Spread of legal innovations defining private and public domains.pdf

Ron Harris

Available at: https://works.bepress.com/ron_harris/45/
Spread of legal innovations defining private and public domains

RON HARRIS

The literature on law and the rise and spread of capitalism is consumed by two major tensions. The first is between the view of law as epiphenomenal to the rise of capitalism and of law as instrumental to its rise. The second is between a view of Western law as developing in two separate and distinct legal traditions, English common law and Roman civil law, and a view of the law as converging into a single capitalist enhancing model. This chapter is organized around the second tension.

It first surveys the literature and shows that much of it pays substantial attention to the unique features of each of the two European traditions, and to the different role played by each in enhancing capitalism. Much of the more recent literature upholds the common law side by asserting that Anglo-American common law and the British and American constitutional tradition facilitated faster and more sustainable growth.

The next part of the chapter surveys the development of the law in the core capitalist countries, in four fields of law that are postulated by economic theory as crucial for economic growth: the concept of freedom of contract; the establishment of land registries; patent law; and the formation of business corporations. This part of the chapter shows that, on the whole, the transformation of law in these fields into a capitalist mode was not based on legal traditions. Countries having similar legal origins, say Germany and France, or the United Kingdom and the United States, in some cases developed different models for dealing with similar problems, while countries of different origins sometimes adopted similar institutional-legal solutions.

The last part of the chapter accounts for the spread of European capitalist law in these four fields to the rest of the world. Here again a pattern of expansion along the lines of legal traditions does not hold well. In some cases, the law of the core of each empire indeed spread to its overseas colonies with settlers or trade. But transplantation throughout the empire was often affected
by the local conditions in each colony and by contingencies. Furthermore, in the imperial peripheries, cross-empire influences sometimes resulted in borrowing models from rival empires. Countries that were not part of the formal empire of a European power were freer to borrow law from different European sources or to reject it, at least in some fields, in favor of local law. Last, a significant tool for spreading European capitalist law was through voluntary transnational organizations that promoted the harmonization of law.

The first theme, the role of law in economic development, is not directly addressed in this chapter. Yet the multiplicity of models of law that emerged in each of the four fields suggests that no single model of law was inevitable for the transformation to capitalism. There was no convergence into a single, most efficient, legal solution. Economies that adopted quite different legal models were able to develop. The question whether differences in legal tradition or in specific legal institutions and rules made a difference in terms of rate of growth or nature of growth is fiercely debated. The conclusion discusses the possibility that despite a multiplicity of legal designs, these were nevertheless functionally equivalent in a manner that suggests a second order convergence.

Law and economic development

Max Weber was among the first to attribute a significant role to the law in the rise of capitalism. European law was developed by jurists on the basis of general legal rules that were shaped over centuries, from Roman times on, and embodied in codes. It was operated by independent judiciaries, academically spirited jurisconsults, and a distinct legal profession. These created a high level of separation between law and other realms of social life, such as religion or politics. European law combines a high degree of legal differentiation with a substantial reliance on preexisting general rules in the determination of legal decisions (Weber 1968: 641–901). Weber argued that the law of other civilizations, notably Chinese law, was not as formal and rational as European law. As a result, the law of these civilizations did not facilitate the rise of capitalism. His argument fails to explain why England’s non-academic case-based law, which is the least formal and least rational in Europe, was the first to industrialize. What is known as the “England Problem” haunted Weber’s thesis and gave rise to later explanations that privileged the common law (Trubek 1972; Likhovski 1999).

From Weber’s time and until the 1970s, law was not viewed as a major factor in explaining economic development. Attention was mainly devoted to
technology, capital accumulation, trade, and education. There were, however, two exceptions. In the 1920s and early 1930s, traditions that originated with Thorstein Veblen and Oliver Wendell Holmes eventually met in an institutional economics-legal realist interaction in the works of John Commons, Robert Hale, and their contemporaries, who viewed the law as a precondition to the functioning of the market (Hovenkamp 1990: 993–1058; Pearson 1997; Fried 1998). In the 1960s and early 1970s, the belief that the law can serve as the key to economic growth spread among lawyers. They believed that less formal and autonomous, and more instrumental and policy-oriented law could help Latin American and Asian economies grow faster. They worked in law school foreign aid programs and developmental agencies and collaborated with the Ford Foundation to promote the reform of legal rules and institutions, strengthen enforcement, and enhance the legitimization of the legal systems of developing countries (Trubek and Santos 2006).

The last three decades have witnessed an institutional turn in the social sciences and particularly in economics. Economists turned their attention from markets to institutions, including legal institutions. This institutional turn, which was mostly due to the influence of Nobel Laureate Douglass North, had historical tendencies. Attention turned to the development of impersonal exchange in pre-state settings, to the rise of states that credibly respect property rights, and to the evolution of market infrastructures. The sources of this change can be identified in the transaction costs and property rights adjustments of the neoclassical economic paradigm, which were first formulated in the theoretical economics discourse of the 1960s by Ronald Coase and later by Oliver Williamson and Armen Alchian, Harold Demsetz, and others. The application of neoclassical economic theory to non-market settings, notably public choice and economic analysis of law, also began during the same decade, in the work of James Buchanan, Ronald Coase, Gary Becker, and Richard Posner. Issues of collective action received attention from Kenneth Arrow, Mancur Olson, and others. These corrections, adjustments and extensions of the neoclassical paradigm drew economists’ attention to institutions. The new turn to institutions in economics made inroads into economic history and into the study of the rise of capitalism in the 1970s and the early 1980s, and caused economic historians to divert more of their research from markets to institutions. Roughly speaking, the turn to institutions had three phases in terms of modeling the relationship between institutions and the economy. Initially institutions were viewed as exogenously endowed on the economy, and the focus was on their effect on economic performance. In the second phase, attention was given to the study of the

Spread of legal innovations
ways in which economic development affects the creation and transformation of institutions. In the third phase, institutions were viewed as endogenous, affecting economic development and being shaped by it, and the study focussed on the details of the reciprocal causal relationships (Harris 2003: 297–346).

Douglass North (initially with Robert Thomas) was the first to argue that the rise of the West can be explained by its institutions. Institutions that developed in Europe were more effective than institutions of other civilizations in reducing transaction costs, protecting property rights, enforcing contracts, and facilitating the spread and management of risks and the monitoring of agents. More specifically, North discussed such institutional changes as bills of exchange, patent law, insurance, accounting methods, and joint-stock companies (North and Thomas 1973; North 1990).

Richard Posner, coming from a law-school tradition and applying to it price theory, argued that, due to litigation and judicial decisions, the common law constantly evolved towards efficiency and better supported economic growth than the code and legislation of continental legal systems (Posner 2002).

Douglass North and Barry Weingast argued that the British were the first to solve the credible commitments problem – the inability of the sovereign and unconstrained state to credibly commit towards its subjects and not to expropriate them. The Glorious Revolution of 1688 epitomized a constitutional transformation, with the Bill of Rights, parliamentary supremacy in issues of taxation and spending, and the establishment of the Bank of England, and created an environment in which investors could rely upon the state to meet its financial promises. The solution to the credible commitment problem allowed Britain to increase government borrowing, lower the interest paid by the government on its debt, and expand the government bond market and private capital markets, resulting in Britain’s ability to wage prolonged and successful wars, and to form the fiscal-military nexus (North and Weingast 1989).1 The solution marked the beginning of a century and a half of continuous and unprecedented economic growth. Countries such as France, which were unsuccessful in solving the problem, dawdled. North and Weingast did not argue for the superiority of European institutions in general, they argued that some Europeans – the British – provided better institutional support for the rise of capitalism than others. The institutional support was connected to law, not to the common law, but rather to constitutional law.

1 But see also criticism of the argument: Munro 2003: 505–562; Sussman and Yafeh 2006; and Coffman, Leonard, and Neal (in press).
Spread of legal innovations

A team of four authors, La Porta, Lopez-de-Silanes, Shleifer, and Vishny, known as LLSV, developed a system for coding and measuring the legal rules governing the protection of outside investors in corporations. They then showed that legal rules protecting investors vary systematically among legal traditions or legal origins. Common law countries provide the most protection; German-based and Scandinavian civil law countries provide a medium level of protection; and French civil law countries provide the least protection (La Porta et al. 1997). They then correlated these levels of protection with economic outcomes. They found that legal origins explained the ownership structure of corporations, firm valuation, the extent and liquidity of the stock market, and, eventually, economic development. Previous econometric studies could not convincingly untangle the causation problem; namely, determine whether better law caused better economic performance, or whether more developed economies gave rise to better law. LLSV argued that because the law in most countries was transplanted by colonial powers, the causal direction is clear (La Porta et al. 1998). The law was exogenously determined at the stage of colonization and not endogenously in interaction with economic development. Developed economies did not adopt common law systems; common law countries developed sophisticated economies due to their legal origins. LLSV convinced non-legal scholars that law matters.

