

**Bringing in Foreign Ideas:
The Quest for ‘Better Law’ in Implicit Comparative Law**

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Abstract: It is one of the common objectives of comparative law to make suggestions on how the law can be improved. In reality, however, comparative lawyers are often uncertain of what to conclude from their findings. For example, having examined a number of legal systems in detail, shall the comparatist recommend the most common approach, a compromise solution with a combination of legal rules, or the most well-designed legal solution? This article suggests that comparatists may also consider that many other comparative disciplines, such as comparative politics, sociology and economics, deal with questions that compare and evaluate legal differences – even if this is not done under the heading of comparative law (thus, here called ‘implicit comparative law’). Such research tends to be less hesitant in making wide-reaching legal and policy recommendations based on cross-country comparisons. This article critically discusses how such research in comparative politics, sociology and economics can help in the quest for ‘better law’ – but also what limitations have to be taken into account as we cross academic disciplines.

Keywords: comparative law, interdisciplinary research, better law, law and economics, development policy, welfare models, forms of government

JEL Codes: A12, E02, K00, K40, O10

**Bringing in Foreign Ideas:
The Quest for ‘Better Law’ in Implicit Comparative Law**

Mathias M Siems*

1. INTRODUCTION

Comparative law can have the aim of making suggestions for law reform. Thus, the first meaning of the title of this article is that law-makers may bring in foreign legal ideas that are seen as beneficial in, for example, pursuing aims such as the advancement of economic development. But the title of this article also has a second meaning, namely that ideas may be ‘foreign’ because they originate from another discipline. This will be called ‘implicit’ comparative law (ICL). ICL is based on the understanding that today many other comparative disciplines, such as comparative politics, sociology and economics, deal with questions that compare and evaluate legal differences. However, this is not done under the heading of comparative law. Thus, it is not ‘explicitly’ treated as research on comparative law.¹

It is suggested that ICL is particularly suitable to help comparative lawyers in the quest for ‘better law’. The reason for this is that those non-law comparative disciplines tend to be less hesitant than comparative law in making wide-reaching legal and policy recommendations based on cross-country comparisons. While such research has sometimes been criticised, it is the overall view of this article that the ‘ICL better-law research’ is valuable and should be incorporated into the discipline of comparative law.

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¹ Note that ICL is different from the use of other disciplines as a conceptual tool to improve the method of comparative law. Further examples of ICL are discussed in Siems, M (2014) *Comparative Law* Cambridge University Press at 287-312.

This article is structured as follows. The next section develops a general taxonomy for comparative research on ‘better law’. On this basis, the subsequent three sections address the way in which ICL can contribute to this quest for better law, distinguishing between ‘technically improved laws’, ‘laws meeting aims more successfully’ and ‘laws promoting new aims’. This will be based on examples from various academic disciplines, although it is not the ambition of this article to present a comprehensive treatment of such research. The concluding section provides further reflections on the relationship between comparative law and other disciplines.

2. THE QUEST FOR ‘BETTER LAW’ IN COMPARATIVE LAW

Comparative lawyers frequently discuss the aims of comparative law.² Often, one of those aims is to make suggestions on how the law can be improved. Explicitly, Konrad Zweigert and Hein Kötz suggest ‘that the comparatist is in the best position to follow his comparative researches with a critical evaluation’, and add that ‘(i)f he does not, no one else will do it’,³ Sir Basil Markesinis encourages us to ‘increase intellectual interaction and borrowings’.⁴ Others call for ‘applied comparative law’ or ‘comparative legal diagnostics’.⁵ In this article the terminology of ‘better law’ is borrowed from a controversial view in private international law.⁶ The apparent problem is how to decide on what is ‘better’. It is suggested that three broad categories, each with further sub-categories, can be identified.

² See, eg, Glenn (2012) in Smits, JM (ed) *Elgar Encyclopaedia of Comparative Law* Edward Elgar at 65-74; Öricü, E (2007) ‘Developing Comparative Law’ in Öricü, E and Nelken, D (eds) *Comparative Law: A Handbook* Hart Publishing 43 at 53-56; Mousourakis, G (2006) *Perspectives on Comparative Law and Jurisprudence* Pearson at 7-15.

³ Zweigert, K and Kötz, H (1998) *An Introduction to Comparative Law* (3rd edn) Clarendon at 47.

⁴ Markesinis, Sir B (2000) ‘Our Debt to Europe: Past, Present and Future’ in Markesinis, Sir B (ed) *The Coming Together of the Common Law and the Civil Law* Hart Publishing 37 at 49.

⁵ Finnegan, DL 2006 ‘Applied Comparative Law and Judicial Reform’ (8) *Thomas M Cooley Journal of Practical and Clinical Law* 97; Bellantuono, G (2012) ‘Comparative Legal Diagnostics’, Working Paper, available at <http://ssrn.com/abstract=2000608>.

⁶ Leflar, RA et al (1986) *American Conflicts Law* (4th edn) Michie Co § 95 at 279. For criticism see, eg, Tetley, W (1994) *International Conflict of Laws: Common, Civil and Maritime* Les Éditions Yvon Blais at 14 -15, 447.

First, comparative law may help to improve law ‘technically’. This refers to the situation when, in particular circumstances, in two or more jurisdictions the law leads to a similar result. Such a view is typical for a functional-technical perspective of comparative law, in particular if it assumes a presumption of similar results (*praesumptio similitudinis*).⁷ There can be different reasons why in such a situation a jurisdiction may regard a foreign law as ‘better’. It could be that this law provides more legal certainty, ie clearer legal rules and concepts, for instance, through codification. But it might also be the case that the foreign law is better able to balance different interests, if, for example, it employs general principles, with the details being left to the judiciary. In addition, such an approach may have the advantage that it is more adaptable to possible future developments. Finally, it may be advantageous to have legal rules which are close to the ‘international mainstream’. The rationale may be that it can reduce the costs which arise from differences between legal systems. Another potential benefit is that moving towards the mainstream has the strategic aim of showing that a country wants to modernise its law, even if the actual results do not change much.

Second, the benefit may be that the ‘better’ law meets a particular aim or aims more successfully. This is based on – what can be called – ‘socio-legal functionalism’, meaning the view that the purpose of a particular item of law is to address a particular problem or to pursue a particular policy. It can also be related to utilitarian perspectives which suggest that there is a certain aim, such as the maximisation of happiness, which the law should pursue.⁸ The most intuitive case is that the transplanted institution may achieve the aim more fully. For example, a foreign rule may be better able to address a social problem. The decisive change may also be the provision of new institutional structures, such as better judicial enforcement. Alternatively, it is possible to compare the domestic with the foreign model in terms of costs and benefits. Thus, here, it would be considered that a foreign model might be more effective but also more costly, and that there may be switching costs when a country adopts a foreign model. Another variant of this category is to be concerned about the belief of the local population that a par-

⁷ For this presumption see Zweigert and Kötz *supra* n 3 at 40.

⁸ For the utilitarian case for legal transplants see Bentham, J (1843) ‘Essay on the Influence of Time and Place in Matters of Legislation’ in Bowring, J (ed.), *The Works of Jeremy Bentham* William Tait vol. 1 at 169. See also Huxley, A (2007) ‘Jeremy Bentham on Legal Transplants’ (2) *Journal of Comparative Law* 177.

ticular aim is fulfilled. Thus, even a ‘legal placebo’⁹ may be ‘better’, for example, if the general public wrongly believes that a foreign model of criminal law is more effective in preventing crime.

