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THE EVOLUTION OF BUSINESS LAW IN COLOMBIA: IS IT POSSIBLE TO END COLOMBIA'S LEGAL DEPENDENCY?

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The Evolution of Business Law in Colombia: Is it Possible to End Colombia's Legal Dependency?¹

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ABSTRACT

Legal transplants have been the most common method used to create and modify business laws in Colombia. Most legal transplants are based on the assumption that transplanting laws from foreign legal institutions are per se better in achieving economic growth and spurring eventually economic development. However this is not necessarily true. Governments in developing countries must not take laws from developed countries solely because they are already in existence; each country must look at its society and determine if there is a need for additional laws.

RESUMEN

Los trasplantes legales han sido los métodos mas comunes para crear y modificar leyes de societarias en Colombia. La mayoría de trasplantes legales se basan en el supuesto que las leyes transplantadas de sistemas legales extranjeros son mejores per se en orden de obtener crecimiento económico y eventualmente incentivando el desarrollo económico. No obstante, lo anterior no es del todo cierto. Los gobiernos en países en desarrollo no deben tomar leyes de países en desarrollo solamente porque ya existen, cada país debe de observar su entorno social y determinar que tipo de leyes son las mas adecuadas.

¹ A previous version of this paper, "*Legal Transplants, Evolution of Commercial Law and Government Failure in Colombia. The Evolution of Business Entities and Ultra Vires Theory is it Possible to Stop the Actual Path Dependence?*" was presented and obtained an honorable mention by Carlos Delvasto in the XV Annual Conference of the Latin American and Iberian Conference of ALACDE celebrated at Pontificia Javeriana University at Bogota in 2010.

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PALABRAS CLAVE: Transplantes Legales, Creación de Ley, Evolución de Ley de Societaria, Dependencia Legal, Instituciones.

I. INTRODUCTION

New Institutional Economics believe that law is the most adaptable institution that can be used to create incentives that contribute to achieve economic growth and development in society. (Rodrik & Subramanian, 2003) Douglass C. North, recipient of the Nobel Prize in Economics, defined institutions as “the rules of the game in a society or, more formally, [institutions] are the humanly devised constraints that shape human interaction. In consequence they structure incentives in human exchange, whether political, social or economic.” (North, 1990) Institutions are classified by North as formal and informal, formal institutions are created intentionally by humans and have their highest expression in the constitution of a nation and its various laws or acts; informal institutions, are internal incentives that can be grouped as codes of conduct; social, moral or cultural rules, among others. All of these affect the way that people live in society. (North, 1990)

Institutions affect the behavior between people by providing a stable (but not necessarily efficient) structure where human transactions occur. According to Douglass C. North, the existence of a stable structure was human interaction and the ability of the people to enter into transactional relationships amongst themselves. This constituted the major role of institutions in a society because it reduces “uncertainty” in human life.² (North, 1990) In theory, formal institu-

tions are provided by political entities in charge of creating rules and standards of the game in society and markets, something called generally as legal system.³ In Colombia the creation of law is done and structured through a process that takes place in Congress, generally with the active participation of the Executive, and on other occasions with the collaboration of other political organizations as well.⁴

Nevertheless, sometimes there is a disparity between formal institutions and informal institutions. Sometimes it seems as if law and other types of formal institutions only have a life in books and as if things in society and business function differently. In other words, it sometimes seems that law is going one-way and society, including business dealings, is going the other way. Some authors have previously elaborated on this idea; Hernando de Soto described it as the difference between law in western and non-western countries, when he said: “[i]n the west, the law is less concerned with representing the physical reality of buildings or real estate [rather it is more concerned] with providing a process or rules that will allow society to extract potential surplus value from those assets.” (De Soto, 2000) De Soto also explained the challenge of nonwestern countries in creating bridges between a legal and extralegal world:

some cases have guidelines that structure the way that persons conduct between them and as well with third parties.

² It is important to acknowledge that Institutions are not the only ones that influence the activities between persons, there are people who gather in pursuit of some specific objectives or purposes, these groups are called by Douglass C. North as organizations, and these ones in

³ See for an extended discussion, “Legal Process and Economic Development A Case Study of Indonesia.” By Gray Cheryly W. (Gray, 1989).

⁴ The Constitution provides that Congress shall make laws, articles 114 and 150 of Colombian Constitution.

"The challenge today in most non-western countries is not to put all the nation's land and buildings on the same map (which has probably already been done) but to integrate the formal legal conventions inside the bell jar with the extralegal ones outside of it...It is law that detaches and fixes the economic potential of assets as a value separate from the material assets themselves and allows humans to discover and realize that potential. It is the law that connects assets into financial and investment circuits. And it is the representation of assets fixed in legal property documents that gives them the power to create surplus value." (De Soto, 2000)

The disparity problem is related with the evolution of legal institutions in developing countries. Typically as it relates to laws from developing country, the base part of a law is primarily borrowed from other already established and developed countries. This concept of borrowing laws from other countries in order for a country to create its own laws is known as legal transplants. Borrowing laws from another place or time have become the solution to law development, to the point that in some cases it is a common characteristic in the creation of laws.⁵

In Colombia, Congress and other political organizations in charge of law production have failed by omission in developing – inventing and innovating – law as a reflexive process that should integrate formal legal institutions with informal institutions of society and markets using as

point of reference extralegal institutions of society and markets.

The paper proceeds as follows: Section II describes the evolution of legal institutions and legal transplants in Colombia. First, it analyzes how in some cases legal transplants might imply legal restrictions when transplant of legal institutions are not contextualized to social and economic conditions. Section II also describes the evolution of Business law through legal transplants in four periods since 1853 until today and finally it traces the evolution of the ultra vires theory in Colombia business law, making some concluding observations that set the scope of the analysis. Section III analyzes the relation between the evolution of business law through legal transplants in Colombia and a path dependence process of legal production. Section IV analyzes the relation between legal institutions and its relationship with economic growth and development. Section V will examine the relationship between the asymmetries of information and government failures. Finally, Section VI will conclude.

II. EVOLUTION OF LEGAL INSTITUTIONS AND LEGAL TRANSPLANTS IN COLOMBIA

The process of transplanting law in Colombia started at the moment Colombia achieved its independence. The Constitution of 1821, also known as Cucuta Constitution, ironically borrowed all the Spaniard legislation that ruled during colonial times. However the Colombian

⁵ The term "Legal Transplant" has been used by legal scholars since Alan Watson in 1974 used it in his book "Legal Transplants: An Approach to Comparative Law". The main argument of Watson is that law is primary borrowed of other societies in space and time, specifically the term indicates the process of moving a legal rule from one society to another; this process can take the shape of a particular legal rule or a system of rules in part or as a whole. (Watson; 1993)

Constitution limited its transplants only to legislation that would not oppose the constitution or any new laws enacted by congress.⁶

It was only a matter of time for the ruling creoles to introduce new laws. For some Latin American countries legal change was borrowed from the country that initially established the colony and the country's created legal institutions (known as donor or mother country). In other cases, the new laws were literally borrowed from another country that previously made the adaptation to local context making this new adaptation a transplant of a transplant.

A. Andres Bello: Legal Transplants and Legal Restrictions

Andres Bello was a Venezuelan who eventually became the Chilean Ministry of Foreign Affairs. Andres Bello's legacy in Latin American legal systems started in 1833 with the drafting of the Chilean Civil Code, which was passed by the Chilean Congress in 1855. The laws drafted by Bello relied mostly on the French Civil Code of 1804. The successful implementation of those laws have been attributed primary on his persistence in a project that lasted approximately 20 years as well that his ability in the use of sources, language and adaptation to Chile's circumstances. (Mirow, 2001) The Chilean Civil Code drafted

by Andres Bello has been used as reference by other Latin American countries.⁷

The origin of the Colombian Legal Civil System was created when it used Chilean Civil Code as its principal source. Because of this, it is fair to say that the origin of the Civil Legal System of Colombia is a legal transplant of a legal transplant. The drafting of the Chilean Civil Code was a long project supposedly contextualized for Chile's circumstances; does this mean that the Chilean Civil Code was ideal for Colombia? An observation may show that it was not. Laws developed elsewhere do not always will fit. Why? Because circumstances of one society may be different from another society, so incentives generated by those institutions will conduce towards unexpected results. An example that illustrates this point can be found in article 675 of the Colombian Civil Code. This one states that all land situated within the territorial limits without an owner is property of the State (Baldios).

Now, this legal provision was copied literally from the article 590 of Chilean Civil Code and this as well was inspired by article 539 of the French Civil Code of 1804, that says "[a]ll property unclaimed and without owner...][...belongs to the nation." Colombia is the twenty-six largest country in the world, much larger than Chile and France.⁸ Due to its large size there were

6 Article 188 of Constitution of 1821 says "They are declared in force and effect laws that until this time governed in all subjects and points, which directly or indirectly do not oppose to this Constitution, nor the decrees and laws to issue the Congress." Examples of this first rules borrowed were: 1."The Seven Part Code", 2."Newest Compilation", 3."Statutes of Bilbao" and 4."Recompilation of the Laws of Indies". See for an extended discussion, Obregon Esquivel T. and Edwin M. Borcard, *Latin American Commercial Law* (Obregon; 1921).

7 El Salvador in 1859, Ecuador in 1860, Venezuela in 1862, Nicaragua in 1871, Colombia in 1873* and Honduras in 1887. * In Colombia the states of Cauca and Cundinamarca adopted Bello's Chilean Civil Code. (Valencia, 1968) Other Latin American countries that were influenced by this code were Uruguay in 1868, Argentina in 1869, Mexico in 1871, Guatemala in 1877 and Costa Rica in 1886. (Baro, 1992)

8 Chile is the 38th largest country and France is the 42nd. Colombia has 1.141.748 km² of land while Chile actually has 756.950 km² and France has 674.843 km²

some areas of that were without owners. Factor endowments, like abundant land, may contribute in achieving economic performance by using them in productive uses and converting them in capital.⁹ Although, without labor it is useless, indeed, it is necessary a mechanism that creates incentives that encourage improvement of those resources; one possibility in achieving this purpose would be through the establishment of property rights.

