# *Legal Origins: Reconciling Law & Finance and Comparative Law*

**Mathias M. Siems***

Law and finance scholars have increasingly relied upon comparative law in the last few years. The work of these scholars has considered, in empirical terms, the effect that legal rules and their enforcement have on financial development in different countries. These studies have routinely adopted the traditional distinction between civil law and common law countries. Whether this revival of "legal families" (or "legal origins") is a useful way forward is, however, a matter of debate. The author challenges the methodology these studies adopt and argues instead for reliance on characteristic features of national legal systems, as distinct from systemic origins, as a basis for analysis.

Les auteurs oeuvrant dans le domaine du droit et de la finance font de plus en plus recours au droit comparatif. Les recherches académiques se situant à l'intersection du droit et de la finance arborent une tendance qui se veut de vouloir quantifier les effets qu'ont les règles de droit ainsi que l'impact de leurs mise en application sur le développement financier de divers pays. De plus, les données émanant de ces études sont souvent attribuées et liées à la distinction traditionnelle qui sépare les pays de tradition civiliste et ceux issus de la common law. La question quant à savoir si le renouveau de ces «familles légales» (ou «origines légales») constitue une avancée n'est cependant pas sans controverse. L'auteur remet en cause ces recherches et préconise une approche plus précise et significative qui consiste en une analyse orientée sur les traits spécifiques et non sur le concept de familles légales.

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> [T]he comparative lawyer cannot restrict his field ... narrowly. More than any other academic[,] ... he must be prepared to find new topics for discussion and research.[1]

## Introduction

It has been said that the twenty-first century will be an "era of comparative law."[2] The problem, however, is how "properly" to engage in comparative law. Politicians and judges allegedly pay no attention to comparative law because it is regarded as too complicated and theoretical for a generalist audience.[3] Recently, however, law and finance scholars have discovered the usefulness of comparative law.[4] Their studies have had an immense impact in academic fields such as comparative corporate governance,[5] and their findings are given great weight by the World Bank when assessing the quality of law and legal institutions in a particular state.[6] In substance, law and finance scholars look at the quantifiable effect that legal rules and their enforcement have on financial development. They ask whether specific legal features, such as a particular legal rule or the effectiveness of courts, correlate with financial data, such as a country's stock market capitalization. Another pervasive feature of these studies is their reliance on the traditional distinction between common law and civil law countries as an analytical tool. This revival of "legal families"—or "legal origins" as these studies call it[7]—may surprise modern comparative lawyers.

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[1] F.H. Lawson, "The Field of Comparative Law" (1949) 61 Jurid. Rev. 16 at 36.

[2] Esin Örücü, *The Enigma of Comparative Law* (Leiden, Neth.: Martinus Nijhoff, 2004) at 216.

[3] See Basil Markesinis, *Comparative Law in the Courtroom and Classroom: The Story of the Last Thirty-five Years* (Oxford: Hart, 2003) at 61-62. See also Basil Markesinis, "Comparative Law—A Subject in Search of an Audience" (1990) 53 Mod. L. Rev. 1; Basil Markesinis, *Foreign Law and Comparative Methodology* (Oxford: Hart, 1997) at 3.

[4] See *infra* note 10ff.

[5] For a recent overview, see Cally Jordan, "The Conundrum of Corporate Governance" (2005) 30 Brook. J. Int'l L. 983.

[6] See The World Bank Group, *Doing Business: Benchmarking Business Regulations*, online: Doing Business <http://www.doingbusiness.org> (in particular the references to "Research" in the categories "Starting a Business", "Employing Workers", "Getting Credit", "Protecting Investors", and "Enforcing Contracts"). For critical comments, see Association Henri Capitant des Amis de la Culture Juridique Française, *Les droits de tradition civiliste en question—à propos des rapports Doing Business de la Banque Mondiale*, vol. 2 (Paris: Société de Législation Comparée, 2006); Claude Ménard & Bertrand du Marais, "Can We Rank Legal Systems According to Their Economic Efficiency?" in Peter Nobel, ed., *New Frontiers of Law and Economics* (St. Gallen, Switz.: Schulthess, 2006); Mathias M. Siems, "Statistische Rechtsvergleichung" Rabels Zeitschrift für ausländisches und internationales Privatrecht [forthcoming].

[7] The terminology employed in the field of comparative law overlaps to a considerable degree: "legal origins", "legal families", and "legal traditions" are often employed interchangeably. In this article, the term "legal origin" is reserved for instances when I am referring specifically to studies that

Comparatists increasingly emphasize that law is becoming international, transnational, or even global, such that looking at legal traditions is considered less important.[8] In light of these different approaches, this article discusses the appropriateness of the continued use made of legal families as analytical categories by law and finance scholars. Part I summarizes the reasoning and results of the studies conducted by law and finance scholars while Part II challenges these studies by identifying problems in the distinction made between legal families. Part III isolates characteristic features that allow for more precise analysis than the use of legal families as such, and Part IV re-examines the differences between countries through the lens of these new identifiers. The article concludes with an invitation to incorporate these lessons from comparative law by employing new criteria in future law and finance studies.

## I. Legal Origins in the Law and Finance Literature

Statements by law and finance scholars on legal origins have two dimensions. On the one hand, they describe the origins of different legal traditions and explain how they have spread throughout the world. On the other, they deploy legal traditions as categories to analyze whether legal rules foster economic development. This analysis is performed quantitatively, by means of statistical regressions.[9]

### *A. The Historical Origins*

Law and finance scholars trace the origins of different legal families to twelfth- and thirteenth-century England and France.[10] Both countries were faced with the

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adopt that language. Otherwise, I will use "legal family" when referring to the analytical category, and "legal tradition" when referring to the character of a legal order.

[8] See Mathias Reimann, "Beyond National Systems: A Comparative Law for the International Age" (2001) 75 Tul. L. Rev. 1103 at 1115; Esin Örücü, "Family Trees for Legal Systems: Towards a Contemporary Approach" in Mark Van Hoecke, ed., *Epistemology and Methodology of Comparative Law* (Oxford: Hart, 2004) 359 at 361 [Örücü, "Family Trees"]; Jaakko Husa, "Classification of Legal Families Today. Is it Time for a Memorial Hymn?" [2004] R.I.D.C. 11; James Gordley, "Common law und civil law: eine überholte Unterscheidung" (1993) Z. Eu. P. 498. See also Stefan Vogenauer, "An Empire of Light? Learning and Lawmaking in the History of German Law" (2005) 64 Cambridge L.J. 481 ("the oft-evoked distinction between 'the Common law' and 'the Civil law' does not prove to be of much help" at 483).

[9] See e.g. Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, "What Works in Securities Law?" (2006) 61 Journal of Finance 1 at 27 [La Porta, Lopez-de-Silanes & Shleifer, "Securities Law"]. Statistical details are outside the scope of this article. In particular, the use of legal origins as a supposed remedy to the problem of endogeneity will not be addressed.

[10] For what follows, see Edward L. Glaeser & Andrei Shleifer, "Legal Origins" (2002) 117 The Quarterly Journal of Economics 1193; Simeon Djankov *et al.*, "The New Comparative Economics" (2003) 31 Journal of Comparative Economics 595 at 605-606. Compare Thorsten Beck & Ross Levine, "Legal Institutions and Financial Development" in Claude Ménard & Mary M. Shirley, eds., *Handbook of New Institutional Economics* (Dordrecht, Neth.: Springer, 2005) 251 at 254-58 (tracing origins to the fifteenth century for France and to the sixteenth and seventeenth centuries for England).

problem of how to protect law enforcers (such as judges) from coercion by litigants through either violence or bribes. According to law and finance scholars, the crucial difference between the two nations at the time was that France was less peaceful than England. In France there was therefore a greater need for protection and control of law enforcers by the state. Consequently, following the Roman law tradition, France adopted a civil law system characterized by fact-finding by state-employed judges, automatic review of decisions, and, later, a reliance on codes rather than judicial discretion. In contrast, England developed a common law system that relied on fact-finding by juries, independent judges, infrequent appeals, and judge-made law rather than strict codes.

