

Legal and Economic Discourses on Legal Transplants: Lost in Translation?

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1 Introduction

Few concepts in legal scholarship have enjoyed such a remarkable ‘career’ as the concept ‘legal transplants’. As is well known, the concept is used to denote the phenomenon of borrowing legal rules and institutions from one legal system and transferring them into another. With its vivid imagery taken from the world of anatomy and surgery, the ‘legal transplant’ metaphor has been successful in conveying a wide-spread perception of law as quasi-organic matter, as well as a general idea about the complex and sensitive nature of any attempt to make laws and legal institutions that have evolved in one particular legal and institutional environment, work outside their natural ‘habitat’.

The concept ‘legal transplants’ was brought to the center of scholarly attention by the famous debate in the mid-1970s between Otto Kahn Freund and Alan Watson.¹ Since then, the scholarly writings on ‘legal transplants’ have expanded vastly. Watson himself has devoted several monographs and a number of articles to the subject.² But also numerous other scholars from different fields of legal research such as comparative law, legal history, legal sociology and jurisprudence, have had their say on the pros and cons, the possibility and desirability of legal transplants.³

One reason for this unusual attention can certainly be found in the very polarized views taken by prominent scholars in the debate on ‘legal transplants’, some vehemently denying the concept and the underlying phenomenon any legitimacy⁴, while others, like Watson, tending to see legal transplantation as a main source of legal change and legal evolution more generally.

1 See Kahn-Freund, Otto, *On Uses and Misuses of Comparative Law*, 37 *Modern Law Review*, 1974, 1-27, and Watson, Alan, *Legal Transplants and Law Reform*, 92 *The Law Quarterly Review*, 1976, 79-84.

2 See in particular Watson, *Legal Transplants*, Edinburgh, Scottish Academic Press; Charlottesville, University Press of Virginia, 1974; Watson, *The Evolution of Law*, Baltimore, MD, Johns Hopkins University Press, 1985; Watson, *Legal Origins and Legal Change*, London, Humbeldon, 1991; Watson, *Law out of Context*, Athens, University of Georgia Press, 2000. For a comprehensive critical analysis of Watson’s scholarship, See Ewald, William, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 *Am J Comp L*, 1995, 489.

3 See Stein, Eric, *Uses, Misuses and Nonuses of Comparative Law*, 72(2) *Northwestern University School of Law*, 1977, 198-216; Mattei, Ugo, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, 14 *International Review of Law and Economics*, 1994, 3; Legrand, Pierre, *The Impossibility of Legal Transplants*, 4 *Maastricht J. Eur. & Comp. L.*, 1997, 111-124; Teubner, Gunther, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 (1) *Modern Law Review*, 1998, 11–32; Gillespie, John, *Transplanting Commercial Law Reform*, London, Burlington, Ashgate, 2006; the concept has even been applied to instances of diffusion of supranational institutions, See Alter, Karen, Laurence Helfer & Osvaldo Salidás, *Transplanting the European Court of Justice: The Experience of the Andean Tribunal of Justice*, 60 *Am. J. Comp. L.*, 2012, 629.

4 See most vocally Legrand, 1997.

Another reason for the continuous interest in the ‘legal transplants’ *problematique* can be seen to lie in its renewed and intensified practical relevance. Especially following the collapse of communism in the late 1980s and the ensuing mass scale legal and institutional reforms in the countries formerly part of the Soviet sphere of influence, legal transfers or ‘transplants’ have been on the upsurge. Despite the harsh criticism to which the earlier Law and Development movement was subject in the 1970s⁵, the 1990s saw a new wave of engagement of foreign development aid agencies and international organisations in legal reform and transition. International economic organisations like the World Bank (WB) and the International Monetary Fund (IMF), but also national development aid agencies and private organisations like the American Bar Association, embarked on ambitious projects of legal assistance, with commercial laws, civil laws and even constitutions being ‘exported’ ‘en masse’ from developed countries to transition economies.

Interestingly, and unlike other legal concepts, the ‘legal transplant’ metaphor has not remained within the confines of legal scholarly discourse, but has reached out to other neighboring disciplines, notably economics. What is more, it has inspired a whole new line of much observed theoretical enquiries in economics by now known as the Legal Origins Theory (LOT).⁶ The authors in this strand of economic research acknowledge the pervasive influence of law on economic performance. Building on the literature on legal transplants, as well as on comparative law research on legal families, they identify distinct patterns of social control of business, which they relate to few major legal traditions (foremost the common law and civil law) and the way the latter have been diffused worldwide. Ultimately, the scholars in this field seek to offer a framework for comparative efficiency analysis of legal institutions across numerous jurisdictions.

The present article looks into the way legal transplants, or less ambitiously, legal transfers are approached and analysed in legal and economic theory. Whereas a mutual interest and a dialogue between the disciplines of law and of economics is positively assessed, some problems of ‘translation’ are identified, that can lead to conceptual and analytic fallacies and possibly to misguided normative advice in legal development cooperation. An attempt is made to explore the reasons for these communicational difficulties and to enhance the mutual understanding between the disciplines, partly through increased sensitivity for intra-disciplinary nuances and debates.

5 Trubek, David and Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in the Law and Development Studies in the United States*, *Wisconsin Law Review*, 1974, 1062-1102.

6 For a comprehensive presentation See La Porta, Rafael, Florencio Lopez-de-Silanes and Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46(2) *Journal of Economic Literature*, 2008, 285–332.

2 The Legal Discourse on Legal Transplants: An Overview

In order to understand the legal discourse on legal transplants, one has to return to the original debate between Kahn-Freund and Watson. As is well known in his 1973 Annual Chorley lecture at the London School of Economics comparative law scholar Otto Kahn-Freund proposed a context-sensitive approach to legal reform based on legal borrowings.⁷ Kahn-Freund proceeded from the famous quotation of Montesquieu:

“The political and civil laws of each nation ... should be so closely tailored to the people for whom they are made, that it would be pure chance (*un grand hazard*) if the laws of one nation could meet the needs of another.”⁸

He also made reference to the various groups of ‘environmental’ criteria, which in Montesquieu’s view determined the ‘spirit of the laws’: geographical, sociological and economic, cultural, and political. While agreeing with Montesquieu on the general importance of social context, Kahn-Freund was careful to differentiate between separate fields of law. According to him legal rules could be ordered along a continuum ranging from rules very close to ‘organic matter’, for which the concept ‘transplant’ was appropriate, at the one end of the continuum, to rules more like ‘mechanical matter’, where one could speak of a simple replacement of a spare part (e.g. of a carburetor), on the other.