Third, the improvement may be that a foreign model triggers changes that pursue new aims, such as introducing a new social or economic policy or a re-balancing of group interests. This would be based on the socio-legal evolutionary view that the modernisation of societies and the modernisation of law go hand in hand. The main case is therefore that changes to legal rules have the aim to change society in a particular way.¹⁰ These changes may be geared towards new economic goals, but it can also be the case that the experience of other countries challenges the domestic law on ethical grounds.¹¹ It is also possible that the society has already changed. Thus, here, identifying ‘better law’ means that the foreign law better responds to those changed societal circumstances.¹² Another variant is that the foreign law does not ‘fit’; however, it is seen as useful to follow, because it can be given a new meaning which is beneficial for the latter country. For example, such a situation may occur in constitutional law, because constitutions have different functions in different political environments.¹³

⁹ Aviram, A (2006) ‘The Placebo Effect of Law: Law’s Role in Manipulating Perceptions’ (75) *George Washington Law Review* 54.

¹⁰ Cf. also Nelken, D (2003) ‘Comparatists and Transferability’ in Legrand, P and Munday, R (eds) *Comparative Legal Studies: Traditions and Transitions* Cambridge University Press 437 at 456 (on legal transplants ‘geared to fitting an imagined future’); Pirie, F (2013) *The Anthropology of Law* Oxford University Press at 183, 227 (legal borrowing often aspiration to participate in ‘civilized and sophisticated traditions’).

¹¹ For a controversial example see Glendon, MA (1987) *Abortion and Divorce in Western Law: American Failures, European Challenges* Harvard University Press. See also Glendon, MA; Carozza, PG and Picker, CB (2008) *Comparative Legal Traditions in a Nutshell* (3rd edn) West at 8 (‘power and duty to make a critical evaluation what he or she discovers through comparison’).

¹² Eörsi, G (1979) *Comparative Civil (Private) Law* Akadémiai Kiado at 564 (suggesting the term ‘adaptational reception’).

¹³ See text accompanying note 104 below.

Table 1: Taxonomy of ‘Better Law Comparisons’

<i>Main categories</i>	<i>Underlying view of comparative law</i>	<i>Common criticism</i>	<i>What implicit comparative law (ICL) can offer</i>
<i>Technically improved law</i>	Technical functionalism; presumption of similarity	Legal systems reflect unique cultures	Are these differences really only ‘technical’ ones or do they play a role for substantive aims?
<i>Law meeting a particular aim(s) more successfully</i>	Socio-legal functionalism; utilitarianism	Law cannot be assumed to have a clear pre-determined causal effect	Do empirics show that particular rules ‘work’ better, and what is the role of law enforcement?
<i>Law promoting new aim(s)</i>	Socio-legal evolutionary approach	Patronising to assume that some legal systems are less advanced	What aims are available, and does experience show that one of them is preferable?

Table 1 summarises this taxonomy. In addition, it indicates some of the criticism directed at ‘better law comparisons’. Here, first, culture and difference play a prominent role. For example, the ‘cultural constraints argument’ argues that differences between legal systems are ‘unbridgeable’ since laws are embedded in ‘unique national cultures’.¹⁴ We are also told to ‘celebrate plurality’ and to reject the view of law as an instrument of solving problems.¹⁵ Second, it is not seen as a task of comparative law to tell us which solutions work ‘better’ to meet a particular aim, but, rather, the aim is to get a better understanding of the world. This also relates to the view that legal rules are deeply embedded in their historical, social, cultural and economic context, preventing valid cross-cultural statements about the quality of legal rules.¹⁶ Thus, it is regarded as

¹⁴ Antokolskaia, M (2007) ‘Comparative Family Law: Moving with the Times?’ in Örüçü and Nelken supra n 2, 241 at 256 (for family law). See also Grossfeld, B (1990) *Strength and Weaknesses of Comparative Law* Clarendon at 41 (uniqueness of legal systems); Legrand, P (1998) ‘Are Civilians Educatable?’ (18) *Legal Studies* 216 at 225, 229 (differences seen as matter of ‘national and cultural identity’).

¹⁵ See McCrudden, C (2007) ‘Judicial Comparativism and Human Rights’ in Örüçü and Nelken supra n 2, 371 at 373-4; Menski, W (2006) *Comparative Law in a Global Context* (2nd edn) Cambridge University Press at 11.

¹⁶ De Cruz, P de (2007) *Comparative Law in a Changing World* (3rd edn) Routledge Cavendish at 224 (‘the comparatist is not seeking to be judgmental about legal systems in the sense of whether he believes them to be “better” or “worse” than any other given system’); Legrand, P (2006) ‘Comparative Legal Studies and the Matter of Authenticity’ (1) *Journal of Comparative Law* 371 at 448 (‘(t)here cannot be a “better” law. The very notion is fallacious. Who could finally and definitively say what it is?’).

impossible to say that laws have a clear pre-determined causal effect. The third line of criticism is that claims about ‘better law’ are often patronising towards allegedly less developed societies. For example, the imposition of human rights on non-Western countries is sometimes seen as a ‘neo-imperial’ endeavour in promoting property rights that mainly benefit international companies and investors.¹⁷ And more generally the reception of a foreign law may even be compared to ‘the extinction of animal and plant species that results from the destruction of natural habitat’.¹⁸

Thus, it seems that this internal debate among comparative lawyers about ‘better law comparisons’ has reached something of a dead end. The remainder of this article will therefore turn to other comparative disciplines (ie, ICL, see 1 above) in order to broaden and deepen our ability to assess legal models from different countries. As Table 1 indicates, this article suggests that ICL may be able to provide answers to a number of core questions of ‘better-law comparisons’. This will be elaborated in the following sections.

3. ICL ON TECHNICALLY IMPROVED LAW

Recommendations for the technical improvement of law may be thought to lie primarily in the domain of comparative (and non-comparative) lawyers. However, ICL also has something to say about this topic. In particular, it can raise the question of whether such differences do not also play a substantive role, as the following two examples aim to illustrate.

First, a major topic of the ‘technical’ nature of law is whether it is preferable to have detailed statute law or more general principles, based, say, on case law. The view favouring statute law can be traced to Max Weber. Weber developed a typology of socio-legal systems, distinguishing between two dimensions: on the one hand formal and

¹⁷ Mattei, U and Nader, L (2008) *Plunder: When the Rule of Law is Illegal* Wiley-Blackwell at 153; Obiora, LA (1998) ‘Toward an Auspicious Reconciliation of International and Comparative Analyses’ (46) *American Journal of Comparative Law* 669 at 673-4.

¹⁸ Hyland, R (1996) ‘Comparative Law’ in Patterson, D (ed), *A Companion to Philosophy of Law and Legal Theory* Wiley-Blackwell 184 at 193. See also de Sousa Santos, B (2004) *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (2nd edn) Butterworths at 192.

substantive (or informal), and on the other hand rational and irrational.¹⁹ It was seen as damaging if a society was based on irrationality, be it formal (eg, using oracles) or informal (eg, deciding conflicts in an arbitrary way). With respect to rational regimes, Weber preferred the formality of rules to the informality of principles, values and traditions. These ‘ideal types’ were seen as related to different countries and regions: irrationality was associated with Asian and African cultures, for example, referring to Confucian ethics in China and the ‘Khadi justice’ of Islamic law. Informal rationality was associated with England, and formal rationality was seen as typical for the modern Roman-based codes of continental Europe which was then also associated with a successful capitalist economy.

Weber’s view has been criticised for its dismissive treatment of non-Western laws,²⁰ but in the present context it is mainly of interest that other researchers regard case law as preferable. For example, law and economics scholars often claim that case law is more efficient than statute law, because it enables a decentralised, bottom-up construction of the legal order.²¹ The argument is that, while civil and common law may often reach similar results, in the long run the case-law style of the common law leads to a legal system that is more adaptable than the civil law.