Another team of economists, Acemoglu, Johnson, and Robinson (hereafter AJR), tackled the causation problem in a different manner. Their theory was that mortality rates among early Europeans (soldiers, bishops, and sailors) in various colonies around the globe determined the feasibility of establishing long-term settlements and the type of early institutions in the colony, and these in turn, through inertia, shaped current institutions that determine current economic performance. Colonies which, due to the mortality of Europeans, could not be settled by Europeans, developed extractive institutions. Colonies that were settled by Europeans developed European-like institutions that protected private property rights and provided checks and balances against government expropriation. The theory is well supported by the empirical findings; a high correlation was found between mortality rates and institutions, and between institutions and economic performance variables such as income per capita (Acemoglu, Johnson, and Robinson 2001; Acemoglu and Robinson 2012). The mortality rate was exogenous to economic development. Further, the correlations hold up well when endowments and other variables are controlled for. The conclusion is that it was institutions, mostly the protection of property rights, that determined economic development.
To sum up, the understanding that law matters for the rise and spread of capitalism has expanded over the last three decades. Economists pay more attention to the law. Many of them attribute the effect of law on development to the legal tradition or the legal origin. In other words, much of the literature attributes to common law origins and to the Anglo-American constitutional tradition an advantage in enhancing economic performance. The role of law in economic development is very high on the research agenda these days (Dam 2006; Milhaupt and Pistor 2008).

The transformation into capitalist law in Europe

European law on the eve of the expansion of capitalism in the late eighteenth century was split. On the continent, civil law was based mostly on Roman law. Its core was the Justinian civil code. It was developed and adjusted to circumstances by university-based jurists that glossed, commented, and interpreted the code. Court procedures were inquisitorial and written. The jury and the lawyers were not central to the system. Legal education was academic. Judges were usually politically appointed and not independent, and tended to represent the ruler’s interests. The civil law developed in detachment from constitutional law which tended to be authoritarian.

In the early modern era continental law underwent gradual divergence from a uniform jus commune to distinct national laws of the emerging nation-states. As the eighteenth century progressed, the law was increasingly inspired by enlightenment and secular natural law ideas. After the turn of the nineteenth century, French Revolution influences and the Napoleonic codification changed it to better facilitate the rise of capitalism.

In England, common law and equity, as reflected in Blackstone’s Commentaries (1765–1769), were still to a large extent based on institutions, procedures, and forms of action that were shaped in the formative era of common law around the thirteenth century. Roman law and university-level jurisprudence were rejected. The law was created by lawyerly trained judges who enjoyed a high level of independence. The court procedure was adversarial, relying on barristers. The jury was the fact finder. Legal education was in the form of apprenticeship in the Inns of Court. Private law and constitutional law that embodied representative and later also liberal elements developed hand in hand.

Later in the eighteenth century, Mansfield (Lord Chief Justice 1756–1788) led a judge-made reform mostly in the fields of mercantile law, and subsequently,
Spread of legal innovations

Bentham’s inspired legislative reforms also contributed to making English law more amenable to capitalism.

In this section, the transformation of law into a more capitalism-enhancing framework will be examined in four legal fields postulated by economic theory as crucial for economic growth: the concept of freedom of contract; the establishment of land registries; patent law; and the formation of business corporations. They deal, in this order, with the facilitation of market transactions; the security of property rights; technological innovations; and the pooling together of capital for investment in firms.  

Freedom of contract

Contracts are the legal tools for conducting market transactions. Barter spot transactions can do without much law. Impersonal exchange relies more on law than personal exchange. Contract law becomes more important as transactions become more complex. Credit transactions, future transactions, multi-stage and relational transactions, and transactions in which quality cannot be observed by the buyer before payment, all need legal enforcement. Transactions that required contractual enforcement expanded with the rise of capitalism. Did contract law respond to the challenge?

Roman contract law recognizes and enforces a variety of forms of agreements including sale, hiring, mandate (agency), and partnership. This is one of the grounds for the assertion that Roman law is based on individualist and liberal values (Gordley 1993). But Roman law did not recognize the general conception of an agreement, divorced of specific form, which is legally binding based on the notion of free will. The French and German codification expanded the realm of contracts. But the process was gradual. The Napoleonic Code Civil (1804) still placed the book on “property” before the book on “acquiring property,” in which sections on succession and donations featured before contracts. The German Civil Code, the BGB (1896), placed the book on “obligations” and the sections on contracts at its center, before the

2 These four fields are by no means the only fields of law which are relevant for economic performance. One could include other fields of law in the list, e.g.: constitutional law; bankruptcy law; tort law; banking law; bills of exchange law. Even within these four fields one could examine different doctrines than those examined here, say eminent domain law rather than land registries, contract enforcement rather the freedom to design contracts, or debt finance rather than equity finance of corporations. My selection is based on space constraints and personal inclinations. I will mention here just two of the most intriguing recent examples that study relationships between legal traditions and economic performance in fields not covered here: bankruptcy (see Sgard 2006); and corporate debt finance (see Musacchio 2008).
book on “property.” Pothier in *Traité des obligations* (1761) put forward a theory of contract that is based on the mutual assent of the parties rather than the unilateral promise of one or both parties. This theory was influenced by social contract philosophy and natural law jurisprudence. The French code followed Pothier and placed consent of the parties as the cornerstone of the validity of a legally binding agreement. \(^3\) The French Revolution also freed land from the legal control of aristocracy and the church and thus commodified it and made it a subject of contracts. In Germany, the commodification of land was still a contested issue when the BGB was drafted towards the end of the century (John 1989).

In England, things were altogether different. Contract was not recognized as a legal category until modern times. Some contracts that fitted forms of action devised during the formative period of the common law (twelfth to fourteenth centuries) were enforced. For example, the writ of covenant allowed claims of damages when promises made under seal were breached. The writ of debt allowed the recovery of a debt for a certain sum of money. Agreements that did not fit any preexisting writ could not be enforced. In the sixteenth and seventeenth centuries, judges gradually expanded the application of the preexisting writs to additional types of contracts. The application of the writ of assumpsit to executory contracts (in which performance of both parties was temporally separated from the agreement stage) in the case of *Slade v. Morley* (1602), is a notable example of this trend. They solved many of the practical problems that resulted from the rigidities of the old forms of action by making discretion the evidentiary realm of the jury, by relegating them to the commercial law device of bill of exchange and to the equitable device of trust. Blackstone still viewed contract as a mode for acquiring title in property and devoted to it only some twenty-odd pages in his four-volume survey of the laws of England. Common law jurists did not theorize much about the general principles of contract law until well into the nineteenth century.

Between Blackstone’s account and Maine’s famous observation a century later that the modern world had shifted from status to contract, the space and content of contract law were transformed. A series of contract law treatise writers, inspired by Pothier, gradually formulated an English contract theory. This theory was also based on the will theory. Common law finally marginalized promises and centralized agreements. Offer and acceptance were the

---

mode by which contracts were made. Doctrinal developments dealt with the nature of contractual terms, the use of implied terms, the nature of mistakes that invalidate contracts, the assessment of damages. The just price doctrine died out. Implied warranties were more rarely read into contracts. The doctrine of caveat emptor reigned. The traditional requirements of consideration and privity of contract were narrowly read (Ibbetson 1999). According to some legal historians, English contract law underwent a transformation in first half of the nineteenth century, into an era of freedom of contract. But the economic and social effects of the transformation are disputed. While some historians believe that it enabled a release of entrepreneurial energy, the expansion of the market, a more efficient allocation of resources and economic growth, others view it as distributive, allowing the rising industrial capitalists to subsidize their activities and transfer wealth to their pockets at the expense of landowners and laborers (Horwitz 1979; Posner 1986: 229–238).

Late in the nineteenth century, the trend reversed. Dicey noticed the growth of intervening regulation and labeled the closing decades of the nineteenth century “the era of collectivism” (Dicey 1905). He referred particularly to legislation that protected labor and the poor. Atiyah’s famous book The Rise and Fall of Freedom of Contract paid more attention to case law doctrines but also identified a turn away from the will theory late in the nineteenth century (Atiyah 1979: 681–777). One important example of this turn was backtracking from enforcement of contracts in restraint of trade, such as cartel agreements, and from giving full effect to contracts in monopolistic markets. The courts then followed the lead of the legislature and gave effect to intervention with freedom of contract in the context of consumer contracts, employment, predatory lending, and more. Next, courts developed doctrines that reviewed the free choice and consent of parties to contracts. Lastly, corporation law, property law, and tort law infiltrated some spheres that in the heyday of freedom of contract were considered within the exclusive realm of contract law.

So, while freedom of contract was on the rise both in England and on the continent, the tools that were used for promoting it were different: a reformed civil code on the continent and judge-made law in England. Furthermore, the heyday of freedom of contract was brief. Early capitalism emerged in its absence. Advanced capitalism expanded despite its retreat. Businesspersons were able to transact without resort to the grand doctrinal contractual rules using niches such as the stock exchange, the international arena, transactions that were carefully designed by shrewd attorneys, even before and after the epitome of contractual freedom.
Establishment of land registries

Lawyers pay a good deal of attention to the minute details of property law doctrines. They pay less attention to land registration, which they consider an administrative and technical matter. But when examined from the perspective of economic growth, such registries play an important role. The problem of recording property rights is common in today’s less developed economies. Informal housing, in which land is first occupied and only years later, if at all, ownership titles are sorted out and registered, are commonplace in the rapidly growing urban centers throughout the developing world. As de Soto showed, a low level of definition and protection of property rights leads to less efficient informal economies (De Soto 1989). Referring specifically to land registries, Benito Arruña argued that increasing certainty facilitates the use of land as collateral for credit, economizes transaction costs, and promotes efficient allocation of resources (Arruña and Garoupa 2005; Arruña 2012).