A mechanism that established property rights was structured through the Law 137 de 1959 (also known as Tocaima law); the purpose was to resolve a social economic problem that emerged when lands that technically belonged to the State were possessed, used and improved by people without a property title. Tocaima Law established that lands would be given to Municipalities of Colombia with a precise instruction to transfer them through contracts of sale to all persons that have possessed and improved lands belonging to the state at the time of the law.

Establishing property rights is only one of the mechanisms that could have been used by drafters of Colombian Civil Code, but this was not the case. The use of land without owner was not resolved by an internal solution, it was resolved by an external solution without even considering local conditions. This land was considered out

of commerce, because of that, it could not be used as collateral for mortgage loans, inherited, transfer or even rented for a long period of time. In conclusion, legal constraints in land helped immobilize or divert resources towards less productive activities (Coatsworth, 1978).

B. Legal Transplants and the Evolution of Business Law in Colombia

Just like civil law, business law has also been developed through legal transplants. Business law in Colombia has evolved in four different periods.

The first period of business regulation was distinguished by the work of Justo Arosemena. Arosemena was an eager and persistent senator that initially proposed commercial regulation in 1842 and proposed it again to Congress in 1853. The code that eventually passed was almost a pure legal transplant of the Spanish Commercial Code of 1829.

The second period of business regulation was divided into two phases. The first was again characterized by Justo Arosemena, who drafted the Panamanian Commercial Code of 1869 borrowing from the Chilean Commercial Code of 1865 which was drafted by Gabriel Ocampo. The Panamanian Commercial Code was adopted by Colombia through Law 57 of 1887 by Colombia. This code was chosen among other states codes because it was seen it as the most advanced commercial code among all others. The second phase was characterized by reforming different laws in different aspects of business regulation

⁹ Apparently the case of some Spanish colonies was quite different. Stanley L. Engerman and Kenneth L. Sokoloff argue that in Central America, South America and the Caribbean, factor endowments, like abundant land and disposable hand labor (natives), "led to highly unequal distributions of wealth, income, human capital, and political power early in their histories, along with institutions that protected the elites. Together, these conditions inhibited the spread of commercial activity among the general population." See for an extended discussion, (Frieden, 2000)

and even though the source of these laws has not been traced in all the cases, there is a strong indication that these new laws were influenced by foreign law as was the case of the creation of the Limited Liability Firm.¹⁰

The third period of business regulation is characterized by the participation of commission draftsmen in the creation of a new commercial code. As discussed below, there is sufficient evidence to affirm that this code was outsourced its laws from other countries. (Pinzon, 1971)¹¹ The fourth period of business regulation started in 1995 with Law 222 of 1995 and was characterized by the active participation of some well-known Colombian legal scholars. These leading corporate lawyers were entrusted with the assignment of drafting new legal institutions and revising the existing ones to needs of society and the market.

B.1. First Period of Business Regulation: 1853 – 1858.

The first Colombian business regulation was the Commercial Code enacted in 1853, which was borrowed from the Spanish Commercial Code of 1829. For example, the definition and type of companies or firms (regular collective company, comandita in company and anonymous company) in the Colombian Commercial Code of 1853 is exactly the same as the Spanish Commercial Code of 1829.

10 Limited Liability Firms evidently had an origin from German business law— Gesellschaft mit beschränkter Haftung.

11 One of the most distinguished lawyers that participated in the different commissions that existed since 1953 until the commercial code was enacted in 1971 said, "[T]he extraordinary decree 410 of 1971, by which the commercial code of the country was adopted...[...have emphasized two things: that Congress does not want to study laws that they have to dictate and it prefers to make almost in ordinary the extraordinary system of legislation through decrees...][...and that presidents do not know how to use the powers conferred to them...][... Because they feel autonomous legislatoers that not always respect the limitations and conditions set by Congress."

Colombian Commercial Code of 1853	Spanish Commercial Code of 1829
Art. 230 "The Contract of company by which two or more people join, putting together assets and industry, or some of these things, with the object of making some profit, this applies to all kinds of commercial operations, under the provisions of general law, with the modifications and restrictions established by commercial laws."	Art. 264 "The Contract of company by which two or more people join, putting together assets and industry, or some of these things, with the object of making some profit, this applies to all kinds of commercial operations, under the provisions of general law, with the modifications and restrictions established by commercial laws."
<p>Art. 231 "The mercantile company can be contracted:"</p> <ol style="list-style-type: none"> 1. "In collective name, under common agreements to all partners involved and in the proportion that they have agreed, of the same rights and obligations, and this one is known by the name as <i>regular collective company</i>;" 2. "Providing one or more persons the funds, to be in the results of social operations under the exclusive direction of other partners that manage them on their own name: this one is entitle <i>comandita in company</i>;" 3. "Creating a determined fund of stocks to apply it on one or many objects, that give name to the social firm, whose management will be entrusted to managers or agents removable at the will of the partners, and this company is the one that receives the name as <i>anonymous</i>." 	<p>Art. 265 "The mercantile company can be contracted:"</p> <ol style="list-style-type: none"> 1. "In collective name, under common agreements to all partners involved and in the proportion that they have agreed, of the same rights and obligations, and this one is known by the name as <i>regular collective company</i>." 2. "Providing one or more persons the funds, to be in the results of social operations under the exclusive direction of other partners that manage them on their own name: this one is entitle <i>comandita in company</i>." 3. "Creating a determined fund of stocks to apply it on one or many objects, that give name to the social firm, whose management will be entrusted to managers or agents removable at the will of the partners, and this company is the one that receives the name as <i>anonymous</i>."

Other examples of the Spanish Law of 1829 that were borrowed by Colombia are Article 284 which stated that all the company contracts should be done through a public instrument—also known as notary instrument provided with all legal formalities and Article 286 that determined that the public document were firms or company were created must express necessarily:

1. The names, surnames and residence of the subscribers.
2. The firm name or signature of the company.
3. The partners that will be in charge of the administration of the company and the use of the firm name.

4. The capital introduced by each of the partners in ready money, credits or effects, with the expression of the value of them, or the way in which the valuation has to be made.
5. The share of the profits or losses assigned to each capitalist partner, or to industrial partners in case of them.
6. The duration of the company, when it has to be for a fixed time, or for a determined object.
7. The branch of commerce, factory or navigation on which the business of the company is to be concerned, in the case that this one is established for one limited or many type of businesses.
8. The sums designated annually to each partner for his private expenses, and the compensation that in case of excess should receive the others.
9. The submission to trial of arbitrators in case of difference between partners, expressing the way in which the appointment would be made.
10. The way in which the liquidation and division of the partnership property is to be effected.
11. All other matters in which partners would like to establish special agreements.

Articles 284 and 286 were transplanted in Articles 250 and 252 of the Colombian Commercial Code of 1853 almost identically. Point number 9 of Article 286 of the Spanish

Commercial Code of 1829 was not included in Article 252 of the Colombian Commercial Code. Point 9 was likely suppressed because the Colombian Commercial Code of 1853 did not borrow the fifth book of the Spanish Commercial Code of 1829 that regulated the administration of justice in businesses. In Colombia, Law 1 of 1853 created an arbitral tribunal that had exclusive competence in all matters related with commercial law,¹² because of that it would make no sense to borrow point number 9.¹³

The Colombian Commercial Code of 1853 maintained the same business entities as the Spanish Commercial Code. However, Colombian Drafters made some important modifications to the structure and especially to corporate regulations. By doing this Colombian business regulations were liberalized, making Colombia one of the most liberal business regulators at the time in comparison with Spain and other European countries, something Robert Means called the “laissez faire approach”. (Means, 1973)

As it relates to business regulations, two articles, 293 and 294, of the Spanish Commercial Code of 1829 were not included in the Colombian Commercial Code of 1853. Article 293 required a condition of operation to anonymous companies. All notary instruments of the company establishment as well as other arrangements that governed the administration and management

¹² Article 1 of Law 1 of 1853

¹³ The tribunal was conformed by a judge of commerce that was elected by the general assembly of merchants for periods of two years (article 4 and 5) and by arbitrators – merchants – appointed by each party. The role of arbitrators was to decide if the facts were proven or not, among other issues (article 33), the judge then must rule in law, and without consulting a lawyer (article 10).

should be subject to an exam of the Tribunal of Commerce of the territory. Article 294 established that companies with a privilege granted by the King had the obligation to submit all documents of establishment for approval of the King.

This first business law transplant reflected two important things; first, liberal ideas influenced drafters on this transplant; As Robert C. Means (1973) acknowledges,

“[T]he Colombian code’s liberalism is not difficult to understand. The Spanish code provisions that the draftsman rejected or modified reflected on a small scale the features of the Spanish political hegemony that many Colombians blamed for their country’s underdevelopment. Moreover, the draftsman could eliminate such archaic features as guild control without offending influential vested interests; in this respect at least the country’s commercial backwardness was an advantage. Yet the draftsman’s putative liberalism would have had no significance had he not been willing to alter the Spanish code where it conflicted with his own views.”

Secondly, despite the influence of liberal ideas and the excitement of drafters, they were unable to make substantive changes in donor legislation, thus the Colombian commercial code lacked originality to the point that the majority of it was borrowed from the Spanish Commercial Code.¹⁴

In spite of these liberal changes the changes were not effective: at this time in Colombia there were no lawyers available to enforce and provide

life to law, in part because no course in commercial law was taught at law schools. Law was in the books but without the spirit of the law descending to society and disseminating in legal culture, therefore entrepreneurs and businesses did not benefit from the liberal changes mentioned above, something that eventually turned in a disparity problem (Means, 1973).