Another major point which Kahn-Freund emphasized was the changing importance of different environmental criteria over time. Thus, the significance of geographical, but also in his view of economic and sociological factors was diminishing, in line with changes in technology, communications and ways of living, whereby even culture and religion were no longer insurmountable barriers for legal transfers.⁹ On the other hand, he saw the importance of political and ideological factors to be increasing.¹⁰ Having his main research interests in the area of labor law and industrial relations, Kahn-Freund underlined the importance of taking into account the socio-political context (constitutional and political order) in the ‘donor’ and the ‘receptient’ country, in particular in areas where pressure groups and political interests exert powerful influence.¹¹

In contrast, comparative legal historian Alan Watson insisted on the possibility of ‘transplanting’ law without knowing or even without caring about the context of the transplanted legal rules in the ‘donor’ country. Taking a historical perspective and focusing on the massive influence of Roman law on

7 Kahn-Freund, 1974.

8 Charles-Louis de Secondat Montesquieu, *De l'esprit des lois (On the Spirit of the Laws)*, book I, ch. 3, Des lois positives, 1748.

9 Kahn-Freund, 1974, 8 et seq.

10 Kahn-Freund, 1974, 18 et seq. This view can probably at least partly be explained by the context of the Cold War, *See* in this sense Teubner, 1998, 22.

11 Kahn-Freund, 1974, 20 et seq.

present day civil laws in Europe and elsewhere, Watson sought to demonstrate the pervasiveness of legal transplants despite dramatically different socio-political context in ‘donor’ and in ‘recipient’ country. Watson explained this pervasiveness by the autonomy of legal rules and institutions and the need for authority. In his account, law reform often relies on the members of the legal profession, who rather than posing as ‘creators’ of rules, prefer to refer to the prestige and authority of foreign normative solutions.¹²

Once the stage was set in so polemic terms, many influential academic minds have been tempted to pitch into the debate. Heated controversies have surrounded not only the empirical question of the actual existence and spread of legal transplants, but also the evaluative question of the success, as well as the normative question of the desirability, of legal transplants. Skeptics like Pierre Legrand, taking a culturalist perspective, have provocatively proclaimed ‘the impossibility of legal transplants’, rejecting the possibility for displacement from one jurisdiction to another of anything else but ‘meaningless form of words’. In this view any advocacy of legal transplants is “reducing law to rules and rules to bare propositional statements.”¹³

In a more nuanced contribution, William Ewald has engaged in a detailed and scrupulous analysis of Watson’s arguments. Ewald identifies internal contradictions in the manifold works of Watson, but acknowledges the convincing force of the “weak version” of Watson’s analysis, namely that law at least partially is autonomous and evolves independently of social context.¹⁴ In a similar manner, legal sociologist Gunther Teubner finds some aspects of Watson’s analysis, and in particular the insulation thesis, to be insightful, but calls for greater sophistication and conceptual refinement in the debate, going beyond the simple dichotomy of context versus autonomy.¹⁵ Teubner considers the ‘legal transplant’ metaphor to be misleading and advances ‘legal irritants’ as an alternative concept. Building on his own theory of law as an autopoietic self-referential system, Teubner argues that legal rules or institutions rather than mirroring society, are tied to different discourses and fragments of society in a selective manner. This coupling can be loose or tight depending on the sphere of law and the social processes with which law interrelates. Consequently, even rules considered by Kahn-Freund to belong to the category of ‘mechanical’ matter, once transferred in a different national context would hardly remain unaffected by the new environment. Importantly, they will not only interact with the host legal system, but will also trigger change in other loosely or tightly coupled societal sectors and production regimes. In view of the different institutional trajectories that economy and society follow in different countries, the prediction is that one and the same rule may produce

12 Watson, *Legal Transplants*, 1974, 88 et seq.

13 Legrand, 1997, 120.

14 Ewald, 1995.

15 Teubner, 1998, 17.

divergent and often unpredicted effects in the host legal and social environment.¹⁶

As mentioned in the introduction, a particular spur in the scholarly debate on legal transplants was given by the collapse of communism at the end of the 1980s. The fall of the Berlin wall was seen by some as the ‘end of history’,¹⁷ bringing an era of ideological confrontation to an end and proving the superiority of the Western liberal democracy ‘as a form of human government’.¹⁸ However, while indeed closing an important chapter in history, it at the same time set the beginning of a complex process of simultaneous economic, social and legal transformation in Central and Eastern Europe (CEE), aptly described as “repairing the ship at sea”.¹⁹ Given the urgency of the task of achieving political and economic reform, legal transplants and borrowings were seen as efficient way to reshape broad areas of law and legal regulation needed for the functioning of the market economy and for the establishment of rule of law and democratic institutions.²⁰

One consequence of these developments is that legal scholars in various areas of law became actively involved in the practice of legal transplantation. Theoretically, positions have diverged with some scholars praising the processes of diffusion of legal norms and standards, for instance in the area of human rights and constitutional law²¹, or acknowledging the time- and resource saving advantages of legal transplants, at least within areas of facilitative law. As put by Waelde and Gunderson, “in time of dramatic change, there is no time carefully to craft ‘organic’, home-made legislation” and “it [at least in some areas of facilitative law] ...makes sense not to try to reinvent the wheel.”²² This is also a point made more generally by Watson in his retrospect article on legal transplants, stressing also the importance of prestige.²³

16 Teubner, 1998, 27 et seq.

17 Fukuyama, Francis, *The End of History?*, National Interest, 1989; Fukuyama, Francis, *The End of History and the Last Man*, London, Hamilton, 1992.

18 “the end of history, i.e. the end point of mankind’s ideological evolution and the universalization of the Western liberal democracy as the final form of human government”, Fukuyama, 1989.

19 Elster, Jon, Claus Offe and Ulrich Preuss, *Institutional Design in Post-Communist Europe. Repairing the Ship at Sea*, Cambridge, Cambridge University Press, 1998.

20 Ajani speaks of “optimistic normativism” in the transition countries, See Ajani, Gianmaria, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 Am. J. Comp. L., 1995, 93-117, at 103.

21 See for instance Arnold, Rainer, *Constitutional Courts in Central and Eastern European Countries as a Dynamic Source of Legal Ideas*, 18 Tul. Eur. & Civ. L.F., 2003, 99-115.

