THE INTERNATIONAL LIBRARY OF CRITICAL WRITINGS IN ECONOMICS 170

COMPARATIVE LAW AND ECONOMICS

VOLUME I

Gerrit De Geest and Roger Van den Bergh

Comparative Law and Economics Volume I

Edited by

Gerrit De Geest

Professor of Law and Economics
Utrecht University, The Netherlands
and Ghent University, Belgium

and

Roger Van den Bergh

Professor of Law and Economics
Erasmus University Rotterdam, The Netherlands
and University of Bologna, Italy

THE INTERNATIONAL LIBRARY OF CRITICAL WRITINGS IN ECONOMICS

An Elgar Reference Collection
Cheltenham, UK • Northampton, MA, USA

Published by
Edward Elgar Publishing Limited
Glensanda House
Montpellier Parade
Cheltenham
Glos GL50 1UA
UK

Edward Elgar Publishing, Inc.
136 West Street
Suite 202
Northampton
Massachusetts 01060
USA

A catalogue record for this book is available from the British Library.

ISBN 1 84064 477 X (3 volume set)

Printed and bound in Great Britain by MPG Books Ltd, Bodmin, Cornwall

Acknowledgements

The editors and publishers wish to thank the authors and the following publishers who have kindly given permission for the use of copyright material.

American Journal of Comparative Law, University of California at Berkeley for article: Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard (2003), 'The Transplant Effect', *American Journal of Comparative Law*, **51** (1), Winter, 163–203.

Blackwell Publishing Ltd for article: Roger Van den Bergh (2000), 'Towards an Institutional Legal Framework for Regulatory Competition in Europe', *Kyklos*, **53** (4), 435–65.

Cambridge University Press for excerpt: Douglass C. North and Robert Paul Thomas (1973), 'The Issue' and 'France and Spain – The Also-rans', in *The Rise of the Western World: A New Economic History*, Chapters 1 and 10, 1–8, 120–31, 159, 165–6.

Elsevier Science for article: Wallace E. Oates and Robert M. Schwab (1988), 'Economic Competition Among Jurisdictions: Efficiency Enhancing or Distortion Inducing?', *Journal of Public Economics*, **35** (3), April, 333–54.

President and Fellows of Harvard College and Harvard University Press for excerpt: Richard A. Posner (1981), 'The Economic Theory of Primitive Law', in *The Economics of Justice*, Chapter 7, 174–206.

Hoover Institution Press and the Board of Trustees of the Leland Stanford Junior University for excerpt: Edgardo Buscaglia and William Ratliff (2000), 'Legal and Economic Integration: The Cases For and Against Legal Transplants', in *Law and Economics in Developing Countries*, Chapter 2, 31–54, references.

Journal of Legal Studies and the University of Chicago for article: Paul G. Mahoney (2001), 'The Common Law and Economic Growth: Hayek Might Be Right', *Journal of Legal Studies*, **XXX** (2, Part I), June, 503–25.

Kluwer Law International for article: Gerrit De Geest (2002), 'Information Problems Caused by Regulatory Competition, and Their Solution: International Standard Codes', in Stefan Grundmann and Jules Stuyck (eds), *An Academic Green Paper on European Contract Law*, Chapter 23, 373–85.

MIT Press Journals and the President and Fellows of Harvard College and the MIT for article: Edward L. Glaeser and Andrei Shleifer (2002), 'Legal Origins', *Quarterly Journal of Economics*, **CXVII**, November, 1193–229.

Oxford University Press for articles: Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer and Robert Vishny (1999), 'The Quality of Government', *Journal of Law, Economics and Organization*, **15** (1), 222–79; Francesco Parisi (2001), 'The Genesis of Liability in Ancient Law', *American Law and Economics Review*, **3** (1), Spring, 82–124; Anthony Ogus (2002), 'The Economic Basis of Legal Culture: Networks and Monopolization', *Oxford Journal of Legal Studies*, **22** (3), Autumn, 419–34.

Tulane Law Review Association for article: Saul Levmore (1986), 'Rethinking Comparative Law: Variety and Uniformity in Ancient and Modern Tort Law', *Tulane Law Review*, **61** (2), December, 235–87.

University of Michigan Press for excerpt: Ugo Mattei (1997), 'The Competitive Relationship among Sources of Law', in *Comparative Law and Economics*, Chapter 4, 101–21.

Yale University Press for excerpt: Mancur Olson (1982), 'The Developed Democracies Since World War II', in *The Rise and Decline of Nations: Economic Growth, Stagflation, and Social Rigidities*, Chapter 4, 75–117, 251–8.

