

Legal Practice and Economic Adaption: Common Practice and Roman Practice Compared

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The practice of Common Law and Roman Law differ, even though both systems in theory permit what they don't prohibit. The Common Practice derived from Common Law in fact truly does tend to permit what it doesn't prohibit, while the Roman Practice derived from Roman Law tends to prohibit what it doesn't permit. Tracing the historical sources for the evolutionary divergence between current Roman Practice and its underlying Roman Law principles is a fascinating exercise (e.g., see Bell's (1) "Mexican Bureaucracy and the Question of Christ's Clothes), but this paper's law and economics perspective demands instead a narrow focus on how the differing Common and Roman legal practices effect their respective economies. Of particular interest are the effects of Common Practice and Roman Practice on economic innovation, economic evolution, and economic growth.

Complex adaptive systems theory contributes substantially to our growing understanding of the interrelationships between economic innovation, evolution, and growth. Biologist Stuart Kauffman and computer scientist John Holland contributed seminal works on the economic applications for the theories to the Santa Fe Institute's conference on the global economy as a complex evolving system (2). Both Kauffman (3) and Holland (4) note that technology (what humanity knows how to do) grows combinatorially. Furthermore, Holland suggests that this explosively-growing technological chain reaction applies to economic innovations (those that humans choose to apply) just as much as to potential innovations (those that technology offers regardless of human preferences) when he notes of complex adaptive economic systems that "improvements are always possible and, indeed, occur regularly." The nature and very rapid growth of diversity in economic activities and specialized skills provides empirical evidence backing Holland's theoretical position: combinatorial growth may indeed drive economic innovation just as it drives potential innovation. If this holds true, the growth in economic specialization throughout humanity's existence from the early Stone Age to date gives only the palest foreshadow of the astounding increase that humanity can expect in the next generation.

Economic innovation's enormous and fast-growing power feeds right into humanity's varied economic institutions, which filter and channel its drive to produce economic evolution in the global economy and its constituent regional and national economies. It is here in the creation of economic webs that the evolved differences between Common Practice and Roman Practice in legal systems affect economic evolution differentially across nations. By permitting what it doesn't prohibit, Common Practice lets innovators compete freely with established products, services, and processes; indeed, in many cases the competition is among several innovators to gain the allegiance of a wave of clients

massively switching away from clearly-obsolete predecessors. By prohibiting what it doesn't permit, Roman Practice puts regulatory hurdles before innovators and increases the comparative advantage for established products, services, and processes. Common Practice nations sustain a faster pace in economic evolution, achieving greater diversity as specialized new products, services, and processes quickly displace established products, services, and processes lacking the efficient applications of the innovations. Regulators from Roman Practice nations can then observe the advances in Common Practice nations as part of the process that determines which technology transfers they will permit for established competitors in their nations.

The composition of economic evolution in the global economy then determines the patterns of economic growth through time and across nations. While suffering from short-term business cycle fluctuations, Common Practice nations tend to sustain moderate economic growth levels through time. Their fast pace in economic innovation is offset by their equally fast pace at dissolving important economic institutions whose procedures have fallen into obsolescence. Conversely, Roman Practice nations tend to have medium-term growth spurts launched by grafting a new series of permissions and technology transfers onto protected competitors, followed by medium-term stagnations when regulators allow few or no economic innovations to occur. I call these Roman Practice growth spurts economic mobilizations to contrast them from the continuous economic evolution that characterizes Common Practice. Mexico's medium-term growth spurt between World War II and the 1976 devaluation, followed by its medium-term economic stagnation to date make a nice example. Economic mobilization always begins from an economic base lagging behind the most advanced living standards, and always peters out well before the Roman Practice nation catches up to the Common practice nations.

This section has introduced this paper's basic thesis. Its point, that economic growth patterns differ between Common Practice and Roman Practice nations primarily because their legal systems affect their economies' timing for adopting economic innovations, is apparently new to the literature. The next section contrasts the behavior of Common Practice and Roman Practice nations, drawing heavily upon Douglass North's economic history. The third section contrasts this papers emphasis on legal practice vis-a-vis innovation timing with two alternative explanations for the differences between Common Practice and Roman Practice nations: De Soto's property titles argument, and the New Institutional Economics' transactions cost argument. The fourth section offers conclusions.

