADAPTING LEGAL CULTURES, 15–20 (2001); Esin Öricü, *Law as Transposition*, 51 INT'L & COMP. L.Q. 205, 205–23 (2002). Some of Öricü's metaphors—salad, salad bowl, mixed or hybrid system—refer to outcomes rather than to process.

18. Twining, *Social Science*, *supra* note 4.

19. On problems of evaluating the impact of such programs, see Veronica Taylor, *The Law Reform Olympics: Measuring the Effects of Law Reform in Transition Economies*, in LAW REFORM IN DEVELOPING STATES (Timothy Lindsay ed., forthcoming 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=893682.

texts, focusing on foreign influences may seem to be as sterile or trivial as a search for origins in history or for influence in art.

If we consider diffusion as a process, the label is not entirely satisfactory. To me the term suggests outward movement—from metropolitan power to colony, from center to periphery, from rich, modern, developed country to poor, traditional, underdeveloped one. Westbrook’s intriguing metaphor of cream poured into coffee, swirling and billowing before blending into a homogenized liquid, is suggestive. But this only captures part of what we should be concerned with. The cream comes from a single outside source, it is poured from above, the flow is in one direction, and the blending is relatively harmonious;²⁰ but many of our stories of diffusion of law are more complex—often involving two or more reciprocally interacting change agents, crossing of levels, and repression, resistance, or avoidance. Not infrequently, there may be a failure to mix, so that the outcome is a veneer of surface law superimposed on pre-existing orderings that survive but are obscured by the “modern” newcomer—more like oil and water than coffee and milk.²¹

I have recently tried to start a brand new fashion in jurisprudence, called the Self-Critical Legal Studies Movement. From some of my own early attempts to give an account of “reception,” I have constructed a naive model of reception that has twelve elements, none of which are necessary and some of which are not even characteristic of most processes of diffusion.²² The assumptions of the model can be briefly restated as follows:

[A] bipolar relationship between two countries involving a direct one-way transfer of legal rules or institutions through the agency of governments involving formal enactment or adoption at a particular moment of time (a reception date) without major change. . . . [I]t is commonly assumed that the standard case involves transfer from an advanced (parent) civil or common law system to a less developed one, in order to bring about technological change (“to modernise”) by filling in gaps or replacing prior local law.²³

Table I²⁴ illustrates just some of the possible variants and deviations from each element in the model. If we view this model as an ideal type of accounts of

20. Westbrook talks of “adoption” by subjects. This is reminiscent of Glenn’s controversial claim that receptions are never imposed, because they only succeed through persuasion. See H. Patrick Glenn, *Persuasive Authority*, 32 MCGILL L.J. 261, 265 (1987). This optimistic view runs counter to most accounts of law and colonialism.

21. The term “surface law” refers to law as it appears on the surface in formal sources (such as codes), official views, textbook statements and the like. Such accounts may or may not be superficial or misleading. On their own they say little or nothing about how the law is interpreted, applied, used, or enforced, about its operation in fact, and what its social and economic consequences are. The concept is in need of development, especially in the context of diffusion. Beneath surface law may lurk other forms of law, which may be obscured or rendered almost invisible.

22. The model is introduced and discussed in Twining, *Diffusion of Law*, *supra* note 4, at 3.

23. *Id.*

24. See Table I *infra* pp. 514–15.

reception/transplantation in the legal literature, we find that some of the deviations are recognized by some commentators, but overall such a model is widely assumed to represent a paradigmatic case.²⁵

I have examined each of these elements at length elsewhere. In the time available, I shall comment on two points.

III. THE SIGNIFICANCE OF NONSTATE LAW

What is diffused? As with legal pluralism, talk of diffusion is a context in which familiar issues about the concept of law are hard to avoid. Talk of diffusion exerts pressure to broaden our conception of law in two ways.

First, most writers on legal reception/transplantation recognize that the objects of diffusion extend beyond legal doctrine to include styles of thought, ideology, procedures, institutions, and such matters as wigs, gowns, courtroom design and standard form documents. It just does not make sense in this context to think of legal rules in isolation.²⁶

On the other hand, most writers on reception choose to focus mainly or entirely on municipal or state law and they assume or openly deny that they are concerned with nonstate law. If one is concerned with law reform in countries in transition, or structural adjustment, or harmonization of private law in Europe, this focus is understandable. However, in considering diffusion as a process, it is difficult to keep nonstate normative orderings out of the picture. Importation of legal ideas rarely involves filling a vacuum, cleanly or completely superceding what was there before.²⁷ The process almost inevitably involves interaction with pre-existing normative orders—whether they are characterized as “law” is of secondary importance. Some writers contrast official and unofficial law,²⁸ modern and traditional law, or formal and informal norms²⁹—the important point is that this kind interaction is almost always an important part of the story.

