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Maria Rosaria Ferrarese

1. Science, technologies and institutions

- 1 Last November, when the various Nobel prizes in the scientific field were awarded, two out of three, those for physics and chemistry, were acknowledging significant technical breakthroughs through the application of scientific principles, rather than scientific advances *per se*. A sign of the times, we may think, in a market-orientated, technology-driven age which prizes practical performance above all else. There is a certain connection between this story and the dynamics of today’s legal and institutional fields in Europe. In modern continental European tradition, law was usually defined and organized as “legal science”¹, and the dogmatic tradition, with its abstract categories and general concepts, has built the necessary tool-box for the working of an “axiomatic” method based on logical deductions derived from “dogmas”². One of the things this scientific concept implied above all was the idea that for each and every problem requiring a legal answer there could be one only right solution. Within this schema, the actual legal techniques used were at the service of legal science, they merely represented the necessary steps required to reach that “unique” legal solution.
- 2 This scientific view of law was challengeable on many levels and could be seen even as an ideology intended to hidden the political substance underlying legal decisions. In any case, it was prevailing in Continental Europe. Moreover, its siren call was even felt in the United States, when Langdell tried to apply the scientific model to the American legal scenario, introducing the case method in Harvard law school teaching. In his vision, court decisions were the “specimens” from which general principles could be induced, and legal case books had to be representative of the set of court decisions. Apart from Langdell’s case method, the scientific idea of law never managed to conquer the American

mind, where law is perceived directly as a technique, a means to an end, rather than a science. Law is a problem-solving tool and legal reasoning is addressed mainly to reach an end, a scenario in which a plurality of legal solutions become possible for each problem, conflict or doubt. This plurality of legal solutions, together with a plurality of paths to achieve them (see below) is a central point for understanding the common law system: as noted by S. Cassese, the case law method used in the USA in teaching and research, maintains “the idea that each issue can be solved in many ways”³. On the contrary, in Germany, where case law is also frequently used, in a situation of “systemic perfection” and consistency, the idea is that there is just one right solution for each legal problem.

- 3 Despite the fact that these contrasts between one legal system and another are still evident, current legal evolution appears to be shifting decidedly from the scientific view that was typical of Continental Europe, towards looser forms of legal techniques and practises, unbound by any overall “scientific” framework. In this trend, we can see an influence of the common law tradition, where law has always been perceived as a technical instrument; one to be used for different purposes and by different actors⁴, without posing too many problems of scientific consistency. Problems of consistency are solved with other means, and especially through a procedural principle as the *stare decisis* is.
- 4 But this shift was not only the result of American cultural influence. Something new has happened over the last few decades, as law was increasingly called upon to deal with “techno-economics”, that becomes “itself normative and wants to determine the content of law”⁵.
- 5 In sketching the rise and diffusion of the idea and operation of law as a technical tool over these last few decades in Europe, but also at an international and trans-national level, I will try to deal with this subject in practical rather than in theoretical and abstract terms. I will try to show how some legal “reforms” were often realised without the benefit of political process, how this was achieved and the ideas and theories that were influential along this transformative path from science to “technique”. Of course, although this trend is important, it is by no means unique. It would be difficult, for example, to include the important and burgeoning field of human rights law into this matrix of the growing technicalization of law.

2. The changing European legal scene: law as a technique without science

- 6 With the birth of modern States legislative law triumphed in Continental Europe, superseding the Medieval practise of law springing from the mores and traditions of social and economic life (⁶): legislation conveyed political will inspired by the idea of “public interest” or “*intérêt general*” into “norms” with “general and abstract” characters, resembling the idea of a “political theology”, as C. Schmitt claimed⁷. The idea of “law as science” in Europe grew side by side with this political identity of law. Law, in this scientific, rational guise, thus neutralised the risk of political interference: its “scientific” application meant results were inevitably predictable and “calculable”. As Max Weber observed, this form of “rational” law matched the legal requirements of capitalism, better than, for example, common law, with its “*kadi justice*”, seen as arbitrary and not “rational”⁸.