Every effort has been made to trace all the copyright holders but if any have been inadvertently overlooked the publishers will be pleased to make the necessary arrangement at the first opportunity.

In addition the publishers wish to thank the Marshall Library of Economics, Cambridge University, the Library of the University of Warwick and the Library of Indiana University at Bloomington, USA for their assistance in obtaining these articles.

Introduction

Gerrit De Geest and Roger Van den Bergh

This collection of articles is the first anthology on comparative law and economics, a new interdisciplinary research field in which differences among legal systems are analysed and evaluated from an economic viewpoint.

Comparative law and economics (CLE) differs from both traditional comparative law and traditional comparative economics. It enriches comparative law by the scientific rigour and explanatory power of modern economics. It enriches comparative economics as well, in which insufficient attention has been paid to legal environments.

This collection attempts to draw a picture of where CLE stands as of 2003. The three volumes contain 46 contributions on a wide variety of topics. The volumes are organized around eight parts which cover the following subjects: general theories and general historical perspectives, regulatory competition and legal transplants, legal systems and economic growth, property, tort law and restitution, contracts and consumer protection, corporate law and organizations, and procedural law. Areas that were excluded are constitutional law, tax law, social security law, antitrust law and international public law.

I. Comparative Law and Economics versus Comparative Law

Comparative law is a branch of legal science in which (legal rules from) different legal systems are compared. In a sense, comparative law is true legal science, as its object of study is not one particular legal system, but all legal systems (of the present and – as we will argue below – of the past). Most traditional legal scholars develop theories on the law by studying the law of only one legal system. From a scientific viewpoint, it is quite dangerous to build theories on single observations. If we are to really understand the law, we need to start from as many viewpoints as possible (in a sense, a legal scholar who studies only his own legal system is like a biologist who tries to understand how mammals function by observing only his own dog).

Ideally, comparative law should attend to three tasks: (1) description (to say what are the rules), (2) explanation (to say why they are there) and (3) evaluation (to say whether they should be there). Each task can be further divided into two subtasks (a and b).

1. *Description*. Comparative lawyers need to describe the variety or uniformity with respect to legal rules of different legal systems. This can be done:
   - (1a) at a macro level (comparing entire systems);
   - (1b) at a micro level (comparing legal rules, or comparing how specific legal problems are solved).
2. *Explanation*. The variety or uniformity needs to be explained. A full explanation includes:
   - (2a) a historical explanation (how and when and why was this rule introduced? This

historical explanation is important to the extent that the choice of legal rules is path dependent);

(2b) a functional explanation (why does that society need that rule? Why hasn't there been enough pressure in that society to abolish that rule?)

3. *Evaluation*. In case of variety, we need to find out what is the best rule. A legal rule can be judged from two perspectives:

(3a) the content: is the rule desirable, i.e. more beneficial to society than alternative rules?

(3b) the technical quality of the formulation: are the rules described in a simpler, more precise and more encompassing way than alternative descriptions? In case of variety with respect to the form, we have to determine which is the best one (i.e. the best concepts, the best structures, the best doctrines) using general scientific criteria such as accuracy, simplicity and explanatory power.

To what extent are these three tasks fulfilled? We should make a distinction between first generation (= old) comparative law, second generation (= current mainstream) comparative law and third generation comparative law (in which economics plays an important role).

First generation comparative law (e.g. René David, 1950) focused on the general characteristics of legal systems, their historical background and their main terminological differences. The analysis was limited to descriptions at a macro level (1a) and historical explanation (2a). This first generation of comparative law was a necessary preliminary step in the evolution of comparative law, though it gave a biased image of the situation by overemphasizing the differences between legal systems.

Second generation comparative law shifted the focus from the macro to the micro level. In addition, legal realism (which tries to demystify law) slowly became the dominant approach: comparatists started to analyse how legal systems solve specific problems. The rhetoric used to justify and classify these solutions was seen as a secondary consideration. From a scientific viewpoint, second generation comparative law is an improvement, since it pays less attention to what courts and legislators say, but more to what they do. In effect, it can be seen to be piercing the legal system's veil.

Second generation comparative law started with Schlesinger (1968). Schlesinger led a group of legal scholars from different legal families. They analysed how types of cases were solved in different legal systems. The general conclusion was that the outcomes are very similar, though courts use different techniques to solve legal problems. More recent second generation comparative law scholarship (e.g. Zweigert and Kötz, 1998; Van Gerven *et al.*, 2000; Beale *et al.*, 2002) seems to confirm the 'common core' thesis of Schlesinger: legal systems differ less than you would believe at first sight. And since the differences are minor, it must be possible to draft restatements to describe the 'common core' of all legal systems. The Lando proposal for a European code of contracts is the typical example.