22 Waelde Thomas and James Gunderson, *Legislative Reform in Transition Economies: Western Transplants – a Short-cut to Social Market Economy Status?*, 43 ICLQ, 1994, 347-378,

23 To the question “Why is law borrowed?” Watson gives the following answer: “Because it is there! Borrowing is much easier than thinking. It saves time and effort. Not only that, it helps the new law to become acceptable because it has a recognized pedigree.” See Alan

Others have been more sceptical toward large-scale reliance on legal transplants pointing out the importance of sensitivity to local context and of involvement of local actors for the sustainable success of legal and institutional reform.²⁴

3 The Legal Origins Theory: Legal Transplants Enter Economic Discourse

Whereas the discourse on legal transplants in legal theory has been going on for decades, the interest of economists in the concept is more recent. It appears that the first time a reference to ‘legal transplants’ was made in economic theory is in a 1996 working paper of La Porta, Lopez-de-Silanes, Shleifer and Vishny (hereinafter LLSV), later on published in *Journal of Political Economy*.²⁵ In this paper a group of economists clustered around Harvard economics professor Andrei Shleifer laid down the main premises of the so called ‘Legal Origins Theory’ (LOT). The theory has been further elaborated and applied in numerous contributions, the original paper soon becoming one of the most cited articles in economics.

3.1 Theoretical Premises and Main Claims

The scholars in this line of economic research take Watson’s theory on legal transplants as one of their main premises. As stated in their 1996 paper: “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).”²⁶ The theory relies also heavily on comparative law scholarship and in particular, on the teaching on grouping legal systems into larger clusters, so called legal families. On the basis of classifications developed and refined by established comparative law scholars like Zweigert and Kötz, David and Brierley and Mary Ann Glendon et al, LLSV distinguish several major legal families in the world, namely

Watson, *The Birth of Legal Transplants*, 41 *Ga. J. Int'l & Comp. L.*, 2012-2013, 605-608, at 607. On the role of chance and prestige in the East European legal transition See also Ajani, 1995.

24 Berkowitz, Daniel, Katarina Pistor and Jean-Francois Richard, *The Transplant Effect*, 51 *Am. J. Comp. L.*, 2003, 163-203; Pistor, Katharina and Chenggang Xu, *Incomplete Law*, 35 *International Law and Politics*, 2003, 931-1013; Seidman Ann and Robert Seidman, *Drafting Legislation for Development: Lessons from a Chinese Project*, 44 *Am. J. Comp. L.*, 1996, 1-44.

25 La Porta, Roberto, Florencio Lopez-de-Silanes, Andrei Shleifer and Robert Vishny, *Law and Finance*, NBER, Working paper Nr 5661, 1996, available at: “www.nber.org/papers/w5661”; La Porta, Lopez-de-Silanes, Shleifer and Vishny, *Law and Finance*, 106 *Journal of Political Economy*, No. 6, 1998, 1113-1154; See also the same authors, *Legal Determinants of External Finance*, LII *Journal of Finance*, 1997, 1131.

26 La Porta et al, 1998, 1115.

common law, French, German, Scandinavian and socialist family.²⁷ Following comparative law scholarship they accord special importance to the distinction between the common law and the civil law tradition.

The LOT uses legal families (or ‘legal origins’) as an 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 in countries where the origins have been transplanted, as well as 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 characterized 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 LLSV 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 today.²⁸

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.²⁹ 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. 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. 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 modernization. The Scandinavian legal tradition has not spread beyond the Scandinavian countries and forms a little and rather exclusive club of advanced welfare states.³⁰

In earlier writings, following Zweigert and Kötz, all former satellites of the Soviet Union in CEE, together with countries like Cuba, China, North Korea, were treated as forming a separate, so called socialist legal family. In subsequent publication, however, the former socialist countries in CEE are

27 Zweigert, Konrad and Hein Kötz, *Introduction to Comparative Law*, Oxford, Clarendon Press, 2nd ed., 1987; 3rd ed. 1998; David, René and John Brierley, *Major Legal Systems in the World Today*, London, Stevens and Sons, 1985, 22-24; Glendon, Mary Ann, Michael Gordon and Christopher Osakwe, *Comparative Legal Traditions in a Nutshell*, St. Paul, West Publishing Company, 1992, 4–5.

28 La Porta et al, 2008, 307.

29 The source on which one relies at least in the earlier publications is a catalogue used by the American Association of Law Libraries, Reynolds and Flores, *Foreign Law: Current Sources of Codes and Basic Legislation in Jurisdictions Around the World*, 1989, See La Porta et al, 1998.

30 La Porta et al, 1998, 1118 et seq. On the need for rethinking the classifications of the former socialist legal systems See Ajani, 1995, 95 et seq.

classified in one of the families within the civil law tradition. This conversion has taken place, as admitted by LLSV, 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.³¹

The LOT is presented as a grand theory promising 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.”³² 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 courts³³ and more generally, on the quality of government.³⁴ The studies that advance the legal origin thesis are designed as large scale comparative studies. Thus, the law and finance study of LLSV covers 49 countries;³⁵ the quality of government project is based on data from up to 152 jurisdictions;³⁶ the study on courts surveys 109 jurisdictions,³⁷ and the one on debt enforcement 139 countries.³⁸

The early writings of LLSV focus rather narrowly on the written legal rules as evidenced from statutory texts, or ‘law in 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 government³⁹, 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.⁴⁰ 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

31 La Porta et al, 2008, 288.

32 La Porta et al 1998, 1115.

33 Djankov, Simeon, Rafael La Porta, Florencio Lopez-de-Silanes, and Andrei Shleifer, *Courts*, 118 (1) *Quarterly Journal of Economics*, 2003, 453–517 (hereinafter Djankov, *Courts*, 2003).

34 La Porta, Rafael, Florencio Lopez-de-Silanes, Andrei Shleifer and Robert Vishny, *The Quality of Government*, 15 (1) *Journal of Law, Economics and Organisation*, 1999, 222–79.

35 La Porta et al, 1998.

36 La Porta et al, 1999.

37 Djankov et al, *Courts*, 2003.

38 Djankov, Simeon, Oliver Hart, Caralee McLeish, Andrei Shleifer, 116 (6) *Debt Enforcement Around the World*, *The Journal of Political Economy*, 2008, 1105–49.

39 La Porta, Rafael, Florencio Lopez-de-Silanes, Cristian Pop-Eleches, and Andrei Shleifer, *Judicial Checks and Balances*, 112(2) *Journal of Political Economy*, 2004, 445–470, 449.

