



Legal Change and Institutional Reforms

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Summary: The belief in the neutrality of private law in relation to local conditions, which has been reinforced in the process of globalisation, is often combined with two different styles of drafting: non-technical language and the style that makes use of standards. There are two approaches that, if used together, can reduce the friction which characterises the process of legal transplants: namely, a reduction in the emphasis on the absolute necessity of imitating the formal contents of the laws, and a recognition of the role played by national institutions in modelling the rules of the reforms.

In this context, an important contribution may derive from institutional law and economics: it is indeed crucial that, within the process which prepares legal change, every single macroeconomic model is separated from the several possible legal profiles that the economic model can assume.

1 THE COMMAND OF LEGAL REFORM.

1.1 *Who is empowered to change the law?*

Within the Western legal tradition, norms are set through two different procedures: reiteration (case law) and parliamentary law-making. While the first procedure dates back to the origins of the common law in England, the second, in its actual practice, is historically indebted to the birth of parliamentary states and democratic participation in France following the 1789 Revolution.

Parliamentary (and governmental) law-making has, however, increasingly contaminated the common law systems; the rest of the world, in spite of possible past contact with the common law, shares the preference for statutory laws.

Following this simple, standard illustration, those empowered to change the law are the judges and the legislators. The difference in democratic legitimacy between the two kinds of subjects consists in asking the less legitimated (the judges) to provide extensive reasoning when departing from a precedent. A similar burden has not, so far, been imposed upon

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legislators, even if, in certain cases, a duty to provide reasons for law-making can be found. Furthermore, judges tend to conceal creativity and to describe their role as one of 'mere law-finding', a worry which does not concern the fully sovereign parliamentary assemblies.

The simplicity of the illustration is the result of a formalistic description of legal change, which is focused on the final outcome of the process, not on the reasons for legal change or on the results of law enforcement.

That illustration does not, however, exhaust all possible answers to the opening question of this paragraph.

What happens, then, when we leave the realm of formalism and embark on a more substantial analysis of law-making?

A different perspective can be achieved by leaving aside the standard illustration of legal change and moving towards an analysis of the *process* which leads to the final result of the legal reform. The reason for this resides in the recognition that the moment $T(x)$, when we identify a legal reform as being adopted, is usually the finalisation of a longer course of action initiated at $T(0)$.

Such an action usually begins with the recognition of the 'good', or, comparatively speaking, 'better' state of the economy in an area of the world (often, but not necessarily, a State). This provides the legitimacy for promoting the imitation of a wide set of rules, such as statutes and codes (Constitutions are also part of the game), and fundamental principles ranging from multipartitism, parliamentary democracy and protection of fundamental rights to, say, the classical themes addressed by constitutional charters which are perceived as key factors for the proper functioning of the market.²

Today, the process of identifying 'best practices' characterises the actions of many political actors in the various developing regions of the world: the command of legal reforms, however, does not seem to be in full control of those who are portrayed as the actors of the legislative process: the Governments and the Parliaments. Several factors seem to be relevant to the process, such as the spreading of economic theories, the actions of international diplomacy, the challenge of commercial competition to legal orders.

All those factors play a role in the process of legal reform.

Let us consider, for example, the so-called 'country targeted legislation'. The expression refers to legislation adopted by a single country which is meant to have its main

2 The EU 2004 enlargement, for instance, was grounded on the principles and criteria agreed among the 15 member states' representatives at the Copenhagen European Council (2003). Those principles and criteria concern:

- the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities (political criterion);
- the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the European Union (economic criterion);
- the ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union (criterion concerning adoption of the Community *acquis*).

effect within a different national legal order, such as, for instance, the US Federal Act entitled ‘Zimbabwe Democracy and Economic Recovery Act’, adopted in 2001,³ or the ‘Trade and Development Act’ adopted by the US Congress in 2000,⁴ better known as the ‘African Growth and Opportunity Act – (AGOA)’. Despite being pieces of domestic legislation, these laws have a direct effect on the actions of the major international financial institutions (IMF, IBRD) as well as on the planning of legal reforms in the targeted countries; within the scheme designed by the 2000 AGOA, the stabilisation of the rule of law, the recognition of pluripartitism and of due process have been listed as prerequisites for the African countries concerned gaining access to the benefits laid down by the Act.⁵

Within a relevant sector of a legal system (including private and procedural law, but also administrative and, occasionally, constitutional law), the standard illustration of legal change we were used to seems to have been taken over by a new mode which grounds legitimacy for law-making not in reiteration, nor in the domestic political debate about the assumed utility of a regulation, but in a technical appraisal of the necessity of a peculiar set of regulations. We can call this mode ‘functionalism’.⁶