IV. INTERLEGALITY

If legal pluralism is conceived in terms of the coexistence of two or more legal orders in the same time-space context, this might suggest a relatively stable, static state of affairs in contrast to diffusion, which suggests a dynamic

25. A striking exception is Glenn, who seems to treat none of these features as necessary or even characteristic of the processes of interaction between legal traditions. William Twining, *Glenn on Tradition: An Overview*, 1 J. COMP. L. 107, 114–15 (2005) (discussing H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* (2d ed. 2004)).

26. Everett Rogers observes that there is a tendency in traditional social diffusion studies to focus on discrete innovations and to neglect “technology clusters” with a resulting “distortion of reality.” EVERETT M. ROGERS, *DIFFUSION OF INNOVATIONS* 14–15 (4th ed. 1995).

27. Rogers refers to the assumption that inventions fill a vacuum as “the empty vessels fallacy.” *Id.* at 240–42.

28. *E.g.*, Daniel Berkowitz et al., *The Transplant Effect*, 51 AM. J. COMP. L. 163 (2003).

29. *E.g.*, KATARINA PISTOR & PHILIP A. WELLONS, *THE ROLE OF LAW IN ASIAN ECONOMIC DEVELOPMENT 1960–95* (1999).

process involving innovation from the point of view of the recipients. The contrast is misleading, because both pluralism and diffusion typically involve interaction between two or more normative orders. Many stories of diffusion involve long timeframes. For example, the standard story of Atatürk's reforms of the 1920s often starts in the nineteenth century (or earlier) and extends to the present day.³⁰ With respect to general acceptance and adoption, the Atatürk legal revolution is not yet completed and maybe never will be.

In this context, Santos's concept of "interlegality," referring to relations between legal (and normative) orders, is suggestive.³¹ It links diffusion and pluralism.³² In particular, it brings out three points: First, the relations between coexisting legal orders may be relatively static or dynamic. Neither stability nor change is necessarily presupposed. Second, it should not be assumed that interlegality necessarily involves conflict or competition. There are plenty of examples in the literature of peaceful coexistence, co-optation, or cooperation, as well as subordination, repression or destruction. Third, it draws attention to the problem of individuation of legal and normative orders. Interlegality suggests interaction between discrete entities, but the interaction is often more like that between waves or clouds or rivulets than between hard, stable entities like rocks or billiard balls.

V. CONCLUSION

Diffusion, interlegality, surface law, legal and normative pluralism, and Westbrook's four categories are just a few concepts that may be useful in analyzing and interpreting the immensely varied and complex processes that constitute diffusion of law. There are many other concepts, hypotheses and models to be found in the much more developed social science literature on diffusion that might be usefully transplanted, imitated, adapted or plagiarized for the modest purposes of legal scholarship and socio-legal studies.

30. Standard accounts of the reception of foreign law in Turkey are discussed in Twining, *Social Science*, *supra* note 4, at 223–28.

31. TWINING, *GLOBALISATION*, *supra* note 4, at 229–31 (discussing BOAVENTURA DE SOUSA SANTOS, *TOWARD A NEW LEGAL COMMON SENSE* (2002)).

32. In a situation of pluralism, interlegality can occur without diffusion.

APPENDIX

TABLE I. DIFFUSION OF LAW: A STANDARD CASE AND SOME VARIANTS

	<i>Standard Case</i>	<i>Some Variants</i>
a. Source-destination	Bipolar: single exporter to single importer.	Single exporter to multiple destinations. Single importer from multiple sources. Multiple sources to multiple destinations, etc.
b. Levels	Municipal legal system—municipal legal system.	Cross-level transfers. Horizontal transfers at other levels (e.g., regional, sub-state, nonstate transnational).
c. Pathways	Direct one-way transfer.	Complex paths. Reciprocal influence. Re-export.
d. Formal/informal	Formal enactment or adoption.	Informal, semi-formal or mixed.
e. Objects	Legal rules and concepts. Institutions.	Any legal phenomena or ideas, including ideology, theories, personnel, “mentality,” methods, structures, practices (official, private practitioners’, educational, etc.), literary genres, documentary forms, symbols, rituals, etc.
f. Agency	Government—government.	Commercial and other non-governmental organizations. Armies. Individuals and groups: e.g., colonists, merchants, missionaries, slaves, refugees, believers, etc. who “bring their law with them.” Writers, teachers, activists, lobbyists, etc.
g. Timing	One or more specific reception dates.	Continuing, typically lengthy process.
h. Power and prestige	Parent civil or common law >> less developed.	Reciprocal interaction.

i. Change in object	Unchanged minor adjustments.	"No transportation without transformation."
j. Relation to pre-existing law	Blank slate. Fill vacuum, gaps. Replace entirely.	Struggle, resistance. Layering. Assimilation. Surface law.
k. Technical/ideological/cultural	Technical.	Ideology, culture, technology.
l. Impact	"It works."	Performance measures. Empirical research. Monitoring. Enforcement.

