Law, Diffusion of

1. Definitional Issues

The definitional issues adumbrated by the concept of ‘Diffusion of Law’ need preliminary clarification. So diffuse a concept overlaps with other titles of this chapter; also, particular definitions of the concept may contradict each other, implicitly if not explicitly. ‘Diffusion’ suggests definitional issues of motivation, of processes, and of outcomes. Especially with respect to the last issue, ‘diffusion’ also suggests an affinity with a concept much in use recently; namely, the convergence of law and of legal systems. This concept, while in play for over a century, today is principally associated with the globalization or regionalization of national economies, and secondarily with the acceptance of a common standard of international human rights potentially binding the state. Because of these contextual associations, a focus on the ‘Convergence of Law’ aspect of ‘Diffusion of Law’ helps clarify the definitional morass inherent in the latter term.

First, this focus serves to differentiate some otherwise overlapping and contradictory neighboring concepts, in particular, those relating to the unification of law and the harmonization of law. The latter are intentional practices, consciously articulated and consciously engaged in (Wiener 1999, 189ff). In the second place, ‘Convergence’ as a more operational concept of ‘Diffusion’ highlights that the latter term too broadly suggests both a process or tendency and a result. Convergence focuses more on the latter point, since directly or indirectly it may be the more or less successful outcome—however measured—of the more conscious efforts suggested by ‘unification’ and ‘harmonization’.

At the same time, however, it in turn suggests two other features of particular importance in recent times. First, ‘Convergence’ captures the underlying polar elements of inevitability and contingency that accompany, facilitate, or hinder those conscious efforts at Unification and Harmonization. Second, it widens our focus beyond the narrow range of formal law-making organs to include the broader range of actors engaged in law production, ranging from individuals through institutions to systems, who or which express the process and shape its outcome. ‘Diffusion’ of necessity is of a preexisting ‘other’ law into a host system. To understand it as ‘Convergence’ more openly and instrumentally faces that reality, while simultaneously accepting the reality that two systems interact in this process, that these may if they do not necessarily influence each other, and that the process may result in a synthesis that differs from each system’s starting point.

All of the foregoing facets of gaining an understanding of the concept of ‘Diffusion’ are displayed in the two principal forms of diffusion of law in the early stages of the modern era, stages that will not be separately discussed herein, though their influences still may be noted in the contemporary era, which is the subject of this entry. The first is the diffusion of law that accompanied the dissolution of the shadow Holy Roman Empire and the arrival of the Napoleonic Period on the European continent at the turn of the nineteenth century. Coing (1989, 56f) describes the situation succinctly:

The loss of a transnational law [at this time] was viewed as an unnecessary constriction [of legal life]. The way out of this situation, since a ius commune no longer existed, was the study of foreign law. A new discipline, the comparison of laws, emerged.

The motives for the diffusion of law inherent in this new discipline may have differed between the two principal state actors—France and the states of the later Germany. In the former, the instrumental interest in other systems’ solution of new problems may have predominated, and in the latter, the need to find a common approach to the search for the applicable law. What was common to both, however, and what therefore is relevant to this discussion, was the outcome: the reciprocal diffusion of law, in the sense of bringing into consciousness the possibility of the convergence of previously disparate law (Buxbaum 1996, 206ff).

The second principal form of diffusion in early modern times was that accompanying colonialism. The more or (at later stages) less unreflective introduction of the English common law to lands as varied as Australia, India, and West Africa was an inherent feature of colonial expansion itself, and the same may be said to varying degree of the colonial powers on the Civilian side of the families of law (Zweigert and Kötz 1998, p. 218). Late examples of this wholesale approach, though now marked by more sensitivity to local conditions, would include the (invited and well-considered) introduction of major parts of the Swiss and German code systems in Atatürk’s Turkey (Watson 2001, 14ff) and the (invited) French introduction of entire Codes to Ethiopia in the late 1950s (David, 1982).

