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Economic Analysis of the Interaction Between National Legal Systems: A Contribution to the Understanding of Legal Diversity and Legal Unity

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**ECONOMIC ANALYSIS OF THE INTERACTION BETWEEN
NATIONAL LEGAL SYSTEMS: A CONTRIBUTION TO THE
UNDERSTANDING OF LEGAL DIVERSITY AND LEGAL
UNITY**

Hugues Bouthinon-Dumas*

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ABSTRACT

Scholars increasingly use expressions such as “regulatory competition” or even “law market” to illustrate the new global legal system and the rivalry between national laws. This paper scrutinizes the legitimacy of the application of such economic concepts to legal systems’ interactions. An economic analysis could allow us to, more precisely, delimit the factors of convergence (leading to unity) and divergence (leading to diversity) between national legal systems due to competitive strategies (namely differentiation and alignment) and the consequences for the regulation of legal systems’ interactions.

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Keywords: law market, market for legal systems, regulatory competition, legal systems, forum shopping, lawmaking, legal mobility

I. INTRODUCTION

To illustrate the effects of globalization on laws and on the law,¹ it is common today to refer to “regulatory competition” or even the “law market.”² Therefore, legal experts are led to use economic concepts such as “competition” and “market.”³ Do such concepts and the concomitant economic analysis allow for a better understanding of the contemporary global legal system and in particular the relationships between national legal systems?⁴ To what extent can we expect a better understanding of the trends towards unity or diversity of the law from an economic analysis of the behaviors related to law (namely lawmaking and legal mobility for law users)?

The objective of this paper is to assess the legitimacy of applying these economic concepts to national legal systems. This paper also aims to demonstrate the fruitfulness of pursuing an economic analysis of the relationships between national legal systems. First, the terms “competition” and “market” imply that there is some form of rivalry

1. T. Halliday & P. Osinsky, *Globalization of Law*, 32 ANN. REV. SOC. 447 (2006); J.-B. AUBY, *LA GLOBALISATION, LE DROIT ET L'ÉTAT* (Montchrestien 2003); H. P. Glenn, *Droit mondial, droit mondialisé ou droit du monde*, in *DE TOUS HORIZON—MÉLANGES XAVIER BLANC-JOUVAN* 259 (Société de législation comparée 2005).

2. H. P. GLENN, *LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW* (Oxford U. Press 2010); *GLOBAL LAW WITHOUT A STATE* (G. Teubner ed., Dartmouth 1997).

3. A. MARCIANO & J. M. JOSSELIN, *FROM ECONOMIC TO LEGAL COMPETITION—NEW PERSPECTIVES ON LAW AND INSTITUTIONS IN EUROPE* (Edward Elgar Publ'g 2003); K. M. MEESSEN, *ECONOMIC LAW AS AN ECONOMIC GOOD: ITS RULE FUNCTION AND ITS TOOL FUNCTION IN THE COMPETITION OF SYSTEMS* (Sellier 2009); E. A. O'HARA & L. E. RIBSTEIN, *THE LAW MARKET* (Oxford U. Press 2009); E. Carbonara & F. Parisi, *Choice of Law and Legal Evolution: Rethinking the Market for Legal Rules*, 139 PUB. CHOICE 461 (2009); D. C. Esty & D. Geradin, *Regulatory Co-Opetition*, 3(2) J. INT'L ECON. L. 235 (2000).

4. A. Ogus, *Competition Between National Legal Systems: A Contribution of Economic Analysis to Comparative Law*, 48(2) INT'L & COMP. L. Q. 405 (1999); H. TJONG, *THE POLITICAL ECONOMY OF REGULATORY COMPETITION: A DIACHRONIC INSTITUTIONAL THEORY OF LEGAL CHANGE IN AN ERA OF GLOBALIZATION* (VDM Verlag 2009).

between coexisting legal systems. However, are these notions relevant? Are concepts taken from economic analysis truly applicable, or is it just a suggestive manner of speaking (i.e., a metaphor)? If so, we would be facing a case of importation of concepts elaborated in one discipline (namely economics) into another discipline (law); the use of the concept being more ideological than scientific. In fact, one may assume that some concepts are relevant whereas other ones are not.

Second, careful economic analysis could allow us to delimit more precisely the factors of convergence and divergence between national legal systems pertaining to national competitive strategies. Following an economic approach, the current global trends of law towards unity or diversity can at least be partially analyzed because of combined individual strategic behaviors (interactions between states and law users). Describing the theoretical conditions of the application of economic analysis to lawmaking and to legal mobility, we will stress that the relevance of this approach depends on the characteristics of the different legal systems, which comparative law highlights. Before developing this idea, it is useful to give some preliminary precisions.