2. Common Practice and Roman Practice Compared

The New Institutional Economics movement justifies its existence with the mass of observations showing that economic institutions do indeed matter. This belief in institutional evolution distinguishes them from neoclassicals, whose comparative statics analysis leads equally well to the "Chicago School," with its firm belief that humanity could reach economic nirvana (e.g., a welfare-maximizing general equilibrium) if only

voters would force governments to quit interfering with naturally-competitive markets, or to the "Cambridge School," which maintains just as firmly that economic nirvana would arrive if only voters would force governments to properly regulate naturally-monopolistic markets. Institutional economists believe in evolving institutions and economic progress, and take historical and comparative economics as serious inputs to theory-building. In his attention to these fields, Douglass North typifies this new institutional approach to economics.

North looks at the broad sweep of economic history, from hunter-gatherer societies barely different from chimpanzee groups right up to the contrasts among modern economic systems. He examines why Western Europe's economic system grew to dominate world output and commerce in modern times, rather than such alternative economic systems as China or Islam or India. Thanks principally to his efforts, this work can offer a rich description of the contrasts between the sustained economic growth of Common Practice nations and the sporadic growth of Roman Practice nations, and especially the contrasts among the nations of the Americas. His observations and corroborating views extend from the Age of Discovery right up to modern times, documenting the basic differences between economic performance over the two systems.

By showing the Roman Practice nations' political and bureaucratic control over economic choices, these views illustrate the differences between the freely-evolving Common Practice and the restricted evolution under Roman Practice. Under Common Practice, innovative procedures compete based on their acceptance by clients choosing the best goods, services, and processes available. They must only offer an improvement for the client. Under Roman Practice, procedures compete by gaining the bureaucratic favor that lets them avoid the general suffocation that Roman Practice bureaucrats impose on all economic activity not having their explicit permission. They must pass through a political filter that typically has little or nothing to do with the merits they offer for their clients.

In "Manual of the Perfect Latin American Idiot," Apaleyu Mendoza, et. al. (6), contrast Roman Practice and Common Practice from the beginning of American colonization, noting that "*The autocratic and theocratic Spain that colonized us, committed to the Counterreformation, always broke private initiative with every kind of ruling. The riches among us didn't come from, as in the case of the primitive colonies of New England, effort, work, savings, and a strong ethic, but from pillage sanctified by official recognition or tithing. Ever since, among us, the ruling State has been the dispenser of privileges.*" To illustrate the details behind that general statement, this paper now cites extensively from Douglass C. North's economic histories.

First, this paper amplifies on the theme of breaking private initiative through the State's dispensation of privileges with Douglass C. North (5): "*The Spanish Indies conquest came at the precise time that the influence of the Castilian Cortes (parliament) was declining and the monarchy of Castile, which was the seat of power in Spain, was firmly establishing centralized bureaucratic control over Spain and the Spanish Indies. The*

conquerors imposed a uniform religion and bureaucratic administration on already existing agricultural societies. Wealth maximizing behavior by organizations and their entrepreneurs (political and economic) entailed getting control of, or influence over, the bureaucratic machinery.” Control over the bureaucratic machinery allowed one the official recognition needed to pillage the agricultural societies, through monopoly privileges, taxes, or tithing. Creating wealth through innovations was unnecessary for those who would enrich themselves, since the vast Roman bureaucratic machinery could turn power into wealth.

To get an idea of the scale of this control, this paper again cites North (7) on Spain, “... *the Crown ... gradually consolidated political and economic decisions into a large and elaborate hierarchy of bureaucrats whose outpouring of royal edicts provided minute regulation over every aspect of the economy. Over 400,000 decrees had been issued concerning the governance and economy of the Indies alone by 1635. The Crown gained unilateral control ... over the polity and economy ...*” Thus, the bureaucracy essentially defined the political economy in very great detail from the ground up. Controlling the machinery meant one could control anything political or economic.

