

# THE “THREE GLOBALIZATIONS” IN LATIN AMERICA

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## I. INTRODUCTION

Duncan Kennedy’s “The Three Globalizations of Law and Legal Thought: 1850-2000”<sup>1</sup> is a welcome contribution to the post-colonial study of local legal epistemologies. More specifically, it is a useful matrix for focusing on legal consciousness in Latin America. The region’s law is still often dismissed in mainstream accounts as historically anachronistic, mindlessly mimetic of law in the West, conceptually limited, and/or culturally discordant with local societies. Duncan’s piece helps to chip away at this simple picture. He demonstrates the extensive migrations of legal thought throughout the world and their multiple local politics and uses. Additionally, he insightfully describes distinct legal elements globalized at different points: reasoning techniques, institutions, vocabularies, and the like. As such, the work provides a suggestive framework for exploring local legal developments in post-colonial sites, while simultaneously relating them to legal thought in Europe and the U.S.

This essay presents, very succinctly, several points of intersection between the Three Globalizations article and some post-colonial perspectives on law in Latin America. It elaborates somewhat on Duncan’s points, and it registers several points of agreement and disagreement with his assumptions. In brief, this quick exercise reveals that more has been globalized than we have tended to think; what has been globalized is different at different times; and the several globalizations have reinforced quite varied local political projects.

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<sup>1</sup> Kennedy, Du. “Three Globalizations of Law and Legal Thought: 1850-2000.” *The New Law and Economic Development: A Critical Appraisal*. Eds. Trubek, David M. and Alvaro Santos. Cambridge: Cambridge University Press, 2006, 19-73.

## II. LATIN AMERICAN LEGAL CONSCIOUSNESS

Mainstream accounts of law in Latin America emphasize a sociological, or external, account of the operation of state law in the region.<sup>2</sup> The relevant academic fields of law-and-development and area studies mostly repeat quite similar views of formal law.<sup>3</sup> The latter is predominantly depicted as either (mal)adapted transplants of European and U.S. legal texts and authorities, or as mere pretextual cover for elite politics and backroom machinations.<sup>4</sup> Legal consciousness is considered, if at all, as near exclusively formalist, corresponding to Duncan's first globalization; devoid of any pragmatic flexibility, corresponding to the absence of a second globalization in the region; and lacking clear consequentialist orientation, reflecting a still unachieved third globalization.<sup>5</sup> This, clearly, is too neat a picture of the relationship between the Three Globalizations and dominant perceptions in the global North of law in Latin America. Still, mainstream accounts can be evocatively understood in terms of Duncan's scheme. From that perspective, Latin America remains mostly stuck in the first globalization, merely updated somewhat by more recent versions of legal formalism.

This dominant image of law in the region can also be seen as emanating from instrumental objectives.<sup>6</sup> The diagnosis of an anachronistic legal formalism, scattered foreign transplants, and wide disjuncture between law and society can be quite forceful arguments. They can be mobilized as yet another way to change existing legal institutions and policies. The charge of law's mal-adaptedness, as a whole, can provide the basis for introducing completely different laws, institutions, and

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<sup>2</sup> Esquirol, J. L. "Continuing Fictions of Latin American Law." *Fla. L. Rev.* 55 (2003): 41.

<sup>3</sup> See generally, Couso, J. Alexandra Huneus, and Rachel Sieder, eds. *Cultures of Legality. Judicialization and Political Activism in Latin America*. Cambridge: Cambridge University Press, 2010; Esquirol, J. "Writing the Law of Latin America." *The Geo. Wash. Int'l L. Rev.* 40 (2009): 693.

<sup>4</sup> See generally, Helmke, G. and Julio Rios-Figueroa, eds. *Courts in Latin America*. Cambridge: Cambridge University Press, 2011; Dezalay, Y. and Bryant Garth, eds. *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States*. Chicago: University of Chicago Press, 2002; Merryman, J. H. and Rogelio Perez-Perdomo, eds. *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*. 3rd. ed. Stanford, CA: Stanford University Press, 2007.