40 La Porta et al, 1998, 1115.

of Freedom by Holmes, Johnson and Kirkpatrick.⁴¹ 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.

3.2 *Main Findings and Normative Implications*

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.⁴²

The judgement is even more 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.”⁴³

To this, poor enforcement and accounting standards are said to aggravate the difficulties faced by investors in the French-civil-law countries. The conclusions are rather categorical and unequivocal, claiming strikingly broad validity. Certainly, some caveats 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

41 La Porta et al, 1999 ; La Porta et al, 2004.

42 La Porta et al, 1998.

43 La Porta et al 1999, 261.

stated by LLSV “France and Belgium, after all, are both very rich countries.”⁴⁴ The emphasis is, however, on median outcomes, which are considered to evidence the inferiority of the French model on all scores.

3.3 *Understanding Economists’ Interest in Legal Transplants*

While the interest of legal scholars in ‘legal transplants’ is understandable, the entry of the concept in economic theory requires some elaboration. After all, until only recently economic theory showed a relative indifference to the economic effects of legal rules and of legal and political institutions and it is very rare that legal concepts and legal scholarship attract the attention of economists. So how can we explain the sudden success of the ‘legal transplants’ concept?

At least partly, the answer seems to lie in economists’ involvement in the grand transformation in CEE and the insights and learning experience gained in this process. Interestingly, some of the main proponents of the LOT were themselves engaged in the economic reforms in CEE, and in Russia in particular.⁴⁵ In the early 1990s Andrei Shleifer was heading a team of Harvard economists who via the Harvard Development Institute were mandated by the American government to assist Russian reformers in carrying through privatization and in achieving a point of no return in the conversion of the Russian command economy into a market economy. The economic advice to governments in CEE at the time was based on a neoclassical economic framework and was pretty straight forward in its main message: Price formation should be free, governments should avoid ownership or subsidization of firms, property rights should be secured by enforcing contracts. Regulation should be responsible and budgets – balanced. Trade barriers should be removed.⁴⁶ Under these macro-economic conditions markets were expected to thrive and lead spontaneously to efficient resource allocation and to economic growth. There was some disagreement among economists as to the pace of economic reform in CEE countries. 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.

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

44 La Porta et al 1998, 1152.

45 Boyko, Maxim, Andrei Shleifer and Robert Vishny, *Privatizing Russia*, Cambridge Massachussets, MIT, 1997; Shleifer, Andrei and Daniel Treisman, *Without a Map. Political Tactics and Economic Reform in Russia*, Cambridge Massachussets, MIT, 2000.

46 Shleifer and Treisman, 2000: vii.

with corruption, plagued by maladministration, tax evasion and political instability. What was the reason for these dramatically different outcomes? Why didn't the neo-classical recipe work in Russia?⁴⁷ It appears that it was the analysis of the failure of Russia's transition and of the US-supported privatization programmes that triggered the interest of the Harvard economists in the link between law and economic performance, and gradually brought them to the theory of legal transplants.

4 Problems of Translation: Economists Interpret Legal Theory

The scholarly work of Shleifer and associates is important in that it draws the attention of economists and policy makers to the role of law and legal institutions for economic growth. 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 typically takes law as given and eventually builds on hidden and unreported assumptions anchored in the American common law system.⁴⁸ By focusing on legal diversity and exploring persistent patterns of institutional choice and design across jurisdictions LLSV succeed in painting a more sophisticated and realistic picture of the link between law and economy. Much in line with recent trends in institutional economics, the LOT summons considerable evidence of the conservative force of legal institutions. Historical paths and past institutional choices seem to influence the trajectory for co-evolution of legal institutions and markets in a long-term and persistent way.⁴⁹

Yet despite the many advantages of the new approach, there are some problems of 'translation' in the communication between disciplines, which require closer examination.

4.1 *The Risk of Using Comparative Law Taxonomies*

Scholars from the LOT make use of classical comparative law taxonomy and rely heavily on the dichotomy between civil law and common law. This of course is not surprising, given the central place awarded to this dichotomy in almost all standard treatises on comparative law. However, in more recent comparative law literature the overemphasis on the common law/civil law dichotomy has been criticized as building essentially on analysis of private law

47 Shleifer and Treisman, 2000; Djankov, Simeon, Edward Glaeser, Rafael La Porta, Florencio Lopez-de-Silanes, and Andrei Shleifer, *The New Comparative Economics*, 31 *Journal of Comparative Economics*, 2003, 595–619, at 597 (hereinafter Djankov et al, *The New Comparative Economics*, 2003).

48 See for instance the classical treatise by Posner, Richard, *Economic Analysis of Law*, Aspen Publishers, 2007.

49 North, Douglas, *Institutions*, 5 *Journal of Economic Perspectives*, 1991, 97.

and reflecting the long-term bias of comparative law scholarship towards private law.⁵⁰ Even Zweigert and Kötz who advance the distinction between common law and civil law point out, that the classification would go along different lines if public law was 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.⁵¹ These observations are particularly relevant when evaluating some of the studies of LLSV 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.⁵²

Other legal scholars have criticised the traditional classifications for being based on very technical ‘lawyerly’ criteria such as sources of law and procedure and providing “few answers to the kinds of policy questions posed by the core policy sciences.”⁵³ The inherent eurocentric cultural bias in according excessive weight to the dichotomy between common law and civil law and thus neglecting non-Western cultures and traditions, has also been brought forward in other contexts.⁵⁴

To be sure, LLSV do not rely on a simplistic taxonomy, but build on the more sophisticated set of criteria, which Zweigert and Kötz have dubbed 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 (i) historical background and development, (ii) the predominant and characteristic mode of thought in legal matters, (iii) distinctive institutions, (iv) legal sources and the way they are handled, and finally (v) ideology.⁵⁵ 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

50 Gerber, David, *Sculpting the Agenda of Comparative Law: Ernst Rabel and the Façade of Language*, in Annelie Riles, *Rethinking the Masters of Comparative Law*, Oxford, Hart Publishing, 190–208; Öricü, Esin, *A General View of ‘Legal Families’ and of ‘Mixing Systems’* in: Öricü, Ersin and David Nelken (eds) *Comparative Law. A Handbook*, Oxford, Hart Publishing, 2007, 169–187; Twining, William, *Globalisation and Comparative Law*, in: Öricü and Nelken (eds), 2007, 170.

