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THE INFLUENCE OF LEGAL ORIGINS' THEORY IN COMPARATIVE POLITICS: ARE COMMON LAW COUNTRIES MORE DEMOCRATIC?

Nuno Garoupa•

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The legal origins theory has impacted and changed comparative law and economics. In this article, I consider the neglected relationship between the legal origins theory, comparative law, and comparative politics. One of the alleged theoretical foundations of the legal origins theory is the more democratic nature of the common law and the more authoritarian nature of the civil law. This article offers indication that there is very little quantitative evidence to support the thesis that common law jurisdictions are more democratic than civil law jurisdictions. The tentative conclusion is that both legal traditions can be easily molded to democratic or authoritarian governments as a function of political determinants.

I. INTRODUCTION

Economists have suggested that legal institutions that countries developed or imported (voluntarily or involuntarily) have profound long-run effects on a range of economic outcomes. This approach is called the "legal origins" theory. Under this theory, legal origins explain a great deal of the variation in economic performance among countries. The general message is that common-law legal systems (that is, legal systems inspired by English law) are statistically associated with more secure property rights, greater levels of judicial independence, superior financial development, and sustainable growth than civil-law legal systems (that is, legal systems inspired by French, German, or Scandinavian codifications movements in the 18th and 19th centuries).

The legal origins theory has generated intense debate. The original wave (the so-called LLSV[1] project) was not received well by comparative law scholars though it became immensely popular with economists[2].

• Antonin Scalia Law School, George Mason University. ngaroup@gmu.edu. The author is grateful to Madeline Conn for excellent research assistance and to one anonymous referee, Jo-Marie Burt, and Laurie Schintler for helpful feedback on different parts of the article. The usual disclaimers apply.

[1] This literature arose from the scholarly work of four economists known under the acronym LLSV – Rafael La Porta, Florencio López-de-Silanes, Andre Shleifer, and Robert Vishny: see R. La Porta *et al.*, *The Economic Consequences of Legal Origins*, in 46 J. Econ. Lit. 285-332 (2008).

[2] Although the legal origins theory has influenced policy design by international organizations such as the World Bank (the famous *Doing Business* project) or the OECD, there has been plenty of criticism to LLSV's work. These critiques raise questions about the classification of legal families (N. Garoupa, M. Pargendler, *A Law and Economics Perspective on Legal Families*, in 7 *Eur. J. Legal Stud.* 33-55 (2014)), the economic implications (K. Dam, *The Law-Growth Nexus: The Rule of Law and Economic Development* (Chicago, IL: Brookings Institution

Comparativists, in general, found the use of the common law/civil law distinction by LLSV inexcusably simplistic. Taken together, the lack of interest for detailed legal analysis, the neglect of enforcement problems and the over-simplistic view of the feasibility of legal transplants made the conclusion about the efficiency of the common law hard to digest for comparative lawyers[3]. Also, in the specific case of corporate law, comparativists pointed out that the studies by LLSV took US law as a benchmark for judging the efficiency of corporate law. In this way, they used a "one-size-fits-all" approach and neglected that different solutions may work better under different circumstances, depending on the characteristics of the financial markets under investigation. Finally, the legal origins thesis is methodologically difficult to make, since the empirical work cannot capture every single aspect of corporate law that matters for economic growth. The cross-sectional research designs used by LLSV suffered from omitted variables biases and, therefore, could not establish a causal relationship (and not merely statistical correlations) between legal rules and economic growth. Not only legal protection of shareholders but also other features of corporate law matter for economic development and may matter even more in a civil law context.

This mixed reaction had two practical consequences. Within comparative law and economics, a second wave of the legal origins theory moved away from general statements (such as the common-law being more conducive of economic growth than the civil-law) and focused on narrower questions (for example, assessing the comparative efficiency of specific doctrines in common-law and civil-law jurisdictions or developing specific case studies on a particularly relevant aspect of law). However, within comparative economics, the common-law/civil-law distinction has become standard in any cross-country regression analysis. In fact, the intense empirical critique of this distinction has yet to influence the discipline of economics.

Press, 2006)), the asymmetric impact of the 2008 global crisis (D. Oto-Peralías, D. Romero-Ávila, *The Distribution of Legal Traditions around the World: A Contribution to the Legal Origins Theory*, in 57 J. L. and Econ. 561-628 (2014); D. Oto-Peralías, D. Romero-Ávila, *Legal Traditions, Legal Reforms and Economic Performance: Theory and Evidence* (Cham, Switzerland: Springer International Publishing, 2017)), the inability to address colonization patterns (D. Klerman *et al.*, *Legal Origin or Colonial History?*, in 3 J. Legal Analysis 379-409 (2011)), and many other considerations (N. Garoupa *et al.*, *Legal Origins and the Efficiency Dilemma* (London, UK: Routledge, 2017)).

[3] See general discussion by N. Garoupa, T.S. Ulen, *Comparative Law and Economics: Aspirations and Hard Realities*, in 69 Am. J. Comp. L. 664- 688 (2021).

In this article, the focus is more specifically on the argument suggested by Paul Mahoney[4]. In his famous work, the author proposed a controversial Hayekian thesis: Common-law systems are more democratic in nature (because law is produced by a bottom-up approach where judicial lawmaking and precedents prevail over statutes) while civil-law systems are more autocratic in nature (because law is codified and imposed top-down on courts and individuals)[5]. The underlying idea is that institutions are designed to minimize both private and state expropriations. Accordingly, common-law legal institutions are designed to mitigate state power while civil-law legal institutions are focused on eliminating private disordering.

