"One Size Can Fit All" – On the Mass Production of Legal Transplants

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Law reformers like the World Bank sometimes suggest that optimal legal rules and institutions can be recognized and then be recommended for law reform in every country in the world. Comparative lawyers have long been skeptical of such views. They point out that both laws and social problems are context-specific. What works in one context may fail in another. Instead of "one size fits all," they suggest tailormade solutions.

I challenge this view. Drawing on a comparison with IKEA's global marketing strategy, I suggest that "one size fits all" can sometimes be not only a successful law reform strategy, but also not as objectionable as critics make it to be. First, whereas, "one size fits all" is deficient a functionalist position, it proves to be surprisingly successful as a formalist conception. Second, critics of legal transplants often insistson what can be called "best law" approach, whereas in law reform, what we sometimes need is law that is just" good enough" law. "Third, legal transplants no longer happen in isolation but rather on a global scale, so that context-specific rules are no longer necessarily local.

This is not a plea for formal law, for commodification of laws, and for "one size fits all". But it is a plea to overcome the romanticism and elitism that may lurk behind the seemingly benign suggestion that law reform must always be tailored to the specific societal context.

I. Introduction

The World Bank likes global solutions. In the first of its annual "Doing Business" reports, it suggested that, in law reform, "one size can fit all—in the manner of business regulation".[1] What the Bank means is that best practices can be identified that would improve the legal system of every country, regardless of its legal and general culture, economic system, level of development, etc.[2] This idea—that what matters is the quality of a legal institution law determined in the abstract, not its fit— is widespread for business law reform, but not confined to this area. Recent studies on transfer of constitutional norms show similar developments. David Law and Mila Versteeg mention "generic rights" that exist in virtually all constitutional texts.[3]

This idea of "one size fits all" is a provocation for comparative lawyers.[4] The presumption that the success of legal transplants is independent of the conditions of the recipient countries runs against longstanding convictions in comparative law. Some of these convictions are empirical and theoretical: the inadequacy of viewing laws as mere words (law in action versus law in the books); the interplay between different legal rules within one legal system, the groundedness of all law in local legal culture. Others are ideological: an opposition against legal hegemonialism through western laws and concepts, against a western preference for formal rules over substantive justice.

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[1] IFC/World Bank, *Doing Business in 2004: Understanding Regulation* (2004) xvi.

[2] The report does suggest that underdeveloped countries should adopt simpler versions. See id. xvi, xvii.

[3] David S. Law & Mila Versteeg, 'The Evolution and Ideology of Global Constitutionalism' (2011) 99 California Law Review 1163, 1199-2002.

[4] For critique, see, especially, Kevin E. Davis, Legal Universalism: Persistent Objections, University of Toronto LJ 60 (2010) 537. A summary of French reactions, see Anne-Julie Kerhuel & Bénédicte Fauvarque-Cosson, Is Law and Economic Contest? French Reactions to the *Doing Business* World Bank Reports and Economic Analysis of Law, 57 Am. J. Comp. L. 811 (2009). The World Bank, in face of this pressure, later dropped the "one size fits all" idea.

In fact, amongst comparative lawyers, "one size fits all" has long been used as an ironic depiction of unsophisticated attempts of law reform that is to be rejected.[5] Another metaphor, similarly scathing, is "cut and paste"[6] – the (critical) observation that legal reformers merely copy textual bits and pieces from one constitution to another, with little regard to context. But the critique of comparatists has long been, to some extent, a matter of faith more than experience. We observe that universal solutions are in fact sought more and more—whether they fit or not. And if we took the "cut and paste" metaphor seriously, we would have to admit that it is not incompatible with context-specificity. When you choose "paste" in your word processing program, it will likely give you three options: "Keep source formatting; match destination formatting; keep text only." Transposed to legal transplants, we can not only try to implement rules in the same fashion in which they exist in the source country—which will likely yield strange results. We can also yield to the demands of comparatists and adapt the rule to the "formatting" of the destination country, so it will match indistinguishably. And, most mysteriously perhaps, we can also transfer rules as "text only" –and then they will, like a chameleon, suddenly become compatible with any new surrounding. How can we explain that?

We need a more sophisticated account, and here, Günter Frankenberg's recent work can help. Frankenberg takes the idea of "one size fits all" more seriously and develops a whole "IKEA theory of legal transplants" around it—though one that he views critically. [7] For Frankenberg, transplants do not take place directly between domestic systems; they are mediated through a global constitution. But that global

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[5] E.g. Randall Peerenbaum, Toward a Methodology for Successful Legal Transplants (2012), http://ssrn.com/abstract=1981887. But see also JP Verheul, Così fan tutte, in and Evaluation: Essays on Comparative Law, Private International Law and International Commercial Arbitration in Honour of D. Kokkini-Iatridou, ed. By K. Boele-Woelki (Dordrecht ; Boston : M. Nijhoff Publishers, 1994).

[6] Richard Zajac Sannerholm, 'Cut-and-paste'? Rule of law promotion and legal transplants in war to peace transitions, in Antonina Bakardjieva Engelbrekt & Joakim Bergelius (eds), New Directions in Comparative Law (___) 56; Michal Gal, The "Cut and Paste" of Article 82 of the EC Treaty in Israel: Conditions for a Successful Transplant, 9(3) European Journal of Law Reform 467, (2007); Holger Spamann, Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law, 2009 Brigham Young Law Review 1813, 1840, citing Kenneth L. Karst & Keith Rosenn, Law and Development in Latin America: A Case Book 67 (1975).

[7] Günter Frankenberg, 'Constitutional transfer: The IKEA theory revisited' (2010) 8 Journal of International Constitutional Law 563; see already Günter Frankenberg, *Autorität und Integration. Zur Grammatik von Recht und Verfassung* (2003) 124–132; Günter Frankenberg, 'Constitutions in Transfer—Territoriality and Extra-territoriality' in Gunther Handl, Joachim Zekoll, Peer Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Brill, 2012) 261, 278-83.

constitution is not a real one. Instead, it is "a supermarket, where standardized constitutional items—grand designs as well as elementary particles of information—are stored and available, *prêt-à-porter*, for purchase and reassemblage by constitution makers around the world."[8]

I sympathize with the comparatists' reservations against the one size fits all idea. How could I not? But I think the critique is not only exaggerated but actually, in part, misdirected. This is so for several reasons. A first reason is that critics like proponents conflate a formalist and a functionalist understanding of law. However, whereas, "one size fits all" is deficient a functionalist position, it proves to be surprisingly successful as a formalist conception. A second reason is that the critique of legal transplants often insists on what can be called "best law" approach, whereas in law reform, what we sometimes need is law that is just good enough. "One size fits all" will not create the best law, but it can sometimes create law that is good enough in situations in which a best law is not available. Just like IKEA brings affordable design into households that cannot afford tailor-fit furniture, so a one-size-fits-all approach to law reform may create good-enough legal solutions that are at least as adequate for globalization as would be purely local rules. A third reason is that legal transplants no longer happen in isolation but rather on a global scale, a process that encourages formalization and standardization. Context-specific rules make sense as local rules only as long as the context remains local. Under conditions of globalizations, such locality becomes questionable.

