15. Toward an institutional approach to comparative economic law?

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I. INTRODUCTION

During the last decade the interest in comparative law has grown exponentially not only on the part of the legal community, but also on the part of neighbouring disciplines, such as economics and political science. This is hardly surprising. The collapse of communism in the countries of Central and Eastern Europe and the following massive economic and legal transformation have raised intricate questions as to the role of law and legal institutions for economic growth and for the success of economic reform and have unleashed a dynamic process of legal borrowing and search for best practices. In addition, the widening and deepening of economic and political integration within the European Union have prompted debates on the relative advantages of uniformity versus diversity of legal institutions and on regulatory competition (Ogus, 2007; Kerber and Heine, 2002). Finally, economic globalisation has intensified the involvement of international economic organisations like the World Bank (WB), the World Trade Organisation (WTO) and the International Monetary Fund (IMF) in market and political reforms in developing and transition countries and has, more generally, triggered an interest in emulating successful legal and economic models.[1]

This chapter looks into several examples of application of economic theory in the area of comparative economic law.[2] The focus is in particular on a series of contributions in the economic literature by now known as the New Comparative Economics (La Porta et al, 2003). The New Comparative Economics (hereinafter NCE) builds on institutional economics, but seeks to offer a framework for comparative efficiency analysis of legal institutions across numerous jurisdictions. The present contribution analyses critically the use of comparative law within this increasingly influential school of economic thought. The strengths and the possible pitfalls of the normative advice drawn from the analyses of the New Comparative Economics are discussed.

Against this background, I argue for a more sensitive use of institutional theory in comparative economic law. It is suggested that instead of aggregate

statistical approaches, the emphasis should be on deep-level comparative institutional analysis (Komesar, 1994; North, 1990), informed by modern theory of comparative law, legal history and comparative jurisprudence (Ewald, 1997). Finally, some areas are mapped where such theoretical enquiries can make a valuable contribution to fine-tuning the reform agenda of economic law within the European Union and at the global level.

II. THE NEW COMPARATIVE ECONOMICS AND THE LEGAL ORIGINS THEORY

The NCE is a theoretical strand associated with a group of economists clustered around Harvard economics professor Andrei Shleifer. The group works in close co-operation with and is often financially supported by the World Bank.[3] The term 'new' in NEC aims to position this emerging research field viz. the old Comparative Economics, which was chiefly preoccupied by comparing socialism and capitalism as two economic systems relying on different forms of resource allocation, namely the plan and the market. With the collapse of socialism the old comparative economics obviously largely lost its relevance as a discipline (La Porta et al, 1999). At the same time, the transition from socialism to capitalism has made it clear that there are more than one models of capitalism and that building the institutional framework of free markets presents a number of difficult institutional choices that may be, and often are, exercised differently across jurisdictions. The NCE thus essentially purports to analyse comparatively questions of institutional choice and design of non-market institutions which frame the market economy. The term institution is in the NCE understood broadly to encompass formal legal rules, but also informal rules, customs and practices that reduce uncertainty and frame social interaction. The main questions are thus: which are the institutions that induce and support economic growth; why is there a broad institutional variation across countries and how are 'good' institutions to be nurtured?

1. Background

The NCE school is to a great extent born out of experience. The leading scholars in this novel theoretical stream have been closely involved in the massive attempts at economic and political transformation of the Central and East European countries (CEECs), and of the Russian economy in particular (Boyko et al, 1997; Shleifer and Treisman, 2000). In the early 1990s Andrei Shleifer was heading a team of young and bright Harvard economists who via the Harvard Development Institute were mandated by the American government to assist Russian reformers in carrying through a swift privati-

sation and in achieving a point of no return in the conversion of the Russian command economy into a market economy. There was at the time disagreement among economists as to the pace of economic reform in CEEC. Shleifer and team were among the advocates of rapid macro-economic transformation, the type of 'shock therapy' approach in the well known Jeffrey Sachs' terminology.

Economic advice to governments in Central and Eastern Europe that streamed from the West in the early stages of transition was based on a neoclassical economic framework and was pretty straight forward in its main messages: Price formation should be free, governments should avoid ownership or subsidisation of firms, property rights should be secured by enforcing contracts. Regulation should be responsible and budgets – balanced. Trade barriers should be removed (Shleifer and Treisman, 2000: vii). Under these macro-economic conditions markets were expected to thrive and lead spontaneously to efficient resource allocation and to economic growth.

Yet, whereas in some respects the reforms were a success, there was in the decade to follow also abundant evidence of rampant failure. More unexpectedly, similar economic policies led to largely differential results in CEEC, such as Poland and the Czech Republic on the one hand, when compared to Russia, on the other. In the mid 1990s Poland and the Czech Republic were already considered firmly set on the path of Western social market economy with stable economic growth, while Russia was struggling with corruption, plagued by maladministration, tax evasion and political instability. What was the reason for these dramatically different outcomes? Why didn't the neoclassical recipe work in Russia? (Shleifer and Treisman, 2000; Djankov et al, 2003b: 597). It seems it was the analysis of the failures of Russia's transition and of the US-supported privatisation programmes that triggered the interest of the Harvard economists in the role of law and legal institutions.

2. The Main Claims

It should be stressed from the outset that under the 'roof' of the NCE different claims are advanced, which do not present a neat and consistent theoretical framework. Given the considerable number of publications in which the theoretical premises and the main findings of the NCE have been presented, the shifting constellation of authors and evolution of the theoretical tools over time, it is probably not surprising that the claims differ in their nuances and are not always easy to reconcile. Apart from the overarching claim that institutions in general and legal institutions in particular, matter for economic development, a claim familiar from the new institutional economics, one can distinguish between two lines of theorising: the Legal Origins Theory (LOT) and the Institutional Possibilities Frontier theory (IPF).[4] Whereas these two strings of

research are related they are in certain important respects distinctive and as I shall argue below, even contradictory.

a. Legal origins

The 'legal origins' hypothesis can be traced back to a 1996 paper of La Porta, Lopez-, Shleifer and Vishny (LLSV) (later on published in the Journal of Political Economy, La Porta et al, 1997) and has been thereafter repeatedly tested in research on external finance, corporate governance, the quality of government, courts, private credit, debt enforcement, etc. (La Porta et al, 1998; La Porta et al, 1999; Djankov et al, 2003a; Djankov et al, 2008; La Porta et al, 2008). It is particularly interesting for students of comparative law, because it builds extensively on comparative law scholarship and in particular, on the teaching of grouping legal systems into larger clusters, so called legal families, and on the theory of legal transplants.

On the basis of classifications developed and refined by established comparative law scholars like Zweigert and Kötz (1998: 66–67) and Mary Ann Glendon (Glendon, Gordon, and Osakwe 1994: 4–5) La Porta et al distinguish several major legal families in the world, namely common law, French, German, Scandinavian and socialist family. Following comparative law scholarship they accord special importance to the distinction between the common law and the civil law tradition. Another major inspiration from comparative law is derived from the theory of legal transplants as developed particularly by Alan Watson (1974). As is well known, by demonstrating the pervasiveness of legal borrowings throughout the history of mankind Alan Watson has made a strong case of legal change as taking place foremost by way of legal transplantation and imitation rather than by endogenous processes of demand and supply of law.[5] Building on this and other accounts on legal transplantation, La Porta et al treat the five major legal families as sources of influence (or origins) for a large number of legal systems around the world, where the legal tradition of the origin countries had been imposed through conquest, colonisation and emigration, or accepted by way of voluntary emulation.

Thus, a central point for any study following the LOT is to pin down a country's legal system to one of the five legal origins, which is normally done on the basis of legal historical accounts and comparative law scholarship. As visible from the extensive tables attached to the individual publications on the LOT, to the common law group are assigned countries like the US, Canada, Australia, India, but also Israel and South Africa (La Porta et al, 1998). In the French group are ordered Italy, Spain, the majority of the Latin American countries, Greece and Turkey and some former French colonies in Africa like Egypt (La Porta et al, 1998). The German group is seen to extend to Austria, Switzerland, but also to Japan, South Korea and Taiwan where German codifications were voluntarily introduced following attempts at modernisation (La

Porta et al, 1998). The Scandinavian legal tradition has not spread beyond the Scandinavian countries and forms a little and rather exclusive club of advanced welfare states. In earlier writings, following Zweigert and Kötz, all former satellites of the Soviet Union in Central and Eastern Europe, together with countries like Cuba, China, North Korea, were treated as forming a separate, so called socialist legal family. More recently, however, the former socialist countries in Central and Eastern Europe are classified in one of the families within the civil law tradition. This conversion has taken place, as admitted by La Porta et al (2008), chiefly in response to scholarly and political criticism; something that demonstrates some dilemmas of classification to which I shall return later on in this chapter.

The LOT uses legal families as independent variable for testing political and economic theories of institutions. The main claim is that legal origins influence in distinctive ways the content of legal rules across countries, the enforcement of the rules and ultimately the structure of markets and economic performance. In particular, the common law family and the continental legal family are seen to be characterised by very different styles of social control of business, with greater reliance on courts and private ordering in the common law and on state control in the continental tradition. According to La Porta et al these differential approaches have their genesis in the historical evolution of legal institutions that started in 12th and 13th century England and France and continued up to the 18th and 19th century. They have thereafter been spread through conquest, immigration and emulation to the rest of the world and, despite modifications and change, continue to exert a notable influence on the way societies solve problems even to day (La Porta et al, 2008: 307).