- 7 Legislation entailed a sort of standardization of legal reasoning, thus protecting it from the pressure of particularistic interests, special circumstances, or cultural attitudes typical of different contexts, as had been typical of the past, and especially of medieval times. This rigidity was not due so much to the impossibility of interpreting the same legal norm in different ways, but rather to a complex doctrinal web that was reasonably successful in preserving unitary legal semantics, in order to maintain the idea of a single solution for each legal case. This legislative rigidity was entirely alien to the American legal mind, used to seeing law mostly as “law in action” rather than “law in books”. Judge-made law is the lone star of the American legal system, that prizes its flexibility and social manoeuvrability; “drift” rather than “direction” lies at the root of its legal tradition⁹.
- 8 The question is: is Weber’s scenario of (legislative) law, still the fittest for the purpose of responding to the needs of today’s capitalism? Law and the legal discourse have changed dramatically with the process of globalization, which has led to a tendency to reform institutions typical of the European tradition. These changes have been even more marked in Europe than in the rest of the West, because modern European law was mainly based on legislation, a legislation which proved not only impracticable at the global level, but also less popular than it was in the past. Statutes, as “general and abstract” legal measures, became the polemical target of new all-conquering neo-liberal doctrines and programmes whose hegemony was gradually established in Europe, as elsewhere, from the 1980s onward.
- 9 This key change followed patterns sketched in particular by the doctrines of law and economics, and of so-called economic neo-institutionalism: two very learned schools, which wrought profound changes on the legal landscape with their new insights and perspectives, generating an impressive literature. Both these doctrines were concerned with discussing the role played by legal institutions in economic life: “institutions matter” rose the cry from neo-institutionalist scholars. However, the importance of law was seen by both of them as strictly linked to its working as a way for reaching economic efficiency. And both of them, on the other hand, stressed the idea that legislation was unfit for purpose in terms of efficiency. In order to achieve economic efficiency, law’s contribution was important, but a type of law that differed from legislation.
- 10 So the Chicago School reversed the Weberian view, popularising the idea that common law alone (i.e. judge-made law, not statute law) was efficient. As noted by Bachkaus, Richard Posner built a legal doctrine, primarily in the field of American civil law, “on the hypothesis that it can be described and taught as if it had been designed with economic efficiency in mind”¹⁰. Statute law, on the contrary, is deemed inefficient because it tends to generate large transaction costs. All these ideas, however “general and abstract”, become very popular. Contrasting them was difficult but not impossible. Michelman, for example, was able to show that if inefficient legal rules can approach efficiency through litigation, this can be achieved both under a common law system and a civil law system¹¹. Michelman’s argument weakened the idea of the superiority of common law, and underlined the idea that judicial rulemaking, independent of the particular legal culture in which a judge acts, can be a means to achieve efficiency.
- 11 Neo-institutionalist literature preached the idea of the inefficiency of legislative law because of its centralism. As suggested by Williamson, Nobel Prize 2009 for Economics, legal centralism is unfit to achieve efficiency¹². The literature on transaction costs has generally upheld the idea that even typical contractual forms and judicial process are

unfit for achieving efficiency, whereas atypical legal forms, especially in the contractual field, perform much better. What is needed are legal solutions *à la carte*¹³: as suggested by Williamson, instead of predicting in advance all the possible legal solutions, it is preferable to leave people and companies free to choose the solutions at the moment. Not uniform legal measures and solutions but a plurality of devices and “alternative” legal solutions.

- 12 These very influential schools achieved two very important results. On the one hand, they were very successful in making efficiency, an economic credo, not a new legal theory, the new engine of law, and the most important principle of guidance for legal change. On the other hand, the link with efficiency was a way to give rise to more depoliticized and privatized legal means. Legal changes called in the name of “economic efficiency” could be seen almost as a new form of social justice, because “efficiency” was defined by Posner as “wealth maximizing” and, as such, it was presented as able to spread its positive effects all over the different parts of societies (Posner 1981, Hofstra Law Review Symposium 1, 11 1980). So, law was becoming more and more similar to a very rich collection of (technical) tools, each able give an answer, to solve a problem, or to provide a service, with beneficial effects on social life, following a “trickle down” logic.