Economists have also tried to identify how such criteria could be measured. For example, Thorsten Beck and colleagues used three proxies for a variable on legal adaptability: ‘complaint must be legally justified, judgment must be legally justified, and judgment must be on law (not on equity)’.²² The result was that the law seemed to be more adaptable in common than in civil law countries. Yet, there are some problems with this line of reasoning. The extent of legal adaptability is not just dependent on the

¹⁹ The main work is Weber, M (1978) [1922] *Economy and Society* University of California Press. This summary is based on Siems, supra n 1 at 303.

²⁰ Eg, Qian, XY (2010) ‘Traditional Chinese law v Weberian legal rationality’ (10) *Max Weber Studies* 29; Nader, L (2009) ‘Law and the Frontiers of Illegality’ in von Benda-Beckmann, F, von Benda-Beckmann, K and Griffiths, A (eds), *The Power of Law in a Transnational World. Anthropological Enquiries* Berghahn Books 54 at 62.

²¹ See, eg, Zywicki, TJ and Stringham, EP (2011) ‘Common Law and Economic Efficiency’ in Parisi, F (ed), *Production of Legal Rules* Edward Elgar 107; Mahoney, PG (2001) ‘The Common Law and Economic Growth: Hayek Might be Right’ (30) *Journal of Legal Studies* 503.

²² Beck, T; Demirguc-Kunt, A and Levine, R (2003) ‘Law and Finance. Why Does Legal Origin Matter?’ (31) *Journal of Comparative Economics* 653 at 664 with data from Djankov, S, La Porta, R, Lopez-de-Silanes, F and Shleifer, A (2003) ‘Courts’ (118) *Quarterly Journal of Economics* 453 at 465.

role of courts. A more meaningful catalogue also needs to take into account the legislature, the lawyers and the general public of a particular place. If this is done, the situation is more ambiguous as to which legal family has an advantage in terms of adaptability.²³ Moreover, adaptability has to be balanced with legal certainty. This leads us back to Weber's reasoning and, in the current context, it has indeed been argued that civil law countries have an advantage in terms of legal certainty.²⁴

Second, even when the actual results are similar, one may well wonder whether it matters if the legal rules of a particular country are close to the international mainstream. Here, the argument in favour of uniform rules is that it can decrease the transaction costs arising from differences between legal systems.²⁵ The opposing view is that there is a benefit in diversity as it stimulates regulatory competition for better laws, ie a 'race to the top'.²⁶

These topics have also attracted a good deal of research in economics and related disciplines. Some of it uses theoretical models in order to understand the costs and benefits of harmonisation and regulatory competition.²⁷ There has also been empirical research, for example, on the functioning and role of both of these themes in the US and its states, Canada and its provinces, and the EU and its Member States.²⁸ But this research has not led to unambiguous results. Lawyers often point out that the legal preconditions for harmonisation and regulatory competition play a decisive role, for exam-

²³ Siems, M (2006) 'Legal Adaptability in Elbonia' (2) *International Journal of Law in Context* 393.

²⁴ See www.fondation-droitcontinental.org/jcms/c_12115/index-de-la-securite-juridique and Raynouard, A and Kerhuel, A-J (2011) 'Measuring the Law: Sécurité Juridique as a Watermark' (8) *International Journal of Disclosure and Governance* 360.

²⁵ Cf, eg, Mattei, U (1997) *Comparative Law and Economics* University of Michigan Press at 94, 219; Pistor, K (2002) 'The Standardization of Law and Its Effect on Developing Economies' (50) *American Journal of Comparative Law* 97.

²⁶ The distinction between 'race to the bottom' and 'race to the top' is from Cary, WL (1974) 'Federalism and Corporate Law: Reflections Upon Delaware' (83) *Yale Law Journal* 663.

²⁷ Eg, Crettez B; Deffains B and Musy O (2013) 'On Legal Cooperation and the Dynamics of Legal Convergence' (156) *Public Choice* 345; Carbonara, E and Parisi, F (2007) 'The Paradox of Legal Harmonization' (132) *Public Choice* 367; Van den Bergh, R (2000) 'Towards an Institutional Legal Framework for Regulatory Competition in Europe' (53) *Kyklos* 435.

²⁸ Eg, in company law: Romano, R (1993) *The Genius of American Corporate Law* AEI Press; Cumming, D and MacIntosh, JG (2000) 'The Role of Interjurisdictional Competition in Shaping Canadian Corporate Law' (20) *International Review of Law and Economics* 141; Becht, M; Mayer, C and Wagner, HF (2008) 'Where do Firms Incorporate? Deregulation and the Cost of Entry' (14) *Journal of Corporate Finance* 241.

ple, the rules on private international law. Economists, by contrast, tend to focus on other themes, for example, the role of information and switching costs, the incentives of both law-makers and users, and the relevance of path dependencies.²⁹

Thus, overall, ICL does not provide a clear answer about the right level of statute law and harmonisation. Yet, in both instances, it manages to show that those differences are not only of a technical nature. Thus, here already, we can see that comparative law can benefit from research in other disciplines. Even more so, this is the case for the topics of the following two categories.

4. ICL ON LAW WHICH MEETS AIMS MORE SUCCESSFULLY

The present section discusses whether comparative experience may be used to pursue a particular aim or aims more successfully. Unlike the discussion in the subsequent section, where comparative insights are used to promote new aims, it is assumed that this aim is not controversial. To be sure, this conceptual division is not always clear-cut. It can depend on the level of generality of whether aims are uncontroversial. For example, general aims such as promoting economic growth or maximising the happiness of all may be uncontroversial for the jurisdictions of a particular study. However, as law-makers pursue more precise aims, it may then be controversial whether, say, growth in production or growth in financial markets is the jurisdictions' main economic aim.

It is suggested that ICL is particularly helpful in analysing the effect of the law from a comparative perspective, because in many non-law disciplines empirical data are more widely analysed than in legal research. The present section explains this research in three steps, while also addressing the difficulty of establishing clear causal relationships.

4.1 Foreign Experience on the Effects of Particular Legal Rules

Economists and other social scientists have conducted many quantitative comparative studies in order to establish which types of legal rules are 'best' — most conducive for

²⁹ See, eg, the research cited in the previous two footnotes.

financial development, for example. A well-known study by Rafael La Porta and colleagues coded the law on shareholder protection (as well as creditor protection) across 49 countries.³⁰ The strength of shareholder protection was based on an aggregate of six variables defined in a binary way. For instance, the variable on ‘proxy by mail allowed’ was said to ‘equal[s] one if the company law or commercial code allows shareholders to mail the proxy vote to the firm, and zero otherwise.’ La Porta et al then drew on these numbers as independent variables for statistical regressions, finding that good shareholder protection leads to more dispersed shareholder ownership, which can be seen as an indicator for developed capital markets. They also grouped the 49 countries into ‘legal origins’ (ie, legal families), with the result that common-law countries had the relatively strongest and French civil-law countries the weakest legal protection of shareholders.

Subsequent papers by those scholars (though with modifications in co-authorship) have used a similar method for other areas of law such as civil procedure, securities regulation and labour law.³¹ The World Bank has also incorporated some of the ‘La Porta studies’ into its Doing Business Reports, annually published since 2004.³² Other organisations and groups of scholars have also conducted empirical research on the effect of legal rules. From as early as the 1990s the OECD developed indicators of employment protection.³³ These indicators have inspired academic research on establishing a link between employment law and the role of firm-specific, industry-specific and general skills.³⁴ In company law and related fields a project on Law, Finance and

³⁰ La Porta, R; Lopez-de-Silanes, F; Shleifer, A and Vishny, R (1998) ‘Law and Finance’ (106) *Journal of Political Economy* 1113. See also Djankov, S; La Porta, R; Lopez-de-Silanes, F and Shleifer, A (2008) ‘The Law and Economics of Self-Dealing’ (88) *Journal of Financial Economics* 430 (acknowledging some of the previous shortcomings). See also the contributions of Dionysia Katelouzou, Jaakko Husa and Gary Watt in this volume.