According to the law and finance literature, the English and French legal traditions spread throughout the world through conquest, colonization, and imitation.[11] Apart from the French model, there are said to be two other civil law traditions: the German and the Scandinavian. The seminal moment for the German legal tradition is the adoption of the German Civil Code in 1900. Much like its French counterpart, the German legal tradition is based on Roman civil law and was subsequently exported to other countries.[12] By contrast, the Scandinavian legal tradition, which developed relatively independently in the seventeenth and eighteenth centuries, is less closely linked with Roman civil law[13] and has not spread throughout the world.[14] Finally, some studies refer to a socialist-transition legal family, which is based on the legal tradition that emerged from the breakup of the Soviet Union.[15]

How exactly legal traditions spread and why a particular country belongs to a particular family is usually not explained in detail. Rather, studies often refer generally to mainstream comparative law books.[16] Insofar as explanations are given, they are usually very short; the act of categorizing a particular country appears unproblematic. For example, it is said that "Austrian and Swiss civil codes were developed at the same time as the German civil code and the three influenced each

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For a critical comment, see Association Henri Capitant des Amis de la Culture Juridique Française, *supra* note 6 at para. 20.

[11] See Beck & Levine, *ibid.* at 258-60.

[12] See *ibid.* at 256, 258-59.

[13] Some studies regard the Scandinavian countries as part of the civil law tradition. See e.g. Rafael La Porta *et al.*, "Law and Finance" (1998) 106 Journal of Political Economy 1113 at 1115 [La Porta *et al.*, "Law and Finance"]. Others treat it as a separate legal family. See e.g. La Porta, Lopez-de-Silanes & Shleifer, "Securities Law", *supra* note 9 at 14.

[14] See Beck & Levine, *supra* note 10 at 257.

[15] See Simeon Djankov, Caralee McLiesh & Andrei Shleifer, "Private Credit in 129 Countries" Journal of Financial Economics [forthcoming in 2007], online: National Bureau of Economic Research <http://www.nber.org/papers/W11078>.

[16] See e.g. René David & John E. C. Brierley, *Major Legal Systems in the World Today*, 3d ed. (London: Stevens & Sons, 1985); Konrad Zweigert & Hein Kötz, *Introduction to Comparative Law*, 3d ed. (Oxford: Clarendon Press, 1998); Thomas H. Reynolds & Arturo A. Flores, *Foreign Law: Current Sources of Cases and Basic Legislation in Jurisdictions of the World* (Littleton, Colo.: Fred Rothman & Company, 1989).

other heavily. In turn, Czechoslovakia, Hungary, Yugoslavia, and Greece relied on German civil law in formulating and modernizing their legal systems in the early part of the 20th century."[17]

### *B. Comparative Statistical Analysis*

The question of whether legal rules foster economic development lies at the core of law and finance studies and extends to the comparative analysis of legal traditions. For instance, in one of their first studies, La Porta et al. found that the protection of investors (i.e., shareholders and creditors) is not only strongly related to financial development, but also that differences can be explained by reference to legal origin.[18] Having examined forty-nine countries, the result of their calculations was that common law countries protect shareholders and creditors better than civil law countries (especially the French ones) do.[19] Recently, Djankov, McLiesh & Shleifer extended this study to the protection of creditors in 129 countries.[20] In contrast to La Porta et al., they looked not only at creditor protection by means of *ex post* private dispute resolution, but also at the use of public credit registries. Because common law countries rely primarily on the former *ex post* mechanism whereas French civil law countries sustain their debt market through the latter *ex ante* institutions, this study also identified differences according to legal origin.[21] With respect to investor protection, a study by La Porta, Lopez-de-Silanes & Shleifer on securities law in forty-nine countries found that there is little evidence that public enforcement is important, but that strong evidence exists to suggest that laws mandating disclosure and facilitating private enforcement through liability rules benefit stock markets. This result was also linked to the common law / civil law distinction. The common law was said to emphasize market discipline and private litigation. The study found that private monitoring and contracting were more important than public enforcement of securities law, and the authors concluded accordingly that these advantages of the

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[17] Beck & Levine, *supra* note 10 at 258. In reality, however, the Austrian Civil Code *(Allgemeines Bürgerliches Gesetzbuch*) was enacted in 1811, well ahead of the 1900 German Civil Code (*Bürgerliches Gesetzbuch*). Furthermore, the Swiss Civil Code (*Zivilgesetzbuch*) was also heavily influenced by the French *Code civil*. See Peter Tuor, Berhard Schnyder & Jörg Schmid, "Einleitung" in Peter Tuor, ed., *Das Schweizerische Zivilgesetzbuch*, 11th ed. (Zurich: Schulthess, 1995) at 1.

[18] La Porta *et al.*, "Law and Finance", *supra* note 13.

[19] *Ibid.* at 1139. For a recent study focusing on self-dealing, which slightly modifies the shareholder index, see Simeon Djankov *et al.*, "The Law and Economics of Self-Dealing" (Working Paper No. 11883, National Bureau of Economic Research, 2005), online: National Bureau of Economic Research <http://papers.nber.org/papers/W11883.html>. For a different index, see Priya Lele & Mathias M. Siems, "Shareholder Protection: A Leximetric Approach" (2007) 7 Journal of Corporate Law Studies 17.

[20] *Supra* note 15.

[21] *Ibid.* at 22.

common law tradition were decisive for the superior quality of securities laws of these countries.[22]

Other studies have confirmed that civil law countries put a stronger emphasis on state involvement. For example, studies by La Porta and others found that in countries of French legal origin there is more government ownership of banks[23] and that state-owned enterprises play a greater role than they do in common law countries.[24] Djankov et al. analyzed the level of regulation in cases of entry by new firms in eighty-five countries. The study found that (French) civilian countries regulate entry more heavily than common law countries do.[25] Furthermore, a study by Botero et al. on labour markets in eighty-five countries found that social control of business by labour law is higher in (French) civil law than in common law countries.[26]

Finally, law and finance scholars have identified two possible mechanisms through which legal origin influences financial development.[27] First, the relevance of legal origins may be explained by the "political channel", whereby the relative priority given to private property rights and rights of the state is considered important.[28] As a proxy for this criterion, two studies examined judicial control of political decisions. The studies found that, for instance, there is less supreme court power in civil law countries than in common law countries.[29] State influence was inferred to be greater in the civil law tradition. Second, it could be decisive that legal systems in different traditions respond differently to changing socio-economic circumstances. With respect to this "adaptability channel", the case law approach by the common law is seen as more flexible whereas civil law is regarded as inherently more formalistic and rigid.[30] A study by Djankov et al. on legal proceedings in 109

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[22] La Porta, Lopez-de-Silanes & Shleifer, "Securities Law", *supra* note 9 at 28. For a different view, see Mark J. Roe, "Legal Origins, Politics, and Modern Stock Markets" (2006) 120 Harv. L. Rev. 460 at 491-94 [Roe, "Legal Origins"].

[23] See Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, "Government Ownership of Banks" (2002) 57 Journal of Finance 265 at 271.

[24] Rafael La Porta *et al.*, "The Quality of Government" (1999) 15 J.L. Econ. & Org. 222 at 261.

[25] Simeon Djankov *et al.*, "The Regulation of Entry" (2002) 117 The Quarterly Journal of Economics 1 at 271.