In France, notaries traditionally kept deeds of conveyances of land. These semi-public registries provided a good starting point on the way to establishing public registries in the modern era (Hofman, Postel-Vinay and Rosenthal 2000; Engerman et al. 2003: 9–10). But this tradition also shaped a model of registries based on recording transactions and not on titles. Following the Revolution, calls for the formation of a national public inventory mounted. But only in the Napoleonic era did a law of 1807 provide the basis for the French parcel cadastre. The work was completed in 1850. In the Code Civil, there was no registration requirement for titles, but mortgages had to be registered. An act of 1855 required the recording of the full text of contracts for the sale of immovables. The register enrolled and kept title deeds and thus provided evidence for property claims. This evidence could be used by the courts to allocate property rights ex post – after litigation. Furthermore, courts apply a non-standard priority rule. When deciding on a conflict with third parties, they determine the priority of claims from the date of recording in the public office and not from the date of the contract.

The German tradition led to a different model of registration. Trading cities of the late Middle Ages (for example the Hanseatic cities of Hamburg and Bremen) were the first to create municipal registration systems. Such registries were further formalized in seventeenth-century statutes. At the beginning of the nineteenth century in some of the German states, cadastral systems were established for taxation purposes. In some of the western provinces, they were based on the cadastres established by Napoleon. In the third quarter of the century, various German states established land registries for titles and
mortgage guaranties, Prussia being one of the last in 1872. The Prussian statutes served as the basis of imperial legislation after the unification. In the BGB, a land registration system for the whole country was established. This system (Grundbuch) bases all rights of ownership and other rights on land and buildings. The German model contains information not on deeds or claims, but on the rights themselves. It thus requires a baseline of the complete purge of property rights.

In England, land surveys for tax purposes were made only sporadically beginning with the Doomsday Book (1086). Disputes about land titles were settled through cumbersome court litigation. In an action begun by writ of right, the losing party was deprived of all claims to the land, but that form of action was very slow and complicated. The alternative faster and less costly writ of Novel Disseisin was not a remedy for the recovery of land to which one is entitled; it was an action that could be employed by a person who has been turned out of possession, and against the person who turned him out. While the writ of right could set the strongest right of land ownership available in England, the writ of Novel Disseisin provided a step down the chain, a right of possession (Maitland, Chaytor, and Whittaker 1909; Baker 2002). There were several additional writs and levels of property rights in the labyrinth of traditional common law forms of action, and these produced much litigation, attorneys’ fees, and economic uncertainties.

The burdensome system of settling property rights through litigation led to growing pressure in the eighteenth and early nineteenth centuries for reforms in property law, prominent among them the establishment of a land registry. The Real Property Commissioners Report of 1830 came down in favor of a general deeds of transfer registry. The idea that registration of titles, rather than transactions, would be possible grew after the Merchant Shipping Act 1854, which established a register of title to ships. Sir Robert Torrens, the Prime Minister of South Australia, piloted land registration in that colony in 1858, to which we shall return later. In England, land registration entered the statute books four years later through the Land Registry Act 1862. The flaws in the first registry were fixed by studying the German model and finally enacting compulsory registration in the 1897 Land Transfer Act (Offer 1981).

**Patent law**

Before the rise of capitalism, Western European states encouraged technological innovations in two ways, monetary payments and grants of monopoly. In Ancien Régime France, the former was the norm. Inventors and introducers of inventions could benefit from titles, pensions, lump-sum grants, bounties or
subsidies for production, and exemption from taxes. They could also on some occasions be granted monopoly in the form of exclusive privileges. In England, the latter was the norm. Elizabeth and the early Stuarts used monopolies to encourage foreign craftsmen and innovators to settle in England and later extended the use of monopoly to inventions by Englishmen. The hostility of parliament and of the common law judges to the use of monopolies by the crown as a means of extracting independent income and increasing political power, led to the enactment of the Statute of Monopolies in 1624.\textsuperscript{4} The statute prohibited the grant of monopolies by the crown without parliamentary authorization. However, as part of a compromise, a number of exceptions were made to this rule. Section 6 of the Statute of Monopolies exempts the grant of monopoly by way of letters patent for “the true and first inventor” of “new manufactures” for “the term of fourteen years or under.” This section created the statutory basis of English patent law for the next two centuries. It meant that the crown could continue the practice of granting monopolies on inventions at the crown’s discretion. Such grants were not subject to any criteria or procedures. These monopolies were enforceable like any other crown patent, charter, or franchise. The crown employed the grant of patents ex post, at its discretion and for its own ends. Thus inventors could not rely on the grant of monopoly and the law did not create calculable ex ante incentives for investment of time and labor in inventive activity.

From the early eighteenth century, the system was redesigned as one of registration, involving time and money, but without an examination of the content of the patent or its value. After 1711, it became more common to ask inventors to append details of the method of their invention to their petitions. In some instances, the officers insisted on the inclusion of detailed drawings. By 1734, the request for specification became the standard practice, but it was only forty-four years later that this practice was embodied in the laws of England, not via legislation but as a result of Lord Mansfield’s 1778 \textit{Liardet v. Johnson} decision. In this case, Mansfield ruled that specification should be sufficiently full and detailed to enable anyone skilled in the general field to understand and apply the invention without further experiment (Adams and Averley 1986).

A plausible explanation for the emergence of the practice is that as patents accumulated – many of them centered on a limited number of fields such as carriages, bleaching, oil, and spinning – the task of the law officers of the

\textsuperscript{4} The discussion of England in this section follows Harris 2004.
crown became more complicated. They were obliged to grant patents only within the powers conferred to them by the Statute of Monopolies, that is, only to new manufacture. They found it more and more difficult to determine whether a petition submitted to them was indeed for a novel method or machine. By asking for specification, their aim was not to put the petitions under their own careful professional scrutiny; they continued to register them as before. The idea was to transfer the burden from themselves to other interested parties (Macleod 1988). In some circumstances, this also meant that the state was no longer a party to the ensuing litigation. An important implication of this shift was that the definition of the property rights of inventors was done ex post and not ex ante. Neither the crown officers nor the courts provided inventors with detailed rules regarding the submission of specifications. Inventors could go to the trouble of investing in experiments, specification, patenting, production, and marketing, only later to face a court suit that would void their patent.

The problem of patent law was wider and graver than the question of specification alone. It resulted from the fact that the statutory basis of intellectual property rights in inventions throughout the industrial revolution was one old clause, Clause 6 of the 1624 Statute of Monopolies. The rest had to be created by judges who could not do much to expound the law when they heard only one case between 1750 and 1769 and twenty-one cases between 1770 and 1799 (Dutton 1984: 69–85).

Since judges, unlike legislators, cannot set their own agenda, they depend on the flow of cases into their courtroom. In this case, the flow was less than one case per year, and many of these cases were decided on evidence or on minor points of law. To this, one should add the fact that creating detailed rules in this field of law was exceptionally complicated, because judges could not apply legal doctrines borrowed from other fields of law since they had to deal with technical issues unfamiliar to lawyers, and because the nature of the innovations was changing rapidly. A manifestation of the unsettled state of patent law can be found as late as 1795 in a note written by Watt himself listing “Doubts and Queries upon Patents.” The eight queries on Watt’s list can be classified into four main issues: What is patentable? What should be included in specifications? What is the relationship between newer and older patents? What kind of use of monopoly power will be considered illegal? Only well into the nineteenth century, with the increase in litigation and the formation of a series of parliamentary committees leading to the Patent Law Amendment Act of 1852, did more detailed and settled rules begin to emerge.

Spread of legal innovations
What the English system offered was ex ante incentives that sometimes only partly materialized ex post (Mokyr 1990: 247–252). Some patents were invalidated by the courts, others were not strictly enforced. Infringement was quite common. Though inventors did not always extract in full the profits they initially expected to gain from their monopolies, the incentives were sufficient for inventors to remain in business and to do well. The state was there to deal with the patent system when it led to undesirable results or when the inventor’s lobby was strong enough. When the state had a strong or symbolic interest in an invention, as was the case with the water chronometer (from which accurate longitude at sea could be calculated for the benefit of the navy and of merchant shipping), a special prize was offered in advance to increase incentives.

The Patent Law Amendment Act, 1852, formalized and streamlined the application process. A Record and Commissioner’s Office was established where applications could be easily filed and records of existing patents could be accessed by patentees and manufacturers. Costs were reduced. Patents were to apply to the entire United Kingdom. But the basic model of registration, without substantive examination and subject to future court review, was maintained.

The modern French patent system was established after the Revolution, according to the laws of 1791 and 1844. Patentees filed through a simple registration system. Unlike the Liardet requirement in England, there was no specification requirement in France as to the nature of innovation. Applicants could carry on in obtaining the grant even if warned that the patent was likely to be legally invalid. The validity of a patent was determined ex post when challenged and not ex ante when registered. In this sense, the French system was similar to the English.

US patent law developed along different lines and gave rise to a distinct model of examination. The Constitution gave Congress the power to “promote the Progress of Science and the useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” This federalized patent law prevented jurisdictional competition among states, assured uniformity, and provided inventors with monopoly over larger markets. The examination system was set in place in 1790, when a select committee consisting of the Secretary of State (Thomas Jefferson), the Attorney General, and the Secretary of War scrutinized the applications. Three years later, due to the time-consuming nature of the task, the validity of patents was delegated to the district courts. This created a registration system in which patents were registered unless an objection was filed. In case...
of objection, the court was to determine whether to uphold or repeal the patent. The 1836 Patent Law reformed the system and established the Patent Office (Khan 2005; Bracha 2005). The Office employed trained and technically qualified employees who were authorized to examine applications. Inventors whose applications were refused due to alleged conflict with a prior patent could petition the federal courts to review the decisions of the Patent Office. The ultimate right of appeal was to the Supreme Court of the United States. The examination system increased certainty with respect to the value of patents (Khan 1995; Lamoreaux and Sokoloff 2001). Registration fees were considerably lower than fees in England and continental Europe. Patent information was made public and accessible. Assignment of patents and licensing was allowed and made readily available due to the certainty of rights in patents.