A useful example to describe the disparity problem between what happened in society and business at that time is provided by the existence of Law 13 of June of 1855. This law authorized the executive to provide patents of incorporation to companies with the purpose of establishing national or special banks.¹⁵ The existence of a patent of incorporation gave the idea that anonymous companies at that moment were considered creatures of the State and did not observe the liberal approach of the Commercial Code of 1853. The Colombian Commercial Code of 1853 did not require any patent of incorporation, in other words, no authorization was needed in order to create a corporation, and only a private contract was needed according to the commercial regulation. As Robert C. Means states:

“[E]ntrepreneurs could not benefit from the draftsman’s liberality until they, and the Congress, were aware of it, and that awareness was apparently some time in coming...][...The changes that the Colombian draftsman made in the Spanish code tend to confirm that he was not a legal technician. In decreasing numerical order, they consisted of simply omitting arti-

14 Robert C. Means referring to this point says, “[c]learly the Colombian draftsman did not view the Spanish code as *ratione scripta*; yet much of its text passed into the Colombian code without alteration.” (Means, 1973)

15 Article 1 Law 153 of 1853. This law understood incorporation as the legal recognition of a company or firm that separates legal entity from its members having its own privileges granted by the incorporation act and with the duty to be liable for performing actions with the funds, values and rights granted (Art. 2).

cles, substantively modifying articles, stylistically modifying articles, and adding articles not found in the Spanish code. This order suggests that while the draftsman wished to alter the substance of many Spanish code rules, he sought to make the alteration in the simplest way possible. He preferred simply to omit Spanish articles, and only as a last resort would he prepare new ones.” (Means, 1973)

B.2. Second Period of Business Regulation: 1858–1971.

The Commercial Code of 1853 applied only for a short time because in 1858 a Federal Republic was established that allowed every State to adopt its own regulation in issues related with commerce.¹⁶ By 1886 rivalries and political instability between the states had become so bad that rebellions and revolutions became very common and some politicians blamed the then-existing Union. As a result, the National Council was formed in Bogota, composed of three delegates from every state that created a new Colombian Constitution on August 4, 1886 (The New York times, 1894),¹⁷ this constitution created a sole state with a central government.¹⁸

16 This Federal Republic was called the Confederation Grenadine, until the Convention of Bogota gave a new name to the confederation, in 1861, calling it United States of New Granada; this name was also changed by the Constitution of 1863 (also known as “Rionegro Constitution”) as United States of Colombia.

17 This constitution is also known as “Nuñez Constitution” and it said “[t]he preservation of public order is vested solely in the nation, which alone can maintain an army and a navy” Source: Changing The Constitution. Important Modifications in The United States of Colombia. The Bridgeport Morning News, Feb 18. 1886. Online Source: <http://news.google.com/newspapers?id=r3kmAAAIBAJ&sjid=FwEGAAAIBAJ&pg=5598,1699004&dq=rafael+nuñez&hl=en>

18 This constitution is also known as “Nuñez Constitution” and it said “[t]he preservation of public order is vested solely in the nation, which alone can maintain an army and a navy” (The Bridgeport Morning News, 1886)

The central government had to decide which law adopt, so it started a selection process, selecting laws from different states within the Union.

The central government through Law 57 of 1887 adopted the Commercial Code of Panama; the prime commercial regulation of the state with respect to land issue.¹⁹ The Panamanian code was enacted in 1869 and was a legal transplant of the Chilean Commercial Code of 1865. For example, the Chilean code of 1865 did not define the contract of company in the same way as the Spanish code of 1829 did; one thing that remained equal between the previous donor countries was the types of companies with only one modification: the introduction of the contract of accidental association or partnership in the article that enunciated the types of companies.²⁰

Nevertheless, this type of association was not new in Colombian legislation. Indeed, the Spanish Commercial Code of 1829 recognized this type of business association in Articles 354 to 358, which the Colombian Commercial Code of 1853 borrowed in its Articles 315 to 319. Business regulations for companies and accidental association were covered from Article 463 to 633 of the Panamanian Commercial Code, for a total of 171 articles. Of these 171 articles: 156 were exactly the same as the Chilean Commercial Code of 1865, 4 were very similar, and only 14 were different.²¹

19 Article 1 of the law 57 of 1957.

20 Article 463.

21 There is no certainty of the novelty of these 14 articles; they just might have been transplanted of another donor country because of this they are reference as different.

An example of duplication laws can be observed in the classification of companies in the two codes.

Panamanian Commercial Code of 1869	Chilean Commercial Code of 1865
Art. 463 "The law recognizes three kinds of company: 1. Collective company; 2. Anonymous company; 3. Comandita in company." "It also recognizes the association or accounts in participation."	Art. 269 "The law recognizes three kinds of company: 1. Collective company; 2. Anonymous company; 3. Comandita in company." "It also recognizes the association or accounts in participation."

The following laws reformed the Panamanian Commercial Code with respect to its business regulation since its adoption as the Colombian Commercial Code:

1. Law 27 of 1888 – Through this law, powers were granted for government intervention in corporations and were regulated some aspects of insurance business, among other reforms.

With respect to business entities it established that Government would exercise an inspection power among all corporations organized and located among the country²² It also prohibited: 1) the existence of corporations with an undetermined duration;²³ or 2) those contrary to good costumes, public order and legal prescriptions; as well 3) that those that tend monopoly of subsistence's as or some branch of industry.²⁴

2. Law 124 of 1888 – Through this law all foreign corporations with the purpose of carrying out permanent business in Colombia should issue a protocol of the articles of incorporation in the subsequent 6 months of the beginning of

businesses, in the respective notary of the circuit where business was done.

3. Law 42 of 1898 – Through this law Articles 552 and 582 of the commercial code were modified. In a nutshell, these two articles created a new requirement of describing the company manager or administrator (name, surname and residence) as well that of two replacements for that position.

4. Law 58 of 1931 – This law created the "Superintendence of Corporations in Colombia."²⁵

5. Law 124 of 1937 – This law introduced a new business entity that was considered a mixture between *intuitus personae* and *pecuniae* to Colombian business law by the name of Limited Liability Firm.²⁶ Its origin was a transplant inspired by foreign law. The origin of this business entity has been attributed to German law from 1892–*Gesellschaft mit beschränkter Haftung*—were it was then borrowed by other European countries. (Pinzon 1962) The first Latin American country that borrowed this law was Chile in 1923, then Mexico in 1934, followed by Colombia in 1937. With respect to this

²² Article 1 of Law 27 of 1888

²³ Article 2 of Law 27 of 1888

²⁴ Article 3 of Law 27 of 1888

²⁵ In Spanish "Superintendencia de Sociedades Anonimas".

²⁶ In Spanish "Sociedad Limitada".

law, Phanor James Eder said: “The limited liability firm (sociedad de responsabilidad limitada) had become increasingly popular in Colombia, both with foreign and domestic investors and entrepreneurs, because of its freedom from government inspection and control....”²⁷

6. Law 59 of 1936 – Through this law the General Inter-American Convention for Trade Mark and Commercial protection was enacted.

7. Decree 2521 of 1950²⁸ – Through this decree important modifications were made to Colombian business regulation. For example, this decree defined company as: “Society or company is a contract by which two or more people stipulate to contribute capital to a social fund with the purpose of sharing between them profits or losses resulting from speculation...”[... The company is a legal entity different from the partners considered individually.”²⁹ This decree also established that it would be unlawful to for an anonymous company to engage in operations

of its object without a special permission provided by the Superintendent of Corporations.³⁰ The modifications made by this decree were inspired by the Spanish draft of law of corporations that eventually became law, and this law was inspired by Italian Law. (Pinzon, 1962)

B.3. Third Period of Business Regulation: 1971–1995

The actual commercial code was strongly influenced by foreign law and it may be considered as a legal transplant. However, the process of its creation is very peculiar, because it seems as if congress outsourced the whole legal process; first in special commissions formed by the drafters then with further participation from congress. The previous code transplant was not successful, and again the process was outsourced in commissions with active participation from the executive. (Pinzon, 1971, 15-24)

It started in 1953 when President Roberto Urdaneta A., through Decree 817 of 1953 created a commission to review all codes including the commercial code. The commission in charge of the commercial regulation was integrated by Rafael Ruiz Manrique, Hernan Copete, Emilio Robledo Uribe, Carlos M. Londoño and Manuel Barrera Parra who was designated by the Chamber of Commerce of Bogota. Some economic organizations – National Merchants Federation, National Association of Industrials, Colombian Association of Small Industries, Colombian Ocean Freight Merchant Fleet and the National Aviation Companies – could assist

27 Phanor James Eder also acknowledges the possibility of discouragement in the use of this business entity because in 1952 a decree extended jurisdiction to the Superintendent of Share Companies, in his own words, [...By Decree No. 2832 of November 19, 1952 (El Siglo, Bogotá, November 20, 1952), this advantage has been in large part swept away. The new decree extends the jurisdiction of the Superintendent of Share Companies to limited liability firms and other partnerships if 33% or more of their subscribed capital is owned by a stock corporation. In such case application must be made to the Superintendent by firms heretofore organized for authority to continue doing business. They must file balance-sheets, provide proportional voting for directors, and will be subject to government inspection and to sundry other rigorous provisions and requirements embodied in the corporations laws. This decree, by its extension of government intervention, however logical it may seem, is an unfortunate step backwards which may tend to further discourage foreign capital investment.” (Eder, 1953)

28 Other reforms to the commercial code were made through the Decree 2831 of 1952; Decree 664 of 1954 and Decree 239 of 1957 among others. Nevertheless in this document it would be omitted any further analyze of this ones.

29 Article 1 Decree 2521 of 1950.

30 Article 1of Decree 2521 Of 1950.

through delegates and participate in the meetings and debates of the commission but without having any voting power in decisions. (Pinzon, 1962)

In 1956, a decision was made to complete a new commercial code in two years and it was commissioned again to a group of draftsman taking as reference the work of the French drafting of the Commercial Code of 1947. The commission was compromised of Alvaro Perez Vives, Emili Robledo Uribe and José Gabino Pinzon and one year later, Victor Cock and Efren Ossa, joined the commission. This commission fulfilled its contractual duties on June 15, 1958. (Pinzon, 1962) However, after a draft of the code passed through Congress it stalled in the Senate. The reason was that in the Senate there was an attempt to modify the draft as it was initially conceived. This new commission was supposed to be compromised of three senators and three representatives but because they were not going to receive payment for their work, the project remained idle. (Pinzon, 1962) In 1970 the President Misael Pastrana Borrero reappointed the commission of drafters and in 1971 the draft became the Colombian Commercial Code through Decree 410 of 1971. (Pinzon, 1971)

The second book of the Commercial Code of 1971 was strongly influenced by the Italian Commercial Code of 1942 and the Mexican Commercial Code of 1934, as well as the Japanese Commercial Code of 1951 and French Business Company Law of 1966. (Pinzon, 1971).

