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Legal traditions and competition policy

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Abstract

This paper examines the relationship between legal tradition and competition policy. Qualitative and anecdotal evidence suggest there are some differences in the competition laws of countries with different legal traditions. Such evidence include differences in the structure and content of competition law, the lack of convergence in terms of substantive decision standards, and the institutions and mechanisms for judicial enforcement of competition law. Quantitative analyses involving cross-country regressions indicate that legal tradition does not have any impact on the decision to implement competition policy. However, countries with German civil law tradition do have a higher probability of implementing pre-merger notification in their competition laws compared to their counterparts with English common law. The length of the competition agency head's appointment and the political/apolitical nature of his/her appointment do not seem to be affected by legal tradition. The performance of competition law enforcement is also not affected by legal tradition.

Keywords: Competition law; Developing countries; Coasian bargain

1. Introduction

The two decades beginning from the early 1980s witnessed significant institutional changes in many economies in the world. Socialist countries in East Europe and Central Asia underwent political transformation to democracies and embraced the market system. Other socialist countries that did not undergo political transformation such as China and Vietnam began using market mechanisms selectively to enhance their economic performance. At the same time, countries that have already adopted the market system undertook to give

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market forces even greater role in their economies by divesting state owned enterprises via large-scale privatization.

Economists have also become more interested in the role of institutions in economic growth and development. In the context of institutional changes that have taken place, economists are pondering over the type of institutions (such as property right protection) that may be considered to be essential for the proper functioning of market economies. The issues that are being explored cover both market institutions and state interventions that are required to address problems of market failures. One such intervention is competition policy.

Today, more than a hundred countries around the world have implemented national competition law[1]. There is sufficient theoretical and empirical support to motivate the implementation of competition policy.[2] What is debatable, especially from the view point of developing countries, is the form and timing of implementation i.e. whether multilateral competition rules are useful and whether more exemptions ought to be allowed for conflicting industrial policies.[3]

For countries that have decided to implement competition law there remains the immense task of formulating a competition law that can be effectively enforced. At first glance, the content of a competition law may not be too difficult an issue as model competition laws would have us believe.[4] In reality, country specific factors such as legal and administrative traditions, stage of economic development and political realities are likely to have significant impact on the efficacy of the enforcement of competition law in any country. This observation has led OECD (2003) to conclude that there is no single (or one-size-fit-all) optimal design of competition institution.

This paper attempts to further analyze the importance of one such country-specific characteristic, namely legal tradition, in the implementation of competition law. The outline of the rest of the paper is as follows. Section 2 provides a brief discussion of the major legal traditions in the world. Section 3 summarizes the empirical literature on legal traditions and their impact on economic growth and development. Section 4 examines the relationship between legal tradition and competition policy. Section 5 concludes.

2. Legal traditions and economic development

2.1. Legal traditions

A legal system refers to an operating set of legal institutions, procedures, and rules.[5] Legal systems can be grouped into different families based on cultural dimensions:

[1] The exact number is difficult to determine. UNCTAD (2003) lists some countries with competition law.

[2] See UNCTAD (1997).

[3] See, for example, Ajit Singh's (2002) arguments. Structural adjustment requirements including competition law enactments and reforms have not been useful in persuading developing countries to implement competition law.

[4] See Lee (2004) for an analysis of the two major model competition laws, namely, the World Bank-OECD and UNCTAD model competition laws.

[5] Merryman (1985), p. 1.

> "A legal tradition . . . is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught."[6]

David and Brierley (1985) list at least three types of major legal traditions (or legal families), namely, the Romano-Germanic (civil) law, Common law and Socialist law. Others include Talmudic, Islamic, Hindu, and Asian legal traditions. There are some differences within some legal traditions that require further reclassification. For example, within the Romano-Germanic legal tradition, scholars distinguish between the French, German and Nordic (Scandinavian) civil law traditions. The French civil law is regarded to be more distrustful of judges (the Napoleonic code) and hence put more emphasis on judicial formalism compared to the German civil law.

Table 1 presents World Bank's (2004) classification of countries in terms of the five major legal traditions in the world, namely: English (Common Law), French (civil law), German (civil law), Nordic and Socialist. The list is based on the origin of the company law or commercial code in each country.

The differences between legal traditions can be illustrated by comparing two major legal traditions namely, the civil law tradition and the common law tradition. The most salient differences are in the independence of the judiciary (from the state), the professional status of judges, their role in the trial process, the use of juries, legal instruction and records, and the importance of precedence and appeal. Table 2 summarizes some of these differences between the two legal traditions.

The judiciary in a civil law system is generally considered to be less independent from the state compared to the common law system. Judges in the civil law system follow a specific career track that culminates in their appointment by the state. In contrast, common law judges are appointed from the community of practicing lawyers. Juries are also more often used in common law than in civil law. The function of prosecution and judgement are combined in civil law whereas the two functions are separated in common law. The combination of prosecution and judgement in civil law also means that judges in a civil law system assume an inquisitorial role—undertaking the investigative part of the prosecution process. In contrast, lawyers and judges assume adversarial roles—lawyers undertake investigations, collect evidence and present their case before the judge (and jury). Legal codes also play a more important role in civil law—the judge's role is to faithfully apply the existing statutory law and render a judgement that is narrowly consistent with it. In contrast, the law is fashioned in terms of broad legal principles in common law. Here, judges interpret, in the best manner possible, the "spirit" of the law. This allows common law judges to "make" laws by setting precedents (*stare decisis*) that are considered to be important interpretation of the law for subsequent and related cases. It is hence not surprising that appeal or re-litigation is an important process in a relatively "open" legal system such as the common law.

