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# IUS COMPARATUM

Benefits of a Legal-Economic Approach to  
Comparative Family Law

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LA MÉTHODOLOGIE  
DU DROIT COMPARÉ  
DE LA FAMILLE

COMPARATIVE  
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# BENEFITS OF A LEGAL-ECONOMIC APPROACH TO COMPARATIVE FAMILY LAW

Mark BEUKER<sup>1</sup>

## Résumé

*Cette contribution analyse des possibilités d'utiliser la discipline économique dans un projet de recherche juridique et interdisciplinaire. L'objectif est de montrer la valeur, mais aussi les pièges et les limites de cette approche. En se référant à la recherche interdisciplinaire existante, le texte espère inspirer des chercheurs à démarrer ou à reconsidérer l'approche de leur propre projet de recherche interdisciplinaire. Les exemples fonctionnent également comme des illustrations qui clarifient la valeur de la combinaison des deux disciplines.*

*La discipline économique peut être utilisée de différentes façons dans la recherche juridique comparative. Une option est de décrire les systèmes juridiques nationaux en termes de concepts économiques. Cela peut conduire à une perspective plus approfondie sur les désavantages (coûts) et les avantages (bénéfices) de chaque système juridique. Une autre possibilité consiste à expliquer les différences et les similitudes entre les différentes lois avec des raisons économiques. Une troisième option est d'évaluer les systèmes juridiques par des normes économiques. Des recherches comparatives 'traditionnelles' dans le domaine du droit de la famille sont régulièrement critiquées pour manquer un cadre d'évaluation général, mais les normes économiques peuvent aider à établir un tertium comparationis pour l'évaluation des lois nationales.*

Mots clés : droit et économie — interdisciplinarité — méthodologie — droit comparé

## Abstract

*This contribution analyzes possibilities for using economics within a legal interdisciplinary research project. It aims to demonstrate the added value, but also the caveats and limitations of such an approach. By referring to existing interdisciplinary research, it hopes to inspire researchers to start or reconsider the*

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*approach of their own interdisciplinary research project. The examples also function as illustrations that clarify the value of combining both disciplines.*

*Economics can be used in comparative legal research in different ways. One option is to describe national legal systems in terms of economic concepts. This can result in a more in-depth perspective on the disadvantages (costs) and advantages (benefits) of each legal system. Another possibility is to explain the differences and similarities between different laws, by means of economic reasoning. A third option is to evaluate legal systems by economic norms. While 'traditional' comparative family law is regularly criticized for lacking an overarching framework for evaluative purposes, economic norms can aid in establishing a tertium comparationis for the evaluation of national laws.*

*Keywords: law and economics — interdisciplinarity — methodology — comparative law*

## TABLE OF CONTENTS

<b>Introduction .....</b>	<b>102</b>
<b>I. SEVERAL BASIC CONCEPTS FROM THE ECONOMIC DISCIPLINE .....</b>	<b>104</b>
<b>II. THE RELEVANCE OF ECONOMICS FOR FAMILY LAW SCHOLARS .....</b>	<b>106</b>
<b>III. ECONOMICS IN DESCRIPTIVE COMPARATIVE FAMILY LAW (PHASE 1 OF COMPARATIVE LEGAL RESEARCH) .....</b>	<b>108</b>
<b>IV. EXPLANATORY ECONOMICS (PHASE 2 OF COMPARATIVE LEGAL RESEARCH) .....</b>	<b>112</b>
A. Provide theory to explain similarities and differences.....	113
B. Confronting theory with practice: Do theoretical explanations prove correct? .....	117
1. Empirically proving explanations .....	117
2. Market failure .....	118
3. Bargaining costs .....	118
C. Convergence and divergence from an economic perspective .....	119
<b>V. EVALUATIVE ECONOMICS (PHASE 3 OF COMPARATIVE LEGAL RESEARCH). 122</b>	
<b>Conclusion.....</b>	<b>126</b>

## Introduction

This contribution focuses on the role that economics can play in comparative legal research. More specifically, it describes ways in which economics can function as an auxiliary discipline to answer questions of comparative legal research.<sup>2</sup> This approach forms an example of an interdisciplinary research method. Using other disciplines to answer legal questions can broaden and deepen the perspective that legal scholars have on their research topic. Throughout the text, the approach will be illustrated with references to existing literature, in order to clarify these advantages, and to demonstrate the proposed methodology and how researchers can apply it. The focus is on research that aims to answer legal questions, because this book is primarily written for people interested in the methodology of comparative *legal* research. It could also be interesting for economists to evaluate the possibilities that the legal discipline offers for answering economic research questions. However, these perspectives for economists will not be elaborated upon hereafter.