The LOT is presented as a grand theory that promises to offer explanation of a highly complex set of social and historical facts on a world-wide scale. The attraction of the theoretical framework is that it facilitates the ordering of the majority of jurisdictions around the world into neat clusters, which in turn 'allows the comparison of both individual legal rules and of whole legal families across a large number of countries' (La Porta et al, 1998). The studies that advance the legal origin thesis are designed as large scale comparative studies of specific legal rules, legal areas, or broad legal institutions such as courts and governments. Thus, the law and finance study of La Porta et al (1998) covers 49 countries; the quality of government project (La Porta et al, 1999) is based on data from up to 152 jurisdictions, the study on courts surveys 109 jurisdictions (Djankov et al, 2003a) and the one on debt enforcement 139 countries (Djankov et al, 2008).

The early writings of La Porta et al focus rather narrowly on the written legal rules as evidenced from statutory texts, or 'law on the books'. Later on, the research design has been refined to incorporate data on 'law in action'. Consequently, the data that are generated and processed consist of legal rules

on particular issue (e.g. investor protection, creditor protection, constitutional review), but may also include evaluative data on the security of property rights against expropriation by government (La Porta et al, 2004: 449), statistical data on the speed and efficiency of enforcement, surveys on perceptions about the quality of the legal system and of the public administration, data on the quality of accounting standards, etc. (La Porta et al, 1998: 1115). Much of the data is taken from secondary sources; for instance the indexing of security of property rights and of business regulation is based on a 1997 Index of Freedom by Holmes, Johnson and Kirkpatrick (La Porta et al, 1999; 2004). On the basis of these statistical data, different characteristics of legal systems are evaluated and coded, i.e. receive numerical indicators. Thus on the efficiency of the judicial system Canada receives 9.25, Pakistan 5, France 8, Turkey 4, Germany 9, Japan 10, Taiwan 6.75 and the Scandinavian countries all get the highest possible of 10 scores.

Whereas the LOT was first formulated within studies on corporate finance, the analysis gradually expanded and is not confined to the domain of economic law and institutions. Quite to the contrary, it seeks to demonstrate the pervasive impact of legal families on broad-base institutions such as courts (Djankov et al, 2003a) and more generally, on the quality of government (La Porta et al, 1999). Although the authors sometimes make disclaimers as to the normative ambitions of their theory, the studies often have a strong evaluative stance. Quite consistently, and irrespective of the area of study, the common law countries are found to offer superior legal institutions in terms of efficiency, whereas the French legal tradition is carped as interventionist and inefficient. For instance, the study on corporate finance concludes that countries in the common law tradition protect investors more than countries in the civil law tradition. Enforcement in turn is assessed as being best in the German and Scandinavian countries, strong in common law countries, and weakest in French countries (La Porta et al, 1998).

The judgement is even more strikingly sweeping when the studies address fundamental questions like protection of property rights, the judicial system or the quality of government. Thus the 1999 study on the quality of government comparing data and indicators from 152 countries concludes:

> Compared to common law countries French origin countries are sharply more interventionist (have higher top rates, less secure property rights and worse regulation). They also have less efficient governments, as measured by bureaucratic delays and tax compliance, though not the corruption score. . . . Finally, French origin countries score worse on our democracy measures than the common law countries (La Porta et al, 1999: 261).

To this, poor enforcement and accounting standards are said to aggravate the difficulties faced by investors in the French-civil-law countries.

These undoubtedly strong statements have provoked irritation and criticism to which I shall return in the following.[6] For now, it suffices to note that the conclusions are rather categorical and unequivocal, claiming strikingly broad validity. Certainly, some disclaimers are introduced. Thus, the crucial question of whether French origin countries with poor investor protection laws and poor enforcement actually do suffer is not answered with certainty. Whereas the data are interpreted as establishing a link from the legal system to economic development and as evidence of adverse consequences of poor investor protection for financial development and growth, it is admitted that deficiencies in investor protection are not insurmountable bottlenecks. As stated by La Porta et al 'France and Belgium, after all, are both very rich countries.' (La Porta et al, 1998: 1152). The emphasis is, however, on median outcomes, which are considered to evidence the inferiority of the French model on all scores.

b. The Institutional Possibilities Frontier

The second line of research that is related to the LOT, but which advances different and to a certain extent even opposite claims, is the theory about the so called Institutional Possibility Frontier (hereinafter IPF) presented in the article of Djankov et al on 'The New Comparative Economics' (2003b). The theory is concerned with the crucial question of institutional choice. Building on classics like Hobbes, Adam Smith and Montesquieu, Djankov et al (2003b) identify two main risks that any society faces and that have to be addressed and controlled. These are the risk of (private) disorder and the risk of (public) dictatorship. The authors then identify a variety of institutions for the social control of business that aim to reduce the costs associated with these two vices, focusing on four more common strategies: private orderings, private litigation, regulation and state ownership.

Seen as points on a continuum between disorder and dictatorship, these strategies imply diminishing costs of disorder and increasing costs of dictatorship. The argument is that there is a trade off between reducing dictatorship and reducing disorder, and that institutions differ in their capacity to minimise the social loss of both vices. Institutions of private ordering such as contracts and self-regulation by voluntary associations imply minimum intervention by the state and can thus be positioned farthest away from dictatorship. At the same time, they are less capable of reducing the social loss from disorder. Courts involve greater degree of intervention, whereas public monopoly and expropriation represent the extreme forms of public intervention, reducing the costs of disorder but increasing the costs of dictatorship.

Importantly, the theory asserts that societies differ in their institutional possibilities. For each society at a given point of time there is arguably, from an efficiency perspective, a limit as to how much disorder can be reduced with

an incremental increase in the power of the state (Djankov et al, 2003b: 599). This limit is called the IPF.[7] The position of the institutional possibilities frontier depends according to Djankov et al on a complex of factors, summarised by the notion 'civic capital'. The notion has commonalities with Putnam's concept of social capital but is broader than that and relates to culture, geography, economic endowments, etc. Consequently, efficient institutional choice would vary between countries with different levels of civic capital. Whereas for a country like Sweden the frontier would arguably allow greater experimentation with both public regulation and private ordering with relatively little social loss from disorder and dictatorship, for a developing country or a transition economy the IPF would not allow the same institutional possibilities. In particular, Djankov et al assert that for countries with less civic capital institutions that increase dictatorship will not necessarily translate into decrease in disorder, since they will trigger private subversion of public rules (Djankov et al, 2003b).

The theory of the IPF is applied to explain a number of institutional choices and historical instances concerning different countries, e.g. the rise of the regulatory state in the US in the early 1900s and at the time of the New Deal; the differential institutional paths for social control of business taken by England and France during the 12th and 13th centuries; the frequent inefficiency of transplantation and the differential success of institutional and economic reform in Central European states as compared to Russia (Djankov et al, 2003b). Contrary to the Legal Origins Theory, the IPF seems to direct the searchlight at each country's specific conditions and, if taken seriously, should require an in-depth analysis of local modalities that condition and constrain institutional choice.

III. THE MERITS OF THE APPROACH

The scholarly work of Shleifer and associates is important in that it draws the attention of economists and policy makers to law and legal institutions. On a general level, the interest of economists in legal diversity and in comparative law, as manifested in the Legal Origins track of research, can be welcomed. It marks a step away from the abstract, ahistorical approach characteristic of much conventional law and economics, which takes law as given and eventually builds on hidden and unreported assumptions often anchored in the American common law system.[8] By focusing on legal diversity and exploring persistent patterns of institutional choice and design across jurisdictions La Porta et al succeed in painting a more sophisticated and realistic picture of the link between law and economy. Much in line with historical institutionalism, the LOT summons considerable evidence of the conservative force of legal institutions. Historical

paths and past institutional choices thus seem to influence the trajectory for co-evolution of legal institutions and markets in a long-term and persistent way. These results are to a certain extent congruent with findings in the 'varieties of capitalism' line of scholarship (Hall and Soskice, 2001).

Furthermore, the school has produced a number of valuable contributions, which increase our understanding about the complexity of institutional design and the interplay between private and public institutional arrangements. In particular works that analyse institutional choice in transition economies take the 'comparative system approach' advocated by Coase (Coase 1960) seriously (Glaeser et al, 2001; Hay, Shleifer and Vishny, 1996; La Porta et al, 1999).[9] They engage in a careful analysis of instances when public regulation may be preferred to judicially enforced contracts (Djankov et al, 2001), finding support in Coase's own admittance that '[t]here is no reason why, on occasion, such governmental regulation should not be an improvement on economic efficiency.' (Coase [1988, pp. 117–118]).

Another valuable insight that has seeped through the findings of the NCE is that exporting law and legal institutions through conquest or imposition may have negative effects in the recipient country since not adapted to its internal institutional needs and balances (Glaeser and Shleifer, 2002).[10] The logical follow-up of this finding would be that reform should not blindly follow abstract 'best practices' advice but shall scrutinise the efficiency impact of new rules in the economic and institutional context of the borrowing country. As stated by Djankov et al reforms in each country must be evaluated relative to its own institutional opportunities, rather than some idealised benchmark of perfect government and markets (Djankov et al, 2003b: 615).

Last, but not least, the methodology employed by La Porta et al has the undeniable merit of bringing together an impressive amount and variety of data and offering plausible explanation of their inner relationships. It has rightly been noted in the literature that for a comparative lawyer to generate and process the same amount of data it would have taken years of scholarly effort and multiple volumes of comparative reports (Siems 2000). The synthetic capacity of the approach is remarkable.

IV. THEORETICAL AND METHODOLOGICAL PITFALLS

Yet despite the many advantages of the new approach, there are a number of theoretical and methodological problems, which require closer examination.