The principal focus of this entry is on the diffusion of law in the contemporary era. Even to that study, however, a brief overview of some central issues concerning the political and economic substrata of law, including some enduring theoretical issues, is necessary. These issues may have been brought to the fore during the Colonial and Imperial Era one and a half centuries ago, but their currently attenuated forms remain relevant to this era of globalization.
2. Value Issues

Law may be seen as an expression of other, more basic forces. The first modern argument in favor of Laws derivation from the cultural seedbed of a linguistically unified nation-state is that of Montesquieu in 1748: ‘The political and civil laws of each nation should be adapted in such a manner to the people for whom they are made, as to render it very unlikely for those of one nation to be proper for another’ (Montesquieu 1748, p. 1/3). And soon after the French Revolution, arguing against law as social engineering, Savigny, in his polemic against Thibaut, restated this view with a power that only he, in his later capacity as Prussian Minister of Justice (and thus of legislation), was able to resist (Savigny 1814, pp. 30, 137):

The sum, therefore, of this theory is, that all law is originally formed...by custom and popular faith, next by jurisprudence, -- everywhere, therefore, by internal silently-operating powers, not by the arbitrary will of a law-giver...[The object of the historical method of jurisprudence] is to trace every established [legal] system to its root, and thus discover an organic principle....

On the other hand, the nineteenth century also saw a considerable amount of conscious shaping of the legal framework of the burgeoning national economies, as these burst the household confines of the classical oikos, leading a contemporary scholar to suggest that ‘[t]he process of economic, social, and cultural assimilation or integration...has been accompanied by a process of political differentiation. It is this dual development of cultural and social assimilation and political differentiation which compels us to shift the emphasis of Montesquieu’s test in order to find some workable criterion that can be used to determine how far a legal institution is transplantable....’(Kahn-Freund 1974).

These quotations' juxtaposition of Culture and Politics suggests an affinity to the phenomenological juxtaposition of Lebenswelt and System, particularly as applied to Law by Habermas (1973/75, 1981/87). The same juxtaposition also suggests an affinity to the tenets of classical Marxism: Law as much as Culture would be superstructural elements, with Economy, recast in Marxist terms more narrowly as control of the means of production, serving as the juxtaposed Basis. To these two approaches, however, Law presents a problem of contradictions. To the former theory, Law not only is the handmaiden of System, legitimating Money and Power. Rather, it may also contain inherent, dare one say essential, attributes (often if inadequately identified as 'procedural regularity') that restrain those expressions of System. Further, if it arose from and depends on Culture/Lebenswelt in Montesquieu’s terms, it may carry some of the resistance of Lebenswelt towards System. In later Marxist theory, too, Law is seen to harbor apparent if only partially autonomous power to influence Basis (Renner 1949).

Within Legal Theory's own discourse of recent vintage, autonomously innocent or disparaging of this debate between Social Theories, arguments about the capacity of Law to rise above the vagaries of national cultures—arguments central to the issue of Convergence—have been conducted both at the general level of historical and economic theories, and at the specific level of case studies. In a modern return to the famous Savigny–Thibaut debate that accompanied the Napoleonic era's codification venture, Watson (1974) and Grossfeld (1990, 1986) have pressed their respective claims of Law's autonomy over or embeddedness within Culture largely on the basis of historical evidence. And in the contentious discussions over the inevitability of legal convergence in consequence of economic globalization, some of the Marxist framing of Basis and Superstructure has been reproduced by the Economic-Determinism camp in its own framing of Efficiency as an evolutionary inevitability (Gilson 2001), while the Path-Dependency deniers of necessary convergence (Roe 1994, Coffee 1999) in their turn reproduce both the older Cultural and the newer Habermasian/Lebenswelt arguments.

Preceding and underlying these issues lies the question of whether the very concept of globalization, in its cultural and societal as much as in its economic aspects, is consciously produced or not. While this debate is not directly at issue in the description of Convergence, it influences the perception of that process as undesirable or desirable, resistible or irresistible. The former, or Wallersteinian formulation (Wallerstein 1979), is well expressed by Santos (1995, 250f):

In view of the hierarchical nature of the world system, it becomes crucial to identify the groups, classes, interests and states that define partial cultures as global cultures, thereby setting the agenda for political domination under the guise of cultural globalization.