Many readers of this book will be aware that comparative family law has developed over recent decades into the well-recognized area of research that it is today.<sup>3</sup> At the same time, a growing body of literature has focused on the economic aspects of family law.<sup>4</sup> In spite of the limitations of applying economics to the family environment, in many ways, approaching law via economic methodology has proven successful in connecting legal changes to behavioural responses.<sup>5</sup> The two approaches to family law (comparative and

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<sup>2</sup> This means that the research is focused on law and is concerned with describing, explaining and evaluating different norms. Scholars use different terminology for this kind of research. See e.g. Van Klink, Bart, and Taekema, Sanne. 2011. On the Border. Limits and Possibilities of Interdisciplinary Research. In *Law and Method. Interdisciplinary Research into Law*, eds. Bart van Klink and Sanne Taekema, 7-32. Tübingen: Mohr Siebeck.

<sup>3</sup> E.g. Scherpe, Jens. 2019. Comparative Family Law. In *The Oxford Handbook of Comparative Law*, 2nd ed., eds. Mathias Reimann and Reinhard Zimmermann, 1089-1109. Oxford: OUP.

<sup>4</sup> Some publications that contain many references to existing literature: Swennen, Frederik. 2016. Family Law and Economics Introduction to a RETHINKIN. seminar. *Family & Law March 2016*. See furthermore: Cohen, Loyd, and Wright Joshua. 2011. *Research Handbook on the Economics of Family Law*. Cheltenham: Edward Elgar Publishing; Brinig, Margaret. 2007. *Economics of Family Law*. Cheltenham: Edward Elgar Publishing.

<sup>5</sup> Dnes, Antony. 2018. Economics and family law, published in Oxford Research Encyclopedia of Economics and Finance, 2, available at SSRN: <https://ssrn.com/abstract=3248776>. (last accessed on: 01-09-2021).

economic) have only incidentally been applied together, maybe because there is little attention given to the role that economics can play in comparative studies.<sup>6</sup> This contribution strives to start filling this unexplored area of science, and to suggest directions for future research.

As with any scientific discipline, economics has its own theories, questions and methodology. Basic economics concepts, such as rational decision-making, utility, and efficiency will be explained briefly in the next paragraph. For a more in-depth treatment of these concepts, reference is made throughout the text to other literature. As economic reasoning does not always provide a good representation of behaviour within the context of families, the paragraph thereafter provides an overview of the criticisms and defences of *law and economics* within the field of family law. It describes some fundamental questions related to the applicability of economics to the area of family law.

The remaining paragraphs of this contribution are devoted to the role that economics can play in different phases of a comparative legal research project. To structure the contribution, a four-stage model of comparative legal research will be used. While multiple models exist that structure the comparative law research process, they all have the acknowledgement of different phases in the process of conducting comparative legal research in common. Each stage requires different tasks and methods from the researcher. As the researcher fulfils different roles at different stages, the role that economics may play can also differ at each stage. These roles will be described separately, in different paragraphs. The Boele-Woelki model recognizes the following four stages in comparative legal research: an *analytical* stage, on the similarities and differences between laws; an *explanatory* stage, on reasons that could account for findings in the analytical stage; an *evaluative* stage, in which the researcher provides normative judgment of the different systems; and lastly, a stage to *report and present* findings.<sup>7</sup>

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<sup>6</sup> One of the few contributions on this topic: Faust, Florian. 2019. Comparative Law and Economic Analysis of Law. In *The Oxford Handbook of Comparative Law*, 2nd ed., eds. Mathias Reimann and Reinhard Zimmermann, 827-851. Oxford: OUP.

<sup>7</sup> Boele-Woelki, Katharina. 2008. What comparative family law should entail. *Utrecht Law Review* 4(2): 1-24.



## I. SEVERAL BASIC CONCEPTS FROM THE ECONOMIC DISCIPLINE

Economics examines how people choose between the alternatives available to them. It is a social science, as it is concerned with human behaviour. It is impossible to fulfil everybody's wishes, because resources are limited. Therefore, people have to choose between alternatives. An owner can use his or her goods in some way, but in choosing to do so, he or she forfeits the opportunity to use them for another goal.<sup>8</sup>

Probably the most important theorem that helps to explain why someone chooses one option over the other is the assumption of rational decision-making. This theorem states that people choose the alternative that is most beneficial to them. They strive to maximize their happiness. To do so, people weigh the costs and benefits of their available options and choose the option that gives them the most satisfaction. The satisfaction derived from something is called 'utility'. Hence, people aim to maximize utility. Given the wish to maximize utility, when someone wants to achieve a specific outcome (leading to a higher utility), he or she will do so in a manner that costs the least utility. Hence, efficiency is an important norm in economic theory; when an outcome can be achieved in multiple ways, that which requires the least resources will be chosen. It is clear that individuals will value efficient outcomes, as they do not like to waste resources.<sup>9</sup>

The market plays an important role in economics, functioning as the arena in which people evaluate their available options and choose to engage in some of them in order to maximize utility. Each individual is best suited to managing his or her own assets, as other people or the state are not fully aware of the utility someone derives from different outcomes. A well-functioning market leads to the efficient allocation of available resources. This requires, among other things, that people have freedom to do as they please, that markets are transparent and competitive, and that property rights are clearly defined and transferable.<sup>10</sup> However, in practice, many obstacles prevent the

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<sup>8</sup> Rittenberg, Libby and Tregarthen, Tim. 2012. Principles of economics. <https://2012books.lardbucket.org/books/macroeconomics-principles-v1.1/index.html>. (last accessed on: 01-09-2021), paragraph 1.1 Defining economics.