51 Zweigert and Kötz, 1998, 66.

52 For a similar critique of neglect of public law See Ewald, William, *Comparative Jurisprudence: What Was it to Try a Rat?*, 143 *University of Pennsylvania Law Review*, 1994-95, 1889–2149, at 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. Similar Siems, Mathias, *Legal Origins: Reconciling Law and Finance with Comparative Law*, 52 *McGill Law Journal*, 2007, 57–81; Siems, *Numerical Comparative Law. Do we Need Statistical Evidence in Law in Order to Reduce Complexity?*, 13 *Cardozo J. Int’l and Comp. L.*, 2005, 521–540; Siems, *What Does not Work in Comparing Securities Laws: A Critique on La Porta et al’s Methodology*, *International Company and Commercial Law Review*, 2005, 300–305.

53 Whitman, James, *Producerism versus Consumerism. A Study in Comparative Law*, 117 *Yale Law Journal*, 2008, 340–406, at 350-51.

54 Öricü, 2007; Twinning, 2007.

55 Zweigert and Kötz, 1998, 67.

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 organized”. 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.”⁵⁶

It is therefore difficult to ascribe the differences between the more liberal common law and more interventionist French legal origins to ideology.

Generally, it should be pointed out that the theory of legal families in comparative law largely serves taxonomic and pedagogical purposes, and most comparatists are well aware of the imperfections and limitations of such classifications.⁵⁷

4.2 *Difficulties of Attributing Legal Systems to Legal Families: a Realistic Look at Legal Reception and Borrowing*

One major problem in 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 and is not supported by legal scholarship. 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.⁵⁸ 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 CEE legal systems. These countries were not covered by the first studies on law and finance by LLSV⁵⁹ and were treated as belonging to a separate group, namely the one of the socialist family,

56 Zweigert and Kötz, 1987.

57 Van Hoecke Mark & Mark Warrington, *Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law*, ICLQ, 1998, 495-536, at 498 et seq; Zweigert and Kötz, 1998, 63 et seq.

58 Öricü 2007.

59 La Porta et al, 1996 ; La Porta et al, 1998.

in the studies on the quality of government⁶⁰ and on judicial checks and balances.⁶¹ 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 CEE countries 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, and nowadays European harmonisation.⁶²

LLSV 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 Ecuador, which initially was a French civil law country; 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."⁶³ In another article, when faced with the jig-saw character of legal systems where certain areas of laws come from 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.⁶⁴ This approach seems however to be at odds with the ambition of showing that rules and enforcement environment are equally influenced by legal origins.

60 La Porta et al, 1999.

61 La Porta et al, 2004.

62 See e.g. for Bulgaria, Bakardjieva Engelbrekt, *Toward an Institutional Approach to Comparative Economic Law?*, in: Bakardjieva Engelbrekt and Nergelius (eds) *New Directions in Comparative Law*, 213-251, at 246, note 19; Cf . for the Baltic countries Siems, 2007; for Poland Manko, Rafal, *The Culture of Private Law in Central and Eastern Europe After Enlargement: A Polish Perspective*, 11 *European Law Journal*, 2005, 527. See also Ajani, who underlines the need for dynamic examination, not least in light of the accession of a number of the CEE countries to the European Union, Ajani, 1995, 116.

63 La Porta et al 1998, 1119.

64 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.

4.3 *What is Being Transplanted? Distinguishing Between 'Law in Books' and 'Law in Action'*

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.⁶⁵ Implied in the theory is an assumption that the transfer of 'black letter' law in these countries would result in broadly comparable economic effects. 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.⁶⁶ 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.⁶⁷

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.⁶⁸ This has been admitted even by the most ardent proponent of 'legal transplants', Alan Watson.⁶⁹ 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.⁷⁰ Consequently, 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 when 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.

65 In a similar sense Berkowitz, Pistor and Richard, 2003, at 167.

66 La Porta et al, 1998, 1151.

67 La Porta et al, 1999.

68 For a theoretical explanation *See* Teubner (1998).

69 In his first monograph on Legal Transplants Watson declares that "it cannot be doubted ... that a rule transplanted from one country to another... may equally operate to different effect in the two societies, even though it is expressed in apparently similar terms in the two countries." But he states that his primary concern is the existence of the rule, not how it operates, *See* Watson, 1974, at 20.

70 In respect to the very unique case of 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.", *See* Zweigert and Kötz, 1998, 178.

It should be noted that the ‘varieties of capitalism’ literature, to which LLSV refer for support of the LOT, focuses on more limited comparative studies between capitalist economies in advanced industrial (OECD) states, chiefly England, Germany, France and the Scandinavian countries.⁷¹ So whereas it concurs with the LOT when it comes to identifying persistent styles of framing the economy, namely liberal and coordinated economies, it does not purport to extend this categorization to developing or transition countries.⁷²

4.4 *Legal Transplants: Universal v Selective Explanations*

Another related objection one can direct at LOT is that the theory seeks to provide a generalized 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.⁷³ 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.⁷⁴ This has been the main point in Kahn-Freund’s incisive analysis of legal transplants referred above, later on elaborated and largely corroborated by Teubner.⁷⁵

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

71 Hall, Peter A. and David W. Soskice (eds) *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*, Oxford, Oxford University Press, 2001.

72 In a similar sense See Deakin, Simon and Beth Ahlering, *Labour regulation, corporate governance and legal origin: a case of institutional complementarity?*, 41 *Law and Society Review*, 2007, 865-908.

73 Ironically Whitman observes that “Shleifer and his co-authors, 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 behavior 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.

74 Steinmo, Sten, Katheleen Thelen, and F. Longstreth, *Structuring Politics: Historical Institutionalism in Comparative Analysis*, Cambridge, Cambridge University Press, 1992; Teubner, 1998; Bakardjieva Engelbrekt, 2008; Knill, Christopher, *The Europeanisation of National Administrations*, Cambridge, Cambridge University Press, 2001.

75 See Kahn-Freund, 1974 and Teubner, 1998.

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.⁷⁶ 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.⁷⁷ Yet the idea of identifying institutions that would be conducive of economic growth under any circumstances fails to convince.⁷⁸

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.⁷⁹ Likewise, comparative lawyers as a matter of principle, refrain from general evaluations as to the quality of different systems, admittedly partly due to limitations inherent in the traditional methodology of legal scholarship.