[6] ibid., p. 2.

Table 1
Countries and legal traditions

English common law (36)	French civil law (64)		German civil law (18)	Socialist law (11)
Australia	Albania	Madagascar	Austria	Armenia
Bangladesh	Algeria	Mali	Bosnia and Herzegovina	Azerbaijan
Botswana	Angola	Mauritania	Bulgaria	Belarus
Canada	Argentina	Mexico	China	Georgia
Ethiopia	Belgium	Morocco	Croatia	Kazakhstan
Ghana	Benin	Mozambique		Kyrgyz Republic
Hong Kong, China	Bolivia	Netherlands	Czech Republic	Moldova
India	Brazil	Nicaragua	Germany	Mongolia
Iran, Islamic Republic	Burkina Faso	Niger	Hungary	Russian Federation
Ireland	Burundi	Oman	Japan	Ukraine
Israel	Cambodia	Panama	Korea, Rep.	Uzbekistan
Jamaica	Cameroon	Paraguay	Latvia	
Kenya	Central African Republic	Peru	Macedonia, FYR	
Lesotho	Chad	Philippines	Poland	Nordic law (4)
Malawi	Chile	Portugal	Serbia and Montenegro	Denmark
Malaysia	Colombia	Puerto Rico	Slovak Republic	Finland
Namibia	Congo, Democratic Republic	Romania	Slovenia	Norway
Nepal	Congo, Rep.	Rwanda	Switzerland	Sweden
New Zealand	Costa Rica	Senegal	Taiwan, China	
Nigeria	Cote d'Ivoire	Spain		
Pakistan	Dominican Republic	Syrian Arab Republic		
Papua New Guinea	Ecuador	Togo		
Saudi Arabia	Egypt, Arab Republic	Tunisia		
Sierra Leone	El Salvador	Turkey		
Singapore	France	Uruguay		
South Africa	Greece	Venezuela		
Sri Lanka	Guatemala	Vietnam		
Tanzania	Guinea			
Thailand	Haiti			
Uganda	Honduras			
United Arab Emirates	Indonesia			
United Kingdom	Italy			
United States	Jordan			
Yemen, Rep.	Kuwait			
Zambia	Lao PDR			
Zimbabwe	Lebanon			
	Lithuania			

Source: World Bank (2004).

Table 2
Differences between civil law and common law

Characteristic	Civil law	Common law
Independence of judiciary from state	State controlled	Independent
Professional status of judge	Professional judges	Lay judges
Use of juries	Less frequent	Frequent
Role of judge in trial process	Inquisitorial	Adverserial
Legal instruction	Legal codes	Broad legal principles
Precendent	Less important	Important
Appeal/re-litigation	Less important	Important
Certainty of law	Legal standards	Rules

3. The impact of legal tradition on economic development

The impact of legal tradition on economic development has recently received some attention in the empirical studies of comparative institutional economics.[7] In this section we review the evidence from such studies. This is done to give us some idea about the significance of the legal tradition as a factor in economic development before we propose and test a similar role in the case of competition policy.

3.1. Legal tradition and finance

The recent work on the impact of legal tradition on the economic development comes from investigations on the relationship between law, financial development and economic growth. This approach, dubbed the "Law and Finance Theory" builds on the basic empirical evidence that financial development has a first-order impact on economic growth.[8] The theory attempts to uncover the determinants of financial development.[9] It argues that international differences in financial development can be explained by differences in legal institutions (system, tradition).

Beck and Levine (2003) summarizes the main findings of the theory in the following manner:[10]

- "Countries where legal systems enforce private property rights, support private contractual agreements, and protect legal rights of investors, savers are more willing to finance firms and financial markets flourish."
- "The different legal traditions that emerged in Europe over previous centuries and were spread internationally through conquest, colonization, and imitation help explain cross-country differences in investor protection, the contracting environment, and financial development."

There are two components in the law and finance theory (see Fig. 1). Firstly, *legal traditions have significant impact on the effective protection of private property rights*

[7] For a succinct summary of the literature, see also Shirley (2003).
[8] See Levine and Zervos (1998), Kunt and Maksimovic (1998), Rajan and Zhingales (1998), and Kunt and Levine (2001).
[9] See La Porta, Lopez-de-Silanes, Shleifer, and Vishny (1997, 1998).
[10] Excerpts from Beck and Levine's (2003) abstract.

Fig. 1. Outline of law and finance theory.

such as enforcement of private contract agreement and investor protection.[11] Secondly, *the protection of private property rights contributes towards financial development*. Essentially, the protection of private property rights provides confidence to savers, lenders and investors to participate in the financial markets.

In terms of the different legal traditions, common law is considered to be more conducive compared to civil law for financial development. Proponents of this theory have advanced at least two reasons to explain this observation. The first is political—civil law protects the rights of the State more than the rights of private investors, while the reverse holds in common law. The second is adaptability of legal systems—civil law, which relies on case law and empowers judicial discretion (interpretation), is more adaptive to changes in economic conditions (compared to civil law which relies on judgements based on statutes).