However, even second generation comparative law covers only a small part of what comparative law should do. The analysis is limited to descriptions of variety-uniformity at a micro level (1a) and historical explanations (2a). Functional explanations (2b) are absent, or based on common sense and intuition, rather than on rigorous scientific analysis. The same applies to the normative evaluation of differences as to the content (3a) and to the form (3b). When comparatists are to decide out of two different rules which is the best one, they still

make a choice on the basis of pure intuitive thinking. When the Lando commission, for example, had to decide which of two doctrines (leading to the same result) were to be chosen for the European contract code proposal, the choice was based on mere intuition (or even majority voting).

Traditional (second generation) comparative research usually ends here, without going further to find an explanation of why there is a convergence in outcomes of cases in spite of different starting points in the legal analysis. Comparative law and economics may explain the process of 'spontaneous harmonization' through case law. The research hypothesis of positive economic analysis that legal rules and institutions can be understood as instruments to achieve efficiency may prove to be a valuable rationalization of why – in spite of historical differences reflected in the wording of legal rules – all systems have evolved in the same direction. If efficiency is the goal to be reached, inefficient rules will not survive in the long run. Judges will use their margin of discretion to reduce the inefficiencies resulting from legal technicalities.

Comparative law and economics may be seen as third generation comparative law. It allows comparative law to fulfil all tasks (including 2b, 3a and 3b). That comparative law and economics may also play a major role with respect to the last task (3b: judging on the technical quality of the formulation) requires further explanation.

A legal doctrine is a scientific theory of the law. It is a coherent set of concepts and rules that describes legal reality. A legal doctrine is the equivalent of a 'law' in natural sciences, like Newton's law of falling bodies. Such a 'law' compresses hundreds of observations into one formula. A legal doctrine compresses hundreds of cases and legislative articles into a set of rules that is as simple and clear as possible.

Though technically evaluating doctrines is something all lawyers do to some extent, comparative lawyers find themselves more often in a position in which they have to make evaluations. This is especially the case for those groups of comparatists who try to draft new European (civil) codes. But as already explained, the weak point of these scholars is their lack of methodology with respect to finding and choosing doctrines. In a sense, they have no methodology: they select on the basis of intuition and – sometimes – compromise (trying to please the lawyers of all legal families).

Quite often the optimal rule from a technical viewpoint will not be an existing one, but a new one, inspired by economic theories. This is illustrated with two examples, both reprinted in Volume II of this collection of articles: Wils (1993) and Bouckaert and De Geest (1995).

Wils (1993) offers a new doctrine on precontractual liability. Who should bear the costs of failed negotiations? According to mainstream Belgian and French legal doctrine, a person is liable for breaking off negotiations when he (clearly) did not behave as a reasonable person. This *culpa in contrahendo* doctrine is based on the vague, even tautological, concept of a reasonable person. Wils's new doctrine is an extremely simple one: you are liable only if you mislead the other party with respect to his chances or the amount at stake. This new doctrine is economically inspired: Wils started from the idea that the fundamental problem is one of asymmetric information. Wils shows that American, French, Belgian and German law corresponds well to his doctrine.

Bouckaert and De Geest (1995) offer a new doctrine on restitution for unjust enrichment. Traditional Belgian and French legal doctrine awards compensation on the basis of unjust enrichment if four conditions are simultaneously fulfilled: (a) there is an enrichment; (b) another person has been impoverished; (c) there is a causal relationship between the enrichment and

the impoverishment; and (d) there is no legal ground for the enrichment. This traditional doctrine is extremely vague. It is based on a set of vague concepts. More importantly, it does not explain why the legal system sticks to the requirement of a contract in some cases, and allows coerced quasi contractual transfers in other cases. Bouckaert and De Geest (1995) propose an alternative, more accurate doctrine, inspired by the property liability rule distinction of Calabresi and Melamed (1972). Quasi contractual transfers are to be considered as coerced exchanges of goods and services, wanted by one party (which they call the 'active party') and imposed on another party (the 'passive party'). They are not the normal ways of exchanges: a market economy is based on transfers that are agreed upon by both parties. Imposed transfers are allowed only if two conditions are fulfilled: (a) high transaction costs (time constraints, incapacity, errors, serious bilateral monopolies) impede a normal contract, and (b) it is obvious to an outsider that the transfer is welfare enhancing.