1. Theoretical Inconsistencies

Thus, whereas the claim that legal origins can be seen as proxies for distinctive

modes of social control of business is insightful and based on careful historical analysis, in particular as relating to the common law and the French legal tradition, what seems less convincing is extending this conclusion to countries where the origins have arguably been transplanted. Implicit in the latter claim is, first, an assertion that legal transplantation proceeds in a wholesale manner. The transfer of legal rules and institutions from a coloniser to a colony is taken to affect the legal system as a whole, in all its branches and ways of operation. The evidence from comparative law is, however, that legal traditions are complex, multilayered and only rarely transplanted 'en bloc' (Örücü, 2007). Only by exception can transplantation encompass both private and public law rules, and importantly, related enforcement mechanisms and structures. The typical case is rather that of the mixed legal system, where rules and institutions from different civil law traditions (French or German) or even from common law and civil law coexist and interplay with local custom and legal culture.

Second, the LOT seems to suggest that legal rules and legal institutions have the same impact irrespective of the broader institutional environment in which they are embedded. This follows from the aggregate treatment of countries classified in the same legal family but having largely divergent economic, societal or cultural background.[11] The LOT seeks to demonstrate not only that the black letter rules in these countries are often similar, but also that the broader economic effects of legal rules are comparable. For instance the studies on finance conclude that French origin countries offer poor investor protection and lead to more limited capital markets, making no attempt to differentiate the economic impact of such rules in origin and in recipient countries (La Porta et al, 1998). Likewise the studies on the quality of government conclude that French origin countries are sharply more interventionist, offer worse property rights protection, have less efficient government and worse provision of public goods, taking French origin countries as a whole (La Porta et al, 1999).

Certainly, institutional patterns have been diffused in pervasive ways: through imposition, emigration, emulation or otherwise. There is, however, abundant evidence from comparative law scholarship that transferred legal institutions rarely have the same effect in recipient countries as in the origin countries.[12] As inferred above, legal transplantation only rarely proceeds in a wholesale manner. But even in cases of wholesale transplantation of codes the transplant does not remain intact in the shape and with the effects it had in the donor country. In respect to the very unique case of the transplantation of the Swiss Civil Code in Turkey, Zweigert and Kötz state:

> This instance of reception is especially interesting because it is so remarkable. . . . Nowhere else in the world can one so well study how in the reception of a foreign

> law there is a mutual interaction between the interpretation of the foreign text and the actual traditions and usages of the country which adopted it with the consequent gradual development of a new law of an independent nature.

It should be noted that the 'varieties of capitalism' literature, to which La Porta et al refer for support of the Legal Origins Theory, focuses on more limited comparative studies between capitalist economies in advanced industrial (OECD) states, chiefly England, Germany, France and the Scandinavian countries. So whereas it concords with the LOT when it comes to identifying persistent styles of framing the economy, namely liberal and co-ordinated economies, it does not purport to extend this categorisation to developing or transition countries.[13]

Another related objection one can direct at both LOT and the IPF is that the theories seek to provide a generalised explanatory framework for the link between legal system and economic performance, treating all branches of the legal system in an aggregate and undifferentiated manner. Institutional influence and legal transfer are thus assumed to take place in the same way irrespective of the area of law and regulation, or the sector of the economy concerned.[14] However, it is highly unrealistic to expect the transfer of legal rules and institutions of so different character such as civil law, commercial codes, banking and labour regulations and constitutional rules and practices, to proceed in the same way unaffected by local preferences and resistance. A number of in-depth comparative studies demonstrate convincingly that local actors, legacies and interest group politics differ substantially between policy areas, which accounts for differential sectoral dynamics of institutional change (Immergut, 1992; Steinmo, Thelen, and Longstrethand, 1992; Knill, 2001).

Importantly, many of the writings of the LOT apparently proceed from an assumption that certain rules and institutions are conducive for economic growth, irrespective of the environment in which they are introduced and of the way of their introduction. Such assumptions are sometimes openly reported and based on authoritative economic analysis (for instance protection of property rights with reference to Adam Smith and Hayek). Often, however, the assumptions are implicit, buried in the less transparent web of indices coding and valuating rules and institutional characteristics (Siems, 2005a). For instance strong investor protection, independent courts, constitutional review are qualitatively identified as contributing to market prosperity and economic growth in pure and abstract terms. These normative claims are rarely subject to discussion in the writings of the LOT.[15] Yet the idea of identifying institutions that would be conducive of economic growth under any circumstances fails to convince (Berkowitz et al, 2003). Moreover, it appears to contradict some of the main premises of the theory of the institutional possibilities frontier. In their article on the New Comparative Economics Djankov et al state:

> [a]n institution that respects the delicate trade-off between dictatorship and disorder in the origin country may not remain efficient once transplanted to a colony (Djankov et al, 2003a: 598).

However, this valuable insight stands in ill harmony with the very design of the LOT.

The acceptance of idealised benchmarks prompts the strong evaluative stance of many of the contributions in the LOT. A comparison with the varieties of capitalism literature shows that the latter theoretical strand avoids normative qualifications. Hall and Soskice explicitly state that they are not arguing for the superiority of one type of capitalism over the other (Hall and Soskice, 2001: 21). Likewise, comparative lawyers as a matter of principle, refrain from general evaluations as to the quality of different systems, partly due to limitations inherent in the traditional methodology of legal scholarship.

A serious drawback of both LOT, and the IPF is that neither theory seems to suggest a credible explanation for legal change. The theories offer a static and to a certain extent determinist conceptualisation of legal institutions since they do not address the mechanisms that lead to shifting the IPF to a superior or inferior status.[16] Thus for example, at the explanatory level Glaeser and Shleifer (2002) find the reasons for the difference between the organisation of justice in the common law and the civil law systems (namely through independent jurors and appointed professional judges) in the lesser risk of law enforcement being subverted in relatively peaceful England compared to revolutionary France. However, it remains unclear why is it that societies in France and in England managed to respond to the challenges in their environment through creating institutions adequate to their demands back in the 12th and 13th centuries, whereas societies in transplant countries fail to carry through a similar adaptation.

The theory of the IPF makes a commendable effort to dig deeper into the reasons for institutional diversity. Yet, the notion of 'civic capital' that is advanced as a main explanatory factor is so multifaceted and vague that its helpfulness can be questioned (see also Rosser and Rosser, 2008). As mentioned above, according to Djankov et al it relates to culture, ethnic homogeneity, and human capital but includes also factors from the physical environment, such as geography and physical endowments. The IPF is moreover said itself to be associated with effective government, greater transparency, and greater freedom of the press (Djankov et al, 2003b: 604). So, the IPF is both a determining factor for, but also a product of institutional choice and institutional reform. This makes it difficult to differentiate between cause and effect, and to analyse the reasons for shifts in the IPF. For instance Djankov et al conjecture that the transplantation of common law, by the latter's correlation with constitutional guarantees of judicial independence, might influence

the location of the IPF and not just institutional choice along this frontier (Djankov et al, 2003b: 612). The theory is ambiguous as to when institutions become part of society's civic capital.[17]

Crucially, much as the NCE is advanced as comparative in the true Coasean sense, some of the conclusions remain puzzling and the analysis one-sided. On the basis of the IPF theory Djankov et al formulate what appears to be a key normative recommendation, namely that '[b]ecause of the substantial risks of public abuse of business, developing countries need less regulation for efficiency.' (Djankov et al, 2003b: 611). To reach this conclusion the authors analyse the possible pitfalls of public regulation in developing countries. What they fail to address is that also courts, self-regulation and market discipline may be negatively affected by the society's poor civic capital as well. The marginal effectiveness of dictatorship in reducing disorder is taken as a crucial determinant of institutional efficiency without enquiring into the effectiveness of private ordering (Djankov et al, 2003b). The analysis is thus a single institutional one (Komesar, 1994, see below).

2. Methodological Fallacies

At least part of the theoretical inconsistencies discussed so far are closely related, it seems, with certain flaws in the methodology employed in the majority of studies in the NCE, and in particular in the legal origins line of research. While the research design has been constantly readjusted and refined, still many of the studies rely on extensive accumulation and comparative evaluation of data across numerous jurisdictions whereby the legal origin of a system is kept as independent variable.

a. Legal families as an imperfect tool

It is probably not surprising that the use of classical comparative law taxonomy in the NCE and the LOT has attracted attention and critical scrutiny on the part of comparative lawyers (Siems, 2007a; 2005a; 2005b). In particular, the central place awarded to the distinction between common law and civil law has been questioned given the massive critique levelled at this distinction in comparative law scholarship. As is well known, the dichotomy has been criticised as building essentially on analysis of private law and reflecting the long-term bias of comparative law scholarship towards private law (Gerber, 2001; Örücü, 2007: 170). As Zweigert and Kötz incisively point out, the classification would go along different lines if public law is taken as a basis, with USA and Germany belonging to the group of countries granting courts constitutional review and UK, the Scandinavian countries and France being far more restrictive in empowering the courts and insisting on the primacy of parliament (Zweigert and Kötz, 1998: 66). These remarks are particularly relevant

when evaluating some of the studies of La Porta et al which are directed not at commercial law institutions, but rather at the constitutional dimension of legal systems, notably the study on judicial checks and balances.[18] In a different vein, Whitman deplores that the traditional classifications are based on very technical 'lawyerly' criteria such as sources of law and procedure and provide 'few answers to the kinds of policy questions posed by the core policy sciences' (Whitman, 2008: 350–51). The inherent eurocentric cultural bias in according excessive weight to the dichotomy between common law and civil law and, more generally, in focusing on domestic law of municipal legal systems, thus neglecting non-Western cultures and traditions, has also been brought forward in other contexts (Örücü, 2007; Twining, 2007).