Not surprisingly, the subsequent debates on the validity of the findings of the law and finance theory have focused on the two sets of linkages: (i) between legal tradition and basic market institutions, and (ii) between basic market institutions and financial development. Even though the proponents of the law and finance theory have described research in this area as on-going, the accumulated evidence in favour of the theory is fairly impressive.[12]

3.2. Legal tradition, regulation and court

Proponents of the law and finance theory have also extended their work to encompass regulation and courts.[13] Two recent examples include Djankov, La Porta, Lopez-de-Silanes, and Shleifer (2002, 2003). Djankov et al. (2002) uses data on the regulation of entry of start-up firms in 85 countries to examine the determinants of the cost of entry. They find that civil law countries (with the exception of Scandinavian countries) tend to regulate entry more heavily compared to common law countries. Interestingly, the authors did not find any correlation between legal tradition and political factors such as executive de facto independence, constraints on executive power, effectiveness of legislature, competition nominating, autocracy and political rights.[14]

Djankov, La Porta et al. (2003) measure the procedures used by litigants and courts to evict a tenant for non-payment of rent and collection of bounced check and used these data

[11] A more ambitious list of market institutions may even include company, securities and bankruptcy laws.

[12] Time constraint prevents an adequate treatment of the subject here. Beck and Levine (2003) review the evidence from both proponents and critics of the law and finance theory.

[13] There is a difference between regulation and courts. Regulation restricts private conduct while the court resolves disputes. See Djankov, La Porta et al. (2003), pp. 453–454.

[14] The exception is the socialist legal tradition which showed correlation with autocracy (positive) and political rights (negative).

to construct an index of procedural formalism for 109 countries.[15] Their intention is to study the effectiveness of courts as mechanisms of dispute resolution. The authors find that civil law countries tend to exhibit higher formalism in adjudication compared to common law countries. Higher formalism is also associated with lower enforceability of contracts, higher corruption, lower honesty, lower consistency, and a less fair legal system.

3.3. Legal origin and legal transplant

The next natural step after uncovering the indirect influence of legal traditions on financial and economic development would of course be the explanation of the choice of legal systems. Economists have applied the rational choice framework to understand the problem of legal origins. The explanation thus far has been a rational and political one—the adoption of a given legal system is understood to be an "optimal" or "efficient" outcome given the adoptee country's political circumstances.

Glaeser and Shleifer (2002), for example, argue that the original choice of a given legal system by a country is an outcome of the political situation in that country in which these laws originated. More specifically, a country would "choose" a legal system that is most efficient given the balance of power between the King and the nobility. The influence of local nobles vis-à-vis the King was greater in France than in England (a dictator-controlled country). Hence, local magnates in France preferred civil law – in which the judges are state-controlled – because they feared independent juries (as in common law) would be compromised by other local interests. The situation in England was the reverse—a dictatorial King required independent judges that may reduce the biasness of the courts towards the royals. Hence, the community engaged in a "Coasian bargain" (i.e. the Magna Carta) whereby the community and the King agree on cash transfer needed to support the efficient outcome i.e. choice of legal system.

The choice of legal systems by other transplant or "non-origin" countries is also an interesting problem.[16] There are significantly more countries to consider and the story is complex. Legal codes have been transplanted to the rest of the world via a variety of mechanisms such as through conquest, colonialization and imitation. Economic inquiry into the question of legal transplant has thus far focussed on the impact of the type (i.e. legal tradition) and process of legal transplant on economic development.

With regards to legal tradition, Berkowitz, Pistor, and Richard (2003) found empirical evidence that the impact of transplanting a particular legal tradition on economic development is not robust to different legality measures.[17] Furthermore, the overall impact of the transplanting process (via its impact on legality) is stronger than the impact of transplanting a particular legal tradition.

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[15] The authors define procedural formalism as the ways in which the law regulate the operation of courts. These include the use of lawyers and professional judges, litigation procedures etc. See Djankov, La Porta et al. (2003), p. 455.

[16] The origin countries include England, France and Germany.

[17] Legality measures include efficiency of judiciary, rule of law, absence of corruption, risk of appropriation and risk of contract repudiation (Berkowitz et al., 2003, p. 182).

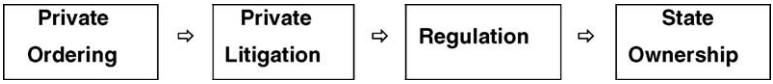

Fig. 2. Forms of business control.

The policy implications that the authors draw from their work are also worth quoting in full:[18]

> "The policy implications of these results are fundamental: a legal reform strategy should aim at improving legality by carefully choosing legal rules whose meaning can be understood and whose purpose is appreciated by domestic law makers, law enforcers and economic agents, who are the final consumers of these rules. In short, legal reform must ensure that there is a domestic demand for the new law, and that supply can match demand . . . a cautious suggestion would be that legal borrowing should take place either from a country with a similar legal heritage, or substantial investment should be made in legal information and training prior to adoption of a law, so that domestic agents can enhance their familiarity with the imported law and make an informed decision about how to adapt the law to local conditions."

The above recommendations suggest that the transplant of law requires careful considerations that extend beyond mere adoption of legal rules and principles from other countries.[19] In particular, the importance of "legality" provides some clues on how to improve the transplant process. We take these insights to motivate our investigations into the importance of legal tradition for the implementation and enforcement of competition policy.