4.5 *The Risk of Working with Ideal Types*

In their recent restatement of the LOT, LLSV 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.⁸⁰ 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 generalized and stylized 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, LLSV portray the common law system as chiefly relying on case law and leaving limited space to statutory law. Yet such description has been criticized as one-sided by Zweigert and Kötz already in the 1987 edition of their work.⁸¹ With the advance of European legal integration and the growing number of

76 Siems, *Numerical Comparative Law?*, 2005.

77 See in a similar sense Pistor, Katharina, Yoram Keinan, Jan Kleinheisterkamp and Mark D. West, *The Evolution of Corporate Law: A Cross-Country Comparison*, 23(4) U. Pa. J. Int'l Econ. L., 791–871.

78 Berkowitz et al, 2003.

79 Hall and Soskice, 2001, 21.

80 La Porta et al, 2008.

81 Zweigert and Kötz, 1987, 278.

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 LLSV 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.⁸² This characterization 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.⁸³ 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.⁸⁴

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 characterized by rigid statutes.⁸⁵ 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 particular in Germany, cf. *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.⁸⁶ 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.⁸⁷ 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.⁸⁸ Generally, it is widely recognised that the law-making role of the judiciary in the civil law tradition is

82 "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." See La Porta et al, 2008, 291.

83 Compare the above quote with the following: "English statutes try to be as precise as possible; they go into great detail even on trivial points and often adopt a form of expression so complex, convoluted, and pedantic that the Continental observer recoils in horror." Zweigert and Kötz, 1998, 267.

84 Teubner, 1998.

85 La Porta et al, 2008, 291.

86 Cf. the famous phrase 'Mon code et perdu' attributed to Napoleon allegedly at the news of the first commentary of the code civil, Bogdan, Michael, *Komparativ rättskunskap*, Norstedts juridik, 2003, 151.

87 Zweigert and Kötz, 1998, 95; Bogdan, 2003, 151.

88 See Bakardjieva Engelbrekt, Antonina, *Fair Trading Law in Flux?*, Stockholm, US-AB, 2003.

much more prominent than admitted in reductionist accounts of both comparative law and comparative economics.⁸⁹

4.6 *Static v Dynamic View on Legal Transplants*

A serious drawback of LOT is that it does not seem to accommodate and suggest a credible explanation for legal change and evolution. The theory offers a static and to a certain extent determinist conceptualisation of legal institutions.⁹⁰ Thus for example, at the explanatory level Glaeser and Shleifer find the reasons for the difference between the organization 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.⁹¹ 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.

Related to the above is another point, often underscored by comparative lawyers, and which is only partly addressed by LLSV, namely the changing character of law and the gradual convergence between the common law and the civilian tradition.⁹² 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 more than 80 000 pages of legal instruments, the so called *acquis communataires*, the European Union is one of the most fascinating and dynamic melting pots of legal rules and ideas. 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 LOT, much like traditional comparative law, reveals the symptoms of methodological nationalism and

89 Deakin and Ahlring, 2007.

90 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. As stated in the paper: “From our perspective, the crucial open questions deal with the evolution of legal systems.” See La Porta et al, 2008, 326.

91 Glaeser, Edward and Andrei Shleifer, *Legal Origins*, 117 (4) *The Quarterly Journal of Economics*, 2002, 1193–1229.

92 Zweigert and Kötz, 1998; Siems, Mathias, *The End of Comparative Law*, 2 *The Journal of Comparative Law*, 2007, 133–150.

offers no useful conceptualisations of legal interaction in a globalised multi-level world.⁹³

5 Problems of Reverse Translation: Lawyers Interpret Economic Theory

In the previous section I have provided some examples of problems of ‘translation’ that have arguably occurred in the process of interpretation of legal scholarship by economists. Apparently, economists approach the literature on legal transplants and comparative law in a selective manner, focusing on those aspects and findings that fit their research design and agenda, and maybe deliberately avoiding the disquieting realm of intra-legal debates and controversies. It would however, be naive if not arrogant to believe that translational problems are one-directional only. The LOT has been subject to a massive critique by lawyers who have made earnest attempts to penetrate the professional jargon and the methodology of the discipline of economics.⁹⁴ Nevertheless, also legal scholars can easily fall in the trap of simplification and selectivity. It is inevitable, that in the interdisciplinary communication some intricate nuances in meaning and in intra-disciplinary economic discourse are lost on lawyers.

5.1 Avoiding Selectivity

One immediate observation is that a great deal of the critique on the part of legal scholars is based on only a few of the most cited articles on legal origins by LLSV. These articles should however, not be seen in isolation but rather as one line of research in the more overarching theoretical strand known as the New Comparative Economics (NCE). As explained by Djankov et al, the term ‘new’ in NCE aims to position this emerging research field viz. the old Comparative Economics, which had been 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 had obviously largely lost its relevance as a discipline.⁹⁵ At the same time, the transition from socialism to capitalism had made it clear that there are more than one models of capitalism and that building the institutional framework of free markets presents a number

93 Beck, Ulrich, *What is globalization?*, Cambridge: Polity Press, 2000; Joerges, Christian, *The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective*, 3 *European Law Journal*, 1997, 378.

94 See for instance the special issue of the *American Journal of Comparative Law* based on the symposium on Legal Origins with contributions by Ralph Michaels, Spamann Holger, John Reitz, Vivian Grosswald Curran, Curtis Milhaupt, Benedicte Favuarque-Cosson and Anne-Julie Kerhuel, et al, 57(4) *Am. J. Comp. L.*, 2009.

95 La Porta et al, 1999.

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 main questions are: 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? In this, the theory builds on some of the most acclaimed achievements in economic theory during the last decades, notably historical institutionalism with Douglass North and varieties of capitalism with Peter Hall and David Soskice.⁹⁶

Also, the legal scholars’ critique has put an excessive emphasis on one of the findings of LOT, namely that “the common law is better for economic growth than the civil law”.⁹⁷ This emphasis is probably justified, given the often unqualified and sweeping character of the claim and its potential normative implications. However, economists working within the group of NCE have produced other valuable contributions, which increase our understanding about the complexity of institutional design and the interplay between private and public institutional arrangements and which have remained less observed by legal scholars. In particular works that analyse institutional choice in transition economies take the ‘comparative system approach’ advocated by Coase seriously.⁹⁸ They engage in a careful analysis of instances when public regulation may be preferred to judicially enforced contracts, 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.’⁹⁹

5.2 *Dealing with Theoretical Complexity*

Parallel to the LOT economists in the NCE have developed a framework for the comparative analysis of institutional diversity centred on the concept of the Institutional Possibilities Frontier (hereinafter IPF).¹⁰⁰ The analysis is

96 North, Douglass, *Institutions, Institutional Change and Economic Performance*, Cambridge, Cambridge University Press, 1990; Hall and Soskice, 2001.