Are economically inspired doctrines always superior? Not necessarily. Economically inspired doctrines, however, have a good chance to be superior for one major reason. What legislators and courts ultimately do is balancing advantages and disadvantages of choices. A theory that is focused on describing these advantages and disadvantages has more chance to be a good description of the legal reality.

II. Comparative Law and Economics versus Comparative Economics, Transition Economics and Development Economics

'Comparative economics', or 'comparative economic systems', is an old branch of economics. Originally, comparitive economists focused on macro comparisons, like 'market economies' versus 'planning economies' – somewhat similar to first generation comparative lawyers who focused on the general characteristics of legal families.

When most planning economies collapsed in the late 1980s, however, a new branch of economics was born: transition economics, which tries to find the best ways to move to a market economy. Soon transition economists discovered the importance of the details of a legal system. One event that contributed to this switch in particular (discussed in Black, Kraakman and Tarassova, 2000, reprinted in Volume III of this collection) was the failure of rapid, mass privatization of state-owned enterprises in Russia. American transition economists had positively advised on this rapid privatization, but had overlooked that in Western market economies private corporations operate within a strict legal framework (corporate law and securities regulation), the purpose of which is to prevent self-dealing. Russia lacked such a legal framework, and its mass privatization resulted in mass self-dealing.

Development economics is a related field. Its central research purpose is to explain why some economies are more developed than others, and why some grow faster. Originally, explanations were sought in factors such as transport infrastructure, schooling or the availability of capital. More recently, attention has shifted towards the institutional factors that are responsible for all other factors. As a result, development economics became development law and economics, which can be seen as the branch of comparative law and economics that deals with the law of developing countries.

In this collection, quite a number of the articles are related to developmental issues: Olson (1982), Buscaglia and Ulen (1997), LaPorta, Lopez-de-Silanes, Shleifer and Vishny (1999),

Buscaglia and Ratliff (2000), Firmin-Sellers (2000), Mahoney (2001), Berkowitz, Pistor and Richard (2003). To some extent, the same holds for Heller (1998), Black, Kraakman and Tarassova (2000), De Geest (2002) and Glaeser and Shleifer (2002).

III. Comparative Law and Economics versus the Economics of Comparative Legal History

Many historical studies are comparative: they compare the legal rules at point of time 1 with those at point of time 2. Should comparative legal history be considered as a subcategory of comparative law? Should economic analysis of comparative legal history be treated as a subcategory of comparative law and economics?

At first sight, one may be inclined to say that these are different disciplines: history of law looks at the past, comparative law at the present. A closer look, however, reveals that the differences are much smaller.

First, the methodology is identical, except for the methods to find and interpret primary sources. Both compare rule 1 of society A to rule 2 of society B. Both try to explain the similarities and differences.

Second, comparative law scholars are used to paying a lot of attention to historical aspects. When scholars find differences among legal systems, it is tempting for them to try to explain them. When they look for an explanation, they first look at the most developed social sciences. History is the oldest social science – institutional economics is much more recent. Therefore it should be no surprise that first and second generation comparative lawyers focused on historical explanations.

Finally, comparative law and economics scholars pay considerable attention to historical aspects as well. In the present collection of articles, it is hard to find contributions in which historical elements are completely absent. Therefore we found no reason to omit articles in which historical elements play a more central role.

IV. The Contribution of Comparative Law and Economics to Law and Economics

Comparative law enriches law and economics scholarship in three ways: (1) it delivers empirical data for testing hypotheses, especially when the outcome at a theoretical level is unclear; (2) it is a source of inspiration for new theories; and (3) it allows for the correction of home-country biases in theoretical explanations.

First, comparative law can be seen as a huge library of reported legal experiments. Quantitative empirical testing requires points of comparison, either in time or cross-country. The need for (costly) empirical studies is the largest when (cheaper) theoretical analyses do not lead to unambiguous outcomes. A good example is White (1989, reprinted in Volume II). According to the equivalence theorem, comparative negligence (a modern tort rule that splits damages between injurer and victim according to their blameworthiness in bilateral accident cases) leads to the same level of care as contributory negligence (an older rule that lets the victim bear the full loss when she was negligent too). White's empirical study (which analysed data from different American states) found, however, that contributory negligence provides better incentives to avoid accidents.

Second, comparative law can be a source of inspiration for new theories, when it finds legal phenomena in other legal systems that cannot be explained by standard law and economics theories. Three contributions in this collection illustrate how comparative law can inspire the formation of theories.