Of course, the answer given to the first question depends on the accepted meaning of a word such as “market.” The word market is polysemic. Therefore, an expression like law market does not have only one meaning. It may correspond to the market for legal services provided by lawyers. In this particular sense, there is undoubtedly a law market involving law firms, especially large international law firms that are competing intensively to meet the demand for sophisticated legal advice coming from multinational corporations and large institutions.⁵ In a very different sense, the term “market” can be used in contrast to other general forms of organization of the economy, such as centrally managed economy based on state-

5. Y. DEZALAY, *LAWYERS AND THE CONSTRUCTION OF TRANSNATIONAL JUSTICE* (B. Garth ed., Routledge 2013).

owned enterprises.⁶ The market, thus, corresponds to the private sector and to all economic relations based on autonomous will and private property. However, the “law market” may also refer to the competition between the legal orders closely attached to different jurisdictions. We will show that countries do compete, through their legal systems, in order to attract players and businesses, but we cannot posit that there is currently a national legal systems market. In other words, if we consider that the concept of a market is specific and not identical with that of competition, then there may be competitive situations that are not based on the market mechanism.

This point has key implications for the regulation of global interaction between national legal systems. If a law market does not exist, it would be unrealistic to hope that such competitive relations could spontaneously lead to equilibrium. In classical and neoclassical economic theory, the market is described as a mechanism that has the capacity of allowing a set of actors who do not coordinate otherwise (by rules, routines, conventions, etc.) to achieve a satisfactory situation in the sense that a deviation from this equilibrium would be disadvantageous. This theory is conceptually based on Adam Smith’s idea of the “invisible hand” of the market. Thus, a real market—in the sense of a specific economic mechanism—is a spontaneous order since the interactions between the economic actors lead to a balance without external public intervention. However, if the interaction between the legal systems is not exactly market-based, it is therefore relevant to consider other ways of regulating competition between national legal systems to remedy possible perverse effects. Again, an analysis of the nature of economic relations between national legal orders provides a better understanding of the dynamics of legal systems. Indeed, to tackle the problem of normative competition, if it does not spontaneously balance itself, one of the actions lies in the harmonization of rules. In this case, normative

6. F. A. HAYEK, *1 LAW, LEGISLATION AND LIBERTY—RULES AND ORDER* (U. of Chicago Press 1973).

competition, which in response calls for a policy of legal harmonization, indirectly feeds the convergence of national laws. Thus, international legal harmonization appears to be a very important remedy to these perverse effects and leads to unification.

II. SPECIFICITY OF THE ECONOMIC ANALYSIS OF THE RELATIONS BETWEEN NATIONAL LEGAL SYSTEMS

As a preliminary point, it is necessary to situate this analysis amid the already vast economic analyses of national legal systems. Indeed, within the last few years, a number of economists have studied, comparatively and with an economic perspective, national legal systems or major families of legal systems (common law, civil law, etc.⁷), in order to highlight the importance of the legal factor in economic development. We could mention, for instance, the pioneering work undertaken by R. La Porta, F. Lopes de Silanes, A. Shleifer and R. Vishny,⁸ and continued by the World Bank (*Doing Business* reports) along with research on *legal origin*.⁹ There is also a growing literature on law and development.¹⁰ This type of approach is also referred to as comparative law and economics.¹¹

Such economic work focuses on legal systems whereas the analysis that seems to be truly needed would focus on the relationships

7. R. DAVID & C. JAUFFRET-SPINOSI, LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS (Dalloz 2002); J. Vanderlinden, *À propos des familles de droits en droit civil comparé*, in HOMMAGE À RENÉ DEKKERS 359 (Bruylant 1982).

8. R. La Porta, F. Lopes-de-Silanes, A. Shleifer, & R. W. Vishny, *Legal Determinants of External Finance*, 52(3) J. FIN. 1131 (1997); R. La Porta, F. Lopes-de-Silanes, A. Shleifer & R. W. Vishny, *Law & Finance*, 106 J. POL. ECON. (1998).

9. E. L. Glaeser & A. Shleifer, *Legal Origins*, 107 Q. J. ECON. 1193 (2002); R. Michaels, *Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law*, 57 AM. J. COMP. L. 765 (2009); S. Djankov, E. L. Glaeser, R. La Porta, F. Lopez-de-Silanes, & A. Shleifer, *The New Comparative Economics*, 31 J. COMP. ECON. 595 (2003).

10. D. Berkowitz, K. Pistor, & J.-F. Richard, *Economic Development, Legality, and the Transplants Effect*, 47 EUR. ECON. REV. 165 (2003).

11. U. MATTEI, *COMPARATIVE LAW AND ECONOMICS* (U. of Michigan Press 1997) [hereinafter *COMPARATIVE LAW AND ECONOMICS*]; A. Ogus, *Economic Analysis and Comparative Law*, in MÉLANGES EN L'HONNEUR DE DENIS TALLON 169 (Société de législation comparée 2000).

between legal systems. The abovementioned works are macroeconomic (i.e., they deal with the economic performance of countries).¹² Whereas the understanding of the interactions between legal systems implies the elaboration of a theory of players and actions and, therefore, an approach based on microeconomics.¹³

If economic comparisons of legal systems are not very helpful for analyzing the interactions between national legal systems, we can note that they are not completely irrelevant to the matter of this study. Indeed, the comparative macro-econometric analysis of legal systems has contributed to making countries and players aware of the idea that national legal systems compete and can be ranked according to their economic merits. Moreover, the composing principles of these rankings and the underlying ideology (i.e., the idea of an economic superiority of common law over systems of civil law, itself related to the liberal preference for self-regulation or judiciary regulation over the so-called tendency for the countries of civil tradition to intervene in the economy¹⁴) suggest a policy of alignment of national legal systems with those legal systems presented as the most efficient from an economic point of view. This is one of the competitive dynamics that we will come back to.