³¹ Djankov et al supra n 22; La Porta; R, Lopez-de-Silanes, F and Shleifer, A (2006) ‘What Matters in Securities Laws’ (61) *Journal of Finance* 1; Botero, J; Djankov, S; La Porta, R; Lopez-de-Silanes, F and Shleifer, A (2004) ‘The Regulation of Labor’ (119) *Quarterly Journal of Economics* 1340.

³² See www.doingbusiness.org. The Doing Business Report also employs some socio-legal data, eg, on courts (see also the subsequent section of this article).

³³ OECD Indicators of Employment Protection (current version from 2013), available at www.oecd.org/employment/emp/oecdindicatorsofemploymentprotection.htm.

³⁴ Estevez-Abe, M; Iversen, T and Soskice, D (2001) ‘Social Protection and the Formation of Skills: A Reinterpretation of the Welfare State’ in Hall, PA and Soskice, D (eds), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* Oxford University Press

Development, based at the University of Cambridge, conducted a more refined study of legal rules than the La Porta studies. However, the claim that the quality of the law is reflected in a country's financial development was only confirmed in some cases.³⁵ Another study conducted at the University of Bremen examined the conveyancing services market in the EU. This study managed to show that a higher degree of regulation has a negative effect on the choice, quality, certainty and speed of conveyancing services.³⁶

This research about the causal effect of law has been highly influential, but also controversial. Some of the criticism relates to the construction of legal indices, the coding of legal rules and the aggregation of legal data. Often this line of criticism is related to specific studies. For example, La Porta et al's quantification of shareholder protection is frequently seen as flawed.³⁷ There is also a more general problem of reducing the high complexity of the strength of shareholder protection (or other legal topics) across countries to mere numbers.³⁸ But this does not mean that such attempts cannot be made, as the experience of other disciplines shows that it is not impossible to quantify information on highly complex topics such as pollution levels, economic growth or intelligence.

A further contentious issue is whether it is possible to say that there is a clear link between law and financial development. Some empirical scholarship has suggested that other aspects such as politics, culture and capital account liberalisation are more important for financial development than legal rules.³⁹ There is also the problem that, if

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³⁵ Summary in Siems, M and Deakin, S (2010) 'Comparative Law and Finance: Past, Present and Future Research' (166) *Journal of Institutional and Theoretical Economics (JITE)* 120.

³⁶ Study for the European Commission (COMP/2006/D3/003), DG Competition led by the Centre of European Law and Politics (ZERP) at Bremen University, Germany, available at http://ec.europa.eu/competition/sectors/professional_services/studies/studies.html.

³⁷ Eg, Spamann, H (2010) 'The 'Antidirector Rights Index' Revisited' (23) *Review of Financial Studies* 468; Lele, P and Siems, M (2007) 'Shareholder Protection: A Leximetric Approach' (7) *Journal of Corporate Law Studies* 17.

³⁸ Siems, M (2005) 'Numerical Comparative Law Do We Need Statistical Evidence in Law in Order to Reduce Complexity' (13) *Cardozo Journal of International and Comparative Law* 521.

³⁹ Eg, Roe, MJ and Siegel, JI (2011) 'Political Instability: Effects on Financial Development, Roots in the Severity of Economic Inequality' (39) *Journal of Comparative Economics* 279; Stulz, RM and Williamson, R (2003) 'Culture, Openness, and Finance' (70) *Journal of Financial Economics* 313; Chinn, MD and Ito, H (2006) 'What Matters for Financial Development? Capital Controls, Institutions, and Interactions' (81) *Journal of Development Economics* 163.

there is causality, it can go the other way.⁴⁰ For instance, there are examples which show that it was only after the number of investors and the importance of the capital market was increased that shareholder protection was strengthened.⁴¹ Yet, there are also ways to address this problem. For example, as far as time series data are available, it can be possible to identify the direction of causality.

In the present context, the main challenge is whether data showing that a particular model works ‘best’ really tells us that this model should be adopted. In reaction to the World Bank’s Doing Business Report, a French group criticised the doing-business focus of the report, taking the view that law should aim ‘to protect social peace and the citizens’ freedom and will’.⁴² Thus, the argument is that claiming to measure what works ‘best’ is only meaningful as far as countries follow the same aim. Apart from basic human needs, this is unlikely to be the case for a study that examines all countries of the world.

Insofar as countries do pursue the same aim, it is also not clear whether following the most successful model is always advisable. The research cited above is only able to show that, overall, a particular model works better than others. But in an individual case it may, given the association between legal rules and the social, economic and cultural context of the law, work quite differently than intended.⁴³ Thus, while such research can be a useful guidance, the apparent advantage of a foreign model should not be seen as providing law-makers with a blueprint that should simply be adopted without further reflections.

⁴⁰ See generally Chong, A and Calderon, C (2000) ‘Causality and Feedback Between Institutional Measures and Economic Growth’ (12) *Economics and Politics* 69 (multiple causal relationship with various feedback mechanisms); Aoki, M (2001) *Toward a Comparative Institutional Analysis* MIT Press at 6 (‘institutions should be viewed as co-evolving with economic-demographic dynamics rather than determining economic demographic variables in a uni-directional way’).

⁴¹ Cheffins, BR (2001) ‘Does Law Matter? The Separation of Ownership and Control in the United Kingdom’ (30) *Journal of Legal Studies* 459. See also Cheffins, BR (2008) *Corporate Ownership and Control: British Business Transformed* Oxford University Press (exploring what actually led to dispersed shareholder ownership in the UK).

⁴² Fauvarque-Cosson, B and Kerhuel, A-J (2009) ‘Is Law an Economic Contest? French Reactions to the Dong Business World Bank Reports and Economic Analysis of Law’ (57) *American Journal of Comparative Law* 811 at 822 (referring to the reaction by the Association Henri Capitant des Amis de La Culture Juridique Française).

⁴³ For the different views about the relationship between law and society see Siems *supra* n 1 at 121-4.

4.2 Learning How Rules Can Be Better Enforced

Meeting common aims more successfully can also be achieved by improving the enforcement of the law. This refers not just to the role of courts but also to administrative bodies and other institutions. Apart from comparative legal research, other comparative disciplines have taken an interest in these topics. In particular, comparative politics has become more and more interested in the way state institutions work, including a shift from emphasising universal relationships to an emphasis on the role of context.⁴⁴

Sometimes it is possible to identify a common general aim which countries pursue in the design of such institutions. For example, comparative research on administrative practices often starts with the problem that rulers may be tempted to appoint friends, family members and political allies to positions of power. Thus, research in political science attempts to develop categories that can be used to compare the professionalism and effectiveness of bureaucracies.⁴⁵ One also needs to consider, though, that this ‘Weberian’ aim for a professional and politically neutral civil service may be supplemented (or substituted) by other aims. For instance, researchers today often distinguish bureaucracies which implement pre-defined programmes from those that aim for client satisfaction, consumer participation, conflict resolution and cost-effective results.⁴⁶

Similar problems arise if one wishes to identify ‘the best’ courts with quantitative cross-country data. However, such an evaluation is often attempted, and the World Bank even claims that ‘(m)easuring the performance of the various elements of the jus-

⁴⁴ See March, JG and Olsen, JP (2006) ‘Elaborating the “New Institutionalism”’ in Rhodes, RAW, Binder, SA and Rockman, BA (eds), *The Oxford Handbook of Political Institutions* Oxford University Press 3; Mair, P (1996) ‘Comparative Politics: An Overview’ in Gooden, R and Klingemann, H-D (eds) *A New Handbook of Political Science* Oxford University Press 309 at 315, 328.

