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Legal Systems in Distress: HIV—contaminated Blood, Path Dependency and Legal Change

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Abstract

This comparative law and economics essay aims to introduce the economic notion of “path dependency” as a tool for comparing legal systems, and further seeks to take a step forward in our understanding of legal change. It discusses the reaction of a number of legal systems (including Italy, France, the U.S. and Japan) to the HIV contamination crisis, arguing that each system follows a pre-established, relatively predictable, path determined by cultural imbeddedness.

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I

INTRODUCTION

This comparative law and economics essay aims to introduce the economic notion of “path dependency” as a tool for comparing legal systems,¹ and further seeks to take a step forward in our understanding of legal change.² Methodologically speaking, the study of comparative law has been dominated by the historical approach, while in the economic analysis of law, historical observations largely have so far been ignored.³ Nevertheless, the “neo-institutional” approach to economics has extensively focused on economic history to understand institutional evolution.⁴

In this essay, I will try to show some possible fruitful cooperation between these two approaches in understanding legal change, and to obtain more precise observations in comparing the law.

This paper, however, does not deal with how one should compare, a much-abused exercise in which comparativists engage all too often. Rather, I have chosen a very specific object of observation: an experiment in legal change under circumstances that are common to a number of legal systems. I have profited greatly through the opportunity to participate in this thorough and creative interdisciplinary project sponsored by the Columbia University and the Toyota Foundation: HIV-Contaminated Blood Policy and Conflict.⁵

The choice of the object of my observation was not a casual one. The problem legal systems face in the context of HIV-contaminated blood is everywhere the same: addressing the legal condition of victims of AIDS, mostly hemophiliacs and persons who have undergone blood transfusions, who have contracted the disease by using -- under medical advice -- contaminated blood or blood products. This conflict involves, as plaintiffs (in the broad sense), hemophiliacs who have contracted the disease. Among the defendants we find multinational corporations that have produced the contaminated blood products, state officials in charge of blood policy, hemophiliac organizations, as well as doctors in various capacities. The *dramatis personae* include other actors, such as gay activists, people who have contracted the disease because of blood transfusions, and politicians in various capacities.

This litigation arena presents a particularly interesting test for legal change since it can be considered everywhere what lawyers call a “case of first impression,” i.e., a particular legal area before the courts for the first time. In approaching and trying to resolve this conflict, therefore, legal systems may be ill equipped because of local technicalities or power relationships which determine their institutional structure. Such institutional form can be seen as determined by the path that legal systems have followed so far, and of course the degree of dependence attached to such path, i.e., the difficulty or the impossibility of solving the problem because it is incompatible to such path, or the immediate recourse to one or another institutional actor to solve it, varies from legal system to legal system, offering ground for a very focused comparison.

Moreover, the case is interesting because the legal system, in the formal or “Western” sense, dependent as it is on its technicalities and on the legal culture of its actors, certainly cannot be considered the only circuit of decision making that affects the outcome. The political circuit is also very much involved, as is witnessed not only by the different relative position which AIDS and related implications occupy depending upon political agenda. The fundamental relationships between the powers of the state have a real impact on the way the problem is perceived and approached.

Another important aspect of the problem is that it involves “blood,” therefore touching upon ground that is deeply loaded from the cultural viewpoint.⁶ Approaching the topic of “blood” and dealing with an epidemic contaminating it call into question not only some fundamental assumptions related to ideas such as community, solidarity and gift, but also more complex systems of belief regarding race, purity, guilt, denial, blame, etc., all deeply affecting the values of society and creating patterns (religious or traditional) that are important local components of each legal system.⁷ Most importantly, such patterns tend to affect the outcome of legal conflicts in a cryptic, “mute” way.⁸ Consequently, the Western-assumed separation among the areas of law, politics and religion-tradition as patterns of social organization having different roles and domains is very openly called into question by the story of HIV-contaminated conflict.⁹

The preceding discussion briefly sketched some characteristics of the problem which is the focus of this paper. The interactions of these characteristics make it a particularly promising object of observation: on the one hand, it is specific and very focused; on the

other hand, it is simultaneously very complex and multi-layered. Because of a certain inherent focus and specificity, we may find it relatively easy to compile a list of relevant factors (legal, political and traditional) that in different institutional systems affect the problem, without running into the risk of being unable to manage the complexity, excluding, of course, such “too obvious “ and, therefore, analytically useless ideas such as the notion that “law cannot be understood unless perceived as imbedded in a social context,” a sociological notion that explaining everything means nothing.¹⁰ A certain complexity co-exists. We thereby may avoid the potential pitfall of reducing comparative law to a mere listing of more or less different black letter rules. Here we have a unique opportunity to test for their effectiveness in action some much-needed tools in handling legal complexity outside of reductionist notions of the law (in the Western sense) as autonomous from other patterns of social organization, such as the one that has so far dominated even comparative legal scholarship. The idea that the law exists and can be compared outside of its connections with politics and tradition is, *prima facie*, absurd in addressing the problem of HIV-contaminated blood litigation. However, again because of the focused, conflicting nature of our topic, the object of our observation is specifically legal, not only requiring the expertise and the specialist skills of lawyers, but, more importantly, teaching us lessons about specific aspects of legal change as distinguished from other instances of social change.

As a consequence, with the tools of comparative law, we may be able to approach a crucial issue that is also at the heart of neo-institutional economic analysis (and any integrated approach to the social sciences): how and why legal institutions change and evolve in the world of globalization. Are we anywhere near developing effective tools to measure legal change in order eventually to be able to push comparative law a step forward? Measuring a pattern of legal change (e.g., its speed, its pervasiveness in the legal system, the layer of law in which it occurs) seems to me a first step in measuring legal differences, rather than restricting comparative law to dealing (at its best) with taxonomy, or (at its worst) with black letter juxtapositions of different national reports.

Paradoxically, while law is certainly the most complex form of modern social organization, and consequently needs to be handled and approached with tools that are capable of handling such complexity, lawyers are among the social scientists the most primitive in developing these tools. As a consequence, the call for the need to create a

“science of organization” as a cooperative interdisciplinary effort to understand social and institutional change,¹¹ has been neglected by lawyers, and that cutting-edge approach has, as a consequence, lost a potentially important contribution: the legal system. Of course, any attempt to reopen a dialogue between lawyers and other social scientists has first to purge the “lawyer’s approach” of its original sin: the state-centric approach that makes it wholly incapable of handling global issues, and that makes the lawyer’s approach formal, verbose and unscientific.

II

MENU DEPENDENCE:

LEGAL POSITIVISM AND THE MONOPOLY OF THE STATE

Lawyers have a strong tendency to assume that the country in which they operate has a monopoly on the production of law. Comparative law strikes a hard blow to this vision by pointing out the degree to which legal issues are not restrained by national boundaries, and how any attempt to analyze them without taking into account their transnational character is severely limited.

For legal scholars and policy makers to refuse to consider the solutions adopted by legal systems other than “their own” -- e.g., the imposition of liability for HIV-contaminated blood -- makes as much sense as an AIDS research team in Paris refusing to read reports from another research team in San Francisco.

From a practical standpoint, the global nature of certain legal problems, like those involving (such as in our HIV-contaminated blood conflict) multinational corporations, is becoming more and more evident to legal practitioners. Different legal systems, on one hand, compete for forum shoppers by offering alternative solutions that less than rarely produce races to the bottom. The transnational nature of certain market actors (e.g., multinational corporations which produce blood products) makes it difficult -- if not impossible -- to monitor by means of *national* law. It follows naturally that various degrees of international legal cooperation are and will become more and more necessary.¹²

Despite the obvious, practical needs of a global approach to the law, the parochial attitude is the rule in legal reasoning, paradoxically even more so in legal scholarship than in

legal practice. Legal positivism -- an approach that in various forms has dominated the Western approach to legal thinking since at least the French Revolution -- has taught lawyers that a legal problem changes its nature with the change of the language of a legal provision. The consequence of this approach in our domain is that lawyers are not participating with other social scientists in the common enterprise of facing the social problem of compensating by official action those hemophiliacs who were wrongfully contaminated. The problem for the lawyer is reduced to whether, given the language of Article 1382 of the Napoleonic Code, the behavior of, say, Mr. Fabius (the former socialist prime minister severely involved in the transalpine blood scandal) can be considered tortious; or, if given the language of the given article of the Criminal Code, its lack of effective political control may be considered reckless and therefore a crime.¹³ Of course, along these lines of reasoning, the change in the language of the tort provision, e.g., from Article 1382 of the Napoleonic Code to Section 823 of the German BGB, changes the entire nature of the problem under inquiry. Should the same problem arise in Germany, as a consequence of this cultural attitude, German courts will be perfectly justified in plainly ignoring what French courts have done or are doing. French courts are perceived as approaching and solving “a different problem.” Perhaps the clever words of Professor Langbain (discussing the subject of abortion) best respond to the myth of “different problem”: “It has been striking to watch the United States Supreme Court wrestle with the problems of abortion as though pregnancy were a phenomenon unique to the United States.”¹⁴

Obviously this parochial attitude is patently absurd, not only when facing defendant corporations which operate in markets which know no boundary, but also as an attitude toward the nature of legal reasoning in general, and of judicial reasoning in particular. Indeed, the language of the tort provision of the Napoleonic Code has not changed for almost 200 years and that of the German BGB for almost a century now! Dare anyone propose that the that French and German tort systems have not evolved and changed to accommodate the tremendous pressures of two centuries of social and economic acceleration? What is even more remarkable is that much of tort law shows convergence at play in most industrialized countries, so that the fact that there is a lot to learn from each other is obvious. It is very difficult even to begin thinking seriously about legal change within this remarkably narrow attitude, one that lawyers share in varying degrees of extremity, throughout the Western legal

tradition and one that is certainly not unique to the civil law world. Legal positivism can be considered as a Ptolemaic approach to legal science, that precluding the Copernican revolution, it places legal discourse in such a primitive, scientific status to make it uninteresting and unusable for other scholarly approaches to social science as much as pre-Copernican astronomic theory would be useless to a modern astronomist. It assumes that nothing exists beyond the Gibraltar of the boundaries of the State. It assumes the State as the center of the legal picture. It refuses to see the different State's contingent approaches as rotating around the law as a global phenomenon of social organization. National legal systems must, however, be understood as different (perhaps staggeringly different) ways to solve the same problems of human co-existence, exactly as different languages introduce different approaches to the same problem of inter-individual communication. Paradoxically, while nobody can claim to be a linguist without using a comparative method and observing structural variations in different languages, everybody can claim to be a jurist while plainly ignoring even the possibility of different ways to approach the very same problem. In the domain of change and evolution nobody who is taken seriously in the scholarly community of linguists can claim to advance a theory on how language changes without considering the interactions between different languages. The comparative approach is in other words absolutely unavoidable in the analysis of any phenomenon of social change. It is incredible to observe the number of theories that claim to understand legal change merely by focusing on one legal system and on the local social and political pressures that may change the law of one legal system in one specific contingency and then infer from that general propositions and statements about how the law changes.