Cheung (1969, reprinted in Volume II) tried to explain sharecropping – a contract type that used to be widespread in parts of China but rare in Western legal systems. It would have been easy for Cheung to come up with a simplistic 'cultural' explanation for this variety. Instead, Cheung presents a rational choice explanation, based on a transaction cost and risk analysis.

Heller's (1997, reprinted in Volume II) general purpose was to explain why the Russian transition from Marx to markets was largely unsuccessful. He was struck by one observation, in particular: why are many storefronts in Moscow empty, while metal street kiosks are full of goods? Heller explained this by the 'tragedy of the anticommons': opening a new store requires the permission of multiple parties at the same time. The anticommons theory was not completely new: it goes back to Michelman (1968). It was largely overlooked in the law and economics literature, until Heller refined and promoted the theory. It is central in, for instance, Parisi (2002, reprinted in Volume II).

Cooter and Ginsburg (1996, reprinted in Volume III) provide a third example. Comparative lawyers have shown that the degree of judicial activism varies substantially among legal systems (e.g. American courts are much more activist than English courts). Traditional comparative lawyers have neglected to come up with explanations that go beyond historical or 'cultural' ones. Cooter and Ginsburg develop a game-theoretical model (in which judges maximize their political preferences) and show empirically that the courts' discretion increases as the probability of legislative repeal of their decisions decreases. This model relates American judicial daring not to 'culture', but to the fact that the competing lawmaking body consists of three players (the President, the Senate and the House of Representatives) who can all obstruct one another's initiatives by their vetoes – a counter-intuitive insight that would have been hard to come up with if the world consisted of only one legal system.

Third, comparative law allows for the correction of home-country biases in theoretical explanations. Such biases are not unusual in social sciences. Social scientists are living in one society, in particular. Characteristics of that society are easily considered as 'normal'. In economic terminology, the feeling that something is 'normal' is easily translated into the statement that something is 'economically optimal'. Most law and economics scholars are American citizens. It should be no surprise that the theoretical explanations they make show a home-country bias in some cases.

Two articles in this collection are attempts to correct such biases. Roe (1993, reprinted in Volume III) noticed that the economic literature (of American origin) concluded that the structure of American corporations and American corporate law was more or less optimal. Yet he showed that the structure of German and Japanese corporations was very different, and still they seemed to work as well. Roe did not make any judgement on which system is optimal, but rather defined the outlines for a modern comparative corporate law. Adams (1995, reprinted in Volume III) provides us with a second example. American procedural law states that each party has to bear its own litigation costs. In contrast, European legal systems generally require the loser to pay it all (fees are shifted). In the American law and economics literature on this subject, the general conclusion seems to be that the American rule is intrinsically superior. Fee shifting is believed to lead to higher trial costs, since the winner can externalize some costs on the loser.

Adams argues, however, that the models on different cost fee shifting rules, made by American economists, do not capture the reality of the British/German rule. These models do not take into account that in Germany the externalization problem is solved, partly by fee regulation and partly by the more active role of judges during the trial.

V. A Brief Introduction to the Collection of Articles

For the three volumes in this collection 46 contributions have been selected. The eight parts cover the following subjects: general theories and general historical perspectives, regulatory competition and legal transplants, legal systems and economic growth, property, tort law and restitution, contracts and consumer protection, corporate law and organizations, and procedural law.

General Theories and General Historical Perspectives (Volume I, Part I)

The first part of the collection contains general theories and general historical perspectives. It starts with the Levmore thesis (1986), which can be considered as the central thesis of comparative law and economics. The Levmore thesis states that, in principle, we can expect the same legal rules in all legal systems (of societies at the same stage of development). The reason is that the purpose of all legal rules is to control self-interested behaviour that threatens the general welfare – a problem that exists in all societies. Variety among legal systems can be expected either (a) when the content of the rule does not really matter (for instance, whether we should drive on the left or the right side of the road), or (b) when the rule raises issues about which reasonable people (even in the same culture) could disagree. The Levmore thesis provides a functional explanation for Schlesinger's (1968) common core observations.

Mattei (1997) provides another nice example of the explanatory function of CLE. Traditional comparative lawyers spend a lot of time in describing the role of different sources of law in different legal systems. Mattei reinterprets this debate, starting from the thesis that sources of law are competing forces.

Ogus (2002) demystifies 'legal culture' – one of those vague notions that play an important role in contemporary comparative law scholarship. Legrand (1996), for instance, argued that harmonization is inherently impossible because of cultural differences. Ogus redefines legal culture in terms of standardization and network externalities. Legal culture is standardized language, spoken by all members of a group of lawyers. Ogus concludes that the resistance of English and other lawyers to a European legal culture can only be interpreted as an attempt to protect the national market from outside competition.