I propose to assess the political regime implications of the legal origins theory. More specifically, I investigate the thesis that common-law systems are more democratic in nature than civil-law systems[6].

The project has three components. First, in section 2, I provide an initial empirical assessment where I make use of the recent data made available by V-Dem for 179 countries[7]. I establish that the correlations between different measures of democracy presented in V-Dem (electoral democracy, liberal democracy, or egalitarian democracy, for example) and legal families are statistically weak. At the same time, I investigate correlations considering the rule of law and judicial politics (proxied by judicial constraints imposed on the executive, judicial independence, judicial corruption, legal transparency, and judicial accountability). They are relevant, but also largely independent of legal families.

I further pursue regression analysis to study linear association between liberal democracy and legal families in Africa. This is a continent where the presence of both legal families is largely exogenous to local institutions and almost entirely determined by military and colonial occupation by European powers in the age of imperialism.

In section 3, it is explained that the role of judicial politics in African countries is a better explanation to the quality of democracy in this continent[8]. Specifically, I argue that

[4] P.G. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, in 30 J. Legal Stud. 503-525 (2001).

[5] LLSV (with different co-authors) explore this argument in later work to propose that common-law is closer to a market solution while civil-law is the equivalent of a central planning economy in the context of social regulation. See A. Shleifer, *The Failure of Judges and the Rise of Regulators* (Cambridge, MA: MIT Press, 2012).

[6] There is extensive literature on LLSV economic and financial implications, but it is tangential, if not oblivious, to political regimes.

[7] https://www.v-dem.net/en/

[8] C.C. Gibson, *Of Waves and Ripples: Democracy and Political Change in Africa in the 1990s*, in 5 *Annual Rev. Pol. Sci.* 201-221 (2002); B.L. Bartels, E. Kramon, *Does Public Support for Judicial Power Depend on Who is in Political Power?*, in 114 Am. Pol. Sci. Rev. 144-163 (2020).

common-law and civil-law distinctions are not a good proxy for strong democracy and strong judicial independence in this area of the world.

Finally, in section 4, I offer some ideas about why legal origins has not captured the interest of political scientists as a possible explanation for democratic and authoritarian regime types. My perception is that the different interests in legal origins reflect the distinct role played by rule of law and democratization in both disciplines.

Section 5 concludes the article with additional remarks.

II. Empirical Analysis

a. General Results

My empirical goal is to illustrate that democracy, rule of law and judicial politics, and legal families have a more complex pattern than suggested by economists. Using the recent V-Dem project for 179 countries, I report the correlations across the variables that measure democracy, rule of law and judicial politics, and legal families in Table 1 and Table 2.

V-Dem has five indicators for democracy reflecting different approaches in comparative politics – electoral, liberal, participatory, deliberative, and egalitarian. Unsurprisingly, all these five indicators have extremely high correlation (but they are not all the same since correlation is between 94% and 97%). There is no sign of correlation with common-law legal family.

TABLE 1 - CORRELATIONS BETWEEN DEMOCRACY AND COMMON-LAW (V-DEM, 2019)

A) WORLD (179 countries)

	E-DEM	L-DEM	P-DEM	D-DEM	E-DEM	COMMON LAW
ELECTORAL DEMOCRACY	1					
LIBERAL DEMOCRACY	0.973	1				
PARTICIPATORY DEMOCRACY	0.966	0.956	1			
DELIBERATIVE DEMOCRACY	0.964	0.972	0.946	1		
EGALITARIAN DEMOCRACY	0.943	0.969	0.936	0.957	1	

COMMON LAW	*0.035*	*0.048*	*-0.015*	*0.022*	*-0.001*	*1*

B) AFRICA (56 countries)

	E-DEM	L-DEM	P-DEM	D-DEM	E-DEM	COMMON LAW
ELECTORAL DEMOCRACY	1					
LIBERAL DEMOCRACY	0.959	1				
PARTICIPATORY DEMOCRACY	0.925	0.903	1			
DELIBERATIVE DEMOCRACY	0.949	0.951	0.918	1		
EGALITARIAN DEMOCRACY	0.933	0.948	0.88	0.938	1	
COMMON LAW	*0.180*	*0.249*	*0.167*	*0.138*	*0.134*	*1*

Consider now the variables measuring rule of law and judicial politics reported in Table 2: judicial ability to constrain the executive, judicial independence, judicial accountability, judicial corruption (higher indicator means less corruption), compliance with judicial decisions, and transparency of law. These six indicators are positively correlated, but not in the magnitude of the different democracy indicators (it varies now from 51% to 91%). The correlation to common-law legal family is positive but weak (from 10% to 19%).