3. Exit strategies from State law

- 13 Today’s legal scene seems to confirm the opposite of what Weber predicted: a growing de-formalization of law and its paraphernalia. Indeed, along the process of globalization we witnessed an enlargement of the idea of “legal sources” intended as something controlled by states and with clear state borders. Also the public law/private law distinction was trespassed upon and blurred in many ways. We could speak of a significant process of legal liberalization that parallels the process of economic liberalization.
- 14 Along this new path of legal liberalization that has put forward a large number of legal tools, the European idea of a “legal science”, with its “dogmatic” certainties and a single, “exact” legal solution for each problem, was facing a serious challenge. Its dogmatic toolbox was unable to provide this variety of legal tools and solutions with a common language and semantics, thus increasingly losing its credibility. This makes hardly practicable any hypothesis of re-founding a European legal science, starting from law teaching, as emerging from Bogdandy’s recent learned project¹⁴. However, sketching a new kind of dogmatic attitude, open to inputs coming from economic and social life, such a project is threatened by the multiplicity and decentralization of legal means and sources that Europe can’t avoid.
- 15 So we now find ourselves with an increasing body of private, rather than public, law outlined by private subjects; “atypical” rather than typical contracts and legal tools and institutional formulas: arbitration houses and centres of mediation and conciliation rather than courts, forum shopping and legal solutions *à la carte* rather than pre-established public courts and jurisdictions. Both individuals and companies are at liberty to pick and choose their own legal solutions, with few public constraints and controls, limited purely by the size of their bank balance. The large variety of legal options, able to satisfy different needs and tastes, and frequently moulded “from below” was a sort of “exit strategy” from the uniqueness of legislation, through a panoply of varied and flexible instruments, ready to be used in different ways and possibly in an “entrepreneurial” way¹⁵. In this scenario we are far from any idea of transcendence, or

the dogmatic character of law: this is the rise of a “now and here” principle in legal development.

- 16 Thus, instead of a hypothesized legal science with normative character, we are witnessing a new form of technicalization of law, that is to say a closer link between the specificity of any legal measure and the particular aim that it pursues. Today the technicalization of law no longer addresses a standardization of legal responses. On the contrary, because efficiency is the new recurrent goal of legal tools, what is required is a “fit for purpose” law, with great plurality of guises, possibilities and solutions. One can see essentially two paths that have led to this new form of “fit for purpose” legal attitude: a return to the ancient concept of customs and legal traditions and a re-invention of existing legal devices as conceived by States¹⁶.
- 17 On the one hand there are legal solutions that seem to echo the past, and that can be efficaciously synthesized in Holsti’s words as “Hidden hands, habits, patterned behaviour, and cultural mores”¹⁷. Old legal practises, and even pre-modern legal practises, such as customs, usages, legal traditions and *lex mercatoria*, are enjoying a renewed lease on life, once again separately from states and any political identity. On the other hand, we can observe a diffusion of legal means that are an imitation and re-production, in different forms, of traditional state legal devices. There was especially a multiplication of types of contract and judicial formulas as opposed to uniform legal measures and solutions; a plurality of devices and “alternative” legal solutions. The Alternative Dispute Resolution (ADR) movement that conquered the scene during the 1980s and 90s, first in the U.S. and subsequently in Europe, was emblematic of this tendency.

4. How did Europe deal with this global change? European governance and its legal strategy

- 18 Europe proved fairly enthusiastic in building institutions for a “New World”. And in doing so it significantly contributed to partly changing the path of its political and institutional history. The so-called knowledge economy, envisaged by the Lisbon Strategy proclaimed in 2000 sounded very promising: “the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion” was to dominate post-industrial European society by 2010. The Commission’s famous “White Paper” on governance was intended “to refocus policies and institutions on clear objectives”, and “renew the Community method by following a less top-down approach and complementing its policy tools more effectively with non-legislative instruments”¹⁸.
- 19 This climate of growing expectations and enthusiasm contributed to increasing respect for technological expertise and trust in technocracy to the point of characterizing a special kind of European governance. Fifteen years later much of this bright future is merely a tarnished memory, and many of those promises made in the name of technological innovation are sadly forgotten. Europe is struggling with an apparently endless series of social and economic crises, with Italy all too frequently jockeying for position at the bottom of the league tables when it comes to performance.
- 20 The acceptance of the governance formula was perfectly functional to the building of the European Union, but also influent in changing the institutional and political face of Europe. What was so revolutionary in the governance processes? On the one hand, legally

the idea of “governance” was challenging especially for the most recent legislative history of Europe. On the other hand, politically it was realized through a technocracy as a partial substitute for political leadership, along the unification process. Let us sketch these two main processes.