This legacy of legal positivism costs dearly. A pre-Copernican theory of astronomy nowadays may offer a certain historical interest, but clearly has no more impact on the science of astronomy, no more impact than does magic on modern medicine in Western societies. Yet, the pre-Copernican mentality of lawyers is a major component of the phenomenon of "path dependence" which this paper addresses. To be sure, the legal choice which is carried on in the face of a social emergency, such as AIDS, and the need to compensate the victims, are indeed affected by a fundamental constraint, or "menu dependence" as Amartya Sen has recently put it ¹⁵. A constraint that is created by pre-Copernican way of thinking about law and institutions, and that is therefore common to all

institutional choices, is much more evident in a crisis situation when the system is in distress. Instead of considering a “menu” of alternative institutional reactions to a given social problem, lawyers simply do not consider opening such menu. The menu is not opened, the menu is not scanned, and the menu is not considered in the typical lawyer’s thought and decision making processes. Because of haste and intellectual backwardness, the law orders the same, tired entree, following a national way of doing things that is the *only* conceivable way in the lawyer’s pre-Copernican approach. The result of such approach to choice may be called “sub-optimal” if we desire a euphemistic description, and “irrational” if we have not that desire, in all cases in which the transaction costs introduced by opening the menu (changing the traditional routine) are not higher than the discounted benefits of a different social choice. Since it is likely that the social benefits from learning from other experiences - rather than continually reinventing the wheel -- could be very high while, information costs to reach knowledge of alternative possibilities would be very low (it may be necessary but to hire a few good comparativists). The choice of not even opening the menu is, *prima facie*, inefficient. It looks as irrational as it would be for a utility maximizer seeking pleasure from food not to consider “foreign” entree selections. Consider a hypothetical American who routinely makes these meal choices: (a) deep-fried, frozen fish sticks over Japanese sushi; (b) Chicken McNuggets from the golden arches before daring Thai chicken satay; or (c) for dessert, an ice cream sandwich rather than French creme brulee. Our hypothetical American food lover has missed out on some great possibilities in his quest for pleasure. As a matter of fact, such refusal to consider alternatives to the usual menu is typical of most children, and strikes adults as irrational. Eventually it can even be prejudicial to a nutritious diet.

Of course, a different and more difficult issue that may be called “path dependence” and distinguished from “menu dependence” although both are aspects of the same broad phenomenon of cultural imbeddedness, is whether it would be efficient to implement the “foreign” information once obtained, rather than sticking to the more comfortable parochial routine.

For the time being it is enough to observe that in many societies law is the most important instrument of social control or, if we prefer, it is the most effective system of social incentives. Consequently, its role in the solution of social problems is extremely important so that an intellectual approach that just excludes from the “menu” whatever is not local, is

severely limiting in the quest for optimal choices. Menu dependence is introducing a limit even to the possibility to observe and rationally decide whether other aspects of path dependence (such as the incompatibility of a possible, alternative way of solving a problem because it is incompatible with the institutional background) determines whether it is worthwhile or not to invest the institutional resources necessary to import successfully the foreign solution.

From the perspective of analyzing legal systems, moreover, such a “menu dependent” intellectual approach affects enormously the way in which a given phenomenon of legal change happens. Most of the time, the reception of foreign law occurs by mere chance, without any *ex ante* open discussions of the cost and benefits of its introduction.¹⁶ Consequently, many “sub-optimal” choices result, and the possibility is all the more likely if a system is “in distress.” Unfortunately, institutions may be as important, and sometimes even more important, than technology in social problem solving.¹⁷ To offer an example, consider the social objective of saving lives on the freeways. There is no doubt that, given the state of technology, we can save more lives by using a speed limit (say 50 miles per hour) than by using technology (say Airbags). It is also true that institutions may offer the incentives to develop technology, so the two aspects of social problem solving should not be kept separate. Most importantly, given that societies never protect any value independently from the cost of protecting it,¹⁸ institutions may be used to obtain a given result cheaper than technology.

If these observations are true, good institutions can make the difference so that artificially closing the boundaries of the market for institutions is a completely mistaken policy. But indeed, this is exactly what legal positivism does, by intellectually supporting an artificial limitation to the possibility of policy makers to learn from other’s experiences.

In the domain of AIDS, as in the case of technology to save lives in freeways, it is most likely that given the current level of research and technology to fight the disease, many more lives can be saved by mean of legal institutions (i.e., by means of the appropriate social incentives) than by means of medicine. Closing the market to institutional ideas at the boundaries of the state is not different than closing to the French market “non-French” blood treating products.

III

THE TECHNOLOGICAL REACTION IN THE HEMOPHILIACS-CONTAMINATION SAGA

In the limited domain we are observing, the technological solution to the problem was reached in a remarkably short time. In July 1982, a report in the Center for Disease Control's *Morbidity and Mortality Disease Weekly Report*, offered for the first time scientific evidence that AIDS could also affect heterosexuals who were not engaging in intravenous drug use. Such report, although very cautious, and indeed very cautiously received, introduced the equation between the use of blood products and AIDS.¹⁹ At the time the only possible reaction was institutional, and has been witnessed in the United States by the relatively rapid (although controversial) policy of exclusion from blood supply of the so called 4-H Club, (Homosexuals, Heroin Users, Hemophiliacs and Haitians) which were rapidly considered risk groups by policy makers. In April 1984, when the discussion over the so called "surrogate screening" was unfolding (i.e., the discussion over the utility of using screening available for hepatitis in order to detect AIDS) the retrovirus responsible for AIDS was identified. This was announced by Secretary of Health and Human Services Margaret Heckler at a Press Conference together with the statement that a blood test for the antibody of the virus would be commercially available within six months. Already in May, the American Red Cross announced its plans to begin wide-scale trial testing of blood donations to antibody to HTLVIII. By January 1985, the Public Health Service issued a recommendation for the screening of the whole blood through blood testing that was by then licensed by the Food and Drug Administration. Blood Bank testing began in April 1985. Following the American leadership, within a year the screening of blood donors was implemented worldwide.

On the different and related field of viral inactivation of clotting factors, those used as medicines by hemophiliacs, the research was started earlier mostly to take care of the problem of hepatitis B transmission to hemophiliacs. The technical problem was complex because there was a deep concern that a pasteurization process would render Factor VIII concentrate (the lack of which is the essence of hemophilia since it precludes blood clotting) less an effective treatment. This would make the care of hemophiliacs more difficult. The first licensing of a heat treatment technique was issued in Germany in 1981. The corporation

producing it acknowledged however a 50 % loss of potency. Heated products moreover were supplied at ten times the price of non heated ones. A higher quantity of plasma became necessary as a consequence of the loss of potency, so that a shortage of supply rapidly followed. Further research led to the licensing by the American Food and Drug Administration of heat treatments in March 1983, eight months after the first reported case of AIDS in an American Hemophiliac. By early 1984, five companies had obtained licenses for heat treatment. General use of treated factor that almost completely rendered clotting factor HIV free began in 1985. About twenty more hemophiliacs became HIV positive between this date and 1988 “when modifications in the process of viral inactivation rendered clotting factor safe. By then HIV had already infected an entire generation.”²⁰

In seven years, from 1978 when HIV first entered the blood supply, security was technologically reached. Despite the high toll in hemophiliacs' lives (many thousands were infected) the timing of the technological reaction to this specific problem seems remarkably short as compared to the timing of the legal systems in most industrialized countries.

IV

EASY AND DIFFICULT

INSTITUTIONAL REACTIONS

The rapid technological reaction to the HIV-contaminated blood saga was accompanied by an (arguably everywhere untimely) first institutional reaction. Protect the blood purity by excluding the possible sources of contamination from supplying it. This institutional response can be considered a typical command and control reaction, possibly the most primitive way of solving a social problem available in any community.²¹ A rather political component of the legal system, typically a high central governmental body reacts by issuing regulations of various nature as an immediate, emergency response to a problem. In this respect, such a legal problem may be considered easy, calling for an obvious reaction that is almost everywhere the same with important variations in timing, in political responsibility, and in social reaction, but not in the legal structure. This is a reaction within the pattern that can be called political law, where legal systems actually do not have much to learn from each other for the good reason that all of them, if reacting, will react quite in the same way: This is what we may want to label a public law or a political responsibility reaction. Institutional actors in charge of a given sector of the government (in this case public health) will react by using their available institutional tools and channels to face the emergency. In cases such as these, problems may arise in case of less than clear jurisdictional boundaries with consequent overreaction (two bodies of government investing resources to react) or underreaction (nobody reacts for what can be considered a negative conflict of jurisdiction). Both of these patterns happened somewhere in legal systems facing the HIV contamination emergency. These problems may be considered structural consequences of the complexity of the modern regulatory State: Sometimes they become relevant in subsequent phases of the institutional reaction as barriers either to criminal or to civil liability.

The target of these public law reactions were the actors of the blood marketplace. A particular marketplace with a rather significant percentage of it by then based on the supply side, on the relationship of gift.²² The problems experienced with for-profit blood collections, from the exploitation of the poor to the poor quality of the blood collected, were

enough at least to introduce attempts to base the blood systems on voluntary donations (Japan offers a particularly interesting example of fast abandoning of the for-profit system).²³ Of course this is true only to a given extent. Indeed, while the rhetoric of gift has been highly pervasive and sacralized at least ever since Titmuss' book in the early seventies, it is still true however that almost all of the plasma supply worldwide is provided by American-based corporations and obtained by paid donors. Consequently, only the fresh blood transfusion market is significantly based on voluntary supply. Also here, however, things are not so clear-cut because the system of indirect payment, e.g., "donation leaves" from work, may have introduced a system of market incentives also within the rhetoric of the "gift of life."

It is important to observe that this first easy institutional reaction aimed to "purify" the blood system has created more social problems, themselves in need of an institutional reaction, that we can see as starting to frame the more difficult legal problem of placing, at different levels, blame and legal liability for the contaminated blood saga. This is indeed the consequence of direct command and control regulation as supported by the positivistic myth of the monopoly of power in the state and of the consequent quasi-divine nature of the legal system. Direct regulators, because of the nature of their decision making process, seem to be sensitive only to their specific worries and tend to value the justification of their existence as top priority, completely disregarding the more general problems that may be left unsolved or even aggrieved by their action.

The problem is that this kind of decision making under distressed conditions has to rely and tends to sacralize an amount of knowledge that is completely insufficient for any rational action, let alone public decision making. The irrational discrimination and the placement of the social stigma that stems from such an indirect institutionalization of a first and still very superficial knowledge, is however very disruptive for the legal system as a whole. While, for example, in the United States the gay community was strong enough to react politically to safeguard its civil rights, in other political and cultural contexts, such as Italy or Japan, this simply was not possible. Sometimes this kind of discrimination, in actual regulation or in proposals, has given incentives to some discriminated social groups to come out of the semi-clandestine state in which they were living and to assert rights to that point outrageously abridged by what Laura Nader calls harmony ideology. Hemophiliacs in Japan

are the most interesting example of this reaction within an institutional background that discourages conflicting standing on rights.