<sup>9</sup> Ibid, paragraph 6.1 Measuring Total Output.

<sup>10</sup> Ibid, paragraph 6.3 GDP and Economic Well-Being.

correct functioning of markets. Classic economics only assumes a role for the government to interfere in markets when markets are not functioning in this optimal manner and, as a result, are failing to maximize total utility.

Although rational decision-making constitutes an important theory, it often does not provide a fair representation of human behaviour. Multiple streams within the economics discipline have recognized the limitations of the rational choice theorem. Behavioural economics emphasizes that people often do not behave rationally. Social and psychological factors play an important role in decision-making.<sup>11</sup> In other words, people are biased when considering their options. They might strive for rational decision-making, but their rationality is bounded.<sup>12</sup> Another stream within economics led to game theory.<sup>13</sup> This line of thinking takes people's strategic motives into account, and stresses that the behaviour of one actor influences that of others. Imperfect information and transaction costs play important roles in this theory, by demonstrating the limits of the rational choice model. Despite its limitations, the rational choice model remains the point of departure for economists.

It is clear that a strong connection exists between laws and human behaviour. Laws directly influence the alternatives that are available to people. Laws forbid or restrict certain behaviour (or transactions), but they can stimulate others. They can also increase the costs or benefits of an alternative. This is why economics can help legal researchers to describe the consequences (costs and benefits) associated with different legal systems, but also to evaluate which law works best in achieving a certain outcome at the lowest cost. So, while the aforementioned fundamentals of economics can be used to explain human behaviour, they can also guide scholars and politicians in finding legal solutions that work best for society.

There is ample empirical evidence proving that legal norms also influence human behaviour in the context of the family. It has been shown that the average age at first marriage, domestic violence, and marriage-specific

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<sup>11</sup> Thaler, Richard. 2015. *Misbehaving: The making of behavioral economics*. New York: W.W. Norton & Company.

<sup>12</sup> Simon, Herbert. 1957. *Models of Man*. New York: John Wiley.

<sup>13</sup> Von Neumann, John, and Morgenstern, Oskar. 1944. *Theory of Games and Economic Behavior*. Princeton: PUP.

investments are all influenced by legal change. This is also the case for marriage and divorce rates.<sup>14</sup> Hence, legal norms influence people's behaviour, leading to different costs and benefits.<sup>15</sup> These not only concern the people directly involved in a transaction; they can also influence third parties. Externalities include (for example) the costs or benefits of a rule, which are not borne by the people involved in the transaction. Within the context of economy, externalities are usually the positive or negative consequences of norms that were not the goal of the rules. One clear example is the negative effect on the environment when a factory produces toxic waste. However, externalities can also arise in the context of family law. An example in this area is the cost that might be borne by children or society, after divorce of parents. A separation could oblige the state to pay benefits to one or both of the divorced parents. It can also affect children if parents cannot share household costs with their partner anymore and afterwards spend less money on care and upbringing of their offspring. An economist's toolbox offers a multitude of such concepts and theories, which can map the benefits and costs of laws.<sup>16</sup> Many of these have already regularly been applied to national family laws. The following paragraphs contain examples of the application of such tools in family law, which further depict how they can be used.

## II. THE RELEVANCE OF ECONOMICS FOR FAMILY LAW SCHOLARS

Legal scholars have regularly expressed doubts about applying economic reasoning in their research. Some researchers go so far as to state that market reasoning is not applicable to family law whatsoever, thereby also questioning the value of comparative family law for the goal of harmonization.<sup>17</sup> This might be caused by general concerns that 'personal' fields of law, such as family law,

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<sup>14</sup> E.g. Brassiolo, Pablo. 2011. Domestic Violence and Divorce Law: When Divorce Threats Become Credible. *Journal of Labor Economics* 34(2): 443-477.

<sup>15</sup> Dnes, Antony. 2018. Economics and family law, published in Oxford Research Encyclopedia of Economics and Finance, 14, available at SSRN: <https://ssrn.com/abstract=3248776>. (last accessed on: 01-09-2021).

<sup>16</sup> For an application of this approach in succession law, see Kelly, Daniel. 2012. Toward Economic Analysis of the Uniform Probate Code. *University of Michigan Journal of Law Reform* 45(4): 855-898.