According to a functionalist approach, legal rules are technical tools needed for a purpose (such as, in general, the modernisation of a given society or, in particular, the adoption of facilitating rules for institutions, such as corporate groups, small enterprises etc.); this approach confers new legitimacy on the law at the same historical moment as the law is losing its grip within the community, which was *local* and has now become *supranational*. This new kind of legitimacy, however, is of a different nature than the one we used to recognise in a traditional parliamentary State: it is based on a comparative assessment and on the assumption that a certain regulation has a direct effect on economic performance. This is an *ex post facto* judgement of a best practice which is taken as a pattern for imitation. In the production of such a judgement, technical experts (mainly, but not only, economists) contribute their specialised knowledge of the relevant issues.

The search by functional utility for a purpose (the ‘good performance of the market’), which is taken to be *objective*, transforms national legislators into guarantors of the

3 See 107th Congress, 1st session, in <http://thomas.loc.gov> (2006).

4 The African Growth and Opportunity Act was passed into law on 18 May 2000 as Title 1 of The Trade and Development Act of 2000.

5 See for instance the *Eligibility Requirements*, as stated under sect. 4 of the AGOA: ‘(a) In general – A sub-Saharan African country shall be eligible to participate in programs, projects, or activities, or receive assistance or other benefits under this Act if the President determines that the country does not engage in gross violations of internationally recognized human rights and has established, or is making continual progress toward establishing, a market-based economy [...]’.

See also the ‘Advance Democratic Values, Address Nondemocratic Countries, and Enhance Democracy Act of 2005’, also called ‘Advance Democracy Act of 2005’.

6 See M. Graziadei, ‘The Functionalist Heritage’, in P. Legrand and R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press, 2003), 100.

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proper functioning of their national economies, either in relation to their citizens or in relation to the international or supranational institutions with which the States that they govern are affiliated.

There is no need to provide too much evidence that 'functional' legal reforms have been occupying the agenda of both state governments and international institutions for the last 15 years.

A major reason for the extended legal change in four continents of the world can be found in the global transition from the 'Import substitution' pattern of development⁷ to the liberalisation of capital, production and trade. In Mexico, for example, between 1982 and 1996, 99 out of 198 federal laws were profoundly reformed, 57 significantly amended, and only 42 remained untouched; in terms of the extension of regulation, it has been calculated that about 80 per cent of Mexican legislation has been modified over a period of 15 years.⁸ These data show an increasing awareness among local political elites of the connections between the general security that may arise from an explicit adherence to the rule of law principles, and economic growth in the long run. The input was provided by the major international financial institutions whose representatives and consultants had already focused on the causal links between good governance and economic performance during the late 1970s.⁹ Other voices joined the chorus and, as a result, public and private actors, state and non-state institutions have become pro-active in the global offer of new laws. Take for instance the US Foreign Corrupt Practices Act; after its adoption in 1977, some US NGOs (such as Transparency International), together with the five major accounting firms, supported the Act by lobbying non-American corporations, aiming at the adoption of the standards contained in the 1977 Act. Twenty years later, an OECD agreement eventually required the signing parties to adopt regulations patterned on the 1977 Act.

As it has been vividly described, 'the standardization of «best practices» or «efficient» law replaces the Schumpeterian process of «creative destruction» with the ideal of «perfect construction» of law'.¹⁰

And while, in the past, the 'creative destruction' and the subsequent legal change were mainly a domestic process, the 'perfect construction' calls for the recognition of models originating outside the national legal system.

What is lost when passing from destruction to construction is the role played by national epistemic communities. Legal change becomes effective, it has a hold over soci-

7 See I. Edge (ed.), *Comparative Law in Global Perspective*, New York, Transnational Publishers Inc., 2000.

8 H. Fix-Fierro, S. Lopez Ayllon, 'The Impact of Globalisation on the Reform of the State and the Law in Latin America', (1997) 19 *Houston J. Int. l. L.*, 785.

9 A. F. Lowenfeld, 'The International Monetary System and the Erosion of Sovereignty: Essay in Honor of Cynthia Liechtenstein', (2002) 25 *Boston College Int. & Comp. L. R.*, 257; M. Wadzyk, 'Is It Appropriate for the World Bank to Promote Democratic Standards in a Borrower Country?', (1999) 17 *Wisconsin Int. Law J.*, 553.

