[2017] C.E.L.B.

THE CARDOZO ELECTRONIC LAW BULLETIN

GLOBAL FRONTIERS OF COMPARATIVE LAW

RULING BY INDICATORS: HOW THE USE OF VAGUE NOTIONS AND QUANTITATIVE INDICATORS FACILITATES LEGAL CHANGE

Gianmaria Ajani

THE CARDOZO INSTITUTE
ISSN 1128-322X

The Cardozo Law Bulletin is a peer-reviewed, English and Italian language journal concerned to provide an international forum for academic research exploring the thresholds of legal theory, judicial practice and public policy, where the use of a 'comparative law and literature' approach becomes crucial to the understanding of Law as a complex order.

The Cardozo Law Bulletin, established in 1995 as one of the world first Law Journals on the Web, invites the submission of essays, topical article, comments, critical reviews, which will be evaluated by an independent committee of referees on the basis of their quality of scholarship, originality, and contribution to reshaping legal views and perspectives.

SUBMISSIONS: The Cardozo Law Bulletin only accepts submissions made in accordance with the MLA (Modern Language Association) style, the most commonly used to write papers and cite sources within the liberal arts and humanities.

http://www.jus.unitn.it/cardozo/

Ruling by Indicators:

How the Use of Vague Notions

and Quantitative Indicators Facilitates Legal Change

Gianmaria Ajani

1. A DYNAMIC APPROACH TO COMPARATIVE LAW

The expression “legal change” as well as its synonym, "legal reform", is commonly used to address the same phenomenon, namely an agenda of institutional transformation, quite often based on the spreading and the dissemination of legal models from an exporting legal order to a receiving one.

In a wider perspective, reception, transplants and borrowings may are used to refer to the process, or to the results of a project of legal reforms, which is in turn initiated by a plan of legal change based upon an imitation of laws, doctrines and theories, judicial decisions, already in place in different legal orders, which are considered to be a good example to be followed.

Legal changes occur constantly, without interruption, and imitation has been, since ancient times, the most common strategy underlying legal reforms. The recognition of such circumstances severely curtails the debate surrounding the mere “possibility” of legal transplants.

Legal reforms are commonly inspired by foreign policies and practices. Regardless of the academic discourses on whether legal transplants are sustainable as a notion in the legal theory, they are common practice. Nevertheless, the degree to which new laws are stimulated by foreign examples can vary. A frequent and often justified criticism is that imported laws are not suited for a certain local context.

Legal borrowings and transplants simply occur, though they can be more or less successful and effective, more or less persistent.

Comparative lawyers have paid a particular attention to the phenomenon of legal change.

At first, the traditional scheme, envisioned a static mapping of the major legal systems[1]: following this thread, which was the custom in the first part of the last century, national legal orders were classified and combined within larger groups, on the basis of the so-called "styles of legal families", or common traits[2]. Such an approach, still influenced by strands of national positivism and by the recognition of enacted legislation as the centre of the observation, certainly removed some of the emphasis previously placed on the aspect of intra-system dissemination of rules.

Where mixed systems, such as South-Africa, or Israel, were recognized, they were presented as exceptional to the monolithic coherence of the several state legal orders, based mainly on the historical development of national law.

A new approach to comparative law was inaugurated in a seminal study by Rodolfo Sacco in 1972. Progressing from the contributions of Gino Gorla[3] and Rudolf Schlesinger[4], Sacco shifted the focus from the static description of legal orders to a dynamic reading of the borrowings which nurture them. If we consider Sacco's starting point, Comparative law presupposes the existence of a plurality of legal rules and institutions. A comparatist is called to study them in order to establish the extent to which they are identical or different. The analysis of legal formants, that is the different formative elements of a legal rule, has the aim to discover how the 'jurist concerned with the law within a single country examines all of these elements and then eliminates the complications that arise from their multiplicity to arrive at one

[1] See R. David, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law*, Stevens, London, 1985. See also P. Glenn, *Legal Traditions in the World Today*, Oxford University Press, Oxford, 2000 and A. Riles (ed.), *Rethinking the Masters of Comparative Law*, Hart Publishing, Oxford, 2001

[2] See K. Zweigert, H. Kötz, *Introduction to Comparative Law*, Oxford University Press, Oxford, 1998

[3] See G. Gorla, *Diritto Comparato e Diritto Comune Europeo*, Giuffré, Milan, 1983

[4] See R. Schlesinger *et al.*, *Comparative Law: Cases, Text, Materials*, Foundation Press, New York, 1998

working rule'[5]. A full understanding of legal formants and their interrelation allows us to ascertain the factors that affect the given solutions. This clarifies the weight that interpretative practices (grounded on scholarly writings, on legal debate aroused by previous judicial decision, etc.) have in moulding the actual outcome of the rules.