TABLE 2 - CORRELATIONS BETWEEN JUDICIAL POLITICS AND COMMON-LAW (V-DEM, 2019)

A) WORLD (179 countries)

	JUD CE	JUD I	JUD A	JUD C	C JUD	T of L	COMMON LAW
JUDICIARY CONSTRAINS EXECUTIVE	1						
JUDICIAL INDEPENDENCE	0.921	1					
JUDICIAL ACOUNTABILITY	0.556	0.512	1				
JUDICIAL CORRUPTION	0.702	0.616	0.744	1			
COMPLIANCE WITH JUDICIARY	0.912	0.794	0.567	0.678	1		
TRANSPARENCY OF LAW	0.774	0.702	0.642	0.696	0.709	1	
COMMON LAW	*0.194*	*0.152*	*0.169*	*0.127*	*0.157*	*0.101*	*1*

B) AFRICA (56 countries)

	JUD CE	JUD I	JUD A	JUD C	C JUD	T of L	COMMON LAW
JUDICIARY CONSTRAINS EXECUTIVE	1						
JUDICIAL INDEPENDENCE	0.891	1					
JUDICIAL ACOUNTABILITY	0.548	0.488	1				
JUDICIAL CORRUPTION	0.634	0.482	0.613	1			
COMPLIANCE WITH JUDICIARY	0.911	0.744	0.440	0.543	1		
TRANSPARENCY OF LAW	0.691	0.553	0.623	0.517	0.638	1	
COMMON LAW	*0.334*	*0.307*	*0.253*	*0.281*	*0.28*	*0.184*	*1*

There seems to be more diversity with rule of law and judicial politics indicators than with democracy measurements. At best, common-law legal family is orthogonal to democracy and weakly correlated with variables measuring rule of law and the quality of the judiciary. On Table 3, I report additional findings that show that the relationship between judicial variables and democracy is not different across common-law and civil-law legal families. Correlations across democracy, rule of law and judicial politics, and legal families are consistent to both legal families.

TABLE 3 – CORRELATIONS ACROSS DEMOCRACY, JUDICIAL POLITICS, AND LEGAL FAMILIES (V-DEM, 2019)

A) COMMON-LAW (56 countries)

	L-DEM	E-DEM	JUD I	JUD A	T of L
LIBERAL DEMOCRACY	1				
EGALITARIAN DEMOCRACY	0.97	1			
JUDICIAL INDEPENDENCE	0.819	0.749	1		
JUDICIAL ACCOUNTABILITY	0.612	0.594	0.502	1	
TRANSPARENCY OF LAW	0.836	0.805	0.69	0.65	1

B) CIVIL-LAW (123 countries)

	L-DEM	E-DEM	JUD I	JUD A	T of L
LIBERAL DEMOCRACY	1				
EGALITARIAN DEMOCRACY	0.970	1			
JUDICIAL INDEPENDENCE	0.840	0.772	1		
JUDICIAL ACCOUNTABILITY	0.553	0.594	0.499	1	
TRANSPARENCY OF LAW	0.820	0.820	0.700	0.633	1

Thus, in conclusion, there is little statistical evidence (within the V-Dem dataset) to support the thesis that legal families reflect revealed preferences over political regime types.

b. Limitations To General Results – Why Africa

It is important to emphasize why these findings (or lack of findings) require additional consideration. Economists tend to agree that it is very unlikely that legal families play any significant role in developed economies where democracy and judicial independence largely prevail anyway. Therefore, the alleged source of the controversial linkage should be observed in developing economies.

In Table 4, I summarize the observability problem – developing economies in America (mostly Latin America and a few Caribbean islands) and developing economies in Europe (Russia and a few neighboring countries) do not exhibit enough variance in legal families (any inference is biased by the lack of an acceptable counter-factual). Therefore, only Africa and Asia are promising cases to test the relationship between democracy, rule of law and judicial politics, and legal families. I have decided to focus on Africa due to its diversity and institutional challenges. Also, unlike Asia, Africa is a continent where the presence of both legal families is largely exogenous to local institutions and almost entirely determined by military occupation and colonial expansion.

TABLE 4 – JURISDICTIONS AROUND THE WORLD

	COMMON LAW	CIVIL LAW	TOTAL COUNTRIES
DEVELOPED ECONOMIES	11	28	39
DEVELOPING AMERICA	4	21	25
DEVELOPING EUROPE	0	14	14
DEVELOPING ASIA AND PACIFIC	17	28	45
DEVELOPING	24	32	56

AFRICA			
TOTAL	56	123	179

Source: Developed economies: EU member-states except Bulgaria and Romania (total 26), plus Australia, Hong-Kong, Iceland, Israel, Japan, New Zealand, Norway, Singapore, South Korea, Switzerland, Taiwan, UK, USA.

c. Results About Africa

If we restrict our attention to African countries (there were 56 African countries in the V-Dem dataset in 2019), the results concerning political regime and legal family are not very different than worldwide. All five indicators of democracy have high correlation (between 89% and 96%). As to correlation with common-law legal family, admittedly, it is more significant than worldwide (from 13% to 25% in Africa against 0% when all 179 countries are included). Still, it is a modest correlation from a statistical viewpoint.

The findings concerning judicial politics and legal family follow the same pattern as before. Correlation with common-law legal family is, nevertheless, more significant in Africa than worldwide (from 18% to 33% in Africa).

These statistics are reported in the second part of Tables 1 and 2. The rule of law and judicial variables, rather than political regime, are more related to common-law legal families. This result is stronger in Africa than worldwide.

d. Additional Evidence about Africa

One needs to recognize the intrinsic relation between legal families and colonization patterns in Africa. Suppose that, for a moment, one could argue that British former colonies are more democratic in nature. The complication would be to disentangle the common-law system imposed by the British (reflected in post-colonial legal institutions) from other significant colonial policies that can explain democratization (such as education, health, infrastructures, or quality of colonial administration). This would not be easy because there is no obvious counter-factual jurisdiction. Using South Africa as an example of British and Dutch influence or Namibia as an example of British and German influence to distinguish pure common-law (for example, in Kenya or Zimbabwe) from common-law mixed with other possible colonial transplants (as in South Africa or Namibia) is a possibility but subject to difficult metrics.