⁴⁵ Discussion of possible criteria in Fukuyama, F (2013) ‘What Is Governance?’ (26) *Governance* 347.

⁴⁶ See Adler, M and Stendahl, S (2012) ‘Administrative Law, Agencies and Redress Mechanisms in the United Kingdom and Sweden’ in Clark, DS (ed) *Comparative Law and Society* Edward Elgar 254 at 257.

tice sector is crucial for any justice reform'.⁴⁷ For example, reports by the World Bank⁴⁸ have incorporated two studies by Simeon Djankov and colleagues. These studies deal with the efficiency of courts and the regulation of entry of start-up firms across 109 and 85 countries respectively, in particular the speed of proceedings. In the article on courts this relates to the duration of trial and enforcement for hypothetical cases to evict a tenant for non-payment of rent and to collect a bounced cheque, and in the article on regulation of entry they examine the number of procedures, official time, and official cost that a start-up must bear before it can operate legally. Finally, the view is taken that in both instances lengthy proceedings are harmful to the ease of doing business.⁴⁹

While the length of proceedings cannot be the only 'benchmark' that matters for the assessment of courts, it seems plausible that overly lengthy proceedings are harmful since they make the substantive rights underlying these proceedings obsolete. The problem is, though, that these substantive rights are often very diverse across countries. For example, the Djankov et al study, which uses court proceedings to evict a tenant as a starting point, is unsatisfactory because some countries have special laws to protect tenants. Such general comparisons of courts can, therefore, only be a valid basis for policy recommendations if they are limited to countries that have a comparable social structure and comparable substantive law on a particular issue.

Empirical research can also be revealing for the strength of other more specific enforcement institutions. For example, Howell Jackson and Mark Roe have challenged the view that it is good private enforcement of investor protection, but not good public enforcement, which stimulates financial market development.⁵⁰ For this purpose, resource-based enforcement data, such as the staffing of securities commissions per population and its budget per GDP, were used as indicators for the strength of public enforcement. The authors found that public enforcement is more important than private

⁴⁷ See <http://go.worldbank.org/LRFA0Q06E1>; ie the purpose is to improve these institutions, thus, developing 'benchmarks' or 'indicators'; see Davis, KE, Kingsbury, B and Merry, SE (2012) 'Indicators as a Technology of Global Governance' (46) *Law and Society Review* 71.

⁴⁸ World Development Report (2002) *Building Institutions for Markets* Oxford University Press at 117-132 (for the courts study) and the Doing Business Reports (see note 32 above).

⁴⁹ Djankov et al supra n 22; Djankov, S; La Porta, R; Lopez-de-Silanes, F and Shleifer, A (2002) 'The Regulation of Entry' (117) *Quarterly Journal of Economics* 1.

⁵⁰ This relates to La Porta et al supra n 31.

liability rules, and about as important as disclosure rules, in explaining financial outcomes.⁵¹

The Jackson and Roe study was based on the plausible assumption that securities commissions have similar tasks, such as enforcing laws against insider dealing, securities fraud, financial disclosure violations and so on. However, it may be problematic to rely solely on ‘input measures’ such as staffing and budget. In the analysis of institutions, political scientists and economists often distinguish between input and output measures.⁵² Neither of these measures are perfect. For example, input measures are not meaningful if good financial resources are wasted, and output measures are not meaningful if a particular jurisdiction happens to have more (or less) violations of the law than others due to external circumstances. Thus, it seems advisable to consider both sets of measures before making policy recommendations based on a foreign enforcement model.

4.3 Complicating the Assessment: Costs and Perceptions

Up to this point, it has been assumed in this section that it ‘only’ matters whether a particular law is better able to pursue a particular aim. But this is not the full picture. First, it seems likely that countries do not just want to assess the benefits of foreign models. They also want to assess their costs. These may be ‘switching costs’, but they may also be permanent ones such as the side effects of substantive rules, or increased funding for improved enforcement institutions. Disciplines which are more quantitative than law can make an important contribution in assessing these costs and benefits.

Take the simple example of a stolen asset bought by a bona-fide purchaser. Some jurisdictions, such as England and Wales, tend to protect the original owner of the stolen asset, whereas others, such as France, tend to protect the bona fide purchaser. Assuming economic efficiency as a common aim, we have to compare the costs generated

⁵¹ Jackson, HE and Roe, MJ (2009) ‘Public and Private Enforcement of Securities Laws: Resource-Based Evidence’ (93) *Journal of Financial Economics* 207.

⁵² See, eg, Fukuyama *supra* n 45 at 355-6.

by taking care of the asset with the costs for investigations of the ownership of the title. This can enable us to say whether the French or the English solution is preferable.⁵³

Second, instead of relying on objective data, law-makers may consider the way in which the population subjectively perceives how well a particular aim is fulfilled. Comparative survey methods are frequently used in the social sciences, and they are also an important tool for governments and other policy actors.⁵⁴ Some global surveys of this type provide interesting opportunities for further analysis. One such survey was conducted by Maksym Ivanyna and Anwar Shah, who constructed a ‘citizen-centric governance index’ based on data from the World Value Survey.⁵⁵ In another such survey, Bruno Deffains and Ludvine Roussey found that the level of trust in judicial institutions, as measured by the same survey, positively depends on public resources devoted to the judiciary.⁵⁶

The problem with comparative survey data is, however, that the answers may not be fully comparable across countries. There is the apparent risk that participants understand broad terms such as ‘trust in the judiciary’ in a dissimilar way, in particular when questions are drafted in different languages.⁵⁷ It is also said that participants are typically coloured by cultural differences and recent economic performance.⁵⁸ Moreover, participants may have their own agenda. For example, a ‘loyal citizen could try to make his country look better than it really is, whereas a political activist striving for improvement might try to make his or her country look worse than it really is’.⁵⁹

⁵³ See Ogus, A (2006) *Costs and Cautionary Tales: Economic Insights for the Law* Hart Publishing at 45-7 (suggesting that the French solution is preferable since it is more expensive to investigate a foreign title than to take care of one’s own assets).

⁵⁴ References in Hantrais, L (2009) *International Comparative Research: theory, methods and practice* Palgrave Macmillan and St Martin’s Press at 17, 26, 49, 130.

⁵⁵ Ivanyna, M and Shah, A (2011) ‘Citizen-centric Governance Indicators: Measuring and Monitoring Governance By Listening to the People’, (12) *CESifo Forum* 59. For the World Value Survey see www.wvsevsdb.com/wvs/WVSDData.jsp.

⁵⁶ Deffains, B and Roussey, L (2012) ‘Confidence in Judicial Institutions: An Empirical Approach’ (8) *Journal of Institutional Economics* 351.

⁵⁷ See Hantrais *supra* n 54 at 78-81.

⁵⁸ Kurtz, MJ and Schrank, A (2007) ‘Growth and Governance: Models, Measures, and Mechanisms’ (69) *The Journal of Politics* 538; Hantrais *supra* n 54 at 82-3.

⁵⁹ Feld, LP and Voigt, S (2003) ‘Economic Growth and Judicial Independence: Cross-country Evidence Using a New Set of Indicators’ (19) *European Journal of Political Economy* 497 at 505.