In response to difficult institutional problems and to obtain rational decision making, legal systems may well learn to learn from each other, especially those in which a different social impact to the easy regulation is felt. It is in the *ex post* distribution of social losses (also in the form of blame and stigma) of a given social tragedy that a number of difficult issues arise for decision makers. While it is often repeated that hard cases make bad law, this is probably true only when the legal system is a place of decision making so closed in itself to be unable to see and experience alternatives. For example, while the costs imposed on certain communities may be external to the decision making process when such communities have no voice for political or cultural reasons (e.g., homosexuals in Japan) their having a voice elsewhere should make apparent such kind of “silent” externalities. In a rational approach to social decision making, a social loss is no less important and relevant to the overall efficiency of the system just because it has no voice and consequently cannot be internalized. A good legal and institutional system evolves in order to correct its own shortcomings, precluding its possibility to reach information relevant to optimal decision making (such as the actual social groups affected by its direct regulation of a given sector). A prerequisite for this evolution is, however, the knowledge of alternatives, a prerequisite for any possible move to their implementation.

V

TRANSFER OF TECHNOLOGY AND **TRANSFER OF INSTITUTIONS**

While constraints in the knowledge coming from menu dependence may seem relatively easy to overcome both under ordinary circumstances and under distressed circumstances (a good study in comparative law is probably easier to provide than a screening test for HIV), this accomplishment may not be so easy in practice. Indeed, it is a whole legal culture still deeply rooted into the pre-Copernican paradigm that must be subverted before it may become routine in legal decision making to open a transnational menu.²⁴

The real problems stemming from path dependence, however, may arise because the so called “legal tradition” (i.e., civil law, common law, post socialist etc.) may be considered itself a major phenomenon of path dependence. Legal systems have evolved for many hundreds of years following different paths. These paths are different routines involving different institutional actors so that the question arises of the costs of departing from these established routines once a possible alternative discovered on the transnational “menu” is considered desirable. We are facing here a crucial problem of comparative law: transfers of legal knowledge.

What makes the problem difficult is that institutions and technology are not the same thing nor they have a similar economic nature. To be sure, they have a similar function. They both lower the transaction costs of social exchange. Good institutions, like good technology, are a prerequisite of economic performance and growth. This is possibly the most important hypothesis explored by the en-institutional economic analysis.

If we focus on transfer, however, institution and technology seem to differ a great deal. Technology is easier to transfer than institutions. Institutions, to be successfully transferred, require a much higher investment in terms of infrastructures because the established routine of legal traditions may require substantial modifications. True, the transfer of technology also may need infrastructure to work. I cannot transfer a brand new Sony television to a desert island if there is no electricity to make it work. Also, it may be difficult to transfer a screening test to an African hospital if there is no manpower able to use it. However, with a rather limited input of infrastructures (e.g., I could export along with the photometer a medicine graduate able to use it), it is possible to export technology. Once exported, the technology will not change its nature. Once exported, it will have a very similar use than in the country of production. Sony televisions transmitting CNN are at work in most African four stars Hotels.

While investment in infrastructures is not necessarily a prerequisite for exporting technology (you may export a working Landrover everywhere), it is always needed for the export of institutions.

Despite this need of investment in infrastructures, and despite the almost total lack of such investment thus far in legal history, as transfer of technology, and transfers of institutions also have happened and continue to happen all the time. The direction of the

transfer also is common, usually from the more developed to the less developed countries. Comparativists have developed an extensive literature and even a sort of a theory around the notion of “legal transplants.”²⁵

Yet, there is another fundamental, I would say inherent, consequence of the economic nature of institutions that makes their transfer different from the transfer of technology. Institutions, but not technology, are deeply transformed for the very fact of being transferred.

Two local factors are always at work changing institutions in the moment of their transfer: politics and tradition. However, while the former can change an institution consciously when receiving it and, by definition, is not a problem but only the consequence of self-determination, the latter may change an institution unconsciously. The local legal tradition is a phenomenon that can be described -- and possibly one day empirically measured, in comparison with other legal traditions -- by the notion of path dependence.²⁶ This observation carries some consequences that appear clearly also in the narrative of comparative legal discourse.

In the beginning, comparativists started talking of legal transplants focusing in slow and incremental transfers of institutions to one context or another, the receiving context being able to absorb and indeed assimilate the received institution. It is not a case that the main focus of Watson's paradigm shifting book of 1974 has been the great reception of Roman law in late medieval Germany.²⁷ This focus on incremental slow changes, as well as the very narrative of legal transplants, has nurtured the idea that law is a living social institution and not merely a product of laboratory technology. If law is culture, a living culture, also rational decision making may be a notion at odds with it. Among the Jehovah Witnesses, for example, blood transfusions are refused for religious reasons. A secular law reflecting such tradition could be difficult to analyze within a context of rational decision making. Arguably, in times of AIDS, such refusal could save a number of people from contamination but as an institutional reaction would be as rational (or irrational) as solving the problem of AIDS spread by imposing sexual chastity. Certainly, however, in a Jehovah Witness society a transplanting of a very rational regulation imposing blood screening before blood donation would not be rational, given the absence of the social practice of transfusions in the proposed “receiving” society. In other words, within the notion of law as a living cultural product

rather than as a system of institutional engineering, the very possibility of axiological (or normative) reasoning about transplants is limited.

More recently, the notion of legal transplants has somewhat changed its meaning and has been applied to what may be seen as much different phenomena of technological transfers of law (i.e., transfers of formal institutions) happening in a very short time, usually as the result of some revolutionary urgency. Such transfers of institutions most times have involved only a superficial layer of the legal systems.

The typical example of such a phenomenon is the export of Western legal institutions into former Socialist countries. Some scholars have observed a real pattern of market competition in the supply of formal institutions.²⁸ However it is not so easy to detect competition between different national (or supranational such as EU) legal systems, since for example, a number of US sponsored programs have ended up proposing German inspired institutional arrangements. Other examples may be the import of Western institutions in China and Japan in the last part of the nineteenth century or the export of Western institutions into former colonies. These phenomena of institutional transfers cannot properly be captured within the metaphor of the transplant (a metaphor that conveys the idea of a living part transferred in a living body) but that would certainly be better captured with the notion of export which does not convey the idea of the necessary assimilation of the product exported. In other words, while the notion of transplants conveys the idea of an organic assimilation, the notion of export conveys the market relationship around a commodity (the institution) which does not need to be assimilated (nor may it be intended for assimilation but maybe for subversion). Interestingly, where you face the relationship of market export rather than that of organic transplants, the outcome has historically been extensive legal pluralism with a number of contradictory legal orders coexisting in the same territory.²⁹

The difference between the two phenomena, long and incremental assimilation as opposed to sudden and reactive exportation, seem very apparent indeed and calls into question the taxonomic choice of using the same label “legal transplants” for these two very different phenomena. In our context, the difference is crucial. Studying legal systems in distress means observing legal systems and approaching problems that by definition must be solved in very little time. Possibly there is no time for transplants under circumstances of distress. There is a case for rational exportation whenever transaction costs that may be

lowered by such exportation are lower than the extra ones that are imposed by the need of changing the routine determined by path dependence. One possibility is to endorse normatively those exports that may and eventually make a transplant happen. Since the time dimension is crucial in detecting the difference between a transplant and an exportation, even if an exportation may well eventually lead to a transplant, it is not advisable to confuse two institutional phenomena that at the very least are experiencing very different phases.

Another aspect that should be at the very least mentioned has to do with the difference between voluntary and coercive transfers of law. Using the market metaphor of the export of legal systems, one takes for granted their voluntary nature. Importing countries are seen as voluntarily importing patterns of law from exporting ones by purchasing them within a market-like transaction. This idea is far from being analytically persuasive, and the implications behind it should be considered briefly if one wants to approach these complex phenomena with some precision. The notion of a voluntary, as opposed to an involuntary, transfer of law is behind a few fundamental notions in the literature that studies transfers of law. It supports the idea of legal imperialism, seen as the imposition of one legal order (usually Western law) on a local society governed by its own law. It is moreover behind the notion of legal transplants happening because of “prestige” as opposed to “force”: the first being voluntary the second being coercive. Indeed the anthropomorphic limits of these notions are clear. Legal systems are not entities capable of expressing a conscious will (or refusal) to buy a legal institution from another legal system. Who expresses the will of the legal system? The law is mostly a spontaneous order and legal change can be understood only within this idea, which is at odds with the notion of voluntary vs. involuntary transplants. On the other hand, there is a difference between a legal order (or a number of patterns of law) imposed by political violence (such as soviet law in Eastern Europe) and a legal order that finds its way because of phenomena of imitation in the scholarly community of a given country (such as American-inspired Criminal Procedure in Italy) or the penetration of legal patterns bolstered by international financial institutions or Western organizations in the third world (e.g., Law and Development in Latin America).

These differences in patterns of legal transfer, despite the analytical weakness of the voluntary metaphor, should not, however, be underestimated -- particularly in an area like AIDS or, more generally, the legal regime of blood and public health. In these areas, we may

be tempted to take for granted that a number of “good” institutional solutions (usually coming from the more advanced Western societies) should be followed worldwide as a matter of course. Unfortunately, this attitude is very dangerous and reflects the same ethnocentric attitude that affects a number of devotees to international human rights movements (and similar approaches such as law and development) that consider objectively good a given approach (the Western) and consider it worth any disrespect for local peculiarities. In our domain, the most important example of this attitude (and of its dangers) seems to be the recommended policy target of national blood self-sufficiency. This idea, together with that of the “gift relationship” covers up a large number of dangerous racist prejudices that should certainly be faced openly when proposing “objectively good” international institutional solutions. Blood self sufficiency dangerously confirms the idea of the purity of local blood as opposed to the tainted nature of foreign blood, a social attitude that I would resist recommending on policy ground in a world where xenophobia is already more than dangerous. Moreover, the “gift metaphor” conveys the notion of the purity of blood coming from the rich as opposed to the dirty and low quality nature of the blood coming from the poor that needs to sell it rather than giving it up for free. The next step when seeing that employees get paid freedom from work in order to donate blood (a form of market-like incentive) will be to say that we only consider pure the blood of self-employed or of rich people that do not need to work, who are the only ones “really” donating it as opposed to the blood of the employee and of the ordinary people. The return to the notion of nobles having “blue blood” is not far away.

To conclude this section, it is important to keep in mind that there are important differences between transfers of technologies and transfers of institutions, differences that cannot be disregarded and that call for analytical instruments able to capture them.

VI

THE IMPACT OF INFORMAL INSTITUTIONS ON THE TRANSFER OF FORMAL ONES

These observations can be highlighted by the neo-institutional paradigm. We can observe that the transfer of “formal institutions” at odds with “informal institutions” of the

receiving country may end up creating transaction costs rather than reducing them. In such a case, the export of institutions would be inefficient within a simple cost-benefit analysis. To offer an example, say that a given racially complex society has worked up an equilibrium of co-existence at the border of two nation states by which the minorities of one ethnicity are respected and accepted by the majority of a different one and vice versa. Importing a policy such as “blood self sufficiency” would create very substantial transaction costs by implicitly blaming the epidemic on the minority group. In this case the formal institution (a law that forbids the use of foreign blood) is at odds with the informal institutions that have guaranteed co-existence. It is easy to observe that its benefits in terms of reducing the AIDS epidemics would be largely overcome by the costs of creating tension and perhaps social disruption.