It follows that circulation of norms, borrowings, and transplants, all that is considered to be part of a process of reception, is the circulation of formants. By recognizing fragmented circulation, comparative law challenges the positivistic idea, which reduces legal borrowings to the dissemination of enactments. The fragmented nature of the process leads to very different situations: in one case, the rule contained in a doctrinal formant may be able to circulate and finally be embodied in a statute. In other circumstances, the influence may remain at the level of homogeneous formants (i.e. case law to case law)[6].

2. Legal borrowings, global harmonization and the neutrality of the law

Historically, the idea of law's indifference towards specific social contents has been kept alive by the millennial success of Roman law.

Subsequently, colonization only served to confirm the fact that different societies may be governed by similar laws. A more recent reappraisal of the idea occurred in the case of transition from Sovietism to market, in the wide area formerly under communist rule.

[5] R. Sacco, *Legal formants. A Dynamic Approach to Comparative Law*, 39 American Journal of Comparative Law, 1991, 2

[6] See P.G. Monateri (ed.), *Methods in Comparative Law*, Edward Elgar Publishing, Cheltenham, 2012

The belief that law or, more precisely, some areas covered by private and business law, can be independent, or neutral, with respect to a given society is closely connected to the idea that law can have a predictable impact on economic performance[7]. The idea is not new at all: in fact, it is linked with the spread of modern rationalism, which secured the transition from natural law to rational law. Similarly, the process of searching for the best legislative practice beyond national borders in order to support the modernization of a national legal system is not a new strategy. In this respect, one may recall the famous polemic originated two centuries ago between two great German legal scholars, Anton F. Thibaut, on the one hand, suggesting that the German states had to imitate French "rational" codification of private law in order to support modernization, and Friedrich K. von Savigny, on the other hand, contrasting the proposal, on the basis of a temporary cultural inadequacy of German legal scholarship[8].

During the last 20 years, after the waning of ideological confrontation, the resurfacing of a search for national identities based on culture and civilization has made the idea of neutrality of certain areas of the law somehow more difficult to defend. As a result, the recognition of what can be considered more neutral, or less dependent on society, has changed.

All throughout the period of the East-West confrontation, family law was deemed to be more indifferent (and therefore the comparison was inspired by a search of similarity), while economic and commercial law was taken as absolutely unfit for comparison. Today, in the age of globalization, many commentators would subscribe the statement that it is a smoother process to

[7] See D. Berkowitz, K. Pistor, J. F. Richard, *The Transplant Effect*, 51 American Journal of Comparative Law, 2003, 163-187

[8] See F. K. Von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence*, Nabu Press, Charleston, 2011

harmonize, for example, company law than the legislation addressing family law issues.

In order to draw closer to assessing the relevance of the principle of indifference towards legal change, one should begin by distinguishing between two possible ramifications: indifference as a political issue and indifference as a cultural issue[9].

As a political question, the principle of the law's indifference to the social context has gained strength since the end of the cold war. While the idea of the uselessness of communist law "in its entirety" (tabula rasa principle) was being affirmed by the governments and the international institutions supporting legal reforms in post-communist states, the neutrality principle characteristic of Western private law was put forward.

The adoption of an ideal model of market development by the neo-liberal economists has significantly influenced the actions of the European Union and the international financial institutions, such as the World Bank and the International Monetary Fund, both seeking to speed up the process of market integration. Yet, this brought the focus of the discussion away from the institutional perspective: the "best" legal transplant appears to be a denationalized one, clothed in an appearance of objectivity that thwarts local resistances based on cultural identity. This separation of the action of the law from the actual role played by institutions is central to an understanding of the many failures of legal reform agendas.