Although, it may be fair to say that the Colombian Commercial Code can be considered a legal

transplant -- because it's heavily influenced by foreign legislation -- there was a process of rethinking and contextualizing foreign law to local conditions and context at that time, in some cases with a notorious acceptance. This process implies in some cases rethinking institutions, rules as well as enforcement according to the local conditions.

B.4. Fourth Period of Business Regulation: 1995 to Present

Some could argue that the changes in business regulation that took place in the nineties were motivated by the new Colombian Constitution of 1991 or by the economic changes that were taking place during that time. Changes begin to take place in business law through the Law 222 of 1995. This law was drafted by a committee that worked for the Minister of Justice in "the Reform of the Commercial Code of Colombia in 1995" coordinated by Francisco Reyes Villamizar and introduced new legal institutions to Colombian business law and definitely was inspired in foreign law.³¹ It was in part a legal transplant; however, as it was in the case of the commission in charge of the Commercial Code of 1971, there was a process of rethinking and contextualizing foreign law to local conditions and context.

Some examples of the improvements made by the Law 222 of 1995 were the regulation of spin-

31 Reyes Villamizar Holds a law degree from Universidad Javeriana and an LL.M. from the University of Miami, he also has been visiting professor at the Paul M. Hebert Law Center of Louisiana State University, Stetson College of Law, Universidad Católica Argentina, Instituto Tecnológico Autónomo de México and Agostinho Neto University in Luanda. Spamann Holger, Contemporary Legal Transplants – Legal Families And The Diffusion Of (Corporate) Law

off process of companies;³² the establishment of withdrawal rights under certain conditions³³; the creation of incentives to minimize principal agent problems (Delvasto, 2007); or the introduction of a new type of business entity³⁴—similar to a sole proprietorship. These improvements opened a door to diminish the role of *ultra vires* theory in business law, among other important changes in business law.

The majority of these modifications were inspired by foreign business law that in all cases have to be considered as good institutions; otherwise it would not seem reasonable to transplant them in first place. However, the openness and enlightenment of some of the drafters does not mean that other members of the legal community accepted and assimilated to the legal changes. In fact, when the drafting committee was discussing the creation of sole business entities, the principal argument against its creation was the ability to create a business entity without a group of owners. For some the idea was simply wrong from a semantic point of view: a company could not exist with only one person. Secondly, there was an implicit idea that with a group of owners within a company this implied some type of legal certainty for third parties willing to engage in transactions; otherwise, it would be suspicious and would facilitate fraud.

As stated by the Constitutional Court in the Sentence C-624 de 1998:

32 Article 3 – 11 of Colombian Law 222 of 1995.

33 Article 12 – 17 of Colombian Law 222 of 1995.

34 Article 71 of Colombian Law 222 of 1995.

“In Colombia, the existence of a sole business entity created a large initial skepticism because it was considered improper for the theory of companies and to the legal tradition of the “corporate contract” (Article 98 of Commercial Code), the inclusion in our legislation of this type of figures who talked of companies with a single partner. In addition, some part of the doctrine accepted easily the thesis of individual enterprise as patrimony of affectation, conformed, as it was said, by a set of goods that led to the production or execution of a particular economic activity; while the second option as one-person company and subject to law as such, generated greater skepticism.”

Another example of the evolution of business law in Colombia through legal transplants is the Simplified Stock Corporations introduced by the Law 1258 of 2008 but inspired by foreign law, particularly United States Limited Liability Company and the French “*Société Par Actions Simplifiée*”. The purpose of this legal transplant was to create a flexible business vehicle characterized by an absolute freedom to govern the company compared with the rigid company structures of the Commercial Code of 1971. (Project of Law 39 First Debate, 2007)

The previous process of evolution of Colombian business law fits the words of Alan Watson: “In most states, at most times, law mostly develops by taking from elsewhere. Legal transplants come in all shapes and sizes. An independent state may accept one rule or institution from another or may take many or even all. It may or may not make changes in what it borrowed.”³⁵ (Watson,1991)

35 Other term used by Alan Watson is “divergence of law and society”. This one denotes two things, first, that the “rule was not the best fitted to meet the needs and desires of a given society”, and second, “that

C. The Ultra Vires Theory and its Evolution in Colombian Business Law

Ultra Vires means “beyond the powers” and “[d]escribes actions taken by government bodies or corporations that exceed the scope of power given to them by laws or corporate charters.” (Legal Information Institute, 2010) Ultra Vires first appeared as a principle in the British legal system from the case *In Equity of Coleman v. Eastern Countries Railway Company* in 1846.” (D.L.,1877) In *Coleman v. Eastern Countries Railway Company*, the Court of Chancery said:

“Joint-Stock companies have funds so extremely large, and exercise powers so extensive and so materially affecting the rights and interest of other persons and the rights which the public or subjects of her Majesty have been accustomed to enjoy under the protection of the laws established in this kingdom, that to look upon a railway company in the light of a common partnership, and as subject to no greater vigilance than common partnerships are, would, I think be, greatly to mistake the functions which they perform, and the powers which they exercise of interference, not only with the public but with the private rights of all individuals in this realm. We are to look upon those powers as given to them, in consideration of a benefit which, notwithstanding all other sacrifices, it is to be presumed and hoped, on the whole, will be obtained by the public. But it being the interest of the public to protect the private rights of all individuals, and to defend them from all liabilities beyond those necessarily occasioned by the powers given by the several acts, those powers must be

always be carefully looked to; and I am clearly of opinion, that the powers which are given by an act of parliament, like that now in question, extend no farther than is expressly required for carrying into effect the undertaking and works which the act has expressly sanctioned.” (Beavan, 1849)

“How far those powers, which are necessarily or properly to be exercised for the purposes intended by the act extended, may very often be a subject of great difficulty. We cannot always ascertain what they are. Ample powers are given for the purpose of constructing and maintaining the railway, and for doing all those things required for its proper use when made; but I apprehend, that it has nowhere been stated, that a railway company, as such, has power to enter into all sorts of other transactions.” (Beavan, 1849)

One of the impressions from reading *Coleman v. Eastern Countries Railway Company* is that corporations were considered as a threat to the public interest because individual rights could be affected by the economic power of corporations; power that had its origin in the state itself. Because of this, the public needed protection and the ultra vires theory was seen as a mechanism of protection between principals/shareholders and the individual rights of the public. Another impression from the *Coleman* case is that corporations were creatures of the state because their power was granted by the state. The act limited the power and transaction capacity of corporations constituting a straitjacket for businesses. (Greenfield, 2001)

In Colombian law, the ultra vires theory is supported in Articles 99 and 110 of the Colombian

the dysfunction was known to the people concerned, and especially to those able to effect change.” (Watson, 2000)

Commercial Code. Article 99 states, with respect to ultra vires: “the capacity of the partnership will circumscribe to the development of the firm or the activity provided in its social object.” This article also establishes that acts directly related with the social object should be considered a part of it as well: “that all the acts with the finality of exercising rights and obligations legal or conventionally derived by the existence or activity of the partnership.”³⁶ In the same sense, Article 110 of the Commercial Code determines that the contract of commercial partnerships is mandatory to elaborate it through a public writing or document that will have to express some determined points in which is required the social object. It also acknowledges that any clause that extends the social object as an undetermined will not have effect.

The Colombian Supreme Court as well as scholars have provided some Colombian definitions of the ultra vires theory. The Colombian Supreme Court of Justice in a sentence of May of 1954 says:

“[t]he juridical persons develop their capacity to act through their organs or representatives, who because of the lack of natural will of the collective entity, act in legal relationships compromising it, within the limits set by law, statutes and the purpose of the juridical person. When such organizations or representatives act beyond these milestones, the relationships that were born do not bind the juridical person...”

36 According to the Superintendencia de Sociedades article 99 of the Commercial Code establishes the limits of the capacity of mercantile societies, the first limit is the principal activities contained in the social object; the second limit are those directly related with the principal activities of the firm, and in third place all of those with the finality exercise rights and obligations of the existence and activity of the societie. (Superintendencia de Sociedades, 1999)

But how did the ultra vires theory evolve through Colombian business law? As previously stated, the first commercial regulation that Colombia had was the Colombian Commercial Code of 1853. This code was initially proposed in 1842 but it failed to pass until a deputy from Panama, Justo Arosemena, again proposed it in 1853. This code was a transplant with only a few changes from the Spanish Commercial Code of 1829 as previously shown above. It did not include the ultra vires theory as we understand it today; although it might have existed as a legal agreement between parties.³⁷

Justo Arosemena drafted the Panamanian Commercial Code of 1869, which was a transplant of the Chilean Commercial Code of 1865. After the civil war in 1885, Colombia adopted the Panamanian Commercial Code as the commercial code of the Republic through Law 57 of 1887. The Panamanian Commercial Code adopted the ultra vires theory in Section Three of Article 552 when it stated: “The writing of the partnership should express...][...3) The company or business that the partnership proposes, and the object where it takes its denomination, making in both a clear and complete enumeration.” This regulation has a similar meaning as in article 426 of the Chilean commercial code of 1865, this one says: “The memorandum of association must state...][...3. The undertaking or business which the company proposes and

37 Two forums usually govern the relationship of people. The first one is principle of autonomy and permits the parties in a legal transaction to self-govern their relationships according to their interests and expectations, this power is manifested through the agreement or convention between the parties, of course always acting in the sphere of public and imperative law; the second is called public interest. The first principle was adopted in the article 264 of the Commercial Code of 1853.

the object from which it takes its name, making clear and complete enunciation of both...”

The Colombian Superintendent of Corporations (1948), referring to the ultra vires theory, said:

“Commercial partnerships have judicial capacity to act in a similar manner as natural persons, but while these ones are able to perform any act not expressly prohibited to them, those can not intervene in different acts that those clearly comprehended within their social object...the enumeration of the social object must be clear and complete, because the company does not acquire capacity to realize acts other than those expressly included in its object....”

The concept of the Superintendent considers all business entities as if they were the same, in other words, the ultra vires theory is applied to the rest of firms, without limiting the scope of Article 552, which applied to corporations.