These complications, however, are detrimental if one cannot find any sort of indication that British former colonies are more democratic in nature. In the previous subsection, I suggested that much based on the V-Dem dataset. With a different approach, Bartels and Kramon (2020) provide a similar conclusion: colonial patterns do not seem to explain variations in public perceptions about judicial power. I have rearranged their characterizations (liberal democracies, electoral democracies, electoral autocracies, and closed autocracies) according to legal families in Table 5. One can observe that they explore more common-law than civil-law countries in their study about judicial power in Africa. However, when it comes to democracies versus authoritarianisms, the relative proportion of African common-law countries versus African civil-law countries is reasonably stable across classifications.

TABLE 5 - CORRELATIONS INSPIRED BY BARTELS AND KRAMON (2020: 159)

	LIBERAL DEMOCRACIES	ELECTORAL DEMOCRACIES	ELECTORAL AUTOCRACIES	CLOSED AUTOCRACIES	TOTAL
COMMON LAW	5 (56%)	9 (60%)	9 (50%)	1 (100%)	24 (56%)
CIVIL LAW	4 (44%)	6 (40%)	9 (50%)	0	19 (44%)
TOTAL	9	15	18	1	43

The correlations presented in this section suggest that democracy is not pre-determined by legal families in Africa, thus rejecting the basic formulation of the legal origins theory. Furthermore, the rule of law and judicial variables are fundamentally related to the nature of regime type and not to legal families (largely imposed by colonial powers a long time ago).

e. Further Empirical Investigation

By combining different information about African countries[9], I pursue a regression analysis to investigate any possible linear association between democracy and common-law. The dependent variable is liberal democracy (as measured by V-Dem). The independent variables or controls include the rule of law (an indicator collected by the World Bank measuring the quality of the legal system), the human development indicator (as indicator

[9] In this section, we narrow the statistical population to 54 jurisdictions since there is missing data for Zanzibar and Somaliland concerning some indicators.

collected by the UNDP), geographical location in the African continent, geographical characteristics (island and landlock), and monarchy.

In order to capture change through time, the dataset includes six years (1995, 2000, 2005, 2010, 2015, and 2020). Since not all indicators are calculated yearly, this approach allows us to operate with panel data, thus reflecting evolution in the last two decades. Some observations for 1995 had to be extrapolated from available data (namely HDI indicator). Given 54 countries and six years, the total of observations is 324.

Legal family is measured in three ways:

(Model 1) pure common-law and pure civil-law jurisdictions, thus excluding mixed jurisdictions (hence, the results should be interpreted against mixed jurisdictions).

(Model 2) common-law (including mixed jurisdictions), civil-law (including mixed jurisdictions), and sharia law (these variables are not mutually exclusive).

(Model 3) colonial background (these dummy variables are also not mutually exclusive given the losses of Germany and the Ottoman Empire after WWI and Italy after WWII).

The panel regression estimation results for liberal democracy are presented in Table 6. I start with standard panel regression estimation, with random effects and robust standard errors, and time trend. There is some indication of multicollinearity (most importantly, between northern Africa and former part of the Ottoman Empire) and significant evidence of serial autocorrelation. Therefore, I have opted for including first-differences panel regression (which reduces the number of observations to 270) and average cross-country regression (with 54 observations).

There is, at best, weak indication that common-law fosters democracy. In fact, two control variables are statistically significant across all nine specifications – rule of law (better quality of the legal system is associated with more liberal democracy) and Western Africa (also a positive association). However, in relation to legal families, the findings are not entirely consistent across all specifications.

(Model 1) Pure common-law has a statistically significant positive coefficient in the first-differences panel regression, but no other legal family variable is statistically significant (recall that in this model the coefficient must be interpreted in relation to mixed jurisdictions).

(Model 2) Both common and civil-law have a statistically significant positive coefficient while sharia law has a statistically significant negative coefficient in the ordinary panel regression. These results are not valid for the first differences panel regression (where civil-

law has a statistically significant negative coefficient) and the average cross-country regression.

(Model 3) The dummies for Portugal, the Netherlands, Italy, and the Ottoman Empire are statistically significant in the ordinary panel regression (positive coefficient for Portugal and the Netherlands, and negative coefficient for Italy and the Ottoman Empire). Some colonial powers (France, Spain, Portugal, and Germany) have a statistically significant negative coefficient in the first-differences panel regression. The dummy for Britain is never statistically significant.

Although I have used three models and three specifications for each model, with a total of nine regressions, I could not find a strong linear association between liberal democracy (as measured by V-Dem) and legal family in the context of Africa.

TABLE 6 – REGRESSION ANALYSIS; LIBERAL DEMOCRACY IN AFRICAN COUNTRIES (1995-2020)