The paper proceeds as follows. In section II, I recapitulate Frankenberg's Ikea theory of legal transplants. In section III, I put this theory into context by juxtaposing it with three theories of transplant—instrumentalism, culturalism, and formalism—and demonstrate that formalism, not functionalism, is most in accordance with it. In sections IV and V I expand on the idea of an IKEA theory by comparing in more depth Ikea's success in the consumer market with the success of legal transplants. First, in section IV, I discuss standardization and economies of scale as factors of success. In section V, I look at globalization as an underestimated element in transfer analyses. A short conclusion follows.

II. The Ikea Theory of Legal Transplants

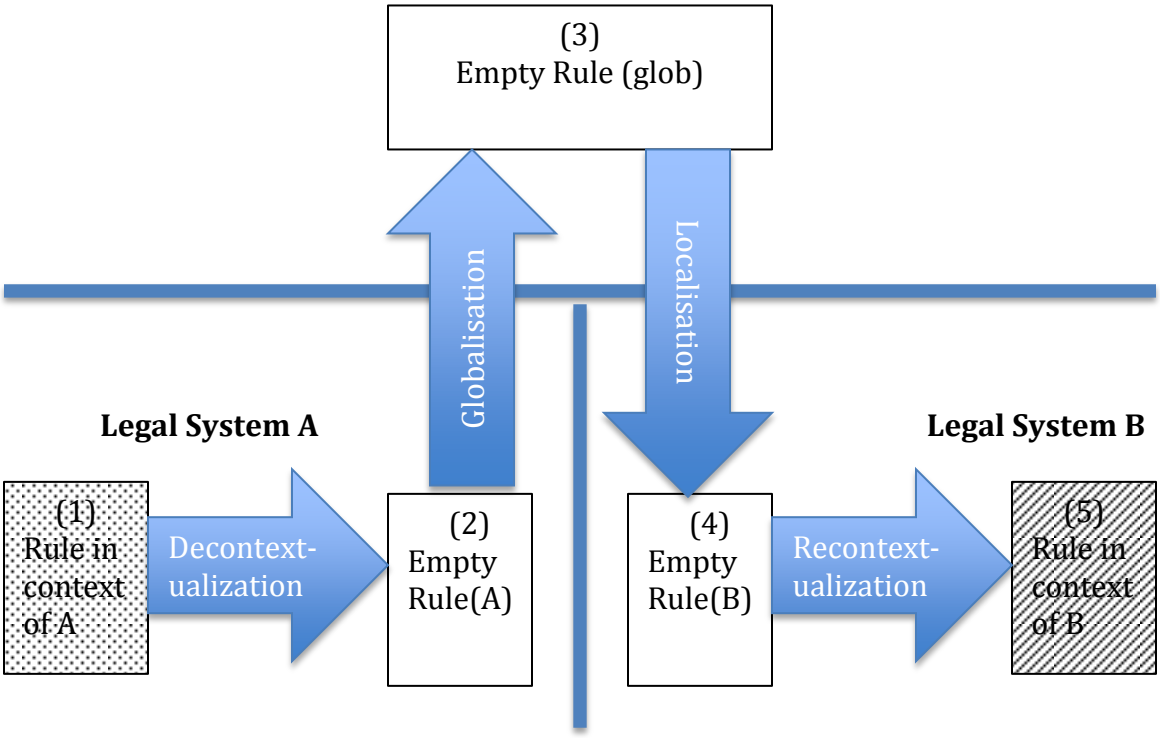
It should be clear from the beginning: "One size fits all" is not just an innocently naïve view of law reform and of legal transplants. Behind the idea lie both a certain concept of law and a certain ideology of law reform. Most analysts view transplants as a two-stage process: a rule is taken from law A, and implemented in law B. Frankenberg, by contrast, helpfully unearths the implications involved in the one

[8] Frankenberg, 'IKEA Theory revisited' (n) at 565.

size fits all approach as a multistage process that he borrows from Edward Said.[9] Instead of summarizing the theory, I want to represent it here both graphically and in a consecution of steps slightly different from the one Frankenberg draws himself.

[9] Frankenberg, IKEA Theory revisited (n) at 570-76. For Said's own theory, see Edward Said, The World, the Text, and the Critic (New York: Vintage, 1983), 226-247.

"Global Reservoir"



In its original version, the Ikea theory includes four steps, but I find it more instructive to recreate the theory as a five-stage process. In the first stage, a legal rule is found in the specific context of a legal system and its underlying legal and political culture. The transfer from stage (1) to stage (2) represents a decontextualization of the rule. This includes three elements: rules are "reified as marketable commodities, then formalized, that is, stripped of their contextual meanings, and, finally, idealized as meaning what they are meant to mean and functioning in the way they are meant to function."[10] Here, the rule is still understood as belonging to legal system A, but this belonging is merely formal—the rule has no context-specific meaning,. It can be called an empty rule.[11]

The step from stage 2 to 3 captures the transfer from the local to the global reservoir. Frankenberg, quite ingeniously, realizes that rules are rarely transferred directly from one system to another. Where they are identified as "best practices," they are no longer viewed as properly belonging to a legal system; they are part of "a reservoir or, for that matter, a supermarket, where standardized constitutional

[10] Id. at 571.

[11] Frankenberg, following Legrand, calls it a "propositional statement". Id. at 567.

items—grand designs as well as elementary particles of information—are stored and available, *prêt-à-porter*, for purchase and reassemblage by constitution makers around the world."[12] As such a rule belongs to no legal system, the legal rule can be transferred back into a different legal system B – the move from stage 3 to stage 4. Like in stage 2, the rule may look as though it belongs to a legal system, but it is a mere empty rule without any contextual meaning. In fact, except for the formal integration into a new legal system, the legal rule looks no different in stage 4 than it did in stage 2 (or 3): its commodification enables it to travel.