10 K. Pistor, 'The Standardisation of Law and its Effects on Developing Economies', (2002) 50 *Am. J. Comp. Law*, 98.

ety, it influences behaviour as long as its meaning is governed in every national context by an *élite* of actors, an epistemic community, or a network of people who maintain control of the direction and the results of legal transplants and ease the process of absorption of the new legal concepts. This scenario explains how legal change was made possible (meaning it became effective) even in adverse conditions in the past; it falls short today, and cannot explain how legal change is operated in those (many) countries where there is no continuous legal tradition, nor an *élite* ready to fill the new notions with agreed content.¹¹

A spreading of best practices and of good examples has always occurred; today, however, we are not only experiencing a quantitative difference, but also a substantial change in the way the identification of the model for legal reforms is occurring. The main factors that explain the reasons for legal reform are derived from the practice of international businesses and from international economic strategies, while the actors promoting the new models are mostly international institutions and private groups rather than nation states. All this generates competition between principles for legal regulation of the economy which are supported by the different institutions or interest groups.¹²

At the same time, the supply and demand of legal models consists of a market of the seller (as the donors are in a position to promote through their educational systems, their institutions providing technical assistance, their own laws), and a market of the buyer (as there is a wide range of possible models to be picked up and used as samples for legal reforms, as well as legitimising devices).

In most cases of dissemination of a new model which serves a legal reform agenda, we find an asymmetry between the demand for legal reform, which is ignorant of the technical contents of the proposed model, and the offer of a sample, which is ignorant of the local context.

Based on this recognition, this paper argues that the increase in legal change based upon a wide recourse to functionalist arguments has:

11 A meaningful example is provided by the 1999 Chinese law on contracts. Searching for a more systematic arrangement for contract law, PR of China has adopted a law which is heavily indebted to foreign models. This has led to the introduction of the notion of 'good faith', which was alien to Chinese legal culture and to judicial practice. To fill the gap, the Chinese Supreme Court adopted a directive to explain the meaning of good faith to the courts, a choice which was dictated by the need to give predictability to case law at the cost of denying the role played by good faith in the Western legal tradition, i.e. to provide flexibility in judicial action.

12 States do still appear as promoters of legal change, and to underestimate their role would be to misunderstand how globalisation works. In doing this, some governments endorse proposals of legal change in support of national economic interests.

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- reaffirmed a formalistic, positivist understanding of the law;
- made use of indeterminacy in terminology: indeterminacy allows us to adhere to legal reforms without necessarily committing ourselves to implementation;
- expanded the concept of development to include law as an end in itself. Development scholars have not rejected instrumental arguments; they still think that law is an important criterion for markets and for the implementation of a host of policies. But they also see legal institutions as part of what is meant by development, so that legal reform is now justified whether or not it can be tied directly to growth.

The combined play of these three factors leads to a ‘sterilisation’ of law-making in relation to socio-economic development. Reformed laws remain distant from the process of adaptation and innovation which characterises the daily action of the law: ‘the process of legal innovation depends on the availability of information, not only about the contents of the rules – something international legal standards do provide – but also about their functioning in the context of a living legal system. The perfect construction of law by legal experts for wide dissemination can deprive lawmakers and law enforcers in the receiving countries of the knowledge of living law, which is context specific.’¹³ Moreover, the imposition of rules from outside may also lead to domestic resistance.

What does comparative law have to say, as a discipline, about that asymmetry?

To some comparative lawyers, their discipline is nothing less than the language of the communication between different legal systems. Its main significance is, therefore, epistemological:

Over the course of the time, however, the epistemological value of a discipline may change. For decades, comparative law’s main roles were:

- firstly external: the contribution to uniformisation;¹⁴
- secondly internal: the challenging of the false perspectives of legal positivism.¹⁵

A new challenge has arisen: the contribution to a better understanding and, possibly, functioning of an array of legal transplants.

¹³ K. Pistor *op.cit.*, 98.

¹⁴ See: B. Markesinis, *Foreign Law and Comparative Methodology*, (Hart 1997); see also: D. Gerber, ‘System Dynamics: Towards a language of Comparative Law’, (1998) 46 *Am. J. Comp. L.*, 719.

¹⁵ H. Muir Watt, ‘La fonction subversive du droit compare’, *Revue Int. Droit Comp.*, (2000), 52.