Germany passed a unified Imperial Patent Act in 1877. The statute created a centralized administration for the grant of a federal patent for original inventions. The system was one of examination by expert Patent Commissioners. Registration of patents was made public and could be opposed by those affected. Patents were granted to the first applicant rather than to the “first and true inventor” (Seckelman 2002). After 1891, a parallel and weaker version of patent protection could be obtained through a *gebrauchsmuster* or utility patent (sometimes called a petty patent), which was granted through a registration system. Patent protection was available for inventions that could be represented by drawings or models with only a slight degree of novelty, and for a limited term of three years (renewable once, for a total life of six years). The German model was quite similar to the earlier American model with the exception of imposing considerably higher fees as a screening device.

A controversy over the desirability of patent systems of both models was at its height in Europe in the third quarter of the nineteenth century. Economists argued that the monopoly granted by any such system contradicts the principles of a free and competitive economy. In England, a bill was drafted in 1872 to weaken the monopoly, but the bill ultimately failed. In Germany, opposition to patents delayed legislation by a few years. In Switzerland, patent law was legislated for the first time in 1887 after earlier initiatives were rejected by the legislature and by referendum. In Holland, an existing patent law was repealed in 1869 and a new one was enacted only in 1910 (Machlup and Penrose 1950). It is interesting to note that at the height of the inventive burst of the second industrial revolution, one of the legal cornerstones of modern capitalism was under heavy attack. But it survived.
Khan and Sokoloff argue that US examination-based patent law was more effective in incentivizing technological innovation than the registration- and litigation-based British law (Khan and Sokoloff 1997; Khan 2008). In the United States, eight federal patent acts were passed between 1790 and 1842 while in England the first act to be passed after 1624 was the 1852 act. As a result, US patent law encouraged a higher level of inventive activity among more varied social groups and in a wider array of industries. Measuring inventive activity and its impact on economic growth is a tricky business. Britain seems to have done quite well in terms of inventions and growth in the period discussed here. It is not clear that the United States did better. Furthermore, a patent law that would better define and more strictly protect property rights could have social costs. It could provide more incentives to inventors, but would also slow the rate of diffusion and increase the monopoly rent of inventors at the expense of manufacturers and consumers. There are notable examples of major inventions that were not registered as patents or whose registration was revoked by courts when disputed, and of patents that were successfully protected or prolonged and as a result, their application was more limited. Many contemporary Europeans envied the British spirit of invention and its patent system.

Corporations

The common early modern method of forming corporations was by way of individual charters granted upon application for a specific purpose and subject to specified terms. In time, the rising nation-states usurped the exclusive prerogative of incorporation at the expense of local and religious entities. The states exercised full discretion when considering petitions and utilized this discretion in order to promote their policies and increase their income in return for incorporation. This method was quite similar to the contemporary method of granting patents.

According to North, Wallis, and Weingast (2009), general incorporation is one of the central components of the transition from limited access to open access societies. This component of the transition took place in capitalist states quite rapidly and uniformly, around the middle of the nineteenth century. In the preceding decades, the number of petitions for incorporation grew dramatically and expanded beyond overseas trade. Entrepreneurs and firms in an array of new sectors, transportation, utilities, finance, and to a lesser extent manufacturing, sought incorporation. A combination of free market ideology, being overburdened by applications, the lack of a clear incorporation policy, and interest group lobbying drove
Spread of legal innovations

England to be the first country to adopt general incorporation in 1844. The underlying principle was to replace the discretion exercised by state officials to one exercised by investors (Harris 2000). The new company law of 1844 conditioned incorporation, through registration with the Companies Registrar, on the filing and disclosure of documents that would provide potential stock buyers with legal and financial information. The English model was soon followed by France (1867), the German Reich (1871), and the United States. In the United States, the process was gradual, because incorporation was in state and not federal domain, and went through two stages: first the enactment of general incorporation for some or all sectors; and next the prohibition (in state constitutions) of incorporation through charters. By 1870, most US states had adopted general incorporation and prohibition of chartering. The shift to general incorporation converged on a quite uniform model.5

Limited liability was viewed by Easterbrook and Fischel (and others) as an essential precondition to the willingness of passive investors to invest in the equity of public corporations and diversify their investments, and to the development of a share market (Easterbrook and Fischel 1985). Hansmann, Kraakman, and Squire view asset partitioning, in the form of limited liability and entity shielding, as a device that increases efficiency by lowering monitoring and information costs, lowering agency costs, and ultimately reducing the costs of credit (Hansmann, Kraakman, and Squire 2006). Nevertheless, general limited liability was introduced even later than general incorporation. Some level of limited liability was attached to corporations in the chartering era. But its content was not always clear or uniform and not every corporation was granted limited liability. General limited liability was introduced in England in 1855–1856. But banking and insurance were subject to distinct liability arrangements. Significant uncalled capital balance was common and this allowed calls on shareholders at insolvency. In the United States, the trust fund doctrine died out only in the 1890s. In some continental jurisdictions, notably Germany, there were relatively high minimum capital and minimum share nominal value requirements, which forced shareholders to risk significant capital. Directors and officers could be exposed to personal liability for corporate debts. In most US states, double or even triple liability was imposed on shareholders by law until after the turn of the twentieth century. In California, pro-rata unlimited liability was abolished as late as 1931.

5 For further information concerning the history of corporations development in the US, see Atack, Chapter 17 in Volume I.
Capitalism emerged and expanded without general limited liability. The latter became the norm only well into the twentieth century.

The evolution of the legal protection of outside investors against stealing or shirking is an essential precondition for the willingness of such investors to place their money, as equity or credit, in the control of managers or controlling stockholders. After the introduction of general incorporation and limited liability (which in one sense bounded investors’ risk but in another sense augmented it), and with the growing use of joint-stock limited liability public corporation, the issue of the protection of investors became central. LLSV showed that the legal rules protecting investors vary systematically among legal traditions, or legal origins (La Porta et al. 1998). How exactly the basic tenets of Anglo-American law are more conducive to investors’ protection, and when and why this protection developed, are questions that their methodology could not resolve. Others have argued that different investor protection mechanisms developed at least partly in response to different governance structures: widely dispersed ownership in the United Kingdom and the United States, controlling families or banks in France and Germany. Once different governance structures were in place, due to whatever causes, the law was adjusted efficiently to address the different agency problems (managers-shareholders or majority-minority) that each of the governance structures gave rise to. Alternately, path dependency led to the lock-in of some systems, not necessarily of French or German origins, in a suboptimal level of agency problems (Roe and Bebchuk 1999).

In the Anglo-American tradition, the organizational menu offered to entrepreneurs was narrow and included only corporations and general partnerships. On the continent, the menu was considerably wider. Limited partnerships were on the menu since the seventeenth century. In France, the Code de Commerce of 1807 also introduced the commandites par action, a limited partnership with tradable shares. Other European states followed France and introduced the share partnership. Germany was the first to introduce the private corporation, the GmbH, in 1892, allowing the use of an organizational form that better catered to the needs of small and medium-sized enterprises than the standard public corporation. A comparable form was introduced in France in 1925 as the SARL (Société à responsabilité limitée). In England in 1907, the law for the first time created a distinction between public and private companies, imposing lower disclosure requirements on the latter in return for restriction on the number of shareholders and on transferability of shares. The United States was the outlier. After an abortive attempt in some states in the 1880s to introduce the partnership association,
a form somewhat similar to the private company, the form was abandoned for about a century (Guinnane et al. 2007). It was reintroduced only in the late 1970s as the LLC (Limited Liability Company). It seems that in terms of the menu of organizational forms, France and Germany offered firms more of a choice, while the US offered the most limited choice. But it is not yet clear whether such a choice is an advantage as far as economic performance is concerned.

Conclusion
We have seen so far that legal institutions developed in the leading capitalist economies before or concurrently with the expansion of the market, the commodification of land, the burst of technological innovation, and the accumulation of capital in big business. In some fields, the leading economies converged on similar institutions; in some fields, different institutional models developed along the lines of legal traditions; and in some fields, countries clustered around distinct models across different legal traditions.

The spread of legal innovation
European law spread globally in several ways: with immigrants; through empire building and colonial administration; through informal imperialism, political pressures, and voluntary importation; and through the development of international organizations and treaties. The manner in which European law spread had an impact on how that law was perceived, implemented, and enforced effectively, and the extent to which it suited other components of the local law and ultimately contributed to economic development in the various jurisdictions.