It is, in fact, rather difficult to conceive a role for a legal transplant without considering how local institutions work. For any single new rule that is

[9] G. Ajani, *Legal Change and Institutional Reforms*, in Ret tog tolerance. Festkrift til Helge Johan Thue, Glydendal Norsk Forlag, Oslo, 2007, 475-477

introduced, role-occupants will necessarily consider, more or less consciously, a set of pre-existing conditions, that are country-specific and often non- or sub-formalized.

As a cultural question, the idea of indifference is indebted with a couple of phenomena that have significantly marked the last decades of the 20th century:

- *post-modernism*: there is something paradoxical in 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 the forceful nature of globalization policies, by making relative the belief in justice and by criticizing the principle of objectivity in the law, have contributed to paving the way to the spreading of globalized formal regulations[10];
- *uniformization of the law*: the success (both in terms of absolute numbers of initiatives, and of 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 characterized by indifference towards domestic diversity and cultural differentiations: the traditional approach to the cultural issue practiced by international lawyers stresses the recognition of "similarities in economic development" (in such a sense, for instance, Thailand and Kenya are similar, in spite of evident cultural difference).

[10] A. Peters, H. Schwenke, *Comparative Law Beyond Post-modernism*, 49 International Comparative Law Quarterly, 2000, 800

In other words, the technical side 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 is left to the realm of local policies.

This approach, however, has been subjected to a set of critiques[11].

A first argument points to the fact that it is almost impossible to discern local from foreign cultures; even within a short span of time what was an alien culture may become local, as illustrate by the important cases of languages and arts, during every historical era and everywhere in the world.

Secondly, the "cultural exception" is of relevance to the context of economic issues. In particular, there are significant cases where the State actors use cultural issues to protect what are perceived to be national economic interests[12].

Finally, legal culture is encompassed by the more general definition of culture; the isolation of local legal culture from the process of legal transplants verges on the absurd. As the comparative law analysis has demonstrated, the dissemination of rules and legal change occur 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".

[11] See Da. Kennedy, *The Politics and Methods of Comparative Law*, in P. Legrand, R. Munday (eds.) Comparative Legal studies: Traditions and Transitions, Cambridge University Press, Cambridge, 2003, 345-433

[12] See for example WTO Dispute Panel Report on Canada - Certain Measures Concerning Periodicals, WT/DS 31/R 14.3.(1997) re US magazines.

3. THE TRANSPLANT OF VAGUE NOTIONS

In contrast to what was common practice until the middle of the last century, when the process of legal reform via legal transplants occurred mainly from state to state, at a slow pace, and generally through the vehicle of legal scholars, an important portion of the dissemination today is entrusted to supranational institutions, such as the International Monetary Fund, the World Bank, the European Bank for Reconstruction and Development.

These institutions support intergovernmental agreements aimed at fostering legal reforms and introduce a matrix of soft laws, proposals and recommendations for legal change.

In the past a new statute, a Code, or a Constitution, were adopted or emended on the assumption that the "prestige" of the imported set of rules was sufficient to legitimize the change.

Today, the process of legitimizing the legal reform cannot be built upon a simple and circular argument such as the reputation of the foreign model.

Within this new situation, we notice that the process of legal transplantation is characterized by the recourse to vague formulas, such as due process, governance (and good governance), reasonableness, rule of law, transparency, accountability[13].

We can identify three factors that have contributed to this shift in the building of legitimacy for the phenomenon of legal transplantation:

- functionalism;
- cultural resistance;

[13] See G. Ajani, *The Transplant of Vague Notions*, in I. H. Szilàgyi, M. Paksy (eds.) Ius Unum. Lex Multiplex. Festschrift in Honour of Zoltàn Péteri, Istvan Tarsulat, Budapest, 2005, 17-37

- recourse to "naïf language".

As far as functionalism is concerned, one may consider replacing evaluations from the side of the borrower, based upon historical ties and cultural appreciation, with assessment built on the assumed utility of a set of norms targeted towards improving economic performance[14].

Cultural resistance concerns the increased awareness, from both sides (importer and exporter of legal rules), that local diversity is (or can be) an obstacle to an open transfer of rules among different legal orders.