Thus, it is doubtful whether law-makers should rely solely on survey data to compare the suitability of legal rules and institutions. However, such data may still be one of several useful sources of information, given that different methods of data collection all have their advantages and disadvantages. Scholars and policy makers have also developed combined indicators,⁶⁰ though those may raise problems of aggregation if the results are sensitive to small changes.⁶¹

5. ICL ON LAW WHICH PROMOTES NEW AIMS

Since different jurisdictions pursue different aims, comparative lawyers are often not sure whether or how it can be said that the law of one jurisdiction is ‘better’ than the law of another jurisdiction. Other social sciences may acknowledge the same problem, but there is also a greater willingness to evaluate whether one of these aims is preferable. This section discusses three fields where this has been attempted. They relate to the: law of developing countries; models of capitalism and welfare law; and constitutional law. These are topics that, traditionally, have not been the core focus of comparative lawyers. Thus, it is suggested that ICL may be able to fill this gap, at least as far as it can present different policy options.

5.1 Economic Development, Human Development and Happiness

Today, a dominant narrative advises that law should aim to promote economic development. Economists in particular have shaped the current debate. For example, the Peruvian economist Hernando de Soto claims that economic development depends on the formal protection of property, because informality tends to foster corruption and ineffi-

⁶⁰ The most well-known set of combined indicators is that set out in Kaufmann, D; Kraay, A and Mastruzzi, M (2010) ‘The Worldwide Governance Indicators: Methodology and Analytical Issues’ World Bank Policy Research Working Paper No. 5430, available at <http://ssrn.com/abstract=1682130>. The World Bank’s Governance Indicators (www.govindicators.org) are based on this method.

⁶¹ Hawken, A and Munck, GL (2011) ‘Does the Evaluator Make a Difference? Measurement Validity in Corruption Research’ Committee on Concepts and Methods Working Paper Series 48.

ciencies.⁶² Books by Kenneth Dam, Bob Cooter & Hans-Bernd Schäfer and Niall Ferguson also refer to the need for secure property rights, rules protecting investors and an effective judicial system if economic development is to take place.⁶³ Moreover, empirical work is said to have confirmed that those and related reasons ‘matter’, in particular ‘institutions’, ‘governance’ and the ‘rule of law’.⁶⁴

However, a number of counter-arguments can be suggested. First, it is unrealistic to assume that there is only a unidirectional relationship between legal and non-legal factors.⁶⁵ In particular, it is also possible that the society has already changed and that law is catching up with these developments.⁶⁶ In the current context this is particularly relevant for the phenomenon of ‘localised globalism’, namely where local patterns change due to the impact of transnational imperatives, for example, if law-makers feel that they have to respond to the growing influence of multinational corporations.⁶⁷

Second, this view has been heavily criticised as far as it appears to suggest a blueprint for all countries of the world. The main objection is that this promotes a Western model that may not be suitable elsewhere. This line of criticism can refer to the legal context: for example, it may be said that there are ‘different popular ideas in different countries about the purposes of law and what is to be expected from it’,⁶⁸ and that ‘pre-packed reforms’ tend to pay no attention to the way new and old law, including its legal

⁶² Eg, de Soto, H (1989) *The Other Path: The Invisible Revolution in the Third World* Harper and Row; de Soto, H (2000) *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, Basis Books.

⁶³ Dam, KW (2006) *The Law-Growth Nexus: The Rule of Law and Economic Development* Brookings Institution Press; Cooter, RD and Schäfer, H-B (2011) *Solomon’s Knot: How Law Can End the Poverty of Nations* Princeton University Press; Ferguson, N (2011) *Civilization: The West and the Rest* Penguin Press.

⁶⁴ Eg Acemoglu, D; Johnson, S and Robinson, JA (2005) ‘Institutions as Long Run Causes of Economic Growth’, in Aghion, P and Durlauf, SN (eds), *Handbook of Economic Growth* (vol IA) Elsevier 385; Rodrik, D; Subramanian, A and Trebbi, F (2004) ‘Institutions Rule: The Primacy of Institutions over Geography and Integration in Economic Development’ (9) *Journal of Economic Growth* 131. See also Haggard, S; MacIntyre, A and Tiede, L (2008) ‘The Rule of Law and Economic Development’ (11) *Annual Review of Political Science* 205.

⁶⁵ See text accompanying note 40.

⁶⁶ See explanations to Table 1 above.

⁶⁷ For the distinction between ‘globalised localism’ and ‘localised globalism’ see de Sousa Santos, supra n 18.

⁶⁸ Nelken, D (2007) ‘Defining and Using the Concept of Legal Culture’ in Örüçü and Nelken supra n 2, 109 at 124-5.

culture and institutions, relate to each other.⁶⁹ It can also be said that the problem with imported Western law is that it may ‘clash’ with the society of the country in question, given that law does not exist in isolation of ‘history, culture, human and material resources, religious and ethnic composition, demographics, knowledge, economic conditions, politics [etc]’.⁷⁰ However, it is clear that this would not convince someone who supports importing a foreign legal model if this model has precisely the aim to change the society in question.

Thus, third, the more substantive counter-argument is that economic development should not be the main aim. Some of the critical literature is fairly ‘political’, rejecting the ‘capitalist’ focus on privatisation, property rights and ease of doing business and the corresponding disregard of resource preservation and social rights.⁷¹ But there are also more refined positions. A good example is the work by Amartya Sen, the winner of the Nobel Memorial Prize in Economic Sciences in 1998. His suggestion is that of ‘development as freedom’, meaning that the main aim should be to enable everyone ‘to be able to do and be’.⁷² This requires elementary ‘capabilities’, not simply income and wealth, but, for example, education, social security, personal liberties, equal opportunities and fairness. A recent report, co-authored by Sen,⁷³ also refers to subjective well-being as a possible measure of social progress, reflecting the growing field of ‘happiness studies’.

It follows that learning is not limited to one model. For example, if one assumes that common law countries have an advantage in economic development, this does not necessarily mean that this model is the superior one. Civil law countries may well perform better if one uses measures of low poverty rates (or perhaps ‘happiness’) as de-

⁶⁹ Trubek, DM (2007) ‘The Owl and the Pussy-cat: Is There a Future for Law and Development?’ (25) *Wisconsin International Law Journal* 235 at 238.

⁷⁰ Tamanaha, BZ (2011) ‘The Primacy of Society and the Failure of Law and Development’ (44) *Cornell International Law Journal* 209 at 219.

⁷¹ Eg Mattei and Nader supra n 17 at 48, 194; Rose, CM (2010) ‘Invasions, Innovation, Environment’, in Barros, BD (ed) *Hernando de Soto and Property in a Market Economy* Farnham 21.

⁷² Sen, A (1999) *Development as Freedom* Knopf.

⁷³ Stiglitz, JE; Sen, A and Fitoussi, J-P (2008) ‘Report by the Commission on the Measurement of Economic Performance and Social Progress’ (commissioned by the French government), available at www.stiglitz-sen-fitoussi.fr.

pendent variables.⁷⁴ It is also said that learning should not be asymmetrical. In particular, it should also include 'reverse learning' by Western legal systems from other parts of the world.⁷⁵

Another plausible response may be that legal rules should reflect both economic and non-economic aims. Such an approach seems to be taken by international organisations such as the UN, for example, in the UN Development Programme (UNDP) and in the Millennium Declaration.⁷⁶ However, it is also clear that not all aims are mutually reconcilable. This will also be apparent in the research discussed in the next section.