Still, it should be conceded, that La Porta et al do not rely on a simplistic taxonomy, but build on the more sophisticated set of criteria, which Zweigert and Kötz have dubbed as the 'style of legal families'. In their contribution to the theory of 'legal families' Zweigert and Kötz identify five factors that are constitutive of such 'style', namely historical background and development, the predominant and characteristic mode of thought in legal matters, distinctive institutions, legal sources and the way they are handled, and finally ideology (Zweigert and Kötz, 1998: 67). Interestingly, La Porta et al take the reference to 'ideology' to be supportive of their own conclusions of a link between legal families and the attitude towards the desired degree of state intervention in economic life. They quote Zweigert and Kötz' statement that 'the style of a legal system may be marked by an ideology, that is, a religious or political conception of how economic or social life should be organised'. According to Zweigert and Kötz, however, ideology becomes important mainly as a factor distinguishing religious-based systems and systems based on socialist ideology. In the 1987 edition of their *Introduction to Comparative Law* they continue:

> 'This is manifest in the case of religious legal systems and of the socialist systems. The legal ideologies of the Anglo-Saxon, Germanic and Romanistic, and Nordic families are essentially similar, and it is because of other elements in their styles that they must be distinguished, but the communist theory of law is so extremely different that we must put into a special legal family the Soviet Union, the People's Republic of China, Mongolia, Vietnam, North Korea and the socialist states of Europe.'

b. Difficulties of attributing legal systems to legal families: a realistic look at legal reception and borrowing

A major problem with the LOT is its reliance on the possibility to classify legal systems across the world in one out of four big legal origins. Such subsuming is, however, far from an easy and uncontroversial operation. The neat tables that appear in LOT publications give a short shrift to a complex and often

contested story of intersecting stages of legal development, where different layers and influences are mixed and remixed in quite disorderly fashion (Örücü, 2007). The classifications are thus sacrificing historical detail and precision for the sake of preserving the clarity of the model.

The problem is well illustrated by the difficulties of finding the appropriate place in the classification for individual CEEC. These countries were not covered by the first studies on law and finance by La Porta et al (1997, 1999) and were treated as belonging to a separate group, namely the one of the socialist family, in the studies on the quality of government (La Porta et al, 1999) and on judicial checks and balances (La Porta et al, 2004). Yet twenty years after the fall of the Iron Curtain, such classification stands out as inadequate. Recent studies have therefore attempted a more exact and up-to-date classification. But whereas the belonging of the CEEC to the civil law tradition can hardly be contested, the choice between the German or the French family has not proved easy. Given the turbulent history of these states and the many layers of their legal traditions, in most cases one can see both German and French origins being at play, intertwined with influences from modern American corporate, economic and constitutional law.[19]

La Porta et al occasionally address the complicating factors of legal dynamics and of multi-layered systems, but either ignore them or take one of several possible 'layers' of a legal system as the defining one. For instance, in the study on Law and Finance, admitting changes in law and in the sources of legal influence in some countries (e.g. common law influences in Equador, which initially was a French civil law countries, German influences in Italy, also a French origin country and Americanisation of company law in Japan, initially a German origin country), the authors opt to 'classify a country on the basis of the origin of the initial laws it adopted rather than on the revisions' (La Porta et al, 1998). In another article, when faced with the jig-saw character of legal systems where certain areas of laws come from a common law and other areas from German or French law, the authors are inclined to accept pluralist classification of a country into different 'origins' depending on the area under analysis.[20] This approach seems however to be at odds with the ambition of showing that rules and enforcement environment are equally influenced by legal origins.

c. The risk of working with ideal types

In their recent restatement of the LOT, La Porta et al concede that 'no country exhibits a system that is an ideal type' and that all countries mix the two approaches to social control of business perceived as so distinctive of the common law and the continental tradition, namely private contract and litigation versus government ownership and mandates (2008). However, the research design, the analysis and the outcomes of their studies reveal an 'ideal

type' approach. The common law and the civil law (in particular the French) tradition are described through highly generalised and stylised characteristics. As often with ideal types, many of the distinctive features ascribed to the two legal origins hardly survive a close empirical test.

To take some examples, following traditional comparative law accounts, La Porta et al portray the common law system as chiefly relying on case law and leaving limited space to statutory law. Yet such description has been criticised as one-sided by Zweigert and Kötz already in the 1986 edition of their work (Zweigert and Kötz, 1986: 278). With the advance of European legal integration and the growing number of statutes entering the British legal system in the process of implementing the European *acquis*, this portrayal is becoming increasingly out-of-touch with reality. When confronted with such criticism La Porta et al concede to the growing role of statutory law, but insist that common law statutes are still highly imprecise, leaving broad room for interpretation to judges.[21] This characterisation is, however, not entirely correct. It is common knowledge that drafting statutes in the common law tradition is an extremely painstaking process of exacting detail and formalism. Precisely because statutory law is considered as an intervention in the realm of common law, statutes are as specific as possible in order not to allow for broad construction (Zweigert and Kötz, 1998). Likewise the aversion of common law countries, the UK in particular, to general clauses is familiar to anyone who has followed the attempts at harmonisation of consumer contract law and unfair commercial practices law in the European Union (Teubner, 1998).

Next, whereas the German civil and commercial codes are said to use more general formulas and to accommodate greater judicial law making, the French tradition is seen as characterised by rigid statutes (La Porta et al, 2008: 291). Contrary to this assertion, many comparative law accounts draw attention to the notoriously vague general clauses in the civil law tradition, which have been a source of flexibility awarding an important role to the judiciary and to legal scholars in Germany (Professorenrecht). Certainly the anecdote of Napoleon's conviction that his code was so perfect that it needed no doctrinal interpretation is well-known among comparatists.[22] But equally well known is the fact that the body of modern French tort law developed on the basis of five short articles on tort liability (delict) in the *code civil* essentially by creative judicial law making (Zweigert and Kötz, 1998; Bogdan, 2003:151).[23] And German unfair competition law provides a fascinating example of elaborate judge-made law that has evolved on the basis of a general statutory clause of unfair competition (Bakardjieva Engelbrekt, 2003; Ohly, 1997). Generally, it is widely recognised that the law-making role of the judiciary in the civil law tradition is much more prominent than admitted in reductionist accounts of both comparative law and comparative economics (Ahlering and Deakin, 2008).

Related to the above is another point, often underscored by comparative lawyers, and which is only partly addressed by La Porta et al, namely the changing character of law and the gradual convergence between the common law and the civilian tradition (Zweigert and Kötz, 1998; Siems, 2007b). The dynamic of legal interaction and legal change is certainly enhanced by processes of supranational and international legal integration where lawyers and institutional actors from different legal systems communicate, negotiate and arrive at mutually acceptable solutions. With its 80 000 pages of legal instruments, the so called *acquis communataires*, the European Community is one of the most fascinating and dynamic melting pots of legal rules and ideas, whereby the national origin of the commonly devised rules and standards, which travel back to the Member States is hard to discern and identify. Likewise the many 'best practices' model codes elaborated under the auspices of the World Bank or the OECD have a mixed and hybrid character. Seen from this perspective, by taking national jurisdictions as the main unit of analysis, the New Comparative Economics, much like traditional comparative law, reveals the symptoms of methodological nationalism and offers no useful conceptualisations of legal interaction in a globalised world (Beck, 2000; Joerges, 1997; Smits, 2008).

d. Measuring legal families

This leads me to the much debated appropriateness of measuring legal systems by using scores and numerical indices. As mentioned above, the various studies of the LOT use and combine diverse sets of data. Some relate to very specific legal rules and institutions, for instance share holders voting rights in companies or constitutional review and are first-hand data, generated by study of the legal texts in the countries under analysis. Others are of an aggregate and evaluative type and relate for instance to the efficiency of the judicial system, rule of law and corruption (La Porta et al, 1998). These are second-hand data, building themselves on primary data generated and processed by other scholars or more typically, policy think tanks and interest organisations.

Both approaches are prone to criticism. As others have argued, there is an inherent imprecision and at worst, hidden bias and lack of transparency in the attempt to capture nuances in legal rules and institutions by numercials (Siems, 2005a; 2007). In the case of questionnaires asking for the availability of a specific rule (e.g. investor protection), the very formulation of the question is often influenced by the background and the expectations of the researcher compiling the questionnaire. The questionnaire may thus omit important rules and institutions that have similar or comparable function, but are located in different branches of the legal and administrative system, and have different conceptual denominations.[24] To avoid such pitfalls comparative lawyers insist on functionality as the main method of comparative law, and

advice scholars to engage in sensitive search for different rules and institutions that provide answers to similar problems in life and in the economy. Following this approach comparative lawyers are instructed to span the research net broadly to be able to unearth functional equivalents when one least expects them, including the area of soft law and non-legal institutions (Zweigert and Kötz, 1998; Reitz, 1998; Michaels, 2006).