	PANEL (I)	PANEL (II)	PANEL (III)	FIRST DIF (I)	FIRST DIF (II)	FIRST DIF (III)	AVG (I)	AVG (II)	AVG (III)
PURE COMMON LAW	0.061			0.024***			0.045		
PURE CIVIL LAW	0.013			-0.008			0.010		
COMMON LAW		0.144**			-0.005			0.112	
CIVIL LAW		0.106*			-0.03*			0.077	
SHARIA LAW		-0.078**			0.006			-0.056	
BRITAIN			0.050			-0.011			0.023
FRANCE			0.022			-0.033***			0.007
SPAIN			-0.032			-0.038***			-0.052
PORTUGAL			0.111*			-0.026**			0.101
GERMANY			-0.011			-0.016***			-0.024
ITALY			-0.105***			-0.002			-0.073
BELGIUM			-0.041			-0.015			-0.030
NETHERLANDS			0.124***			-0.009			0.081
OTTOMAN			-0.283**			0.018			-0.211
NORTHERN	0.055	0.113*	0.276**	0.024	0.018	0.025	0.001	0.042	0.154
MIDDLE	0.033	0.043	0.004	0.015*	0.011	0.010	0.054	0.061	0.013
WESTERN	0.116***	0.139***	0.097*	0.023***	0.022***	0.024***	0.097**	0.118***	0.085**
SOUTHERN	0.267***	0.179**	0.240***	-0.002	0.003	-0.009	0.164**	0.099	0.152*
ISLANDS	0.182***	0.188***	0.121**	0.001	-0.0002	0.004	0.089	0.097*	0.043
LANDLOCK	-0.020	0.015	0.013	-0.015**	-0.016**	-0.014**	-0.021	0.008	0.011
MONARCHY	-0.211**	-0.153*	-0.278***	0.013	0.013	0.036*	-0.193**	-0.148**	-0.231**
RULE OF LAW	0.399***	0.391***	0.361***	0.231***	0.231***	0.232***	0.669***	0.634***	0.557***
HDI	-0.332**	-0.307**	-0.305**	-0.183	-0.191	-0.203	-0.252	-0.199	-0.107
YEAR	0.022***	0.022***	0.021***	-0.005*	-0.005*	-0.005*			
CONSTANT	0.168***	0.054	0.174**	0.018	0.045**	0.047***	0.139	0.041	0.116

N OBSERV	324	324	324	270	270	270	54	54	54
ADJ R2							0.69	0.71	0.70
OVERALL R2	0.63	0.65	0.68	0.12	0.11	0.12			
VAR INF FACTOR (VIF)	4.80	6.27	7.06	1.90	2.46	4.20	2.31	3.18	4.60

* 10% significance level, ** 5% significance level, *** 1% significance level

Panel and First Differences – random effects, robust standard deviations.

III. The Case of Africa

The political science literature on political regimes in Africa does not mention legal families as a co-determinant, even less as an explanation, for democratization[10]. In his review, Gibson (2002) discussed the different theories on democratization in African countries. Legal origin is not considered or mentioned, unlike economic or political factors. A similar observation applies to the recent survey of the judicial independence and rule of law literature by Heyl[11].

In a broader reading, however, one could argue that legal origin is implicit in other explanations proposed by Gibson (2002). First, following the thesis defended by Mahoney (2001), maybe legal origin is implicit to economic growth policies. Gibson recognized different approaches (such as economic transformation, liberalization, urbanization, and industrialization), but they do not seem to reflect a distinction between Francophone and Anglophone countries. Second, most obviously, legal origin is related to colonization patterns. Inevitably common-law prevails in former British colonies and civil-law prevails in former French, Portuguese, Spanish, Belgian, Italian, and German colonies. There are no civil-law former British colonies and no common-law former non-British colonies (with the potential caveat of Liberia). Indeed, Gibson related colonization patterns to political institutions (for example, modern bureaucracies, management of clientelism, village decentralization, and local oligarchies).

In the same vein, one could argue that the theories explored by Heyl (2019) are related to legal origins in some way. In using terms relating to formal and informal institutions, one

[10] Although, for example, in his seminal article, S.M. Lipset, *Some Social Requisites of Democracy: Economic Development and Political Legitimacy*, in 53 Am. Pol. Sci. Rev. 69-105 (1959) divides countries between English-speaking nations and other (European and Latin American) nations.

[11] C. Heyl, *The Judiciary and the Rule of Law in Africa*, in W.R. Thompson (ed.), *Oxford Research Encyclopedia of Politics* (Oxford, UK: Oxford University Press, 2019), https://doi.org/10.1093/acrefore/9780190228637.013.1352 .

finds references to the weak explanatory power of electoral competition, patterns of colonization, and post-colonization democratization.

Yet both authors never mentioned legal families or legal institutions as a source of conditions to successful or unsuccessful democratization. At a quick reading, scholars in political science disagree on the causes and measurements of democratic success in Africa, but legal families are never offered as an explanation.

As to the role of judicial politics in Africa, political scientists have explored the influence of legal families for the reason that judicial institutions tend to follow transplants from colonial powers. Anglophone countries have courts of law that follow structures and procedures like the English tradition, whereas Francophone countries have adopted arrangements from France, Portugal, Spain, or Belgium[12].

One example is the role of a separate (mostly centralized) constitutional court in new democracies. Unsurprisingly, these institutions exist in most of Francophone Africa. However, Stroh and Heyl[13] showed that its diffusion and success vary. While some countries have an independent and effective constitutional court (such as Guinea, Niger, or Benin), others have a weak and politically ineffective constitutional court (such as Burkina Faso, Mali, Senegal, or Mauritania). The authors suggested that where presidential and legislative elections are highly competitive, one observes strong constitutional review. The opposite result holds for countries with low electoral competitiveness. Their methodology is debatable (there could be some concerns about endogeneity), but in the context of my research question, their finding is relevant – there is plenty of variance concerning judicial variables within the civil-law legal family. These African countries are not overwhelmingly authoritarian with failed constitutional review. There is a significant variety of experiences concerning regime types.