Looking at how this control extended to the Americas, this paper cites North (7) once more: “*That (medieval) belief system, as reflected in personalized exchange, kinship ties, status systems in a completely politicized environment of centralized governmental decision making, not only never made the crucial step of creating institutions for impersonal exchange, but perpetuated that structure downstream in the polities of Latin America. After Latin American countries became independent they simply substituted centralized local bureaucratic controls in place of those from Madrid.*” And then North’s citation of John Coatsworth: “*The interventionist and pervasive arbitrary nature of the institutional environment forced every enterprise, urban or rural, to operate in a highly politicized manner, using kinship networks, political influence, and family prestige to gain privileged access to subsidized credit, to aid various stratagems for recruiting labor, to collect debts or enforce contracts, to evade taxes or circumvent the courts, and to defend or assert titles to land. Success or failure in the economic arena always depended on the relationship of the producer with political authorities...*” (Coatsworth, 1978, p. 94)

Finally, updating this theme of privilege dispensation, this paper cites a random example of how Mexico handles innovation taken from Patricia Lopez Suarez’ (8) article in the Research and Development supplement to the daily La Jornada that describes the Mexican government’s project to promote clean electric automobiles: “*The second (project stage) includes the elaboration of norms and the design and instrumentation of diverse mechanisms for incentives and promotion of private sector projects. Success in the second stage will require a meticulous specialized evaluation by the project’s*

Technical Committee, which is coordinated by the National Ecology Institute, with participation by specialists from the Commerce and Industrial Promotion Secretariat, UNAM's Engineering Institute, the Electrical Research Institute, the National Commission for Energy Savings, National Financier (a development bank), the Federal District Department (Mexico City's government), and the Mexico State Government." All this could lead to a set of regulations for the purchase of these vehicles, which would set standards for access to special exemptions from Mexico's normally suffocatingly high tax and electricity rates in the production, sales, and operation of these vehicles. Of course, those with the political power to determine the outcomes of this bureaucratic process can enjoy riches by selling subsidized vehicles to the Mexican public.

The preceding empirical observations, despite their anecdotal nature, provide quite a lot of detail supporting the contention that monarchic Roman Practice generally prohibits what it doesn't permit. This contrasts with the open, plural nature of Common Practice, which North (5) illustrates: *"In the case of North America, the English colonies were formed in the century when the struggle between parliament and the Crown was coming to a head. Religious and political diversity in the mother country was paralleled in the colonies. The general development in the direction of local political control and the growth of assemblies was unambiguous. Similarly the colonies carried over free and common socage tenure of land (fee simple ownership rights) and secure property rights in other factor and product markets."* North (9) also notes: ***"While the specific details vary the broad patterns of England successful evolution, on the one hand, and Spain's unsuccessful evolution on the other have been replicated in subsequent centuries. English settlements that were not complicated by overlying different (and conflicting) native cultures produced path dependent patterns of economic growth, political democracy, and the rule of law. As noted above Spanish (and Portugese) settlements failed to produce such results (even in those cases such as Argentina that did not have the complications of blending different cultures)."***

Finally, it is worthwhile to note that economic regions and sectors in Common nations can incorporate Roman Practice, and vice versa. In the United States, urban political machines give great power over to bureaucracies that enforce political control over economic life. Allied with unions and criminal organizations, political leaders in cities such as Chicago require entrepreneurs to run a gauntlet of ward bosses, union bosses, and mafia bosses to open and operate a business. It is no wonder that Chicago's population has declined since the 1950s from a peak slightly above 3 million to a current level near 2 million, while suburban Chicago's population has risen over the same period from about 500,000 to about 5 million. By simply crossing the border from Chicago to a suburban city, a business can avoid the Roman Practice that Chicago's Democratic machine maintains as its instrument of political control. This produces a result similar to crossing the border from Mexico to the United States, and is far easier to accomplish. Interestingly, the population of Chicago is now overwhelmingly immigrant, with very large concentrations of recent arrivals from Mexico and Poland. Fresh off the boat, as it

were, these new Americans don't yet realize how easy it is to avoid the ward, union, and mafia bosses that run their new home. Once they learn, they move to the suburbs to enhance their economic freedom, just as they had once moved to Chicago to enhance their economic freedom. In the meantime, Chicago suffers for its prior prohibitions on economic innovation.

A Mexican experience demonstrates the beneficial effects of incorporating Common Practice in a Roman Practice nation. Avantel, a new long-distance carrier, began interconnecting Mexicans to their new, low-cost long distance services by inviting them dial in through Telmex's toll-free lines. Telmex, the previous holder of a government-enforced monopoly, complained bitterly to Mexico's telecommunications regulator, COFETEL, that Avantel's innovative approach to interconnection violated Mexico's telecom rules. Avantel maintained that it didn't.