5.2 Welfare Models and Varieties of Capitalism

In the same way as comparative law classifies countries into legal families, other comparative social sciences have developed classifications which include topics that have a legal dimension. Often, these classifications are also seen as test cases concerning the preferability of the respective models. The following discusses two of these, partly overlapping, contemporary classifications that originate from research in comparative politics, political economy and social policy.⁷⁷

The first is the distinction between 'three worlds of welfare capitalism' by Gøsta Esping-Andersen.⁷⁸ These forms of capitalism are based on a variety of substantive policies such as pensions, sickness and unemployment benefits, and lead to a distinction between the liberal welfare systems of Anglo-Saxon countries, a conservative-corporatist category of most continental European countries, and the social-democratic Scandinavian countries. Subsequently, it has been argued that Mediterranean countries

⁷⁴ Sachs, J (2008) *Common Wealth: Economics for a Crowded Planet* Penguin at 258.

⁷⁵ De Sousa Santos, B and Rodriguez-Garavito, CA (2005) 'Law, Politics, and the Subaltern in Counter-Hegemonic Globalization' in de Sousa Santos, B and Rodriguez-Garavito, CA (eds) *Law and Globalization from Below: Towards a Cosmopolitan Legality* Cambridge University Press, 1; Nelken (2007), supra n 68, 35; Hantrais supra n 54 at 15 (for social sciences more generally).

⁷⁶ See <http://www.undp.org/> and <http://www.un.org/en/development/devagenda/millennium.shtml>.

⁷⁷ For further discussion and examples see Siems supra n 1 at 257-301.

⁷⁸ Esping-Andersen, G (1990) *The Three Worlds of Welfare Capitalism* Princeton University Press.

such as France and Spain deserve a separate category.⁷⁹ Also, if one adds countries of the developing world, further groups may be necessary, such as regimes of ‘informal security’ and ‘insecurity’.⁸⁰

The second main classification derives from the ‘varieties of capitalism’ literature. According to Peter Hall and David Soskice⁸¹ the main distinction is between liberal market economies such as the UK and the US on the one hand and coordinated (or organised) market economies such as Germany and Japan on the other. A typical feature of the former countries is the use of competitive markets, whereas the latter rely more on collaborative relationships. Within the group of coordinated market economies Hall and Soskice distinguish between countries with industry-based and group-based coordination. Others suggest further categories, for example, a category of governed market economies, such as today’s China,⁸² or three categories for the northern, western and southern countries of continental Europe.⁸³

The concept of ‘institutional complementarities’ plays an important role in understanding the varieties of capitalism. It suggests that the differences between these groups extend to many institutional features. For example, being a coordinated market economy is seen as related to strong employment protection, support of incremental innovation, sectoral training schemes, coalition governments and high levels of social welfare.⁸⁴ It is also thought that the varieties of capitalism distinction can explain conceptual differences in many areas of law,⁸⁵ as well as differences between common and

⁷⁹ Eg Castles, FG (2004) *The Future of the Welfare State* Oxford University Press 26.

⁸⁰ Suggested by Wood, G and Gough, I (2006) ‘A Comparative Welfare Regime Approach to Global Social Policy’ (34) *World Development* 1696.

⁸¹ Hall, PA and Soskice, D (2001) ‘An Introduction to Varieties of Capitalism’ in Hall and Soskice supra n 34, 1.

⁸² See Weiss, L (2010) ‘The State in the Economy: Neoliberal or Neoactivist?’ in Morgan, G; Campbell, JL; Croch, C; Pedersen OK and Whitley, R (eds.), *The Oxford Handbook of Comparative Institutional Analysis*, Oxford University Press 183 at 184.

⁸³ Amable, B (2003) *The Diversity of Modern Capitalism* Oxford University Press (Scandinavian welfare state, Rhine capitalism and Mediterranean model, in addition to the market-based Anglo-Saxon model and the meso-corporatist model of Asia).

⁸⁴ Hall and Soskice supra n 81 at 17, 19, 39, 50. See also Hall, PA and Gingerich, DW (2009) ‘Varieties of Capitalism and Institutional Complementarities in the Political Economy: An Empirical Analysis’ (39) *British Journal of Political Science* 449.

⁸⁵ Kennedy, D (2012) ‘Political ideology and comparative law’ in Bussani, M and Mattei, U (eds) *Cambridge Companion to Comparative Law* Cambridge University Press 35 at 46-8 (on corporate law, labour law, welfare law, civil procedure); Casper, S (2001) ‘The Legal Frame-

civil law countries.⁸⁶ Specifically, Katharina Pistor and Curtis Milhaupt refer to differences in the degree of centralisation of law-making and enforcement, expecting more centralisation in civil than in common law countries. However, using case studies of individual countries they also show that regulatory responses to financial crises may depart from these different starting points.⁸⁷

The question remains whether identifying differences in capitalism — including their connections to other legal and non-legal themes — may lead one country to decide that it wants to follow the ‘better’ model of another country. Here a first consideration could be that, according to the political science literature, such a policy transplant does not work if countries are ideologically and psychologically incompatible.⁸⁸ Yet, researchers have also examined how changes occur, for example, how models of the welfare state have diffused within Europe,⁸⁹ how distinctions between welfare states have weakened (or strengthened) in recent times,⁹⁰ and how dynamic elements can be incorporated into an understanding of varieties of capitalism.⁹¹

Thus, returning to a distinction made earlier in this article,⁹² on the one hand it is possible that a jurisdiction deliberately wants to change its law in order to shift in its approach to welfare and capitalism. On the other hand, it is possible that the society has already changed. For example, it is conceivable that changes in corporate ownership

work for Corporate Governance: The Influence of Contract Law on Company Strategy in Germany and the United States’ in Hall and Soskice supra n 34, 387 (on contract law); Tate, J (2001) ‘National Varieties of Standardization’ in id 442 (on liability law).

⁸⁶ Pistor, K (2005) ‘Legal Ground Rules in Coordinated and Liberal Market Economies’, in Hopt, K, Wymeersch, E; Kanda, H and Baum, H (eds) *Corporate Governance in Context: Corporations, States and Markets in Europe, Japan and the U.S.* Oxford University Press 249.

⁸⁷ Milhaupt, C and Pistor, K (2008) *Law & Capitalism: What Corporate Crises Reveal About Legal Systems and Economic Development Around the World* Chicago University Press.

⁸⁸ Rose, R (2005) *Learning from Comparative Public Policy: A Practical Guide* Routledge; Hantrais supra n 54 at 133-9.

⁸⁹ Manning, N and Shaw, I (1999) ‘The Transferability of Welfare Models: A Comparison of the Scandinavian and State Socialist Models in Relation to Finland and Estonia’ in Finer, CJ (ed) *Transnational Social Policy* Blackwell 120.

⁹⁰ See, eg, Hay, C (2011) ‘Globalization’s Impact on States’ in Ravenhill, J (ed) *Global Political Economy* (3rd edn) Oxford University Press 312; Hacker, J (2002) *The Divided Welfare State: The Battle Over Public and Private Social Benefits in the United States* Cambridge University Press.

⁹¹ Deeg, R and Jackson, G (2007) ‘Towards a More Dynamic Theory of Capitalist Variety’ (5) *Socio-Economic Review* 149.

⁹² See explanations to Table 1 above.

structures shift a country closer to one or the other variant of capitalism: then, if the law-maker wants to follow, it may be advantageous to transplant the legal rules of a country where these changes have already occurred.

5.3 Forms of Government and Constitutional Design

Research which tries to classify forms of government goes back to Aristotle, who analysed the constitutions of Greek towns based on the number of rulers and the quality of governments, leading to three ‘good’ types (monarchy, aristocracy, polity) and three ‘corrupt’ ones (tyranny, oligarchy, democracy). Today, a well-known dataset derives from the Polity IV Project which provides world-wide information on political regimes, distinguishing between full democracy, democracy, open anocracy, closed anocracy, and autocracy.⁹³ Recently, another project has also established a dataset on varieties of democracy.⁹⁴

In the past, the question about the ‘best’ form of government has often led to the response that it all depends on the country in question. For example, in the 18th century Montesquieu famously suggested that constitutional structures should reflect the climate, geography, culture and character of a nation.⁹⁵ Today’s research is less ‘relativist’. The use of quantitative data has led to the consensus view that there is a positive correlation between the level of democracy on the one hand and economic growth, security and safety on the other — though it is highly controversial whether this means that economic development stimulates democracy, or vice versa.⁹⁶

⁹³ Polity IV Project: Political Regime Characteristics and Transitions, 1800-2010, available at <http://systemicpeace.org/polity/polity4.htm>.