A notable exception in the Anglophone world is South Africa. A separate constitutional court was created in 1994 as part of the arrangements for the peaceful transition out of apartheid. This is an important example of a common-law jurisdiction creating a non-common-law legal institution to deal with counter-majoritarian pressures in a new democracy. Still, the optimistic view of the role of the South African constitutional court has changed since 1994. By the early 2000s, political scientists were documenting that the

[12] For a recent survey of empirical evidence, see D. H. Lewis, *Empirical Studies of African High Courts: An Overview*, in N. Garoupa, R. D. Gill, and L. Tiede (eds.), *High Courts in Global Perspective: Evidence, Methodologies, and Findings* (Charlottesville, VA: University of Virginia Press, 2021).

[13] A. Stroh, C. Heyl, *Institutional Diffusion, Strategic Insurance, and the Creation of West African Constitutional Courts*, in 47 *Comp. Pol.* 169-187 (2015).

court failed to act as an important "veto player" and did not contribute to democratic consolidation[14]. The general assessment was that the institution was not able to be above social and racial cleavages. It also had a difficult time in establishing independence in a context of political hegemony of a dominant party. A later review by Gibson was less negative. A few landmark decisions in the 2000s enhanced the court's political independence and reputation. However, Gibson still detected a shortfall of institutional legitimacy that begs for a bolder court[15].

Looking at former British colonies, one also finds a plethora of experiences. For example, Widner reviewed the cases of Tanzania, Uganda, and Botswana. She observed that the role of courts as a restraint to executive power is not analogous across jurisdictions. Furthermore, she identified a "capacity building" limitation reflecting practical substantive and procedural aspects (such as lack of resources, administrative delay, absence of law reports, and inability to enforce court orders)[16]. These challenges are common in Commonwealth Africa. In fact, an earlier report edited by Brody and MacDermot presents a grim description of rule of law in former British colonies in Africa[17].

A later article by Ellett went further and recognized the failure of courts in shaping statehood and democracy in former British colonies in Africa[18]. She argued that formal institutions were transplanted from the common-law tradition, but local realities shaped their developments. For example, colonial British law was distorted to safeguard a principle of executive supremacy in ruling the colonies, "protecting both property rights and the rights of the government to control its citizens"[19]. After independence, these distortions in the common-law tradition were easily consistent with authoritarian governments[20]. Specifically, nondemocratic constitutionalism in Tanzania, Uganda, and Malawi made extensive use of the common-law tradition to justify oppressive legislation and limitations

[14] J.L. Gibson, G.A. Caldeira, *Defenders of Democracy? Legitimacy, Popular Acceptance, and the South African Constitutional Court*, in 65 *J. Pol.* 1–30 (2003).
[15] J.L. Gibson, *Reassessing the Institutional Legitimacy of the South African Constitutional Court: New Evidence, Revised Theory*, in 43 *Politikon* 53–77 (2016).
[16] J. Widner, *The Courts as a Restraint: The Experience of Tanzania, Uganda, and Botswana*, in P. Collier (ed.), *Investment and Risk in Africa* (London: Macmillan, 1999).
[17] R. Brody, N. MacDermot (eds.), *The Independence of the Judiciary and the Legal Profession in English-Speaking Africa*, International Commission of Jurists (1987).
[18] R. Ellett, *Courts and the Emergence of Statehood in post-Colonial Africa*, in 63 Northern Ireland Legal Q. 343–363 (2012).
[19] Ellet, cit., 343.
[20] Ellet, cit., 344.

to individual rights[21]. Doctrines of precedent were used to control rather than enhance judicial independence[22]. Ellet concluded that when these countries moved to multiparty systems in the 1990s, with few exceptions (such as an assertive supreme court in Tanzania for a short period before 1994), courts were weak, cautious, and unwilling to challenge the executive power.

In a related work, VonDoepp and Ellett examined how courts have limited executive power in new democracies in Commonwealth Africa (Namibia, Tanzania, Malawi, Zambia, and Uganda)[23]. Their finding was that challenges to the executive were not frequent and reflected only occasional disagreements. Although there were different executive reactions to these defiant judicial decisions, the authors suggested that patronage and personal linkages to the ruling elite played an important role. However, government interference with the judiciary varied somehow from low interference in democratic Tanzania (1995-2005) to high and persistent interference in democratic Uganda (1997-2007) and democratic Malawi (1994-2012).

IV. THE BIGGER QUESTION: WHY IS LEGAL ORIGINS THEORY IGNORED BY POLITICAL SCIENTISTS?

While the theory of legal origins has played an important role in comparative economics in the last two decades (inevitably subject to methodological and conceptual controversies as I have emphasized), it has failed to get the attention of comparative political scientists. Given the emphasis of comparative politics on the rule of law (and related notions about comparative judicial politics), this is somewhat surprising. However, I suggest this can be explained by the way economists and political scientists refer to the rule of law in their research agenda.

Economists look at democracy and the rule of law primarily as control variables to explain economic dependent variables – GDP growth, inequality, macroeconomic stability, unemployment, inflation, and so on[24]. Political scientists use democracy and the rule of law essentially as dependent variables to be explained by a set of structural and institutional

[21] Ellet, cit., 352-353.
[22] Ellet, cit., 355.
[23] P. VonDoepp, R. Ellett, *Reworking Strategic Models of Executive-Judicial Relations: Insights from New African Democracies*, in 43 *Comp. Pol.* 47–165 (2011).
[24] For example, D. Acemoglu *et al.*, *Democracy does Cause Growth*, in 127 J. Pol. Econ. 47-100 (2019).

factors, depending on the different theories. Taking democracy and rule of law to be control or dependent variable leads to varying, if not opposing, concerns and priorities.