3.4. Legal tradition and the new comparative economics

The literature on comparative institutional economics in which legal tradition is included as an important variable has evolved towards discovering the political determinants of institutional choice (including legal origin). In Djankov, Glaeser, La Porta, Lopez-de-Silanes, and Shleifer (2003), the label of "new comparative economics" is used to describe a framework of analysis for institutional choice. According to this framework, institutional choice involves *a political tradeoff between the cost of disorder (in the form of appropriation by private parties) and those of a dictatorship (appropriation by the State)*. Depending on the enforcement environment, one or more of the following four (non-mutually exclusive) forms of business controls (i.e. private ordering, private litigation, regulation and state ownership) might be chosen (Fig. 2).

The enforcement environment depends on a variety of factors under the general term of "civic capital" that encompasses broad aspects such culture, ethnic heterogeneity, factor endowments, physical environment as well as more specific ones such as distribution of wealth and power, political freedom, and effectiveness of government.

[18] ibid., p. 192.

[19] Readers interested to explore this issue should also look at Pistor et al. (2003).

With regards to the importance of legal tradition, Djankov, Glaeser et al. (2003) reaffirms Glaeser and Shleifer's (2002) arguments for legal origin and argues that some of the problems observed in developing countries stem from the transplantation of legal traditions that are inconsistent with the conditions of the society.

The characterization of the trade-off between disorder and dictatorship also receives some attention in Acemoglu and Johnson (2003). In their paper paper, they differentiate between two types of institutions: "contracting institutions" that supports private contracts (which would include private ordering) and "property rights institutions" that constrain government and elite expropriation. Legal tradition is considered to be a proxy for contracting institutions (via justification by way of reference to Djankov et al., 2002 and Djankov, La Porta et al., 2003). In the study, property rights institutions have a first-order effect on long-run economic growth, investment and financial development. On the other hand, contracting institutions matter only for the form of financial intermediaries. The reason for this is that it is difficulty to write contracts that prevent the State from expropriation while private contracting is flexible enough to overcome the problems of legal formalism.

The importance of politics in the choice of institutions also figures prominently in comparative law literature as well. For example, Djankov, Glaeser et al.'s (2003) reference to Hobbes (1651) – who favoured a strong State to reduce disorder – and Montesquieu (1748) – who was mindful of taking by the State – finds some resonance in the interpretation of law in the comparative law literature as well:[20]

> "In civil law jurisdictions, the first step in interpreting an ambiguous law, . . . is to discover the intention of the legislator by examining the legislation as a whole . . . In common law jurisdictions, by comparison, statues are to be objectively constructed according to certain rules standing by themselves, such as that an enactment must be read as a whole, and that special provisions will control general provision, so as to meet the subjects' reasonable understandings and expectations . . . Two reasons can be advanced to explain this difference in interpretation. Firstly, common law statutes have to be read against a case law background, while civil law codes and statutes are the primary source of law under Montesquieu's theory. Secondly, civil law judges are influenced by Rousseau's theory that the State is the source of all rights under the social contract, while English judges favour Hobbes' theory that the individual agreed to forfeit to the State only certain rights."

The reference to Montesquieu also leads us to another important aspect of institutional choice, namely, the separation of powers between legislature (parliament), executive and judiciary (courts). This is necessary to ensure that the power of the State does not fall into one person or a small group in society.[21] What is the relationship between separation of powers and legal tradition? The work of Glaeser and Shleifer (2002) certainly suggest that the two is related. For example, the judiciary in a civil law system – by virtue of being an extension of the executive – has less separation of powers than in common law system.

[20] Tetley (2000), p. 24.

[21] The economic literature on separation of powers has flourished in recent years. For instance, see Persson et al. (1997), Laffont (2000).

4. Legal tradition and competition policy

Many of these competition legislations around the world are fairly new. At least 60 (or 70%) of these countries have implemented their competition law between 1990 and 2003 (see Table 3). The implementation of competition laws is fairly evenly distributed across the different legal traditions.

Based on the distinctions that legal scholars draw between the different traditions as well as from the evidence gathered by the law and finance theorists, it is plausible that legal traditions do have some impacts on the implementation of competition policy. Precisely in what forms do these of impacts take will require some further thought. In this matter we draw some clues from existing empirical work related to competition policy and from the law and finance theory.

4.1. Cross-country empirical work on competition policy

Cross-country and econometric-based studies on competition policy have thus far been fairly diverse focusing on issues such as the reason for and impact of implementation of competition policy. There has also been an attempt to construct an index for competition law regimes that can be used as an indicator of governance.[22] We briefly review some of the main findings from these works.

Palim (1998) is interested in finding out the reason for implementing competition policy in 70 countries. The author finds that the implementation of competition policy is associated with economic reform and increased level of development.[23] In terms of the influence of events and institutions, Palim finds that the implementation of competition law is significantly associated with Europe's market unification attempts (for relevant countries), dramatic economic crisis (debt default), and the transition from planned to market economy. Interestingly, Palim finds no evidence of foreign aid having a positive influence on implementation of competition policy. Furthermore, there is no evidence that the implementation of competition policy is related to international trade.

Dutz and Vagliasindi (2000) look at the experience of implementing competition law amongst 18 transition economies. They relate three dimensions of the effectiveness of competition law (enforcement, competition advocacy, and institutional effectiveness) to indicators measuring the intensity of competition (measured by economy-wide enterprise mobility). The authors find robust positive relationship between effective competition law implementation and intensity of competition. The most import element of effective competition element is institutional effectiveness which highlights the importance of independence (from pressure groups), transparency and effectiveness of appeals.