When mentioning "naïf" (i.e. non-technical, ordinary) language, one may recall the use of general terms and concepts that characterizes lawmaking as practiced by some institutions.

As an illustration, we can consider the case of the European Union: if we examine the style of EU laws we cannot fail to notice that, while drafting directives and regulations, the EU institutions do not feel the obligation to adhere to the system of concepts and doctrines practiced at state level by local jurists.

This approach has led, in the last 15 years, to a proliferation of the use of vague notions and to their inclusion within the rhetoric of "good governance for the market".

Furthermore, because broad formulas expressed in ordinary language are more palatable to the media, a bundle of concepts whose juridical/technical content is far from certain became the paradigm for assessing the modernization of a legal system.

---

[14] See M. Graziadei, *Comparative Law, Legal History, and the Holistic Approach to Legal Cultures*, Zeitschrift fuer Europaeisches Privatrecht, 1999, 531-543

Let's consider some examples: what is, for instance, the actual meaning of the slogan: "Russian law today is based on the US model of corporate governance"?

It is easy to grasp the symbolic meaning of the statement: those involved in reforming Russian law indicate that the Russian commercial law has accomplished its renewal from plan to market. By proclaiming the adoption of the US pattern for corporate governance (whatever its contents can be), it is also implied that the economic system is able to become as sophisticated as the ones where corporate governance based on US law is in operation.

Such a symbolic significance, however, does not shed a lot of light upon the casual links between the nature of the market and the contents of the rules: is it from a particular market that the corporate governance has come into effect, or, the other way round, is it the particular organization of the market, with its constraints and freedoms, that originated such a model for corporate governance?

Another relevant example concerns the notion of the "Rule of Law".

The lip service paid to the rule of law idea by many Constitutions adopted, f.i. in the Russian Federation or in the People's republic of China during the last 20 years, acts as a legitimization for legal and judicial reform and for intrusions inspired by those who formulate, know and possess the taxonomy of reforms currently attached to the vague notion under scrutiny[15].

Over the past quarter of century, Western nations, international organizations and NGOs have spent billions of dollars into rule of law reform

[15] See A. Santos, *The World Bank's Uses of the "Rule of Law" Promise*, in D. Trubek, A. Santos (eds.) The New Law and Development: a critical Appraisal, Cambridge University Press, Cambridge, 2006

programs in transitional and developing countries. In 2016, the World Bank alone invested $406 million in projects focusing on rule of law promotion[16].

The insistence in reproducing the rule of law blueprint within constitutional texts also demonstrates that the professionals who organize legal reforms in the new post-Soviet Countries "are part of the West", and share the so called Shihata's doctrine (named after the former General Counsel of the World Bank)[17]. The doctrine is based on a global generalization of Max Weber's assessment of the role of rules and institutions for economic development.

Following such a design, the process of transplanting new laws is conducted by following two different steps: bringing the rule of law and other related and vague notions to the attention of reformers; and conveying operational rules as necessary consequences, that follow the adoption of rule of law as a "constitutional standard". The process is manifest in the pronouncements made by major financial institutions, as well as by other institutions, such as the European Union, or the World Trade Organization.

Its recognition, however, should not lead us to the immediate identification of that two-steps process as a sort of machination; using vague notions in order to ease the by-passing of cultural sovereignty could, in fact, be part of a plan, aimed to an intense homogenization of the rules that are conceived by the International Financial Institutions as conducive to liberalization of trade, but this is not the only possible explanation of the success of the rule of law notion.

---

[16] World Bank, *The World Bank Annual Report 2016*, 2016, 62, http://www.worldbank.org/en/about/annual-report/overview, last accessed 25 June 2017

[17] See I. Shihata, *Complementary Reform: Essays on Legal, Judicial and Other Institutional Reforms Supported by the World Bank*, Kluwer Law International, The Hague, London, Boston, 1997

Beside the desire to avoid negotiations in the process of legal transplant, other reasons can be spent, such as the spreading, among the agencies exporting legal rules, of a practice of legitimization for their action based on the recourse to broad and consensus-making formulas. And if we share the élitarian explanation for the success of legal transplants suggested by some comparatists (Watson), we will assume that a recourse to vague notions is welcomed by the lawyers in the recipient country, who share the interest of the exporters in overcoming local resistances against transplants.