- 21 When we speak of governance, the involvement of private subjects in the (public) decision-making process, is probably the most remarkable and notorious aspect. But that is not all. Much more is at stake. This concept of governance breaks some further important characters that were typical of the modern political and legal system. In particular, the notions of “territory” and “people”, two constitutive aspects of the modern states, are bypassed by governance processes, that each creates its own “people” and “territory”, tailored to ever changing specific needs and situations.
- 22 In order to reconstruct a “genealogy”, or a history of governance, we can start with the realm of corporations, where the idea of “corporate governance” first appeared, and the field of international relations, where a situation of “governance without government” was first discovered and analyzed¹⁹. But if we think of governance as an innovative rift of the *government* model, the place to start is Great Britain, traditionally characterized by the “Westminster model”, that is by the pre-eminence of Parliament: it enthusiastically embraced the idea of “re-inventing government”²⁰, and sophisticatedly theorized the idea of governance²¹. Of course, when we say that Great Britain can be considered the homeland of European governance, we have to bear in mind that governance style draws liberally on British and American paradigms and models. We might state that forms of proto-governance have always been alive in the United States, through common law channels and a wide participation of private actors in many institutional mechanisms²².
- 23 Notwithstanding the fact that governance was a “soft revolution”, especially for the European tradition, it had concrete legal and political effects²³. If we think of Europe in a political sense, governance increases the crisis of representative democracy, because it posits interests in the centre of the scene. So governance breaks with any unitary idea of representation and opens the doors to many forms of self-representation of interests, giving legitimacy to lobbies and lobbyism. Not only can interest groups, professional associations, and companies speak in the name of their interests, but even single people can try, for example in a judicial or quasi-judicial trial, to represent a more general interest which touches their single cases. We could say that governance implies the continuous creation of ever-new decision-making scenarios, almost a travelling theatre, which assembles its scenes in different ways and with different actors for each performance. At the same time, this “theatre” largely relinquishes the “public” character that was the hallmark of state institutions, and largely celebrated by Bagehot as being typical of the British Parliament.
- 24 If we think of Europe in a legal sense, we discover a new legal strategy which addresses the need for flexibility evidenced, in particular, by the market. So governance goes in the same direction as the rise of legal tools and practises which transcend or by pass legislation. Indeed, contracts and judge-made law are both very effective legal ways of governance, so that we can also speak of “judicial governance” and “contractual governance”²⁴. In other words, contracts and judge-made law become not only very frequently used legal tools, but also ways for solving problems that politics does not consider. This situation has been frequently presented as one of “juridification” or of “judicialization” of the political sphere.

- 25 Here we see not only a new form of surrogacy of politics by law, but also a meaningful transformation of the legal rationality of subjects involved in legal operations, which switch from a “parametric” model to a “strategic” model, to use the language of game theory²⁵. What does a “strategic” or “parametric” use of law mean? What does it imply in terms of “legal rationality” for actors involved in legal dynamics?