Generally speaking, the continental legal tradition was better configured for spreading legal institutions than the common law tradition because since Roman times, that tradition had expansionist and universalist tendencies. A law that originally applied to a town, expanded to relate to an empire. A law that originally applied to Roman citizens could be applied to all subjects of the empire. Similarly, the three components of the medieval jus commune were spread throughout Europe; canon law by the Church, merchant law by the universities, and Roman law through mercantile contacts in ports and fairs. Continental law expanded outside Europe with the Iberian conquests in America. On the other hand, common law for a century was the law of the

6 For further discussion of the use of the corporation form, and specifically the formation of corporate groups, see Morck and Yeung, Chapter 7 in this volume.
English, tightly connected to the English Crown, the Constitution, and Anglo-Saxon customs. Another, more technical, reason for the difference is that continental law was better packaged for exportation. It was easier to transfer a legal code, packaged in a single volume, than judge-made law that relied on oral tradition and, insofar as it was recorded in writing, was scattered in dozens of case reports that were accessible only to trained barristers. But despite the differences in tendencies and techniques, both traditions spread outside Europe. European law, in its capitalist form, spread through two channels: first, within empires; and second, on a transnational and international level.

**Expansion within the empires**

The expansion of European law began with the expansion of the empires themselves.\(^7\) The Spaniards carried their law to Muslim territories as part of the Reconquista and then to the Americas.\(^8\) English law was carried to North America by settlers and to Asia with East India Company Officials (Stern 2011; Hulsebosch 2005). This expansion reached its peak on the eve of World War I.\(^9\) I will demonstrate this type of expansion through its prime example, the British empire, which, at its height, controlled a fifth of the world’s population and a quarter of the earth’s total land area.

English law, in its nineteenth and early twentieth century capitalist form, spread throughout the empire thanks to a number of legislative tools employed by three branches of the imperial governance: colonial governments; Britain’s parliament; and the Colonial Office. Colonial legislators throughout the empire were often British officials who were committed to English law and to harmonization. They had the authority to legislate within their colonies. The parliament at Westminster was also an imperial parliament and could pass legislation that would apply directly to the colonies. The Colonial Office was a pivotal player. One of the main tasks of the legal department of the Colonial Office, headed by John Risley in the years 1911 to 1931, was to promote harmonization. The Colonial Office had a dual

\(^7\) For the wider contexts of European imperialism and the empires, with emphasis on the relations between the Imperial centers and their colonies, see Austin, Chapter 10 in this volume.


\(^9\) It should be noticed that the empires were a channel for the spread of economic policy to the colonies, just as they were a channel for the spread of law to colonies. See O’Rourke and Williamson, Chapter 1 in this volume.
capacity with respect to the harmonization of commercial law. It directed and supervised legislation by local authorities in the colonies. In addition, it drafted Orders in Council, regulations which, once approved by the Privy Council and having received Royal Assent, through a formal but nominal procedure, were applied directly in the relevant colonies as part of their local law. Harmonization was required because the precolonial laws of the various colonies were obviously very different from each other and were often not suited for a capitalist economy, and because initiatives on the ground by officers in the colonies hampered harmonization. Non-uniform laws obstructed the flow of goods and capital between markets within the empire and reduced the advantage of trading within the empire compared to trade with foreign nations and empires. The Colonial Office, inspired by the Board of Trade, expected colonies to enact commercial legislation which closely followed the English model and could be updated in line with changes to that model. The subject matter of commercial law invited importation from England and consistency across the empire. Furthermore, English-based commercial law generally did not conflict with local traditions because it was not intended for the general population but, rather, for a commercial elite and for foreign investors.

On the other hand, uniformity in fields which were embedded in culture, customs, and religion was considered something that should be avoided. In relation to some fields of law, say family law, it was said that English law did not fit local religions or traditions and should not be transplanted. In relation to other fields, it was said that English law was too advanced for the colonies. And with respect to yet other fields, famously criminal law, and to new legal techniques such as the Benthamite codification of the common law, officials desired to use the colonies as a laboratory for experimenting with legal reform before applying it to the core of the empire. But the outcomes and their relevance to European civilization were debated and only rarely did law that was first experimented with in the colonies come to be applied back home.

The issue, however, was not only in which fields of law there was a demand in the empire for English law. On the supply side, in some fields, such as contract law, property law, the law of negotiable instruments, and (until 1890) the law of partnership, English law was wholly judge-made law and could not be readily packed and exported to the colonies. But in other more recently created fields of law, created by Acts of Parliament or through legislative reform by the mid nineteenth century, there was no need for the Colonial Office to prepare a code or a digest based on the English common law. New and relatively comprehensive acts existed, ready to use, on the shelves.
The idea of transnational law was not foreign to Europe. Roman law in its classical era, and *jus commune* around 1500, which contained Roman law, canon law, and law merchant, were uniform throughout wide territories, beyond their Italian place of origin. However, the rise of the nation-state, and with it of national law and national codes, not only led to legal divergence but also to hostility to universal law. The natural law school, in its Enlightenment form, and the post-revolutionary Napoleonic codes, allowed for the revival of legal unification. The codes were carried by French armies across Europe. In some localities, such as Germany, they were overturned with the withdrawal of the French, but in others, they were preserved. When the newly independent Latin American states looked for non-Spanish law in the 1820s and 1830s, they turned to France and adopted its codes. So did the Ottomans when they wished to modernize their law in the 1870s and beyond.

By the 1860s, a new movement that aimed to promote legal harmonization had emerged. The key players in the movement were not state officials but rather legal scholars and practicing lawyers. The creation of the Society for Comparative Legislation (1869) and of the International Law Association (1873) as well as comparative and international law journals indicated the return to aspirations for universal or at least more uniform law. The next practical measures were meetings at conferences, the formation of working committees, and the drafting of conventions (typically governments were called upon to join in only at this stage). Harmonization initiatives took place before World War I mainly in three general areas of law: international transactions including modes of payment, such as negotiable instruments; international transportation by sea, land (train), and air; and intellectual property. After the war, harmonization efforts gradually moved from the private realm to the newly created international organizations. Though the League of Nations Covenant (1919), which emerged from the Treaty of Versailles, and signed by forty-four states, did not amount to a clear power to harmonize and universalize law, it came close and served as a basis for forming international organizations that came even closer to achieving this.\(^\text{10}\) The International Labor

\(^{10}\) Article 23 of the League’s Covenant included among others the following aims: respecting international covenants; the maintaining of humane conditions for labor; the execution of agreements with regard to the traffic in women and children, and the traffic in opium and other dangerous drugs; and maintaining freedom of communications and of transit and equitable treatment for the commerce of all Members of the League.
Organization (ILO) was set up in 1926 as an auxiliary organ of the League of Nations and promoted labor legislation. The International Institute for the Unification of Private Law (UNIDROIT) was established in the same year. Its declared purpose was: “to examine ways of harmonizing and coordinating the private law of States and of groups of States, and to prepare gradually for the adoption by the various States of uniform rules of private law.” More specifically, its aims were to prepare drafts of laws and conventions to promote uniform internal law; resolve conflicts of law in the field of private law; undertake studies in comparative private law; organize conferences and publish works in the field; and carry on preexisting activities in the field. Its activities mainly concerned the laws of sales of goods, transportation, arbitration, and negotiable instruments.

After World War II, in the context of the formation of the UN, the Cold War, and the rise of the United States at the expense of Europe, some of the nineteenth-century and interwar institutions became less relevant, and new institutions connected to the UN or based on intergovernmental agreements, such as the International Monetary Fund (IMF), the World Bank, United Nations Commission on International Trade Law (UNCITRAL), and World Trade Organization (WTO), were created. To some extent, the agenda of each of these bodies includes the spreading of law that serves as infrastructure for markets and facilitates economic growth. The postwar period and these organizations and their legal activities are beyond scope of this chapter.

Another central body that helped to promote the legal harmonization, with an emphasis on the convergence of the common law with the continental tradition, was the European Union (EU). The EU declared harmonization of law as one of its aims and policy objectives. The assignment of creating a harmonization across the two European legal traditions became part of the agenda upon the United Kingdom’s and Ireland’s joining of the EU in 1973. The most significant factor that contributed to the legal integration in Europe was the European Court of Justice (ECJ), which made use of Article 234 of the Treaty of Rome, the preliminary ruling procedure, in order to create increasing convergence between civil and common law procedures.

12 The leading capitalist countries, who were the force driving those organizations, initiated pro-globalization policies which enabled the creation of an infrastructure for international and global markets and facilitate economic growth (see O’Rourke and Williamson, Chapter 1 in this volume).
The spread of law on an international and transnational level was inhibited by several factors. On the legal level, scholars from different traditions, common law and civil law, German law and French law, could not agree on one model for uniform law. The French, whose jurisprudence was more universalist, supported the harmonization project. Germany invested its legal attention until the turn of the twentieth century in its own unification and national codification project. The United Kingdom did not view its common law as suitable for every civilization and focussed its attention on harmonization within the empire. Politically, the heyday of optimism with respect to the fate of globalization declined, with the scramble for Africa, the arms race, and the diplomatic maneuvers that led to the outbreak of World War I. After 1917, the USSR did not support the harmonization of law based on the capitalist model and aimed at spreading its socialist model of law. Following a short heyday in the 1920s, by the 1930s, harmonization was on the decline.

Retreat in face of Socialism and re-expansion

Before Socialism, the legal systems in Russia and Eastern Europe were influenced by the Roman-Germanic law both directly and indirectly (by the Byzantine law which was based upon the Roman law) (David and Brierley 1978: 148–152).

The Marxist ideology is based on the idea that law (of any kind) is a superstructure in the base and superstructure model of society, an instrument in the hands of the ruling class, landed aristocracy, or capitalist bourgeois, which makes use of it in order to strengthen and legitimize its class-based oppression (David and Brierley 1978; Pashukanis 1978). In the post-revolutionary transition to communism the law should be supportive of the abolition of private property, of the implementation of a more egalitarian society, and of the promotion of socialist ideology. An ultimate Socialist society is not supposed to be based on law but on a unanimous and harmonious agreement of the proletariat.