The latter formulation finds typical expression in Slaughter, who welcomes Convergence on the assumption that the Thibaut/Watson view of Law's autonomy can be reconciled both with the Montesquieu/Savigny Organicist position and with Habermas' assertion of Law's capacity to tame System (Slaughter 2000, p. 1124):

Constitutional courts—or any courts concerned with constitutional issues—will be forging a deeply pluralist and contextualized understanding of human rights law as it spans countries, cultures, and national and international institutions.... All this activity requires recognition of participation in a common judicial enterprise, independent of the
content and constraints of specific national and international legal systems. It requires that judges see one another not only as servants or even representatives of a particular government or polity, but as fellow professionals in a profession that transcends national borders.

A third view of the underlying values and forces supporting the Convergence phenomenon contends that to the extent any conscious will drives it, it is that of the less-favored members of the international community of states and societies—members who see in the end result of Convergence a shortcut to a larger share of aggregate wealth and respect than they enjoy now. This is a theme well expressed by Teubner, who concludes a review of this argument with the assertion that ‘[g]lobal law will grow mainly from the social peripheries, not from the political centres of nation-states and international institutions’ (Teubner 1997; p. 3). Within any of these ‘peripheral’ states, however, it may—and not paradoxically—be the social forces/classes standing to gain the most from that increase, which in turn drive this effort. As Schneiderman (2000; p. 757) puts it, ‘[t]his inchoate global law is being developed by economic subsystems “in relative insulation from politics” outside the usual centers of gravity of legal development.’

The substantive content of the law that is being diffused or is converging of course is as varied as the substantive content of law as such. Nevertheless, put in substantive and extreme terms, we can identify two principal societal forces converging on Convergence, and each is hinted at in the preceding citations: those involved in the evolution toward a new international order of Human Rights and those involved in the evolution toward a new international order of economic activity (Delmas-Marty 1998). While the drives toward these respective orders share some common features, they also evidence one essential distinction. The movement toward a new Human Rights Order is driven mainly by conscious social forces, often already successful in achieving the embodiment of their values in the formal legal orders of their home states and as a result deriving some of their own power from the political and economic power of those states. The movement toward a new Global Economic Order is driven in the main ‘from below,’ by market forces that generate the demand for their legal facilitation within those very market processes. This is not to deny that, especially at later stages in the evolution toward transnational markets, these forces evidence conscious use of state power to achieve that result; the role of TRIPS within the post-Uruguay international trade structure of the World Trade Organization alone is ample evidence thereof. And in some cases, of course, the two movements may themselves converge both as to the level of their conscious introduction into legal discourse and in their intended or unintended outcomes: whether the drive to ban the industrial-level fishing that catches dolphins in tuna nets is an issue of ecology or of protectionism may depend on the perspective of the observer.

3. Diffusion as Osmosis

3.1 The Hegemonic Imposition of Law Upon Formal Equals

The experience of Germany and Japan after World War II is a paradigmatic example of this phenomenon. Two elements mark these legal ‘transfers’: their emphasis upon the more political and public branches of the law, especially of constitutional and administrative law; and the degree to which their success depended upon their relatively negotiated as against relatively coerced transplantation. Especially in Germany, but to an extent also in Japan, the vanquished nation’s government no longer existed, and the occupation authorities, standing in for these governments, could be said to have negotiated with themselves. In fact, however, these countries’ legal experts from the beginning were in essential discourse with those authorities, and their increasingly autonomous negotiation capacity quickly became evident and influential (Symposium 2000, p.1). As a result, one can trace a successful diffusion of these components of public law to that process, as especially the history of the Basic Law of the Federal Republic of Germany attests.