<sup>5</sup> Esquirol, J. L. "Continuing Fictions of Latin American Law" cit. (In my own work, I have examined this phenomenon in Latin America and characterized it in terms of the "fiction of Latin American Europeanness.")

<sup>6</sup> See generally, Ruskola, T. "Legal Orientalism." *Mich. L. Rev.* 101 (2002): 179.

procedures. Notably, 1990’s neo-liberalism enlisted these common images quite directly to further its program of far-reaching law reform.<sup>7</sup> In that case, the images of legal failure in the region propelled the rejection of existing social laws, non-adversarial criminal procedure, national economic regulation, and the like.<sup>8</sup> No less, these common perceptions of Latin American law may also support those on the left who would argue for different political projects, such as was the case in the first round of law and development in the 1960’s and 70’s. Thus, beyond simply a neutral diagnosis of law in the region, prevailing international politics no doubt plays a significant role in the dominant characterizations of Latin American law.

As such, demystifying the various movements of legal thought – as the Three Globalizations article does -- is a powerful intervention in global North perspectives and politics related to national law elsewhere. Notably, this intervention coincides with the post-colonial preoccupation for an internal point of view, in this case of local “legal consciousness.”<sup>9</sup> This latter perspective highlights the production of local meaning and significantly convincing effects of legal discourse within a given epistemological community.<sup>10</sup> This approach goes beyond positing how local culture or material conditions modifies or distorts given international models or Western legal transplants. And it eschews simply political or external descriptions of law as a mere record of political settlements concluded elsewhere. Rather, it highlights how legal discourse also produces meaning, if sometimes through idiosyncratic uses of

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<sup>7</sup> See Esquirol, J. L. “The Failed Law of Latin America” *Am. J. Comp. L.* 56 (2008): 75.

<sup>8</sup> Trubek, D. and Alvaro Santos, eds. *The New Law and Economic Development: A Critical Appraisal*. Cambridge: Cambridge University Press, 2006.

<sup>9</sup> Garavito, C. R., ed. *El Derecho en America Latina. Un mapa para el pensamiento jurídico del siglo XXI*. Buenos Aires: Siglo Veintiuno Editores, 2011; López Medina, D. *Teoría impura del derecho. La transformación de la cultura jurídica latinoamericana*. Colombia: Legis Editores, 2004; Langer, M. “Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery.” *Am. J. Com. L.* 55 (2007): 617; Bonilla, D. “Legal Clinics in the Global North and South: Between Equality and Subordination. An Essay.” 5 June 2012. [http://www.law.yale.edu/documents/pdf/sela/SELA12\\_Bonilla\\_CV\\_Eng\\_20120321.pdf](http://www.law.yale.edu/documents/pdf/sela/SELA12_Bonilla_CV_Eng_20120321.pdf); Santos, A. “Three Transnational Discourses of Labor Law in Domestic Reforms.” *U. Pa. J. Int’l L.* 32 (2010): 123; Jaramillo, I. “The Social Approach to Family Law: Conclusions from the Canonical Family Law Treatises of Latin America.” *Am. J. Comp. L.* 58 (2010): 8; Gonzalez-Jacome, J. “Emergency Powers and the Feeling of Backwardness in Latin American State Formation.” *Am. U. Int’l L. Rev.* 26 (2011): 1073; Esquirol, J. L. “The Turn to Legal Interpretation in Latin America.” *Am. U. Int’l L. Rev.* 26 (2011): 1031.

<sup>10</sup> Ibid.

transnational materials and ideas, and provides for the working out of divergent local interests, if in a different way than legislative politics.