In canonic comparative law books, such as the first and second editions of David and Brierley’s *Major Legal Systems in the World Today* (published in 1968 and 1978 respectively) and the first and second editions of Zweigert and Kotz’s *An Introduction to Comparative Law* (published in 1977 and 1987 respectively), the socialist legal system was mentioned as a legal family for all intents and purposes alongside, and on equal status with the two Western legal families, common law and civil law (Zweigert and Kotz 1977: xii; Zweigert and Kotz 1987: xi; Zweigert and Kotz 1998). However, in the third edition of Zweigert and Kotz, published in 1998, the socialist legal system was left out. Hence, one
could deduce that socialist law was seen by comparative law scholars, as long as the Eastern-Soviet Block was held together by socialist ideology, as a separate legal system or legal family. After the 1989 revolutions, the fall of the Berlin Wall, and the dissolution of the Soviet Union, the notion of socialist law, as opposed to capitalist law, disappeared. Formerly socialist legal systems were mostly reclassified as Roman-Germanic civil law systems.\(^\text{14}\)

The Socialist law began to develop in Russia following the 1917 Revolution. It supported nationalization, was hostile to private property and freedom of contract, subjected the court system to the Party and its ideology, downplayed the role of the legal profession, and criminalized counter-revolutionary activities. The Socialist legal system was supposed to be an answer to the common law and civil law traditions that were identified with capitalist, bourgeois, imperialistic, and exploitative societies. The practical reality in Russia has necessitated the creation of a legal system that would deal with everyday issues as well (De Cruz 1999: 184–185).

Socialist law had spread within the Soviet Union upon its formation. It spread with the expansion of Soviet dominance to Eastern Europe since 1945 and to China since 1949, to North Korea, North Vietnam, Cuba, and other states that turned to communism during the Cold War.\(^\text{15}\) The Communist International (Comintern, 1919–1943) and Council for Mutual Economic Assistance (Comecon, 1949–1991) were among the facilitators of the voluntary expansion of socialist law globally next to the expansion by way of empire and military and political dominance (Zweigert and Kotz 1987: 312–317).

Starting in the middle of the 1960s, some of the states of Eastern Europe experienced changes in their laws, with an emphasis on civil legislature which was widely influenced by the BGB and by non-Socialist models (Ajani 1995: 99–102). In 1980 the law of Russia itself began stepping out of communism in favor of a more capitalistic law. In this context, Russia makes an enlightening example of the endogenous response of the law to the transition to capitalism. For example, the changes in Russia’s company law occurred in accordance to the changing economic needs in Russia – from the decline of the USSR to the period following its fall. The origin of Russia’s company law can be traced in “The Law of State Enterprise” from 1988, which was meant to support the beginning of the change from administrative control to greater enterprise

\(^{14}\) For more about the evolution of legal family taxonomies and the differences in classification of legal families, see Pargendler 2012: 1043–1074.

\(^{15}\) For more about the establishment of the People’s Republic of China (PRC) and the triumph of Mao’s communist regime, and about the legal experience under Mao’s Leadership in China, see Chen 2008: 44–50.
autonomy. From the 1990s many changes have occurred in Russian company law, in order to align it with privatization and the market-oriented changes in the economy. The goal was to make Russian corporations more efficient and more suitable and opened to the global market (Grey and Hendley 1995: 21–26).

To conclude, the laws of Russia, Eastern Europe, and China were initially based on continental civil law, which was conducive to capitalism. This more capitalist-oriented law retreated, in the period from 1917 to 1949, in face of socialist political, economic, and legal order. But then again, starting in 1989, capitalist law re-expanded into these legal systems, reconnecting them with the civil law tradition.

**Spread of contract law**

French contract law, that embodied consensual and free market doctrines together with the ideas of the French Revolution, was carried to other countries in western and central Europe by the Napoleonic armies as part of the *Code Civil*. It was literally translated into Spanish and adopted by the newly independent Latin American states. It was implemented as is by French colonial administrators in Africa and Southeast Asia. The Ottoman empire, which imported other French codes (the commercial code, the criminal code, and procedural codes), did not import the French civil code. The Ottoman civil law that was based on the Shari’a was defended by conservative and religious circles among jurists. Nevertheless, the continental-Roman concept of codification as a framework for organizing legal rules was imported by the Ottomans from France. Ottoman-Islamic contract law went through a codification process that produced the *Mejelle*, which incorporated in it Shari’a-based contract law.

The English common law of contracts could not be exported as swiftly. In English settlement colonies, it was carried with the settlers but went through gradual adaptation that resulted from the level of communication and of legal expertise as well as from local conditions (Ross 2008; Nelson 1975). In Canada, for example, the idea of freedom of contract, a cornerstone of English mid-nineteenth-century common law, was imported into case law and not legislation. It was imported by jurists via a few importation channels. Many judges and legal scholars were educated in England. English contract law treatises were read in Canada. Canadian judges cited English cases. Appeals from Canada were decided by the Judicial Committee of the Privy Council in London, and its decisions were binding as precedents in Canada. The final outcome of importation through all these channels was that by the early
twentieth century, Canadian contract law resembled English contract law, including its freedom of contract bent.\(^\text{16}\)

While the importation of case law through a variety of channels well suited settler societies such as Canada, a contract law codification was especially prepared for the largest colony, the crown jewel, India. The Indian code was a hybrid, combining English law, Hindu law, Muslim law (also known as “Muhammadan Law”), and purposely drafted rules (Pollock and Mulla 1972: 1–2). Some of these served as laboratory experiments for possible future use in the core of the empire. In some of the other colonies, such as Palestine, the English made no effort to implement their contract law (Shachar 1995: 1–10; Harris et al. 2002).

China is an example of a country that introduced freedom of contract after a long period in which such was denied by the socialist-inspired concepts of law. In 1949, planned command economy was put in place by Mao’s Communist Party. This economic system was supplemented by a legal system that justified state intervention in contractual relationships. No room was left for voluntary contractual relationships in the open market (Chen 2008: 39–76). Hand in hand with economic reforms, contract law received more space starting in 1982. Freedom of contract as a governing principle of contract law was legislated for the first time in the 1999 Contract Law. The principle was interpreted widely by scholars as encompassing freedom to choose parties, form, content, mode of dispute resolution and more (Zhang 2000: 241–246).

Spread of land registries

Land registries offer an interesting and complex pattern of expansion. The European continent offered two models, German and French. The English were latecomers in introducing land registries. Yet, the British empire was expanding fast and British settlers migrated to newly acquired colonies in North America, Australia, and South Africa in growing numbers. Were they to apply the medieval and by now outdated English model of defining titles in land, or adopt newer continental models?

The origins of the Torrens system of land registration introduced in South Australia in 1857–1858, which later spread to other parts of Australia and the empire, have been the subject of a great deal of debate over the years. Some scholars have put forward the view that the Torrens system is an entirely

indigenous South Australian invention, developed by Sir R. R. Torrens without any help from outside sources. Others argued for influences from the English Merchant Shipping Act of 1854. Yet others asserted that Torrens received significant help from Dr Ulrich Hübbe, a German lawyer from Hamburg who emigrated to South Australia in 1842. He had written a book that was published in Australia in 1857 and promoted reform of the system of land transfer along the lines of the law of Hamburg. Torrens consulted him when preparing the original draft of his system in 1858. It is asserted that the chief features of the Hamburg system, as developed since the seventeenth century and which still functioned there in the mid nineteenth century, are all present in the South Australian system. Sometimes the resemblance is remarkable, as is the case, for example, with respect to the institution of register books, public maps, the use of predetermined formulae to effect transactions, and the mortgage. In addition, the principle of conclusiveness of the register, which is the crux of the system and did not exist in the British Merchant Shipping Act 1854, was adopted in South Australia as it existed in Hamburg (Esposito 2003).

South Australia was the first common law jurisdiction to establish a system of registration of title to land. Its success there was in vivid contrast to the failure in reforming the land titles system throughout the nineteenth century, despite a succession of commissions, committees, and reports. The Torrens system was adopted in Queensland in 1861, in Tasmania, Victoria, and New South Wales in 1862, and in Western Australia in 1874. In 1870, New Zealand repealed the Land Registry Act passed in 1860, which was based on Report of the English Royal Commission of 1857, and replaced it with a land transfer act modeled on the Torrens system (Simpson 1976).17

By far the best known single Australian contribution to the law of Canada is the Torrens system (Finn 2002). The origins of land registration in Vancouver Island (1862) and British Columbia (1866, 1870) are debated, and may have been something of a hybrid combining Torrens principles and British proposals that were not implemented in the home country. It was not until later decades that pressure for the adoption of a true Torrens system grew sufficiently intense to produce legislative action. The first provinces to adopt a true Torrens system were Manitoba (1885), followed by New Brunswick, Saskatchewan, Alberta, and the Northwest Territories (Hogg 1920: 14). By 1920, there were no fewer than twenty-eight distinct land registration systems

17 Papua and Fiji are two other jurisdictions that adopted the Torrens system. See Hogg 1920: 8–10.
Spread of legal innovations

throughout the British empire. Some, though definitely not all, followed some variation of the Torrens system. 18

The example of land registries is instructive. A law that facilitates a capitalist economy by better defining property rights did not spread from the center of an empire (Britain) to its peripheries. In Britain, the main issue was sorting out disputes over long-owned property. The needs in the colonies were different from those in Europe, mainly surveying lands and recording initial allocation to settlers in order to create a baseline of rights or a meaningful database of conveyances. A solution to these problems was designed in a colony (Australia), based on indigenous settlement needs, with some influences from a less developed capitalist system (Germany). This then spread from one periphery (Australia) to another (Canada). The colonies served as a lab for the center (Britain), which only later introduced its own registry.