Context-specific meaning is added in the contextualization which leads from stage 4 to 5. This last step, Frankenberg suggests, presents far greater risks than are usually acknowledged: rules may require complicated adaptations, reinterpretations, *bricolage*, and parts may be missing to make such adaptation possible. The recontextualization may or may not be successful. The rule may be met with resistance. It may be a bad fit for the new system. And it may face what Frankenberg, invoking his Ikea metaphor again, calls "the risk of 'missing links'—institutional parts, doctrinal screws, ideological hooks, and the like." [13] Recontextualization thus creates technical problems that are underplayed by law reformers. But recontextualization also creates ideological concerns. The foreign rule may function as an irritant, to use Gunther Teubner's term;[14] it may put considerable pressure on the recipient legal system. Such irritation can sometimes be desirable, as Wilhelmsson has argued with regard to pressures from EU law on domestic la.[15] Even then, this is where the threat of hegemonialism and imperialism becomes most virulent.

There are, thus, three different critiques involved in the Ikea theory. The first of these, the one most familiar from the general literature, concerns recontextualization – the step from stage 4 to 5. Here, Frankenberg does not add much to what we already know in theory (though we do not always pay enough attention to it in practice)—the fact that law reformers are often insensitive to the actual requirements in the recipient country. A second critique is less common, though it exists in the literature, too. [16] This is the critique concerning

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[12] Id. at 565.

[13] Id. at 575.

[14] Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 Modern Law Review 11, 12.

[15] E.g. Thomas Wilhelmsson, 'Private Law in the EU: Harmonised or Fragmented Europeanisation?' (2002) 1 *European Review of Private Law* 77, 91-93; cf. Ralf Michaels, 'Why we have no theory of European private law pluralism' in Leone Niglia (ed.), *Pluralism and European Private Law* (Hart. 2013) 139, 154.

[16] It has been made by Frankenberg before, too. In an early text, he already laid the foundation for his critique of the Ikea approach to transplants:

decontextualization, the step from stage 1 to 2. Here, Frankenberg draws on Legrand's critique against Watson's theory of legal transplants, in particular the distinction between laws as text versus laws as propositional statements. The third critique is, I think, the most novel and the most illuminating. It concerns the steps between stages 2, 3, and 4, where a rule travels freely between (different) local levels and a global level. This travel is made possible by the commodification of the legal rule—treating it as a commodity that can be bought and sold in a global public market for laws.[17] Here, Frankenberg's critique is not merely practical, as that of many other opponents to legal transplants. Rather, it goes directly against the capitalist ideology underlying the "one size fits all" approach.

III. Instrumentalist, Culturalist and Formali Transplants

Frankenberg's critique of decontextualization as a step in the transplant process finds some inspiration in the so-called Watson-Legrand debate on legal transplants.[18] This provides a helpful framework for discussions of legal transplants,

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> How solutions can be 'cut loose' from their context and at the same time be related to their environment , how law can be 'seen purely' as function satisfying a 'partucular' need escapes me. It seems to require two contradictory operations: first, suppressing the context and considering it; and then moving from the general (function) to the specific without knowing what makes the specific specific. The functionalist negates the interaction between legal institutions and provisions by stripping them from their systemic context and integrating them in an artificial universal typology of "solutions." In this way, "function" is reified as a principle of reality and not taken as an analytical principle that orders the real world. It becomes the magic carpet that shuttles us between the abstract and the concrete, that transcends the boundaries of national legal concepts, that builds the system of comparative law, the "universal" comparative legal science or "the general law.

Günter Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law, (1985) 26 *Harvard Journal of International Law* 411, 440 (internal citation omitted).

[17] Ralf Michaels, 'Make or Buy—A Public Market for Legal Transplants?' in Horst Eidenmüller (ed.), *Regulatory Competition in Contract Law and Dispute Resolution* (Hart, 2013).

[18] Frankenberg (n ___ above) 565-70. Alan Watson first presented his thesis in his *Legal Transplants* (1974), and in numerous iterations since. Pierre Legrand's reply is entitled 'The Impossibility of 'Legal Transplants' 4 *Maastricht Journal of European and* 111-124 (1997); republished without significant changes as Pierre Legrand, 'What "Legal Transplants"?' in *Adapting Legal Cultures* 68 (David Nelken & Johannes Feest eds., Hart, 2001). Alan Watson responded to Legrand in his Ius Commune Lecture: 'Legal Transpants and European Private Law' Electronic Journal of

but I worry that the discussion is inexact in one important aspect. Frankenberg, like Legrand and many others before him, criticizes Watson for both formalism and functionalism; he suggests, in fact, that functionalists should agree with Watson.[19] But such an equation of formalism and functionalism, although not infrequent,[20] is problematic. When functionalism was developed as an approach to law, this happened in explicit opposition to formalism.[21] The critique against formalism is that it does not care about consequences, whereas the critique against functionalism is that it cares only about consequences. An approach that tries to be both functionalist and formalist would thus be internally contradictory. I therefore discuss first functionalism (and within it the variant most at play in the one size fits all approach, namely instrumentalism), then the culturalist critique, and only at the end formalism.

a) The Instrumentalist failure

Although both Legrand and Frankenberg direct their critique against Alan Watson's position, I think the main culprit, in their view, are law reform institutions like the World Bank and scholars like La Porta *et al*, who develop single best solutions for the problems of each society.[22] Such law reformers have an instrumentalist understanding of law; they view laws as means towards an end. Their approach has three elements. First, "law matters": law has predictable consequences on society. Second, those effects are, in principle, the same in any society. Third, based on this knowledge, law reformers can pick the best laws in order to bring such consequences about.

Note that, among the three elements of this approach, the first and the last are less controversial than the second. The first element, namely that law has an impact on society, can hardly be denied in general (though Alan Watson does deny it, at least for private law). The third, namely that law reformers can pick the best laws in order to bring about the best consequences, is more contentions, but still widely supported. Without this assumption, law reform would be futile. It is the second

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Comparative Law, 4.4 *Electric Journal of Comparative Law* (Dec. 2000), at http://www.ejcl.org/ejcl/44/44-2.html.

[19] Frankenberg (n ___ above) 569.