More importantly even, the existence of a rule in a country's legal system does not tell us much about the way this rule is used and 'appropriated' by the legal community in a country or by other actors potentially affected by the rule. The existence of legal doctrine, legal precedent, administrative practice and more broadly legal ideas that mould and flesh out statutory rules remains unaccounted for in the LOT. The importance of these ideational strata of a legal system is however hard to overestimate and has been convincingly brought forward among others in studies on comparative law, comparative jurisprudence and system theory (Sacco, 1991; Ewald, 1995; Teubner, 1998).[25]

3. Legal Origins v The Transplant Effect

A fundamental and particularly effective critique of the LOT has been dealt by a group of lawyers and economists, who while partly using the same data as in the early study of La Porta et al on legal finance (1997, 1998) offer alternative, and on many points more convincing, interpretations of the results (Berkowitz, Pistor and Richard, 2003). Instead of tracing the efficiency impact of legal rules along the lines of the established legal families Berkowitz et al proceed to test the effects of the way in which the transplant operation has been carried out. They reorder the countries which are covered by the La Porta study into origins and transplants, depending on whether the domestic legal order developed internally or through external influence. Following this criterion Berkowitz et al identify eight origin countries (Germany, France, Austria, Switzerland, Denmark, Sweden, Norway, Finland, United Kingdom, US). The rest of the countries are in the category of transplants, where the legal order has developed to a considerable extent under exogenous influences. The transplants are in turn divided into receptive and non-receptive, depending on processes of change and adaptation of transplanted law statutes, the degree of voluntary choice, the familiarity with the country from which law is taken, migration processes etc. The important question thus is not 'from where law has been borrowed' but rather 'in what way law has been developed and borrowed'. The main claim of Berkowitz et al is that '[t]he way in which a country received its formal laws is a much more important determinant of the currant effectiveness of its institutions than the particular legal family it adopted.' (Berkowitz, Pistor and Richard 2003: 167).[26]

The results lend strong support to the initial assumption that countries where law has developed internally as a response to local conditions or where the population has been familiar with the main legal principles of the transplanted law (due to emigration flows and long term colonisation with massive presence by the colonisers) show higher levels of legality. As underlined by Berkowitz et al, it is ownership of reform which is important. This theory receives further support in middle-range comparative studies by Pistor where the rate of change in corporate statutes is traced. These studies suggest that adaptability, i.e. the possibility of engaging local actors in using the legal rules and the institutional framework, is crucial for the effectiveness of reform (Pistor et al, 2003a; 2003b). This point has been further theorised by Pistor in follow-up work on the incompleteness of law (Pistor and Xu, 2003).

The transplant effect theory builds on an understanding of law as a cognitive institution. On a normative note the studies of Pistor et al submit that 'for the law to be effective, it must be meaningful in the context in which it is applied so that citizens have an incentive to use the law and demand institutions that work to enforce and develop the law. Judges, lawyers, politicians must be able to increase the quality of law in a way that is responsive to demands for legality.' (Berkowitz, Pistor and Richard, 2003: 167).

V. AN ALTERNATIVE COMPARATIVE INSTITUTIONAL APPROACH

Given the criticism of the methodology, the approach and results of the NCE, can we conclude that institutional theory cannot make a valuable contribution to comparative law and that interdisciplinary endeavours should be abandoned? I believe such conclusions would be hasty and unfortunate. Quite to the contrary, institutional theory, I submit, can serve as a common platform for economic, political and legal inquiries into the comparative features and advantages of legal systems. The potential of institutional theory is already visible in some of the in-depth comparative analyses of the NCE mentioned above, as well as in the further research on the evolution of law and the transplant effect by Berkowitz, Pistor and Richard (2003) and Pistor (Pistor et al, 2003a, 2003b and Pistor and Xu, 2003), which through sensitive merging of disciplines has produced robust and credible results.

In the following, I suggest that there is yet another fruitful way of combining insights from recent institutional scholarship to advance the comparative analysis of law and legal institutions. The proposed framework builds on a participation centred comparative institutional approach as elaborated by public policy scholar Neil Komesar (1994) combined with insights from historical institutionalism (North, 1990; 1991, 1993).

1. Participation-centred Institutional Approach

Similar to Djankov et al in their article on the NCE (2003), Komesar proceeds from classical Coasean transaction cost analysis (1960). The market and the political process, but also the courts, and occasionally the administrative process, are conceived as aggregate decision-making processes and as institutional alternatives for addressing different law and public policy issues. Komesar argues convincingly for a full-fledged comparative system analysis that implies careful evaluation of each alternative. He criticises mainstream law and economic analysis as being locked in what he calls 'a single institutional analysis', focused either on the advantages of markets and private ordering or on the failures of government regulation. What is missing is the true comparison. Also, in this respect this analysis has certain commonality with the appeals for broader reading of the Coasean theorem by the NCE (Glaeser et al, 2001).

The major difference is, however, that Komesar identifies the participation of affected actors in the respective decision-making process as the main factor for comparative evaluation (the 'participation-centred' approach). The use of the broad concept of 'participation' serves to facilitate the extension of the Coasean transaction cost approach from markets to politics, to public administration and adjudication. It allows integrating important insights from public choice theory into the analysis and brings the logic of economic theory closer to public policy and law. The focus is on the mass of participants, i.e. consumers and producers for the market process, voters and lobbyists for the political process and litigants for the judicial process (Komesar, 1994: 7).

Studying the opportunities for participation (and representation) implies on the one hand analysis of the interests involved in a particular public policy issue and, on the other hand, analysis of the characteristics of the alternative decision-making processes that enhance or reduce participation. Participation opportunities are weighed through assessing the costs incurred and the benefits expected from participation of the actors in the respective decision-making process. For the market these are transaction costs and benefits, while for the courts they are litigation costs and benefits. In terms of the political process, such opportunities depend on the costs and benefits of political participation. Benefits and costs of participation thus become the main units of analysis. They account for the relative efficiency of the alternative decision-making processes with regard to a specific law and public policy issue. Probing into the costs of participation reveals a major difference between issues that concern a small number of stake holders with even distribution of the stakes and issues concerning high number of affected interest-holders with low and dispersed stakes. It is 'big numbers' and skewed stake distribution that typically complicate decision making and require hard institutional choices (Komesar, 1994).

The participation-centred approach is developed chiefly for the purposes of informing institutional choice in law and public policy within a single jurisdiction. However, it provides a valuable analytical grid for the cross-country comparative study of institutions (Mattei, 1998; Bakardjieva Engelbrekt, 2003). First, Komesar stresses the importance of the question 'who decides' and of allocating decision making competences between the market, the political (legislative) process, courts and administrative agencies. Obviously countries may, and do differ in allocating decision-making competences to these institutional processes in certain areas of law and policy. The question of institutional choice can therefore be identified as one of the fundamental questions in comparative economic law.

Second, the emphasis on participation as the main factor for evaluation of the efficiency of decision-making processes and of institutional choice has several implications for a cross-country comparison. Incentives for participation will obviously differ in different areas of law and public policy. Therefore a generalised country-based comparison of institutional choice appears to be of limited validity. Next, in a cross-country setting actors may differ, depending on a variety of historical, technological and other circumstances. Such differences would seem important for defining the structural modalities of institutional choice.

Third, the institutional design of non-market decision-making processes like the political process, the courts or administrative agencies emerges as an important determinant of participation costs and benefits. Whereas in his analysis, Komesar mainly scrutinises the characteristics of the political process and the courts from a single country (i.e. US) perspective, clearly in a comparative cross-country study the emphasis will be on identifying differences in the design of political processes, judiciaries and administrative agencies that facilitate, respectively impede participation. Rules on access to courts and administrative agencies, rules on litigation costs and procedure will be among the most important components of the comparative investigation (Bakardjieva Engelbrekt, 2003).

The participation-centred approach is in many respects congruent with the transplant effect line of theorising advanced by Berkowitz et al (2003) and with the theory on incomplete law (Pistor and Xu, 2003). It gives additional support to the claim that efficiency comes with active adaptation of law and its responsiveness to local demands. At the same time, the participation-centred approach identifies instances when ensuring participation and efficient decision-making is particularly difficult and when the question of allocating decision-making competences becomes crucial. This is often the case of public goods, where dispersed, small stake interests risk to remain underrepresented in all institutions. It is also typically problems of public goods that are solved differentially across jurisdictions, allocating decision-making to courts, markets or administrative agencies.

2. Historical Institutionalism

Still, the participation-centred approach does not fully explain the processes of legal change and legal persistence. Therefore, it is suggested that comparative institutional analysis should be complemented by a historical institutional perspective. Historical institutionalism highlights the role of institutions as humanly devised constraints, whose main function is to reduce uncertainty by providing a structure to everyday life (North, 1991). Institutions thus include formal legal rules, but also informal constraints (such as ideologies and customs) and the enforcement characteristics of both (North, 1993: 36). Unlike other institutional economists who treat organisations as institutions, North insists on distinguishing between the two in order to enable stringent analysis of their interaction. The distinction is crucial, since in this way the analytical approach is capable of capturing not only processes of institutional stability and inertia but also processes of change at incremental or more dynamic pace. Organisations are conceived as 'groups of individuals engaged in purposive activity.' They are designed by their creators to maximise wealth, income, or other objectives defined by the opportunities afforded by the institutional structure of society (North, 1993: 36). This broad definition covers the classical market organisation, the firm, but likewise the guild, the political party, the Congress or the executive agency.

The core of the theory of institutional change advanced by North could be summarised as aiming to explain 'how the past influences the present and the future, the way incremental institutional change affects the choice set at a moment of time, and the nature of path dependence' (North, 1990: 3). One of the main puzzles that drive North's analysis is the dramatic divergence in economic performance and development between different countries in the world (North, 1990: 6). Contrary to the evolutionary theory of economic development elaborated by Alchian, predicting convergence towards efficient institutions (Alchian, 1950),[27] North demonstrates empirically that inefficient institutions prosper and divergence between developing and developed countries in efficiency terms even increases. North explains the puzzle by highlighting the constraining force of institutions and their propensity to persist over time. Institutional paths may be followed not because they are efficient but because their change is costly. Moreover, institutions tend to produce incentives for the creation of organisations, which then depend on the institutional framework and contribute to the latter's stability (institutional symbiosis).