<sup>17</sup> Nicola, Fernanda. 2010. Family Law Exceptionalism in Comparative Law. *The American Journal of Comparative Law* 58(4): 777-810.

are less suitable for economic reasoning than commercial fields of law. It is this fundamental doubt that has given rise to the idea of *family law exceptionalism*, which states that market rules do not apply within families. Bonds between family members are based on altruism and affection, not on utility.<sup>18</sup> An exchange mentality would also possibly destroy the concept of family, as functioning unconditional love is required for the family to work.<sup>19</sup> Therefore, economic analyses are not suitable for investigating behaviour within families.

While it holds true that economics cannot account for all aspects of family life, this does not mean that economics plays no role whatsoever. People often consider the financial implications of their behaviour. It seems only sensible to take into account the possibilities of a future divorce when getting married, especially in countries with high divorce rates. Furthermore, it should be stressed that economics is concerned with utility, and utility is not synonymous with money. The theory applies to human behaviour, which includes non-material, non-financial actions. Applying economic reasoning therefore does not imply the commodification or commercialization of relationships, but merely analyzes the logic of behaviour.

Although the supporters of family law exceptionalism provide interesting arguments, a growing body of research demonstrates the suitability of economic reasoning within the family. Numerous scholars have successfully applied economics to the field of national family law.<sup>20</sup> Economic reasoning can successfully be applied within a non-commercial context such as the family, as economics deals with utility and not only with money. The choices of families or individual family members might not (or only partly) be based on monetary considerations, but they will often be made after an analysis of the advantages and disadvantages of the available options. Economics is definitely not suited to accounting for all aspects of family law and family life, but it certainly has a role to play.

Other reasons that researchers might give for the unsuitability of economics to

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<sup>18</sup> Halley, Janet and Rittich, Kerry. 2010. Critical directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism. *The American Journal of Comparative Law* 58(4): 753-776.

<sup>19</sup> Brinig, Margaret. 2000. *From Contract to Covenant*. Cambridge (MA): HUP.

<sup>20</sup> See e.g. Cohen, Loyd, and Wright Joshua. 2011. *Research Handbook on the Economics of Family Law*. Cheltenham: Edward Elgar Publishing.

their research projects can stem from the idea that they do not consider themselves apt to perform or use economic analyses. The background and methodology of economics are different from legal backgrounds. In practice, this might be the argument most often used to refrain from using economics in legal research, but it does not diminish the possible value of this approach. Although the scientific standards of economic research should be met, this does not make economics elusive to the average legal researcher. An application of economic theories and tools is in practice not so far removed from the way legal researchers work, as might sometimes be expected. As economists are often interested in numerical data, in their research they emphasize different aspects to legal scholars. Economic research often applies an empirical approach. Legal analysis is often more qualitative in nature. However, it should be stressed that the differences between the disciplines partly result from academic culture, and they are not necessarily connected to the discipline.

The principles underlying economic reasoning are general, and they fit well within the already existing dogmatic reasoning, which also takes into account the consequences of legislation when it is being interpreted. The rise and success of the law and economics movement in the United States exemplifies the possibilities for economic approaches taken by legal scholars. The interdisciplinary nature of many research networks can also facilitate the cooperation of researchers who are better versed in economic research.

### **III. ECONOMICS IN DESCRIPTIVE COMPARATIVE FAMILY LAW (PHASE 1 OF COMPARATIVE LEGAL RESEARCH)**

The descriptive phase is the first step in a comparative legal research project. In this phase, the researcher starts by analyzing how different national systems fulfil a certain function. He or she does so by looking at each national legal system under review separately.<sup>21</sup> After the separate analyses, the researcher describes what similarities and differences exist between the legal systems. According to Boele-Woelki, this undertaking ideally entails a systematic approach that pays equal consideration to each system.<sup>22</sup>

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<sup>21</sup> The functional approach is widely applied, amongst others described by Zweigert, Konrad and Kötz, Hein. 1998. *Introduction to comparative law*. Oxford: OUP.

<sup>22</sup> Boele-Woelki, Katharina. 2008. What comparative family law should entail. *Utrecht Law Review* 4(2): 1-24.

Nevertheless, it seems that research projects regularly rely on quick scans of different systems. This may be due to time or monetary constraints. It seems that researchers particularly choose to limit the descriptive research phase to quick scans, if they are only striving for the improvement of their own system and are less interested in the rules of certain countries that do not appear best.

When describing the similarities and differences between legal systems, it is important to distinguish between *real* similarities and differences, and those which only seem to be such at first glance. Many systems seem different at first, but prove to have comparable solutions when they are analyzed in more detail. This is why comparative research usually takes a functional approach, analyzing law in practice in order to attempt to distinguish real differences, as opposed to e.g. the differences that merely appear from analysis of specific parts of the law in the books.

Economics can help in describing how the law fulfils a certain function, and in analyzing the differences and similarities between countries. Economics (just like comparative law) often applies a functional method.<sup>23</sup> This functional economic approach can be valuable in legal research. Traditional legal analysis focuses on the differences between norms, while economic analysis is more often explicitly concerned with the outcomes of these norms. The following examples may clarify this difference.