[20] Kerry Rittich, 'Functionalism and Formalism: Their Latest Incarnations in Contemporary Development and Governance Debates' (2005) 55 *University of Toronto Law Journal* 853 (2005); Peer Zumbansen, 'Law after the Welfare State: Formalism, Functionalism and the Ironic Turn of Reflexive Law' (2008) 56 *American Journal of Comparative Law* 769-805; also in *Beyond the State—Rethinking Private Law* (Nils Jansen & Ralf Michaels eds, Mohr Siebeck 2008) 349.

[21] Felix S. Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 Columbia Law Review 809.

[22] Rafael La Porta et al, 'The Economic Consequences of Legal Origins' 46 *Journal of Economic Literature* 285 (2008).

step—the idea that laws yield the same outcomes anywyere, and that therefore one solution is the best for any society, that is the most problematic.

This is a kind of legal functionalism, even if that is not always said openly.[23] But it is a very peculiar kind of functionalism. First, in insisting that one solution fits the problems found in every legal situation, it ignores one core element of functionalism in comparative law, namely functional equivalence—the insight that, in different systems, different legal solutions may respond to similar problems.[24] Second, in viewing law as a tool, it represents a specific kind of functionalims, namely instrumentalism[25] Functionalism takes an observer's perspective on the relation between institutions and societal needs; it incorporates also unrealized needs and unrealized ("latent") functions. Instrumentalism, by contrast, adopts a participant's need: here, the societal need is necessarily known, and a legal rule is aimed at responding to this need—whether successfully, or not. Third, although instrumentalism could develop different solutions for different societies, the one-size-fits-all approach, in proposing one solution for every society, must deny the relevance of context, or of the specific character of the legal problem to respond to. This is sometimes called the law of the hammer ("If all you have is a hammer, everything looks like a nail").[26]

b) The culturalist critique

Such a functionalist and instrumentalist understanding of law for legal transplants has often been criticized by comparative lawyers.[27] The most radical critique of transplants has been voiced by Pierre Legrand. In opposition to both functionalism and instrumentalism, Legrand represents what can be called a culturalist approach to legal transplants.[28] He suggests that legal transplants are both impossible and undesirable. His main argument is that rules are inseparably connected with their local/national culture and society and thus cannot be taken out of one society and

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[23] Ralf Michaels, 'The Functionalism of Legal Origins' in *Does Law Matter? On Law and Economic Growth* (100 Ius Commune Europaeum, Michael Faure & Jan Smits eds, Intersentia, 2011) 21.

[24] Ralf Michaels, 'The Functional Method of Comparative Law' in *The Oxford Handbook of Comparative Law* (Mathias Reimann & Reinhard Zimmermann eds., Oxford University Press, pb. ed. 2008) 339, 376-78.

[25] See id. at 351.

[26] Cf. Abraham Kaplan *The Conduct of Inquiry: Methodology for Behavioral Science* (San Francisco: Chandler Publishing Co. 1964) 28-29 ("the law of the instrument"); cf. Abraham H. Maslow, *The Psychology of Science* (1966) 15.

[27] For a collection of such arguments, see Ralf Michaels, 'Comparative Law By Numbers? Legal Origins Thesis, *Doing Business* Reports, and the Silence of Traditional Comparative Law' (2009) 57 *American Journal of Comparative Law* 765.

[28] References above n ___.

transplanted to another without losing, or changing, their meaning. Moreover, Legrand argues, transplants need to be rejected vigorously because they threaten the integrity of legal cultures.

Legrand's thesis is sometimes viewed as exaggerated but generally sound, at least among comparative lawyers. And indeed, Legrand's suggestion that law is cultural fits well our desire in comparative law to focus on law in action rather than in the books, and to see law in context. We know (or we think we know) that legal rules alone do not do much work, that the real life of the law is in its interaction with society and culture.

We should note, however, a certain inconsistency between the two critiques. Recall that Legrand voices two arguments against the transplant theory: first, they are impossible (thus the title of his article); second, they are to be rejected because they lead to undesirable outcomes. Actually, these two arguments are inconsistent:[29] something cannot be without and effect and harmful at the same time. Either legal cultures are robust, then transplants are impossible. Or, legal transplants do change cultures, then they cannot be impossible.

This suggests two weaknesses in the culturalist critique of legal transplants. The first concerns the object of critique, in particular the conflation of functionalist and formalist conceptions. One part of Legrand's critique is directed against a formalist understanding of legal rules as mere propositional statement, which, precisely because they have no meaning, have no impact on society. Another part of his critique, by contrast, is directed against an instrumentalist understanding, which is aimed at having an impact on society.

The other weakness is the underlying assumption of legal cultures as relatively isolated entities. In reality, we can see that legal rules often receive their meaning, in part, from inspiration by foreign legal systems. This is so not only where comparative law is used explicitly—a strategy that culturalists see with justifiable suspicion.[30] It is also true where societies have forgotten that they once borrowed both an institution and its underlying rationale. One example is the concept of "militant democracy"—developed by Loewenstein after his emigration in the US context, and later imported into Germany.[31]

c) The Formalist Challenge

Now, insofar as the culturalist critique is directed against instrumentalism, it does not apply to Watson's thesis. Watson's thesis is not that laws are transplanted as

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[29] As has been noted by Annelise Riles, 'Comparative Law and Socio-Legal Studies' in *Oxford Handbook of Comparative Law* (n ___ above) 775, ___ n ___.

[30] Pierre Legrand, 'Comparative Legal Studies and the Matter of Authenticity' (2006) 1 *Journal of Comparative Law* 365, 404-25.

[31] See also *The "Militant Democracy" Principle in Modern Democracies* (Markus Thiel ed, Ashgate 2009).

instruments to improve society. Rather, he suggests that a connection with society is irrelevant. Laws are transplanted all the time; over centuries and between vastly different societies. Chinese, Ecuadorian and French rules on minute details of contract law are almost verbatim, despite the great differences between societies.

It is usually overlooked that Watson—in that sense in perfect agreement with Legrand—is explicitly antifunctionalist and antiinstrumentalist. He suggests, repeatedly, that legal transplants do not matter. This is so because, in his view, law—at least private law—does not matter. To go back to the Ikea theory, because Watson denies any relevance of context for legal rules, he would deny that stage 1 plays any role—and, consequently, also that stage 5 could play any role. His focus is only on the transitions between stages 2 and 4. Legrand, by contrast, focuses only on a direct transition from stage 1 to stage 5 and thus, because he ignores stages 2 to 4, considers transplants impossible. Neither of them offers a meaningful concept of translation.