Kee and Hoekman (2003) investigate the effect of competition law on the contestability of markets in 42 countries over a period of 18 years. They find that competition law has no direct impact on industry markups. However, they find some evidence of competition law

[22] A fourth work is Pittman (1998) which is descriptive in nature.

[23] The economic reform variable comes from the economic freedom index developed by Gwartney, Lawson and Block (1996), *Economic Freedom of the World: 1975–1995*. The level of development is measured by GDP per capita.

Table 3
Competition legislation around the world, 1889–2003

Legal tradition	1880–1889	1890–1944	1945–1969	1970–1979	1980–1989	1990–1999	2000–2003	No.
English common law	Canada (1889)	U.K. (1890)	South Africa (1955)	Pakistan (1970)	S. Lanka (1987)	Ireland (1991)	Namibia (2003)	21
		U.S. (1890)	India (1969)	Australia (1974) Thailand (1979)	Israel (1988) Kenya (1988)	Fiji (1993) Iceland (1993) Jamaica (1993) Malta (1994) Tanzania (1994) Zambia (1994) Zimbabwe (1996) Malawi (1998)		
French civil law				Guatemala (1970) Chile (1973) France (1977) Greece (1977) Cote d'Ivoire (1978)	Argentina (1980) Spain (1989)	Cyprus (1990) Dominican Republic (1990) Italy (1990) Peru (1990) Dominican Republic (1990) Belgium (1991) Peru (1991) Tunisia (1991) Venezuela (1991) Colombia (1992) C. Rica (1992) Lithuania (1992) Mexico (1992) Portugal (1993) Brazil (1994) Senegal (1994) Turkey (1994) Albania (1995) Algeria (1995) Panama (1996) Romania (1996) Netherlands (1997) Gabon (1998) Mali (1998) Indonesia (1999) Morocco (1999)		32

German civil law			Japan (1947) Germany (1957)	Luxembourg (1970)	Korea (1980) Switzerland (1985) Austria (1988)	Poland (1990) Bulgaria (1991) Czech (1991) Latvia (1991) Slovakia (1991) Slovenia (1991) Taiwan (1992) China (1993) Estonia (1993) Croatia (1995) Hungary (1996)		16
Socialist law						Kazakhstan (1991) Russia (1991) Belarus (1992) Moldova (1992) Tajikistan (1992) Uzbekistan (1992) Azerbaijan (1993) Mongolia (1993) Kyrgyzstan (1994) Georgia (1996)	Armenia (2000) Ukraine (2001)	12
Nordic law						Finland (1992) Norway (1993) Sweden (1993) Denmark (1997)		4
Total	1	2	4	9	8	60	3	86

Source: UNCTAD (2003) andPalim (1998).

having indirect impact on industry markups in the long run by promoting a larger number of domestic firms. The authors also make the startling suggestion that the reduction of trade barriers and government regulation over entry–exit conditions yield a higher level of benefit compared to the implementation of competition policy.

Nicholson (2004) attempts to "quantify" competition laws by coming up with an "Antitrust Law Index" that can serve as another measure of governance. The index for each country is constructed by summing up the points given for various aspects of competition law such as extraterritoriality, fines, divestitures, merger notification, etc. The author then discovers a non-linear ("U-shaped") relationship between the Antitrust Law Index and GNP.

None of the empirical studies cited above have examined the effect of legal tradition on the implementation and enforcement of competition policy. In the rest of this paper we attempt to examine this issue.

4.2. Relating legal traditions to competition policy

How is competition policy related to legal traditions? We can examine this issue through the lens of existing literature on the economic impact of legal traditions that we have reviewed earlier. It is perhaps easier to focus on competition law rather than the broader concept of competition policy.[24] A useful framework for analyzing the various issues involved (one that is inspired by our review of the relevant literature) is presented in Fig. 3.

The first component of the framework is the choice of legal tradition—either by the country of the legal origin or transplant by other countries. Broader political issues covering aspects such as separation of powers, the role of regulation versus courts, and contract versus property rights institutions are important. Obviously, we should expect some differences between the origin and transplant cases, particularly when in transplant cases involving colonialized countries.[25]

The second component relates to the implementation of competition law. Here, we may want to distinguish between origin and transplant countries. The United States, a civil law country, can be regarded as an 'origin country' for competition policy. Whether there are other 'origin' countries is an important question. An 'origin' country with regards to legal tradition may not be an 'origin' country with respect to competition law. Interestingly, civil law countries (such as France) only began implementing competition law in the late 1970s. Civil law countries such Japan and Germany may have adopted U.S. type competition law. Hence, legal tradition may not have a one-to-one relationship with a competition law type. More specific questions can also be asked, for instance, how does legal tradition affect the various aspects of the implementation of competition law such as the transplant process, the content of the law, input resources applied (such as lawyers, judges, etc.), the enforcement structure and process and the outcome (or output) of enforcement in the form of remedies and sanctions.

[24] Here, we regard competition policy as including competition law and more: "The full range of measures that may be used to promote competitive market structures and behaviour, including but not limited to a comprehensive competition law dealing with anti-competitive practices of enterprises." (WTO, 1999).

[25] A plausible research direction would be along the lines of Acemoglu et al. (2001).