Whatever the case is, strategy or serendipity, it is very reasonable to assign to the mentioned vague notions the role of reducing transaction costs arising from the process of legal transplant.

4. Legal transplants and International Law

The transnational institutions' officials that are active in supporting legal transplants have inherited an obsession with the establishment of worldwide recognized norms from international lawyers. To attain the objective of a global recognition of international norms in a world where cultural diversity claims are reaching their climax, there are only two, rather conflicting paths. The first entails recourse to hyper-specialized language, which is assumed to be, similar to the language of technicians and engineers, neutral and unrelated to local considerations. The alternative lies with the use of ordinary language, which does not dabble with the jargon of local experts.

The rule of law has not only become a substitute for discussion on the effects of development policies, but also a means to avoid, at least during the initial stages of dialogue between donors and recipient countries, an embarrassing confrontation on the "operational meaning" of widely debatable political

notions such as democracy, pluripartitism, and judicial independence. Such an opportunity has proved to be useful not only for the international financial institutions seeking to sidestep problems with their mandate, but also for the European Union institutions, involved in the extremely delicate issue of outlining the conditions for the Union enlargement towards East.

It is very clear, at this point, that the problem of providing exact definitions has been simply postponed by the urgency of having to adopt legal reform programs without too much discussion about contents or possible effects on the concerned domestic legal and economic system. Vague notions are useful as long as they respond to the persistent problems of globalization: scarcity of time and lack of consent. If this is the context, the strategy of legal transplants and reception requires that the rhetoric of the vague notions be characterized by a neutral style. Normative arguments follow at a later stage, once the sovereignty barrier has been circumvented the process of transplanting rules assumed to be necessary for a good development of the market will be presented as a natural derivation from the vague notion itself.

What lies at the core of the practice of legal transplants is the contamination by the "style" of negotiation that characterizes both international conventions and supranational legislation.

Indeterminacy of language allows the reaching of consensus (when required) and obtaining agreements within a reasonable span of time. In other words, a vague language facilitates the following:

- postponing the tackling of obscure issues and puzzles related to implementation;
- avoiding a dive into details of distributional nature, and choices connected with introduction of good governance standards;

- putting off the resolution of arguments deriving from translation;
- empowering external law-makers, who ground their legitimacy on a set of previously adopted vague formulas ;
- keeping the governance of macro-economic decisions under the control of "external standards provider" (for instance, the EU, during the process of enlargement towards Central and Eastern Europe) the governance of macro-economic decisions;
- producing an output ostensible to the donors (Codes, laws, conventions and the like).

These facilitating factors support an uncontested transplant of laws that are considered necessary for market functioning and economic development.

At the same time, however, they produce a false image of law as a static, neutral set of rules of universal application, under the unique condition that governments express a commitment to the rule of law.

5. GLOBAL INDICATORS AND LEGAL TRANSPLANTS

Vagueness is not the only instrument that has been used to promote legal change. Global goals, rankings and indicators are increasingly designed and adopted by international organisations and NGOs to facilitate the transplant of legal norms in transitional and developing countries.

In the last two decades, the number of these quantitative tools has been growing significantly both at a national and transnational level[18].

[18] See, for instance, the Doing Business Project promoted by the World Bank, the Sustainable Development Goals established by the United Nations or the Corruption Perceptions Index developed by Transparency International.

Indicators are the representation of a certain performance in classificatory terms. They are characterised by specific features: a name that has the power of defining a specific phenomenon; an ordinal structure that facilitates comparison and ranking, thus, exerting pressure for enhancing the measured performances; a numerical representation that simplifies complex social phenomena; a scientific justification founded on a methodology adopted by global experts; the possibility of being used for evaluative purposes[19].

The production and use of these quantitative instruments have both a knowledge and a governance effect[20].

As form of knowledge, indicators rely on the magic aura that numbers convey and on the appearance of impartiality and certainty that they communicate. A key aspect of their power consists in the capacity to transform complexity into clear and non-ambiguous measurements. They manage to submerge particularities and local idiosyncrasies in universal categories, generating a standardised knowledge, which is comparable among different nations and regions.