Glaeser and Shleifer (2002) offer a powerful explanation for the differences between common law and civil law traditions. In the twelfth and thirteenth centuries, when the two systems diverged, trials by independent juries or judges could not work in the less peaceful France, where Feudal lords were so powerful that they could easily coerce law enforcers through either violence or bribes. Therefore state-employed (royal) judges were needed to resolve disputes. Of course, these judges needed to be monitored by the king. Glaeser and Shleifer argue that the typical characteristics of French law (emphasis on written records, codification of customary law, appeal courts reviewing of evidence) are methods for a principal (the king) to control his agents (the judiciary).

A remarkable detail is that this seminal (and non-technical) contribution to comparative law has been published in a leading economic journal (the *Quarterly Journal of Economics*) – evidence perhaps of the fact that economists are taking over the explanatory part of comparative law? The reason why economists like Shleifer are now showing interest in comparative law is that recent economic studies (including those co-authored by Shleifer) found a link between French civil law systems and poor economic performance.

Posner (1981) and Parisi (2001) offer historical perspectives. Posner's (1981) work is the starting point of economic analysis of tribal law – i.e. the type of law that is likely to differ most from our modern Western legal systems. Parisi (2001) explains convergences with respect to legal evolution. He offers an economic explanation for the widely observed fact that tort law systems generally develop out of a state of nature (in which discretionary retaliation is the norm), via two steps, regulated retaliation (like the *lex talionis*) and blood-money rules.

Regulatory Competition and Legal Transplants (Volume I, Part II)

To what extent is it desirable to harmonize private law in Europe? There is another debate among traditional comparative lawyers, to which comparative law and economics can add interesting perspectives. An increasing number of scholarly legal publications favours a far-reaching harmonization of private law or even a European Civil Code. The idea of a uniform European private law is not only supported by prominent comparative lawyers, but also by European institutions. In its Resolution of 16 March 2000, the European Parliament stated 'that greater harmonisation of civil law has become essential in the internal market'.[1] Comparative law and economics provides an economic framework to assess arguments in favour of harmonization (the need to internalize externalities across jurisdictions, the danger of a 'race to the bottom', the achievement of scale economies and the reduction of transaction costs) and against harmonization (different rules may reflect different preferences of citizens; legal experiments are valuable).

Oates and Schwab (1988) present a seminal paper that applies Tiebout's ideas on a competition for public goods to a competition for legal rules. Van den Bergh (2000) summarizes the economic literature and relates it to the current debate in Europe.

Legal transplants is a term introduced by Watson (1974), who tried to explain the remarkable degree of convergence among modern legal systems. Watson's explanation was a historical one: most legal systems have copied a huge number of rules from one another over time. Buscaglia and Ratliff (2000) relate the comparative law literature on legal transplants to development economics.

De Geest (2002) tries to explain why developing countries (with underdeveloped legal systems) do not simply copy ('transplant') entire branches of developed legal systems more often, given the fact that legal rules are not copyright-protected. The answer lies in the way legal information is structured. The lack of standardization with respect to information on legal rules makes it prohibitively expensive to copy entire branches of legal systems. The same informational problems are responsible for the fact that regulatory competition hardly works in practice. De Geest concludes that the market for legal rules needs information regulation, just like any other market.

Berkowitz, Pistor and Richard (2003) show that the way the law was initially transplanted is a more important factor than the particular legal family from which the rules were copied.

Legal Systems and Economic Growth (Volume I, Part III)

In recent years, the literature on economic growth has expanded enormously. Quite a number of these publications relate growth to institutions. North and Thomas (1973) and Olson (1982) are early classics that show how institutions influence economic growth. Nobel laureates North and Thomas were the first to systematically apply new law and economics theories to economic history. Olson (1982) was the first to link the (at that time) young public choice theory to economic history and economic growth, in particular. Olson argued that the fact that nations perform well after losing a war (Germany and Japan) or after a revolution (France in the nineteenth century) is due to the fact that these dramatic events erase the privileges and organizational strength of pressure groups, so that the economic systems suffer less from rent-seeking.

La Porta, Lopez-de-Silanes, Shleifer and Vishny (1999) and Mahoney (2001) provide examples of more recent research: careful empirical analyses departing from impressive data sets. Mahoney (2001) shows that common law systems produce faster economic growth through greater security of property and contract rights.