### III. DIFFERENT SORTS OF PHENOMENA, GLOBALIZED

The *Three Globalizations* presents a broad framework in which to explore many of these ideas. For example, it illustrates that the *thing* globalized can take different forms. The globalized can consist of value-laden concepts -- like will and rights -- that are worked out by legal scholars (CLT), institutional orientations developed by legislators and activists (the social), or an attractive legal discourse taken up by national elites (reception). This provides a rich rebuttal to the standard 1960's-70's law and development account of Latin America. The problem diagnosed at that time, as part of the reason for economic and political under-development, was unfamiliarity with anti-formalism at least in the form of pragmatic legal reasoning adapted to economic and social objectives. The description of a second globalization, in Duncan's article, highlights by contrast the history of anti-formalist social law thought globally. It helps to show its impact and imprint, even within presumably still first globalization jurisdictions.

Duncan's framework is helpful, on this question in particular, in relating global legal ideas with their local elaborations. It thus helps explain why socio-legal theorists, especially ones from the center writing on Latin America, may have been highly influential in the region.<sup>11</sup> Moreover, it provides the context for how this social globalization could have been translated locally quite differently and idiosyncratically. Indeed, the description of the second globalization, in particular, demonstrates how "anti-formalism" and "social law" were not only present -- but also highly developed -- in other parts of the world, especially in civilian legal systems, Latin America included. The piece shows that "anti-formalism" is not a characteristic part of U.S. exceptionalism in legal thought. Notably, Duncan does differentiate "legal realism" from the social or anti-formalism -- retaining the exceptionality of U.S. legal realism. Regardless, this broad recognition of "the social" globally in the early twentieth

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<sup>11</sup> Esquirol, J. L. "The Fictions of Latin American Law" *Utah L. Rev.* 1997 (1997): 425; Lopez Medina, D. *Teoría impura del derecho. La transformación de la cultura jurídica latinoamericana*. cit.

century allows for the retrieval of ideas that then pervaded and still inform contemporary legal culture in places like Latin America.

Duncan’s piece endorses a particular theory about the operationalization– or popularization -- of a *langue*, the main metaphor used to describe the variety of *things* globalized. He points to the multiplicity of possible combinations of *paroles* within any one *langue*. This image is quite helpful in, at least, the following way. Namely, it offers a theory of the variability of similar ideas applied in discrete -- and potentially divergent -- political interventions. The *langue* can be the same, but the arguments they produce can be either left or right, conservative or progressive, etc. The notion helps to deny any necessary connection between anti-formalism and progressivism or legal formalism and conservatism. As such, it makes it easier to speak of the participation of Latin America at a conceptual level within these movements of legal thought.

Some of the same ideas may have been processed but taken quite different political forms.<sup>12</sup> This also helps explain why the ideas may seem missing from the local stock of legal intellectual culture. In a different political form, they may appear less recognizable. Thus, a conservative anti-formalism may be more easily missed by scholars and commentators. Nonetheless, social law in the region may have been no less “anti-formalist” even though it did not support a more progressive political project in the law than the existing legal traditionalism. This insight allows for a clearer perception of the impact and influence of anti-formalist thought. If necessarily tied to progressive politics, it may remain unseen. Moreover, if only perceived as occurring in the form of more recent legal sociology or informality, much other anti-formalism would also be missed.

As such, globalizations may be metabolized quite differently in different places. While social law thinking – common the world over -- had the potential of offering a more distinct alternative to traditional legal culture, in Latin America, its promoters ended up reinforcing the same liberal legalist project of traditionalists. In

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<sup>12</sup> See also Mushtaq, K. “State Failure in Developing Countries and Institutional Reform Strategies.” *Toward Pro-Poor Policies: Aid, Institutions, and Globalization. Annual World Bank Conference on Development Economics, Europe (2003)*. Eds. Tungodden, B. and Stern, N. and Kolstad, I. Oxford: Oxford University Press and World Bank, 2004, 165.

fact, socio-legal particularity, rather than a necessarily expansive mode of introducing local particularity within legal reasoning, mostly affirmed the legal commonality between Europe and Latin America. For mid-twentieth century jurists in the region, legal positivism and conceptualism were – at the end of the day – apparently a more palatable political project. It was surely less frightening than the risk of fascism, communism, or even worse indigenism, to which untamed social methodologies might lead.<sup>13</sup>

#### IV. THE LOCAL POLITICS OF LEGAL GLOBALIZATIONS IN THE PERIPHERY

*Three Globalizations* also raises the question of whether or not globalization through colonial imposition significantly differs from globalization through “influence and prestige” when speaking about “legal consciousness.” In Latin America in the relevant period here, and given these two options, the route of “influence and prestige” is most relevant. However, this latter image may not be the only – or even the best way – of describing the local politics that draw on, and therefore, globalize legal phenomena.