As a form of governance, they are extensively used by decision-makers to adopt important decisions, such as how to tackle specific gender equality issues or where to provide humanitarian aid. By replacing judgments based on politics or values with more (allegedly) rational decisions based on numbers and rankings, the use of statistical information and indicators determines a significant shift in the power dynamics of the decision-making process[21].

---

[19] K. E. Davis, B. Kingsbury, S. E. Merry, *Indicators as a Technology of Global Governance*, 46(1) Law & Society Review, 2012, 72-76

[20] S. E. Merry, *Measuring the World: Indicators, Human Rights and Global Governance*, 52 Current Anthropology, 2011, 84

[21] *Ibid*., 85

The proliferation of numerical targets and indicators is determined by various factors:

the absence of legal certainty in the transnational legal system, to which global experts try to respond through the objectivity of indicators;

the lack of democratic mechanisms within international organisations, to which quantitative measurements represent an alternative source of legitimisation[22];

the neutrality that is supposed to prevent indicators from being influenced by political stances[23].

The success of these instruments is to due to the fact that numbers both transmit a resemblance of objective truth and express the possibility of comparing different socio-economic contexts. However, it is important to remind that all indicators refer to specific theory of social change, which cannot (and should not) be considered as politically neutral.

Thanks to their characteristics, indicators are much more effective than traditional top-down processes of law-making in mobilising action and promoting legal reforms. They are used, for instance, to measure and rank the economic efficiency of specific legal systems, with the aim of pushing national elites to adopt legal reforms that would improve the ranking of their country[24].

However, it must be borne in mind that the creation of goals and indicators tend to standardise complex problems and to sideline other understandings

---

[22] S. Cassese, L. Casini, *La disciplina degli Indicatori Globali*, in M. Graziadei (ed.) Annuario di Diritto Comparato e Studi Legislativi 2012, ESI, Napoli, 2012, 100-101

[23] K. Rittich, *Governing by Measuring: the Millennium Development Goals in Global Governance*, in H. Ruiz, R. Wolfrum e J. Gogolin (eds.) Select Proceedings of the European Society of International Law, Hart Publishing, Oxford, 2010, 466

[24] *Ibid*., 474

of the same issues. Targets and measurements may also be ideologically driven and be designed to support prior political assumptions about development and social change. In this case, they will be poor or contestable proxies for the underlying objectives they affirm to promote[25].

Even though measuring is often seen as a technical exercise, choosing what to measure constitute a highly political decision. The use of quantitative data creates an impression of scientific knowledge, which manages to legitimise political power dynamics.

Because of the proliferation of global goals and indicators, political discussions are nowadays substituted by technical debates on how to create an indicator, what should be measured and what the measurement represents. The result of these discussions is presented as a form of knowledge while it should be more appropriately considered as a political choice[26].

The widespread use of goals, targets and indicators raises some concerns also for other reasons:

- everything that is measured by indices can be an imperfect and questionable proxy of the goals that they are supposed to evaluate;
- when the achievement of a good placement in a given ranking becomes the principal purpose of decision-makers, national actors might try to manipulate the indicators, so that, it is possible to obtain good statistical results, even if good performances are actually lacking;

[25] *Ibid.*

[26] S. E. Merry (n. 22) 88

- indicators may be misleading especially if they are used to make a comparison between countries or regions that have very different history and institutions;
- international rankings may force local communities to allocate resources based on criteria imposed by foreign actors;
- targets and indicators are sometimes identified because of their susceptibility to quantitative measurement rather than because they best embody the goal they are linked to.

Despite the existence of such problematic issues, the number of influential global goals and indicators is increasingly growing. This is because indicators provide a powerful transition from ambiguity to certainty, from complexity to reliable numbers. Such characteristics are particularly effective in promoting the transplant of legal norms and principles.

6. THE (A)POLITICAL ROLE OF GLOBAL EXPERTS

While in theory the use of statistics in the decision-making process could help enhance its transparency, indicators and quantitative data have often been used to consolidate political power in the hands of those who possess specific technical knowledge[27].

The turn towards indicators did not eliminate the powerful role of global elites in the decisional process but replaced it with the technical and scientific competence of global experts. Decisions that used be taken by political leaders or the judiciary are now adopted by technicians who design targets and indicators to measure legal norms and social behaviour[28].