One may assume that the intrinsic economic efficiency of the different legal systems is not a well-established theory.¹⁵ A histori-

12. N. Garoupa & T. Ginsburg, *Economic Analysis and Comparative Law*, in *COMPARATIVE LAW AND ECONOMICS*, *supra* note 11, at 58; F. Faust, *Comparative Law and Economic Analysis of Law*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 837 (M. Reimann & R. Zimmermann eds., Oxford U. Press 2006); G. DE GEEST, *ECONOMICS OF COMPARATIVE LAW* (Edward Elgar Publ'g 2009).

13. H. R. Varian, *Microeconomics*, in *THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS* 461 (Macmillan 1987); H. R. VARIAN, *MICROECONOMIC ANALYSIS* (3d ed., W. W. Norton & Co. 1992).

14. See World Bank, International Finance Corporation, & Oxford University Press, *Doing Business in 2004—Understanding Regulation* at XIV (Washington, D.C. 2004); P. G. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30(2) *J. LEGAL STUD.* 503 (2001).

15. This theory has generated critical reactions, both from economists and lawyers (e.g., J. Klick, B. Deffains, J. Armour, Association Henri Capitant).

cal overview of the relations between the law and economic development shows that legal systems that are currently viewed as relatively economically inefficient (e.g., France, Italia, or Germany) compared to common law systems (e.g., England, U.S., Singapore), have been linked to remarkable periods of economic take-off and sustained growth.¹⁶ Furthermore, fast-growing economies, such as that of China, are not based on legal frameworks that are usually viewed as conducive to economic development. Therefore, the economic attractiveness of laws is not based, or at least not only based, on the substance of laws, but also on the legal systems' position in the market (i.e., on their relative position compared to the other ones) regardless of content. Also, the choice made by lawmakers to specifically position their legal systems can be analyzed with the analytical tools provided by economic theory.

III. THE APPLICATION OF ECONOMIC ANALYSIS TO THE RELATIONSHIPS BETWEEN NATIONAL LEGAL SYSTEMS

Economic analysis was first established to explain activities that seemed fundamentally economic in nature, such as the production or exchange of goods. In this view, law does not seem to be an economic matter. It is a component of the economic environment (i.e., a piece of data that economists may take into account), but it is not the main area of investigation. The general framework of economic analysis, however, has a broader scope of application (sometimes described as "economic imperialism"¹⁷). Faced with the challenge of explaining how economic agents can mobilize limited resources

16. D. C. NORTH & R. P. THOMAS, *THE RISE OF THE WESTERN WORLD: A NEW ECONOMIC HISTORY* 1-8, 120-131 (Cambridge U. Press 1973).

17. G. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* (U. of Chicago Press 1976); D. FRIEDMAN, *LAW'S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS* (Princeton U. Press 2000); R. H. Coase, *Economics and Contiguous Disciplines*, 7(2) *J. LEGAL STUD.* 201 (1978).

to best satisfy their interests, economic analysis has become a general theory of choices under constraint¹⁸ and of rational behavior.¹⁹

If we adopt this abstract conception of economic analysis, it is possible to apply it to the system composed of the different national legal systems.²⁰ The contemporary global legal system can indeed be modeled as a universe in which different players (countries) produce a particular object (norms and judiciary institutions) that other players (individuals, businesses, NGOs) choose to use.²¹ This theoretical framework was originally provided by Charles Tiebout's analysis of jurisdictional competition.²²

The relevance of this model is based on the assumption that law can be chosen, both by the lawmakers (who design the law) and by the law users (who choose the governing law or the dispute resolution mechanism).²³ Some long-term evolutions contribute to making this hypothesis realistic. However, at this stage in the development of law in the world, the legal malleability and the legal mobility are only partially true in reality.

As far as the law users' point of view is concerned, the real possibility of choosing the law has to be verified. There must be concrete mechanisms enabling the choice of one legal system over another; this constitutes the assumption of "legal mobility."²⁴ We shall

18. See Robbins' definition of economics: "Economics is the science which studies human behaviour as a relationship between ends and scarce means which have alternative uses," L. ROBBINS, AN ESSAY ON THE NATURE AND SIGNIFICANCE OF ECONOMIC SCIENCE 15 (Macmillan 1932).

19. P. VAN PARIJS, LE MODÈLE ÉCONOMIQUE ET SES RIVAUX (Librairie Droz 1990).

20. Legal systems likely to compete against one another are not limited to national systems, since supranational legal systems (in particular European Union Law) and international legal systems (e.g., *lex mercatoria*) may compete with national legal systems.

21. R. Romano, *The Need for Competition in International Securities Regulation*, 2(2) THEORETICAL INQUIRIES LAW 387 (2001).