The spread of European land registries to Latin America took place as part of the more general expansion of European law. The German, French, and Spanish statutes and regulations were among the most influential on the Mexican Civil Code for the Federal District and Territories of 1928. Mexico’s land registry, a typical Latin American system, was based on Spain’s system of registration in colonial times and after independence. Like Spain’s, it was a hybrid system of rights and duties. On one hand, it resembled the French or declarative system in its recognition of rights in rem created between the original parties outside of the registry. Accordingly, immovable property may be sold, transferred, or mortgaged without need of recording. On the other hand, it purports to follow the German system in protecting third parties’ rights where an infirmity in their title does not appear clearly in the registry. Unlike German and Spanish law, however, Mexican law does not entrust the registrar with any significant powers of evaluation (Kozolchyk 1970).

But what is even more interesting with respect to Latin American land registries is the growing gap between the formal registration system as embodied in the law books and informal practices. The widening gap between the formal and the informal are best documented for Peru rather than Mexico, thanks to de Soto’s studies. But the Peruvian experience is believed to be typical of Latin America. Early in the twentieth century, formally established businesses began constructing residential neighborhoods around Lima without obtaining permits, without completing public works as required by law, and without providing services. Such neighborhoods were initially built for

18 The Torrens system was also adopted by these jurisdictions in the British Empire: Jamaica; Trinidad-Tobago; East Africa; Uganda; and Sudan (Hogg 1920: 5, 17–18).
the middle class but later most were built for lower class residents. Municipalities tried to deal with this phenomenon by issuing decrees that prohibited the purchase of land, the initiation of construction, and the sale of apartments before formalities were met. But gradually, between the 1920s and the 1950s, the state gave up and began implicitly and informally recognizing the reality in these neighborhoods. By the 1960s, legislative recognition began. An alternative system of property rights emerged, rights that were not documented in the land registries but nevertheless provided some level of protection against further invasion of the same lands, some ability to obtain credit based on the informal right, some ability to sell the land, and some ability to benefit from urban services. This informal land regime, which had nothing to do with formal land registration institutions, was far from optimal economically (De Soto 1989: 17–57). The fact that European capitalist institutions spread to Latin America on the formal law level clearly does not mean that they functioned in Latin America as they did in Spain, France, or Germany.  

**Spread of patent law**

Patent law reflects yet another pattern. The defining feature of this field was the desire of technological innovators in leading countries to implement it globally in order to protect their inventions and extract monopoly rent. Attempts at universalizing patent law took place both within the empires and internationally, and resulted among others in the Paris Convention for the Protection of Industrial Property of 1883. This convention required that its signatories, whose number grew rapidly, treat foreign nationals on equal terms with locals when applying for a patent. It did not adopt a principle, advanced by the United States, of reciprocity, which would allow inventors to register and enforce patents in host countries according to the law of their home country.

In the field of copyright law, the English law regime gradually expanded throughout the empire. The Statute of Anne, which had served as the basis for state protection of the rights of authors in their books since 1710 and was reformed in 1814, was gradually turned into “Imperial Law,” an act that

---

19 The European capitalist institutions and the European law that supports them were also spread to Africa through the French empire and the British empire (Joireman 2001: 576–581). The law and institutions in the Middle East were influenced by the three ruling empires: the Ottoman empire, the French empire, and the British empire, in addition to the Islamic law, which was also dominant in the Middle East (Mallat 2007; Hill 1977–1978: 284–297).
protects rights throughout the British empire. In 1842, the Literary Copyright Act provided protection throughout much of the empire for books published in United Kingdom. No protection in Britain for books published in the colonies was offered. The 1862 Fine Arts Copyright Act did not protect British artistic work in the colonies, but did protect a work created in a colony in that colony. The 1886 International Copyright Act offered protection in the United Kingdom for books and artistic work produced in the colonies (subject to two conditions). The end result of this territorial expansion of English law was that books and fine arts produced in the colonies were protected in the United Kingdom and books produced in the United Kingdom were protected throughout the empire, but arts produced in the United Kingdom were not protected in the empire. Finally, in 1911, the parliament in London exercised its power to enact for the empire as a whole, and passed the Imperial Copyright Act. This act offered reciprocal protection for works published in any dominion, colony or protectorate, throughout the empire. The general conception of rights in literary and artistic work roamed the empire throughout the second half of the nineteenth century and was ultimately uniformly applied on the eve of World War I.

Patent law, on the other hand, was not applied uniformly. The Patent Act of 1852 applied only in the United Kingdom, allowing the registration of a single patent for England, Scotland, and Ireland, but requiring separate registration in every colony in which the inventors wished to be protected. An imperial patent act, on the model of the copyright act, was discussed but never passed. Reactions in Australia to the idea of an imperial act well demonstrate the reasons for the failure to promote a single law for the entire empire. Until the mid nineteenth century, patents were not an issue. Only a handful of patents were claimed; some were secured through private bills and other applications were neglected along the way. Following the 1852 British Patent Act, the Colonial Office circulated a memorandum to the colonies. After drawing attention to the recent British act, it enquired as to the local patent law and the mode of proof of a British patent in each colony. The Colonial Office went on to suggest that it might be desirable to create a single system of patent law for the empire by extending the British law to cover the colonies as well. Local colonial officers in Australia were quick to respond, stating that they had no intention to privilege British inventors, that the costs imposed in Britain were too high for the colonies, and that the American patent law model should also be considered. Preemptive local patent laws were eventually enacted in several provinces (Finn 2000). For the next thirty years, the issue of an imperial patent act was periodically raised by London and repeatedly rejected in Australia.
In Australia and Canada, there was a shift from privately and specifically granted patents of monopoly to a general system of patent granting, a colonial adaptation of the British Patent Act of 1852 to allow the local grant of patents on examination. It seems clear that applications for patents increased markedly once this was possible. What prompted the system of local enactments? There appear to have been two quite different motivations for the legislation. The first was simply pressure by local inventors to simplify the procedure and reduce the costs of patent application. The second was colonial resistance to a unified imperial patent system (Finn 2000).

Parallel to the spread of patent laws within the British empire, laws also spread on the international level. A ‘unification of patent law’ movement was initiated by a group of specialist patent lawyers who met at the Vienna World Fair in 1873 and decided to try to unify patent law on an international level. The project was taken up again and advanced at the Paris World Fair in 1878 and a commission was formed, which submitted the text of a preliminary draft to the governments in 1879. In 1880, an International Conference met in Paris, and in 1883 a second International Conference adopted the Convention for the Protection of Industrial Property (“Paris Convention”), in the field of copyright. Another private group, the International Literary and Artistic Association, started the movement for the unification of intellectual property law. This association was created in 1878 and, at its Congress in Rome in 1882 and in Berne the following year, drafted a convention that was approved by an international conference convened by the Swiss government in 1886, which became the Berne Convention on the Protection of Literary and Artistic Works. In the following years, conventions were also drafted for trademarks and patterns and designs. The Berne and Paris Conventions did not insist on a globally uniform intellectual property law. They aimed at a more modest goal: equality of treatment for nationals and foreigners; minimum protection to be provided for authors and inventors in every country; and coordination of the registration of patents. The Paris Convention was initially signed by eleven states in western and central Europe and Latin America. Common law legal systems joined gradually: the United Kingdom (1884); the United States (1887); Canada (1923); Australia (1925); and New Zealand (1931). Japan enacted a short-lived patent law in 1871, reintroduced in 1885 an act based on French and American influences, and finally another act in 1899 that was in line with the Paris Convention and was followed by the accession of Japan to the Convention that same year (Oda 1992). Japan thus represents the best example of the spread of European patent law beyond Europe by means of international harmonization rather than colonialism. China is a counter example. The
Qing dynasty was reluctant to react to the harmonization movement. The first regulation relating to technology, Reward Regulations on the Development of Technology, was enacted in 1898 but was never effective. There was no concept of invention and no process of examination, and society at large was encouraged to use inventions and creations. During the Kuomintang era, a few patent laws were enacted but these were limited in scope and applicability. Only in 1944 was a more wide-scale reform introduced, which also allowed foreigners to apply for patents in China. With the rise of the Communists in 1949, the law was suspended, and China accessed the Paris Convention only in 1985 (Yang 2003). After World War I, the Convention expanded to a few countries in North Africa, the Middle East, and Eastern Europe.  