[27] S. Cassese, L. Casini (n. 24) 99
[28] S. E. Merry (n. 22) 85

Those professionals are economists, lawyers, engineers, policy professionals who share a common intellectual background and communicate across the world in a common language[29]. They influence the world as we know it: technical expertise shapes how problems are defined and narrows the variety of solutions that might be taken into consideration by policy-makers and legislative bodies[30].

There exists a widespread belief that the work carried out by technicians, managers and academics is apolitical and non-contestable. The norms and institutions they deal with lie in the background of global politics and their professional work entails activities such as counselling, implementing, interpreting rather than taking decisions. Their choices appear to be necessarily determined by scientific knowledge and their competence is rarely expressed in forms that reminds of the words of a political debate. Their vocabulary is not a vocabulary of power but of technology and know-how[31].

Global experts themselves tend to consider their own professional activity as an exercise of good judgment rather that the expression of political choices. Hiding behind the neutrality of science, they manage to conceal the crucial contribution they give to global governance but they cannot change what actually happens in reality[32].

The political nature of technical choices made by experts is evident when such decisions determine a redistribution of resources among various groups of the society (men and women, rich and poor people, agriculture and

[29] B. S. Chimni, *International Institutions Today: an Imperial Global State in the* Making, 15(1) European Journal of International Law, 2004, 5

[30] Da. Kennedy, *Challenging Expert Rule: the Politics of Global Governance*, 27 Sidney Law Review, 2005, 17

[31] Da. Kennedy (n. 13) 408

[32] *Ibid*.

industry, etc.) or when they have a certain impact on the distribution of power between ideological positions which are usually associated with traditional political perspectives of left, centre and right[33].

An example of these dynamics is offered by the World Bank's Doing Business Project, a program, which provides a quantitative measurement of national economic norms and their implementation in 190 countries around the world[34]. Those indicators are based on the explicit assumption that the dynamism of the private economic sector constitutes the best means to achieve development[35]. However, asserting that development depends on the thriving of the private sector means to reject other eminent theories of economic development, such as the one according to which the key of development lies in the allocation of capitals to industries through specialised banks[36]. Therefore, it is apparent that the emphasis that the experts of the World Bank put on the private economic activity constitutes a subjective and non politically neutral choice: although supported by influential theoretical basis, it is founded on a controversial concept of development.

It is evident that, although the work of the global experts within the international organisations is presented as a scientific and politically neutral activity, the work of these professionals is eminently political in nature and, as such, should be critically evaluated.

---

[33] Da. Kennedy, *The Rule of Law, Political Choices and Development Common Sense*, in D. Trubek e A. Santos (eds.) The New Law and Development: a Critical Appraisal, Cambridge University Press, Cambridge, 2006, 95

[34] See the Doing Business Project website at the following link: http://www.doingbusiness.org/, last accessed 26 June 2017

[35] World Bank, *Doing Business 2011*, 2010, V, http://www.doingbusiness.org/reports/global-reports/doing-business-2011, last accessed 26 June 2017

[36] J. K. M. Ohnesorge, *Legal Origins and the Tasks of Corporate Law in Economic Development: a Preliminary Exploration*, 6 Brigham Young University Law Review, 2009, 1625

7. CONCLUSION

Despite the academic discussions on the possibility of transplanting legal norms from one legal system to another, legal transplants have happened in the past and continue occurring today. At the same time, the way these transplants are generated has evolved over the years and it has been significantly influenced by the fast dynamics of globalisation.

The present article has underlined how the use of vague notions and of quantitative indicators play a central role in the production of legal transplants and reforms. A critical analysis of these phenomena is needed in order to attain a clear and informed understanding of development issues.

Both comparative analysis and functionalist methodology tell us that different rules may lead, through interpretation, to analogous results. The actual insistence on extensive harmonization, shared by most global institutions is originated by a deficit of confidence in the capability or in the willingness of the local governments to set in place the enactments that are considered to ease economic development.

A reduction of the emphasis on the absolute necessity to imitate the formal contents of the laws, and a more convinced recognition of the role played by institutions in modeling the rules: this two actions, when taken together, can reduce the friction that characterizes the process of legal transplants.