##### A. ORIGINS AND INTERESTS

In terms of the influence and prestige mode of dissemination, Duncan mostly describes the things globalized as the products of innovation, with an appreciable and appreciated origin. However, origins narratives in the political economy of Western liberal law are notorious for subordinating those in the periphery.<sup>14</sup> The resources of the center, and extensive means of dissemination, make it so that individuals in the periphery are rarely credited with a seminal idea. Moreover, those locales are unlikely seen as influential leaders, innovators, and the like. As a result, the stories based on the existing literature are skewed in this way, and they have a role in re-producing the center/periphery divide and the geo-politics that goes along with it.

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<sup>13</sup> Esquirol, J. L. “The Fictions of Latin American Law.” cit.

<sup>14</sup> Said, E. W. *Orientalism*. New York: Vintage 1978; Spivak, G. C. “Can the Subaltern Speak?” *Colonial Discourse and Post-Colonial Theory: A Reader*. Eds. P. Williams and L. Chrisman. New York: Columbia University Press, 1994, 66; Bhabha, H. *The Location of Culture*. London: Routledge 1994.

The things globalized could *alternatively* be seen as fitting a narrative of “interests convergence.”<sup>15</sup> The picture then would highlight more deeply the local politics in different places. This may show how, indeed, the periphery assisted in creating origins narratives that suited their purposes as well. In this way, in particular places, the balance of local political forces, each from their own particular perspective, may find that it would benefit – in whatever way – from the adoption of a particular element. In a locale where the balance of forces is completely one sided, it would seem a clean, up or down, question. In more deeply divided places, each side would have to imagine when all was said and done that they – and not their opponents-- would comparatively prevail. A story of globalization would thus consist of moments of multiple local calculations to draw, or not draw, on certain legal phenomena. The effect of these multiple adoptions is what would then produce their overall globalization.

Of course, this account is not mutually exclusive with Duncan’s emphasis on influence and prestige. It simply highlights the local political dimension more specifically. However, faced with equally likely and multiple dynamics, a political one in which there is a convergence in the balance of forces in favor of the adoption of “things globalized” --- rather than a tale about the intellectual origins of will theory or the social would seem to offer a less top-down representation.

#### B. THE TROUBLE WITH “LANGUE”

Across all three globalizations, the *thing* globalized is primarily characterized as a langue. But, it seems that this image can have -- and does have -- different meanings within different globalizations – and possibly even within the same globalization. At certain points, langues and paroles appear to have different types of relationships. They can be seen, at different times, to represent both grammars and rhetorics. In the first two globalizations, the period langue appears capable of producing a coherent grammar: even if excluding some areas of law, such as family law in the first globalization. By the third globalization, however, the langue cannot

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<sup>15</sup> Bell, D. “Brown v. Board of Education and the Interest Convergence Dilemma.” *Harv. L. Rev.* 93 (1980): 518.

possibly exhibit the same type of generative coherence since separate sub-languages co-exist and collide with each other.