[26] Juan C. Botero *et al.*, "The Regulation of Labor" (2004) 119 The Quarterly Journal of Economics 1339 at 1365. For a comment, see Simon Deakin & Beth Ahlering, "Labor Regulation, Corporate Governance and Legal Origin: A Case of Institutional Complementarity?" Law & Soc'y Rev. [forthcoming in 2007].

[27] For a good summary, see Beck & Levine, *supra* note 10 at 271-73.

[28] Thorsten Beck, Asli Demirgüç-Kunt & Ross Levine, "Law and Finance: Why Does Legal Origin Matter?" (2003) 31 Journal of Comparative Economics 653 at 654.

[29] See *ibid.* at 667. For other criteria such as the likelihood of judges receiving tenure and judicial review of the constitutionality of laws, see Rafael La Porta *et al.*, "Judicial Checks and Balances" (2004) 112 Journal of Political Economy 445.

[30] Beck & Levine, *supra* note 10 at 261-62. For a more comprehensive view of legal adaptability, see Mathias M. Siems, "Legal Adaptability in Elbonia" (2006) 2 International Journal of Law in Context 393.

countries confirms this result. Djankov et al. looked at numerous variables, such as the need for legal representation and written documents, statutory justification for a complaint, and limits on the use of evidence. They found that civil law countries (in particular the francophone ones) provide a more formalist approach than do common law countries.[31]

## II. Legal Families: A Problematic Distinction

Law and finance studies have received a lot of criticism.[32] In particular, the relevance of legal origins for financial development is doubtful. There are scholars who emphasize that other aspects of a society, such as politics,[33] culture or religion,[34] and geographical institutions[35] are considerably more determinative than belonging to a particular legal tradition. If one disregarded these other social elements, one could easily come to absurd results. This was made very clear in a paper by West, which examines whether legal origin influences success in the World Cup of soccer![36] He

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[31] Simeon Djankov *et al.*, "Courts" (2003) 118 The Quarterly Journal of Economics 453.

[32] See *supra* note 6. On the choice of variables and their coding, see Lele & Siems, *supra* note 19; Mathias M. Siems, "What Does Not Work in Comparing Securities Laws: A Critique on La Porta et al.'s Methodology" (2006) 16 International Company & Commercial Law Review 300 [Siems, "A Critique on La Porta et al."]; Sofie Cools, "The Real Difference in Corporate Law Between the United States and Continental Europe: Distribution of Powers" (2005) 30 Del. J. Corp. L. 697; Udo C. Braendle, "Shareholder Protection in the USA and Germany: 'Law and Finance' Revisited" (2006) 7 German Law Journal 257; Markus Berndt, *Global Differences in Corporate Governance Systems* (Wiesboden, F.R.G.: Gabler Edition Wissenschaft, 2002) at 17-18; Holger Spamann, "On the Insignificance and/or Endogeneity of La Porta et al.'s 'Anti-Director Rights Index' under Consistent Coding" (Discussion Paper No. 7, Harvard Law School John M. Olin Center for Law, Economics, and Business, 2006), online: Harvard Law School John M. Olin Center for Law, Economics, and Business <http://www.law.harvard.edu/programs/olin_center/fellows_papers/pdf/Spamann_7.pdf>.

[33] See Mark J. Roe, *Political Determinants of Corporate Governance* (Oxford: Oxford University Press, 2003); Roe, "Legal Origins", *supra* note 22; Marco Pagano & Paolo Volpin, "The Political Economy of Finance" (2001) 17 Oxford Review of Economic Policy 502; Marco Pagano & Paolo Volpin, "The Political Economy of Corporate Governance" (2005) 95 American Economic Review 1005; Peter A. Gourevitch & J. James Shinn, *Political Power and Corporate Control: The New Global Politics of Corporate Governance* (Princeton, N.J.: Princeton University Press, 2005).

[34] See René M. Stulz & Rohan Williamson, "Culture, Openness, and Finance" (2003) 70 Journal of Financial Economics 313; Amir N. Licht, Chanan Goldschmidt & Shalom H. Schwartz, "Culture, Law, and Corporate Governance" (2005) 25 Int'l Rev. L. & Econ. 229.

[35] See Daron Acemoglu, Simon Johnson & James A. Robinson, "The Colonial Origins of Comparative Development: An Empirical Investigation" (2001) 91 American Economic Review 1369.

[36] Mark West, "Legal Determinants of World Cup Success" (Discussion Paper No. 009, University of Michigan John M. Olin Center for Law & Economics, 2002), online: University of Michigan Law School <http://www.law.umich.edu/CENTERSANDPROGRAMS/OLIN/abstracts/discussionpapers/2002/west02-009.pdf>. See also "Football, Sports and Development", online: World Bank <http://rru.worldbank.org/features/worldcup2006.aspx>.

found that a legal order influenced by the French civilian tradition correlated with World Cup success in a statistically significant way:

> Perhaps teams from countries with systems based on the French model (such as 1998 champion France and 2002 champion Brazil) perform well due to the remaining vestiges of the Napoleonic Code that somehow remove discretion from coaches and managers in the same manner that the civil law system curtails judicial activism. Or maybe—just maybe—some other forces are at work.[37]

The search for other factors is indeed the usual reaction to strange statistical results, as robustness checks may expose a bias due to a limited breadth of variables considered.[38]

However, the main problem of legal traditions and law and finance lies somewhere else. Before considering different channels and checking the robustness of the results, one must first determine which legal system belongs to which legal family. For instance, in the Djankov, McLiesh & Shleifer study on creditor rights, the classification appears as follows:

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[37] West, *ibid.* at 5.
[38] See Beck & Levine, *supra* note 10 at 268-69.

| *Legal Origin*[39] | *Countries* |
|---|---|
| English Legal Origin | Australia, Bangladesh, Botswana, Canada, Ethiopia, Ghana, Hong Kong, India, Iran, Ireland, Israel, Jamaica, Kenya, Lesotho, Malawi, Malaysia, Namibia, Nepal, New Zealand, Nigeria, Pakistan, Papua New Guinea, Saudi Arabia, Sierra Leone, Singapore, South Africa, Tanzania, Thailand, Uganda, United Arab Emirates, United Kingdom, United States, Yemen, Zambia, Zimbabwe. |
| French Legal Origin | Albania, Algeria, Angola, Argentina, Belgium, Benin, Bolivia, Brazil, Burkina Faso, Burundi, Cambodia, Cameroon, Central African Republic, Chad, Chile, Colombia, Democratic Republic of the Congo, Republic of the Congo, Costa Rica, Cote d'Ivoire, Dominican Republic, Ecuador, Egypt, El Salvador, France, Greece, Guatemala, Guinea, Haiti, Honduras, Indonesia, Italy, Jordan, Kuwait, Lao PDR, Lebanon, Lithuania, Madagascar, Mali, Mauritania, Mexico, Morocco, Mozambique, Netherlands, Nicaragua, Niger, Oman, Panama, Paraguay, Peru, Philippines, Portugal, Puerto Rico, Romania, Rwanda, Senegal, Spain, Syria, Togo, Tunisia, Turkey, Uruguay, Venezuela, Vietnam. |
| German Legal Origin | Austria, Bosnia and Herzegovina, Bulgaria, China, Croatia, Czech Republic, Germany, Hungary, Japan, Republic of Korea, Latvia, Macedonia, Poland, Serbia and Montenegro, Slovak Republic, Slovenia, Switzerland, Taiwan. |
| Nordic Legal Origin | Denmark, Finland, Norway, Sweden. |
| Socialist Legal Origin | Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Mongolia, Russia, Ukraine, Uzbekistan. |

[39] This classification is taken from Djankov, McLiesh & Shleifer, *supra* note 15, Appendix A. The other studies mentioned in Part II.B use almost identical classifications.