The theory of dynamic comparative law, developed by Rodolfo Sacco through the observation of the several *formants*¹⁶ that make up the complex fabric of every legal system, stresses that the final result of comparative analysis is a realistic representation of the analogies and differences between legal orders. Following the technique of identification of legal formants, one may discover that even where different legal orders seem to be dishomogeneous as to the formal blueprint of the norms, the operational rules which guarantee the actual functioning of the system may offer a more consistent design. Within the realm of private law one may find important evidence of this result in the law of torts, where the actual operation of case law brings towards convergence even those legal orders, such as the German and the French, that appear very distant at the level of enacted legislation, as well as in the formation of contracts, or in the transfer of movable assets.¹⁷

Law is a cognitive institution. As such, new laws have to be connected with other rules and institutions that are already in place. Without ensuring this kind of connection between the new rules and the pre-existing institutions, efforts at modernisation will be forced to remain an abstract exercise.¹⁸

Making wider use of comparative law methodology should result in a new balance in the appreciation of the interplay of legal formants among themselves and of the institutions called on to provide implementation. This would provide lawmakers with a better informed perception of the legal transplants they are seeking to promote in their countries, by looking at the different options practised in the world. On their part, institutional economists should provide further information by assessing the different institutional constraints that affect the different possible legal models.

In doing this, the scholarly research would correct the flaws affecting legal transplants today, namely an excess of normativistic optimism and lack of determinacy. This will eventually lead to the emergence of a 'market for information on the actual capacity of

16 The notion of 'legal formant', as introduced by Rodolfo Sacco ('Legal Formants: a Dynamic Approach to Comparative Law', 39 *Am. J. Comp. Law*, (1991), 1–34, and 343–402) refers to the plurality of elements that, within one single legal system, are capable of influencing the solution of a legal problem. All rules presenting the same characteristics, like, for instance, all judicial decisions, represent a legal formant of a given legal system. Legal formants can include formally issued legal rules (statutes, decrees), rules elaborated by scholars, rules that are expressed by a judge in a judicial decision, rules that are actually applied by the judge in solving a case, that do not necessarily coincide with the rule that has been expressed); while a national lawyer, particularly within a civil law country, may like the idea that a rule has only one 'correct' interpretation, a comparatist is more keen to recognise that the several formants within a legal system are not necessarily coherent, neither among themselves nor in comparison with analogous formants existing in a different legal system.

17 See: R. Sacco, *op.cit.*, 363.

18 A convincing example comes from Nebraska, a state which blindly copied the Delaware corporate legislation without getting a fraction of the number of incorporations that occurred in the imitated state. This has been explained by the lack, in Nebraska, of the positive network externality of the Delaware system; see K. Pistor, *op.cit.*, fn. 18.

legal models to have an impact upon comparable situations'¹⁹ and to recognition of the interdependence between the legal framework and the institutions of enforcement.

The following part of this paper is organised as follows: Section II focuses on the principle of indifference of law in relation to local cultures; Section III links the principle of indifference to the practice of using law as a substitute for economic reforms; Section IV draws some conclusions about the role that institutional law and economics might play in supporting the recognition of the several formants²⁰ of the law as concurring elements in the formulation of the rules for legal reforms aimed at a better functioning of the market.

2 NEUTRALITY OF THE LAW?

Historically, the idea of the *indifference* of law to the specific social contents has been nurtured by the millennial success of Roman law; later on, colonisation has confirmed that different societies may be ruled by similar laws. A more recent reappraisal of the idea occurred in the case of the transition from Sovietism to the market in the extensive area formerly under communist rule.

The belief that law can be independent, or neutral, in respect of a given society is closely connected with the idea that law can have a predictable impact on economic performance.²¹ The idea is not very new at all: it is in fact indebted to the spreading of modern rationalism, which has changed *natural* law into *rational* law. Nor is the process of looking abroad to best legislative practice in order to support domestic modernisation a new one: one may recall the famous polemic originated two centuries ago between the two great German legal scholars, Thibaut, who suggested that the German states had to imitate French 'rational' codification of private law in order to support modernisation, and von Savigny, who opposed the proposal based on the assumption of the momentary cultural inadequacy of German legal scholarship.

Today, following the fading away of ideological confrontation, the rebirth of the search for national identities based on culture and civilisation has somehow made it more difficult to defend the idea of the neutrality of certain areas of the law. As a result, the recognition of what can be considered more neutral, or less dependent on society, has changed; during the period of East-West confrontation, family law was deemed to be more indifferent (and therefore the comparison was inspired by a search for similarity), while economic law was taken to be absolutely incomparable.

¹⁹ K. Pistor, *op.cit.*, 103.