Historical institutionalism has several important implications for comparative legal analysis. By taking a broad definition of institution, it highlights the importance of comparing not only formal rules, but also informal constraints. According to North, among these are codes of conduct, norms of behaviour, conventions, beliefs and ideologies (North, 1993: 36). Given the decisive role

that lawyers play on all levels, from designing formal rules to their enforcement, the wider intellectual reference frame of those actors is to be taken into consideration. Therefore, comparative analysis shall place formal rules against the backdrop of existing legal ideas and schools of thought. Historical institutionalism thus resonates well with Ewald's appeal to comparative lawyers to redirect their attention from the comparative study of black letter rules to the comparative study of legal ideas and jurisprudence (Ewald, 1994–1995).

Obviously, the LOT is in many respects related to historical institutionalism. Legal families the way they are conceptualised by the LOT can be ultimately seen as a complex of formal and informal institutions as well as enforcement characteristics which, once introduced in a society, are costly to change. They follow with a myriad of actors and organisations, not least legal professionals, who benefit from and contribute to the system's perpetuation. However, historical institutionalism also stresses the role of local actors, lock-ins and resistence to change. It therefore requires a careful study of institutions, related actors and institutional evolution. Methodologically it invites for in-depth 'process tracing' and evolutionary approach (Thatcher, 2007; 2008) rather than large-scale statistical approaches.

3. Merging the Two Approaches

The most important intersection between historical institutionalism and the participation-centred institutional approach appears to lie in their understanding of efficiency. Both approaches advocate an unorthodox view on efficiency. North in particular elaborates at length on the concept of adaptive efficiency of institutions, according to which efficiency is equalled with generating the highest possible number of trials for addressing societal problems. According to North, adaptive efficiency 'provides incentives to encourage the development of decentralised decision-making processes that will allow societies to maximise the efforts required to explore alternative ways of solving problems' (North, 1993: 36). This concept can be seen as coming close to the participation-centred approach advanced by Komesar. Efficient representation of all interests concerned in the decision-making processes and at all levels, both in market, rulemaking and enforcement, is arguably intimately related, if not synonymous, with ability to generate a high number of trials. Efficient opportunities for representation will per definition imply high interest awareness and will supposedly bring about challenge of the institutional framework with any perceived inefficiency. Like the analysis of Komesar, North's conceptualisation also finds a productive conjunction between economics, politics and law by demonstrating the immediate economic importance of democratic government and institutions.

If we try to translate this normative component into legal terms, then the question may be: how do we shape legal rules and enforcement mechanisms

which can better account for all interests involved and avoid unproductive lock-ins? Cast in these terms, the concept of 'adaptive efficiency' becomes much appealing for legal analysis. Success in economic history is associated with legal and political institutions including rules on enforcement that have rendered the institutional framework more responsive to changing preferences and costs, assuring more adequate interest representation and making room for new interests and actors as they emerge. Broad representation through democratic procedures thus receives a concrete economic meaning, as it contributes to improved economic performance through better capturing and reflecting the preferences of involved interests. The concept 'deliberation' familiar from legal and political science is close to mind (Bakardjieva Engelbrekt, 2003).

VI. APPLICATIONS

The combined institutional approach sketched out above has, it is submitted, a number of useful applications in comparative legal analysis. It provides a toolbox for comparative studies of institutional choice and design between individual national legal systems. It offers likewise, a way of improving our understanding of the interaction between legal systems in the form of legal transplants, legal emulation and supranational legal and economic co-operation.

1. The Institutional Approach and Theories of Legal Change

As outlined above, both the LOT and the Transplant Effect theory offer alternative conceptualisations of legal transplants and legal change. Whereas the LOT highlights the pervasiveness of transplantation of formal rules and enforcement patterns, the Transplant Effect Theory directs the attention to the gap between law on the books and law in action in recipient countries and demonstrates the importance of the process of transplantation and of local ownership of reform. Also, in comparative legal theory there has been a lively debate on the relevance of societal context for legal change. As well known comparatists such as Otto Kahn-Freund, have proposed a context-sensitive approach to the study of legal reform differentiating between separate fields of law (Kahn Freund, 1974). Having conducted research on legal regulation characteristic of the modern welfare state, Kahn-Freund underlined the importance of taking account of the social-political context (constitutional and political order) in areas where pressure groups and political interests exert powerful influence. Conversely, legal historian Alan Watson, taking a long-term perspective, has tried to demonstrate the autonomy of legal rules and institutions and the possibility of 'transplanting' law irrespective of divergent social-political contexts (Watson, 1974).

The different conclusions of the two authors are apparently dependent on the legal areas that form the subject of the bulk of their own work. While Kahn-Freund (despite his broad competence), has been most prolific in the area of industrial relations, which is also at the centre of his 1974 article, Watson is an expert in Roman law and has mainly dealt with tracing the Roman law origin of many doctrines in contemporary European civil law. In his argumentation Kahn-Freund is clearly aware of the importance of the specifics of each legal area, and speaks of a continuum of legal rules and areas from 'organic matter' where the concept 'transplant' is appropriate, to 'mechanical matter' where one can speak of a simple replacement (e.g. of a carburettor) (Kahn Freund, 1974).

Given this differential starting point and focus, the two claims are not mutually exclusive and possibly even harmonious when seen from an institutional perspective. Both authors agree on the importance of law as an institution. In the area of core private law, where the main interests of Watson lie, one might from an institutional perspective argue that law performs the chief function of assignment of property rights in a world of individual exchange with typically negligible transaction costs. Following Coase (1960), the initial allocation of property rights would not affect the ultimate use of the property since efficient outcomes would be eventually achieved through voluntary bargaining between the actors involved. In other words, what is important is not the rule itself, but rather the very existence of a rule and the certainty it creates, which helps actors to arrive at mutually advantageous solutions. This may explain the lack of resistance (apart from, nowadays, resistance from legal professional circles) to transfer of legal rules.

In contrast, industrial relations, as much of economic regulation produced in the modern welfare state, have aimed at coping with problems of collective action, externalities and market failures. In this case the political and legal systems have been challenged to step in as alternative institutions to the market. However, the same transaction cost problem has plagued these alternative processes (Komesar, 1994). The solution has then been dependent on the political system and its particular constitutional design, on the availability of interest groups, the possibility for collective interest representation in the political and judicial processes.

Institutional economic analysis thus hints at some answers to the puzzle of varying rules and their 'transplantability'. The more rules are connected to public goods and complex processes, involving high number of actors, low transparency, high transaction costs and requiring a high degree of human co-operation, the more difficult is the transfer of legal and institutional solutions. Even if formal rules may be borrowed in these situations, their integration in the institutional environment may produce very different results.

Seen through the prism of the two distinct institutional perspectives

outlined above it appears that Kahn-Freund emphasises interests and institutional structures and is thus close to the participation approach advanced by Komesar. Watson emphasises continuity, the decisive influence of the legal profession, the self-referentiality of law (Teubner, 1998), as well as the detachedness of law from its immediate political context and interest struggles. It therefore seems fair to say that Watson's understanding of legal change has affinities with historical institutionalism. One should also add that in fact Alan Watson, in his 1978 article 'Comparative Law and Legal Change' takes a more sophisticated position on the question of legal change, very much in line with the institutional approach presented here. He identifies the factors promoting and impeding legal change by addressing 'pressure forces', 'opposition forces', 'the role of lawyers' and importantly 'inertia' (Watson, 1978).

2. The Institutional Approach and the Study of European Integration

Finally, the institutional approach presented above allows for a more productive conceptualisation of the complex relationship between national law and supranational and international law and institutions. Historical institutionalism alone, as well as NCE, have been rightly criticised of determinism and overemphasising continuity and incremental change, leaving phenomena such as radical change and the influence of international processes and organisations unaccounted for (Thatcher, 2008; La Porta, 2008). By contrast, combining a participation-centred approach with a historical institutional perspective promises to give insights in the dual forces of continuity and change associated with Europeanisation and globalisation and their influence on national institutional frameworks.

If one looks in particular at European integration one manifest feature of the European Community project from an institutional perspective, is that it offers new arenas for decision-making. The national market flows over into a Common Market. National political and legislative processes are connected by way of dense net of visible and invisible rules to the political process at the Community level. The European judiciary enters as a new decision-making institution, concurring with national courts and acting often as an arbiter and distributor of decision-making competencies between Community and Member States as well as between the different Community institutions. For national economic and political actors European integration inevitably changes the established balance of participation, powerfully influencing previously insulated procedures of law-making and rule-implementation. Obviously the costs and benefits of participation at the European decision-making level may vary from those in respective national arrangements.

Variations can certainly also be observed depending on interest structure in individual sectors. Changes in the domain of institutional choice have to be explored in more detail when looking at how particular European measures have been implemented at the national level and how do national stakeholders adapt to the changes in the opportunity set (Bakardjieva Engelbrekt, 2003).

From a historical institutional perspective the focus in studying European integration should be on the different ways in which Europeanisation fits into or challenges long-standing institutional constraints such as ideologies of legal regulation or well-engrained habits in case-law and administrative implementation. Is implementation of European measures disrupting efficient institutional equilibria, causing disarray among the actors involved and decreasing coherence and predictability? Or does it expose inefficient lock-ins and, thus, enhance the adaptiveness of the institutional framework?[28] To what extent Europeanisation opens for new variations and possibilities of learning and influencing the framework? And when are we to expect the one or the other eventuality?

The whole European project is per definition about institutional change, pursuing openly the effectuation of change in formal legal rules (harmonisation), informal constraints (attitudes in market actors, consumers and European citizens) and enforcement (new mechanisms of enforcement before European and national bodies). A central theme in the Europeanisation debate has predictably been that of convergence or divergence of national legal systems, cultures or regulative approaches in more specific areas. By tracing on the one hand the changed opportunities for participation of affected interests, and on the other, the constraining effects of deeply embedded institutional habits, the institutional approach presented above is able to shed some new light into this debate.