Yet these and similar classifications are not at all self-evident. Rather, for about eighty per cent of the 129 countries that Djankov, McLiesh & Shleifer examined, the categorization according to legal origin is far from clear. The difficulty arises mainly with respect to legal systems in Eastern Europe, Asia, Africa, and Latin America. The following examples illustrate this difficulty.

According to Djankov, McLiesh & Shleifer, Lithuania belongs to the French legal family and Latvia to the German legal family because "Latvia's laws belonged to the German civil law tradition prior to annexation by the Soviet Union in 1940; it reverted back to them in 1991. Lithuania was influenced by French and Dutch law both before its annexation in 1940 and after independence in 1990."[40] This is, however, hardly obvious. Although the Latvian and Lithuanian civil codes have been influenced by German and French law, they are not at all mere copies of the parent codes. Rather, they are drafted in a comparative fashion that takes different models into account. For instance, though the Latvian Civil Code[41] bears some resemblance to the German Civil Code, it is unclear in what proportion it is based on the German model. More generally, legal traditions beyond the German and French influenced Latvian and Lithuanian law. In recent years, both legal systems have been influenced by legal advice from the Nordic countries and the United States, as well as by the implementation of European directives.

More importantly, the notion of legal families is not only—or perhaps not even primarily—about legal rules as such. If one looks at other criteria it becomes clear that Latvia and Lithuania should not necessarily be placed in separate categories. The Djankov, McLiesh & Shleifer categorization disregards historical similarities between the Baltic States such as the occupation by Germany and the Soviet Union during World War II, contemporaneous periods of independence after World War I and 1990, and the accession to the European Union in 2004. This common history is reflected in legal rules, culture, and practice. My own experience teaching students from the three Baltic States suggests to me that their law and legal practice cannot be categorized along lines established by German or French legal influence. Rather, distinctions such as EU/non-EU, Eastern / Western Europe, and Baltic/non-Baltic countries emerged. As a result, it appears strange that according to Djankov, McLiesh & Shleifer, for example, Latvia and Taiwan are put into one legal category and Lithuania and Syria into another. This insight can be extended to other Eastern European countries, whose legal systems often have a mixture of different influences and exhibit features dissimilar to those of Western Europe.

According to Djankov, McLeish & Shleifer, China and Japan are treated as being of German legal origin. At least with respect to China, this does not make sense at all.

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[40] *Ibid.* at 10-11.

[41] For an English version, see *The Civil Law of Latvia*, online: <http://www.ttc.lv/lv/publikacijas/civillikums.pdf>.

While Djankov et al. give no reasons for their categorization, it likely results from having traced some export of German law to China. For example, *The Company Law of the People's Republic of China*[42] of 1993 was primarily based upon the company laws of Taiwan, France, Germany, and Japan. For language reasons, legislators paid particularly close attention to the Taiwanese law. Yet, Taiwan's company law is itself a hybrid, since it was originally based on both German and Japanese law and, after World War II, came under U.S. influence.[43] As a result, codified Chinese company law is to a large extent a mixture of various legal influences and not simply of German legal origin. This can also be seen in other areas of Chinese law because, in contrast to Germany (or France), there is no comprehensive civil code,[44] and Chinese securities law is in principle based on the U.S. model.[45]

It is more difficult to criticize the classification of Japan as being of German legal origin. Between 1890 and 1900 Japan did indeed copy large parts of the five major German codes.[46] However, these legal transplants have not necessarily retained their importance to Japanese law. For example, the Commercial Code of Japan has been substantially changed since World War II, in particular because of American influence.[47] The same is true for other areas of trade and business law.[48]

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[42] Adopted at the 5th Sess. of the Standing Comm. 8th Nat'l People's Cong., 29 December 1993, promulgated as Order No. 16 of the President of the P.R.C., 29 December 1993, effective 1 July 1994, trans. in *The Company Law of the People's Republic of China* (Beijing: Foreign Language Press, 2001) (P.R.C.).

[43] See Mathias M. Siems, *Convergence in Shareholder Law* (Cambridge: Cambridge University Press) [forthcoming in 2007].

[44] There are "only" two legislative sources. See *General Principles of the Civil Law of the People's Republic of China* (adopted at the 4th Sess. of the 6th Nat'l People's Cong., 12 April 1986, promulgated as Order No. 37 of the President of the P.R.C., 12 April 1986, effective 1 January 1987) (P.R.C.), trans. by Chinacourt, online: Chinacourt <http://en.chinacourt.org/public/detail.php?id=2696>; *The Contract Law of the People's Republic of China* (adopted at the 2d Sess. of the 9th Nat'l People's Cong., 15 March 1999, effective 1 October 1999) (P.R.C.), trans. online: Judicial Protection of IPR in China <http://www.chinaiprlaw.com/english/laws/laws2.htm>.

[45] See Lawrence S. Liu, "Chinese Characteristics Compared: A Legal and Policy Perspective of Corporate Finance and Governance in Taiwan and China" (2001) at 2, online: Social Sciences Research Network <http://ssrn.com/abstract=273174>.

[46] See e.g. Zweigert & Kötz, *supra* note 16 at 298-301. But see Masao Ishimoto, "L'influence du Code civil français sur le droit civil japonais" [1954] R.I.D.C. 744.

[47] See generally Curtis Milhaupt, "Creative Norm Destruction: The Evolution of Nonlegal Rules in Japanese Corporate Governance" (2001) 149 U. Pa. L. Rev. 2083. Milhaupt writes:

> [T]he validity of the classification scheme used [by certain authors] to create the legal origin variable is highly suspect. For example, these studies list Japan as belonging to the German civil law family. This is partially, but only partially, true of Japan's five major codes ... But many subsequent Commercial Code revisions and [a number of] important economic regulatory statutes [bearing on investor protections] are of U.S. origin. German law has had only a minor influence on postwar Japanese legal developments. Thus, the classification for Japan is only about partially accurate and no theory is offered to explain why legal origin, as opposed to subsequent legal

Yet the more fundamental counter-argument is that it is not enough to look only at legal rules. In the light of the deeper structure of legal systems, the distinction between the common law and French, German, and Nordic civil law begins to appear both overly legalistic and Eurocentric.[49] In particular, one must consider legal culture if one hopes to obtain a meaningful understanding of different legal traditions. Legal culture refers to those elements in law that go beyond the mere content of statutory or case law. It includes the historical background of a legal system, the emergence of sources of law, the systematization of the law, the style of argument and codification, legal education, and the ranking of law in a country's social order.[50] The importance of these factors should not be underestimated. It is sometimes even claimed that because of these factors, "legal transplants" are "impossible" in the sense that even formally identical rules, being interpreted and applied differently in different legal systems, do not survive the journey from one legal system to another unchanged.[51] In any case, it is necessary to take into account the characteristics of Asian legal traditions[52] in order to avoid the misleading results that flow from superimposing European legal traditions onto non-European countries.

The need for a more tentative approach is confirmed in the case of Africa. Based on the history of colonization, Djankov, McLiesh & Shleifer regard, for example, the former English colonies of Botswana and Ghana as countries of English legal origin and the former French colonies Mali and Niger as countries of French legal origin. There is, however, no reference to the former German colonies, such as Namibia and Togo. The reason for this is probably that the German colonial regime did not last very long (1884–1919)[53] and that, therefore, law and legal culture in Namibia and Togo may not have changed significantly and permanently. Yet, one can also question the impact of other European legal traditions in other African countries. A simple categorization according to English common law or French civil law once again

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> developments, would be determinative of corporate governance patterns. It would not be surprising if the classifications of legal origin for other countries in the study were subject to similar defects (*ibid.* at 2123, n. 131).