The phenomenon of institutional transfer when described within the economic notion of “export” rather than with the organic metaphor of transplant, calls for a new analysis of the economic nature of the transaction between the importing country and the exporting one. Indeed, it is very likely that when there is tension between the receiving informal institutions and the imported formal institutions, what changes is the very nature of institutions as devices to lower transaction costs in limited information settings. The friction between the two sets of institutions may end up producing so many additional transaction costs that formal institutions as exported commodities may not be explained as transaction costs reducing devices, but as objects of a market transaction whose happening is difficult to explain both within the neoclassic model (formal institutions may have no market value) and within the neo-institutional one. In order to understand institutional transfers, therefore, we may need integrated interdisciplinary models that thus far we have not developed.

Given the function of institutions as transaction costs reducers in contexts of limited information, their efficient transferability may be limited by the fact that formal institutions only live in symbiosis with a set of informal institutions and practices that allows them to work. The main difference between the transfer of technology and the transfer of institutions is that the latter are necessarily transformed by the set of informal (or of other formal) institutions in which they are received. To use an example in the domain of blood, while a given screening test (a technology) can be properly used in a foreign context (as it is therefore efficiently transferable), a legal regime for blood transfer (a formal institution) necessarily changes its nature when affected by the local tradition or of by the new political

context. It is indeed affected by the cultural construction of blood on one hand³⁰ as well as by the possibilities to be politically exploited in order, for example, to polarize the political marketplace. It is moreover affected by the institutional setting that is already in place which may, for example, undermine the possibilities of implementation. Consequently, while a given technology has market value everywhere, legal institutions have market value (as transaction cost-lowering devices) only where they are compatible with the receiving (formal or informal) institution setting. Otherwise they are valueless.

If such is the case, one could be tempted to observe that there is no way to explain in economic terms the fact that transactions having as an object something completely valueless happen and have happened all the times in history. It is easy to observe that in transactions having as an object formal institutions, the utility may be for those “selling” rather than for those buying them. Whether the utility is measurable in term of “national” political and economic influence in the receiving country, or whether the competition is between advisors over resources of international aid, the outcome may be always the same, and shows, once more, how problematic it is to make sense of the notion of a market for institutions. Such conclusion is sustained by observing how in Eastern Europe, Asia or Africa, advisors try to sell apparently valueless institutions (mainly Codes or written law) while the receiving countries are interested in getting technology (like computers). While formal institutions, such as codes or paper law, are economically useless (at least in the short run, unless and until a transplant happens) and do not have measurable economic value, technology (computers, Landrovers or screening kits) have a market value and are immediately useful.

Concluding on the difference between technology and institutions one could observe that institutions (as transaction cost-lowering devices) can be considered a “living” aspect of societies sharing with language and music an important aspect of “local knowledge.” Of course, all living legal systems, given their complexity, can only be understood as a necessary aggregate of formal and informal institutions so one cannot be conceived as separate from the other.

Formal, “laboratory-made” institutions, such as those that are created and supplied (by Western scholars and financial institutions) to developing countries or to countries that are experiencing a transitional phase, on the other hand, share aspects of technology. They may or may not lower transaction costs depending on the nature and compatibility of the

receiving background. In case of incompatibility, the transfer of such laboratory made law can be explained only as transfer of useless technology, which of course happens a lot (particularly from the north to the south) but that can be explained only as a pattern of corruption (of the ruling elite) or of exploitation of a weaker party, or as outright fraud. In other words, such laboratory-made institutional technology cannot be transplanted unless the local informal institutional setting is compatible. To ascertain such compatibility or to invest in making it compatible may require a great deal of time with the consequence that a system “in distress” it is very unlikely to result in successful transplants.

VII

INSTITUTIONAL DISTRESS: **LEGAL AND POLITICAL EMERGENCIES**

Does this mean that transfer of knowledge is impossible in the law without creating distortion? Does this mean that on policy ground the positivistic paradigm not only is the only one that works but also should be safeguarded? Should we conclude that institutions should be produced locally rather than internationally? In other words, is the difference in possibilities of success between the export of a blood screening test (or a Land Rover) in Africa and that of a legal regime for blood transfusion (or of car accidents) a consequence of the inherently transnational and global nature of markets and of the inherently local nature of institutions?

If such were the case, it would make sense for the AIDS research team in Paris to communicate with the one in San Francisco while trying to develop a vaccination kit (which has general market value) while it would make little sense for the legal research in the two contexts to communicate. If legal institutions are not transferable in an efficient way (i.e., if transfer of legal knowledge is never worthwhile since the result would be increasing rather than decreasing transaction costs) it makes sense to invest in local institutional knowledge rather than in transnational communication.

Despite the mentioned differences between transfers of institutions captured by the narrative of legal transplants and transfers of technology captured by the economic narrative of import-export, such conclusions would be wrong. To begin with, importing a technology

outside of an institutional setting that favors its proper use may be wrong on policy ground. It would be very dangerous to import HIV screening technology without a legal regime to protect privacy, or without limits to the possibility of its coercive application, as much as it may be very costly for society to import cars outside of a rule for circulation and liability. There are, moreover, some theoretical reasons that bring us to the heart of this paper.

To begin with, the market for technology is not necessarily global, being largely affected by protectionist practices. In the domain of blood and blood products, this is particularly clear (the French resistance in front of the American screening of products being paradigmatical).³¹ Moreover, the very fact that transplants have historically happened shows that sometimes efficient transfers of institutions are possible. This last observation inserts the time dimension into our problem. Historically, indeed, transplants do happen but they never happen under time stress. Put it in other terms, historically the export of institutions can be successful only if there is enough time for the local institutions to adapt to the new, imported formal ones by adapting and modifying them.

This creates a serious problem when an international emergency such as that of HIV-contaminated blood arises. In a case like this, while it seems obvious that international cooperation is needed not only in trying to create technological answers to the problem, but also to work out good legal solutions that may help to limit the bad consequences of the emergency, the scarce adaptability of legal systems in distress creates major problems.

In cases of distress, path dependence seems omnipotent, showing all its power in foreclosing the knowledge of alternatives (that is, “menu dependence” as an intellectual outcome of legal positivism) and, most importantly, in keeping legal systems following decisional routines that may be sub-optimal.

This phenomenon of path dependence may be analyzed in two sub-phenomena: (a) “reinvention of the wheel,” that in economic terms can be described as loss of opportunity to gain from scale economies; and (b) unpredictable impact of imported, internationally developed “institutional solutions” to social emergencies.

The supply of HIV-tainted blood and products is an emergency situation that creates institutional distress in the sense of the challenge to all legal systems involved to find an institutional solution to a sudden and dramatic social problem. The optimality of any institutional reaction should not be evaluated only from the perspective of the “one shot”

impact of the solution of the present conflict, but also from the set of signals and incentives that it conveys to future transacting. While AIDS victims' compensation and the placing of social blame and responsibility for that avoidable tragedy is now the only (difficult) legal problem to be solved, since the technological problem has been solved by the development of screening tests and heat pasteurization procedures, it is crucial to find a solution able to prevent future occurrence of similar tragedies. For example, while a victims' compensation fund (such as that provided by a number of legal systems³²) may be optimal to compensate hemophiliacs, avoiding for them the additional distress of litigation, it is crucial not to forget that if compensation is paid out of public money it will not create any incentives to responsible parties (such as corporations) to act differently in the future. The simple application of basic economic analysis of tort law shows that we may prevent future accidents of this kind only by placing their burden on the market actors that can be detected as responsible for them.

In both these dimensions, both the backwards-looking (compensation) and the forward-looking (disincentivating future similar tragedies) path dependence creates distortion that may end up foreclosing the possibility of institutions to reduce transaction costs. To be sure, possible alternative institutional solutions present costs and benefits, and tradeoffs may be unavoidable. For example while tort litigation may give correct future signals (particularly when using punitive damages), it may also introduce extra distress to victims and it may introduce very high transaction costs, such as attorneys' fees. Victims' funds may be cheaper in administrative costs but may be less disincentivating for future behavior. Criminal law may be very effective in preventing future behavior but may be undercompensatory. One of the impacts of path dependence is that it precludes for different reasons the possibility of getting the best from each alternative. For example, a victims' compensation fund may be created using the punitive damages obtained by a class action litigation; or victims may be allowed to participate to the criminal trial in order to get direct compensation; or some public interest agency may litigate in behalf of the victims. Usually this comparative functional analysis of the alternative possibilities of solving a problem is precluded by path dependence. Legal systems have developed in time a number of technicalities that simply make very rational solutions unfeasible, for example, those precluding a victim's participation in the criminal trial in America, or those making punitive

damages unavailable in France, seem to be obvious aspects of path dependency that preclude the efficient solution of a given emergency.

Such an emergency is not a unique phenomenon in the law. Legal systems have faced other emergencies in the past. An obvious example may be the environmental crisis in the early seventies which has been accompanied by a reaction whose path dependency is easy to detect. Despite a number of early studies devoted to compare the efficiency of alternative legal regimes to compensate pollution victims and to reduce future pollution,³³ the institutional reaction of legal systems has followed very predictable paths. The French have used a lot of administrative law, while the Americans have mostly resorted to courts to take care of such emergencies. Such a behavior could be predicted by reading Tocqueville written almost 150 years ago. Legal traditions are paths that are very difficult to change.

Examples may be multiplied although it seems difficult to find one-shot emergencies with all of the structural characteristic that make the HIV-contaminated blood emergency so interesting, because it is so concentrated in time. Perhaps however, comparing it with other emergencies and other distresses of the legal system one can better focus the characteristics of our problem. When compared with another major emergency faced by all legal systems, such as car accidents due to the staggering diffusion of cars early in our century, our problem shows its remarkable short time dimension. Interestingly, while it took only ten years from the enactment of the BGB (1900) for the Germans to enact a special provision taking care of the problem, it took to the French almost one hundred years of case law reinvention of the wheel before adopting similar enactments. The slow timing and the relatively slow development of that emergency is clear also observing case law developments in common law, with the possible *prima facie* conclusion that when an emergency is out there Courts are not the best agencies to take care of it given the lengths of litigation in legal systems. The reaction of legal systems to car accidents may be easily described as path dependent. The myth of the completeness of the Napoleonic Code, the traditional unwillingness to tamper with its language, the parochial attitude precluding the observation of what was going on a few miles away on the other side of the Rhine, the very peculiar logic that allows French lawyers to read within the Code what the application of ordinary logic would exclude, are all important aspects of the French legal tradition, investments that shape the French routine. They all make the French reaction to the increasing numbers of car accidents perfectly

explainable as path dependency. Similarly, in Germany, the reaction was shaped by previous institutional developments: a brand new Code, which takes pride in the precision of its language and whose language of the tort provision makes it more difficult to introduce liberal interpretations. The strict Leibnitzian logic which does not offer free rides to the interpreter, as does the French Port Royal based counterpart.³⁴

Not only the very short timing of the HIV tragedy, but also the specific and circumscribed characteristics of the conflict should be considered. A small number of definite social groups (hemophiliacs in our case) is facing a definite problem due to a relatively specific course of action. The economic and social structure of our problem is very well defined and yet the legal reaction of the countries involved shows a staggering variety of patterns. Of course, detecting those patterns and, in particular, which one of the actors of the institutional system takes the lead, teaches us an important lesson regarding the power relationship between sources of law that goes well beyond the formalistic description of it.³⁵

From the social perspective, all legal systems are facing *the same* problem. Yet, within the positivistic paradigm leading among lawyers all the systems are facing *different* problems. This paradox is a unique opportunity to see the shortcomings of the municipal attitude of lawyers but at the same time challenges whoever advocates a transnational solution (i.e., whoever argues that also the legal problem is the same³⁶) to provide the community of social scientists with tools to handle the inherent structural diversity of legal systems involved in the solution of this problem. It is crucial, in other words, to have a sense of what makes an institutional reaction “legal” rather than “political” in its character.