Spread of corporation law

As shown above and elsewhere in this volume, the development of corporation law made it possible for corporations to evolve in Europe and North America and those corporations had an unquestionable influence over the development of capitalism in these parts of the globe (Jones, Chapter 6 in this volume). Yet, the pressure for spreading corporation law globally was weaker than that for patent law. Less developed countries and countries in which business was organized in families and social networks were not in immediate need of it. Western capitalists could organize their corporations in their own countries and according to their domestic law even when doing business in their country’s colonies or elsewhere overseas. As a result, there was no significant pressure for international conventions or imperial legislation. Nonetheless, the harmonization of company law in the British empire seemed more attainable when compared with other harmonization projects. The issue of harmonization of company law was on the agenda of the Imperial Conferences of 1907 and 1911, which were a meeting place for officials from London and from the colonies (primarily the white settlers’ dominions). For each of these, the Board of Trade prepared a comparative survey, “Company Law in the British Empire.” These surveys identified similarities and differences, particularly between the dominions and the United Kingdom, and served as a basis for discussion of further harmonization. The harmonization project received support from the legal profession and academia; for example, from the British Society of Comparative Legislation and its Journal of the Society of Comparative Legislation (established 1896). The journal published annual
surveys of legislation in numerous jurisdictions in the empire and in a few legal systems outside it. Local colonial officials could learn about trends throughout the empire from the journal and publicize their achievements in it.

Despite the institutional support and the importance of company law as perceived by jurists and politicians, in fact, company law throughout the British empire was a patchwork quilt of systems. There were colonies, such as Gibraltar, which had no company legislation. There were jurisdictions, such as Malta, the Seychelles, and Cyprus, in which the common law was not in force, and no attempt was made to enact English-based company legislation. In these jurisdictions, the company law in force was Ottoman or French-based. In many colonies, company law was based on one or another version of an English act. In some, it was based on the 1862 Act (Australian colonies and some Canadian provinces), in others on the 1908 Act (other Canadian provinces, South Africa, India, Hong Kong, Nigeria), and in still others, on the 1929 Act (Palestine). This was done either by literally copying the Act into a Colonial Ordinance or by making some adjustments for local conditions. Colonial Ordinance amendments were then based on amendments to the English legislation. In other colonies, the English legislation was imported through a single clause. For example, in Sierra Leone, the local statute imported the Companies Acts that were “in force in England at the commencement of the local statute.” In the Falkland Islands, the importation was of “all laws, rules, and regulations for the time being in force.” This created an open channel for importation. The Indian Companies Acts, which were based on the English acts with some adjustments, were in turn imported in full by Iraq, North Borneo, East Africa, and Uganda.

Looking beyond the British empire, Japan constitutes an interesting example. During the Meiji Restoration it drafted a German-inspired commercial code, promulgated in 1899, that included sections on company law. This law was in effect until the end of World War II. At that stage of the US occupation of Japan, the Supreme Commander for the Allied Powers was determined to change Japan’s financial and commercial structure. As part of a wider New Deal-inspired legal reform, the Illinois Business Corporation Act of 1947 served as the basis for the new Japanese Commercial Code of 1950. So Japan initially adopted one capitalist corporation law model, the German, and with it made a huge leap forward in the first half of the twentieth century, and then switched to another model, the American, and with it achieved another economic leap forward in the second half of the century. But interestingly, though in 1950 the Japanese law was very similar to that of the State of Illinois, and to the American Model Business Corporation Act
that was drafted in the same year based on the Illinois Act, Japanese corporation law diverged from American law in subsequent decades. The explanation suggested by West of the divergence is that different mechanisms of change operated in Japan and the United States. Different ability to respond to changing reality, different interest group politics, and different exogenous shocks led to a growing divergence despite globalization and integration of financial and goods markets (West 2001). Japanese corporate governance was not dramatically shifted due to the law from controlling shareholder or interlocking group model, akin to that of Germany, to widely dispersed ownership similar to the one most common in the United States. Chile provides a similar pattern. It borrowed in 1854 from France and from French-inspired Spain, its commercial code. This code allowed significant state intervention in the affairs of corporations. Only in 1981, during Pinochet’s regime, Chile went through a major revision of its corporation law that borrowed heavily from the United States (Pistor et al. 2002).

China represents another kind of shift. Until the late nineteenth century, the private enterprise run as family or clan firms was the predominant form of business institution in China. The late Qing reforms were a moderate attempt by the government to introduce legal, institutional, and educational reforms in order to satisfy popular demands for change and modernization, in face of Western and Japanese dominance, while maintaining the political status quo of a conservative imperial monarchy. The 1904 Companies Act, part of this reform, was based on Japanese law, which was in turn recently influenced by German law and English company laws, but in much abbreviated form (Goetzmann and Koll 2005: 149–184). This Qing company law remained in force throughout the Republican period. In the 1950s, following the Communist Revolution, the 1904 Act that facilitated private ownership of companies was abolished. New socialist legislation complemented large-scale nationalization of enterprises and absorbed these now state-owned enterprises into the administrative apparatus of the state. Starting in 1984, the state-owned enterprises were gradually separated from the administration, were recognized as legal entities, as responsible for their own profits and losses, and enjoying managerial autonomy. The Corporate Law of 1993 was the first significant piece of corporate legislation since the founding of the People’s Republic of China in 1949. In was an enabling legislation, regulating the formation of state-owned enterprises as well as closely held corporations and public corporations. China, thus exemplifies a pattern that combines the importation of European capitalist law, directly and via Japan, a reaction to capitalism that was manifested in the importation of a European-created
Soviet-Socialist model, and at a third stage a return to more capitalist law of corporations (Schipani and Liu 2002).

Interestingly, the LLSV law and finance literature does not deal with this diversity. They coded each country’s quality of protection of shareholders and creditors based on the state of its company law in the mid 1990s. They classified legal systems into families of legal origins according to the perceived origins of their company law. Countries with complex origins, even such that at some point were part of the British empire (such as Malta, the Seychelles, and Cyprus), seem to have been left out of the sample. They ignored the mode by which company law was introduced into each country. The transplant effect – that is, whether company law was introduced voluntarily or imposed – was later shown by Berkowitz et al. to make a difference (Berkowitz, Pistor, and Richard 2003). They also ignored the question of what exactly was imported from Europe. As we have seen above, there were significant differences in content and track of the importation of company law from England, France, or Germany. Their methodology could not account for countries such as Japan, Chile, and China that were for lengthy periods of time under the spell of company law originating from different legal traditions within the capitalist world or, in the case of China, of capitalist, socialist, and again capitalist, law. These differences seem to only partly correspond with the mode of transplantation and also result from timing, interest group lobbying, administrative factors, personal issues, and contingencies.

Conclusion

All four examined fields of law went through a transformation in the nineteenth century. But the transformation was not uniform and neither was there convergence toward a single model. Furthermore, with respect to all fields, no consensus emerged as to the first best rules and institutions. In contract law, the idea of the freedom of contracts emerged in both common law and civil law jurisdictions. But it was packaged differently: in court cases in the former and in civil codes in the latter. Furthermore, the idea did not dominate contract law for long. Eventually a more interventionist, or collectivist, model replaced it. In land registries, two separate models, recording of transactions and recording of rights, emerged and prevailed in the capitalist

21 LLSV classified the following as common law countries: Australia; Canada; Hong Kong; India; Ireland; Israel; Kenya; Malaysia; New Zealand; Nigeria; Pakistan; Singapore; South Africa; Sri Lanka; Thailand; UK; US; and Zimbabwe.
Spread of legal innovations

economies, but not along the lines of legal traditions. In patent law, ex ante examination and ex post litigation developed. Again the two modes did not correlate with legal origins. Furthermore, abolishment of the entire system was seriously considered. In corporation law, the development both on the continent and in Anglo-American jurisdictions was based on statute law. Generally speaking, all the capitalist systems converged to a model of general incorporation, limited liability, joint stock, delegated management, and transferable shares. Differences were relatively marginal. The private company was added to the menu in Germany, the United Kingdom, and France in that order, and again, not based on legal traditions. Eventually, in the twentieth century, governance structures in the United States and the United Kingdom shifted toward widely dispersed ownership, while in France and Germany controlling shareholders prevailed. The debate as to whether convergence is taking place, and whether any of the models is more efficient, is still raging.

The spread of law beyond Europe did not reinforce the common law–civil law divide. A few of the above examples demonstrate this. The Torrens system of land registration is one example of a possible German influence that spread through part of the British empire. The non-enforcement of the European-Spanish-based land registration system and the rise of informality was another cause for divergence within a single legal tradition. Local resistance to the imposition of uniform imperial patent law that would serve the interest of British industrialists is another example of diverging dynamics. The Paris Convention is a further example of a force that works across legal traditions, but, in this case, leading to harmonization rather than hybrids.

The study of the four legal fields does not allow us to reach clear conclusions as to causality flowing from law to economic development. The recent aggregated econometric studies of LLSV and AJR definitely amount to a breakthrough in untangling the causation problem. But on the other hand, the detailed study of the four fields of law provides significant support for the thesis that the law in fields most relevant to economic growth did not converge to a single, efficiently superior, capitalist model, well into the twentieth century. This study thus leans on the side of persistence of legal divergence in the recent debates about convergence versus divergence. It backs those, in the old and still lively debate, who hold to the view that legal developments do not just respond instrumentally to demands from the outside but also to some internal autonomous dynamics. We may conclude that though the law creates some inertia and rigidity, these internal dynamics, in the most part, have nothing to do with ancient legal origins. Much more research is needed to explain in which legal institutions and rules the legal
traditions manifested in a manner that affected economic growth rates. We can conclude that law mattered and facilitated the rise of capitalism but we still don’t know enough on the extent to which it mattered. We now have a better understanding of how or why the two European legal traditions mattered in the rise and spread of capitalism. But we still have more questions than answers.

References


Spread of legal innovations


Spread of legal innovations