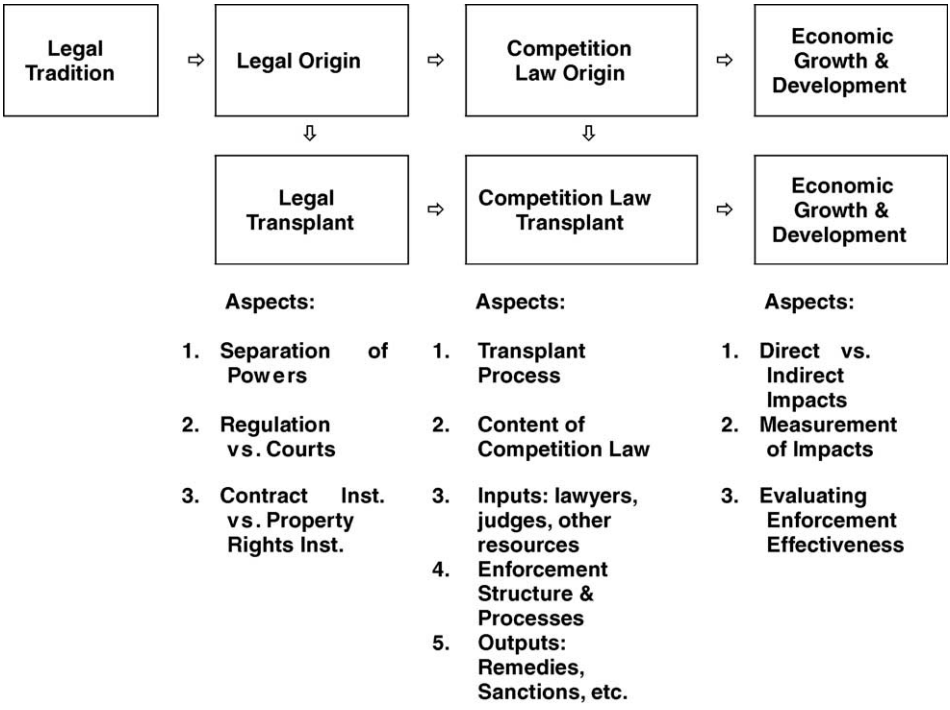

Fig. 3. Framework for analyzing the relationship between legal tradition and competition law.

The third component in the framework should examine the direct or indirect impacts of competition policy within the context of legal tradition. The measurement of such impacts is obviously an important topic. Does legal tradition affect the effectiveness of a country's competition law?

We use the above framework as a guideline to empirically evaluate the links between legal tradition and competition policy. Obviously, we will not be able to do this exhaustively. In the following sections, we try examine both the qualitative and quantitative evidence on the relationship between legal tradition and competition policy.

4.3. Qualitative and anecdotal evidence

There are some qualitative and anecdotal evidence on the impact of legal tradition on competition law. Scholars certainly recognize the importance of legal tradition when discussing competition law but very few have articulated this as a central issue. As a result, the qualitative and anecdotal evidence is scattered and varied. We review some of these evidences in this sub-section. They range from specific discussions on competition law in a common law setting, the issue of convergence in competition law and enforcement problems across OECD countries.

4.3.1. Competition law in common law jurisdictions

Hylton's (2003) analyzes competition law from a common law perspective and raises several key issues relating to:

- certainty of law;
- the relative merits of rules versus legal standards;
- the process of legal evolution; and
- the capacity of courts to apply reasonableness standards to business practices.

Even though Hylton's discussions are one-sided in the sense of addressing only common law—it gives an insight into the types of issues that might be relevant in comparing competition laws in different legal traditions.

Hylton highlights the tension between the economic conception of a reasonableness inquiry and the administrative concerns of courts and enforcement agencies. The asymmetry of information between firms and courts (and enforcement agencies) makes it difficult for the latter to undertake a full assessment of the cost and benefits of a challenged practice (e.g. resale price maintenance).

One solution is to remove from the plaintiff the burden of demonstrating that the challenged practice is economically unreasonable e.g. via a per se type clause.[26] This option, however, is difficult to implement in common law countries because the common law process relies on precedents that are generated over time based on equating legal validity with the notion of reasonableness.[27] In the United States, this constraint is reflected in the changes from a reasonableness-based inquiry to per se standard and back to the reasonableness-based inquiry. These changes are also documented in Kovacic and Shapiro (2000) as well as Gifford and Kudrle (2003).

The difficulty in reconciling economic reasonableness and legal administrative concerns also relates to the role of economic theory. Hylton, for example, quotes Judge Breyer's opinion that reflects how law in the common law tradition is incomplete, cumulative and adaptive:[28]

> "For, unlike economics, law is an administrative system, the effects of which depend on the content of the rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients"
>
> Justice Breyer in Barry Wright versus ITT Grinnell Corporation.

When law is administrated in such manner, there is always the possibility of the courts making either mistakes of false conviction or false acquittal. The choice of rule of reason versus per se illegality then depends on the expected costs of making the different type of mistakes. If the expected costs of false convictions for a challenged practice exceed those of false acquittals, we should prefer to adopt per se legality rules for the challenged practice.[29]

[26] Different terminologies are sometimes used. Per se clauses are also known as prohibitions provisions. Economic reasonableness is applied in interpreting 'rule of reason' clauses. 'Abuse principles' relate to conduct-based prohibitions that are subject to reasonableness-based inquiry.

[27] Hylton (2003), p. xiv.

[28] Quoted in Hylton (2003), p. xv.

[29] ibid., p. xv.