This seems, at first, an uninteresting theory. Watson has little to offer, it appears, beyond the observation that rules as mere propositional statements are borrowed and transferred all the time. His suggestion that legal rules are detached from society seems extreme, even if (as Bill Ewald suggests)[32] it is an implication and not a precondition of his views on transplants, leaves us only with a negative but not independent theory of law. And his project – to look at texts of rules that regardless of their purpose or impact – seems, intellectually and asthetically, deeply unattractive.

The theory gets more exciting, however, if we view it in light of the IKEA theory. After neither functionalism nor formalism can explain the "empty rule" element of that theory, it seems Watson's formalism seems most compatible with both theory in form of the IKEA theory and with experience. When laws are transferred, they are transferred as mere forms, largely devoid of meaning. They receive their meaning in the local context, but they retain their denationalized, abstract character. They do represent "propositional statements," but, amazingly, as such they suddenly transcend national contexts and therefore are able to travel.

This phenomenon is looked down upon in traditional legal scholarship, which has become profoundly antiformalist. But such disdain for form is not shared in other disciplines, especially (legal) anthropology. Marilyn Strathern has suggested the constraint of form as a valid object of ethnographic analysis.[33] is known from anthropology, in particular from science and technology studies. Bruno Latour has suggested that standardized forms make it possible, effectively, to travel far without leaving home: the form is capable of traveling and of referencing its origin, without

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[32] William Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants' (2005) 43 *American Journal of Comparative Law* 489, 502-3.

[33] Marilyn Strathern, *The Gender of the Gift: Problems with Women and Problems with Society in Melanesia* (University of California Press, 1988) 180-82.

the need to carry meaning with it.[34] Annelise Riles has applied such insights to legal anthropology. In her ethnology of financial markets, she finds that forms and documents are what is transplanted and what keeps global law together—complex legal documents with no relevance other than its symbolic role.[35]

Indeed, it seems fruitful to view the empty rules that travel so easily, detached from any contextual meaning, less as propositional statements, and more as artifacts.[36] Fuchs praises artifacts for much the same things that legal transplants are supposed to accomplish: they "'make little room for skepticism, especially when they generate rather predictable uniform outcomes across a variety of settings, occasions, times or operating personnel'.[37] It is their character as artifacts that enables rules to travel. And it is that character that enables their commodification, too.

IV. Ikea revisited 1: Economies of Scale in Law Reform

This may explain how one size fits all, and the IKEA theory, presuppose the possibility of a purely formal understanding of legal rules, of rules as artefacts. But how can "one size fits all" work? It is worth going back to Frankenberg's Ikea metaphor and expanding on it, maybe taking it more seriously even than its creator. I want to look at what makes IKEA so successful in the marketplace, and what we can learn from this for legal transplants. I do this in first steps—first by focusing on local consequences, then on global ones.

a) Standardization and Adaptation as Complementary Strategies

When companies go global (as Ikea has), they have, it is often said, two alternative possible strategies.[38] One is *adaptation* to local contexts—the willingness to sell, in

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[34] Bruno Latour, Science in Action: How to Follow Scientists and Engineers through Society (Harvard University Press, 1987); see also, e.g., Stefan Timmermans & Marc Berg, 'Standardization in Action: Achieving Local Universality through Medical Protocols' (1987) *Social Studies of Science* 273.

[35] Annelise Riles, 'The Anti-Network—Private Global Governance, Legal Knowledge, and the Legitimacy of the State' (2008) 56 *American Journal of Comparative Law* 605, and in *Beyond the State* (above n ___) 183.

[36] Annelise Riles (ed.), *Documents—Artifacts of Modern Knowledge* (2006).

[37] Stephan Fuchs, *Against Essentialism: A Theory of Culture and Society* (2001) 306.

[38] John K Ryans jr, David A Griffith, D Steven White, 'Standardizations/adaptations of international marketing strategy: Necessary conditions for the advancement of knowledge' (2003) 20 *International Marketing Review* 588; Marios Theodosiou and Leonidas C Leonidou, Standardization versus adaptation of international marketing

each countries, products tailor-made for that country. In comparative law, adaptation seems most analogous to calls for making legal transplants fit the respective local context. But whereas such adaptation is often viewed as the only possible strategy for legal transplants, in international marketing, a different strategy has proven popular, too. That strategy is *standardization*. Here, the idea is to establish a worldwide standard that can be used for every country. The great advantage of standardization lies mainly in cost efficiency: research and development costs are reduced (because fewer products need to be developed); large numbers of its product for worldwide markets enable economies of scale; global marketing strategies enhance the value of the brand. This approach is analogous to universalism in comparative law.[39] Notably, because the standard is not, ideally, drawn from one background but instead incorporates worldwide differences, such a strategy can be successful, too

Ikea's global strategy is clearly one of standardization.[40] Ikea's official business idea is "to offer a wide range of well-designed, functional home furnishing products at prices so low that as many people as possible will be able to afford them."[41]. Billy, the famous bookshelf, has been sold at least 41 million times worldwide.[42] Ikea products fit in a vast variety of places. And we find the same products, by and large, in Sweden, the United States, and Hong Kong—an extreme standardization of products. Although Ikea does offer slightly different products in different countries, the layout of its stores is the same everywhere, and many of its most successful

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strategy: An integrative assessment of the empirical research' (2003) 13 *International Business Review* 141–171.

[39] Mark Tushnet, Some reflections on method in comparative constitutional law, in Sujit Choudhry (ed.), The migration of constitutional ideas (Cambridge University Press 2006) 67, 69-72; cf. Ran Hirshl, On the blurred methodological matrix of comparative constitutional law, id. at 39, 43-46 ("concept formation through multiple description"); Günter Frankenberg, Stranger than Paradise: Identity and Politics in Comparative Law, 1997 Utah L Rev 259, 264-5.

[40] This has been established in several Swedish university theses; see, e.g., Damien Badier & Carole Rousset, *Strategies Adopted in the International Market—The Case of IKEA in France* (Bachelor Thesis, University of Skövde, 2007); *David Eskander & Mohamed Kotaiba Abdul Aal, Does IKEA Culture Apply Abroad? A Study of IKEA in Saudi Arabia* (Master's Thesis, Karlstad University, 2010); Sofiya Gilyazova and Alina Gogunova, *IKEA and Volvo marketing strategies in the Italian market* (Jönköping International Business School, Spring 2012). Standardization is not absolute; IKEA also adapts to local circumstances: Ulf Johansson & Åsa Thelander, 'A standardised approach to the world? IKEA in China' (2009) 1 *International Journal of Quality and Service Sciences* 199.