²⁰ See *supra*, fn. 15.

²¹ F. See Lopez-de-Silanes, 'The Politics of Legal Reform', *UNCTAD G-24 Discussion Papers Series* (2002), no.17; as an example of adjusting quantitative measuring to legal reforms see also K. Stephen, K. Philip, 'Institutions and Economic Performance: Cross-Country Tests Using Alternative Institutional Measures', 7 *Econ. & Pol.*, (1994), 207.

Moving closer to the point of the relevance of the principle of indifference as a starting point in the actual legitimation of legal change, one should first differentiate between:

- indifference as a political issue;
- indifference as a cultural issue.

As a *political* question, the principle of the indifference of law to the social context has been strengthened by the fall of the Soviet block: at the same moment as the idea of the total inutility of communist law ‘as a whole’ (*tabula rasa* principle) was affirmed, the principle of the neutrality of Western private law, the ‘good for all sizes’ slogan, was launched. The adoption of an ideal model of market development by neo-liberal economists has immediately become a political choice in the actions of the EU and the international financial institutions in order to speed up the process of market integration. At the same time, this has taken the focus of the discussion far away from the institutional perspective: the ‘best’ legal transplant appears to be a denationalised one, vested with the appearance of objectivity that circumvents local resistance in the name of cultural identity. This separation of the action of the law from the actual role played by institutions is central to understanding the many failures of legal reform agendas; it is in fact hard to conceive a role for a legal transplant which is not based on consideration of how local institutions work: for any single new rule that is introduced, role-occupants will necessarily have to consider, more or less consciously, a set of pre-existing conditions that are country-specific, and often non-formalised or sub-formalised.

As a *cultural* question, the idea of indifference is indebted to a set of phenomena that have made a significant mark on the last decades of the 20th century:

- post-modernism: there is something paradoxical about the fact that, by insisting on the incommensurability of phenomena such as culture and social behaviours, post-modernist theories, which were perceived as a defence of localism against globalisation policies, have eventually contributed to weakening localism in the face of the spreading of globalised formal regulations;²²
- uniformisation of the law; the success (both in terms of the absolute number of initiatives and of the number of adhering States) of the recourse to international conventions has brought the style of international law into the process of legal transplant; this has important effects on the issue of neutrality, as international law was traditionally characterised by indifference towards domestic diversity and cultural differentiation: The traditional approach to the cultural issue practised by international lawyers

²² A. Peters, H. Schwenke, ‘Comparative Law Beyond Post-modernism’, (2000) 49 *Int. Comp. L. Q.* 800.

stresses the recognition of ‘similarities in *economic development*’ (in the sense, for instance, that Thailand and Kenya are similar despite evident cultural differences). In other words, the technical aspect of neutrality is expressed by the language of performances and functions, while the cultural difference calls for an explanation in terms of history. International law deals with the former, while the latter remains the concern of local policies.

- This approach, however, is open to the following critiques:
 - firstly, it is argued that it is almost impossible to discern local from foreign cultures; even within a short span of time, what was an alien culture can become a local one, as demonstrated many times throughout history and everywhere in the world by important cases of languages, alphabets (Chinese characters in Japan) and arts;
 - secondly, the cultural exception is also relevant in the context of economic issues; in particular, there are significant cases where states use cultural issues to protect what are perceived to be national economic interests;²³
 - thirdly, legal culture is part of the more general definition of a culture; the isolation of local legal culture from the process of legal transplants seems nothing less than absurd; as the methodology of comparative law has demonstrated, the dissemination of rules and legal change takes place with the active involvement of legal doctrines. This is usually classified as interpretation, but it would be more accurate to speak of ‘interdoctrinal legal transplants’.²⁴

3 THE INSTRUMENTAL USE OF THE LAW.

The recognition of a functionalist approach to the law dates back to the 1920s, when Ernest Rabel illustrated the social purpose of the law as a starting point for any comparison;²⁵ from Rabel, the approach was brought to the US by Max Rheinstein, who repeat-

23 See for instance the famous case brought by Canadian publisher against US magazines on the basis of ‘cultural diversity’: WTO Dispute Panel Report on Canada – Certain Measures Concerning Periodicals, WT/DS 31/R 14.3. (1997) re US magazines.