97 Michaels, Ralf, *Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law*, 57 *Am. J. Comp. L.*, 2009, 765–795.

98 Glaeser, Edward, Simon Johnson and Andrei Shleifer, *Coase versus the Coasians*, 116(2) *Quarterly Journal of Economics*, 2001, 853–899; Hay, Jonathan, Shleifer, Andrei and Vishny, Robert, *Toward a Theory of Legal Reform*, 40 *European Economic Review*, 559–567; La Porta et al, 1999.

99 For instance in analysing comparatively the Czech and the Polish approach to corporate governance in the years following mass privatisation programmes, the authors note the advantages of the stricter regulatory approach applied in Poland using a true comparative institutional framework. See Glaeser et al, 2001 with reference to Coase [1988, pp. 117–118].

100 Djankov et al, *The New Comparative Economics*, 2003.

concerned with the crucial questions of institutional choice and design. Building on classics like Hobbes, Adam Smith and Montesquieu, Djankov et al 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 minimize 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.

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. This limit is the IPF of a given society.¹⁰¹ The position of the IPF depends according to Djankov et al on a complex of factors, summarized 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, an increase of dictatorship will not necessarily translate into decrease in disorder, since it will trigger private subversion of public rules.¹⁰²

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. Contrary to the Legal Origins Theory, the IPF seems to direct the searchlight at each country's

101 See Djankov et al, *The New Comparative Economics*, 2003, 599 also with a graphical representation of the theory.

102 Djankov et al, *supra*, 598.

specific conditions and, if taken seriously, should require an in-depth analysis of local modalities that condition and constrain institutional choice. In their article on the NCE 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.”¹⁰³

A valuable insight that seeps through the findings of the NCE, and which brings it closer to legal scholarship on legal transplants, 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.¹⁰⁴ 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.¹⁰⁵

The theory of the IPF makes a commendable effort to dig deeper into the reasons for institutional diversity. Still, the notion of ‘civic capital’ that is advanced as a main explanatory factor is so multifaceted and vague that its helpfulness can be questioned.¹⁰⁶ 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.¹⁰⁷ 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.

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.”¹⁰⁸ To reach this conclusion the authors analyse the possible pitfalls of public regulation in developing countries. What they fail to address is that

103 Djankov et al, *The New Comparative Economics*, 2003, 598.

104 Glaeser and Shleifer, 2002.

105 “Ultimately, efficient institutional design depends on specific characteristics of countries and sectors, which can only be ascertained empirically. In the next few sections, we illustrate how empirical and historical analysis can inform the application of this framework.” See Djankov et al, *The New Comparative Economics*, 2003, 615.

106 See also Rosser Jr, J. Barkley and Marina Rosser, *A Critique of the New Comparative Economics*, 21(1) *The Review of Austrian Economics*, 2008, 81–97.

107 Djankov et al, *The New Comparative Economics*, 2003, 604.

108 Djankov et al, *ibid*, 611.

also courts, self-regulation and market discipline may be negatively affected by the society's poor civic capital. 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. The analysis is thus in the terms of Neil Komesar 'single institutionalist'.¹⁰⁹

What appears important is to acknowledge that neither the LOT, nor the NCE are monolith and one-dimensional theories. Given the considerable number of publications in which the theoretical premises and the main findings of the NCE and of LOT have been presented, the evolution of the theoretical tools over time, as well as the shifting constellation of authors involved in individual projects, it is probably not surprising that the claims differ in their nuances and are sometimes even contradictory. Legal scholars willing to engage in the debate should recognize, and be ready to deal with this complexity, exploring a broader set of theoretical contributions and approaches.

5.3 *Problems of Methodology: Measuring Legal Families*

Yet, the most fundamental barrier in the interdisciplinary communication on legal transplants between lawyers and economists is arguably a methodological one, and relates 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.¹¹⁰ 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.

From a legal perspective 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 numerals.¹¹¹ Reduction of complexity is certainly an important task of scientific research. However, this task should not be pursued at the cost of data contamination.¹¹² 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

109 Komesar, N., *Imperfect Alternatives, Choosing Institutions in Law, Economics and Public Policy*, Chicago, The University of Chicago Press, 1994, 6.

110 La Porta et al, 1998.

111 Siems, *Numerical Comparative Law*, 2005. The potential and weaknesses of the indexing method have been extensively discussed by Deakin and Ahlering, 2008

112 Siems, *ibid.*

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.¹¹³ 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.¹¹⁴

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.¹¹⁵

At the same time, despite the justified criticism directed at the methodology employed by LLSV, one has to admit the undeniable merit of bringing together an impressive amount and variety of data and offering plausible explanations of their inner relationships.¹¹⁶ 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.¹¹⁷ The synthetic capacity of the approach employed by LLSV is indeed remarkable. For legal scholars and comparatists the challenge remains to sharpen their methodological tools, to self-critically reflect on the social relevance of their research and to find more effective ways of communicating their findings.¹¹⁸

113 On the problems with the questionnaire method, See Schultz, Mårten, *The Questionable Questionnaire*, in Bakardjieva Engelbrekt and Nergelius, *New Directions of Comparative Law*, Cheltenham, Edward Elgar, 2009, 173.

114 Zweigert and Kötz, 1998; Michaels, Ralf, *The Functional Method of Comparative Law*, in Reimann, M. and R. Zimmermann (eds) *The Oxford Handbook of Comparative Law*, Oxford: OUP, 2006.

115 Sacco, Rodolfo, *Legal Formants. A Dynamic Approach to Comparative Law*, 39 Am. J. Comp. L., 1996 (Installment I) 1–34; (Installment II) 343–401; Ewald, 1995; Teubner, 1998.