This interesting specificity of the HIV-contaminated blood problem also makes it different in front of more global emergencies that legal systems may be called upon to face. Emergencies such as the pressure from third world immigrants in wealthier societies have produced reactions that can be seen as mostly political in their structure. True, the law is used (usually as a coercive instrument of expulsion) but the major forces behind the way in which these problems are approached are political rather than legal. Indeed, in these clearly political emergencies, also the traditional institutional path (easy to observe in the Environmental emergency and also in the car accident case) may be changed. For example, while in most contexts the Courts are the main actors of the American institutional scenario, in front of the immigration emergency they have been largely marginalized within a major

phenomenon of administrative discretion of the INS that is very unusual in the United States. HIV-contaminated blood case problems are more specifically linked with the structure of the legal systems involved. This is the aspect that makes our problem different from other emergencies, such as, for another example, the need to create the legal structure for a market economy in former socialist countries where the political temperature of the debate, like in the case of immigration law, is hot. In a way, what makes the HIV-contaminated blood problem specific and particularly interesting is that while circumscribed to hemophiliacs (as we are doing) the political stake seems limited.

True, a lot of political problems and turmoil have followed the HIV-contaminated blood saga. The problem of contaminated hemophiliacs, however, is not one that allows open political division in front of it. There is no political argument in favor of letting the blood be contaminated, whereas there are many political arguments that can be spent in favor of keeping the hardware industry nationalized rather than privatizing it in Hungary, or in favor of a tough (versus a receptive) policy towards immigrants from the third world.

This means that our problem can really be considered a specific legal emergency which calls for a legal reaction. Of course, as already seen, in order to understand legal change in distress we need to use broad approach to the law inclusive of political as well as of some cultural-traditional components.

In comparing the institutional reactions to the HIV-contaminated blood problem with the reaction of legal systems under different kind of distress, one has to consider the peculiarities of it. However its complex relationship with politics and tradition makes it an ideal test to approach legal change, hopefully obtaining some general lessons and exploring some implications on the law as a routine to face social problems.

To conclude this section, while it is difficult to describe (now that the formalistic approach to the law is dead) what makes an emergency legal rather than political, since the two aspects overlap, we may rather easily detect in front of an emergency that sometimes the political pressure yields to the law in social problem solving. Consequently a rather unsatisfactory casuistic approach is all that we may have in analyzing social distress. In this perspective, while it seems clear that “immigration” and “transition to market economy” are emergencies in which the political process does not yield to the legal process and where therefore institutional reactions may be less predictable, emergencies like the environmental

crisis of the seventies and the HIV-contaminated blood conflict have more a legal character and the reaction is therefore path dependent. The hypothesis is therefore that path dependency (and predictability of the reaction) is directly proportional to the “legal” nature of the problem and inversely proportional to the “political” nature of the same. This rough statement, while justifying our condescension towards the definition of what is law and what is politics, does not spare us the effort to develop a taxonomy that allows us to consider the impact of politics on the reaction to legal distress.

VIII

DEVELOPING A FRAMEWORK FOR PREDICTIONS

Legal systems are a complex aggregate of different sets of formal and informal institutions. If we wish to detect how they react in distress in attempting to work out a solution to a sudden social problem, we need to rely on a taxonomy that allows us to handle such complexity.

Such a taxonomy is not only necessary to detect patterns of path dependence within each legal system, but it is also indispensable to attempt predictions of how formal institutions may change their nature in the course of their being transferred from one system to another. What we need in other words are tools to detect and to answer to a simple question: Has legal transplant X from country A to country B been successful? I submit that the way of answering this question is to be able to know whether or not the transplant in question has lowered the transaction costs. If on balance, the costs of modifying the particular path are lower than the benefits that one can expect from institutional arrangement X than the transplant can be considered successful. In the opposite case, it may be considered a failure. To attempt to answer this question, it is not only sufficient to do some (difficult) empirical research. It is necessary to have valuable a framework that makes it possible to capture those institutional impacts that are felt beyond the formal institutional system. For example, in comparing from the perspective of transaction costs the reduction the state of legal system A before transplant X with the state of the same legal system after the transplant, one must look also at the impact of the transplant in circuits of social organization different from the law in

the formal (Western) sense. To stick to the same example that we have already discussed, importing a formal institutional arrangement that bans homosexuals from donating blood may well lower transaction costs of blood screening allowing the blood system to rely on a supply of blood comparatively less infected than if homosexuals could donate. Such a ban may be perfectly compatible with the social structure of the exporting society (for example, Dutch homosexuals do not have important reasons to fear for disrespect of their civil rights) and this may well be an efficient, transaction costs-lowering institutional arrangement. In certain contexts and in certain conditions, the homosexual population may well accept limits on blood donation without feeling abridged of a fundamental right, not much differently than when, for precautionary reasons, a perfectly healthy child whose brother has chickenpox may refrain from going to school given the higher probability of carrying the infection along. In different contexts, however, such a formal ban may in balance raise transaction costs rather than reduce them. For example, in the United States homosexual civil rights activism may arise as a consequence of such a ban. The homosexual population in the United States has more reasons to fear discrimination and would not easily accept a social transaction that excludes them and increases social stigma. Increased activism on the other hand may increase tensions with other more conservative political segments of the society, making social transactions between those groups more costly. In such a case, on balance, our hypothetical imported formal institution may increase rather than reduce transaction costs.

In other countries, transaction costs may increase for reasons different from the increase in political temperature. In certain societies, such as some of the Mediterranean European countries, such a ban may reinforce a tradition of exclusion of homosexuals from active society. The reinforcement of such short-sighted traditions is socially wasteful because it increases the exclusion from social transactions a relatively large sector of the population because of sexual preferences that have nothing to do with the capacity to transact. Obviously such a cost of a formal institution in the sense of reinforcing irrational informal traditional ones should also be considered when one attempts to measure the net impact on transaction costs of a given imported institution.

In order to develop this fundamental framework, I rely on some previous work of mine, where I depict legal systems as the result of a competitive relationship among three fundamental systems of social incentives (which I call patterns of law) that are at play in all

legal systems in the world within different relationship of hegemony. Such patterns are called professional law, traditional law and political law to stress the fact that they actually are part of the law (and not of different social circuits) if only this notion is approached in a sufficiently broad and global framework.³⁷ The legal systems belonging to the Western Legal Tradition have worked out a formal divorce between the lawyer, the politician and the religious authority, each one having relatively clear-cut domains. Other systems have not worked out such a divorce. For example, in Islamic law the religious authority and the professional lawyer are not separated that clearly, while in socialist countries the political authority and the lawyers do not have different domains. Of course, such divisions are not clear-cut, but the important observation here is that in every legal system of the world one pattern of law is hegemonic (religious law in Islamic countries, professional law in Western societies, political law in traditional societies, etc.) and the other ones, short of disappearing, still play a larger or smaller role in the everyday life of the law.

In certain areas of law, and for the reasons I have discussed at the beginning of this paper, this is likely to be the case in HIV-contaminated blood litigation, the cryptic role played by the non-hegemonic patterns is likely to become more apparent and to affect both the direction of legal change and the possibilities of success of transplantations from one to the other legal systems both within the same family of legal systems and across the family boundaries.

All of the three patterns of law are affected by a legal emergency, and, predictably, legal systems will react by making use of the hegemonic pattern within them. Consequently, not only a first general phenomenon of path dependence may be detected (only Western countries are likely to rely mostly on formal law to tackle an emergency) but since the non-hegemonic patterns are likely to affect the hegemonic ones anyway, it becomes crucial to analyze the legal reaction to an emergency focusing on the role played by all three of the patterns. In particular, it is impossible to attempt any prediction on the likelihood of success of an institutional transfer without knowing which pattern of law is hegemonic in the receiving countries as well as the relative scope left in a given area to non-hegemonic patterns. Incompatible hegemonic patterns are likely to defeat the possibility of successful transplantation of law. Consequently, reactions based on religious-traditional law are not likely to be effective in systems where professional law is hegemonic because they tend to

work only in relatively homogeneous social settings. A strong religiously-backed commitment not to lie about one's HIV-positive status, for example, may work within a homogeneous group or kinships but the incentives not to lie will be gone as soon as the (sexual) transaction is carried on with someone outside of the group or the kinship (e.g., sex with a non member of the same religion). This is why such a model of institutional reaction could not work in polarized, extended and anonymous Western societies and why, despite attempts to enforce it by mean of criminal law, such a reaction is likely to be ineffective (very high monitoring costs). Conversely, relying on the formal legal system and on courts as enforcing agencies may not work in societies where traditionally people do not like to dispute publicly about intimate issues, or in societies where courts are not effective enforcement agencies being maintained in a weak role by the hegemonic pattern of political law.

To understand the reaction of a given legal system in distress, as a consequence, one should therefore approach first the hegemonic pattern within that particular legal system. It should be possible to detect whether the reaction to HIV-contaminated litigation is coherent with the pattern of law hegemonic to it.

For example, a prediction would be that Japan, fitting within what I call rule of traditional law, would try to work out the problem within informal, mediation-structured and harmony- inspired mechanisms while the United States would resort to adversary litigation and to the courts as primary means of approaching the problem.

The analysis should then detect how the non hegemonic patterns fit the picture and what their role is in the HIV contaminated saga. For example, the impact of the possibility of confrontational litigation in Japan (how group dynamics are affected by the shadow of professional law) or the role of mediation schemes in USA. Finally, the role that is left in affecting the social behavior of political decision making both coherent and at odds with the formal legal structure.