3.2 The Liberal Economy As the Political Initiator of the Diffusion Process

The experience, especially of Central European states after 1989, exemplifies this form of diffusion. Their political transformation, once they were out of the shadow of the Soviet Union, was an internal and not an imposed process, nor has the process been either uniform or completed (Mádl 2000). The diffusion of the legal superstructure of a liberal economy into their legal systems, however, has been driven largely if not totally by the purported requirements of the Western European and American economic actors whom these states have invited or been pressured by Western political actors to invite as participants (the title of a major US legislative initiative for the CIS states makes the point: ‘The Freedom for Russia and Eurasian Economies and Open Market Support Act of 1992’). In the first stage of this diffusion process, a relatively uncontested acceptance of major legislative packages occurred; as the specifics of national needs became more apparent and the timing of economic liberalization within the larger context of democratization and resource redistribution became more contested, a second stage of partial rejection of these transplants and of more nuanced adaptation came
into being. At this time, it is too early to predict any eventual and in any event temporary equilibrium.

The difference between a diffusion process that is part of a clearly marked larger political transformation, as in the above examples, and one that is part of an incremental change of national markets toward more global units is one of degree as much as it is of kind. A principal differentiation between the two, however, lies in the intermediation, in the latter case, of global or at least supranational legal regimes in this diffusion process. The paradigmatic example of this situation is that of the evolution of the General Agreement on Tariffs and Trade into the World Trade Organization, and especially in the latter's increased scope of substantive coverage from trade through technology transfer (partly correlated with trade in services) to investment.

From the beginning of the postwar (II) period, efforts of goods-, services-, and capital-exporting states to encourage the creation of legal regimes in the importing states facilitative of these processes have been marked by this internationalization of the diffusion process. The first efforts were those of UN-supported agencies such as the abortive International Trade Organization proposed by the Havana Charter, but because of internal conflicts between these exporting states (and the reluctance of the United States to enter an international organization governing trade regimes (Diebold 1952), this ambitious effort was cut back in substance and in institutional power to the GATT regime (Jackson 1969, Jackson et al. 1984). As the subject matter of these efforts suggests, the regimes they produced within municipal legal orders were largely specific elements of public law requiring the reduction of state distortion of a global liberal regime supporting the trade in goods (and later, since the Uruguay Round, in services).

On the investment side, this effort was first internationalized at the private-sector level through the Investment-Code proposals of the OECD and then formalized at the supranational governmental level by the World Bank through its sponsorship of the treaty regime institutionalized in the International Conference on the Settlement of Investment Disputes (ICSID). Here, too, what was introduced into municipal legal regimes were largely specific public-law prohibitions; in this case, of expropriation measures without adequate compensation. In recent years, this international process has doubled back into national venues, with the introduction of networks of so-called Bilateral Investment Treaty regimes. These extend the obligation to provide national and most-favored-nation treatment of incoming direct investment to the point, at least in some of them (Van develde 1992), of forcing ‘open-door’ investment-entry regimes upon the signatory capital-importing countries (Dolzer 1995).

On the other hand, international organizations also play a role in the recent transformative experiences of countries of the former Socialist camp. This is evident in the trade sector (where the desire of these countries to gain the benefits of membership in the WTO in turn requires them to adopt the domestic liberal economic policies and their legal dress that constitute the acquis mondiale attributes of membership). It is most pronounced, and in this differs from the immediate post-WWII situation, in the sector of public finance, in which IMF and World Bank assistance is premised on liberal and to some degree politically controversial fiscal and monetary policy regimes.

All of these revolutions or evolutions have in common the relatively unilateral push of prepackaged legal goods onto these host states for relatively nonnegotiated and often nonnegotiable acceptance. This version of diffusion of law may be characterized pejoratively in neo-colonial terms, or it may be characterized as representing and meeting the wish of the recipient nations to gain the benefits of the existing international trade and investment regimes, however legitimated a wish internally along the spectrum of more or less democratic processes in formal and functional terms. In terms of the diffusion of law, however described, it is a unidirectional diffusion. The effort of developing countries in the 1960s and 1970s to negotiate a New International Economic Order, with its implication of a different outcome in the substance of what was diffused, did not succeed at that time.