116 Reitz, John, *Legal Origins, Comparative Law, and Political Economy*, 57(4) Am. J. Comp. L., 2009, 847–862.

117 Siems, *Numerical Comparative Law*, 2005.

118 See in the same vein Whitman, 2008.

6 Legal Origins v The Transplant Effect: a Critique from Within

Given the difficulties of interdisciplinary communication and translation it is probably not surprising that the most fundamental and effective critique at the LOT has been dealt by a group of scholars including both lawyers and economists. While partly using the same data as in the early study of LLSV on legal finance the scholars in this interdisciplinary team offer an alternative, and on many points more convincing, interpretation of the results.¹¹⁹ 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 LLSV 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 current effectiveness of its institutions than the particular legal family it adopted.”¹²⁰

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 colonization with massive presence by the colonizers) show higher level 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

119 Berkowitz, Pistor and Richard, 2003, with reference to La Porta et al. 1997, 1998.

120 Berkowitz, Pistor and Richard 2003, 167. *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 colonization through physical presence or through exploitation of resources, Acemoglu, Daron, Simon Johnson and James A. Robinson, *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 (5) *The American Economic Review*, 2001, 1369–1401.

possibility of engaging local actors in using the legal rules and the institutional framework, is crucial for the effectiveness of reform.¹²¹

The transplant effect theory builds on an understanding of law as a cognitive institution. On the 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.”¹²² This proposition is in harmony with much deep-level comparative research on legal transplants and law reform.¹²³

7 Conclusion

The entry of the concept ‘legal transplant’ in economic discourse and its use in the LOT has stirred an intense debate in, and between, the disciplines of law and economics. This debate presents a rare instance of interdisciplinary communication and exchange. For each discipline, to see its methodological tools and findings being exposed to scrutiny from outside has certainly generated impulses for much needed self-reflection. Whatever the merits and demerits of the LOT, there is little doubt that the school has contributed to breaking the insulation of social disciplines.

Of course, one should not draw too far-fetched and optimistic conclusions. The opening has more probably been temporary and incidental and we are still a long way from a true and long-lasting interdisciplinary dialogue. It is noteworthy that despite the heavy reliance on comparative legal literature, the scholars from the LOT only to a limited extent sought to engage in a debate 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.¹²⁴ 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 resonance of the main claims of the LOT among comparative lawyers reached

121 Pistor, Katharina, Yoram Keinan, Jan Kleinheisterkamp and Mark D. West, *The Evolution of Corporate Law: A Cross-Country Comparison*, 23 (4) *University of Pennsylvania Journal of International Economic Law*, 791–871; Pistor, Katharina, Yoram Keinan, Jan Kleinheisterkamp and Mark D. West, *Innovation in corporate law*, 31 *Journal of Comparative Economics*, 676–694; See also Pistor, Katharina and Chenggang Xu, 35 *Incomplete Law*, *International Law and Politics*, 931–1013.

122 Berkowitz, Pistor and Richard, 2003, 167.

123 See Seidman and Seidman, 1996.

124 Reference has been more readily made to the work of Berkowitz et al, 2003, most likely because it applies a comparable methodology and thus tries to seize the fortress from within.

back to the economists.¹²⁵ And even after the debate was in full swing, at a symposium exclusively devoted to Legal Origins, and ultimately resulting in the above mentioned special issue of the American Journal of Comparative Law, none of the exponents of the LOT seems to have been represented.

Certainly, one should not underestimate the intricacies of interdisciplinarity. The preceding analysis gives abundant evidence of problems of 'translation' in the interdisciplinary communication on legal transplants. As always with interdisciplinary adventures, one of the main challenges that the analyst encounters is the availability of not just one, but plentiful versions of the invoked 'alien' social discipline. The temporary 'visitor' in the field is thus forced to choose between various contested views and interpretations, facing what is sometimes called the 'selection problem' of interdisciplinary analysis. One need not subscribe to sophisticated views of self-reference (autopoiesis) of highly differentiated social spheres to realize that discourses in law and in economics are often highly specialised, dynamic and 'self-referential.' In order to be employed in economic analysis, legal theories need to be funnelled into an applicable economic model; and vice versa, legal scholars when approaching economic theory have to grasp and be able to critically relate to the methodology used in economic analysis. This inevitably implies certain reductionism of the complexity of the respective discipline at the risk of possible distortion.

Whereas these are real problems, I nevertheless believe that they should not be exaggerated. After all, reduction of complexity, and the associated trade-offs, are at the heart of every scholarly endeavour and not limited to interdisciplinary analysis. And there is more to be gained than lost by leaving, at least temporarily, the cosy world of one's own discipline with its established truths and accepted methodologies. At the same time, one should not lose sight of the different nature of the discourses characterizing law and economic theory respectively. In an incisive contribution on, among others, interdisciplinary dialogue, Joerges cautions against rapid and unreflecting transposition of arguments from one field into another. Whereas economic analysis is often positive and evaluative, legal analysis is inherently normative. What is required is sensitive fine-tuning and translation of economic findings to the practicable tools of legal analysis.¹²⁶

If we transpose this advice to the field of legal transplants, one should probably warn against ascribing excessive policy relevance to the LOT. With its large scale research design and the impressive volume of data generated and

125 For lawyers' reaction See Ahlering, Beth, and Simon Deakin, *Labour Regulation, Corporate Governance, and Legal Origin: A Case of Institutional Complementarity?*, University of Cambridge Centre for Business Research, Working Paper 312, 2005; Siems, 2005, Siems, 2007. For economists' reaction to legal contributions See La Porta et al, 2008. 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.

126 Joerges, Christian, *Quality Regulation in Consumer Goods Markets: Theoretical Concepts and Practical Examples*, in: Daintith, Terence and Gunther Teubner (eds.) *Contract and Organisation* (Berlin: de Gruyter, 1986), 132.

processed the theory promises scientific cost-efficiency and is, quite understandably, politically attractive. A single theoretical framework 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. It is hardly surprising that the findings of the LLSV have readily found their way into the work of international organisations, notably the World Bank. They have already produced palpable effects for governments around the globe through the Doing Business Indicators of the WB.¹²⁷

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. Attractive as the promises of big scale and mathematical precision may be, they should be treated with sound scholarly scepticism and caution. Regression analyses and statistical methods can be highly valuable for identifying patterns and capturing trends. However, the results of such analyses can guide legal and economic reform only if combined with in-depth comparative studies, based on close observation of local context and careful process-tracing of legal and institutional evolution.

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."¹²⁸ 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."¹²⁹

Hopefully, the interaction between lawyers and economists, which has been triggered by the legal transplants debate will enhance the dialogue and the mutual learning between the disciplines, and will contribute to a culture of patient scholarly 'gardening' and critical self-reflection.

127 Michaels, 2009.

128 Hayek, Friedrich v., *The Pretence of Knowledge*, 79(6) *American Economic Review*, 1989[1974], 3–7.

129 Hayek, *supra*, 7.

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