Hylton (2003) analysis seems to suggest that legal tradition (e.g. common law) has impact on the structure or content of competition policy (e.g. rule of reason versus per se illegality) and their effectiveness/impacts (e.g. errors, costs). Hylton's work can also be related to Londregan (2002) who addresses the issue of ex ante predictability in the enforcement of laws in civil law and common law. Londgren discusses court predictability in the two legal traditions in the context of redistributive politics. Yet another interesting area that may be relevant is the relationship between the evolution of competition law in the U.S. and the ascendancy of the 'Chicago School of Antitrust'.

4.3.2. Convergence of competition laws

There are some hints on the differences between competition laws under different legal traditions in the literature on convergence of competition laws. Gifford and Kudrle (2003) opine that convergence of European competition law with American competition law is constrained by history, ideology, politics and legal tradition. The authors focus on differences between the two competition regimes in terms of substantive decisional standards (e.g. efficiency, consumers' welfare, etc.). With regards to legal tradition, the authors noted that European competition law is largely administered in the civil law tradition in which laws are set forth in legislation. This approach is more legislation-bound compared to the common law tradition which relies on adjudication and the precedents created.[30] Hence, they argue that European competition law is less flexible in the sense that any changes require legislative changes.[31] It is further argued that the continued divergence between the two competition laws (in terms of the substantive decision standards) is partly due to such differences in legal tradition.

4.3.3. Judicial enforcement

The judiciary is an important institution in the enforcement of competition law. OECD (1997) highlights the two functions of the judiciary in the enforcement of competition law, namely:[32]

- ensuring that procedural due process is observed; and
- applying the underlying substantive principles of the competition law in a correct and consistent manner.

There are some differences in the mechanisms for judicial enforcement in countries with different legal traditions. In common law countries, the strong emphasis on the separation of powers in the constitution implies that the administration of justice is exclusively undertaken by the courts. However, constitutions under common law (e.g. Australia, Ireland) usually allows for the establishment of independent bodies (e.g. tribunals) that examine factual issues in competition cases.[33] In contrast, bodies in civil law countries (e.g. the

[30] Judicial precedent does play some role in the interpretation of competition law statutes in civil law but presumably less important than in common law jurisdictions.

[31] This same aspect (of flexibility) appears in the law and finance theory's discussions on the civil law and common law.

[32] See OECD (1997), p. 10.

[33] OECD(1997), pp. 51–53.

Competition Council in Belgium) are establish within ministries and can decide on whether an anti-competitive conduct has occurred or not. The courts are involved when and if there are appeals against such decisions. There are also countries such as Canada where the Competition Tribunal is a hybrid institution comprising judges and lay members.[34] The Tribunal is an adjudicative body for non-criminal competition matters. Here, the judicial members of the Tribunal decide on 'questions of law' while questions of fact and of mixed law and fact are decided by all members of the Tribunal. The relationship between legal tradition and the judicial enforcement process of competition law is obviously a complex one. Because competition law is only one law (and a newer one) amongst many in a country, we should expect some variations in how competition law is enforced in countries with different legal traditions.

4.4. Preliminary quantitative evidence

There is very little secondary data available for cross-country analyses of competition regimes. The available data is also subject to debates in terms of their appropriateness and quality. Despite such limitations, we should attempt to begin some form of quantitative analysis of the impact of legal tradition on competition law. In this section we explore such relationships empirically using some of the available data.

(a) Competition law implementation and legal tradition

We run three simple logit regressions to find out if the implementation of law is influenced by gross national income (GNI) per capita and legal tradition. Both the data for GNI per capita and the classification of countries by legal tradition is from World Bank (2004). Table 4 summarize our regression results. GNI per capita is a significant determinant of the implementation of competition law. This is consistent with existing results such as Palim (1998). However, legal tradition does not seem to be a significant determinant of the implementation of competition law.

(b) Legal tradition and content of competition law

To examine the influence of legal tradition on the content of competition law, we focus on three variations of a simple variable, namely, merger notifications. Data for pre-merger, post-merger and voluntary merger notifications comes from UNCTAD (2003). Table 5 summarizes our results. Interestingly, legal tradition may be influential only in case of pre-notification mergers. The odds-ratio (not reported here) indicates that switching from an English common law to German civil law doubles the probability of implementing pre-merger notification.

(c) Legal tradition and structure of competition agencies

We examine the variables that highlight the structure of competition agencies, namely the length of the head of agency's appointment and the political appointments in the agencies. The data is from Global Competition Review (2003a). The regression results are summarized in Tables 6 and 7. Legal tradition does not seem to have any influence on either of these variables.

(d) Legal tradition and enforcement of competition law

[34] OECD (1997), pp. 133–134.

Table 4
Determinants of competition law implementation

	Logit specification		
	Competition law (yes = 1, no = 0)	Competition law (yes = 1, no = 0)	Competition law (yes = 1, no = 0)
GNI per capita	0.00093*	0.000094*	0.00010*
	(0.00003)	(0.000033)	(0.00003)
French		−0.01742	
		(0.44853)	
German		1.38981	
		(0.74354)	
French + German			0.23764
			(0.43499)
Intercept	−0.0805	−0.46038	−0.51008
	(0.2153)	(0.39445)	(0.39483)
LR	13.98	19.07	14.1
Log likelihood	−82.31	−71.22	−73.55
Number of observations	132	117	117

Note: Standard errors are in parenthesis.