22. C. Tiebout, *A Pure Theory of Local Expenditures*, 64(5) J. POL. ECON. 416 (1956).

23. J. M. Smith, *Legal Engineering in an Age of Globalisation: Is There a Future for Jurisdictional Competition?*, in LEGAL ENGINEERING AND COMPARATIVE LAW 51 (E. C. Ritaine et al. eds., Schulthess 2008).

24. O'HARA & RIBSTEIN, *supra*, note 3; L. E. Ribstein, *Choosing Law by Contract*, 18 J. CORP. L. 245 (1993).

distinguish two main mechanisms that allow economic or social actors to choose a legal system:

The *physical mobility* that enables them to settle in the territory of a country whose legal system they want to adopt (assuming that the criterion of applicability of the law is territorial);

The *will* that enables them to directly choose the applicable law for a specific transaction (e.g., a clause of governing law in international contracts) or for an organization (incorporating a business in a country whose corporate law one wants to apply, regardless of the location of the actual headquarters, in legal systems that do not apply the seat-of-administration rule).

Thus, legal mobility is the result of a combination of legal factors (free movement of goods, services, people, and money; free trade, territoriality of law, national sovereignty, etc.) and non-legal factors (economic globalization, information and communications technologies, drastic decrease in transportation costs, the existence of a global language, etc.). Legal professionals with international networks and global consulting firms ready to provide services to global groups play an important role in promoting and implementing this legal mobility.

On the supply side, we shall insist on an essential point. The economic model is applicable to the international legal system because the national legal systems may be chosen. This relationship of choice opens a field of possibilities. There are two implications: first, law users must have a choice to make from among several legal systems; second, lawmakers must have the power to change the law.

Conversely, some structures of the global legal system are not compatible with a choice-based economic analysis. National legal systems may not be chosen by individuals and businesses for several reasons, such as the following:

- because laws are not mainly based on territories, in particular national territories (e.g., laws are clan based, as they used to be during the early medieval period);

- because there is only one applicable law to a given matter, without any alternative solution (e.g., the *jus commune* hypothesis, which explains for instance why there is no competition between national canon laws);
- because there is no room left for a choice between coexisting legal systems (i.e., situation of strictly compartmented national legal systems. For this reason, we cannot say that North and South Korean legal systems compete—they are simply foreign to one another).

The propensity of states to implement competition-seeking strategies based on legal solutions in line with the market depends on the characteristics of the national legal systems. Laws are actually more or less likely to be modified in response to governments' willingness to adopt strategic positions. There are two reasons for limiting the malleability of laws. First, the law of a country may not be likely to be changed by the state because the law is not primarily a product of the political will (as it is the case for statute law), but rather the fruit of judges' wisdom (case law), the practice of lawyers, or social traditions (customary law).²⁵ Second, the intensity of the relationship between the national legal system and a nation varies significantly from one country to another. When the law has played a very important role in the constitution of a state and in the self-consciousness of the people, it is unlikely that the government will be able to modify easily the law to attract foreign actors.

In a country like France, the Civil Code resembles a civil “constitution” as Jean Carbonnier put it, after Demolombe.²⁶ It is a fundamental historical landmark (*lieu de mémoire*²⁷). Therefore, it is difficult to imagine that the venerable Civil Code could be replaced by another system of law regulating private relations without the

25. N. Garoupa & A. Ogus, *A Strategic Interpretation of Legal Transplants*, 35 J. LEGAL STUD. 339 (2006).

26. P. Mazeaud, *Le code civil et la conscience collective française*, 3 POUVOIRS 152 (2004).

27. J. Carbonnier, *Le code civil*, in LES LIEUX DE MÉMOIRE III 293 (P. Nora ed., Gallimard 1986).

French national identity being profoundly affected. In the same way, the English people have an extreme attachment to the Common law. The transformation of the British legal system under the influence of European law has given rise to considerable reactions of mistrust and rejection. The nostalgia for a return to English law, free from any European influence, has recently emerged as an important argument in the public debate on Brexit. Certain legal systems are very strongly linked to a specific legal tradition and the legal systems of the same family.²⁸ For instance, legal systems of countries from the “new world” are generally very dependent on their seminal laws, as it is the case for Australian law with respect to English law. The dependent legal systems can provide some differentiations compared to the seminal law, but they remain limited, except in the case of mixed legal systems.²⁹

Examining the conditions for the application of economic analysis to national legal systems is an opportunity for us to emphasize that the relevance of economic interpretation is not merely theoretical. The validity of the application of microeconomic analysis to legal systems depends on the characteristics of the legal systems as historical evolutions made them. The more legal systems are based on written law and contingent regulations, the more the assumption of legal malleability is relevant. Detailed regulations can be changed easily by political will.³⁰ Therefore, states will be more likely to adopt policies strategically in order to position their law compared to the other legal systems. Moreover, countries whose legal culture is mild and where law is not a structuring element of national self-consciousness can most easily carry out strategic reorientations.

28. K. ZWEIGERT & H. KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW* (Oxford U. Press 1998).

29. K. REID, D. VISSER, & R. ZIMMERMANN, *MIXED LEGAL SYSTEMS IN COMPARATIVE PERSPECTIVE: PROPERTY AND OBLIGATIONS IN SCOTLAND AND SOUTH AFRICA* (Oxford U. Press 2005).