*Example 1: Scherpe, The financial consequences of divorce...<sup>24</sup> Scherpe describes substantive law, but his focus on the financial aspects of divorce can be seen as an acknowledgement of the value of financial/economic measures. The research questions and method will be familiar to comparative legal researchers. However, a traditional legal analysis would probably show that spouses in Country A enjoy protection in matrimonial property law, while the interests of ex-spouses in Country B are covered by state benefits. Scherpe goes one step further by using economic concepts, such as compensation, relationship-generated losses and need, to demonstrate the underlying similarities in*

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<sup>23</sup> Van Aaken, Anne. 2012. A Functional Approach to International Constitutionalism: The Value Added of a Social Science Contribution. *Archiv für Rechts- und Sozialphilosophie (ARSP) Beiheft* 127: 155-171.

<sup>24</sup> Scherpe, Jens. 2016. The financial consequences of divorce in a European perspective. In *European Family Law Volume III. Family Law in a European Perspective*, ed Jens Scherpe, 146-208. Cambridge (UK): Intersentia.

*different laws. His work fits within the framework of economic research, but is mostly concerned with the content of national laws. This research could have focused even more on economics by quantifying those measures.*

*Example 2: Brinig, From Contract to Covenant...<sup>25</sup> This book analyzes the economic aspects of the family. It uses the market to describe the laws that govern parties when entering into family relationships, but also when dissolving families. By describing costs and benefits of family structures, the book explains human behaviour. While this work covers many economic aspects of family law, such analyses can also be performed on specific topics. Informal cohabitation can influence, for example, taxes, state benefits, the possibility of alimony, and someone's position in succession law. This is clearly the case in the Netherlands where the advantages of a cohabitation agreement are a major reason to enter into one of these contracts. By focusing on economic consequences of informal cohabitation, researchers could clarify how the laws of countries differ, not only in their norms, but also in the way they work out in practice.*

As is the case in these examples, a focus on economics will not only lead to analyses of the norms, but also of the outcomes of those norms. Such research might calculate the impact of divorce on the financial position of spouses in different countries. These analyses can provide more insight when they are combined. Legal analysis might show that claims against the richer divorced spouse are strongest in Country A, whereas economics might show that the outcome of the rules results in the position of a divorced woman being better in Country B. Combining these perspectives is not difficult, as law and economics can both measure legal rules by their ability to fulfil societal needs.<sup>26</sup> In this manner, economic analysis can be used to acquire a more in-depth understanding of the functioning of the law.

The fact that economics often uses specific measurable concepts to describe systems makes it easier to compare legal systems in a more objective manner. Economics can be used to establish specific measures by which legal

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<sup>25</sup> Brinig, Margaret. 2000. *From Contract to Covenant*. Cambridge (MA): HUP.

<sup>26</sup> Michaels, Ralf. 2009. The Second Wave of Comparative Family Law and Economics?, *The University of Toronto Law Journal* 59(2): 197-213.

systems can be compared. For a system aiming to guarantee that both spouses can afford the cost of living after a divorce, a description of the financial position of the divorced spouses could help (for example) in evaluating to what extent the law succeeds in this goal. Hence, the legal-economic approach to comparative family law makes it possible to compare all legal systems, even those which are sometimes considered too different to compare.

When describing and comparing national legal systems, it is likely that the researcher is not interested in just one aspect of the law (such as the financial position of the ex-spouse). It is hardly ever the case that law influences just one person. Rather, the normative consequences of laws impact different aspects of society, in either a positive or a negative way. For a more complete perspective, these different costs and benefits are analyzed when describing a legal system (or, in the next comparative legal research steps, when explaining differences and similarities, or evaluating legal systems). Economics also analyzes how, and at what cost, outcomes are achieved by the legal system in question. Additional benefits that were received are also taken into account. The researcher does so by, for example, describing the costs and benefits associated with a certain rule.<sup>27</sup>

*Example 3: Chapter 3 of OECD report, Women's Economic Empowerment...<sup>28</sup>*  
*This report describes the impact of different rules on the economic empowerment of women in selected MENA (Middle Eastern and North African) countries. This research does not take a quantitative approach, but provides an interesting example of qualitative reasoning that is based on law, but also on economics. It shows how incentives for women are influenced by legal rules. The law appears to make it easier for women to work outside the house. An analysis of the economic position of women could be limited to this observation. However, it becomes clear that women may not have incentives to work. In many cases, women are still expected to do all the household tasks, and any*

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<sup>27</sup> Kelly, Daniel. 2012. Toward Economic Analysis of the Uniform Probate Code. *University of Michigan Journal of Law Reform* 45(4): 855-898.