Additionally, the slippage between languages and paroles appears again precisely at the point they are globalized. In the periphery, the language of the first two globalizations can likely be hybrid, taking into account “‘indigenous’ elements” having differing levels of “dialectical counter-influence.”<sup>16</sup> To deal with this latter phenomenon, Duncan uses the metaphor of “contexts of production” and “contexts of reception,” popularized by Diego Lopez Medina.<sup>17</sup> In contexts of reception in the periphery, thus, the language metaphor covers at least two different situations. First, the language may not be wholly assimilated, or may compete with local elements with which it is re-combined. As such, the language would not retain its coherence – at least not in the same way as it would in a purported “context of production.” Second, the language can be seen, at some points, as signifying pure rhetoric. In this sense, it merely represents a thin rhetorical patina masking the real underlying relations – which may have not changed at all as a result of the new language but are now merely expressed in that language. An example of the latter from Duncan’s piece is the phenomenon of describing as liberal employment relations, and the product of “will theory,” what are actually semi-feudal relations in the periphery.<sup>18</sup>

However, the potency of the language metaphor lies in the fact that it provides a significantly coherent generative grammar producing a varied – yet finite -- range of paroles. The outer limits of the language can thus be seen to provide a sort of “phenomenological” determinacy. If the language is broadly hybrid or merely rhetorical, in the periphery, it then represents an infinitely diverse range of possible relationships between language and paroles, possibly with no recognizable limits at all. Thus, from my perspective, the language relationship can be recognized as intrinsically variable – and not simply varied due to transposition to contexts of reception or to the third globalization. By contrast, in its guise as a generative grammar, a language would appear to represent that there is an actually correct usage that is then

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<sup>16</sup> Kennedy, Du. "Three Globalizations of Law and Legal Thought: 1850-2000." cit., 23.

<sup>17</sup> López Medina, D. *Teoría impura del derecho. La transformación de la cultura jurídica latinoamericana*. cit.

<sup>18</sup> Kennedy, Du. "Three Globalizations of Law and Legal Thought: 1850-2000." cit., 35-36.



manipulated, misunderstood, misapplied, etc. in the periphery. In short, it would be better if all are genuinely conceptualized as contexts of reception in varied ways.

## V. THE OUTWARD AESTHETICS OF GLOBALIZATION IN LATIN AMERICA

The *Three Globalizations* describes a dynamic of influence and, alternatively, imperialism across national legal consciousness(es). In effect, the reason that these ideas moved across the world is because they were attractive to, or in many cases imposed on, local legal elites. Another relevant distinction is whether or not the globalizations’ “foreign origins” are recognized. Indeed, by adopting an “intellectual origins” approach to legal consciousness, as noted above, the sites of origin are always multiple enough that any globalization can be represented as at least partially foreign.

In addressing this point, Duncan explains the Savigny historicist method which allowed for the adoption of German will theory elsewhere, while being able to *deny* that it was foreign at all. As the reader will remember, this was the case since Roman law was its purported source, which was in turn common to all civilian (civilized) legal systems. This seems both correct and slightly incomplete. Additionally, the foreign sources can also become a source of legitimacy and prestige. Indeed, extending the story in this way helps make more intelligible and even defensible how legal actors in Latin America have constructed legal systems playing up the relationship to Europe or “developed law.”

The outward identification with European law – rather than something shameful and to be denied – can be a powerful source of legitimacy. It may seem, at first blush, that legal consciousness inflected in this way reflects social alienation or internal colonialism. It may also make it seem like local law is disconnected from local societies. However, the historical relevance of globalization – not just a contemporary phenomenon of mass communications and transportation -- can also make more sense of how a “globalization” of law (transnationalism) can itself be a useful and reasonable mode out of which to construct the legitimacy of a national legal system.

The point Duncan makes that Latin Americans were the only ones, in the first globalization, to own a “criollo” legal consciousness may be somewhat overstated.<sup>19</sup> The “criollo” legal consciousness was limited to public international law, in the work of Alejandro Alvarez and fellow travelers.<sup>20</sup> Yet, even there, it was highly contested and contained.<sup>21</sup> Moreover, Alvarez was a main expositor of a social approach to law, emphasizing the actual practice of states and concepts of interdependence. Finally, the significance of “criollo” legal identity could be, as Duncan himself explains, quite minimal. The lesson from Savigny’s historicism in Germany is that it is possible to arrive at the same notions of “rights,” “will,” and “fault,” while outwardly purporting to be excavating national particularity.