5. Governance, language and ‘strategic’ legal attitudes

- 26 Contract law and judge-made law might be thought of as two heirs sharing the legacy of legislation, dispersing the abstractness and generality of rules as well as the “theological” character of law envisaged by Carl Schmitt. Inspired by the ‘here and now’ principle, they no longer come from ‘elsewhere’, and are far removed from any form of transcendence and dogmatism. They are, on the contrary, merely a product of the actions of competing individuals, corporations, groups and even states motivated by specific goals and interests, although within boundaries dictated by laws and general principles of law. Above all, judicial and contract law have become crucial in today’s world for their ability to adapt in a twofold way to the ongoing tendency towards privatization. On the one hand, they provide an important role to private subjects, albeit each in different ways. On the other, both are capable of promoting and satisfying the ‘legal entrepreneurship’ of subjects, something typical of American history, that corresponds to the economic trend that global capitalism has forced onto institutions.
- 27 The transposition of the ‘language of interest’ into legal relations happens above all through the growing importance of contract and judicial law, which assign a direct role to actors in shaping legal rules, and reward their dynamism and interactive abilities²⁶. In other words, it might be said that judge-made law and contractual dynamics both make use of what J. Elster calls “the language of negotiation”²⁷, which is typical of ‘strategic’ forms of action. In a way, when actors behave strategically, they no longer obey law as a ‘command’. On the contrary, they are encouraged to act so as to use legal means and occasions (opinions, courts, arbitral awards, contracts, etc...) instrumentally, in order to produce results in line with their own aims, that is, the maximization of utility and the satisfaction of their own interests.
- 28 So, we can say, referring to game theory language, that the rules of governance are no longer supported by a ‘parametric rationality’ but by a ‘strategic rationality’. This regards people acting in competitive situations, each one trying to guess the moves of the others in response to their own. In fact, each actor is pursuing his own purposes through a competitive interaction (or game) with the other parts. As is known, such ‘games’ even contemplate the possibility that individuals resort to ‘threats’, misrepresentations, false statements and other strategies that belong to the repertoire of war in order to challenge the counterpart and eventually win. Rules are the result of these competitive contexts.
- 29 While legislative law was supposed to offer a single, coherent solution, a unique and generalized answer to any specific problem or social demand, the rules emerging from contracts and court decisions are strongly influenced by the competitive environment that generates them and by the skills and strategic capabilities of the parties taking part in the competition. They represent contingent and particular responses that cannot be immediately generalized and may not be immediately applicable to different situations.

Strategic rationality also affects public law, which is again drawn towards strategic models of action and subjected to economic analysis.

- 30 The emphasis on actors' strategic attitudes, especially in the context of judicial and contractual governance, implies a strong depletion of the normative horizon of law. The notion itself of legality, mostly deprived of the guiding role of legislation, becomes today more than ever a 'myth'. This is especially true with reference to the international scenario, where states and other various international structures are engaged, within a contractual framework, in collaborating and competing with one another. Consequently, the notion of legality is subject to challenges and forms of exploitation while performing functions that limit power in the name of rights. The crucial role played by interests and the shift towards strategic rationality may seem to contradict the constitutional shift that characterizes our time. Yet rights and interests are the great combination buttressing the political and institutional organization based on governance²⁸. The imbalance between these two components also represents the imbalance between normative and strategic attitude in current legal relations.
- 31 Weber's prediction that capitalism needs a "complete calculability of the functioning of public administration and law" as a condition to ensure "the highest degree of formal calculability" now seems distant indeed²⁹. On the contrary, it is in a spectrum of highly differentiated choices, methods, practices and legal possibilities, in accordance with different interests, criteria and rationalities, that today's capitalism builds its legal language and shops for its legal solutions.

6. European governance through technocracy

- 32 When the European Union officially embraced the strategic step of governance it also created its own form of governance through technocracy, nicely nicknamed "comitology". It is somewhat paradoxical that it was Europe, the place where modern politics was invented, that delegated so much to technocracy: that is to say a form of rule by expertise. Technical expertise is a tried and tested way of providing solutions to problems in given fields, following supposedly scientific criteria. We could say, in fact, that European technocracy is expertise "at the top" rather than expertise "on tap", as it should be. Of course expertise is a precious source of knowledge and a "necessary evil" in today's world: we could not live without its precious services, but although it is the solution to many problems, it also raises issues still to be resolved. What Rathenau called "the mechanization of the world" produces results both good and bad, it surrogates human drudgery, but weakens basic skills. Its rapid progress alleviates labour on one hand but creates unemployment on the other. Electronic devices make many aspects of our daily life much easier, but undermine our privacy. Automation helps do things but weakens capabilities, for example in calculation, and even in writing. And so on.
- 33 But it is when expertise takes over "at the top" that it raises questions and creates problems of democratic accountability, without necessarily delivering perfect technological decision-making. Technocracy seems very promising, because in the name of knowledge it portrays itself not only as a sort of automatic provider of solutions, but also a guarantee of correct solutions. Yet, at the same time, it claims legitimacy purely through the possession of expert technical knowledge and skills, and differently from politics, is a type of power that is presumed to be above public scrutiny. This calm assumption of authority by expertise at the top leads to a potentially dangerous

perception of it as a form of automatic truth, almost by default. This highlights its dichotomy with politics, which represents itself as the reign of conflict of one party against another one, and the reign of choice and decision. Technocracy, on the contrary, assumes that it has no enemies because “scientific” truth can have no enemy, nor can it be discretionary, as it is. Moreover, technocrats have another marked characteristic: because true expertise is assumed to be in scarce supply, they appear as a restricted, elitist group dominating a closed market. They resemble a sort of club, an oligarchy, distant from popular opinion, which admits only the very favoured few, and is immune from democratic pressures.