<sup>28</sup> OECD. 2017. The impact of family law on women's economic empowerment in selected MENA countries. In *Women's Economic Empowerment in Selected MENA Countries: The Impact of Legal Frameworks in Algeria, Egypt, Jordan, Libya, Morocco and Tunisia*, OECD Publishing, Paris.



*employment they have does not allow for self-fulfilment; instead, it is meant only to help raise their family's living standard.<sup>29</sup> Furthermore, assets are usually registered under the name of the husband, and the default marital regime is the separation of property. This implies that if women work, the fruits of their labour will ultimately be outside of their access and control, making work a far less attractive option for them. By analyzing all these different aspects of the legal system and society, it becomes clear who benefits from the current system and how these rules together influence the economic empowerment of women.*

It will often not be possible to take all the economic aspects of an entire legal system into account. Limiting the treatment of economic aspects to those which are most relevant is also acceptable, from a scientific point of view. In fact, economic studies almost always limit themselves to studying the relationship between a couple of economic measures. It is up to the researcher to select which economic tools should be applied. This is comparable to the 'traditional' comparative research freedom to discern which elements of a legal system require elaboration and which elements do not. It goes without saying that acknowledgement of the limitation of the analysis shows methodological insight.

#### **IV. EXPLANATORY ECONOMICS (PHASE 2 OF COMPARATIVE LEGAL RESEARCH)**

After the *descriptive* phase, the researcher moves on to the *explanatory* phase. In this stage, the aim is to provide explanations for the similarities and differences discovered in the analytical phase. Only by understanding why similarities and differences exist can the researcher better understand the working of these systems. Sometimes, researchers only write countrywide reports about national systems, or they answer questionnaires to describe a specific part of national regulation. Such products are usually mostly (or only) descriptive, which might be the aim of the researcher. In such cases, the research ends after the first stage. However, this kind of research is usually only

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<sup>29</sup> Ibid, 85.

the first step in a comparative legal project; often, researchers need these initial descriptive parts, in order to continue their analyses.

### **A. Provide theory to explain similarities and differences**

The reasons why countries have similarities or differences can vary tremendously. The history of a national legal system is often important to understand the structure and functioning of the law. Other examples include sociological, technological, political and economic factors. It is therefore clear that many scientific disciplines could play a role in this phase of legal comparative research. Many scholars already acknowledge and use different factors to explain the similarities and differences between countries. However, legal researchers are not always clear about the methodology they are using to explain the similarities and differences. They often do not elaborate upon the methods they use, nor on the extent to which their explanations can account for the differences and similarities discovered. More methodologies are therefore necessary.<sup>30</sup> It is within this area that legal scholars often turn towards non-legal factors for explanation, as doctrinal methodology does not provide a satisfying answer.

Many scientific disciplines can help to explain similarities and differences between national legal systems. Economics is one of these disciplines; paragraph 2 already described how rational decision-making theory can be used to explain why people behave in a certain way. Hereafter, it will be shown that also the way the legislator shapes rules can be explained by economic reasoning. However, once again it should be stressed that this approach cannot account for all possible explanations; supporters of family law exceptionalism stress the importance of other factors, such as fairness, human rights, feminism, political incentives, and public opinion, which also influence lawmaking.

According to economics, an important goal of the legislator should be the maximization of utility. Following this line of thought, economics can be used to assume that each country has a law that is most efficient. This is because the

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<sup>30</sup> E.g. Michaels, Ralf. 2009. The Second Wave of Comparative Family Law and Economics?, *The University of Toronto Law Journal* 59(2): 197-213 supports an economic approach to help this lack of methodology.

law is, amongst other things, used as a tool to influence incentives, in order to facilitate and promote desired practices. In this sense, Schneider points to the channelling function of law, stating that governments can use it to structure people's behaviour.<sup>31</sup> He states that governments opt for regulations that are the most efficient; in other words, they use the law as a tool to support wealth. Although other factors also play an important role, economics has been shown to have much explanatory power in the field of (national) family law.<sup>32</sup> Although efficiency is only one goal of legal systems, it is a powerful one.<sup>33</sup>

Economic reasoning acknowledges that no specific law is most efficient for all countries; each legislator should, given the societal circumstances, consider the costs and benefits of different rules and choose the one that leads to the highest utility. What rule is optimal for a specific country, depends on the specific characteristics of that nation. The economic discipline can function as a filter which integrates many societal characteristics and developments into a model explaining why national systems are formed as they are.

The rules which lead to the highest utility (the least costs and the highest benefits) are influenced by all the societal characteristics and developments that influence people's incentives, no matter their nature - as long as they influence people's incentives, they are relevant. For this book contribution, such societal characteristics will be viewed as given parameters, which can bring their influence to bear on economic incentives. Technological factors can explain certain behaviours and rules, as they, for example, make it easier for women to do certain jobs traditionally more suited to men, making women less dependent. However, societal and cultural factors - such as educational opportunities and equal payment - can have a similar influence. Women who are less independent have less need for legal measures aimed at protecting the female spouse. All these factors can influence people's incentives, such as the benefits and costs of working, marrying, and divorcing.