Let us start with comparative economics. Statistical endogeneity has been the underlying concern since the 1990s. Democracy and the rule of law cause economic growth, but economic growth could also cause democracy and the rule of law. Nobody disputes the existing strong correlation (easily documented in Table 3). It is the direction of causation that is subject to intense debate. Do we need democracy and the rule of law to foster growth? Or do we need to reach a certain level of economic growth to produce institutions conducive of democracy and the rule of law? The answer to these questions begs for a variable that is exogenous to both contemporary growth and institutions. Such a variable could be thought of as reflecting underlying social preferences or political inclinations that are exogenous to growth and institutions, but in turn, determine growth and institutions. Economists argue that legal origins from two hundred years ago are these exogenous social preferences or political inclinations that determine growth and institutions (including democracy and the rule of law) two hundred years later[25]. Broadly speaking, economists see democracy and the rule of law resulting from immutable social preferences and political inclinations (as well as structural factors, but there is no disagreement with political scientists in this regard), and legal origins reflect these underlying, stable, and exogenous attributes.

Comparative politics aims at explaining the combination of factors that result in democracy and the rule of law (or lack of both). Agency theories and institutional explanations are less concerned about measuring exogenous social preferences or historical political inclinations. First, they are more interested in the behavior of individuals, agents, parties, elites, and social movements in reaction to specific contexts. Second, social preferences about regime types are likely to be endogenous and respond to time and context. Therefore, legal origin is not helpful to this viewpoint. In fact, if democratization or strong rule of law is a mere consequence of immutable social preferences and political inclinations as determined two hundred years ago, there is little scope for elite-driven theories. Moreover, focusing on a specific country, it is difficult to envisage some underlying and immutable social preferences

[25] This theory has been widely criticized as I pointed out in note 2. For example, LLSV presupposed that the distribution of legal families around the world is exogenous to economic variables. This is historically problematic since the expansion of the British empire (after defeating all other competing European empires in the 18th century) is notoriously economically driven.

from two hundred years ago, and at the same time, explain many regime type changes within these same two hundred years.

I have reviewed in this article the academic discussion about the relationship between courts and judiciary, that is, the rule of law and democracy in Africa. Prevailing academic discussions contain no mention of legal origin because, implicitly, political scientists do not seem to think that there is a valid distinction between Francophone and Anglophone Africa when it comes to predominating political regime types in the last thirty years. My own position goes in similar lines. I do not think economists can be very successful in explaining Africa's patterns of economic growth (or lack thereof) by insisting on legal origin. Moreover, given the patterns of colonization in Africa, it is very unlikely that legal origins reflect local social preferences anyway.

How about Latin America? There is plenty of discussion focused on the role of the rule of law[26], including the controversy about the alleged failure of rule of law reforms[27]. Still, the most immediate remark is that almost all Latin American countries are civil-law jurisdictions[28]. Legal origin can only be part of a counter-factual reasoning. Making the argument that Pinochet should be understood as a product of civil-law immutable social preferences while an English-speaking Chile would be saved from an English-speaking Pinochet could be an exciting intellectual exercise, but is unlikely to advance our understanding of Chile's former (authoritarian) and current (democratic) political regimes.

It can be puzzling that comparative political science research on courts and regime type has not responded to comparative economics. Nevertheless, it seems to me that legal origins have not been ignored due to any sort of negligence or overlook – quite the contrary. I take the view that legal origin is simply not a useful concept when explaining regime type within a certain geographical area.

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[26] See, for example, G.A. O'Donnell, *Polyarchies and the (Un)Rule of Law in Latin America*, in J.E. Méndez *et al.*, *The (Un)rule of Law and the Underprivileged in Latin America* (Notre Dame, Ind.: Notre Dame University Press, 1999); P.S. Pinheiro, *Democratic Governance, Violence, and the (Un)Rule of Law*, in 129 Daedalus 119-143 (2000).

[27] L. Hammergren, *Latin American Experience with Rule of Law Reforms and Applicability of Nation Building Reforms*, in 38 *Case Western Res. J. Int'l L.* 63-93 (2006); J.L. Esquirol, *The Failed Law of Latin America*, in 56 Am. J. Comp. L. 75-124 (2008).

[28] For example, P. Paterson, *The Rule of Law in Latin America: A Selected Annotated Bibliography*, William J. Perry Center for Hemispheric Defense Studies (1997) lists more than one hundred references on the study of the rule of law in Latin America without a single mention to legal origins.

V. FINAL REMARKS

Economists have proposed that the common-law tradition is more democratic, and the civil-law tradition is more authoritarian in their ideology. I started by showing that there is little linear correlation between political regimes and legal families. I suggested that we should focus on Africa rather than other parts of the world because these two legal traditions coexist in a continent experiencing post-colonial realities with comparable social and economic challenges. Statistically, one still finds very weak indication that there is some sort of linear correlation between democracy and common-law tradition.

It is difficult to find support in the political science scholarship to the view that democracy in Africa is related to the common-law versus civil-law tradition. There is evidence that colonization patterns explain, at least partially, success or failure in democratization, but legal family does not seem to be part of the bundle of important colonization factors. Furthermore, it is not possible to confirm that judicial institutions originated by common-law transplants are more conducive of democracy than those originated by civil-law transplants. In both Anglophone and Francophone Africa, we find that these institutions adjust to local realities, including political regimes. European-style constitutional courts and English-style supreme courts are consistent with democracy and authoritarianism. Even in multiparty systems, we do not find strong counter-majoritarian courts.