30. P. Legrand, *The Impossibility of ‘Legal Transplants’*, 4(2) *MAASTRICHT J. EUR. & COMP. L.* 111 (1997).

The relevance of applying the economic model to national legal systems is, therefore, dependent upon the level of development of the global legal system, which needs to be composed of different national systems that are independent from one another, and relatively substitutable (i.e., largely capable of assuming the same functions,³¹ following a classical view in comparative law theory). Competitive oriented lawmaking is, thus, perhaps only one explanatory factor.

IV. RELEVANT ECONOMIC CONCEPTS: REGULATORY COMPETITION BUT NO MARKET FOR LEGAL SYSTEMS

After showing that the structure of the contemporary international legal system allows us to apply economic analysis, we need to determine which economic concept is appropriate for illustrating the relationships among national legal systems.

On the one hand, the economic notion of *competition* is relevant.³² We can state that national legal systems compete because countries try, through their legal systems, to be attractive for economic actors and businesses, and to acquire international influence. States provide the legal rules and institutions that best suit actors' individual preferences. Furthermore, mobile economic actors, particularly businesses, seek to take advantage of the heterogeneity of the global legal system by choosing laws most profitable for them. That is why national or state corporate laws are seen as competing laws.³³ Nonetheless, economic motivations are not the only determiners of behaviors. Profit is not the only motivation in search of

31. E. RABEL, *AUFGABE UND NOTWENDIGKEIT DER RECHTSVERGLEICHUNG* (Hueber 1925).

32. U. Mattei & F. Pulitini, *A Competitive Model of Legal Rules*, in *THE COMPETITIVE STATE: VILLA COLOMBELLA PAPERS ON COMPETITIVE POLITICS* 207 (A. L. Breton et al., Kluwer 1991).

33. L. A. Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 *HARV. L. REV.* 1435 (1992); W. L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83(4) *YALE L. J.* 663 (1974); R. Romano, *Law as Product: Some Pieces of the Incorporation Puzzle*, *J. L., ECON. & ORG.* 225 (1985); R. Romano, *The State Competition Debate in Corporate Law*, 8 *CARDOZO L. REV.* 709 (1987).

the most appropriate jurisdiction. They may also be interested in the fact that certain values are recognized and promoted in some territories rather than in others. For instance, same-sex couples may leave their country of origin to have access to the possibility of getting married in another country.³⁴

On the other hand, the notion of a *market* does not seem applicable to the relationships between national legal systems. The market is a bilateral relation of exchange.³⁵ In the market, each player gives and receives something and rationally tries to obtain the best ratio between the things exchanged. One of the elements of such exchange is often the payment of a sum of money. The best price needs to be found—the highest for the seller and the lowest for the buyer. In the case of relationships between countries and law users, this bilateral exchange usually does not exist, meaning that contracting parties who choose a particular governing law in their agreement do not have to pay anything to that country. Sometimes, a fee is required upon completion of a formality in a given legal system (e.g., incorporation of a business). However, this represents more the actual price of the formality rather than a payment for access to the legal system. Note that situations where a tax is directly attached to the choice of a law are actually quite rare.

Some might object to the concept of the market that we consider in our reasoning because it is inspired by the market for goods and services. Some might also believe that there is no reason why this

34. J. G. Brown, *Competitive Federalism and Legislative Incentives to Recognize Same-Sex Marriage in the USA*, in INTERNATIONAL REGULATORY COMPETITION AND COORDINATION: PERSPECTIVES ON ECONOMIC REGULATION IN EUROPE AND THE UNITED STATES 257 (W. W. Bratton, J. McCahery, S. Piciotto, & C. Scott eds., Clarendon Press 1996) [hereinafter INTERNATIONAL REGULATORY COMPETITION AND COORDINATION]; J. L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 OR. L. REV. 433 (2005).

35. K. BAIN & P. G. A. HOWELLS, UNDERSTANDING MARKET: AN INTRODUCTION TO THE THEORY, INSTITUTIONS AND PRACTICE OF MARKETS (Harvester-Wheatsheaf 1988); O. FAVEREAU & E. LAZEGA, CONVENTIONS AND STRUCTURES IN ECONOMIC ORGANIZATION: MARKETS, NETWORKS AND HIERARCHIES (Edward Elgar Publ'g 2002).

concept should be applicable to the relations between legal systems because the law is not immediately seen as a good or a service. Nevertheless, many authors who refer to “law market” or to the “market for legal systems” easily see the law as a good (a set of rules) or as a service (an institution that allows economic and social actors to achieve specific objectives).³⁶ It should also be emphasized that the market not only applies to goods and services, but it can also be used to describe the functioning of the “labor market” or the “capital market.” Therefore, the field of application of the concept of “market” is broader than the field of trade in goods and services. However, this field of application is not unlimited. The specific criterion of the market is the possibility of arranging the exchange based on the relationship between the terms exchanged. If the conditions of a bilateral exchange are unquantifiable, are not independent from one another, or if one of the conditions of the bilateral exchange does not exist, then there is no genuine market.