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<sup>31</sup> Schneider, Carl. 1992. The Channelling Function in Family Law. *Hofstra Law Review* 20(3): 495-532.

<sup>32</sup> Dnes, Antony. 2018. Economics and family law, published in Oxford Research Encyclopedia of Economics and Finance, available at SSRN: <https://ssrn.com/abstract=3248776>. (last accessed on: 01-09-2021).

<sup>33</sup> E.g. Michaels, Ralf. 2009. The Second Wave of Comparative Family Law and Economics?, *The University of Toronto Law Journal* 59(2): 197-213.

*Example 4: Jänterä-Jareborg, Grounds for Divorce...<sup>34</sup> In Sweden, maintenance is seldom awarded. Compared to many other European laws on alimony, this seems to be a strange system. However, the notion in Swedish law that divorce severs all economic relations between spouses might, for example, be explained by the high percentage of Swedish women with jobs that make them financially independent. This societal characteristic may take away the need for strict divorce law, and may even have adverse economic effects. The current system encourages women to participate in the labour market more, and often does not lead to harsh consequences, as many women are self-supporting.*

In this manner, economic theory is used to explain why legislators created a specific legal system. While it might seem obvious that societal developments and characteristics shape law, this notion does not often form the basis for legal and economics research. An example of this is provided by research on the grounds for divorce. Many authors have concluded that changing from fault to no-fault divorce rules leads to a higher divorce rate, but there is also reason to assume it is the other way around; that a higher divorce rate caused by social developments more clearly shows the problems with fault divorce rules, leading to political change.<sup>35</sup>

Nevertheless, influence also works the other way around; behaviour can influence the law. Llewellyn wrote:

*Society moulds and makes the individual; but individuals are and mould society. Law is a going whole we are born into, but law is a changing something we help remodel. Law decides cases, but cases make law. Law deflects society; but society is reflected in the law.<sup>36</sup>*

Although this link might be more directly visible in common law systems, the same applies in civil law systems, via the intermediation of the legislator.

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<sup>34</sup> Jänterä-Jareborg, Maarit. 2003. Grounds for Divorce and Maintenance between Former Spouses. Available at: <http://ceflonline.net/wp-content/uploads/Sweden-Divorce.pdf>. (last accessed on: 01-09-2021). Also published as Swedish answers to the questionnaire in *European Family Law in Action: Volume II - Maintenance between Former Spouses*, eds. Katharina Boele-Woelki, Bente Braat and Ian Sumner, Antwerp: Intersentia.

<sup>35</sup> E.g. Ellman, Ira. 2003. Why Making Family Law is Hard. *Arizona State Law Journal* 35: 699-714.

<sup>36</sup> Llewellyn, Karl. 1932. Behind the Law of Divorce. *Columbia Law Review* 32: 1281-1308. See also part two of this essay. Llewellyn, Karl. 1933. *Columbia Law Review* 33: 249-294.

This reasoning also makes it clear that the most efficient law is not universal; it depends on the parameters that are present in a national system. Early economic comparative law wrongly assumed that a market of legal systems would arise and that countries would swap their rules for the most efficient ones, without any bargaining costs. In studying legal transplants, researchers often assume the basis for accepting a certain norm lies in the efficacy of that norm.<sup>37</sup> Given the important influence of specific societal characteristics on the most efficient norm, it is necessary to pay attention to the differences between countries, just as in traditional comparative law. The available solutions to problems, and their related costs and benefits, can differ widely between legal systems. Given the chance of divorce and the extent of alimony, in some countries women could be better off marrying later in life, having children later, and not marrying immediately but cohabiting as unmarried partners first. Norm A might be the best norm in Country B, while this norm might not be the best choice for Country C. Economics takes these differences between countries into account and makes them explicit.

*Example 5: Lord Hardwicke's Act of 1753 was aimed at preventing clandestine marriages. The Act introduced requirements for entering into marriage and gave parents more power to prevent the marriage of their children. Landowners in England also profited from clear rules on marriage. It was applied to marriages in England, but not in the United States; in the 18<sup>th</sup> century, there were more private and less formal marriage routines in the United States than in England. Friedman states that the reason for this could lie in the fact that the United States was a more mobile society, and property was more equally distributed.<sup>38</sup> This made it less economically necessary to apply Lord Hardwicke's Act, which could explain the difference between the two legal systems.<sup>39</sup>*

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<sup>37</sup> Torpman, Jan and Jörgensen, Fredrik. 2005. Legal effectiveness: Theoretical Developments Concerning Legal Transplants. *Archiv Für Rechts und Sozialphilosophie* 4: 138-159.

<sup>38</sup> Friedman, Lawrence. 2005. *A History of American Law*. New York: Simon & Schuster, 146.