- 34 These few observations on a theme which is both vast and complex, boasting an extensive, specialized literature, are merely the preamble to a general warning: However unavoidable expertise and technocracy may appear, they both need to be kept under observation, together with all the ambivalences they generate. Thus, at this point, the question “Why did Europe opt for technocracy?” seems to both make sense and await an answer.
- 35 As said before, a European Union administered by a technocratic form of governance “not designed for political accountability”³⁰ is something of a paradox. With the Council and the Commission, institutions which undoubtedly suffer from a certain democratic deficit, European governance bestowed a major role on technocracy; using expertise as a lever for increasing the legitimacy of the European decision-making process, given the role of its institutions as regulatory bodies. There was therefore a logic of surrogacy working at a political level in the building of Europe. Indeed, Weiler has lately spoken of a “political messianism” in Europe, aimed at mobilizing forces and political energies around a “Promised Land” waiting at the end of the road, an attitude that happily co-existed with an institutional framework that was formal, elaborate yet substantially apolitical³¹.
- 36 From a comparative perspective it is interesting to see that, as suggested by Martin Shapiro, the European choice of technocracy was very different from its U.S. counterpart. In the New Deal the United States celebrated the prestige of a new technocracy familiarly known as the “egg heads”, but it was a technocracy which exercised its functions under the strong political guidance of Franklin Delano Roosevelt. Moreover, the high-level experts who came to dominate American bureaucracy were confronted by widespread judicial suspicion and supervision. The attrition between the two acted as a spur to the reform of American administrative law³², through a sequence of litigation embodying “the clash of opposing experts offered by government and interest groups”. American administrative law was moulded in a way that allowed some form of public scrutiny on the choices made by technocrats. Most importantly, disagreements and conflicts between technical experts working either for government or for interest groups were examined in court, and so the scarcity of objectivity in the choices made and presented as “technological” was clearly revealed. The judicial forum became a theatrical *mise en scene* worthy of Molière.
- 37 In the EU, on the contrary, experts and committees “were subject to no administrative law and no judicial review”³³. This act of faith in technocratic legitimacy as a substitute for democratic legitimacy was prompted by at least two factors. First of all it took shape against a background of general weakness in political direction and power. Moreover, “comitology” became almost a distinctive characteristic of the EU, conveying the image of a plural scenario, crowded by many minds incorporating not only technical expertise,

but also shared ethics and professional creeds, as suggested by the concept of “epistemic communities”³⁴.

- 38 If there is a logic of surrogacy with a technocracy working at the political level, it is hardly surprising to see this logic of surrogacy replicated at a legal level, as with the role played by law as a substitute for political choices, especially but not only through the European Court of Justice, that has been a true protagonist of the unification process with its judge-made law, and has designed the most important chapters in the tale of global “judicial governance”. But this is another story!

NOTES

1. There is a vast literature on the subject in Continental Europe, where the idea of a systematic body of “norms” found in Kelsen’s doctrine a fundamental basis. Different was the idea of law as a “social science” that was, not by chance, rejected by Kelsen. The idea of law as a science underlines the growing analytical literature as well.
2. Brutti, M. (2013), “Per la scienza giuridica europea (Riflessioni su un dibattito in corso)”, *Rivista trimestrale di diritto pubblico*, n. 4, p. 919. This article critically addresses the attempt made specially by A. von Bogdandy to re-build a European legal science, at a supra-national level, on dogmatic basis, however partially renewed.
3. Cassese, S. et L. Torchia (2014), *Diritto amministrativo. Una conversazione*, Bologna, Il Mulino, p. 16.
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9. J. W. Hurst, *Law and Social Process in United States History*, cit., pp. 28-93.
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14. Bogdandy A. von (2012), “National Legal Scholarship in the European Legal Area: A Manifesto”, 10 *International Journal of Constitutional Law*, p. 604 e ss.
15. See Ferrarese M. R. (1996), “An Entrepreneurial Conception of the Law? The American Model Through Italian Eyes”, in D. Nelken (ed.), *Comparing Legal Cultures*, Aldershot, Dartmouth, Vt., pp. 157-181.
16. Ferrarese M. R. (2014b), “Sulla governance paragiudiziaria. Arbitrati e investimenti esteri”, *Politica del diritto*, n. 3.