The idea of the law market is based on the assumption that states are interested in making their law attractive because they receive taxes from entities (persons or companies) that choose their law. This idea should be challenged. If the location of an activity determines the applicable law and taxation at the same time, theoretically it may be expected that there will be an indirect correlation between the applicable law and the taxes to be paid to the state. Under this hypothesis, the state is both the lawmaker and the recipient of tax revenue, whereas the entity who chooses the law is also the taxpayer. However, it should be made clear that the actual behavior of people and firms who play with the diversity of legal and tax systems does not fit with this theory. Indeed, players who benefit from legal mobility elaborate sophisticated strategies to avoid the linkage between tax and laws. Multinational groups and even medium-sized companies do not just locate activities where the tax rates are the lowest,

36. See MEESSEN, *supra* note 3.

they combine the locations of the different components of their businesses (e.g., intellectual property, headquarters, labor, place of listing, contracts, inputs) to largely avoid taxation. If the measures created by the Organisation for Economic Co-operation and Development (OECD) to combat tax avoidance are successful, some of the most shocking excesses in tax optimization strategies related to tax rulings and circumvention of stable establishments should decrease in the future. The Base Erosion and Profit Shifting (BEPS), an OECD initiative, aims at preventing the exploitation of gaps and mismatches in tax rules to shift profits artificially to low or tax-free locations. However, the idea that actors can take advantage of the plurality of national legal and tax systems to adopt laws without necessarily being subject to the accompanying taxation structure is not over.

Economic analysis, therefore, enables us to show that national legal systems do compete, but that in the absence of compensation for the offering of laws by countries, there is no such thing as a market for legal systems or a law market.

V. NATIONAL STRATEGIES OF DIFFERENTIATION AND ALIGNMENT IN REGULATORY COMPETITION

This finding enlightens the understanding of interactions between national legal systems. If we consider the relations between legal systems from the perspective of competition, we can outline two economic dynamics that contribute to frame the global legal system. These forces are, moreover, contradictory. They correspond to two opposite strategies that countries are likely to pursue rationally in order to oppose (defensive strategy)³⁷ or take advantage of (offensive strategy) the competition that exists between legal systems.³⁸

37. U. Mattei, *Legal Change: The Comparative Law and Economics Perspective*, in *COMPARATIVE LAW AND ECONOMICS* 123 (U. of Michigan Press 1997).

38. Garoupa & Ogus, *supra* note 25, at 339.

The first strategy consists of a legal system distinguishing itself from the existing regulatory or legal offer, including acting as a free-rider in a unification process. A country may aim at accentuating the originality of its legal system to obtain a competitive advantage. For instance, some countries have historically chosen to adopt strict regulations regarding bank secrecy. Jurisdictions where bankers face serious criminal charges when they communicate information about their clients, even when requested by national tax administrations, gave rise to geographic centers specializing in wealth management (e.g., Switzerland, Luxembourg, Lebanon, Singapore).³⁹ Several degrees of bank secrecy correspond to various legal preferences and economic specializations. Thus, from a broader point of view, the differentiation strategies stimulate the diversity of law.

This policy is strategic in the sense that the efficiency of choosing to differentiate a legal system depends on the other countries' reactions. If the other legal systems quickly align themselves with the position of the innovative lawmaker, the latter must again produce an innovation to retain its advantage over the others, and so on. Thus, lawmakers' strategies stimulate the volatility of law and not only its diversity. Sometimes, there is a persistent premium for the first mover. For instance, Luxembourg tries to keep its leading position in the market of the administration of investment funds through a swift transposition of the European directives governing the different categories of investment funds, e.g., Undertakings for Collective Investments in Transferable Securities (UCITS) and Alternative Investment Funds (AIF).

The valuable differentiation does not need to be very significant. There are two types of differences between legal systems. A national law can be distinguished from another national law by different parameters within the same paradigm. For example, one country may choose that cars must drive on the right, while another may

39. A. P. MORRIS, *OFFSHORE FINANCIAL CENTERS AND REGULATORY COMPETITION* (AEI Press 2010).

choose the opposite, but in both cases the structure of the rule is the same. In the same sense, the lawmakers may decide different maximum numbers of directors, but in any case, boards will oversee the activities of corporations and the number of seats in the boardroom will be capped. However, the legal systems can also be distinguished more deeply according to their general approach to matters. Deep differences make legal concepts very difficult to translate from one language to another. For example, the concept of remedies has no equivalent in the French language.⁴⁰

A competitive advantage based on a particular legal tool or set of rules may be an effect of a micro-differentiation. The legal attractiveness is not correlated with the size of the gap with other legal systems. This leads to the conclusion that the legal diversity produced by lawmakers' strategies can be more intense (number of differentiations) than deep (magnitude of the differentiations). In this regard, the economic and strategic aspect of differentiation contrasts with the legal diversity that is produced by the historic development of particular separated legal traditions. The divergence between the English common law and the French civil law tradition is obviously not the effect of legal strategies of France and England.⁴¹ In this case, the legal diversity is probably deeper but slower (the differences are rooted in long-term process).