24 ‘The duty of care is a «legal transplant»: it is a fixture of the classical law of trusts and agency that was transplanted into corporate law along with the duty of loyalty. As is often the case with legal transplants, whether interdoctrinal or cross border, the change can cause mischief ... The peculiar problems with corporate law’s duty of care derive from the transplanting of a concept from the market context into the firm context’; E. Rock, M. Watcher, ‘Dangerous Liaisons: Corporate Law, Trust Law, and Interdoctrinal Legal Transplants’, (2002) 96 *Northwestern Univ. L. R.*, 651.

25 About the role of Rabel as the ‘founder of modern comparative law’ see: the essay by David Gerber in Riles A. ed. *Rethinking the Masters of Comparative Law*, (Hart 2001), 262.

edly stated that comparative law must go beyond static taxonomies or analytical descriptions of the existing legal systems; instead, it should investigate the reason for a norm to exist in its function with respect to the actual society.²⁶

This approach has dominated till the present, and the 'Comparative Law and Economics'²⁷ movement is an updated version of Rabel's approach, which pays tribute to the idea of efficiency. Those supporting the functionalist approach stress that, with the spreading of a global society, national/state traits will no longer be relevant in several fields of the law; legal functionalism would therefore be ready to build a theory on the basis of legal convergence.

Notwithstanding the amount of essays and seminars devoted to investigating the impact of legal reform on economic performance, a generally valid theory, able to demonstrate that a well-functioning legal system is conducive to sound economic results and to reconcile the grand scheme with the important exceptions, is still lacking. What we have is a set of fragmented reasons, which often leave us with the doubt that the direct causal link between good performance and good laws has yet to be proved.²⁸

Many critical assessments of functionalism hint at its bad effects: when adapted to Human Rights and Rule of Law discourses, functionalism is seen as a threat to the autonomy of the law and to its moral value; when applied to economic performance, it would conceal the distributive aspects intrinsic to private law.²⁹ Within the context of EU law, many have noticed a recourse to functionalist argumentation by the European Court of Justice aimed at expanding the jurisdiction of EU institutions vis-à-vis the Member States.

The instrumental use of law has thereby become an issue of significant confrontation; these are the main arguments one can find in the literature:

- law is a policy science ('legal process' approach)³⁰
- it is society that creates the law and not the other way round ('law and society' approach);³¹

26 See B. S. Markesinis, *Comparative Law in the Courtroom and the Classroom: The Story of the Last Thirty Five Years*, (Hart 2003).

27 U. Mattei, A. Monti, 'Comparative Law and Economics: Borrowing and Resistance', (2001) 1 *Global Jurist Frontiers*.

28 King and Levine, for instance, show that the average growth of GNP is higher in countries where the legislation on financial markets is more developed; La Porta, when he shows that the existence of rules protecting the minority groups in the stock companies are determinant to find out the cost of capitals.

29 Du. Kennedy, 'Law-and-Economics from the Perspective of Critical Legal Studies', (1998) 2 *The New Palgrave Dictionary of Economics and the Law* (P. Newman ed.).

30 W. Eskridge and P. Frickey (1994) 'The Making of The Legal Process', (1993) 107 *Harvard Law Review*, 2031; see also: Salamon L.M. (ed.), *The Tools of Government: A Guide to the New Governance*, (Oxford Univ. Press, 2002).

31 See D. M. Trubek, 'Toward a Social Theory of Law: An Essay on the Study of Law and Development', 19 729 82 *Yale L. J.*, 1.

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- law is merely the result of political decisions (nihilistic approach and Critical Legal Studies approach);³²
- as law is deep-rooted within society, any attempt to instrumentally use the first to change the second is an illusion (neo-Savignianist approach);³³
- law is intrinsically indeterminate: any attempt at social engineering through the law is therefore bound to produce unpredictable results (deconstructionist approach);³⁴
- legal change cannot be conceived as a substitute for economic policy.³⁵

Let us deal with this last argument. The process and the rhetoric of legal change are ingrained in the process and rhetoric of globalisation. This connection not only leads governments to overemphasise the actual impact of articulated reforms *in the short run* (because globalisation is per se a fast process, which is supposed to speed up local economies, exposing them to the opportunities of the global market), but it also leads to the undervaluation of the importance of informal institutions.

Informal institutions do not in fact suit the globalisation agenda: formal institutions can be better identified, measured and evaluated; they produce those outputs (enactments and regulations) that can be perceived and quantified by the external actor in the process of legal transplants. This situation has several effects on the legal discourse:

- it influences the style of legal change, favouring an emphasis on formalised, black-letter rules (neo-positivistic attitude);
- it reduces the role of commentators to that of simple spokespersons for the letter of the law (exegetic attitude);
- it favours the duplication in local laws of the myths and stereotypes elaborated in the Western legal tradition.