In truth, like bureaucrats everywhere, SCT's bureaucrats rarely foresee innovations, so their rulemaking simply didn't address what Avantel did. The two companies agreed on the facts, but differed on their perspectives. As a company steeped in Roman Practice, Telmex believed that Mexico prohibits what it doesn't permit. Avantel, with many Common Practice antecedents, believed that Mexico permits what it doesn't prohibit. In fact, COFETEL ruled for Avantel and against Telmex, and now Telmex is trying to attract clients the same way, rather than expending its energies on blocking competition. COFETEL's decision lets us know that Mexican regulators can favor creative innovations over entrenched interests in connecting Mexicans to Mexico and the rest of the world. Roman Practice is indeed more a matter of attitude and history than it is a matter of Roman Law, and the improvements Common Practice offers are readily available to those Roman Law governments that change their attitudes.

3. Two alternative development theories

The observation that nations differ in economic development is commonplace, and economists have advanced many theories to explain those differences. Recent events have discredited controlled-market, public capital Marxist and socialist development theories, leaving free-market, private capital neoclassical and institutional theories ascendant. This section looks at two prominent alternative institutional arguments: De Soto's property titles argument, and the New Institutional Economics' transactions costs argument, comparing them with this paper's innovation barriers argument.

This emphasis this new work places on the differential effects of Roman Practice and Common Practice on the acceptance of economic innovations differs in degree rather than kind from the theoretical work of De Soto and North and other Neoinstitutionalists. As in all scientific endeavors, though, advances in knowledge stem from inconsistencies and anomalies, and this section will sharply address the mass of empirical evidence to highlight those anomalies that emerge with the alternative theories addressed here. To date, this work has uncovered no glaring anomalies between its own predictions and the

empirical facts, but scientific acceptance of any theory must be tentative and this theory's apparent consistency with current observations must undergo the more thorough scrutiny that its readers ought to apply.

It's important to note that the anomalies uncovered in this analysis do not mean that the two factors discussed cannot or do not contribute to successful economic evolution. Rather, anomalies between a specific theory and the behavior of complex adaptive economic systems mean that that theory's claim to have identified essential factors, as opposed to positive factors, falls short of universality. Indeed, the study of complex adaptive systems in general strongly suggests that no single factor will always be crucial to successful evolution, even though an approximate ranking of factor importance may hold at any given time. Indeed, in attaching particular factors to particular theoreticians, this paper undoubtedly overstates the theoreticians' attachment to those factors, and may also frequently understate other theoreticians' contributions. The author apologizes in advance for the paper's oversimplifications and omissions. First this section will discuss Hernando de Soto's property titles prescription for economic development, then the New Institutional Economic's transactions costs prescription.

Hernando de Soto (10) said: *"In the next 150 years, the countries in Latin America and elsewhere that make the jump to a developed market economy will be those that spend their energies ensuring that property rights are widespread and protected by law, rather than those that continue to focus on macroeconomic policy."* De Soto's Institute for Liberty and Democracy is titling thousands of Peruvian properties to the individuals who occupy them. Property titles, he argues, are essential for financing economic growth. In all De Soto's experience, of course, banks only grant financing backed by collateral, and the preferred collateral is real estate.

Reflecting at de Soto's property rights theory, the Grameen Bank anomaly instantly comes to mind. Unlike traditional Roman Practice banks, the Grameen Bank, doesn't require property titles or any other collateral from its prospective borrowers. Instead of these formalities, Grameen Bank simply asks a prospective borrower to demonstrate that other community members will subject their own capital access to that prospective borrower's performance. If an individual finds acceptance in a peer group, then Grameen Bank also accepts that individual, regardless of their property or lack thereof. Says Mohammed Yunus, Grameen's founder, the bank's new approach to microcredit liberates credit from collateral.

Given all the problems that Mexico has had recently with supposedly-well-collateralized loans, or for that matter the problem that the US had with with supposedly-well-collateralized loans at savings and loans, this group lending approach seems to have at least as much merit as traditional alternatives. Indeed, repayment rates at the Grameen Bank typically top those at the world's better commercial banks. Once people get the tools they need, their productivity increases can easily pay back the credits for the tools. Experience shows that looking forward to expectations rather than backwards to history

certainly has advantages in the credit analysis process. Property titles, while desirable, certainly aren't a prerequisite to financing economic growth.