In another concept, the Superintendent of Corporations (1948) stated that all Colombian partnerships must have a principal social purpose and have the possibility to develop other activities. However, in all cases, these activities must be related to the principal purpose and acknowledges that “[t]he relation that must exist between the principal purpose of the partnership and the accessories activities, should be from medium to end.”³⁸

As previously stated, the current Commercial Code of Colombia in Articles 98 and 110 adopted for the constitution of firms the ultra vires

theory. Article 98 defines a company as contract between two or more people with an obligation to make money, work or any other type of valuable asset with the purpose to divide between them the profits of the firm or the social activity. It also establishes that once the company is constituted legally it will constitute a legal entity – juridical person – different as the associates or partners. Article 110 stipulates the requirements that must be fulfilled in order to constitute a partnership. These requirements are a detailed set of obligations and rights that must govern the system of relationships of the firm and are known as essential elements of the articles of incorporation. Without these obligations and rights, the articles of incorporation would be declared void according to the circumstances. The purpose of a partnership is one of the essential elements of the partnership contract and it constitutes the guidelines that determine the capacity of the partnership. Any violation of this purpose will constitute an ultra vires act and thus the partnership will be considered void.

In this order of ideas and with respect to the ultra vires theory, the regulation of Law 222 of 1995 did not adopt it. Article 72 establishes that the document that creates the “Sole Business Entity” must fulfill some conditions in order for the merchant to register in the Chamber of Commerce. One of those conditions is to make “a clear and complete statement of the main activities, unless it is expressed that the company may perform any lawful act of commerce...” This was the first advanced in Colombian law in order to diminish the importance of ultra vires in partnership law, although, it was not complete

38 Other concepts that refer to “ultra vires” in the same way, an example are Oficio number 2761 of the 6 of June of 1942 or Oficio number 5-5542 of June 18 of 1953.

because the evolution only applied to sole business entities and not to partnerships under the commercial code.

In Colombian commercial law, Law 1258 of 2008 created a new type of business entity: *Sociedad por Acciones Simplificada* or Simplified Stock Corporations. This business entity was totally different from other types of businesses regulated by the commercial code.³⁹ This business provided corporate shielding for shareholders even if the business only had one shareholder. This business will acquire its juridical personality once someone registers the business in the chamber of commerce.⁴⁰ This law, as well as Law 222 of 1995 did not adopt the ultra vires theory. One of the drafters of Law 1258 of 2008 (Reyes, 2008) referred to the ultra vires theory as,

“[O]ne of the most anachronistic remnants of the theories in vogue at the beginning of last century in partnership’s matter. The presumed benefits of this thesis in terms of protection offered to associates are clearly overshadowed by the detriment suffered by third parties in terms of uncertainty about the validity of acts celebrated by the company. Under the current thesis, the company can find a speedy way to violate its contractual obligations by challenging the acts that overextend the scope of the object.”

According to Article 5 of Law 1258 of 2008 this type of business will be created by a contract or a unilateral act drafted at least in a private

document. The document must fulfill certain requirements, one of these requirements is “a clear and complete statement of the main activities, unless it is expressed that the partnership may conduct any commercial or civil activity. If nothing is explicit in the act of incorporation, it is understood that the company may conduct any lawful activity.” This type of business entity can be established to conduct any type of commercial activity within the limits of law and by doing so it abolished the use of the ultra vires theory for this type of business entity.

Based on the previous propositions, three important conclusions can be drawn:

1. The first one is that legal transplants have been the most common tool use to modify business law in Colombia. My belief is that this circumstance started because there is an impediment in the legal system to produce its own rules and evolve by itself.

In the first and second period of business law the evolution was driven using foreign legal institutions as a source. In some cases without even conceiving the possibility that changes may have to reflect or be in tone with social relations and informal institutions of the base, as it was the case of the first and second period of business law. By contrast the third and fourth period of business law rethinks and contextualizes foreign law to local conditions and context.⁴¹

39 The 1258 Law of 2008 created a new business entity called Simplified Stock Corporations, in Spanish “*Sociedad por Acciones Simplificada*”. Francisco Reyes & Asociados web site. Online source: <http://reyesvilamizar.com/firm.html#reyes>

40 Article 1 and 2 of Law 1258 of 2008.

41 In some cases rethinking and contextualizing foreign law is related with an acceptance and success of transplants. An example can be appreciate by comparing the total amount of business entities created (40.701) and the number of Simplified Stock Corporations (18.194) that were created in 2009; only one year after Law 1258 was enacted 44.7% of all business entities were created using the suit of the latest business entity. (Confecamaras, 2009)

Nevertheless, in all periods of the evolution of business law the evolution was driven from the top to the base of society and markets and not from the base to the top. In other words, evolution has not been product of a down-up process where the base endows and shapes formal institutions up.⁴²

What happens to legal culture when legal institutions are constantly borrowed and not provided by its own legal system?

2. The second conclusion is that prior facts suggest that law production in Colombia has been done by third parties, in some cases with an active participation of notable leading corporate lawyers,⁴³ that with their enlightenment and persistence have managed and struggle to push the boundaries of legal institutions. Nevertheless the evolution process of business law seems more like an outsourcing of law in third parties than a fulfillment of constitutional duties of Congress and suggests a lack of functionality of the legal system.

In our view the first period of business regulation is distinguish by the work of Justo Arosemena. An eager and persistent Senator that regained the commercial regulation proposed in 1942 and

proposed it again to Congress during in 1853. Needless to say, the code itself is almost a pure legal transplant from the Spanish Commercial Code of 1829. Robert C. Means said that arguments of the codification of 1853 were mainly procedural and had little to do with the necessity of new rules of society and markets.⁴⁴

The second period of business regulation is divided in two phases. The first was characterized again by the participation of Justo Arosemena, apparently he drafted the Commercial code of panama of 1869 and borrowed it from the Chilean commercial code of 1865 drafted by Gabriel Ocampo.⁴⁵ As it was said, the commercial code of Panama was adopted through Law 57 of 1887 by Colombia when the federal project failed in 1886. Apparently, this code was chosen among other states codes because it saw it as the most advanced commercial code among them. (Campbell, 2004)

The second is characterized by being reformed through different laws in different type of aspects of business regulation, and even though, the source of these laws has not been traced in

42 Some scholars previously have acknowledged the idea of structuring formal institutions from the base to the top. See for an extended discussion: 1. Hernando de Soto in "The Mystery of Capital Why Capitalism Triumphs in the West and Fails Every where Else. 2. Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard, Economic Development, Legality, and the Transplant Effect.

43 In our opinion, notable leading lawyers encharged of drafting law and statutes are similar as caudillos, their intelligence in the subject, plus their charismatic and enchanting personality, as well as their implicit power, in part because have been called as drafters of law by legal makers -- semi-legal makers -- make them acclaimed by their counterparts in legal culture to the point that are considered leaders in their field as caudillos.

44 Robert Means referring to this point said "[a] certain degree of isolation is a natural part of codification in the civilian tradition because of the relative autonomy of that traditions intellectual structure. But the disparity in development between Colombia and even relatively underdeveloped European countries like Spain magnified the isolation in two ways. The first concerned the number of persons for whom the code had any relevance. Even in Europe commercial law governed a relatively small part of the population, but that proportion was drastically smaller in an underdeveloped and basically noncommercial country like Colombia. The second is concerned the proportion of the new code that was relevant to anyone. The arguments for codification had been basically procedural and thus had little to do to any demand for the new rules governing this field; it was due to the structure of the Spanish code." (Means, 1973)

45 In 1852 Law 14 empowered President Montt to hire persons with a pay equal to that as members as Supreme Court of Justice and appointed a commission to draft the bills for new codes, this is why Gabriel Ocampo drafted the Chilean Commercial Code. (Campbell, 2004)

all the cases, there is a strong suggestion that were nourished by foreign law as was the case of the creation of the Limited Liability Firm that evidently had an origin of the German business entity – Gesellschaft mit beschränkter Haftung – and probably also in Chile and Mexico business law as well.

The third period of business regulation is characterized by the participation of commissions of draftsmen in the elaboration of the commercial code. This is sufficient evidence to affirm that this code was definitely an outsourcing of law in third parties.

One of the most distinguished lawyers that participated in the different commissions that existed since 1953 until the commercial code of was enacted in 1971 said, “[T]he extraordinary decree 410 of 1971, by which the commercial code of the country was adopted...][...have emphasized two things: that Congress does not want to study laws that they have to dictate and it prefers to make almost in ordinary the extraordinary system of legislation through decrees...][...and that presidents do not know how to use the powers conferred to them...][...Because they feel autonomous legislators that not always respect the limitations and conditions set by Congress”. (Pinzon, 1971)

The fourth period of business regulation started in 1995 with Law 222 of 1995 and has been characterized by the active participation of some well-known legal scholars of Colombia. These leading corporate lawyers in some occasions have been entrusted with the assignment of drafting new legal institutions and actualizing

the existing ones to actual needs of society and markets.

3. The third conclusion is that previous legal transplants are based on the assumption that foreign legal institutions where transplants were taken are better per se to achieve growth and eventually economic development. It would be a waste of time and resources to invent something that is already invented, why bother to create the wheel if your neighbor already has found a solution? It would be wasteful not to transplant legal institutions. On the other hand, are foreign legal institutions good for growth and economic development? And assuming they are does this mean that they will fit to social and economic conditions of the transplanted country?