IX

PREDICTABLE AND NON-PREDICTABLE **ASPECTS OF HIV-LITIGATION**

I will now turn to seek to apply to the HIV litigation problem the analytical framework discussed so far. Let me clearly state that I am interested only in those aspects of the HIV litigation that seem to be affected by the deep structural fundamental differences between legal systems, those differences that legal comparativists call macro-comparative. Indeed these are the aspects of a legal tradition that may be considered productive of path dependence, since they cannot be changed outside of a fundamental transformation of the routine that has been developed by the actors of the legal system in their pluricentennial equilibrium. Comparativists consider these fundamental aspects as pertaining to the “style” of the legal system, to the deep relationship of power and posture between the sources of law. These aspects can be equated to the common characteristics that make individuals belonging to the same species despite the fundamental differences between individuals or groups belonging to the species. At this general level of observation, consequently, details are irrelevant and consequently the description that follows will be very general seeking only coherence or non-coherence with these fundamental structural differences. To clarify using the species metaphor, if one wishes to classify an individual within the taxonomic category of cats rather than that of dogs, certain aspects of the individual will be relevant and certain others will be irrelevant. It is certainly relevant what kind of teeth structure the individual shows. What kind of noise it produces will also be relevant. It is certainly irrelevant the color of the individual. Even the dimensions, although usually relevant (horses are usually bigger than dogs), may not be conclusive. If the taxonomy is accurate, one can make predictions (in the sense of expected reactions to given situations) only by focusing on relevant aspects. So one observes that the individual to be classified as a dog or as a horse eats a certain kind of food (e.g., meat) it will have focused on a relevant factor. If he observes the color, the factor is irrelevant. If one knows a number of relevant factors of an individual, he or she may make predictions of behavior. For example, if I have elements that allow me to consider that individual as a dog (because it eats meat) I may predict that under distress it will bark. His barking is a predictable behavior. Similarly, if I know that a given legal tradition tends to solve problems by resorting to courts, I may expect that under distress that will be the agency they will mostly use. If it happens that they use only or mostly a different agency, I may conclude that either the taxonomy I am using is inappropriate, or that the particular problem I am observing (the individual; or the HIV-contaminated conflict) has

some characteristics that make him exceptional. There is a peculiar breed of dogs for example that does not bark.

Consequently, the aspects of the HIV litigation that I will consider in the following pages are those relevant at this broad level of abstraction, so that a number of irrelevant analogies and differences will be left out of the picture. Obviously, the choice of what is relevant and what is irrelevant has a degree of arbitrariness into it but this is unavoidable.

X

PREDICTABLE REACTIONS:**ITALY AND FRANCE**

Focusing on Italy and France, countries at the core of the civil law tradition, even a superficial observation of the system is sufficient to confirm certain paradigmatic aspects of path dependence affecting the HIV-contaminated blood saga. In both these countries, to begin with, the criminal law system has been involved seeking to ascribe, within a very long and difficult prosecution, both official and private responsibility. The involvement of the criminal law system, based as it is in both countries with the principle “*nullum crimen nulla poena sine lege*” (ex post facto law clause), has created a number of problem of interpretation of old and obsolete code language and of detecting the intentional mens rea required by the criminal law system.

In both system, another important aspect of the legal reaction, has been the involvement of the administrative state at a relatively early stage. Systems of compensation of the victims, largely perceived as inadequate, have been developed while whoever has been involved in the HIV contamination problem in an official or bureaucratic capacity has attempted to use administrative law privileges as shield towards ordinary responsibility. The development of a criminal law and administrative law reaction, both accompanied by the introduction of *ad hoc* command and control legislation, have marginalized the private law process. The reasons of such marginalization are relatively easy to perceive: in Italy and France, the tort process is longer and more expensive than the criminal law process. Moreover, victims have a broad possibility to participate to the criminal trial and to obtain damages within it while externalizing on the public prosecution many costs of the litigation. Finally, there are no punitive damages available and the hope to obtain a significant redress is therefore minimal. In other words there are no incentive to use the tort process in cases where, arguably, the criminal law can be involved. On top of all of this, the conceptualist reasoning of the European legal culture plays a role in the few instances of blood-related litigation. Blood is not classified as a product and strict liability, therefore, is out of the picture.

A rather substantial difference between the two countries can be observed at the political level. The proportions of the contamination and of the consequent scandal have not been comparable in the two countries. In France the toll has been quite substantial, and even political law, which in different circumstances would have been enough to shelter at least ministers and other high officials, had eventually to defer to professional law.³⁸ Indeed, very high politicians, despite a tradition of arrogance of political power, have been heavily involved in the scandal. It is important to observe here the important role played by the popular press in producing the social culture in front of this episode. Probably one could see the remarkable “success” of the formal legal system partially as a result of its alliance with the social culture (or tradition) constructed by the press.

Incidentally one could observe that where the tradition of social security and of accountability of politicians is well established, the legal system effectively plays a role both in compensating and in ascribing responsibility. Among European countries Denmark offers an example. The HIV-contaminated blood scandal went so far as to produce the resignation of a prime minister in office, but probably in these contexts the expectations in front of the politicians may be seen as so high to make the HIV problem a political rather than a legal crisis, since a very wealth welfare state has been able to guarantee early compensation.

In Italy, the proportion of the contamination and of the scandal have been minimal.³⁹ The first aspect remains a lucky mystery in a country in which no information about AIDS reached the public before 1986, and where the collusion between the pharmaceutical industry and the ministry of public health has traditionally produced major problems of corruption. As to the absence of a scandal, which in large degree is in proportion to the first, one could only observe that the media did not play any significant role in creating a culture of AIDS. Even today the dominant tradition (bolstered by the Catholic Church) is to consider AIDS mostly as an epidemic affecting outcasts (drug addicts and homosexuals) rather than normal people. Moreover, the timing of the ascription of responsibility for HIV-contaminated blood has coincided with those of a number of other major scandals involving the system of public health so that the attention could not have been as focused as in France.

Concluding on these two core countries, we may observe a picture that is remarkably coherent on what we may expect. In the civil law tradition, whenever the State and the administration are involved, major aspects of the rule of political law are still felt outside of

the hegemonic rule of professional law. As a consequence, the criminal law system is the only aspect of professional law that may be strong enough to assert itself in front of the political power. The private law is simply too ill equipped to tackle legal problems in which policy issues cannot be short-circuited by formalistic reasoning. Administrative law, as the law governing a centralized bureaucratic system of decision making, plays a role of mediation between the political system and the judiciary and may end up offering those compromise solutions that have cooled major confrontations. In the face of the HIV litigation, all these deep characteristics of the civil law tradition seem to have played a major role in the unfolding of the story we are telling.

XI

PREDICTABLE REACTIONS:

THE UNITED STATES

In the United States, a country belonging to the common law tradition, a number of predictions could be made just by observing its common law belonging. Another number of predictions, moreover, can be made by focusing on some specific aspects of the American model that have shaped its deep structure in more recent time. From the common law belonging and the traditional absence of a private law-public law dichotomy as deeply rooted as in continental civil law, one could predict a large involvement of the Courts and a relatively minor involvement of administrative agencies and alternative systems of compensation.⁴⁰

From aspects more specifically connected with the American legal process, one could moreover predict a relatively minor involvement of the criminal law system. This is explainable because of the political legitimization of the prosecutor (most everywhere elected) and the openly discretionary nature of the prosecution with the consequent focusing of prosecutorial resources in areas characterized by local social alarm (and consequent impact on prosecutor's reelection) such as violent crime.

Moreover, and again mostly for reasons that the American tort process does not share with any other legal system in the world, one could predict a development of very complex

litigation problems, with scores of lawyers actively involved introducing enormous transaction costs to the whole problem solving process.⁴¹

The different conception of the Welfare State in America and the dismantling in recent years of public health care system could lead to certain predictions on the limited role of alternative compensation schemes. Finally, the nature of the American political process and the difficulty of the traditional adversary system of litigation to give voice to group based rights and interests⁴² make predictable the involvement and the polarization of conflicts between different groups, usually competing for the same scarce resources, such as hemophiliacs, and other HIV victims or potential victims fearing discrimination (mostly gays).

Looking at what actually happened in the United States makes most of these predictions quite accurate.

Only a few sketches will be sufficient to prove my point. As to the role of courts, one should compare the easiness with which American courts have stepped in the middle of the picture with the European tort system incapable of emerging from Neanderthal-era formalistic reasoning. As early as 1987 in Doe vs. Miles Laboratories Inc.,⁴³ a U.S. District Court framed the problem in the language of tort law, strict liability and even cost/benefit analysis. This court confirmed the remarkable capacity of the American Judiciary to introduce public policy considerations within the technical nature of professional legal reasoning. The plaintiff, however, not a hemophiliac, had ingested some 500 units of a Kenyan blood coagulation-factor concentrate, produced by a division of defendant under medical suggestion, in order to cure vaginal bleeding after delivery of a baby. In the following months, the plaintiff discovered that she had contracted AIDS.

In finding the defendant strictly liable as a matter of course, the judge stated:

“The arguments in favor of strict product liability apply as persuasively to blood and blood products as they do to any other product. . . . It makes for a more efficient allocation of social resources when the transfer of a transfusion of blood or blood products reflects its true costs. . . . To . . . exempt blood from strict liability would be to subsidize the product by forcing either victims or government through its social welfare programs to bear accident costs. In the absence of a clear expression on the part of the legislature of an intent to subsidize a particular product, it is not this Court’s role to create the subsidy

indirectly by carving out a judge made exemption to strict products liability.”

As to the difficulty of alternative ways of compensation, one should compare the inadequacy of the American reaction if compared to that of all of other developed countries. So far, no one knows what is going to happen to the *ad hoc* Ricky Ray Legislation to create a compensation fund for hemophiliacs, pending in Congress. Whatever the result will be, the delay is staggering . In the fall of 1991, when at least 17 other countries had created a compensation fund for hemophiliacs, the Secretary of Health and Human services had to confront for the first time that request. The prohibitive “costs of health insurance, the inability to purchase life insurance, the need to prepare for funerals and to assure the economic well being of families when work became impossible were cited as financial justification.”⁴⁴ A compensation scheme of this kind is perceived as a matter of course in European welfare states. Quite interestingly, as evidence of how organizations adapt to institutional frameworks, the National Hemophilia Foundation has opposed such a compensation scheme, standing alone among the world’s hemophilia associations.

The amount of tort litigation involving hemophiliac plaintiffs seeking punitive damages from corporations involved gives a sense of the prominent role of the tort system. About 300 law suits were filed involving 400 hemophiliac plaintiffs before, on September 30 1993, a class action filed by hemophiliac activists against the four manufacturers of factor concentrate in the United States and against the National Hemophilia Foundation charged of betrayal of the interests of hemophiliacs. After about one year Judge John Grade issued class certification for plaintiffs, a certification later reversed, by Judge Posner, who, when it comes to the interests of large corporations, obviously tends to forget the economic efficiency justifications that made him famous and that were briefly exposed in Miles Laboratories.