Methodologically, the analysis of Europeanisation seems to require a cross-country comparative research design. If confined to a single legal system, the institutional analysis may give results highly specific to this jurisdiction and not yield to generalisation. At any rate, a comparative approach is better suited to generate findings of broader validity. It also brings the research design closer to the dynamic reality of European integration where Community legal rules and principles are forged against a background of divergent national legal and institutional approaches and then transmitted back for implementation and enforcement in the same national environment. Only a comparative analysis of legal change under European influence allows us to test contradictory claims of convergence and divergence of legal systems, of harmonisation or of disintegrative influences of European law on national law.

VII. EXAMPLES

Due to limitations of space, it is impossible here to give full fledged account of specific applications of the approach suggested above. Therefore, I would only sketch two areas of law and regulation where the approach has, I believe, yielded interesting results. For more extensive account of such applications the reader is referred to my earlier publications (Bakardjieva Engelbrekt, 2003; 2007).

1. Europeanisation of Consumer Law and Policy in the European Union

The first area is that of harmonisation of consumer law in the European Union. The history of such harmonisations starts in the 1970s and has during the first decades of Europenisation been chiefly concerned with approximation of substantive rules and standards. A variety of Community directives was adopted during this period, gradually expanding to cover the whole field, from marketing practices, to product safety, product liability and consumer contracts. The process of harmonisation showed, however, a general neglect of interests, actors and enforcement issues. As is well known, consumer law and policy face the hard dilemma of defining and ensuring adequate protection of broad and dispersed collective interests of consumers. The crucial questions following a participation-centred institutional approach, are thus who defines and represents these interests, who enforces the relevant rules and at what cost. Differences in institutional choice and enforcement design across jurisdictions can be expected to result in different incentives for participation in decision making, in divergent actor involvement and ultimately different impact of similar substantive rules. At the same time a historical institutional perspective highlights the conservative force of existing institutions and the institutional symbiosis between institutional framework and its organisational 'clients'.

A more focused and extensive comparative study of the evolution of German and Swedish regulation of marketing practices law seems to confirm the above hypothesis (Bakardjieva Engelbrekt, 2003). In Germany this area of regulation is conceptualised as unfair competition law. It has its roots in a communitarian neo-corporatist model dating back to the first Act Against Unfair Competition (UWG) of 1909. The statute reflected in its original version the strong position in the political process of the German Mittelstand during the early 1900. The emphasis was on the interest of competitors and on private law enforcement through voluntary business organisations. In Sweden despite early proclaimed legislative intention to follow the German model developments took a different turn. The regulatory approach in this country had its take-off in the consumerist spirit of the 1960s. Consumer protection

policy emerged as a new policy domain, which was rapidly occupied by powerful trade unions and the dominant social democratic party who actively engaged in the legislative process purporting to represent the broad consumer majority. As a consequence, the resulting Marketing Practices Act of 1970 was conceptualised as a consumer protection statute. Institutional choice was exercised in favour of public representation of consumer interests through a Consumer Ombudsman and a centralised Public Consumer Protection Agency. These differently exercised institutional choices have found expression in different institutional design of courts, self regulation and public intervention with different modalities for actor participation. Ultimately, they have produced different beneficieries from the institutional framework and different impact on markets.

In view of these very divergent starting positions of the two countries, the question of the impact of the process of harmonisation of European consumer law becomes particularly pertinent. Has European integration brought national institutional frameworks closer to each other, has it enhanced the existing divergences or has it simply left those differences unaffected? One straightforward observation from the institutional responses in the area of fair trading in Germany and Sweden is that the effects of integration have been very dissimilar in the two countries. One and the same Community act has produced strikingly different repercussions in the institutional landscapes of the respective legal system.

Generally, both systems have remained within their own macro-institutional constraints in terms of the divide between private and public and the importance of private law and private autonomy in the overall legal system. However, a careful scrutiny of the multifaceted impact of European integration demonstrates that it may have broken the spell of old lock-in effects and increased the plurality of decision-making instances and the number of 'trials'. For German law the consumer perspective is nowadays more readily recognised in legislation, case law and doctrine. In Sweden private autonomy has received a boost and individual traders enhanced access to the courts. There are, on the whole, strong indications that European integration questions fundamental ideological conceptions and could provide the impetus for incremental but profound changes in long-term institutional legacies as well.[29]

2. Copyright Law and Policy in an Institutional Perspective

Another area of regulation that can arguably be productively analysed through the prism of the institutional approach outlined above is copyright law and policy at global and European level. Copyright law is an area of intellectual property law dealing with the protection of original expressions. During the

last decades, it expanded vastly in at least three different respects: regarding the subject matter covered, as to the scope of the exclusive rights, as well as concerning the term of protection, now extending to 70 years after the death of the author. In still a forth direction, by way of interlinked international agreements (Bern Convention, Rome Convention, WIPO Copyright Treaties, TRIPS) and European directives, an international regime of copyright protection has emerged, that has been diffused to a wide range of countries worldwide, not always willingly accepted by political constituencies.

Like consumer law, also copyright law reveals a complex constellation of actors and interests that are not equally structured across countries despite considerable harmonisation of substantive standards. Apart from the paradigmatic author, and the broad circle of users, a whole array of intermediaries in the process of production and consumption of intellectual works have emerged with their vested interests in the shaping and fine-tuning of the regulative regime. These include publishers, producers, libraries and broadcasting organisations, and importantly collective organisations for management of copyright and related rights. Consequently, to better understand the logic of Europeanisation and institutional change in this field, a rigorous analysis of actors, interests, stakes and modalities of participation at European and global level seems to be required.

Novel digital and information technologies influence the dynamic of participation in decision-making processes at all levels and unsettle previously established institutional equilibriums. A good example is the Infosoc Directive, the probably most ambitious instrument in the field of copyright at the EU level which sought to adapt copyright to the challenges of the Information Society and to align national divergences. However, instead of smooth convergence, the Directive seems to have unleashed a dynamic process of unwieldy institutional adjustment in the Member States of the European Union. The recently published study commissioned by the European Commission on the state of national implementation of the Directive by the Member States, carried out by the Institute of Information Law in the Netherlands (IViR) demonstrates that a widely divergent set of institutional arrangements has sprung out of the implementation process (Bakardjieva Engelbrekt, 2007). These institutions can be placed at different junctures on the scale between private and public and seem to be influenced by national historical legacies and patterns of actor participation. This dynamism can be interpreted as a search for appropriate decision-making institution to mitigate the consequences of an expansive legislative copyright policy as materialised in the Infosoc Directive and to re-establish a balance of rights and obligations. The comparative institutional approach outlined above suggests that the institutional design of these schemes and the modalities for actor participation will be crucial for their sustainable success and therefore deserve a careful scrutiny.

At the same time, the conservative force of institutional legacies should be carefully weighed as a factor deterring institutional innovation.

The importance of enforcement and interest representation in judicial and administrative processes appears to be gaining growing recognition within the process of European harmonisation. There is a notable shift towards enforcement in European harmonisation initiatives in all areas of regulation and consumer and copyright law and policy are good examples for this tendency. In the consumer policy domain a 1998 Injunctions Directive 1998/29/EC addressed the role of consumer organisations in enforcement of harmonised consumer law, whereas a 2005 Consumer Law Cooperation Regulation requires Member States to empower centralised public consumer bodies stressing the advantages of public enforcement. The Commission is presently in a process of consultation concerning possibilities and necessity for collective consumer enforcement at the European level. A European small claims regulation is already in place, not only confined to consumer issues.

Recent initiatives in the domain of copyright policy, and of intellectual property more generally, also demonstrate an increased interest in procedural and institutional issues. Notably, the Enforcement Directive 2004/48/EC attempts to alleviate national differences in respect to measures, procedures and remedies for enforcement of IP rights. Probably not surprisingly it has become a matter of controversy, whereby the process of national implementation is accompanied by heated public debate and corresponding transposition delays.

Overall, and not necessarily as a result of intended efforts, a common direction of European influences appears to be towards involving a broader spectrum of actors who have developed their own expectations and subjective models under different institutional frameworks. In this sense we can say that Europeanisation processes unsettle previously existing equilibrium and bring institutional frameworks closer to the state of adaptive efficiency (North, 1990).

CONCLUDING REFLECTIONS

Is the comparative institutional approach suggested above to be considered as belonging to the realm of 'comparative law'? Not, if we accept a narrow and conservative notion of comparative law, including in this category only the traditional comparisons between black letter laws stemming from municipal legal systems of sovereign states. Indeed, such a conservative notion of comparative law has rightly been criticised as parochial and plagued by methodological nationalism (Twining, 2007; Joerges, 2004) and it is not surprising that it prompts somewhat provocative claims about the death of

comparative law (Siems, 2007). By contrast, if understood in line with the broad institutional approach advocated above, comparative law is more relevant and needed than ever.[30] Modern theories of global and multi-level governance do not prognosticate the disappearance of the nation state. Legal orders based on the nation state will thus continue to exist parallel to the emerging strata of supranational and transnational governance. There is consequently a growing need to reconcile divergent national legal traditions and cultures with the supranational level at which the economy operates (Buxbaum 1996). This in my view strengthens, rather than weakens the urge to better understand the historical, cultural and institutional foundations of different legal approaches to the economy.

The institutional approach advanced in this paper builds in many respects on sources and theories similar to those of the NCE. Yet, the approach also differs on some crucial points. Theoretically, it purports to offer explanation and conceptualisation of processes of both legal continuity and legal change in a comparative cross-country setting. It seeks to account for and improve our understanding of the interaction between national and supranational legal systems in a multi-level system of governance. Methodologically, the approach calls for careful historical 'process tracing' and penetration in the legal ideas that surround and support legal rules. Large scale statistical analyses are avoided and preference is given to focused in-depth comparative studies of qualitative character. What is advocated is humility and patience in trying to disentangle the intricate interaction between law and the economy, thus eschewing strong normative advice.