III. LAW AND ITS RELATION WITH ECONOMIC GROWTH AND DEVELOPMENT

Business law in Colombia has been transplanted on the assumption that foreign legal institutions where transplants were taken are better per se to achieve growth and eventually economic development. As previously stated, law is considered the most adaptable formal institution that can be used to create incentives that contribute to achieve economic growth and development in society. (Rodrik, 2003; Ulen 2010)

In recent years, some scholars have given some thoughtful answers of the relation between institutions, and being more precise law, with growth and development. Well, understanding law as

a formal institution. Particularly, Acemoglu and others (2002) have determined in a theoretical and empirical way that society's with an institutional framework that provide incentives and opportunities for investment will obtain economic gains and perhaps achieve economic growth and development or at least will be in the path to obtain it. Something called "institutional hypothesis". (Acemoglu, Johnson & Robinson, 2002) An example of an institution that provides incentives and opportunities for investment is the Morrill Act in 1862 in United States (Baldwin, 1988) as well as other educational policies adopted in United States during the nineteenth century. (North, 1990)

By contrast society's that have "extractive institutions" will fail in achieve economic development. (Acemoglu, Johnson & Robinson, 2002) Extractive institutions are institutions that do not promote development. In part, Douglass C. North supports this idea when he describes an "institutional framework with a reverse set of incentives".⁴⁶ History can provide some examples of how some regions of the world were affected by the insertion or maintenance of extractive institutions and may provide an idea of the way in which is related with economic development.

⁴⁶ The opportunities for political and economic entrepreneurs are still a mixed bag, but they overwhelmingly favor activities that promote redistributive conditions and that restrict opportunities rather than competitive conditions and that restrict opportunities rather than expand them. They seldom induce investment in education that increases productivity. The organizations that develop in this institutional Framework will become more efficient - but more efficient at making the society even more unproductive and the basic institutional structure even less conducive to productive activity. Such a path can persist because the transaction costs of the political and economic markets of those economies together with the subjective models of the actors do not lead them to move incrementally toward more efficient outcomes." (North, 1990)

When Europeans established colonies in America they arrived to geographic areas that in some cases were "sparsely populated", those regions could be considered as "poor regions". By contrast, there were other regions, which were highly populated with some type of organization and with a certain degree of prosperity that could be considered as prosperous regions. The arrival of Europeans brought to American society's new type of institutions: in "poor regions" Europeans "develop institutions encouraging investment", on the contrary in prosperous regions were introduced or maintained "extractive institutions" that were beneficial only for colonizers and the colonizers elites. (Acemoglu, Johnson & Robinson, 2002)

Scholars believe that good institutions, also known as institutions of private property, are essential for economic performance because they create a cluster of institutions that ensure "secure property rights for a broad section of society." (Acemoglu, Johnson & Robinson, 2002) On the other hand, extractive institutions created conditions of economic gain for small groups and there are characterized by concentration of power in small elites that retain political power and constantly threaten to deprive others outside of their group. (Acemoglu, Johnson & Robinson, 2002)

The Basic idea of Acemoglu and others (2002) is that good institutions, also called as "institutions of private property", are essential for economic performance because they create a "cluster of institutions" that ensure "secure property rights for a broad section of society". On the

other hand, “extractive institutions” created conditions of economic gain for small groups but as a whole there is not a win solution for society, only for the extracting group, there are characterized by concentration of power in small elites that detent political power and a constant threat of expropriation for the population outside the rulers group.

An example of an extractive institution that contributed to the “institutional reversal” in Spanish American Colonies was the Encomienda. Encomienda was a right over indigenous labor, it permitted Encomenderos extract a tribute or payment determined by the output, or they could use the Indigenous as a labor force for their own benefit. In the end, Encomienda was a restricted type of property right over Indigenous labor granted by the Crown in specific areas. Furthermore, this right was restricted in three ways, first of all, Encomenderos did not own Indians, they were not considered a thing or object and because of this they could not be negotiated and were not in commerce. In other words they could not be bought, rented or other. Second, Encomenderos could not succeed or inherit their title, it was forbidden to them. With respect to the transmission of the rights of the title to descendents they only could be transfer to the second generation, after this generation encomienda return to the dominium of the Crown, and could go to other Encomenderos or be retained by the Crown. Third, Encomenderos had a right to the labor of the indigenous people in a determined territory they did not own any title to the land, because of this they could not be reallocated in other geographic parts. (Yeager, 1995)

The Encomienda seemed like a reasonable institution for the Crown although it generated the type of incentives that fit a tragedy of the commons situation described by Garret Hardin (1968). With Encomienda, as well as with the commons, the central problem consisted in the incentives that are generated by the absence of effective property rights; the second generation of Encomenderos knew for sure that the Encomienda would not pass to their heirs, so why should they care for the next Encomendero in the list? Instead why not use resources to their maximum capacity disregarding if those resources were depleted in the process, if the title was not going to remain in their control. As Milton Friedman, said “[t]he central principal is that nobody takes care of somebody else’s property as well as he takes care of his own.”⁴⁷

The incentives generated by Encomienda were definitely extractive. In fact,

“[E]ncomienda lowered revenue by more quickly depleting human capital, restricting labor mobility, and promoting higher average costs. The Crown preferred this organization over other forced labor alternatives because it allowed rents to be earned from native labor and gave the Crown greater security of rule in the New World while not reducing Native Americans to the status of slaves...[...The crown guarded its security at expense of creating a poor institutional framework for productivity and investment....”(Yeager, 1995)

The important thing stated so far, is that institutions play a key role in the economic growth and

47 Friedman Milton, Take It To The Limits: Milton Friedman on Libertarianism, Hoover Institution, Stanford University. <http://www.hoover.org/multimedia/uncommon-knowledge/26936>

development of society. According to Acemoglu and others (2002), “[t]he institutions hypothesis, combined with the institutional reversal, predicts that countries in areas that were relatively prosperous and densely settled in 1500 ended up with relatively worse institutions after the European intervention, and therefore should be relatively less prosperous today.”

Dani Rodrik, pointed out the necessity of other type of institutions, besides market creating institutions—those that protect property rights and ensure that contracts are enforced— in order to obtain long-term economic growth and achieve development. Rodrik (2003) suggests, market regulating, market stabilizing, and market legitimizing institutions.

It is true that institutions are fundamental in society and “good institutions” – those that generate incentives and create opportunities for investment and apply for a large portion of society – are essential for growth and economic development. Formal institutions generally adopt the form of law, and because law is the most malleable institution is likely to be transplant.

Well, this is more or less true. Yes, in some contexts law will matter, and probably business and commercial would encourage growth and economic development. Conversely, in others it might not, or it will do so partially given specific circumstances. New research has shown that under some circumstances social rules will be the key.

The work done by Robert C. Ellickson in Shasta county is extremely useful to support this

argument, Robert Ellickson, made an investigation of the manner in which rural landowners in Shasta County, California, resolved disputes originated by trespass by livestock.

The empirical results found by Ellickson were different of the manner in which law determined things to function, as well, that it was partially different of way in which Ronald H. Coase structured his hypothetical problem between ranchers and farmers in his article “The Problem of Social Cost” (1960). The theoretical results of this article were previously known in the academic literature as “The Coase Theorem”, holding that an “efficient use of resources does not depend on the assignment of property rights in situations of zero transaction costs.” (Cooter & Ulen, 2008) Well, in theory you could say that transaction costs are zero; nevertheless, reality shows that they are always costs in every transaction. Put it differently, when transaction costs are high, according to “Coase Theorem” there is necessary a first assignment of resources, in order obtain an efficient use of them.

According to Ellickson study of Shasta County, Coase was correct, but not because transaction costs were zero, but because, transaction costs were high, the legal process, the living law has its costs, well at least, residents have this conception, and because this they rely on informal norms to find a solution to the trespass problems. In words of Ellickson (1986):

“[t]he Shasta County evidence indicates that Coase’s Farmer-Rancher Parable correctly anticipates that a change in the rule of liability for cattle trespass does not affect, for example, the

quality of fences that separate ranches from farms. The Parable's explanation for the allocative toothlessness of law is, however, turns out to be exactly backward. The Parable's explanation is that transaction costs are low and that parties respond to a new rule by agreeing to an exchange of property rights that perpetuates the prior (efficient) allocation of resources. The field evidence I gathered suggests that a change in animal trespass law indeed fails to affect resource allocation, *not because transaction costs are low, but because transaction costs are high*. Legal rules are costly to learn and enforce. Trespass incidents are minor irritations between parties who typically have complex continuing relationships that enable them readily to enforce informal norms. The Shasta County evidence indicates that under these conditions, potential disputants ignore the formal law."

In theory, in Colombia legal institutions are created and structured through a process that takes place in Congress in some cases with the active participation of the executive.⁴⁸ This political body has a constitutional function in creating rules for Colombian society and because law is the most malleable institution lawmakers are likely to believe that once enacted a law the rest would be a matter of time, or at least in my opinion, there is a belief in legal culture to think that law is fundamental in resolving society problems. However how many Shasta County's are there in Colombia?

In this point is important to acknowledge the words of Abraham Maslow, who said, "[i]t is tempting, if the only tool you have is a

hammer, to treat everything as if it were a nail." (Maslow, 1966) The point of Maslow was reaffirmed by Abraham Kaplan in the so called "Law of Instruments", when he observes, "[g]ive a small boy a hammer, and he will find that everything he encounters needs pounding...][...The price of training is always a certain "trained incapacity": the more we know to do something, the harder it is to learn to do it differently (children learn to speak a foreign language with less of an accent than adults do only because they did not know their own language so well to start with)". (Kaplan, 2004)

Professor Thomas Ulen, went a step further and stated, "[l]awyers have law as their principal tool, and, as a result, lawyers see every problem as amenable to legal solution." (Ulen, 2010) Well, all of this is probably true, and maybe as professor Ulen says, "the vital role of private and public law and the legal profession are overblown and possibly inaccurate and misleading."⁴⁹

49 Professor Ulen arguments are the following. First, he affirms that it's a fact that other alternatives to law might perform the same function of it, and using as an example the empirical work made by Robert C. Ellickson in Shasta County, he says, "social norms appear to be a close substitute for the law...][...formal law may not be necessary for a well-ordered society; social norms may serve perfectly well. In fact, it may be the case that where the institutions of law are either absent or ill-managed, social norms become elaborate enough to perform many of the functions that a well - functioning legal system would have provided." So he concludes, "It may be, then, that the absence of a well-functioning legal system should not be taken as a signal that a society cannot sustain modern economic growth...][...a modern legal system may be a product of development, not a prerequisite to it..." The second one stability, this is an important condition for "long-term growth". Economic agents need to perceive that propitious conditions are going to maintain constant because their expectations are supported on those beliefs, in his own words, "stability of background conditions is extremely important to "long-run growth." Because of this, he manifests, some tensions might surge between having the correct institutions and having stable but not ideal institutions that could be more propitious for economic growth. The third one is political courage; economic growth implies a change in actual economic conditions, because of this some agents will gain more economic power with respect to others, that probably, will imply that some agents that detent power wont maintain it, in Ulen words, "gainers will surely encourage and accept the change, but losers may fight to prevent their losses from be-

48 The Constitution provides that Congress shall make laws, articles 114 and 150 of Colombian Constitution.

Our view is very skeptical in believing that donor legal institutions, as the case of foreign business law, are better per se for encouraging growth and development. The belief assumes that foreign legal institutions of “modern” or “developed” countries are good institutions, and understanding by good institutions those institutions that root growth and economic development.