In any case, some of the differences between legal systems in Europe and Latin America— on this score -- may simply be variations over how much of the foreign or global connection is outwardly recognized. In Latin America, the foreign connection, itself, is mobilized as a source of legitimacy, in order to emphasize that the law is beyond mere local politics. In other words, its nature as transnational law can itself be emphasized, rather than hidden, to deny local juristic arbitrariness or political bias. Thus, the widespread existence of globalization may be observed while its open, and even instrumental recognition, in particular locales may vary.

## VI. LEGAL CONSCIOUSNESS AND GLOBALIZATION

The picture that Duncan paints in the third globalization is, from my perspective, the most compelling. This is the case because it describes legal consciousness as a multiplicity of co-existing technologies and operations: formalism, the social, policy, etc. deployed simultaneously.<sup>22</sup> And yet, the other two globalizations – especially when read together with the third -- may give the impression of a progression of knowledge taking place rather than simply some

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<sup>19</sup> Kennedy, Du. “Three Globalizations of Law and Legal Thought: 1850-2000.” cit., 30.

<sup>20</sup> Obregon, L. “The Colluding Worlds of the Lawyer, the Scholar and the Policymaker: A View of International Law from Latin America.” *Ws. Int’l L.* J. 23 (2005): 145.

<sup>21</sup> Esquirol, J. L. “Latin America.” *Oxford Handbook of History of International Law* Eds. Fassbender, B. et al. Oxford: Oxford University Press (forthcoming 2012); Esquirol, J. L. “Alejandro Alvarez’s Latin American Law: A Question of Identity.” *Leiden J. Int’l L.* 19 (2006): 931.

<sup>22</sup> Kennedy, Du. “Three Globalizations of Law and Legal Thought: 1850-2000.” cit., 63 ff.

technologies are dominant in a given time and place.<sup>23</sup> As such, the *Three Globalizations* taken in series could be read to suggest either a linear or dialectical form, albeit with internally un-synthesized elements.

However, both of these images of legal consciousness, linearity and dialectic, tend to reproduce a global hierarchy related to timing and, again, influence. The narrative of progression or modernization is the paradigmatic framework that produces the periphery. The periphery in this sense is the backward or retrograde in relation to change and movement. As such, a more useful image may consist of the depiction of a variety of analytical technologies and devices, always already available even if in incipient form. Some of these may become dominant, globally, at certain times and certain places. Of course, this process may be driven through imposition as well by dominant countries or international organizations, but they are because of it not less idiosyncratic in their collection of constitutive legal elements.

Finally, some of these technologies may or may not be outwardly connected with foreign sources or genealogical commonalities, as discussed above. Their assignation – as either foreign-inspired or locally-originating – is no less an instrumental and strategic choice of a particular place and time. This more eclectic emphasis in the story of globalizations – it seems to me – would be less likely to suggest that the periphery is merely a receiver of globalizations, or just a belated or mimetic reflection of legal consciousness in the global North.

## VII. CONCLUSION

The *Three Globalizations* is extremely useful in demonstrating the widespread movement of legal ideas across the world historically. It dispels the common myth that certain legal ideas have simply not arrived or have not been significantly understood in broad swaths of the world. Rather it shows how those ideas may have been assimilated differently and incorporated with different political valences. At the same time, the series of globalizations could be misunderstood as a progression of world legal thinking, with areas of leading and others of backward legal thought.

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<sup>23</sup> See generally Chatterjee, P. *Lineages of Political Society: Studies in Postcolonial Democracy*. New York: Columbia University Press, 2011, 1.

Instead, an important part of the story relates to the local internal forces that at specific times marshal specific legal elements and, in some cases, the very aesthetics of global or transnational legality. In any case, the study of legal consciousness in historical peripheries has been quite limited in comparative scholarship. This article provides a roadmap for continuing work in this area.