17. K. J. Holsti, “Governance without Government: Poliarchy in Nineteenth-Century European International Politics”, in J. N. Rosenau, E.-O. Czempiel, *Governance without Government: Order and Change in World Politics*, Cambridge University Press, Cambridge Mass., 1992, p. 32.
18. See also *Our Global Neighborhood*, Oxford University Press, New York 1995, coming from the ONU Commission on governance, that had equally promoted “formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest”.
19. J. N. Rosenau & E.-O. Czempiel (eds.), *Governance without government: order and change in world politics*, cit.
20. Osborne D. et T. Gaebler (1993), *Reinventing Government: How the Entrepreneurial Spirit Is Transforming the Public Sector*, Reading, MA: Addison-Wesley.
21. For a deepened “genealogy” of governance see M. Bevir (2010), *Democratic governance*, Princeton, Princeton University Press.
22. Ferrarese M. R. (1996), “An Entrepreneurial Conception of the Law?” cit.
23. Ferrarese M. R. (2014a), *Governance. Sugli effetti politici e giuridici di una “soft revolution”*, in “Politica del diritto”, n. 2.
24. M. R. Ferrarese (2010), *La governance tra politica e diritto*, Bologna, Il Mulino. The idea of “judicial governance” has been developed especially by A. Stone Sweet in Shapiro M., A. Stone Sweet (2002), *On Law, Politics and Judicialization*, Oxford University Press, Oxford 2002.
25. Kreps, D. M. (1990), *Game Theory and Economic Modelling*, Oxford, Oxford University Press.
26. See Ferrarese M. R., *Le istituzioni della globalizzazione*, cit., pp. 32 and ff.
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28. M. R. Ferrarese, *La governance tra politica e diritto*, cit.
29. M. Weber, *Economia e Società*, cit., vol I, p. 85.
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ABSTRACTS

The article tries to show how Europe, from the 80s of last century, was involved in deep legal and political changes, under the influence especially of Law & economics, and economic neo-institutionalist doctrines. Governance and technocracy became its ways of “re-inventing” government, and efficiency became the new aim of law. So, through a path of growing technicalization “without science”, law became a collection of “fit for purpose” instruments. Now we are before an increasing body of private law and legal solutions à la carte, and “atypical” contracts, legal tools, and institutional formulas: arbitration houses rather than courts; forum shopping rather than pre-established public courts and jurisdictions. While Weber hypothesized the “rational” and “abstract” legislative law as the fittest for the needs of capitalism, today’s

capitalism asks for the opposite: very differed legal means and answers, tailored on the specificity of situations.

L'article essaie de montrer comment l'Europe, à partir des années 1980, a été engagée dans de profonds changements juridiques et politiques sous l'influence, en particulier, des doctrines Law& Economics et des doctrines économiques néoinstitutionnalistes. Gouvernance et technocratie sont devenues ses façons de « réinventer » le gouvernement et l'efficacité est devenue le but principal du droit. Ainsi, à travers un sentier de technicisation « sans science » le droit est devenu une collection d'instruments « adaptés à l'objectif ». Nous sommes maintenant face à un corps croissant de droit privé et de solutions juridiques à la carte, de contrats atypiques, d'outils juridiques et de formules institutionnelles : maisons d'arbitrage plutôt que tribunaux, forum-shopping plutôt que juridictions et tribunaux publics préétablis. Alors que Weber avait fait l'hypothèse d'un droit législatif « rationnel » et « abstrait », comme le plus adapté aux besoins du capitalisme, le capitalisme d'aujourd'hui demande l'inverse : des réponses et des moyens juridiques très différenciés, adaptés à la spécificité des situations.

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