[41] http://inter.ikea.com/en/about-us/purpose.

[42] *Billy, the world's most versatile bookcase turns 30!* (2009), http://www.ikea.com/ms/en_CA/img/pdf/Billy_Anniv_en.pdf, 2, 7.

products can be bought anywhere in the world. Such standardization extends even to standards of quality, efficiency, and socially responsible behavior[43]—in a sense, Ikea comes with its own Ikea law. IKEA's "one size fits all," is not accidental; it follows a deliberate company strategy.

This global success is made possible by a second element: the quality and style of Ikea products. Ikea products are relatively durable. Moreover, they are not completely without style. In its early days, Ikea sold what we foreigners took to be Swedish design. Later, Ikea adopted—aped, one may say—other styles, became more minimalist in its design, and indeed often looked like a cheap copy of "real" design.

Today, one can well speak of a distinct Ikea style. Of course, this is a strange style, reminiscent of the bizarre imaginary buildings on Euro notes—a style that suggests a number of local references but remains strangely ephemeral, placeless, global. It is, in Frankenberg's words, decontextualized. But it would not be successful if it were genuinely decontextualized. By contrast, a large part of IKEA; success derives from its presentation as genuinely Swedish[44]—it uses the national colors, Swedish names for its products, Swedish dishes in its cafeterias. This Swedishness may be an idealization—" bereft of its local, theoretical, and doctrinal elaborations and controversies". We now know that some of the genuinely Swedish furniture was actually produced by political prisoners in East Germany.[45] But in the end, this matters little to consumers.

The same seems to be true for legal transplants. A globalized rule may, in substance, be stripped from any link to the national context from which it once emerged. But it will not be successful unless it appears to be "from somewhere" – the Torrens system of land registration from Australia (though it may in reality emerge from Hamburg) [46].

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[43] Suzanne Konzelmann, Frank Wilkinson, Charles Craypo and Rabih Aridi, 'The Export of National Varieties of Capitalism: The Cases of Wal-Mart and IKEA' in *Varieties Of Capitalism And New Institutional Deals: Regulation, Welfare and the New Economy* (Wolfram Elsner, Hardy Hanappi eds, Edward Elgar, 2008) 123.

[44] http://www.ikea.com/ms/en_US/about_ikea/the_ikea_way/swedish_heritage.

[45] 'Ikea Admits Forced Labor Was Used in 1980s' New York Times, Nov 18, 2012; see also 'Ikea—Die Legende vom ehrlichen Möbelhaus' Der Spiegel, Issue 51, Dec 17, 2012.

[46] Antonio Esposito, 'Ulrich Hübbe's Role in the Creation of the 'Torrens' System of Land Registration in South Australia' (2003) 24 Adelaid Law Review 263; id., 'A Comparison of the Australian ("Torrens") System of Land Registration of 1858 and the Law of Hamburg in the 1850s' (2003) 7 *Australian Journal of Legal History* 193; Horst Lücke, 'Ulrich Hübbe and the Torrens System: Hübbe's German background, his life in Australia and his contribution to the creation of the Torrens system' (2009) 30 *Adelaide Law Review* 213; for critique of the thesis, see also Greg Taylor,

b) "Best Solutions" and "Good enough solutions"

Such standardization will, of course, never create optimal furniture. Ikea products will never represent the same quality as high-prize furniture. Nor will they ever fit their surroundings as well as tailor-made furniture pieces would. What makes them so successful in the world are two addituonal characteristics that play a role for law reform as well: their price is low, and customers can assemble them on their own. Now, in law reform, price is rarely considered: we care about quality and disregard, more often than not, what such law reform costs and how easily it is implemented.[47] But of course law reform is not costless. Good tailor-made law reform requires great expertise of the specific societal and institutional conditions for which a law is made. Obviously, where such expertise is available, tailor-made law reform can be successful. Often, however, sufficient expertise is lacking in the recipient country of law reform, and law reformers from the first world cannot substitute for it. Undoubtedly, the first world law reformer with insufficient interest in the recipient country will not bring about good reforms; he will try to replicate his home law, and fail. But the context-sensitive law reformer will often fail as well, realizing, at the same time, the need to go native and her ability to do so.[48]

It may seem crude to present the problems of interculturality and transplants in mere economic terms as costs. But ultimately, this is one way in which they materialize. First world law reformers would undoubtedly provide better service if they were schooled in the culture and law of the recipient country for several years. Law reformers in the recipient country would benefit from multi-year interdisciplinary studies in comparative law. Law reform would be easier if lawyers in recipient countries were paid higher salaries and had access to more legal materials. But in the end, the costs for all of this would be prohibitive—or, at least, law reform institutions are not willing to provide for them.

And it may also be idealistic to ask that all these resources be spent to create a perfect law, when in reality the resources are not available. IKEA may be ultracapitalist, but its project to offer furniture that is both functional and affordable has progressive roots in the Bauhaus and its effort to bring quality not just to the few rich but to the masses. If we want to achieve the same for law reform, then we may want to learn from the Bauhaus and from IKEA that perfect law reform, in the sense of providing a perfect fit, may not be what is necessary. To take an example from current work of the World Bank,[49] it may not be clear how the regulation of access to electricity for small businesses should be handled. Under some

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Is the Torrens System German?, (2008) 29 *Journal of Legal History* 253; id., 'The Torrens System—Definitely not German' (2010) 30(2) *Adelaide Law Review* 195.

[47] See also Michaels, Public Market (above n ___).

[48] Frankenberg, supra n. ___, 266-70.