[48] See R. Daniel Kelemen & Eric C. Sibbitt, "The Americanization of Japanese Law" (2002) 23 U. Pa. J. Int'l Econ. L. 269.

[49] See Boaventura de Sousa Santos, *Towards a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York: Routledge, 1995) at 273; Mathias Reimann, "The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century" (2002) 50 Am. J. Comp. L. 671 at 685; Upendra Baxi, "The Colonialist Heritage" in Pierre Legrand & Roderick Munday, eds., *Comparative Legal Studies: Traditions and Transitions* (Cambridge: Cambridge University Press, 2003) 46 at 49; Günther Frankenberg, "Critical Comparisons, Re-thinking Comparative Law" (1985) 26 Harv. Int'l L.J. 411 at 422, 442.

[50] See e.g. David Nelken, "Disclosing/Invoking Legal Culture: An Introduction" (1995) 4 Soc. & Leg. Stud. 435 at 438.

[51] See Pierre Legrand, "The Impossibility of 'Legal Transplants'" (1997) 4 M.J.E.C.L. 111.

[52] See e.g. H. Patrick Glenn, *Legal Traditions of the World*, 2d ed. (Oxford: Oxford University Press, 2004) at 301-42 [Glenn, *Legal Traditions*].

[53] See generally William Otto Henderson, *The German Colonial Empire, 1884–1919* (London: Frank Cass, 1993).

disregards deeper legal structures, such as the question of how courts work or how new law, old law, and customs interact. Thus, the fundamental question of how the imposed new legal traditions mixed with chthonic and Islamic legal traditions[54] has to be answered in order to get to a meaningful description of legal families in Africa.[55] This is not merely of conceptual importance. For instance, in Islamic commercial law there are Islamic partnerships but no corporations because the concept of separate legal personality is unknown.[56] Thus, for certain issues, such as shareholder protection in different countries,[57] there is a fundamentally different starting point in comparison with the commercial law of the West. The law and finance categorization is therefore too heavily focused on European or Western legal traditions. A more significant distinction would be between the concept of law in the West, which may be characterized by its Christian roots, specific form of rationality, and concept of rights, and the African legal traditions that continue to exist despite colonization.[58]

Latin America may be less problematic. Law and finance studies treat the Latin American countries as being of French legal origin. It is indeed correct that via Spain and Portugal almost all Latin American countries were influenced by the civil law tradition as exemplified by the French Civil Code. Yet even law and finance scholars see differences between the European "parent tradition" and its Latin American "offspring". In particular—citing Merryman[59]—it is said that the export of the Napoleonic Code had pernicious effects in French, Belgian, Dutch, Spanish, and Portuguese colonies that it did not have in France itself.[60] Consequently, the fact that the French legal family performs worst[61] in most law and finance studies is mainly a reflection of Latin American performance. Yet, it is doubtful whether this performance is really linked with the export of French law to these countries. It is

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[54] See Glenn, *Legal Traditions*, *supra* note 52 at 59-91, 170-221.

[55] Similarly, in reference to the spread of the common law, Zweigert & Kötz write:

> [T]his might lead one to the conclusion that in the areas of Africa which were previously under British rule most legal relations today are governed by the rules of English Common Law. This conclusion would be wholly erroneous. The fact is that to much [of] the largest part of the African population the Common Law is of almost no practical significance; the legal relations of Africans, in contract and land matters as well as family and succession matters, are principally governed by the rules of customary African law, and in many regions also by the rules of Islamic law (*supra* note 16 at 230).

[56] See Glenn, *Legal Traditions*, *supra* note 52 at 183-84.

[57] See e.g. La Porta *et al.*, "Law and Finance", *supra* note 13.

[58] Cf. Glenn, *Legal Traditions*, *supra* note 52 ("So we should ... start thinking about the common law and the civil law as representing some of the same ideas, compared with other traditions" at 166).

[59] John Henry Merryman, "The French Deviation" (1996) 44 Am. J. Comp. L. 109 at 116.

[60] See Beck & Levine, *supra* note 10 at 259.

[61] See Part I.B, above. For a counter-reaction to this result by the French Ministry of Justice, see Attractivité Économique du Droit, "Programme international de recherche", online: Mission de Recherche Droit et Justice <http://www.gip-recherche-justice.fr/aed.htm>; Association Henri Capitant des Amis de la Culture Juridique Française, *supra* note 6.

likely that legal and economic problems would not be significantly different had Latin American legal systems not copied the French but, for instance, the German Civil Code. This can also be seen by the fact that German influence on Brazilian law[62] and U.S. influence on the commercial law of most Latin American countries[63] have not caused an automatic change for the better. Thus, the problems in Latin America seem to have a greater connection with the social and economic impacts of colonization[64] than with the borrowing of particular foreign statutes.[65]

As a result, one cannot escape the conclusion that the law and finance categorization of most countries of the world according to a small number of legal families is to a large extent arbitrary. This is also in line with insights from general comparative law, as even comparative lawyers who still apply the notion of legal traditions[66] emphasize the notion's limits. For instance, legal traditions are said to be just "a loose conglomeration of data,"[67] the idea of legal families "is used purely for explanatory purposes,"[68] and even if "[w]e mostly continue to divide the world into civil law, common law, and several other systems[,] ... we know that these are ideal types which merely serve our need to maintain a rough overview."[69] Thus, the criticism in this part does not imply that one should altogether cease to talk about comparative law in terms of legal traditions or families. It makes sense for a textbook on comparative law to divide its chapters according to such categories, as both

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[62] See Zweigert & Kötz, *supra* note 16 at 115.

[63] See M.C. Mirow, "The Code Napoléon: Buried but Ruling in Latin America" (2005) 33 Denv. J. Int'l L. & Pol'y 179 at 185-87.

[64] Glenn suggests a possible reason:

> [I]n creating large states, large corporate structures, large labour organizations, large legal professions—in short, large institutionalized élites in all directions, western law provides all the disadvantages of a large, wooden house in a warm, humid climate. It may be beautiful, and well-designed, but be subject to many forms of internal rot. To survive, it requires protection beyond the structure itself and if this is neglected, or impossible, the structure will not last (*Legal Traditions*, *supra* note 52 at 265).

[65] For a related point, see *ibid.* ("Western development work has thus far been unable to overcome the problem of widespread corruption of western institutions and western law when it has been transplanted abroad ... There appears to be little difference between civil and common law traditions in this regard" at 267-68).

[66] For examples of comparative lawyers critical of the notion, see *supra* note 6.

[67] Glenn, *Legal Traditions*, *supra* note 52 at 15.

[68] René David, *Les grands systèmes de droit contemporains*, 9th ed. (Paris: Dalloz, 2000) at 15, trans. by Zweigert & Kötz, *supra* note 16 at 73. See also David & Brierley, *supra* note 16 (the idea of legal families "is no more than a didactic device" at 21).

[69] Reimann, *supra* note 49 at 677. Zweigert & Kötz express a similar sentiment: "[A]ny division of the legal world into families or groups is a rough and ready device. It can be useful for the novice, by putting the confusing variety of legal systems into some kind of loose order, but the experienced comparatist will have developed a 'nose' for the distinctive style of national legal systems ... " (*supra* note 16 at 72).

Zweigert & Kötz[70] and Glenn[71] do. In these works, the authors can sufficiently address the extent to which (1) the spread of a particular legal tradition has really changed pre-existing traditions, (2) the imported tradition has been displaced by more recent legal traditions, and (3) the secular and religiously inspired legal traditions have interacted in the same country.[72] However, for an econometric study such as those performed by law and finance scholars, clear criteria are necessary because otherwise measurement errors and biased coefficients can result.