The second strategy consists of a system aligning itself with an existing offer. In terms of competition, it can be risky to propose an original law without losing a lot of influence. It can be preferable to align with one of the existing dominant legal systems, also called "origins" by Garoupa and Ogus.⁴² In the language that is common among comparative lawyers, it is a massive legal transplantation

40. R. Sefton-Green, *Why are Remedies not a Legal Subject in Civilian Law?*, in *LES INTRADUISIBLES EN DROIT CIVIL* 1-37 (A. Popovici, L. Smith & R. Tremblay eds., Thémis 2014).

41. P. RICHARD, *LE JEU DE LA DIFFÉRENCE—RÉFLEXIONS SUR L'ÉPISTÉMOLOGIE DU DROIT COMPARÉ* (Presse U. de Laval 2007).

42. Garoupa & Ogus, *supra* note 25, at 339.

process.⁴³ English, U.S., French, and German laws are international standards in terms of legal systems. Alignment with dominant legal systems gives some advantages.⁴⁴ Such aligned national legal systems benefit from the image and the knowledge that international players already have of them. Regardless of their inherent qualities, *familiarity* is an important quality when choosing one legal system over another.⁴⁵ For example, given the number of U.S. and UK investors, international business law tends to favor legal solutions close to Anglo-American legal practices.

Moroccan law provides a good example of a legal system that has generally chosen to follow French law. During the colonial period, French law was the basic law (except for family law and personal status) and the legal matrix of modern Moroccan law. Moroccan law could then have emancipated itself from French law or adopted another legal system as a model. That is not what happened. Moroccan law has continued to be largely inspired by French law, under the influence of Moroccan lawyers often trained in French universities and through cooperation with the French administrations and jurisdictions. Thus, French law inspires new laws (e.g., telecommunications regulation), the adaptation of certain laws (e.g., company law), and the courts' interpretations, which often take French case law as a benchmark. This long-term inspiration has several advantages for Morocco (and for France). It facilitates the international training of Moroccan lawyers in universities in France, Belgium, and Quebec. It also encourages the establishment of foreign companies on Moroccan territory, in order to take advantage of economic opportunities specific to the country, but also to serve as a hub for the development of activities in French-speaking Africa.

43. A. WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (U. Press of Virginia 1974); R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39(1) *AM. J. COMP.* 1 (1991).

44. P. Grajzl & V. Dimitrova-Grajzl, *The Choice in the Lawmaking Process: Legal Transplants vs. Indigenous Law*, 5(1) *REV. L. & ECON.* 615 (2009).

45. J. du Bois de Gaudusson, *Le mimétisme postcolonial, et après ?*, 129 *POUVOIRS* 49 (2009).

Casablanca could not have become one of the main legal and financial hubs in Africa if Morocco had not adopted one of the main international legal standards.

One can hesitate between two explanations for this alignment of Moroccan law with French law.⁴⁶ According to a first theory (which could be called neocolonial), Morocco remains under the political influence of France. Its autonomy would remain limited and the former colonial power would have the means to weigh on its choices. However, it can be observed that the U.S. has also influenced Morocco's policy in the geopolitical context of the Cold War. However, Morocco has hardly been tempted to be open to the U.S. legal influence. According to the second theory, it is a rational economic calculation that led Morocco to adhere to French law. In fact, the two theories are not incompatible. Sharing a common legal culture that affects both institutions and individuals can result in both political influences and well-understood economic interests.

Whatever the cause, it seems certain that the policies of alignment with an international legal standard contribute to reducing the legal diversity and reinforces a "market structure" that tends to take the form of an oligopoly. Following this dynamic, the world legal system is structured around three to four major legal traditions, as showed in the comparative law literature.

Thus, we can see that economic analysis of relations between legal systems enables us to highlight two original factors of convergence or divergence: competitive strategies of differentiation, and strategies of alignment with dominant standards.

46. C. SAINT-PROT & F. ROUVILLOIS, *L'EXCEPTION MAROCAINE* (Ellipses 2013).

VI. REGULATION OF THE COMPETITIVE RELATIONSHIP BETWEEN NATIONAL LEGAL SYSTEMS

Economic analysis is not only useful to explain the current state of things, but also to shed light on how things should be, in terms of relationships between national legal systems.⁴⁷ First, the structure of relations between national legal systems presented earlier contributes to the discussion pertaining to the merits of regulatory competition.⁴⁸ Regulatory competition is indeed a controversial position of legal policy.⁴⁹ Some scholars stress the expected advantages. Competition between legal systems is supposed to squeeze out the least efficient processes and regulatory measures that are also the most expensive for users, as they would stop being used. Regulatory competition is also supposed to make the most appropriate legal solutions available so that the user rapidly prospers. Therefore, it should lead to a general improvement of law. Another argument consists of saying that if legal systems compete, countries will be encouraged to offer a diversity of legal systems expressing political options as diverse as the expectations and preferences of citizens and businesses, in particular in terms of fiscal and social matters, from among which economic and social players may choose.⁵⁰ This type of argument is based, implicitly or explicitly, on Adam Smith's theory of the "invisible hand of the market." Competition is supposed to lead every player in the system, while pursuing their own individual interests, to contribute to a globally profitable result.