1. Resisting the Political Attractiveness of Statistical Approaches

To be sure, a call for in-depth study of the participation modalities and the historical determinants of institutional choice and design in comparative analysis of economic law and policy is hardly prone to attract enthusiasm and attention on the part of influential international think-tanks and organisations in the same way as did the LOT.[31] With its large-scale research design and the impressive volume of data generated and processed the latter approach promises scientific cost-efficiency. A single theory is expected to give universal explanation to a broad spectrum of social facts and to fit the puzzling disorder of institutional diversity into a neat and comprehensible pattern. Likewise numerical and mathematical approaches lure with the promise of yielding results with the compelling certainty of natural sciences and with a clear-cut normative advice. The temptation is understandable. It is, however, submitted that the grand design and the simplicity of the theory, as much as they constitute its great attraction, also represent its main weakness. Reduction of complexity is an important task of scientific research. However, this task

should not be pursued at the cost of data contamination (Siems, 2005a). Attractive as the promise of mathematical precision may be, it should be treated with sound scholarly scepticism. One should recall Hayek's warning directed at his fellow-economists against 'scientistic' attitudes and against their 'propensity to imitate as closely as possible the procedures of the brilliantly successful physical sciences' (Hayek, 1989[1974]: 1). In his Nobel Memorial Lecture Hayek insisted on the inherent limitation of economics as a social science, i.e. a science studying organised complexity and appealed that man should 'use what knowledge he can achieve, not to shape the results as the craftsman shapes his handiwork, but rather to cultivate a growth by providing the appropriate environment, in the manner in which the gardener does this for his plant.' (Hayek, 1989 [1974]: 7).

2. Breaking the Insulation of Disciplines

I have argued above for an increased use of interdisciplinarity in comparative law. The question of course is what kind of interdisciplinarity. It is suggested that interdisciplinarity can be defined in a weak and in a strong sense. In a weak sense interdisciplinarity is confined to getting inspiration from a different scholarly discipline, while retaining the base and focus of research within the original discipline, and importantly directing the research results to one's own research community. In a strong sense, interdisciplinary implies taking the other discipline seriously, by trying to truly penetrate its objectives, thinking and methodologies. It builds not on colonising and appropriating but on respect, sensitive learning, intense communication and exchange of research results. Whereas 'weak' interdisciplinarity is relatively common, strong interdisciplinarity is rather the exception because it is exceedingly demanding. Still I believe that it is interdisciplinarity in the strong sense that we need to see more of in future comparative research of the interrelations between law and economy. Otherwise misconceptions and watertight compartments risk persisting despite efforts toward cross-fertilisation.

It is noteworthy that despite the heavy reliance on comparative legal literature, the scholars from the NCE only to a limited extent engage in scholarly exchange with comparative lawyers. Obviously the academic journals that economists consult are predominantly the established peer-review journals of their own discipline and occasionally some journals on law and economics.[32] The same applies for comparative lawyers insulated in their internal scholarly discourse. It is therefore hardly surprising that it took time before the LOT and the NCE found their way to lawyers and still more time before the powerful reaction to the main claims of the NCE of comparative lawyers (Deakin, 2008; Siems, 2003, 2007; Brandle, 2006) reached back to the economists (La Porta et al 2008).[33]

This notwithstanding, it shall be conceded that, whatever the substantive merits and demerits of the NCE discussed above, the school has contributed to opening a cross-disciplinary debate and making an important step in overcoming the insulation of social disciplines and of comparative law. Ultimately it has had the unintended but very welcome effect of 'prodding' comparative lawyers to think more about public policy problems, and to think more like social scientists' (Whitman, 2008).

NOTES

1. See Ajani's contribution to this volume.
2. By economic law I mean legal rules and institutions that frame the economy. Recently the term regulatory private law has also been employed (Cafaggi and Muir Watt, 2008).
3. Simeon Djankov is an economist from the World Bank's influential research department.
4. 'Law and the quality of its enforcement are potentially important determinants of what rights security holders have and how well these rights are protected' (La Porta et al, 1998: 1115).
5. 'Our starting point is the recognition that laws in different countries are typically not written from scratch, but rather transplanted – voluntarily or otherwise – from a few legal families or traditions (Watson 1974).' (La Porta et al, 1996).
6. See in particular the concerted response by Association Henri Capitant (2006).
7. For a graphical representation of the theory see Djankov et al (2003b).
8. See for instance Posner's classical treatise on the subject (1992).
9. According to Dahlman this is 'an approach that compares the economic consequences of alternative ways of organising the allocation of resources' (Dahlman, 1979: 161).
10. The fact that colonial transplantation is such a significant determinant of institutional design suggests that the observed institutional choices may be inefficient. A legal and regulatory system that is perfectly suitable to France may yield inefficiently high levels of regulation and state ownership when transplanted to countries with lower civic capital. Likewise, a system of independent courts that works in Australia or the US may fail in Malaysia or Zimbabwe. (Djankov et al, 2003b: 610).
11. In a similar sense Berkowitz, Pistor and Richard (2003: 167).
12. For a theoretical explanation see Teubner (1998).
13. In a similar sense see Ahlering and Deakin (2005: 18).
14. Ironically Whitman observes that 'Shleifer and his coauthors, after reading the comparative law literature, drew the conclusion that the distinction between common law and civil law was something like the distinction between reptiles and mammals – a classificatory distinction of such fundamental importance that it would dictate the behaviour of legal systems in almost every respect and every environment.' Contrary to such holistic approach he argues rightly that the classification should simply be regarded as 'useful for some purposes, but not others.' (Whitman, 2008: 353).
15. See in a similar sense Pistor et al (2003a).
16. This is admitted by La Porta et al in their 2008 restatement of the LOT and identified as one aspect where the theory deserves further elaboration.
17. 'They [La Porta et al, 2004 Judicial Checks and Balances] find that constitutional guarantees of judicial independence are correlated with both common law legal origin and the security of property rights. The transplantation of common law might thus influence the location of the IPF and not just the regulatory stance.' (Djankov et al, 2003b: 612).
18. For a similar critique of neglect of public law see Ewald (1994–95), 1987. Ewald points in particular at the fallacy of treating 'the Civil Law' as a unitary system and refers to the deep divides in the area of public law, for instance judicial review.
19. I was personally asked by a colleague trying to apply the La Porta methodology, to provide

evidence supporting the belonging of the Bulgarian legal system to the French legal family. This was needed to counter objections of a critical reviewer that the country belonged to the German tradition. The truth is that Bulgaria, as many other relatively young nation states on the European continent, has an extremely mixed legal tradition with elements of both German and French influences, not seldomly refracted through Swiss, Austrian, Italian and other modifications of the origins. See also Siems (2007a).

20. See 'The coding is similar to the general commercial legal origin reported in La Porta et al. (1997, 1998), with some exceptions. For example, the commercial and company laws in Iran, Saudi Arabia, and the United Arab Emirates are based on English laws, but their bankruptcy laws are of French tradition – via France, Egypt, and Kuwait, respectively. Although Japan and Korea are of German commercial legal origin, their bankruptcy codes are based on English law. Switzerland, Russia, and Bulgaria base their bankruptcy laws on the French tradition; their commercial laws are of German origin.' (Djankov et al, 2004:1120).
21. 'Indeed, statutes in common law countries are often highly imprecise, with an expectation that courts will spell out the rules as they begin to be applied.' (La Porta et al, 2008: 291)
22. Cf. the famous phrase 'Mon code et perdu' attributed to Napoleon allegedly at the news of the first commentary of the code civil (Bogdan 2003: 151).
23. Particularly insightful is Ansgar Ohly's analysis of the German and the common law evolution of the law of unfair competition. On the basis of a broad general clause the judiciary in Germany developed constantly expanding categories of situations which fell under the prohibition of unfair competition, whereas common law judges, exercising discipline and self-restraint refused to create a tort of unfair competition and sustained the strict limits of the torts of passing off and injurious falsehood (Ohly, 1997).
24. On the problems with the questionnaire method, see Schultz in this volume.
25. The potential and weaknesses of the indexing method have been discussed extensively by Ahlering and Deakin (2005).
26. See also the contribution by Acemoglu et al who seek the explanation of differential economic performance in different colonial countries in the different rates of mortality of Western settlers in the colonies and the resulting strategy of colonisation through physical presence or through exploitation of resources (Acemoglu et al, 2001)
27. See also the discussion on convergence in Glaeser and Shleifer (2002:1222), which is however only limited to wealthy economies in the common law and the civil law tradition.
28. For an application of historical institutionalism in the analysis of European influences over national public administrations, see Knill (2001).
29. Needless to say, this is an oversimplified representation. For an extensive and detailed process-tracing of the institutional evolution in the two countries see Bakardjieva Engelbrekt (2003).
30. Arguments in support for a similar dynamic approach to comparative law can be found in Gerber (1998).
31. The political impact of the the research by La Porta et al and in particular the influence this research has exerted on the development policy of the World Bank is noteworthy and has been widely observed (Deakin, 2008; Siems, 2005a; Siems, 2005b; Siems, 2007; Rosser and Rosser, 2008).
32. Reference has been more readily made to the work of Berkowitz, Pistor and Richard (2003) which applies a comparable methodology and thus tries to seize the fortress from within.
33. Another pretty obvious bias of the academic debate is its centeredness on English language contributions. Possible critique of French-speaking and German-speaking peers is not taken into consideration. Yet, given the harsh judgement on these legal systems' effect on efficiency, the reaction of local lawyers and economists should be of interest.

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