## III. Unbundling Legal Families: The Search for Characteristic Features

The criticism put forth in Part II of this article does not imply that different legal traditions are irrelevant. The general statement that "a country's legal heritage shapes its approach to property rights, private contracting, investor protection, and hence financial development"[73] makes sense. Yet, at least for an econometric study on law and finance, one has to find more precise criteria than worldwide distinctions between different legal families. This part identifies and discusses characteristic features that are related but not identical to the notion of legal families.[74]

### *A. Unreliable Categories*

First of all, given that Roman law is a foundation for civil law, but not for the common law,[75] one might expect that the relevance of Roman law to a particular legal system is an appropriate criterion for analysis. Yet there are problems with this proposition. On the one hand, no contemporary legal system is entirely based on Roman law. This is true for even traditional civil law countries such as France and Germany. Both France and Germany can be understood as having mixed legal systems because apart from Roman law, the *droit coutumier* of tribes from Northern

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[70] *Ibid.* The authors have chapters discussing "the Romanistic legal family", "the Germanic legal family", "the Anglo-American legal family", "the Nordic legal family", "the law in the Far East", and "religious legal systems".

[71] *Legal Traditions*, *supra* note 52. Glenn's chapter titles include "A Chthonic Legal Tradition", "A Talmudic Legal Tradition", "A Civil Law Tradition", "An Islamic Legal Tradition", "A Common Law Tradition", "A Hindu Legal Tradition", and "An Asian Legal Tradition".

[72] See Glenn, *ibid.* at 32-58, 343-47; Zweigert & Kötz, *supra* note 16 ("[T]he division of the world's legal systems into families, especially the attribution of a system to a particular family, is susceptible to alteration as a result of legislation or other events, and can therefore be *only temporary*" at 66 [emphasis in original]); Ugo Mattei, "Three Patterns of Law: Taxonomy and Change in the World's Legal Systems" (1997) 45 Am. J. Comp. L. 5 ("[L]egal systems never are. They always *become*" at 14 [emphasis in original]).

[73] Beck & Levine, *supra* note 10 at 254.

[74] This line of reasoning is different from the counter-argument that refers to factors unrelated to legal traditions, such as geography, culture or politics. See notes 33-35 and accompanying text.

[75] See Zweigert & Kötz, *supra* note 16 at 75, 100, 133-34; Alan Watson, *The Making of the Civil Law* (Cambridge, Mass.: Harvard University Press, 1981) at 4.

France and Germanic sources of law influenced their legal systems.[76] On the other hand, various traces of Roman law can be found in common law countries. For instance, in Glenn's description of English law, there are repeated references to Roman law, starting with the influence of canon law and concluding with the role of the European Union.[77] Given these nuances, it would be necessary to set a threshold, such as fifty per cent for example, to determine whether a legal system could be called "Roman" for the purposes of categorization. This would raise the larger problem of how to determine whether a country contains the required "level" of Roman law, a very burdensome (if not impossible) task. As such, the criterion of "Roman law" should not be adopted.

Similarly, it would be difficult to ascertain, for instance, the "Frenchness" or "Germanness" of a country's civil code. Although it is true that many countries have been influenced by the French and German codes, no country has a code that is identical to the French or German model. Even the codes of countries with close ties to France and Germany may look quite different. For instance, there is probably no provision that is exactly the same in any two of the German, Austrian, and Swiss civil codes. Furthermore, the structure, language, and legal concepts are quite different in each of these three. Even for these countries, it would therefore be a very time-consuming process to look at the more than two thousand provisions of each code, identify the similarities and differences between these provisions, and establish a threshold above which these three countries would fall into the same category. For non-European countries, the fact that codes are usually drafted in a comparative fashion further compounds this matter. Thus, the "closeness to a specific code" criterion is also not a very effective standard.

Similar problems arise for the criterion of common law influence in a particular legal system. Legal rules, culture, and practice of countries that are said to belong to the common law family can differ significantly. For instance, one can make the claim that it is far from obvious today that the United States really belongs to the common law family because "[i]n many respects US law represents a deliberate rejection of common law principle, with preference being given to more affirmative ideas clearly derived from civil law."[78] For countries in which pre–common law traditions are still relevant, a common law identity is even more doubtful. An example might be India

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[76] See e.g. Zweigert & Kötz, *ibid.* at 75, 139. See also Örücü, "Family Trees", *supra* note 8 ("[A]ll European systems can be better understood as overlaps" at 363).

[77] *Legal Traditions*, *supra* note 52 at 222 (discussing canon law), 226 (on the similarities between the Roman and English judiciaries), 231-32 (regarding the teaching of Roman law in the twelfth century), 244 (on comparative law in England of the seventeenth century), 246 (discussing Sir Francis Bacon as an example of an English lawyer trained on the continent), 254 (on the Roman origins of trust law), 255 (concerning the influence of continental commercial law), 256 (on civilian lawyers testifying in common law courts), 257 (on Pothier as formal authority in England), 257-58, n. 124 (discussing EU influence). See also H. Patrick Glenn, "La civilisation de la common law" [1993] R.I.D.C. 559.

[78] Glenn, *Legal Traditions*, *supra* note 52 at 248.

because, despite the relevance of the common law's older traditions, indigenous law may be too deeply rooted to be simply disregarded.[79] Similarly, it is said about Thailand that it

> has had in its modern texture a real mixture of sources such as English Law, German Law, French law, Swiss Law, Japanese Law and American Law ... alongside historic sources in existence since 1283, such as rules from indigenous culture and tradition, customary laws and Hindu jurisprudence, still to be found in some modern enactments.[80]

One would therefore need to establish a specific criterion—such as whether the most important judgments of English case law are regarded as "good law"—in order to determine whether a country belongs to the common law family. Once again, this would be very difficult if not impossible in practice.

### *B. Four Criteria for Effective Differentiation*

A more fruitful criterion is whether a country experienced European colonization in the sixteenth through twentieth centuries. This is generally a precise criterion, although one has to clarify how to deal with short-term colonial regimes and how to categorize countries that were colonies of two different colonial powers. This criterion overlaps to some extent with the conventional legal family definition, because colonies of the same country are usually treated as members of that country's legal family. The advantage of this approach, however, is that it looks at the impact of colonization on a particular country as a whole and not only at legal transplantations that may have been only superficial or temporary. That said, analysis based on colonial background may still reveal that the particular way a new law was applied influenced the development of the country. For instance, Glenn has said that "English technique generally involved a more hands-off approach," whereas "[t]he French saw a more universal role for a more universal French law ... "[81] This difference in legal approach may explain differences between former English and French colonies.

A second potentially effective criterion is language. At first blush, this may appear strange: because no language is better than any other, it should not, as such, influence financial development.[82] Yet language is a key determinant of how well ideas "travel" between different countries. This is all the more true if one views translations as necessarily imperfect;[83] the phenomenon of international languages

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[79] *Cf.* text accompanying notes 66-72; Glenn, *ibid.* at 296-97 (relating to chthonic, Hindu, Islamic, and Asian legal traditions); Baxi, *supra* note 49 at 51.

[80] Örücü, "Family Trees", *supra* note 8 at 364.

[81] Glenn, *Legal Traditions*, *supra* note 52 at 259. Differences in colonial strategies are also addressed in Daniel Berkowitz, Katharina Pistor & Jean-François Richard, "Economic Development, Legality, and the Transplant Effect" (2003) 47 European Economic Review 165.

[82] But see Association Henri Capitant des Amis de la Culture Juridique Française, *supra* note 6 ("Génie de la langue française?" at para. 79).

[83] See e.g. Glenn, *Legal Traditions*, *supra* note 52 at 47-48.

(first Latin, then French, and now English) and the possibility of translations do not ensure accurate communication between native speakers of different languages. Though it can be overstated, there is no denying that commonality of language is relevant. A common language facilitates not only the copying of black letter law and its application in practice, but also the exchange of information about its philosophical, sociological, and economic background.