Property (Volume II, Part I)

Volume II starts with Demsetz's (1967) classic paper on property rights, in which comparative legal history (the evolution from common property to private property within the same legal system) plays a central role. Levmore (1987) presents a further elaboration of the Levmore thesis (1986); and Ramseyer (1989) shows the economic logic behind Japanese water law. These customary rules encouraged water-dependent investments by protecting private claims to water flow. Ramseyer also compares these rules with the rules in the American West. Firmin-Sellers (2000) explains why insecure land tenure persists in some West African countries. This study is a nice example of modern empirical research, in which the role of culture is incorporated into the economic analysis. (Heller, 1998, and Parisi, 2002, have already been discussed above.)

Tort Law and Restitution (Volume II, Part II)

The first article in this part is by White (1989) and presents an empirical study test of comparative and contributory negligence rules. The second essay, by Finsinger, Hoehn and Pototschnig (1991), employs a path-breaking methodology within European comparative law scholarship. While traditional comparative lawyers base their comparisons on law-in-books (legislative Acts, leading cases, textbook generalizations), Finsinger *et al.* use statistical tools to get a more precise law-in-action picture of the differences between English and German product liability rules. Ott and Schäfer (1997) present a model that explains how poorly informed courts can develop negligence standards over time; this model is illustrated with cases from German courts. Finally, Bussani, Palmer and Parisi (2003) discuss a legal puzzle that is hard to solve without a rigorous economic analysis: to what extent should compensation be awarded for pure economic loss? The authors show that the implicit logic behind the case-law in 13 European jurisdictions is an economic one. (Bouckaert and De Geest's (1995) paper has been discussed in a previous section.)

Contracts and Consumer Protection (Volume II, Part III)

Cheung (1969) and Wils (1993) have been discussed in previous sections: the first paper is a typical example of the inspirational role of comparative law, the second is a typical example of an economically inspired new legal doctrine. Landa (1981) offers an economic explanation for facts reported by comparative legal historians. She explains the commercial success of ethnically homogeneous middleman groups in some (older) legal systems by the fact that legal enforcement in these systems was costly, so that more informal reputational mechanisms needed to be organized, something that relatively small ethnically homogeneous groups were better at.

Kroll (1987) applies economic theories on optimal remedies for contract breach to Soviet contract law and shows that Soviet law has an underlying economic logic too. The fact that specific performance is the standard remedy – in contrast to the common law which mainly relies on damages – is explained by the difficulties to compute damages in the absence of market prices.

Kötz's (2000) article on precontractual duties of disclosure is not only interesting because of its content, but also because of its author, for Kötz is one of the leading figures of what we have called second generation comparative law. This paper is illustrative of the increasing interest that mainstream comparative lawyers are showing in law and economics.

Gilson (1999) presents an example of intra-USA comparative law, and explains the economic success of Silicon Valley in California (compared to Route 128 in Massachusetts), by the fact that non-competition clauses are forbidden in California and allowed in Massachusetts. Finally, Rekaiti and Van den Bergh (2000) critically examine the rules on cooling-off periods in consumer laws of the EU member states.

Corporate Law and Organizations (Volume III, Part I)

Roe's (1993) paper can be considered as the starting point of the recent literature on comparative corporate governance. He formulates the central research question: how can we explain that American, German and Japanese corporations all seem to function quite well, notwithstanding their apparent differences with respect to corporate structure and legal environment?

White (1996), a professor of economics, formulates the agenda for a more empirical comparative corporate bankruptcy. Hansmann and Mattei (1998) revisit trust law, a common law feature that is discussed by all comparative law professors in all their comparative law courses to illustrate that differences among legal systems do exist.

La Porta, Lopez-de-Silanes, Shleifer and Vishny's paper (1998) is a much-cited quantitative study that shows that common law legal systems have better legal protections for minority shareholders, and this explains their broader and better functioning capital markets.

Hansmann and Kraakman (2001) argue that the deeper tendency in the corporate law system is towards convergence. The idea that the fundamental goal of corporate law is the maximization of long-term shareholder value seems now to be generally accepted.

Coffee (2001) offers a cross-country examination of the private benefits of control, and tries to explain why Scandinavian corporations perform well in this respect, notwithstanding the fact that the Scandinavian legal systems belong to the civil law tradition that is believed to offer less protection to shareholders. Coffee argues the shortcomings of the legal system are corrected by social norms which play an important role in Scandinavia. His article is a nice

example of modern comparative law and economic analysis, in which a lot of attention is paid to social norms. (Black, Kraakman and Tarassova's (2000) paper has been discussed in the section on comparative economics, above.)