3.3 The Competition Among the Providers of the Law Being Diffused

While all more or less committed to liberal economic regimes, the states providing the legal goods, in retail or wholesale packages, are not a monolithic legal block; indeed, in their variety they illustrate both Montesquieu’s and Kahn-Freund’s analyses. Whose offer is accepted, or whose wares are preferred, may depend on preexisting (including in colonial times) affinities of the respective legal systems; may depend upon tying agreements that lead the state proffering desired resources to condition those offers on the condition of acceptance of specific legal regimes; or may depend ‘on chance and prestige’ (Ajani 1995, 1998).

This competition has had the effect of recreating a degree of bargaining power for the law-importing states, both directly, as a consequence of gaining from this competition, and indirectly, as a consequence of the increase in knowledge of the specific wares and in the sophistication of the tests of their adaptability to the host system (Ajani 1998). This has been helped and to a degree encouraged by the acceptance by the World Bank and the International Monetary Fund of the relevance of appropriate specific legal regimes to the success of their own
primary missions. The policy implications of the IMF’s change of approach are illustrative: ‘[T]he Legal Department has recently expanded its work to include bankruptcy and foreign investment law…. The Legal Department addresses these areas of need in close consultation with the legal staffs of other international organizations… in order to arrive at a reasonable division of technical assistance tasks and avoid duplication of work’ (IMF Annual Report 1994, p. 183).

Whether these large-scale legal importations following the 1989 political transformations will be more successful (with success itself perhaps differently defined by the law-exporting and the law-importing states) as a result of this competition and coordination is not yet predictable (Kranjc 1993, World Bank 1995). It may be as much a mark of success as of failure that some initial providers of these materials now pay more attention to the difficulties of the transplantation exercise even in such fields, as Company and Capital Market Law, in which transplantation has historically been seen more as a carburetor transplant between automobiles than a kidney transplant between human beings (to the historical view, Klein 1904, p. 10; to the current self-criticism, compare Black and Kraakman 1996 with Black et al. 2000).

### 3.4 Convergence of Laws As the Outcome of Globalization of Economies

That in 1945 the United States was the only remaining powerful producer, capable supplier of capital, and large internal market posed a challenge to legal theorists speculating on the future shape and content of legal regimes in the postwar world, at least that industrialized portion thereof not within the Socialist camp. The introduction of American versions of major facilitative structures of law, such as antitrust law and capital-market regulation to nations and systems on their way to or hoping to reach similar levels of wealth production (such as the European Economic Community of 1958) fueled the discussion of legal convergence of legal systems (including of the large systems of the Civil Law and the Common Law (Merryman 1978, p.195) and specifically of convergence onto, even the reception of, American law (Wiegand 1991)). Not only substantive law, but changes in the underpinnings of law production in legal education, in the role of the legal profession, and indeed in legal culture itself often were deemed to occur as the almost inevitable byproduct of the unique position of US law and law-related institutions. Because of its economic situation, US law often had to face problems that would in time arise elsewhere because they occurred in the US first, ranging, e.g., from issues of privacy to issues of product liability in an age of mass production. This first-exposure condition made its law a natural object of attention as the underlying economic and social realities began to be experienced elsewhere.

At the same time, however, the imperfect analogy to the Roman-Law reception of medieval times was also noted, and was predicted to set limits on any one-sided convergence of law. Both tendencies were noted by Wiegand (1991, p. 247):

American law is not superior to European law in the sense that ius commune was to the European law of that time…. The lack of this degree of superiority…. however, is compensated for in other areas; in particular by the political and economic dominance of the United States. This dominance was responsible for the dissemination of the new forms of business transactions as well as for the reception of American legal terms and legal thought…. One aspect [of the reception of American law] is of particular importance; namely, the fact that… American legal developments have [first] followed the requirements of the post-industrial era and of the service-dominated society.