In doing this, an important contribution may derive from institutional law & economics[37]: it is indeed essential that, within the process which prepares legal change, every single macroeconomic recipe, for instance the recognition of freedom of competition as an element of good economic

[37] See U. Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, 14 International Review of Law & Economics, 1994, 3-19

performance, is separated from the several possible legal designs that it can assume. This should be based on the recognition that, historically, a successful transition from stagnation or under-development to economic development was originated by a peculiar blend of mainstream economic theories and local regulations.

Bibliography

Berkowitz D., Pistor K., Richard J. F., The Transplant Effect, 51 American Journal of Comparative Law, 2003, 163-187

Cassese S., Casini L., La disciplina degli Indicatori Globali, in M. Graziadei (ed.) Annuario di Diritto Comparato e Studi Legislativi 2012, ESI, Napoli, 2012, 100-101

Chimni B. S., International Institutions Today: an Imperial Global State in the Making, 15(1) European Journal of International Law, 2004, 5

David R., Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law, 3rd ed., Stevens, London, 1985.

Davis K. E., Kingsbury B., Merry S. E., Indicators as a Technology of Global Governance, 46(1) Law & Society Review, 2012, 72-76

Glenn P., Legal Traditions in the World Today, Oxford University Press, Oxford, 2000

Gorla G., Diritto Comparato e Diritto Comune Europeo, Giuffré, Milan, 1983

Graziadei M., Comparative Law, Legal History, and the Holistic Approach to Legal Cultures, Zeitschrift fuer Europaeisches Privatrecht, 1999, 531-543

Kennedy Da., Challenging Expert Rule: the Politics of Global Governance, 27 Sidney Law Review, 2005, 17

Kennedy Da., The Politics and Methods of Comparative Law, in P. Legrand, R. Munday (eds.) Comparative Legal studies: Traditions and Transitions, Cambridge University Press, Cambridge, 2003, 345-433

Kennedy Da., The Rule of Law, Political Choices and Development Common Sense, in D. Trubek e A. Santos (eds.) The New Law and Development: a Critical Appraisal, Cambridge University Press, Cambridge, 2006, 95

Legrand P., European Legal Systems are Not Converging, 45 International and Comparative Law Quarterly, 1996, 52-81

Merry S. E., Measuring the World: Indicators, Human Rights and Global Governance, 52 Current Anthropology, 2011, 84

Monateri P.G. (ed.), Methods in Comparative Law, Edward Elgar Publishing, Cheltenham, 2012

Ohnesorge J. K. M., Legal Origins and the Tasks of Corporate Law in Economic Development: a Preliminary Exploration, 6 Brigham Young University Law Review, 2009, 1625

Peters A., Schwenke H., Comparative Law Beyond Post-modernism, 49 International Comparative Law Quarterly, 2000, 800

Riles A. (ed.), Rethinking the Masters of Comparative Law, Hart Publishing, Oxford, 2001

Rittich K., Governing by Measuring: the Millennium Development Goals in Global Governance, in H. Ruiz, R. Wolfrum e J. Gogolin (eds.) Select Proceedings of the European Society of International Law, Oxford, 2010, 466

Sacco R., Legal formants. A Dynamic Approach to Comparative Law, 39 American Journal of Comparative Law, 1991, 2

Santos A., The World Bank's Uses of the "Rule of Law" Promise, in D. Trubek, A. Santos (eds.) The New Law and Development: a critical Appraisal, Cambridge University Press, Cambridge, 2006

Schlesinger R. et al., Comparative Law: Cases, Text, Materials, New York, Foundation Press, 1998

Shihata I., Complementary Reform: Essays on Legal, Judicial and Other Institutional Reforms Supported by the World Bank, Kluwer Law International, The Hague, London, Boston, 1997

Von Savigny F. K., Of the Vocation of Our Age for Legislation and Jurisprudence, Nabu Press, Charleston, 2011

Watson A., Legal Transplants: An Approach to Comparative Law, Scottish Academic Press, Edinburgh, 1974

Zweigert K., Kötz H., Introduction to Comparative Law, Oxford Univ. Press, Oxford, 1998