Douglass North (5; emphasis in original) asserts that sustained global economic growth of the sort first experienced after World War II depends on the ability of a society's beliefs systems to generate the stable institutions that *"provide low costs of transacting in impersonal political and economic markets."* Indeed, the New Institutional Economics not only strongly emphasizes low transactions costs as the principal source of economic growth, but decries the overemphasis on technology, as in North (7), *"A major failing of the literature of both economic history and economic development is that the emphasis is upon technology as the impetus for economic development--and hence we have endless studies of technological failure or stagnation."*

This focus on lowering transactions costs is consistent with the New Institutional Economics' insistence on maintaining that old Classical and Neoclassical holdover, scarcity, as an organizing principle for their economic paradigm. Given scarce resources, transaction cost efficiencies provide incremental gains in allocations. Yet the very same technological innovations that North decries as a focus for economic analysis have repeatedly transformed scarcities into abundances, completely changing the limitations that economies face in satisfying human needs and wants. Horsepower was once very scarce, and economizing on power was a basic element in designing profitable activities. The emergence of steam engines made horsepower abundant relative to other factors, so that economizing on power was no longer the priority it once was.

Steel was once scarce; the Bessemer process made it unimaginably abundant. Aluminum was once scarce; the Hall process made it unimaginably abundant. In our own day, transistors were once scarce; integrated circuits have made them unimaginably abundant. These gains are not incremental: the Mistry process instantly increased the best synthesis rates on diamond by 1,000 times, and in the near future we will find diamond unimaginably abundant. Technology has repeatedly overthrown scarcity as an organizing principle of economics, rewarding those who would use unimaginable quantities of horsepower, or steel, or aluminum, or transistors, or diamond, to get the job done. Incremental reductions in transactions costs that improved the allocations of the goods and services produced by the technologies of the 1700s are not what have produced the physical abundance the developed nations enjoy today. New technologies produced that abundance. Any assertions to the contrary do not stand up before history.

4. Conclusions

This paper presents a new theoretical approach for explaining the differential economic development between Common Practice countries (alternatively called Anglo-Saxon nations) and Roman Practice countries (or Latin nations). This approach focuses on economic innovation as the driver for living standards, and looks at how the two legal systems treat innovations. The Common Practice permits what it doesn't prohibit, allowing innovators to flourish or fail on their innovation's merits with their clients. The

Roman Practice prohibits what it doesn't permit, forcing innovations to run a gauntlet through a hostile bureaucracy before the innovator's clients can judge them. The bureaucracy has its own clientele, and in virtually all cases the bureaucracy's clients have vested interests in the economy as it is, and don't perceive incentives to change it. This difference lets innovators in Common Practice nations launch far more new industries and create far more new wealth than innovators in Roman Practice nations.

To better illustrate its innovation timing theory of economic development, this paper contrasts it with De Soto's property rights theory and the New Institutional Economics' transactions costs theory. It ties Douglass North to transactions costs theory, but tying North exclusively to the New Institutional Economics' transactions costs theory comes very close to caricature, since of all the Nobel Memorial Prize winners to date, North comes closest to an appreciation for the economy as a complex adaptive system. Indeed, immediately after decrying the misplaced emphasis on technological innovation as the source of sustained economic growth, North (7) goes on to tie in several institutional factors besides transactions costs: *"In fact, the key to growth is the institutional/organizational structure and its effect upon incentives -- not only the incentives to invent and innovate, important as they are, but the incentive to organize the production process more efficiently, to reduce transaction costs in factor and product markets, to organize a judicial system to enforce contracts, to create a polity that will specify and enforce property rights, and most important of all to maintain those incentives."* This paper's introduction emphasizes that innovations arise all the time in all nations; the difference in economic development stems from how economic institutions receive them. North would surely agree

Like this paper, then, North also includes institutional incentives to invent and innovate as an important factor in economic growth. The difference is a matter of degree rather than principle. Still, in explaining the differential development between Roman Practice and Common Practice nations, the gains from technological innovations are so important that the Roman Practice's prior prohibition on economic innovations counts for more than the deadweight costs that Latin America's enormous bureaucracies impose on transactions. In fact, this paper's argument that evolutionary economic success requires avoiding those bureaucratic institutions that restrain economic evolution would seem almost tautological if it wasn't advanced in a global economy that includes many national and lesser institutions with unrelentingly hostile attitudes towards innovations. It is the author's fervent hope that expressing this nearly-tautological argument will in fact diminish the force of those hostile institutions over time, and thereby facilitate the creation of new wealth for humanity.

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