South Africa provides a good example to illustrate the limitations of the legal origins theory. It is a common-law country (although influenced by Dutch law). It is an established democracy, with an important constitutional court, an institution alien to the common-law tradition. Yet, the court has been slow to establish its legitimacy within the democratic political system. Dealing with the hegemony of one single political party since 1994 has not been easy. Scholars are somewhat optimistic about recent developments (but disappointed that the court failed expectations in the 1990s). However, such evolution does not reflect any democratic nature of the common-law, but merely complicated interactions in the political system, public opinion, business interests, and judicial inclinations.

I am not arguing that legal traditions are irrelevant. My tentative conclusion is that these traditions simply do not have an intrinsically democratic nature. They can be easily appropriated by democracy as well by authoritarianism. These traditions are adjustable to political regimes. In fact, experiences show that they did adjust to varying degrees of political competitiveness, social pressure, or economic factors in the post-colonial African world.

Legal families do not predetermine, and probably do not even influence, democratization. Moreover, since they were imposed by colonization, legal families do not reflect preferences for or against democracy in African societies.

APPENDIX

TABLE A1 – DESCRIPTIVE STATISTICS (179 COUNTRIES, 2019)

Variable	Mean	Standard Dev	Min	Max
ELECTORAL DEMOCRACY	0.52	0.25	0.02	0.9
LIBERAL DEMOCRACY	0.40	0.25	0.01	0.86
PARTICIPATORY DEMOCRACY	0.33	0.19	0.02	0.78
DELIBERATIVE DEMOCRACY	0.40	0.24	0.01	0.85
EGALITARIAN DEMOCRACY	0.39	0.23	0.04	0.84
JUDICIARY CONSTRAINS EXECUTIVE	0.58	0.30	0.01	0.98
JUDICIAL INDEPENDENCE	0.33	1.42	-2.82	2.84
JUDICIAL ACOUNTABILITY	0.68	1.32	-2.64	3.61
JUDICIAL CORRUPTION	0.13	1.50	-3.15	3.31
COMPLIANCE WITH JUDICIARY	0.44	1.34	-3.21	2.84
TRANSPARENCY OF LAW	0.57	1.32	-2.41	3.51
COMMON LAW	0.29	0.46	0	1

Source: V-Dem (2019); Common Law from Klerman et al (2011).

TABLE A2 – DESCRIPTIVE STATISTICS (54 AFRICAN COUNTRIES)

	Definition	Source	Mean	St Dev	Min	Max
LIBERAL DEMOCRACY	LIBERAL DEMOCRACY INDEX (1995-2020)	VDEM	0.27	0.19	0.006	0.705
PURE COMMON LAW	PURE COMMON-LAW COUNTRIES	Standard legal classification	0.30	0.46	0	1
PURE CIVIL LAW	PURE CIVIL-LAW COUNTRIES	Standard legal classification	0.41	0.49	0	1
COMMON LAW	COMMON-LAW COUNTRIES INCLUDING MIXED JURISDICTIONS	Standard legal classification	0.39	0.49	0	1
CIVIL LAW	CIVIL-LAW COUNTRIES INCLUDING MIXED JURISDICTIONS	Standard legal classification	0.69	0.47	0	1
SHARIA LAW	SHARIA LAW COUNTRIES INCLUDING MIXED JURISDICTIONS	Standard legal classification	0.26	0.44	0	1

BRITAIN	FORMER BRITISH COLONY	Wikipedia	0.43	0.50	0	1
FRANCE	FORMER FRENCH COLONY	Wikipedia	0.41	0.49	0	1
SPAIN	FORMER SPANISH COLONY	Wikipedia	0.04	0.19	0	1
PORTUGAL	FORMER PORTUGUESE COLONY	Wikipedia	0.09	0.29	0	1
GERMANY	FORMER GERMAN COLONY	Wikipedia	0.09	0.29	0	1
ITALY	FORMER ITALIAN COLONY	Wikipedia	0.07	0.26	0	1
NETHERLANDS	FORMER DUTCH COLONY	Wikipedia	0.04	0.19	0	1
BELGIUM	FORMER BELGIAN COLONY	Wikipedia	0.06	0.23	0	1
OTTOMAN	FORMER OTTOMAN EMPIRE	Wikipedia	0.09	0.29	0	1
NORTHERN	COUNTRY LOCATED IN NORTHERN AFRICA		0.11	0.31	0	1
MIDDLE	COUNTRY LOCATED IN CENTER AFRICA		0.17	0.37	0	1
WESTERN	COUNTRY LOCATED IN WESTERN AFRICA		0.28	0.45	0	1
SOUTHERN	COUNTRY LOCATED IN SOUTHERN AFRICA		0.09	0.29	0	1
EASTERN	COUNTRY LOCATED IN EASTERN AFRICA		0.35	0.48	0	1
ISLANDS	COUNTRY LOCATED IN AN ISLAND		0.11	0.32	0	1
LANDLOCK	LANDLOCK COUNTRY		0.30	0.46	0	1
MONARCHY	POLITICAL REGIME IS MONARCHY	Wikipedia	0.06	0.23	0	1
YEAR	TIME TREND = 0,1,2,3,4,5		2.5	1.71	0	5
RULE OF LAW	RULE OF LAW INDICATOR (1995-2020)	World Bank	0.29	0.21	0	0.8325
HDI	HUMAN DEVELOPMENT INDICATOR (1995-2020)	UNDP (United Nations Development Program)	0.49	0.13	0.18	0.804

Source: Standard legal classification based on Klerman et al (2011).