The aftermath of Posner’s decertification, characterized by a clash between activists and their lawyers, by secret negotiations, by offers of inadequate settlements by defendant corporations, by the opting out of some hemophiliacs from settlement proposals in the hope of obtaining more by pursuing individual litigation, is still unfolding. It remains true, however, that the tort system, despite its flexibility and the structure of the American process that makes it a remarkably pro-plaintiff device ,has proved remarkably ineffective. True, if not for the fear of huge damage awards, corporations would not have tendered compensation

offers (about \$100,000 USD for each hemophiliac). It is, however, also true that still in 1997, more than ten years after the beginning of the HIV-contaminated blood tragedy:

“U.S. Hemophiliacs remained the only hemophiliacs in the economically advanced democratic world that have not obtained compensation from either the State or corporations for the injury suffered in the first years of epidemic.” According to an authoritative observer, however, whatever they have obtained or are still hoping to obtain has been due much more to their political organizational effort than from the machinery of justice as such: their achievements “stand in stark contrast to the state of affairs that prevailed with regard to individuals who had become infected through blood transfusion, . . . isolated and without organizational voice they remained utterly dependent on the course of litigation: Each standing alone before the courts of the fifty States.”⁴⁵

Also for hemophiliacs, however the saga is continuing, predictably, as an adaptation (efficient?) of litigator to the American tort system. The time to opt out of the settlement proposal (\$100,000 USD to each hemophiliac who contracted HIV from tainted blood products) has now expired. Apparently, about 6,000 American Hemophiliacs have signed up for the settlement, while about 350 people have filed separate lawsuits. One of the hemophiliacs who opted out has already obtained a \$2 million verdict.⁴⁶

XII

LESS PREDICTABLE REACTIONS:

JAPAN

The HIV-contaminated blood saga is a particularly interesting area to test the comparative knowledge we have about this legal system. Japanese legal studies have been traditionally marginalized from mainstream comparative legal research. The more or less explicit assumption behind this phenomenon is that there is no law in Japan, that Japanese people are ashamed to litigate, that social conflicts in Japan are solved by Confucian-inspired social hierarchical patterns, and that the only law that one can find is but the result of voluntary facades, e.g., imports from Germany during the Meiji period, and of American - inspired impositions after the Second World War.⁴⁷ This picture is obviously caricature-like, and any unbiased observer will find in Japan a very sophisticated legal system sharing some

characteristics with Western law but also showing remarkable aspects of originality.⁴⁸ This caricature view, shared by some of the mainstream comparativists, has had a negative impact, not only because of its inherent superficiality, but also because of the reaction it has produced within serious Japanese law scholarship. Some of the most important writings, particularly in the United States, have instead focused on the polar opposite, emphasizing every possible common aspect of Japanese law with the Western legal tradition, to the extent of identifying Japan as a core civil law country.⁴⁹ This extreme approach, although justified by the need of self legitimization of the Japanese law scholarly community in an academic environment as parochial as the Western one, may have some limits too. The emphasis on analogies almost inevitably ends up precluding the understanding of the differences. Since the use of path dependence in comparing legal systems is aimed at the possibility of the eventual, effective measurements of differences, I will try to approach the Japanese legal system within the following assumptions: Japan, as is inevitable in any highly developed capitalistic country, has developed a very sophisticated legal system. Such a legal system is different from the systems belonging to the Western legal tradition because different is the relationship of power that connects to each other the three patterns of law. In particular, in Japan the pattern of traditional law is still hegemonic, introducing a number of “harmonious” mechanisms both within the legal and the political process.⁵⁰ The relationships among professional law, traditional law and political law are consequently different both from the mainstream civil law one (discussed in our domain with focus on France and Italy) and from the common law (discussed here with emphasis on the U.S.A.). If this is the case the prediction would be that the pattern of traditional law, with its harmony based, hierarchical-paternalistic approach to problems would determined the reaction of the Japanese legal system in distress, and that consequently in the unfolding of the HIV-contaminated blood conflict, the Western-based professional patterns would remain marginalized. If this is the hypothesis to be tested the picture may appear contradictory.

It is easy to observe that one of the factors that made difficult for American infected Hemophiliacs to settle for little more than \$100,000 USD may have been that around the time in which the offer has been tendered, Japanese hemophiliacs contaminated had just received about 420.000 USD each as a settlement for their own tort based litigation.⁵¹ It is tempting to conclude in front of this observation that the Japanese tort process, despite its being based on

a less effective civil law-based structure, and despite the traditional non rights assertiveness of the Japanese legal culture, has proved much more effective, and indeed at least as confrontational, as its American counterpart.

While this prediction could not be based on the path dependence hypothesis, and certainly makes the Japanese story less predictable than the ones that we have so far discussed, one should not rush to the conclusion that path dependency cannot teach us anything about the Japanese reaction.

Let us try to make a list of the aspects of the story that could be anticipated and let us try to explain the unpredictable aspects of the outcome.

Among the path dependent “traditional” aspects of the Japanese legal culture, one would certainly note the high degree of harmony ideology. And to be sure, the first reaction of the legal system to the HIV-contaminated hemophiliacs was largely harmonious. In early 1987, when the tort litigation had not even be threatened, the government began discussing a fund for hemophiliacs. When on April 16, 1988, the Ministry of Health and Welfare announced the establishment of a relief scheme for hemophiliacs, such harmonious characteristics were even more clear: “Bureaucrats . . . approached the companies selling imported blood products in Japan and persuaded them to contribute (to the fund). This was not difficult given the close working relationship between the industry and the pharmaceutical industry.”⁵² The fund was offering substantial relief.

Another deep characteristic of the Japanese legal system that would have justified some predictions based on path dependency can be considered: its limited sensitivity to rights. The draconian AIDS legislation that the Ministry distributed to the press on February 19, 1997 can be considered a predictable consequence of that institutional attitude. The law “included penalties for individuals with AIDS or HIV infection who engaged in unsafe sexual acts or donated blood, possible prison sentences to those who lied to medical authorities about HIV; fines for physicians who failed to report an AIDS diagnosis to the prefecture government; and mandatory reporting on the names of those with HIV-AIDS to prefecture health authorities.”⁵³

After this first proposal, and the hostile reaction among hemophiliacs against a proposed legislation that obviously reinforced patterns of social discrimination and violation of basic human rights, the evolution of the text in the year preceding its approval is extremely

interesting. On one hand the text was emended to introduce even harsher language including the following:

“Physicians must report the age, sex, and route of infection of all patients infected with the AIDS virus to the prefecture governor within seven days;

If a physician deems that a patient is not following the physician’s advice and may be infecting others, the doctor must report the name and address of the patient to the prefectural governor.

If a physician believes a non-patient has transmitted AIDS to a patient, the doctor can give the name and address of the non patient to the prefectural Governor.

Prefectural Governors can recommend that people suspected of being carriers and infecting other people be tested for the virus, and require a test for individuals who do not voluntarily comply.”⁵⁴

On the other hand, even more interesting and revealing of the “harmonious” we are discussing, following the extensive lobbying of hemophiliac organizations a provision was introduced in the final text introduced the following wording : “Cases of HIV positive persons infected through blood products (hemophiliacs) do not have to be reported to the government.”

This evolution is extremely revealing . Hemophiliacs, because of their organized outspoken reaction to more discrimination, and because of their being recognized as the only victims of AIDS considered “innocent” by the politicians and the public opinion had developed a somewhat cozy relationship with politicians that has granted them immunity from this law. Nothing better than the analysis of this legislation offered by one hemophiliac leader captures the sense of what I mean when I consider these reactions predictable within the Japanese pattern of path dependency: “It is . . . characteristic of Japanese Society that it does not have any keen sense of respecting other’s privacy, stemming from a traditionally homogeneous society of paternalism.”⁵⁵

The lawsuit did not start until October 27 1989. Its filing, surprising as it may be after hemophiliacs had obtained the mentioned remarkable successes due to the combination of their extensive public campaigning in the name of violated rights and simultaneous

transacting and bargaining with centers of political decision making, also shows some aspects of the impact of culture and tradition on the working of the legal system.

To begin with, the litigation can largely be explained by the hemophiliac's demand for apology, and by the harsh resistance of the industry and the ministry to apologize until the very last phase of the saga. Pharmaceutical companies and high officials were willing to paternalistically bestow on the victims of their business dealing the benefits of a relief. They resisted the idea of compensating and of admitting responsibility. This attitude became more and more unacceptable to the Japanese hemophiliacs who just could not take more of the traditional unfair discrimination and public hypocrisy.

As replied in one of Professor Feldman's interviews with attorneys for the plaintiffs, "The purpose of this litigation is not money. The plaintiffs want to know who is to be blamed . . . the Hemophiliac's litigation is about human rights. That is the most important part of the litigation."⁵⁶

Another clearly traditional aspect is the attempt, on the side of the plaintiffs, to keep the Japanese Red Cross ("JRC") out of the litigation. This is indeed remarkable, given the institutional responsibilities it carries being the leading actor of the Japanese blood system. Compare this attitude with the firing of the Canadian Red Cross Secretary General just a few weeks ago, for no direct responsibility in the blood scandal (he was not in office at the time) but just for having defended the institution's behavior.⁵⁷ According to Feldman, "[t]aking the Red Cross to court in Japan is like inviting one's mother to the senior prom. It not a violation of any specific code or law. It is just considered bizarre, unnatural and undesirable. The honorary chair of the JRC has, since the Meiji period, been a member of the Japanese Royal family, which has bestowed a peculiar kind of sanctity on the organization. . . . In short, suing the JRC is taboo, and all parties to the conflict over HIV and blood have taken pains to avoid involving it in the controversy."⁵⁸

In front of this "traditional", "harmonious" scenario, one wonders how hemophiliacs have been able to succeed in obtaining a remarkable amount of justice, not only getting satisfactory settlements on top of the relief plan, but including, more recently, a thorough criminal prosecution bringing to jail senior bureaucrats, with corporate Green Cross executives even admitting criminal liability.⁵⁹

I submit that these outcome, unpredictable as it seems within the path dependence idea, can still be explained within our taxonomy as a change in the nature of the problem, as an aspect of revolutionary rather than incremental legal change. The apparent final triumph of the rule of law (tort system and criminal law) on the harmonious nature of the Japanese legal system can be only understood as a consequence of our problem turning political. What made possible these evolution, then is a strong alliance between professional law and politics against the hegemonic Japanese traditional pattern.

Both the satisfactory court settlement proposal (including apology) and the criminal prosecution were respectively formulated and begun after the tiny Sakigake party leader Kan Naoto became (by political chance) minister of Health and Welfare in 1995. This unusual figure of formerly radical politics seized the chance of transforming the HIV-contamination scandal into the political opportunity of his lifetime. In short, he started a campaign against the traditional “harmonious” political practices of the LDP, succeeding in putting the scandal on the front pages of the news and linking to its numerous unfoldings his reputation as one of the few political innovators in Japan.⁶⁰ The HIV scandal in Japan, like the corruption scandal in Italy, became an instrument of political change aimed to delegitimize a political class in power since the end of the war.

In other words, the wind of political change have shaken the HIV-contaminated blood saga in Japan, determining its outcome and limiting its predictability within the path dependency explanation.