At present, we can already see the beginnings of a new set of convergence/diffusion phenomena. One is a convergence on a new European-level substance, driven largely by the unification and harmonization imperatives of the European Community (Markesinis 1994). At its extreme, this implies even the partial move of the core Common-Law regime, Great Britain, towards a European-wide and of necessity at least partially Civil-law system. If the well-established Common-Law system as found in Great Britain is experiencing ‘Continental drift,’ then the second phenomenon also may be on the way to observable status—the establishing of a mixed but largely Civil-Law European Community legal regime that can rival that of the United States in terms of sophistication as well as in power (Markesinis 2000).

On the level of the global economy and the law particularly relevant to its functioning, one type of tension between the leveling effects of product and service (including above all, financial) markets will arise. This tension may be seen as the collision between global and niche markets. As Ginsburg (2000, 840f) puts it

The single-dimensional shift toward markets and formal rules implicates the issue of legal convergence. There are valid reasons for doubting that the shift toward rule-based law is inevitable, even in an era of global capitalism. Some economies will enjoy economic niches that would be hindered by greater reliance on legal ordering…. From this perspective, globalization produces results that are similar to those of modernization theory, but does so as a result of specific political and economic pressures rather than because of a universal cultural shift. In other words, reliance on law reflects local political outcomes…. Market solutions and particular policy responses are still being contested, and any legal convergence will remain incomplete as long as this is the case.
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Another way to formulate this tension is to focus on the enduring power of political forces at the national level to immunize national markets and economic institutions from the bite of unified formal legal rules. As one writer illustrates this approach: ‘Although Japan and the United States of course have differing institutional structures, if there is one place that theory would predict convergence,...[corporation law] might be it. But convergence has not occurred...[s] limited convergence of...rules helps elucidate recent claims in the theoretical literature that convergence of rules may not necessarily lead to convergence of corporate structures’ (Symposium 2000, 5ff, Coffee 1999).

Seen this way, the convergence of law on a set of rules comprising a mix of relatively uniform (regulatory) and relatively diverse (facilitative) components may still best be explained, and predicted, by the juxtaposition of the original epigrammatic quotations cited at the beginning of this entry.

Bibliography

Ajani G 1995 By chance and prestige: Legal transplants in Russia and Eastern Europe. American Journal of Comparative Law 43 93


Buxbaum R 1996 Die Rechtsvergleichung zwischen nationalem Staat und internationaler Wirtschaft. Kabelsz 60 201–30

Coffee J C 1999 The future as history: The prospects for global convergence in corporate governance and its implications. NWUnitsLRev 93 641


Ginsburg T 2000 Does law matter for economic development? Evidence from east Asia. Law and Society Review 34 829

Grossfeld B 1986 Kernfragen der Rechtsvergleichung. Mohr/ Siebeck, Tübingen

Grossfeld B 1990 The Strength and Weakness of Comparative Law. (Weir A tr.) Clarendon, Oxford

Habermas J 1973/1975 (tr.). Legitimation Crisis. (McCarthy T tr.) Beacon Press, Boston

Habermas J 1981/1987 (tr.). The Theory of Communicative Action II. (McCarthy T tr.) Beacon Press, Boston

International Monetary Fund (IMF) 1985 Technical Assistance and Training Services of the International Monetary Fund. IMF Pamphlet Series 43, Washington DC.


Jackson JH 1969 World Trade and the Law of GATT. Bobbs-Merrill, Indianapolis


Kahn-Freund O 1974 On uses and misuses of comparative law. ModLRev 37:1

Klein F 1904 Die neuere Entwicklung in Verfassung und Recht der Aktiengesellschaft. Berlin

Kranjc J 1993 Probleme der Übernahme ausländischer Rechtssätze in nationale Rechtssysteme. WiRO 2 409


Savigny F K v 1814 Von Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft. (ed. 3 1840) JCB Mohr, Heidelberg (Of the vocation of our age for legislation and jurisprudence. (Hayward A tr.) Littlewood, London; repr. 1975 Arno Press, New York)


Symposium 2000 The reception in Japan of the American law and its transformation in the fifty years since the end of World War II. Law in Japan 26.
Wiener J, 1999 Globalization and the Harmonization of Law. Pinter, London

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