Third, the relative importance of statutory law and courts serves as a useful criterion. The traditional distinction between civil law and common law holds that statutory law is more important in civil law countries and that courts are more important in common law countries.[84] Yet, as statutory law and courts coexist in all countries today,[85] determining which legal institution is "more" important becomes difficult. A possible (though rather formal) standard would be the existence of a comprehensive civil code that covers at least contract, tort, unjust enrichment, family, and succession law. Such a model could be seen as an illustration of what lawyers in a particular country expect a "proper legal system" to look like—namely, an extensively codified system logically structured by abstract legal norms. A more material criterion would be, for instance, the independence and power of judges and the correspondingly reduced influence of statutory law. In this respect, law and finance research on the "political channel" can be used in classifying different countries.[86]

Fourth, a similar but not identical factor for consideration is the formality or flexibility of a legal system. Although it can be suggested that formality is linked to statutory law and flexibility to judge-made law, this is not necessarily the case, since statutory law can also be flexible and case law rigid. The relationship between this consideration and that of legal tradition is particularly strong in the case of French civil law, which is regarded as more formal than other civil law systems.[87] As a proxy for formality or flexibility, the law and finance research on the "adaptability channel" offers useful insight for the classification of different countries.[88]

## IV. Re-examining the Differences

My suggestion is to use the four identifiers considered in Part III.B instead of the legal origins classification used in the law and finance studies. I will therefore provide an example of the findings of a study conducted using the legal origins classification and contrast it with my own approach.

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[84] See e.g. Zweigert & Kötz, *supra* note 16 at 69, 71.

[85] See e.g. Roe, "Legal Origins", *supra* note 22 at 475-79.

[86] See generally note 28 and accompanying text.

[87] See e.g. Beck & Levine, *supra* note 10 at 259. See also Roe, "Legal Origins", *supra* note 22 at 489-92 (noting that over-regulation in civil law countries differs between labour and securities law).

[88] See generally note 30 and accompanying text.

### *A. An Example from the "Legal Origins" Literature*

The Djankov, McLiesh & Shleifer study on creditor protection identified four variables as proxies for the strength of creditor rights.[89] The laws of 129 countries were coded according to these four variables, and each country was given a score from 0 (signifying weak creditor protection) to 4 (signifying strong creditor protection). On the basis of these ratings, Djankov, McLiesh & Shleifer calculated the mean of creditor rights for each legal origin. The result is shown in Table 1, which demonstrates the typical[90] result that the average score of countries of English legal origin (2.222) is higher than the average score of countries of French legal origin (1.328). Because it is possible that differences between the two groups exist simply by chance, the authors carried out the so-called "t-test" to ascertain that the difference in means is statistically significant.[91] In this case, the t-value was calculated to be 3.721; the difference is significant at the one per cent level, leading Djankov, McLiesh & Shleifer to infer that countries of English legal origin really do provide better creditor rights than those of French legal origin.

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[89] These four variables are: (1) restrictions on a debtor's right to file for bankruptcy or restructuring, (2) secured creditors' ability to seize collateral after the bankruptcy or restructuring petition is approved, (3) secured creditors' right to be paid first out of the proceeds of liquidating a bankrupt firm, and (4) management removal from administration of its property pending the resolution of the restructuring (Djankov, McLiesh & Shleifer, *supra* note 15 at 25).

[90] See Part I.B, above.

[91] The t-value yielded by the calculation correlates with the significance of the difference of the means. A t-value below 1.28 means that the difference of means is not statistically significant. A t-value between 1.28 and 2.58 indicates that the difference is statistically significant at the ten per cent level (i.e., that there is a ten per cent probability that the means are different simply by chance). A t-value greater than 2.58 indicates significance at the one per cent level. The higher the t-value, the greater the likelihood that the means are different not simply by chance. Tables illustrating the relationship between t-value and significance can be found in any econometric textbook. See e.g. James H. Stock & Mark W. Watson, *Introduction to Econometrics* (Boston: Addison Wesley, 2003) at 644.

| ***Table 1: Creditor Rights by Legal Origin (Djankov, McLiesh & Shleifer)***[92] | | | |
|---|---|---|---|
| *Legal Origin* | *Number of countries* | *Mean of creditor rights* | |
| English | 36 | 2.222 | t-test<br>English vs. French: 3.721<br>(i.e., significance at the 1 % level) |
| French | 63 | 1.328 | |
| German | 16 | 2.333 | |
| Nordic | 4 | 1.750 | |
| Socialist | 10 | 2.182 | |
| All | 129 | 1.789 | |

### *B. An Alternative Methodology*

The comparison of means according to legal origin is not particularly illustrative, because the way law and finance scholars assign countries to different legal origins is to a large extent random.[93] Instead, I have used the Djankov et al. data on creditor rights and grouped the 129 countries according to "colonizing power", "language", "relative importance of courts and statutory law", and "formality and flexibility of legal systems" as proxies for legal origin. This is shown in Table 2 and subsequently explained.

[92] *Supra* note 15 at 26 (Table II.A for 2003).
[93] See Part II, above.

| ***Table 2: Different Criteria*** | | | |
|---|---|---|---|
| *(1) Creditor Rights by Colonizing Power* | | | |
| *Countries* | *Number of countries* | *Mean of creditor rights* | t-test<br>Former English vs. former French colonies: 4.3853 (i.e., significance at the 1 % level) |
| Former English colonies | 28 | 2.179 | |
| Former French colonies | 24 | 0.75 | |
| Former Spanish colonies | 18 | 1.667 | |
| Former Portuguese colonies | 3 | 1.33 | |
| Others | 59 | 2.067 | |
| *(2) Creditor Rights by Language* | | | |
| *Countries where people speak …* | *Number of countries* | *Mean of creditor rights* | t-test<br>English vs. French: 5.384<br>(i.e., significance at the 1 % level) |
| English | 27 | 2.380 | |
| French | 16 | 0.5 | |
| Spanish | 19 | 1.684 | |
| Portuguese | 4 | 1.25 | |
| Arabic | 14 | 1.5 | |
| Scandinavian languages | 4 | 1.75 | |
| German | 3 | 2.333 | |
| Others | 51 | 2.059 | |

| *(3) Creditor Rights by Supreme Court Power*[94] | | | |
|---|---|---|---|
| *Countries with …* | *Number of countries* | *Mean of creditor rights* | t-test<br>control vs. no control: 1.034<br>(i.e., no significance) |
| Control of administrative cases | 46 | 2.086 | |
| No control of administrative cases | 14 | 1.714 | |
| Term of supreme court judges of at least 6 years | 49 | 2 | |
| Term of 2 to 6 years | 9 | 2.111 | |
| Term of less than 2 years | 2 | 1.5 | |
| *(4) Creditor Rights by Legal Justification*[95] | | | |
| *Countries with …* | *Number of countries* | *Mean of creditor rights* | t-test<br>partly flexible vs. partly inflexible: 1.827 (i.e., significance at the 10 % level) |
| Flexible legal justification (0) | 6 | 2.5 | |
| Partly flexible legal justification (0.33) | 14 | 2.5 | |
| Partly inflexible legal justification (0.66) | 28 | 1.821 | |
| Inflexible legal justification (1) | 23 | 1.565 | |

[94] The criterion of supreme court power is based on La Porta *et al.*, "Judicial Checks and Balances", *supra* note 29 at 34-35.

[95] The legal justification criterion is based on Djankov *et al.*, *supra* note 31. It is "formed by the normalized sum of (i) complaint must be legally justified, (ii) judgment must be legally justified, and (iii) judgment must be on law (not on equity). The index ranges from zero to one, where higher values mean a higher use of legal language or justification" (*ibid.* at 465).