Table 5
Determinants of merger notification in competition law

	Logit specification		
	Pre-merger notification (yes = 1, no = 0)	Post-merger notification (yes = 1, no = 0)	Voluntary merger notification (yes = 1, no = 0)
French	0.7621	1.3581	−0.5465
	(0.6256)	(1.1519)	(0.8022)
German	3.1600*	1.3398	Dropped
	(1.1403)	(1.2230)	(perfect prediction)
Intercept	−0.4520	−2.6391	−1.0116
	(0.4834)	(1.03510)	(0.5839)
LR	12.92	1.93	0.46
Log likelihood	−33.48	−22.99	−19.33
Number of observations	60	52	38

Note: Standard errors are in parenthesis.

Does legal tradition affect the performance of the enforcement of competition law? We use Global Competition Review's (2003b) rating index as a measure of performance of competition law enforcement. Aside from legal tradition, we include variables such as GNI per capita (from World Bank, 2004), competition agencies' budget per staff (computed from Global Competition Review, 2003a), and age of competition agency (from UNCTAD, 2003 and Palim, 1998). Interestingly, legal tradition is not significantly related to performance of competition law enforcement (Table 8). Only budget per staff and GNI per capita are significant determinants of the performance of competition law enforcement.

Table 6
Determinants of length of head of agency term of office

	OLS specification Length of head of agency term of office (years)
English	−0.9423
	(4.14445)
French	1.0250
	(3.9701)
German	−0.2500
	(4.1095)
Nordic	-1.02×10^{-14}
	(5.1254)
Socialist	Dropped
Intercept	9.25
	(3.6242)
R-square	0.0124
Number of observations	55

Note: Standard errors are in parenthesis.

Table 7
Determinants of appointment of top posts in competition agency

	Logit specification	
	Political appointment of posts in agency (yes = 1, no = 0)	Political appointment of posts in agency (yes = 1, no = 0)
French	0.6286	
	(0.7692)	
German	−0.6242	
	(0.7966)	
French + German		0.0896
		(0.6752)
Intercept	0.4700	0.4700
	(0.5701)	(0.5701)
LR	2.84	0.02
Log likelihood	−28.88	−30.29
Number of observations	46	46

Note: Standard errors are in parenthesis.

(e) Limitations and future work

The quantitative analysis carried out in this section is obviously limited. There are many aspects of competition law that have not been examined. Important omissions include transplant effects and the impact(s) of competition law (direct and indirect). More work need to be done on the judiciary's versus competition agency's role in competition law enforcement. In the future we may also want to look at the links between per se versus rule-of-reason provisions for various practices and legal tradition. It may

Table 8
Determinants of enforcement of competition law

	OLS specification			
	Global Competition Review's rating (index)			
English	0.3875	0.6776	0.2622	Dropped
	(0.5227)	(0.3977)	(0.4910)	
French	−0.7722	Dropped	−0.8834	−0.7860
	(0.5114)		(0.4797)	(0.4885)
German	Dropped	−0.0404	Dropped	−0.0474
		(0.4908)		(0.5081)
Nordic	0.1375	−0.1163	0.1360	0.2781
	(0.6151)	(0.5530)	(0.5734)	(0.5991)
Socialist	Dropped	Dropped	Dropped	Dropped
GNI per capita		0.00006*		
		(0.00002)		
Budget per staff			5.36×10^{-6}*	5.12×10^{-6}*
			(2.58×10^{-6})	(2.54×10^{-6})
Age of competition law				0.0085
				(0.0063)
Intercept	3.3000*	1.8394*	2.8264*	2.6191*
	(0.4101)	(0.3284)	(0.4450)	(0.5398)
R-square	0.25	0.51	0.38	0.43
Number of observations	26	26	26	26

Note: Standard errors are in parenthesis.

also be important to include the impact of other laws on competition.[35] In this light, there is also a need to go beyond the narrow investigation of competition policy in terms of competition law. One significant limitation of this and other quantitative studies has been due to data constraints, resulting in poor proxies and measures and small sample.

5. Conclusions

This paper has attempted to uncover the complex relationship between legal tradition and competition policy. Qualitative and anecdotal evidence on the impact of legal tradition on competition law has revolved around discussions of competition law in common law setting, convergence in competition laws, and the enforcement problems of competition laws in OECD countries. First, the structure of competition law differs between the different legal traditions in terms of the choice between rule of reason and per se illegality provisions. Second, there is also a lack of convergence in terms of substantive decision standards between countries with different legal tradition. Third, the institutions and mechanisms for judicial enforcement of competition law are not the same in the different legal traditions.

[35] For example, Tirole (1999) argues that proper legal enforcement of contract can enhance competition either: (a) directly, e.g. market entry is encouraged when ability to enforce contracts make it easier for firms to vertically disintegrate or outsource; (b) indirectly, e.g. new or young firms can borrow more and at more favourable terms when creditors' and shareholders' interests are legally protected (similar to the law and finance literature).

Quantitative analysis involving cross-country regressions provided additional evidence on the relationship between legal tradition and competition policy. Legal tradition does not seem to be a significant determinant of the decision to implement competition policy itself. Countries with a German civil law tradition do have a higher probability of implementing pre-merger notification compared to English common law countries. The length of the competition agency head's appointment and the political/apolitical nature of his/her appointment do not seem to be affected by legal tradition. The performance of competition law enforcement is not affected by legal tradition. Overall, the quantitative evidence on the impact of legal traditions on competition policy that comes from cross-country regressions is less striking. This could be due to the severe data limitations. Thus, there are significant opportunities for further empirical work in this area.

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