The spreading and imitation of laws from one country to another is not a new phenomenon at all; what is new is the wide acceptance (from both the promoting and the receiving sides) of the principle of the indifference of the legal norms to the social context.

32 Hutchinson A. C. and Monahan P. J., 'Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought' (1984) 36 *Stan. L. Rev.* 199.

33 See P. Legrand, 'The Impossibility of Legal Transplants', (1997) 4 *Maastricht Journal of European and Comparative Law* 111.

34 See Kennedy Du., 'Critical Theory, Structuralism and Contemporary Legal Scholarship', (1985) 21 *New England L. Rev.* 209.

35 See Da. Kennedy, 'The Politics and Methods of Comparative Law' in Legrand P. and R. Munday (eds.) *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press, 2003).

The recognition of the principle of indifference entails the identification of the legal rule as an 'ad hoc' instrument and leads to the abandonment of the old perception of the rule as the reiterated answer to questions that originated locally. The move from traditional, circular law-making to the linear belief in secure economic growth brings with it trust in the permanent evolution of legal orders towards an 'increasing better performance'. Such a dynamic applies either to situations of full harmonisation or to situations of competition among legal orders. If, for instance, *antitrust regulation* and *consumer protection* are grounding principles inherent to an efficient economic system, such as the US market is assumed to be, then the imitation of those policies becomes mandatory. It is on those two principles that a single European market and, later, the restoration of a market structure in the post-Soviet states was established.

However, one should at this point notice that the imitation of the US institutional setting with respect to market functioning was, in the early case of European Community law, limited to the modelling of the *macroeconomic* device. It is useful to remember how different the legal design is for the antitrust mechanisms in American and European law. A similar argument can be put forward in connection with consumer law: it is only very recently that a US-inspired mood has changed the legal regime of consumer law from the judicial assessment of the legitimacy of contractual clauses towards the establishment of information duties.

Those examples, however, belong in the past. In the more general and recent frame of legal globalisation, the distinction between the economic model and its legal design(s) seems to be lost. There are several different reasons that contribute to explaining why this change in the way legal transplants took place:

- the spread of functionalist theories supported the recognition of law (namely, but not only, private law) as inherently indifferent to the social context, while law and economics has reinforced, since the popularisation of the Coase theorem, the idea of indifference (scholarly reason);
- the mandate of the international organisations mostly involved in supporting legal reforms normally excludes politics and local culture from their scope of action, thus inducing a more 'technical' understanding of the role of law in society (institutional reason).
- While these two sets of reasons seem, in principle, to be compatible with the acceptance of the proliferation of different legal solutions as long as they reflect the contents of an agreed economic agenda, a second set of reasons has contributed to reducing the options with respect to the modelling of legal transplants:

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- the emphasis on trade liberalisation that characterised both the phenomenon of globalisation in the 1990s and the finalisation of the single European market in the same period has favoured the treatment of legal rules as an appendix to the market; as such, they must offer identical opportunities for all traders and investors, and therefore, have to be harmonised (ideological reason).
- the whole process of globalisation, which was welcomed as an opportunity for diffuse solid performances, has rapidly become a chance to avoid stagnation and economic crisis; this added an element of rush to a development that was already speedy by nature; as a result, a permanent *lack of time* in the adjustment of legal reforms has favoured blind imitation (contingent reason 1);
- the fact that most of the legal systems interested in general legal reforms were not inscribed in the hall of fame because of the reputation of their local juridical culture (at least with respect to the legal aspects of market functioning, if not in general), has contributed to a *lack of trust* on the part of the donors. The international institutions, as well as the European Union, managing a 14-year-long process of enlargement, thus came to believe that the best guarantee for proper adaptation of the reforming legal regime to the needs of market functioning is the imitation of a set of rules already established in the West (contingent reason 2).
- If one accepts that contingent reasons are not by definition permanent in the process of legal transplants, and that ideology has now entered a phase of revision, for the sake of simplicity referred to as the ‘post-Washington consensus’,³⁶ it is consistent to argue that there are no stringent arguments against a reorientation of the process in terms of a clearer distinction between economic recipes and legal design.

4 CONCLUSIONS

The belief in the neutrality of the law, which has been reinforced in the process of globalisation, is often combined with two different styles of drafting:

- non-technical language
- the style that makes use of standards.