Procedural Law (Volume III, Part II)

Miller (1997) presents an economic analysis of comparative civil procedure. French procedural law leads to lower quality but cheaper procedures (for instance, relying on written evidence simplifies the procedure, but the exclusion of other valuable sources of evidence reduces the chance that the court will find out the truth). As a result, property and contract rights are less enforced (as courts make more errors).

Ramseyer and Nakazato (1989) attack the emphasis on culture in comparative studies of Japanese law. They show that settlement amounts and verdict rates in Japan can be explained by the rational choice models of the law and economics literature.

Posner (1996) provides an inspiring macro-comparison between the American and English legal system; and Buscaglia and Ulen (1997) present the first quantitative analysis of courts in Latin America. (Adams (1995) and Cooter and Ginsburg (1996) have been discussed in a previous section.)

VI. Some Reflections on the Development and Current Status of Comparative Law and Economics

This collection of articles allows us to reflect on the development and status of CLE. Here we discuss (1) the growth of CLE; (2) the types of journals in which CLE papers have been published; (3) the methodology; and (4) the future.

The Exponential Growth of CLE in Recent Years

Most of the articles in this collection are relatively recent – only two papers date from the 1960s and one from the 1970s, and 10 papers were published in the 1980s, 17 in the 1990s and 16 during 2000–3. Of course, these figures have to be interpreted with caution. There may be a selection basis by the very fact that . . . they are data on a selection. Yet, they indicate a tendency that cannot be denied: comparative law and economics is a relatively recent discipline that has grown exponentially in recent years. How can this growth be explained?

1. (Traditional) comparative law has grown exponentially in Europe, driven by the exponentially growing European economic and political integration.
2. (Traditional) comparative law scholarship in Europe is narrowly related to policy debates at a European level; economic arguments are very well accepted in political debates.
3. Economics in general is paying more attention to institutional aspects (as illustrated – and accelerated – by the Nobel Prizes for Hayek, Stigler, Buchanan, Coase, Becker and North).
4. In development economics, in particular, greater attention is paid to the role of legal systems in fostering or retarding economic growth.

5. Many comparative economics have become transition economists, and many transition economists have become law and economics scholars.

Which Journals Publish CLE Articles?

Out of the 46 contributions in the three volumes of the present collection

- 15 have been published in specialized law and economics journals (6 in the *Journal of Legal Studies*, 5 in the *International Review of Law and Economics*, and 1 in the *Journal of Law and Economics*, the *Journal of Law, Economics, and Organization*, the *American Law and Economics Review*, and the *European Journal of Law and Economics*).
- 9 in law journals (*Harvard Law Review*, *Yale Law Journal*, *Stanford Law Review*, *New York University Law Review*, *Georgetown Law Review*, *University of Pennsylvania Law Review*, *Oxford Journal of Legal Studies*, *Tulane Law Review*).
- 9 in economic journals (*American Economic Review*, *Journal of Political Economy*, *Quarterly Journal of Economics*, *Rand Journal of Economics*, *Journal of Public Economics*, *Journal of Institutional and Theoretical Economics*, *Kyklos*, *Journal of Consumer Policy*, *Journal des Économistes et des Études Humaines*).
- 5 in specialized comparative law journals (4 in the *American Journal of Comparative Law*, 1 in the *European Review of Private Law*).
- 8 were book chapters.

This overview shows that no more than about one-third of the contributions appeared in specialized law and economics journals. What is remarkable, however, is the evolution over time. Of all selected publications from before 1990, six were published in law and economics journals, three in economics journals, three in books, only one in a law journal and none in comparative law journals.

This seems to suggest (though it is no more than a suggestion, given the smallness of the sample and the likelihood of a selection bias) that the very first contributions to the field were submitted to the audience that was likely to be the most open to these new ideas: the law and economics scholars. The interest of (comparative) lawyers in the field seems to be more recent.

Methodology

In about 20 per cent of the selected contributions, quantitative analysis plays a central role: Berkowitz *et al.* (2003), LaPorta *et al.* (1998, 1999), Mahoney (2001), White (1989), Finsinger, Hoehn and Pototschnig (1991), Ramseyer and Nakazato (1989), Cooter and Ginsburg (1996) and Buscaglia and Ulen (1997). Some other contributions contain some quantitative parts too.

Futurology

Finally, let us make six predictions with respect to law and economics, and with respect to comparative law research, in the next two decades. First, though we will see more quantitative studies as the field expands, the relative number of quantitative studies compared to armchair studies will remain constant in comparative law and economics scholarship, since quantitative