One final note may be added. At least one traditional \ cultural aspect of the Japanese legal system has survived the political earthquake. The tragedy of the HIV-contaminated blood made self sufficiency the number one priority in Japanese health policy: “Foreign blood, not Japanese bureaucrats or politicians, or corporations or physicians is considered the true villain. . . . Japanese folk beliefs consider blood the template of identity. A, B, AB and O are not simply biological indicators; they describe the character of different types of individuals. Families also have identities, captured in the concept of bloodlines. . . . Like individual blood types and family bloodlines, the blood of the Japanese state is also a symbol of identity, national identity. Conflict over contaminated blood was prolonged and bitter; but never was there disagreement about the undesirability and impurity, metaphorical and

biological of foreign blood.” This illustrates a (predictable) triumph of local tradition over the globalization of markets, law and policy.

XIII

PATH DEPENDENCE AND OPPORTUNITIES TO MAKE MEASUREMENT AND PREDICTIONS

It is time for a few final wrap-up observations that may set the agenda for further research. The use of the idea of path dependence in comparing legal systems allows us to focus better on two crucial issues in the social sciences: (1) the possibilities of measurement; and (2) the possibilities of predicting.

In particular, measuring differences and analogies seems to be the only possibility open to comparative law to go beyond taxonomy (at best) and mere juxtaposition of black letter law (at worst). More specifically, in social sciences we are all facing the problems of monitoring institutional change and of predicting it. Of course, the prediction of the changes in different contexts is crucial for appropriate global policy making.

Economists within the institutional analysis framework, by means of sophisticated models of cognitive psychology, are beginning to apply empirical research in order to measure the impact of transaction costs on decision making in limited informational contexts within well established routines.

This paper has offered evidence, although still in a very rough and primitive state, that within an appropriate taxonomy to handle the complexity of legal systems, we can consider legal traditions as routines in which different social actors and organizations (lawyers, politicians, community value keepers, etc.) play their respective roles in adapting to the institutional context. Such routines are devices to lower transaction costs and it should eventually be possible to measure their comparative efficiency to this purpose, both as adaptive efficiency (to the institutional framework) and as wealth maximization (including the costs of changing the institutional framework).

In particular, in situations of extreme scarcity of time (such as in the HIV-contamination example) where the different components of the law cannot properly communicate with each other, with consequent Prisoner's Dilemma problems, the

comparative efficiency of one or the other decision making process should be easier to measure.

Emergencies such as HIV-contaminated blood can be analyzed within the model of repeated Prisoner's Dilemma interactions, that may end up establishing patterns of cooperation among such actors which may remain sub-optimal because of path dependency.

In particular, there may be at play a tension between the continuity and the incremental change of routines (as captured by the legal tradition seen as a path dependent local aggregate of professional law, political law and traditional law) and the pressures to immediate political change (as captured by political attempts to introduce new legislation or to blame social problems to the path dependent continuity).

The United States, Italy and France may be seen as examples of the first dynamic, while Japan offers a clear example of the second. Of course, neither legal tradition nor attempts at political change which affect the actual institutional framework of the society can ignore the other. This is particularly so when attempts at political change are carried on in legal systems in which the legal tradition is so strong, and so at odds with the novelty, that long-term attempts at political change are sabotaged.

NOTES

¹ An accessible description of the economic idea is in D. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* (1991).

² See, on the Neanderthal stage of legal scholarship in this area, Alan Watson, *Comparative Law and Legal Change*, CAMBRIDGE LAW J.(1978) 313.

³ I develop this point in UGO MATTEI, *COMPARATIVE LAW AND ECONOMICS* (1997).

⁴ See D. NORTH, *STRUCTURE AND CHANGE IN ECONOMIC HISTORY* (1981).

⁵ The project is organized by Ronald Bayer and Eric Feldman. See: RONALD BAYER and ERIC FELDMAN (eds), *BLOOD FEUDS: AIDS, BLOOD, AND THE POLITICS OF MEDICAL DISASTER* (1999)

⁶ See Dorothy Nelkin's paper in BAYER-FELDMAN cit supra note 5.

⁷ See Clifford Geertz's idea of local knowledge.

⁸ See R. Sacco, *Mute Law*, 43 Am. J. Comp. Law, 455 (1995).

⁹ See Ugo Mattei, *Three Patterns of Law. Taxonomy, and Change in the World's Legal Systems*, 45 AM. J. COMPARATIVE LAW, 1 (1997) .

¹⁰ This is the problem with much of legal sociology , particularly when it approaches comparative law. See the critiques of Abel to Watson discussed in P. LE GRAND, "THE IMPOSSIBILITY OF LEGAL TRANSPLANTS", in ID., *FRAGMENTS OF LAW AS CULTURE* (1999).

¹¹ See O. Williamson, *Chester Barnard and the Incipient Science of Organization* , in O. WILLIAMSON (Ed.) *ORGANIZATION THEORY*, at 172 (1995).

¹² On the notion and the use of international legal cooperation, see R. SCHLESINGER- H.W. BAADE-M. DAMASKA-P. HERZOG, *COMPARATIVE LAW* (5th ed. 1988) 405 ff.

¹³ The French blood scandal and some details of the legal and political issues involved are discussed in M. Provine, *Courts in the Political Process in France*, in H.. JACOB, *et al.*, *COURTS, LAW AND POLITICS IN COMPARATIVE PERSPECTIVE* (1996) 220 ff.

¹⁴ J. H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 AM. J. COMPARATIVE LAW 545, 550 (1995).

¹⁵ See AMARTYA SEN, *MAXIMIZATION AND THE ACT OF CHOICE*, IN *ECONOMETRICA* (4th ed. 1997) .

¹⁶ See, for a broad analysis of such phenomena in less developed countries: Paul H. Brietzke, *Democratization and ... Administrative Law*, 52 Okla. L. Rev. 1 (1999).

¹⁷ See D. NORTH, *supra*, at note 2.

¹⁸ See G. CALABRESI, *THE COST OF ACCIDENTS* (1970).

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- ¹⁹ See, for details particularly focusing on the cold reception of this evidence, R. Bayer, *Blood and AIDS in America: Science, Politics and the Making of a Iatrogenic Catastrophe*, in BAYER-FELDMAN, *cit. supra*.
- ²⁰ BAYER, *cit. supra*
- ²¹ See, in the domain of the environmental emergency, B.A. ACKERMAN, *et al.*, THE UNCERTAIN SEARCH FOR ENVIRONMENTAL QUALITY (1973).
- ²² See, for a discussion of the advantages of gift-over-sale, the “classic” in this domain which has earned widespread acceptance, R. TITMUS, THE GIFT RELATIONSHIP (1973).
- ²³ See Feldman, *Blood and Belonging in Japan*, in BAYER-FELDMAN, *cit. supra*.
- ²⁴ See Mattei, The Comparative Jurisprudence of Sacco and Schlesinger. A Study in Legal Influence, in A. RILES (Ed.) RETHINKING THE MASTERS OF COMPARATIVE LAW, (Forth. Hart Publishing 2001)
- ²⁵ For recent reviews of such literature, E. GRANDE, IMITAZIONE E DIRITTO. IPOTESI SULLA CIRCOLAZIONE DEI MODELLI (2001)
- ²⁶ See NORTH, *cit supra* at note 3
- ²⁷ See A. WATSON, LEGAL TRANSPLANTS (1974).
- ²⁸ See Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, AM J. COMPARATIVE LAW. 1995.
- ²⁹ See HOOKER, LEGAL PLURALISM AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS (1975); E. GRANDE (ED.) TRANSPLANTS INNOVATION AND LEGAL TRADITION IN THE HORN OF AFRICA (1995).
- ³⁰ See Dorothy Nelkin’s paper in BAYER-FELDMAN *cit. supra*.
- ³¹ See PROVINE, *cit. supra*, note 14 at 220 ff.
- ³² See *infra*.
- ³³ See ACKERMAN *cit. supra*, at note 23.
- ³⁴ See Monateri, *Regles et techniques de la definition in droit Civil. La Synecdoque Francaise*, REV. INT. DR. COMP (1983).
- ³⁵ See Mattei, *cit. supra*, note 4
- ³⁶ See J. Gordley, *Comparative Legal Research.: Its Function in the Development of Harmonized Law*, 43 AM. J. COMPARATIVE LAW, 555 (1995).
- ³⁷ Mattei, *cit. supra*, at note 10.
- ³⁸ Provine, *cit. supra*.
- ³⁹ See Izzo in BAYER-FELDMAN.
- ⁴⁰ See, for discussion of other common law jurisdictions the report by J. BALLARD, THE CONSTITUTION OF AIDS IN AUSTRALIA: TAKING GOVERNMENT AT A DISTANCE SERIOUSLY AND N. GILMORE-M.A.SOMERVILLE, HIV/ AIDS AND HE CANADIAN BLOOD SYSTEM in BAYER-FELDMAN, *cit. supra*.

⁴¹ See RICHARD L. MARCUS, EDWARD F. SHERMAN, COMPLEX LITIGATION : CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE (American Casebook Series) 3rd edition (1998)

⁴² See Rubenstein, Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns, 106 Yale L.J. 1623-81 (1997)

⁴³ 657 F. Supp. at 1466

⁴⁴ Bayer, *cit. supra*, note 20 at 54.

⁴⁵ Bayer *cit. supra*, note 20 at 64-65.

⁴⁶ See *Pact on AIDS Hemophilia Leaves Suits*, WALL STREET JOURNAL March 25, 1997.

⁴⁷ See among others R. DAVID, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY;() ; id. Sources of Law, International Encyclopedia of Comparative Law

⁴⁸ See F. UPHAM, LAW AND SOCIAL CHANGE IN POST WAR JAPAN (1987)

⁴⁹ Completely undermining the cultural difference is: M. RAMSEYER AND M. NAKAZATO, JAPANESE LAW : AN ECONOMIC APPROACH (Studies in Law and Economics) (1999). Less extreme positions, in F. UPHAM, *cit. supra*

⁵⁰ In the sense made famous by L. NADER, HARMONY IDEOLOGY (1990).

⁵¹ See Bayer, *cit. supra*, note 23 and the detailed analysis of the litigation in E. FELDMAN, HIV, BLOOD AND BELONGING IN JAPAN, in BAYER-FELDMAN *cit. supra*.

⁵² See Feldman, *cit. supra*, note 52 at 13.

⁵³ See Feldman *cit. supra*, note 52 at 9.

⁵⁴ LAW CONCERNING THE PREVENTION OF ACQUIRED IMMUNODEFICIENCY SYNDROME, MINISTRY OF HEALTH AND WELFARE (March 6 1987) *cit.* in FELDMAN, *supra*, note 52 at 11.

⁵⁵ Ishida Yoshihaky, Chairman of the Kyoto Branch, Japanese Friends of Hemophilia Association, November 5, 1987, cited in FELDMAN, *supra*, note 52 at 11.

⁵⁶ Reported in Feldman, *supra* note 52 at 17.

⁵⁷ See Financial Post, Canada, 25 3 97 p. 2. (Thanks to John Ballard for this information).

⁵⁸ Feldman *supra* note 52 at 16

⁵⁹ See *Japan: Green Cross Presidents Admit Charges in AIDS Case*, REUTERS NEWS SERVICE, JUI PRESS, March 24 1997. [Thanks to John Ballard for mailing this last development.]

⁶⁰ See the description of what became known as the Kan Kan in Feldman, *cit. supra*, note 52 at 27 and ff.