Take, for instance, the European Union. If we consider the style of many EU laws, we cannot avoid noticing that, while drafting directives and regulations, EU institutions do not consider themselves to be obliged to adhere to the system of concepts and doctrines prac-

³⁶ See: [German] Federal Ministry for Economic Cooperation and Development, *BMZ Diskurs. Post Washington Consensus: A Few Thoughts* (Discussion paper, 2004) no. 4.

tised by national jurists.³⁷ The main reason for this recourse to non-technical language is that it responds, without too much resistance from the level of local legislation, to the request for increased harmonisation between legal systems.

This is a not yet fully investigated aspect that characterises the actual phase of legal change: national legal orders are subject to a process of renewal which requires renewed communication between institutions, actors and enterprises. This is not only true within the context of European integration, but also on the wider scale of global law. Today, national laws are also assessed and evaluated on the basis of their openness to the external world. It is not by chance that *transparency* in procedure, reform of administrative law and *access to justice* have also become recurring issues in the technical field of harmonisation promoted by the WTO.

As to the recourse to standards, their role seems to be the opposite of the one played by non-technical language; the purpose they serve is the same, however, namely to bypass domestic resistance through recourse to 'objective and technical standards' (in the different fields of accountancy, safety, technology and so forth). The question: 'Who is empowered to change the law' then becomes: 'Who is empowered to set the standards?'

There is no systematic answer to this last question, as it depends on the specific area involved; while, for instance, the TRIPs agreements demonstrate unilateral pressure from the most industrialised countries to ensure a high level of protection for Intellectual Property rights, in other areas one can notice a flow of models within the circle of the international institutions: the EU Code for social security, for example, was modelled on ILO social security convention no. 102 of 1952. In other cases, what we perceive is a close competition among several institutions: the OECD's antitrust recommendations have superseded the UNCTAD programmes, while the UNCTAD code of behaviour on the transfer of technology was first absorbed in the sphere of interest of the WIPO and finally moved within the TRIPs agenda at GATT/WTO. This happened because the negotiators of the TRIPs agreements paid special attention to the crucial connection between trade policies and competition policies. The result of all these strategies is a system of international relations whereby, besides the traditional instrument of international conventions, extensive use is made of standardisation promoted by international institutions. This creates continuous links between the level of negotiation, which occurs inside the organisations, and the level of domestic laws, which are affected by those standards.

³⁷ A recently adopted EU Directive (no. 143/2004) on environmental liability, for instance, states that '«damage» means a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly' (Art. 2.2.); what we find here is the contamination of the legal language by the jargon practiced among ecologist groups. I would hardly define this choice as a political (pro-ecologist movements) one but rather as an attempt to bypass different scholarly doctrines and notions used at the level of member states with respect to the definition of damage in the realm of environmental law.

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It seems, therefore, that the Westphalian paradigm, which has informed relations among sovereign states, has to be revised: what is needed is a new blueprint wherein the conflicting interests of transnational groups can be recognised and settled. The ultimate result of such a shift of focus would be to give a greater voice to the traditional actors of international law, i.e. states, as their voice has now diminished as a result of the adjustment policies carried out by financial institutions and implemented through overall legal reforms based on the model of Western best practices.

The actual insistence on extensive harmonisation shared by several international financial institutions and, at regional level, by the EU Commission, originated in a lack of confidence in the capability or willingness of local governments to set in place the enactments that are considered necessary to facilitate satisfactory economic performance.

There are two approaches that, if taken together, can reduce the friction which characterises the process of legal transplants: a reduction in the emphasis on the absolute necessity of imitating the formal contents of the laws and a recognition of the role played by national institutions in modelling the rules.

If this is done, an important contribution may be derived from institutional law and economics. It is indeed crucial that, in the process which prepares legal change, every single macroeconomic recipe, for instance the recognition of freedom of competition as an element of good economic performance, is separated from the 'n' possible legal blueprints that it can assume. This should be based on the recognition that, historically, the successful transition from stagnation to economic development – in Taiwan and South Korea in the late 1960s, in Brazil, in the PR of China and in Turkey in the late 1980s, in India and Chile during the 1990s – originated in a peculiar blend of mainstream economic theories and local regulations.

Unlike formal legislation, institutional innovation cannot be smoothly imitated. The Chinese success in setting up a mixed economy could not be exported to other countries in transition from command economy to market. The standing of the PR of China within the international system cannot be 'exported' or traded with another country. This has a direct influence on legal transplants and their effectiveness; this is one of the reasons, if not the main one, why, after at least 15 years of insistence on legal change as a substitute for institutional development, the rate of substantial success of legal reforms is still highly questionable.