47. INTERNATIONAL REGULATORY COMPETITION AND COORDINATION, *supra* note 34, at 1-538.

48. P. SCHAMMO, EU PROSPECTUS LAW: NEW PERSPECTIVES ON REGULATORY COMPETITION IN SECURITIES MARKETS (Cambridge U. Press 2011).

49. W. E. Oates & R. M. Schwab, *Economic Competition Among Jurisdictions: Efficiency Enhancing or Distortion Inducing?*, 35(3) J. PUB. ECON. 333 (1988).

50. D. D. Sokol, *Explaining the Importance of Public Choice for Law*, 109(6) MICH. L. REV. 995 (2011).

The dynamics of competing legal systems would lead to a virtuous equilibrium.⁵¹ However, the major weakness of this argument is the fact that such a law market does not exist, as we demonstrated above. Also, said equilibrium, in particular between laws offered by countries, and compensation obtained by them, cannot exist. It could be otherwise only if the fiscal resources of each country were strictly correlated to the adherence of a player or a business to the law of that country. Yet, as we know, the global legal system offers a huge variety of legal, fiscal, and social choices for global players. In addition, the rules, legal tools, and regulatory constraints can be combined. A complex policy of localization of assets, employees, company headquarters, and transactions, generates the possibility of dissociating the legal systems that are applicable to a player or a transaction.⁵²

As the relations between national legal systems correspond to a competitive relationship that is not a genuine market, it is unrealistic to hope for self-regulation between national legal systems. Unfair tax competition, the regulatory race to the bottom, and social dumping⁵³ are well-known perverse effects of regulatory competition.⁵⁴ They require corrective measures that can only be external as they cannot take the form of the immanent, spontaneous, and automatic corrective action that characterizes the market. Initiatives taken by countries in the European Union⁵⁵ or the OECD against unfair tax

51. J. HARSANYI, *RATIONAL BEHAVIOR AND BARGAINING EQUILIBRIUM IN GAMES AND SOCIAL SITUATIONS* (Cambridge U. Press 1977); V. Vanberg & W. Kerber, *Institutional Competition Among Jurisdictions: An Evolutionary Approach*, 5(2) *CONST. POL. ECON.* 219 (1994).

52. D. D. MURPHY, *THE STRUCTURE OF REGULATORY COMPETITION: CORPORATIONS AND PUBLIC POLICIES IN A GLOBAL ECONOMY* (Oxford U. Press 2004).

53. R. L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 *N.Y.U. L. REV.* 1210 (1992).

54. Bebchuk, *supra* note 33, at 1437.

55. F. H. Easterbrook, *Federalism and European Business Law*, 14 *INT'L REV. L. & ECON.* 125 (1994); J. M. Sun & J. Pelkmans, *Regulatory Competition in a Single Market*, 33(1) *J. COMMON MKT. STUD.* 67 (1995); R. Van der Bergh, *Towards an Institutional Legal Framework for Regulatory Competition in Europe*, 53(4) *KYKLOS* 435 (2000).

competition constitute interesting examples of such control of regulatory competition. Certain forms of harmonization such as the establishment of social and economic standards (e.g., minimal wages, maximum working time) are other ways of overseeing competition between national systems.⁵⁶ In other words, regulatory competition should be mitigated and circumscribed through state cooperation.⁵⁷ Economic analysis provides criteria for deciding when legal harmonization is required due to transboundary externalities for instance.⁵⁸

Thus, if we take into account the reaction of states and international organizations to the perverse effects of regulatory competition, we perceive a second force that leads to the convergence between the legal systems. Sometimes, the multiplicity of national legal solutions tends to be abolished and replaced by a single international standard, through cooperatives dynamics.⁵⁹ In other cases, a top-down or consensual position on harmonization will lead to the limitation of diversity of national legal systems, within the limits that will be set up.

VII. CONCLUSION

An economic analysis of the relations among international legal systems shows that laws are in a relationship of competition. Nevertheless, competition does not equate to a real market likely to function without any external regulation. It also highlights the original forces contributing to a dynamic international legal system. Differentiation strategies feed divergence between legal systems, while

56. P. DE CRUZ, *COMPARATIVE LAW IN A CHANGING WORLD* (Cavendish Publishing 2013).

57. D. C. ESTY & D. GERADIN, *REGULATORY COMPETITION AND ECONOMIC INTEGRATION: COMPARATIVE PERSPECTIVES* (Oxford U. Press 2001).

58. Esty & Geradin, *supra* note 3, at 235-255.

59. E. Carbonara & F. Parisi, *The Paradox of Legal Harmonization*, 132(3) *PUB. CHOICE* 367 (2007); B. Crettez, B. Deffains, & O. Musy, *Convergence of Legal Rules: Comparing Cooperative and Non-Cooperative Processes*, 12(1) *REV. L. ECON.* 13 (2016); B. Crettez, B. Deffains, & O. Musy, *On Legal Cooperation and the Dynamics of Legal Convergence*, 156 *PUB. CHOICE* 345 (2013).

alignment strategies constitute a vector of convergence between national legal systems. The latter trend is also enhanced by the harmonization promoted as a remedy to the drifts of non-self-regulated regulatory competition.