[49] IFC/World Bank, *Getting Electricty: A Pilot Study by the Doing Business Project* (2010).

circumstances, a one-stop-shop solution, in which only one comprehensive application is handed to one authority that then is responsible for dealing with all other relevant authorities may be preferable. Under other circumstances, it may be preferable for the applicant to be in charge of dealing with several relevant authorities individually. It seems clear, however, that a situation in which applicants have to deal with twenty-seven authorities and need an average 233 days to be connected is deficient. In such a situation, it may not make much sense to wait until a perfect, tailor-made legal solution is established. It may be more helpful to develop a "best practice"—an IKEA-like cheap solution that fits, relatively well, most contexts—that provides a solution that is not a "best solution" but that is "good enough."

c) The Adaptability of Formal Solutions

Something more is relevant. As a matter of fact, the thought that laws must necessarily be tailor-made for the societies in which they should perform, is somewhat unrealistic. It rests on an ultimately romantic idea of a perfect fit between law and society.[50] But just as people have, since time immemorial, imported their furniture from foreign countries and then put to use in their homes, so legal transplants can come from afar and be put to new use in a new home. Laws cannot meaningfully be reduced to propositional statements, that much is true. At the same time, the fact that laws come in the form of words means that they can remain a constant source of reference that enables alterations in meaning.[51]

And sometimes laws that are *more* formal, less rich in intrinsic meaning, less "odd",[52] are actually to be preferred—not just because they travel more easily, but also because they are more open to changes in meaning within one society. It is true, as critics of transplants have pointed out, that legal rules will often acquire a different meaning in the recipient country than they do in the donor country. An attempt to replicate the meaning and effects from the donor country in the recipient country is thus doomed to fail. But it seems to me that especially those who insist on the context-sensitivity of legal rules should then praise such legal rules that can acquire different meaning in different contexts. If we find the same Ikea shelves and tables in student apartments, designer lofts, coffee bars, and entrance lounges, this suggests their flexibility, their ability to function differently in different contexts.

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[50] Thus the friendly critique by James Q. Whitman, 'The Neo-Romantic Turn' in *Comparative Legal Studies: Traditions and Transitions* 312 (Pierre Legrand & Roderick Munday eds., CUP, 2003).

[51] Cf, in a different context, H Jefferson Powell, 'Parchment Matters: A Meditation on the Constitution as Text' (1985) 71 *Iowa Law Review* 1427.

[52] Cf. Frankenberg, supra n ___, 572-4.

And then, of course, even Ikea furniture need not necessarily remain the same. One new emergent trend is Ikea hacking.[53] People take Ikea furniture and assemble it differently from the producer's intention. And then they share their new constructions on the internet and can thus inspire other users.[54] Such creative re-use may not be favored by IKEA—just as the creative re-use of legal rules in a recipient country may not be what the donor country intended. But it may well serve the needs in the recipient country.

V. Ikea Revisited 2: Taking Globalization Seriously

So far, I have assumed that legal rules travel from one legal system to another. This leaves out what Frankenberg calls the global constitution—the global reservoir from which solutions can be dispatched to very different contexts. It is a main achievement of his theory to account for globalization, since any theory of legal transplants that ignores globalization must remain deficient.

a) Global Product Lines

A first aspect is not strictly one of globalization but can most fruitfully be discussed here. One further element that guarantees Ikea's success is that it offers matching pieces. Ikea furniture may not match its new surroundings perfectly, but in return it will match other pieces from Ikea. Ikea pieces are not just individual; they are parts of whole series. The purchaser of a chair from a series knows that he can buy also a table and a shelf from Ikea that will match the chair.

The same is true in law reform. Take, for example, law reform for OHADA, the organization of French-speaking countries in Africa.[55] Here, a new, and Western-inspired contract code may not immediately match African peculiarities (though contract law has proven remarkably adaptabe to local circumstances). But it matches other law reform projects, also inspired by Western laws: corporate codes, bankruptcy codes, etc. It is not clear, a priori, which match is more important.

This has at least two consequences. For the global reservoir of legal rules, it means that its rules do not stand in isolation from each other. Rather, the global reservoir becomes attractive as a package solution. And for the legal system, it results in what

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[53] Daniela Rosner & Jonathan Bean, 'Learning from IKEA Hacking: 'I'm Not One to Decoupage a Tabletop and Call It a Day.', *CHI '09 Proceedings of the SIGCHI Conference on Human Factors in Computing Systems* 419-22 (2009). I thank Rebecca Myers for pointing me to the practice of Ikea hacking.

[54] E.g. www.ikeahackers.net.

[55] Claire M Dickerson, 'Harmonizing Business Laws in Africa: OHADA Calls the Tune' (2005) 44 *Columbia Journal of Transnational Law* 17.

is sometimes called bricolage:[56] an amalgam of legal rules, often from different contexts, fitting sometimes the local context, sometimes the global reservoir of legal rules. A romantic understanding of legal systems as coherent would need to be terrified but such a result. But arguably, bricolage represents quite weill the situation of postmodern law. Legal systems display internal inconsistencies not just as a consequence of globalization and legal transplants but also of conflicting internal rationalities. Legal transplants are thus not only a cause of internal fragmentation, they are also in accordance with such fragmentation as a typical feature of current law.

b) Transformation

This is not all. Ali Yakhlef, a scholar teaching in Sweden, has suggested—using Ikea as his example—that adaptation and standardization are not the only alternatives of international strategy.[57] In fact, both adaptation and standardization suffer from the same shortcoming: they assume that local contexts are a given that global companies have to accept as it is. (We see a similar shortcoming in comparative law, where legal culture is often viewed as static and immune to change.)[58] In reality, however, global companies do change local circumstances, and they often do so quite deliberately. In China, consumers are not used to assembling their furniture themselves. Yet rather than give up its cost-efficient do-it-yourself approach, Ikea is teaching the Chinese how to assemble their furniture. Thus, instead of adapting the product (and its assembly) to the context, Ikea is adapting—transforming—the context to its product.[59]

Yakhlef suggest that it is therefore necessary to add a third strategy, that of transformation. This may be novel for global marketing, but it is well known in the context of legal transplants. After all, transformation is an explicit goal of law reform. Where Western institutions support law reform, they invariably do so in the hope of changing society: they want to secularize and democratize it; they want to increase the protection of human rights or the rule of law; they want to bring about economic prosperity. If transplants alter legal cultures, this is often desired.

Of course, such transformation is problematic, both empirically and normatively. Empirically, transformation through law reform was largely unsuccessful in the first

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[56] Mark Tushnet, 'The Possibilities of Comparative Constitutional Law (1999) 108 *Yale Law Journal* 1225, 1229 (1999): Michele Graziadei, 'Legal Transplants and the Frontiers of Legal Knowledge' (2009) 10 *Theoretical Inquiries in Law* 693, 694.

[57] Ali Yakhlef, 'The trinity of international strategy: Adaptation, standardization and transformation' (2010) 9 *Asian Business & Management* 47.