Well, so just, why not start borrowing rules from China? Eventually they will be developed at almost growing rates of 10% GDP in past 30 years. China GDP has grown since 1978 at an average rate of 9.98% per year, and passed from 148.179 Billion dollars of current GDP in 1978 to 4.985 Trillion dollars of current GDP in 2009. Colombia GDP in same period of time had an average of growth rate of 3.6% per year, and passed its current GDP from 23.264 Billion dollars to 234.045 Billion of dollars. (World Bank) ⁵⁰

As we said before, it is true that institutions are fundamental in society and “good institutions” -- those that generate incentives and create opportunities for investment and apply for a large portion of society -- are vital for growth and economic development.

The problem is that the impact of formal institutions, law as its principal form, in growth and

economic development is not so clear for the moment. In some contexts law will matter, and probably business and commercial would encourage growth and economic development. Conversely, in others it might not, or it will do so partially given specific circumstances. As we have seen, new research has shown that under some circumstances social rules will be the key and not law. This means that we need to study more the relation of law and development, and even much more the impact of foreign law in growth and development of countries like Colombia.

Now let's imagine that institutions of developed countries are “good institutions”, would this mean that foreign “good institutions” will function the same as in the donor country? We presume they will not. We are not going to elaborate this answer, as we have seen law is the most malleable institution and because of this is likely to be transplanted or borrowed. Not acknowledging that things simply might be different and may need different solutions, solutions in some cases in harmony with local context, would be a clear mistake in borrowing foreign law. In my opinion legal institutions should be rooted in social-economic contexts where they are meant to fit.⁵¹

Acknowledging potential implementation problems of legal transplants does not mean that in the process of evolution of commercial and busi-

coming permanent or crippling.” This struggle process between losers and winners will probably imply a block of the economic reforms that change the balance of political power. (See for a further discussion, Acemoglu Daron and James A. Robinson, Political Losers As a Barrier to Economic Development. January 11, 2000.) This is why “leaders with extraordinary courage, vision and determination” are necessary in order to conceive, implement and achieve policies that will conduce to the path of economic growth, even though, they would not be popular for some economic as well as political sectors.

50 Source World Bank. Own Calculations. <http://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG>

51 Contrary to this view Jonathan M. Miller noted that in some cases, the previous process could have an Achilles' heel, in his words, “local product may be as unrealistic as any transplant. While one would expect domestic drafters to have a sense of local problems, nothing makes local drafting “per se” better suited to local conditions than a foreign model that local legislators deem useful.” (Miller, 2003)

ness law foreign legal institutions and ideas in general should not be used as an input. Indeed legal reforms could benefit from previous and foreign ideas, the point is that those business reform projects inspired in foreign legal institutions should be rooted in social, cultural and economic relations, at least legal rules would fit those conditions; on the contrary, if the cost of rearranging those conditions with formal institutions would be excessive or prohibitive to accomplish, it would be helpful in economic terms to have a one size fit all legal institutions – rules or principles – at least with them it would be easier to connect society conditions with law.

IV. PATH DEPENDENCE AND EVOLUTION OF BUSINESS LAW IN COLOMBIA

What happens to legal culture when law is constantly borrowed, and not provided by its own legal system? In our belief, it creates a dependent situation and an implicit perception in legal culture that in order to achieve growth and economic development it is necessary to have institutions, including law, equal or similar as developed countries, this is one of the causes that from time to time Colombia runs an actualization process of legal institutions. To the point that the legal culture considers foreign law of developed countries better per se. In other words, in Colombian legal culture there is an implicit perception of inferiority with respect to law and legal institutions of developed countries.

Some suggestive examples of the tendency in Colombian legal culture to perceive itself as inferior with respect to foreign law of developed countries can be found in legal culture. Well recognized such as scholars as Phanor J. Eder or José Gabino Pinzon have this implicit idea in some of their writings.⁵² Phanor James Eder, a recognized Colombian lawyer during the 20th century, noted that Colombian law in the late 19th century and beginning of the 20th century was highly influenced by French sources and that Colombian courts followed French commentators in obscure points of Colombian law, as he affirms in his book *Colombia* (Eder, 1913):

French and Spanish influences are predominant in shaping the law of the country; the writings of English, American, and German jurists are scarcely known, except as they filter through French sources: on the other hand, French commentators are regarded with high authority, and usually control the decisions of the courts on points where the Colombian Codes are obscure.

After the Colombian Commercial Code was published, the Bogota Chamber of Commerce published a series of papers associated with the new code. José Gabino Pinzon wrote one of those papers.⁵³ Mr. Pinzon stated that the work done by the commission in charge of drafting the Commercial Code of 1958 changed the Public Register of Commerce from a prerequisite for

52 Phanor James Eder was born in Palmira (Colombia) in December 11 of 1880, he graduated from New York City College in 1900, in 1903 he graduated from Law at Harvard Law School. See for an extended discussion, The American Journal of Comparative Law, To PHANOR JAMES EDER Vol. 18, No. 3 (Summer, 1970), pp. 479-482.

53 See for an extended discussion José Gabino Pinzón Martínez. <http://www.javeriana.edu.co/javeriana/medio/galeriajaveriana/galeria.php?pag=respuesta&id=131&cont=1>

the validity of certain acts to a mere publicity requirement “matching it with a tendency already well defined in modern commercial law and which are eloquent examples the register system of the Italian code of 1942 and the French decree of August 9 of 1953.” (Pinzon, 1971)

Other examples may be found in court decisions, as it was the case of The Colombian Supreme Court of Justice on February 21 of 1938, which affirmed: “[Referring to Colombian regulation] in line with positive regulations and doctrine of other people from advanced Legal Culture, where Colombia has often taken the mold of their conceptions of civil regulation [referring to French regulation].”

During the drafting of Project of Law 39 of 2007—the project that became Law 1258 of 2008—the first debate affirmed that positive and principal aspects of foreign law or regulation should be transplanted, acknowledging that law should be imitated according to the economic conditions of our society and making present that the purpose is not to copy literally.⁵⁴

Project of Law 39 of 2007 uses French law and the opinion of recognized foreign scholars, as was the case with Yves Guyon who was a recognized professor of Panthéon-Sorbonne law school to support the arguments of the project and as a demonstration of success of the business entity in French legal system.⁵⁵ Curiously, and as it was pointed by Phanor James Eder almost 100 years ago, French influence continues

to apparently be a point of reference in shaping business law of the country. However, since the last period of business law there has been a change toward U.S. business and corporate law and sources, apparently as a change of preferences in legal education and especially as crescent tendency in Colombian legal culture to pursue graduate legal education such as J.S.D. or LL.M.⁵⁶

The constant modification of business law in Colombia by outsourced commissions conformed by notable leading corporate lawyers, which use as principal source foreign business law of developed countries, especially from those influenced by the academic and professional background of these notable lawyers, has created a path that continually is used to modify the law and created an implicit perception in legal culture that its necessary to have legal institutions equal or similar as developed countries to achieve growth and economic development.

56 The education background of a scholar may shift the lineage of corporate law of a country. As Holger Spamann points it: “The changing lineage of the Colombian corporate law statute is mirrored in, and can perhaps be traced to, the writings of the leading Colombian corporate lawyers. While the 1996 book by the principal draftsman of the 1995 law, Reyes Villamizar, cites as many US as foreign civil law sources, the 2002 books by his predecessor as *Superintendente de Sociedades* and legislative draftsman, José Ignacio Narváez García, cite many European civil law, very few Colombian, and no US sources.” These draftsman’s are well known in Colombia by their professional and academic work, and of their main difference is their academic background and approach to different legal cultures, while Jose Ignacio Narvaez is a lawyer of the Externado University and has served as Superintendent of Societies on two occasions, as well as Minister of State, member of the Commission reviewing the Commerce Code (1968 - 1971), honorary member of the Bar Association Commercial and number of the Colombian Academy of Jurisprudence; Reyes Villamizar Holds a law degree from Universidad Javeriana and an LL.M. from the University of Miami, he also has been visiting professor at the Paul M. Hebert Law Center of Louisiana State University, Stetson College of Law, Universidad Católica Argentina, Instituto Tecnológico Autónomo de México and Agostinho Neto University in Luanda. Spamann Holger, *Contemporary Legal Transplants – Legal Families And The Diffusion Of (Corporate) Law*. http://www.law.harvard.edu/programs/olin_center/fellows_papers/pdf/Spamann_28.pdf

54 First Debate Paper of Project of Law 39 of 2007, Colombia.

55 First Debate Paper of Project of Law 39 of 2007, Colombia.

And generally when foreign legal systems evolve by inventing or innovating legal institutions there is a necessity to catch up these foreign systems and the perception is that law is anachronic; therefore the system runs again an actualization process of legal institutions and the path dependence continues again.

V. ASYMMETRY OF INFORMATION AND GOVERNMENT FAILURE IN COLOMBIA

The frequently evolution of business law in Colombia by outsourced commissions conformed by notable leading corporate lawyers, which use as principal source foreign business law of developed countries is rooted in an impediment of the legal system to produce its own rules and evolve by itself. We think, the impediment is an asymmetry of information between governmental organizations encharged of developing legal infrastructure and the necessities of economic agents and the existing extralegal institutions of society and markets.