⁹⁴ Available at <https://v-dem.net/DemoComp/en>. See also Collier, D and Levitsky, S (1997) ‘Democracy with Adjective: Conceptual Innovation in Comparative Research’ (49) *World Politics* 430.

⁹⁵ Montesquieu (1914) [1748] *The Spirit of Laws* G Bell & Sons. However, this book is also interpreted as a ‘thinly veiled critique of monarchical absolutism’ of eighteenth century France’, Launay, R (2001) ‘Montesquieu: The Spectre of Despotism and the Origins of Comparative Law’ in Riles, A (ed) *Rethinking the Masters of Comparative Law* Hart Publishing 22 at 25.

⁹⁶ The first view was suggested by Lipset, MS (1959) ‘Some Social Requisites of Democracy, Economic Development, and Political Legitimacy’ (53) *American Political Science Review* 69. For the current discussion see, eg, Halperin, MH; Siegle, JT and Weinstein, MM (2010) *The Democracy Advantage: How Democracies Promote Prosperity and Peace* Routledge; Feng, Y (2003) *Democracy, Governance, and Economic Performance: Theory and Evidence* MIT Press.

Current research has also refined the analysis. On the one hand, this concerns the need to examine different shades of democratic and non-democratic regimes. For instance, it is sometimes suggested that a ‘benevolent autocracy’ may be less problematic than a weak democracy.⁹⁷ On the other hand, research on ‘constitutional engineering’⁹⁸ has tried to establish what impact specific choices have on the aims law-makers want to pursue. Take the following examples:⁹⁹ it is suggested that the extent to which a country is a ‘consensus democracy’ is associated with less violence and more extensive social welfare,¹⁰⁰ that parliamentarism is more conducive to stability and development than presidentialism,¹⁰¹ and that proportional representation leads to larger government spending and more frequent political compromise than more majoritarian voting systems.¹⁰² Studies have also looked at differences in the involvement of stakeholders in the law-making process, and how those may relate to laws favouring group interests.¹⁰³

For law-makers such research may show that they may be able to design constitutional rules in order to achieve particular aims. To be sure, here too, it needs to be considered that those general regularities will not work in every political and socio-economic context. But, sometimes, it is possible that this ‘merely’ leads to a shift in the meaning of the rules. It can be observed that constitutions follow quite different aims: in the West it is primarily a legal document, in transition economies it may be more of an aspirational one, in countries with internal or external tensions it may aim to unite the country and strengthen the state, and in some developing countries it may mainly be used to please possible donor countries.¹⁰⁴ Thus, a country that adopts a constitutional

⁹⁷ For a review of literature see Libman, A (2012) ‘Democracy and Growth: Is the Effect Nonlinear?’ (2) *The Economic Research Guardian* 99.

⁹⁸ Sartori, G (1997) *Comparative Constitutional Engineering: An Inquiry into Structure, Incentives and Outcomes* (2nd edn) NYU Press at 199.

⁹⁹ See also Siems *supra* n 1 at 293-5.

¹⁰⁰ Lijphart, A (1999) *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* Yale University Press at 244, 258-271, 293-300.

¹⁰¹ Linz, JJ (1990) ‘The Perils of Presidentialism’ (1) *Journal of Democracy* 51.

¹⁰² Persson, T and Tabellini, G (2003) *The Economic Effect of Constitutions* MIT Press.

¹⁰³ Eg, Streeck, W (2006) ‘The study of organized interests: before “The Century” and after’ in Crouch, C and Streeck, W (eds) *The Diversity of Democracy* Edward Elgar 3.

¹⁰⁴ See, eg, Frankenberg, G (2006) ‘Comparing Constitutions: Ideas, Ideals, and Ideology – Toward a Layered Narrative’ (4) *International Journal of Constitutional Law* 439 at 451-5, 458-9; Rosenfeld, M (2012) ‘Constitutional Identity’ in Rosenfeld, M and Sajó, A (eds) *The Oxford Handbook of Comparative Constitutional Law* Oxford University Press 756.

rule of another country may well be aware that its operation will be different, but still see it as a useful model to follow.

6. CONCLUSION: BEYOND ACADEMIC SILOS

This article has taken the view that ‘implicit comparative law’ research can provide useful suggestions on how to improve legal rules and institutions. ‘Implicit comparative law’ (ICL) was defined as research from non-law disciplines which compares and evaluates legal differences. Mainstream comparative law largely ignores such research. As far as such research is considered, it is also frequently dismissed. For example, some of the quantitative work is just seen as too simplistic and insensitive towards the complexity of legal rules and the respect for foreign legal cultures.

However, such criticism may also be criticised for being insensitive towards the paradigms, methods and tools of other academic disciplines. It is understandable that a researcher may face something of a culture shock when she reads papers from other disciplines that do not follow the line of reasoning she has taken for granted. In particular, this is the case when, say, a legal scholar reacts to the bold statements made by economists, perhaps overlooking that these are just models constructed under certain assumptions or just hypotheses proposed to be tested. To be sure, it is not suggested that only legal scholars are at fault. In particular, some of the comparative work conducted by economists¹⁰⁵ would have benefitted from closer interaction with legal scholars.

All of this means that cooperation across disciplines should be strengthened.¹⁰⁶ Researchers need to reach beyond their ‘academic silos’ in order to gain a fuller understanding of the world. It is suggested that this is particularly true in comparative law and in particular for the issue of ‘better law’. Comparative law is closely related to other comparative disciplines, such as comparative politics, sociology and economics, since these latter disciplines are often crucial for the understanding of similarities and differ-

¹⁰⁵ See text accompanying note 30 above.

¹⁰⁶ For similar suggestions see already Siems, M (2008) ‘Legal Originality’ (28) *Oxford Journal of Legal Studies* 147; Siems, M (2009) ‘The Taxonomy of Interdisciplinary Legal Research: Finding the Way Out of the Desert’ (7) *Journal of Commonwealth Law and Legal Education* 5; Siems, M and Mac Síthigh, D (2012) ‘Mapping Legal Research’ (71) *Cambridge Law Journal* 651.

ences between legal systems.¹⁰⁷ In order to evaluate law it is also crucial to consider the non-legal context of the law. Moreover, as this article has aimed to show, such non-law comparative disciplines have the advantage that they are less hesitant than legal research in making legal and policy recommendations based on cross-country comparisons. This does not mean that these recommendations always get it right. But they also show that comparative law is clearly too important to be solely left to comparative lawyers.

¹⁰⁷ The recent literature also urges comparative lawyers to become more interdisciplinary: see, eg, Samuel, G (2012) 'All that Heaven Allows: Are Transnational Codes a 'Scientific Truth' or Are They Just a Form of Elegant 'Pastiche'?' in Monateri, PG (ed) *Methods of Comparative Law* Edward Elgar 165 at 190 (comparatist has 'by definition to be interdisciplinary'); Peters, A and Schwenke, H (2000) 'Comparative Law Beyond Post-modernism' (49) *International and Comparative Law Quarterly* 800 at 832 (full understanding requires a comprehensive and interdisciplinary approach); Mousourakis supra n 2 at 39 (interdisciplinary and comprehensive approach).