[58] Ralf Michaels, 'Legal Culture' in *Max Planck Encyclopedia of European Private Law* (Jürgen Basedow, Klaus Hopt, Reinhard Zimmermann eds., Oxford University Press, 2012) 1060.

[59] Yakhlef, supra n ___, at 58-9.

wave of law and development; whether the current wave can be more successful remains to be seen.[60] Normatively, such transformation smacks of Western hegemonialism and parochialism: Either Westerners know better what is right for developing countries, or, worse, they try to transform those countries for their own benefit.[61]

However, such a story may again be too bleak. Or, rather, it may be apt for the instrumentalist but not for the formalist concept of legal transplants. Formal legal rules may occasionally transform societies in ways that we find quite desirable. Or, put more appropriately, they may provide societies with instruments that help them to transform themselves. Rather than impose new and foreign concepts on a society, such law reform may provide the powerless with new tools to challenge those in power. Thus, Sally Merry reports how women in India use human rights in what has effectively become a fragmented legal system in order to tap into a discourse that strengthens their position—often without even a clear idea of what human rights actually are.[62]

c) Globalization

The insight that transplants enable recipients of legal rules to tap into a global discourse leads to a last aspect of globalization. If Ikea transforms Chinese culture by teaching the Chinese to assemble their own furniture, it thereby also helps make Chinese culture less genuinely Chinese (if such genuinity were ever possible in the first place) and more global. What Ikea creates, through standardization and transformation, is a global IKEA culture.

The same seems to be true in law reform. Frankenberg, in developing his IKEA theory, explicitly ignores, "if only for the time being" the idea of a global constitution as an actual body of legal rules;[63] in his presentation the global constitution is a mere reservoir that feeds the "real" legal systems. In the end, even on his own turns, this seems insufficiently informed by globalization. The idea of legal transplants between legal systems A and B, whether direct or mediated through a a global constitution, still suggests that legal systems A and B remain distinct entities. In reality, they no longer are (if they ever were). Even in developed countries, constitutions

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[60] Kevin E Davis & Michaels J Trebilcock, 'The Relationship between Law and Development: Optimists versus Skeptics' (2008) 56 *American Journal of Comparative Law* 895.

[61] James Q Whitman, 'Western Legal Imperialism' (2009) 10 *Theoretical Inquiries in Law* 635.

[62] Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago University Press 2006).

[63] Frankenberg, supra n ___, 564-5.

The global character of the "reservoir of rules" that Frankenberg describes as his stage 3 is thus mirrored by the global character of the emerging world of national constitions. The uniformity offered by the warehouse bot presupposes and results in, unsurprisingly, a uniformity of emerging constitutional texts. Frankenberg is correct to point out that this uniformity is only superficial—below the propositional level, meanings of seemingly similar legal rules and concepts can differ dramatically from one context to the next. But he seems to assume that these differences exist, largely, between, not within national legal systems. In reality, however, it seems that the uniformity of the propositional level has helped spur a truly global discussion on legal concepts, and that as a consequence, similarities of meaning exist no longer predominantly within national legal systems, but often also transcend such contexts. Whether Constitutions could remain separate if their texts looked very different is an open question. But once their texts look similar, increased interaction among them appears almost inevitable. The global constitution is no longer just a reservoir or a supermarket; it is also an emerging network of local constitiutions and actors.

We may, of course, oppose globalization, including legal globalization, because we believe that it facilitates the exploitation of developing countries. By installing laws in these countries that are made more for Western investors than for indigenous needs, we prioritize the interests of global commerce over those of indigenous culture. Pierre Legrand's critique of legal transplant undoubtedly has such a culturalist and anticapitalist bent. But we should be aware that such attempts to protect local cultures can also be paternalistic and thus, in an ironic way, hegemonialist as well. Developing countries depend on investment, and it seems questionable whether we even can, let alone should, try to isolate them from globalization and thereby from investors.

VI.Conclusion

Let there be no doubt—the IKEA theory, just like its inspiratio in, the furniture producer, is both an emanation and an accelerator of global capitalism. Legal transplants in the IKEA theory mode not only increase global flows of legal rules; they also help turn laws into commodities. One may therefore argue that they support everything that we fear about globalization: They threaten to help exploit developing countries. They are often as lopsided as the legal systems in the developed countries from which they are borrowed, focusing on he liberalization of markets rather than social welfare, on negative rights rather than positive rights and access, on overall economic efficiency rather than substantive equality and justice.

Regardless of one's normative position, however, it seems necessary for understanding, let alone critique, to have an adequate understanding of the processes of legal transplantation. Analytically, the IKEA theory seems to me to be to provide a very helpful structure for analyzing legal transplant processes. The theory is superior to other models because it focuses not just on the transplant from one system to another, but also includes de- and recontextualization. It is superior also

because, by introducing a global level, it transcends the mere horizontal relation between legal systems and thus makes it possible to properly conceptualize the current "one size fits all" revival in comparative law. If the theory has one descriptive deficiency, then maybe that it does not take the globality of current law sufficiently seriously, that it still insists too much, for conceptual anaysis, on treating national legal systems as distinct.

As concerns our critique of current practice of legal transplants, however, I think we must be weary not to misunderstand the phenomenon we deal with. There exists, of course, a naïve instrumentalism or functionalism in law reform that deserves criticism. However, what emerges from the IKEA theory as a much more powerful agent of global legal change is not functionalism but formalism. Rules that are tied to one legal function will be ineffective in societies with different functional needs; their transplant is often a waste of time and resources, but not much more. The truly powerful rules are such formal rules that, precisely because they carry so little inherent meaning, can become active in very different legal systems—and, at the same time, link different legal systems to each other.

What we are observing, under conditions of globalization, is a move towards more formal, less context-specific legal rules. This new formalism is not a neoliberal strategy or ideology; it is a consequence of a globalizing world, in which the creation of meaning and context is no longer a national affair, and in which a fragmented society makes rules with fixed and unitart meaning impossible—on any level , whether global, national, or local. In the face of this, insisting on culture-specificity and locality of legal rules, as we comparative lawyers are used to doing, may be both romantic and elitist. It may be romantic because it overestimates local cultures—their localness, their persistence, their desirability. And it may be elitist because it suggests that only best law solutions are good enough. If we comparative lawyers want to be relevant, we must take the return to form and standardization seriously. And we may, grudgingly, have to admit that Alan Watson is not, in the end, as uninteresting as we make him to be.