### 1. Methodology

Table 2 uses the same methodology as Table 1.[96] As such, Table 2 not only categorizes countries into different groups but also examines whether the differences in creditor protection affiliated with these groups are statistically significant. The result is that the first two categories (colonizing power and language) have a high statistical significance at one per cent, which means that we can be ninety-nine per cent certain that the differences are not simply random. By contrast, the third category (supreme court power) is not statistically significant, and the fourth category (legal justification) is only significant at the ten per cent level. While this does not mean that these latter two categorizations are useless, we must at the very least interpret the differences in these categories with caution.

### 2. Explaining the Categories

The categorization of countries according to colonizing power and language—(1) and (2) of Table 2—resulted in some countries being classified as "others". This was necessary because some countries either have never been colonies or do not belong to one of the seven language groups listed as part of this table. Moreover, some countries (e.g., Togo, Burundi, Rwanda, and Tanzania) have been colonized by various powers so that they could not be categorized in this respect. With respect to language, a slightly different approach was taken. As the use of the same language fosters communication about law and legal practice, I considered it sufficient if one of the official languages was English, French, Spanish, or Portuguese. Only when a double assignment was necessary, and neither of the two languages was dominant, was a country classified as one of the "others".

To categorize countries according to the relative importance of statutory law and courts and to the formality and flexibility of legal systems, the proxies "supreme court power" and "legal justification"—(3) and (4) of Table 2—were used. The data derive from La Porta et al. and Djankov et al. and have not been re-examined. The role of the supreme court—in particular its powers and the independence of its judges—is a good proxy for the attitude with which a particular legal system regards courts in general. Similarly, the way courts justify a decision is a suitable proxy for the formality or flexibility of a legal system in general. Of course, the use of this data does not imply that, for instance, the flexibility of the law of a particular country is perfectly measured by this single variable. However, given the fact that more than sixty countries are taken into account, these factors can provide some indication of the differences between legal systems.

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[96] See Part IV.A, above.

### 3. The Results

The general result shown in Table 2 is that there are considerable differences between groups of countries. This suggests that legal rules are not merely autonomous tools of governance but are significantly influenced by certain elements of a country's particular legal tradition.

Of the four criteria, colonizing power and language—(1) and (2) of Table 1—appear to be more important than supreme court power and legal justification—(3) and (4) of Table 2—for determining creditor-rights protection. Yet, the high statistical significance of the first two criteria may also be explained by the fact that the questions that determine the creditor-rights score[97] were drafted by English-speaking lawyers from one of the former English colonies (namely, the United States).[98] The analysis could therefore simply confirm the fact that ideas spread more easily among countries with the same language. Thus, the third and fourth criteria are also important because they may reflect legal culture at a deeper level.

In order to understand the results it is also useful to look at the places where these four identifiers overlap. The classifications based on colonizing power and language are similar but not identical. As the former looks at history and the latter at the present situation, some subgroups of the first identifier have fewer members. In this respect, language is more precise because, for instance, it takes into account the fact that ties with former occupiers may have weakened in Arabic-speaking countries. That said, the criterion of colonizing power can have the advantage that the former colonial powers are not themselves included, and thus the category may pinpoint problems that are specific to former colonies.

With respect to supreme court power, all of the former English colonies (and English-speaking countries) belong to the forty-six countries where there is supreme court control of administrative cases and to the forty-nine countries where the term of supreme court judges is more than six years. Former English colonies aside, there is a mixed picture for the supreme court control of administrative cases. The fourteen "no-control" countries are former French, Spanish, and Portuguese colonies as well as countries where people speak French, Portuguese, Spanish, Arabic, German, and the Scandinavian languages. Regarding the term of supreme court judges, more than six of the eleven countries where judges are appointed for less than six years are former Spanish colonies or are Spanish-speaking countries.

The results for legal justification are even more diverse. As expected, the English-speaking countries (as well as the former English colonies) are flexible in this respect (mean: 0.42).[99] Yet, the score for the Nordic countries implies even slightly more

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[97] See Djankov, McLiesh & Shleifer, *supra* note 15 at 25.

[98] This home bias is also a problem of other law and finance studies. See Lele & Siems, *supra* note 19; Siems, "A Critique on La Porta et al.", *supra* note 32.

[99] The following numbers in parentheses all refer to means. A mean closer to 1 indicates less flexibility.

flexibility (0.418). The results for French- (0.668) and Arabic-speaking (0.736) countries as well as for the former French colonies (0.716) indicate that these countries are somewhat inflexible. Finally, German- (0.89), Spanish- (0.903), and Portuguese-speaking (1) countries as well as the former Spanish (0.897) and Portuguese (1) colonies are least flexible.

This article cannot explain in detail why there are differences in these four identifiers. Yet, it is apparent that these differences confirm the danger of using one narrow criterion, such as the common law / civil law distinction. The results by Djankov et al. and other law and finance scholars who use this distinction (Table 1) are most similar to my results when the proxies "colonization" and "language" are used (Table 2). My approach has, however, the advantage of clearly identifying the basis for categorization. If one speaks of colonies (and not members of the same legal family) it becomes clear that the reasons for differences among countries may be a consequence not only of different legal origins but also, for instance, of the ongoing political and economic effects of colonization.[100] The same is true for language because language does not only foster communication about the law but is also a transmitter for ideas in general ("memes").[101]

Law and finance scholars also misinterpret how legal thinking affects the law of different countries. They take as a given that because countries belong to a particular legal family one has to examine the "channel" through which these different legal traditions shape finance.[102] Yet legal traditions are not unvariegated wholes; they have differing components. One of them is, for instance, whether legal systems follow a formal or flexible way of legal reasoning. The adaptability of legal systems is therefore important not as an adaptability "channel", but rather as a criterion that can help identify commonalities and differences in legal thinking among countries. Such a criterion obviates the need to rely on preconceived categories of civil and common law.

## Conclusion

"[C]omparative [law] is bound to be superficial."[103] Therefore, to argue that law and finance studies employ categories that are not one hundred per cent accurate is to mount an unfair criticism. There could also be good reasons why the reduction of

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[100] See Part II, above.

[101] On memes, see especially Richard Dawkins, *The Selfish Gene*, 2d ed. (Oxford: Oxford University Press, 1989). The inventor of the concept of memes was probably Richard Semon. See Richard Semon, *Die Mnemische Empfindungen in ihren Beziehungen zu den Originalenempfindungen* (Leipzig: Wilhelm Engelmann, 1909). See also Simon Deakin, "Evolution For Our Time: A Theory of Legal Memetics" (2002) 55 Current Legal Probs. 1.

[102] See text accompanying notes 27-30.

[103] Lawson, *supra* note 1 at 16.

complexity resulting from this kind of "numerical comparative law"[104] could be a way forward. However, with respect to the specific question of legal traditions, these studies are questionable. The worldwide distinction between different legal families, such as common law and (French, German, or Nordic) civil law is not useful for law and finance analysis. Instead, more precise criteria must be found. My proposal is that the categories "colonizing power", "language", "relative importance of courts and statutory law", and "formality and flexibility of legal systems" should be used. This article has provided an example of what this new approach could look like. Future research may also apply these criteria for statistical regressions.[105] Such studies would enable researchers to analyze with greater nuance the determinants (legal and otherwise) of important phenomena like investor protection or World Cup success.

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[104] See generally Mathias M. Siems, "Numerical Comparative Law: Do We Need Statistical Evidence in Law in Order to Reduce Complexity?" (2006) 13 Cardozo J. Int'l & Comp. L. 521.

[105] For the taking into account of specific econometric problems, such as endogeneity, see e.g. Stock & Watson, *supra* note 91 at 333.