As Hernando de Soto stated referring to extralegal businesses and entrepreneurs in underground economies (2000), “[m]ost people do not resort to the extralegal sector because it is a tax haven but because existing law, however elegantly written, does not address their needs or aspirations.” (2000)

And then referring to a program applied in Peru to attract agents in the legal system he says, “[i]n Peru, where my team designed the program

for bringing small extralegal entrepreneurs into the legal system, some 276,000 of those entrepreneurs recorded their businesses voluntarily in new registry offices we set up to accommodate them...][...We were successful because we modified company and property law to adapt to the needs of entrepreneurs accustomed to extralegal rules. We also cut dramatically the costs of the red tape to enroll business.”

Asymmetries of information in words of Joseph Stiglitz (2002), is the “fact that different people know different things. Workers know more about their abilities than the firm does; the person buying insurance knows more about his health...][... Similarly, the owner of a car knows more about the car than potential buyers; the owner of a firm knows more about the firm than a potential investor; the borrower knows more about the riskiness of his project than the lender does; and so on.” Some persons could argue that this lack of information is a natural circumstance present in social and human relations, indeed I agree, after all a liberal market economy is based on the assumption that people are free to choose, in other words make individual decisions. However, in some circumstances asymmetries of information can distort human relations and provoke unthinkable market problems like adverse selection, moral hazard, agency problems, among other’s; this is why scholars consider asymmetries of information as a market failure.⁵⁷

⁵⁷ Economic theory contends, almost unanimously, that there are four conditions under which a market result would be unsatisfactory and result in a failure; these conditions are commonly termed as Market failures. These ones are: a) public goods, b) failure of competition, c) externalities, d) asymmetry of information. Although some authors extend these failures to incomplete markets, imperfect complementary, and so on. See for a further discussion Joseph E. Stiglitz. *Economics of the Public Sector: Third Edition*, (W.W. Norton, 2000).

Under the existence of market failure resources are not assigned in an efficient manner, for that reason government should undertake and regulate activities related with those failures. Providing public goods is one of those activities that government should undertake, because, otherwise economic agents would not produce those goods in markets, or produced in low amounts, given the incentives generate by public good conditions (non rival and non excludable). Legal infrastructure is similar as public goods; it affects every single person and evidently producing it implies a large-scale activity, large – scale activities imply an active coordination and administration. In my view legal system should have those organizations encharged of administering and coordinating legal infrastructure and in theory in Colombia Congress and other governmental organizations should do this. In my view, governmental organizations have failed in omission in developing and innovating legal infrastructure. As we described previously creating a “cluster of institutions” that ensure “secure property rights for a broad section of society” is one step necessary to achieve growth and economic development. (Acemoglu, Johnson & Robinson, 2002)

The lack of information of Colombian of market structure and in general society conditions, inhibit a reflexive process of development of legal institutions that integrated formal and informal markets. Under this circumstance, borrowed law could not be useful, well, at least to some part of entrepreneurs and micro-entrepreneurs that would only manage to stay afloat under the backwardness of legal institutions.

On the other hand, outsourcing law involves a less expensive process of law production for governmental organizations in the short run, this type of transplants have been called by Jonathan M. Miller (2003) as cost-saving transplants. Commissions conformed by notable leading corporate lawyers entrusted with law production, could also present problems caused by asymmetric information, as Jonathan M. Miller (2003) recognizes it, “the cost-saving transplant involves a drafter who when confronted with a new problem pulls a solution from elsewhere off the shelf of the library to save having to think up an original solution...”

This type of solution could imply not knowing the social economic context where it will apply (asymmetric information) and also could determine that the drafter only considers his available information and tools to do the transplant, something named by Jonathan M. Miller (2002) as “bricolage”.⁵⁸

Katarina Pistor with respect to this point says that, “the external supply of best practice law, while facilitating more radical change than might be feasible without external pressure, sterilizes the process of law-making from political and socio-economic development, and thereby distances it from the process of continuous adaptation and innovation. The process of legal innovation depends on the availability of information not only about the contents of legal rules – some thing international legal standards do provide – but also about their functioning in the context of

58 Jonathan M. Miller considers that bricolage “[...]process of bricolage, simply pasting together whatever one has at hand, and the results may appear to have the time or lacked the technical competence to anchor” (Miller, 2003)

a living legal system. The perfect construction of law by legal experts for wide dissemination can deprive law makers and law enforcers in the receiving countries of the knowledge of living law, which is context specific.”

Third parties encharged of law production – through an outsourcing process – could tend to barrow legal institutions only because others have borrowed them and are some type of fashion thing to have them, something like a “bandwagon effect” in legal transplants. All these circumstances and probably others not included will affect an eventual institutional legal change done by different parties entrusted with law production, as is the case of commissions conformed by notable leading corporate lawyers.

Nevertheless, if changes in legal institutions imply variation in the balance of power of domestic, and even in some cases in foreign interest groups, the process might be different, because, new legal institutions will generate a “creative destruction” process. Eventually, someone will obtain benefits and other will achieve loses, but if the party who loses has a dependent and proportional relation with political actors, there is a high possibility that the legal change will be block by those groups, unless there is superior gain obtained and provided by the beneficiaries of the change to unblock the change through political channels. At the end of the day, if a sort of political efficiency is achieve legal Institutions will be reform, and in some cases transplanted and borrowed from foreign countries in a process driven up-down the base of society and the market without having information of the

way things are done in society and markets, the dogs will continue to bark and social relations will continue to be the guideline of informal markets and business.

In the process of setting rules and standards is crucial and relevant information, as well that for the enforcement and the evolution of new legal institutions and rules, as Robert C. Means (1973) says, “[a] modern legal system continuously produces data—legislation, court decision, and scholarly writing—that the system’s decision makers consider relevant.” In this point “cognitive legal institutions” enter in action by transmitting “knowledge of legal rules from their makers to those who apply and obey them. This is the function of the official gazette and the published code...[... Cognitive legal institutions also organize and transmit data produced by rule interpreters—courts and, particularly in civilian jurisdictions, legal scholars. The importance of this function lies in its close relationship to the legal system’s capacity for interstitial growth. Legal institutions must perform this function to flesh out the framework of legal rules and adjust it to changing conditions through the accumulation of case law and doctrine.”⁵⁹

As it was said previously, acknowledging potential implementation problems of legal transplants does not mean that in the process of evolution of business law through foreign legal

59 Robert C. Means (1973) almost 40 years ago affirmed that In the nineteenth-century Colombian “[c]ognitive legal institutions were poorly developed at best, and those that existed—the law schools and some treatises—ignored corporate law.” Nevertheless, according to him “[t]he lack of widespread dissemination of legal rules in Colombia is probably due more to social problems such as illiteracy and geographical remoteness than to inherent defects in the legal institutions.”

institutions and ideas in general should not be used as an input.

Indeed legal reforms could benefit from previous and foreign ideas, the point is that those business reform projects inspired in foreign legal institutions should be rooted in social, cultural and economic relations, at least legal rules would fit those conditions; on the contrary, if the cost of rearranging those conditions with formal institutions would be excessive or prohibitive to accomplish, it would be helpful in economic terms to have a one size fit all legal institutions -- rules or principles -- at least with them it would be easier to connect society conditions with law. As Jurgen Habermas (2001) says it "only those [moral] norms can claim to be valid that meet (or could meet) with the approval of all affected in their capacity as participants in a practical discourse".

VI. CONCLUSION

Based on the previous discussions above, some important conclusions can be drawn:

One of the first conclusions that can be drawn is that legal transplants have been the most common method used to create and modify business laws in Colombia. Most likely this started because there is an impediment in the Colombian legal system, the existence of asymmetry of information between governmental organizations encharged of developing legal infrastructure and the necessities of economic agents and the existing extralegal institutions of society and

markets; which hinders its ability to produce its own rules and evolve by itself.

During the first and second periods of business law the evolution of law was driven by using foreign legal institutions as a source. Many times this was done without considering the affects that these foreign laws would have on Colombian society. In contrast, the third and fourth periods of Colombian business law evolution rethinks and contextualizes foreign law to local conditions and context. However, in all periods of Colombian business law evolution of law has been driven by the top down to the base of society and not from the base to the top, specially by outsourcing legal production in commissions conformed by notable leading corporate lawyers, which have used as principal source foreign business law of developed countries, especially from those influenced by the academic and professional background of these notable lawyers. Continually outsourcing law has created a legal dependency in foreign business law as an input of Colombian business law and an implicit perception in legal culture that it's necessary to have legal institutions equal or similar as developed countries to achieve growth and economic development.

Another conclusion is that lawyers outsourcing law may be affected by the existence of asymmetry of information problems, especially when drafters don't know the social economic context where law will apply, or when they only consider their available information and tools to do the transplant, incurring in some sort of bricolage transplant.

We believe that most of the legal transplants in Colombian business law are based on the assumption that transplanting laws from foreign legal institutions are per se better than creating laws based on the needs of the citizens in order to achieve growth and spur eventually economic development.

However this is not necessarily true. Constantly transplanting laws from other countries, have caused legal dependency in foreign law. This in turn creates the perception that it is necessary for developing countries to have legal institutions equal or similar to those of developed countries in order to achieve growth and spur economic development.

The point is that legal reform projects inspired by foreign legal institutions should be rooted in social, cultural and economic needs within Colombia. As lawmakers continue to apply and create laws to situations and circumstances here in Colombia, Colombia as a country can end its legal dependency on other countries and create business laws that will truly benefit its citizens.

Governments in developing and third world countries must not take laws from developed countries solely because they are already in existence; each country must look at its society and determine if there is a need for additional laws. If there is a need or demand, then countries should not blatantly copy or borrow from other countries; if they do decide to borrow laws from other countries those laws should fit to the needs of the citizens within their country.

Another conclusion, is that, whenever foreign legal systems evolve by inventing new legal institutions or innovating legal institutions, automatically there is a necessity to catch up these foreign legal systems; therefore the system runs again an actualization process of legal institutions and the legal path dependence continues again, probably encouraged by some type of “bandwagon effect” in legal transplants.

This article is not stating that transplanting laws and rules from other countries is necessarily a bad thing. All countries have received inspiration from other countries when drafting laws for their citizens. Also, acknowledging potential implementation problems of legal transplants does not mean that the ideas and laws of foreign legal institutions and ideas in general should not be used as an input. Indeed, legal reforms could benefit from previous and foreign ideas.

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