<sup>39</sup> Dnes, Antony. 2018. Economics and family law, published in Oxford Research Encyclopedia of Economics and Finance, available at SSRN: <https://ssrn.com/abstract=3248776>. (last accessed on: 01-09-2021).

## **B. Confronting theory with practice: Do theoretical explanations prove correct?**

Hitherto, the explanatory power of economics was about qualitative reasoning, but theory is not always correct. By examining if theory holds true in practice, researchers can learn about their theories and improve them.

### **1. Empirically proving explanations**

Economics can also be used in a quantitative way, to test possible explanations empirically. This empirical method is often applied in purely economic research, but less often in legal research. More statistical skills are required from the researcher, but these empirical economic research methods can be used to improve this aspect of comparative family law, by validating assumed explanations. Statistical methods provide a possibility to investigate the relationship between  $x$  (an explanatory factor) and  $y$  (the legal framework).

The different national systems provide a rich 'database' for the comparative researcher, delivering empirical data that can be used in economic modelling.

*Example 6: Allen, Marriage and divorce...<sup>40</sup>; and González and Viitanen, The effect of divorce laws...<sup>41</sup> A lot of research focuses on the relationship between (the introduction of) no-fault divorce and divorce rates. Researchers disagree about the effects of this legal change. It is clear that many societal developments influence divorce rates. However, even controlling for such developments, multiple scholars find a positive relationship between the introduction of no-fault divorce and divorce rates. They argue, for example, that transaction costs can prevent transactions from taking place. The introduction of no-fault divorce lowered transaction costs, at least somewhat, by providing an easier ground for divorce. In this manner, the introduction of no-fault divorce has been linked to*

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<sup>40</sup> Allen, Douglas. 1992. Marriage and Divorce: Comment. *The American Economic Review* 82(3): 679-685. His conclusions are supported by Friedberg, Leora. 1998. Did Unilateral Divorce Raise Divorce Rates? Evidence from Panel Data. *The American Economic Review* 88(3): 608-627.

<sup>41</sup> Another example is provided by González, Libertad and Viitanen, Tarja. 2009. The effect of divorce laws on divorce rates in Europe. *European Economic Review* 53(2) 127-138.

*higher divorce rates by, among others, Allen (1992), González and Viitanen (2009).*

## **2. Market failure**

The economic model of rational decision-making does not always prove to be true; the market does not always guarantee the most efficient outcome. People often have imperfect information, so they cannot properly estimate what would be the best result. This can lead to market malfunctioning, which can be even worse if other people in the market possess more knowledge. In the latter case, information asymmetry exists. This information asymmetry can also play a role in agency problems (see example 11). Discerning which factors play a role, and what their role is, is also therefore a very difficult task.

The assumption that countries choose options that are most efficient within the context of their specific circumstances, does not always hold true. To understand this, it is necessary to look towards market failure. While law can be a tool to stimulate overall utility, it can also be used for personal gains. Rational decision-making theory recognizes that legislators and judges are also people with their own personal incentives. These legal actors adopt rules from which they can derive the greatest personal utility. Ideally, this utility corresponds with the utility of society as a whole. It is nevertheless clear that individuals are (also) influenced by personal, egotistical incentives.<sup>42</sup> The Netherlands, for example, has a modern economy, but outdated family law (in several aspects), which is attributed to the strong influence that Christian political parties have had on public policy.<sup>43</sup>

## **3. Bargaining costs**

Early research combining comparative law with economic insights mistakenly assumed that the most efficient legal rule would win the competition, and hence be implemented everywhere. Paragraph 5.1 already discussed that societal characteristics influence what rule leads to the highest

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<sup>42</sup> Posner, Eric. 2000. Agency Models in Law and Economics. *John M. Olin Program in Law and Economics Working Paper No. 92*: 1-12.

<sup>43</sup> Antokolskaia, Masha. 2003. Development of Family Law in Western and Eastern Europe: Common Origins, Common Driving Forces, Common Tendencies. *Journal of Family History* 28(1): 52-69.

utility. However, this approach even neglected the bargaining costs that are associated with implementing new norms. When a rule is introduced in another country, that country is faced with the costs of changing its existing system. Furthermore, the background against which a new norm is implemented can have a tremendous impact on the efficiency of that law. The legal institutions of the society to which the new rule is being introduced can, for example, influence the efficiency of the rule. The rule might be efficient in Country A, but not in Country B. This helps explain why one norm is not always best, and even why systems develop in different ways (divergence).

### **C. Convergence and divergence from an economic perspective**

While the previous parts of this contribution mainly assume analysis of laws as they are at a certain point in time, comparative research often also focuses on explaining developments in the law (convergence and divergence).<sup>44</sup> In the first (descriptive) comparative legal research stage, the researcher can attempt to give a more or less value-neutral description of these phenomena (comparable to the approach worked out in paragraph 4), and can also use numerous theories explaining the development of legal systems. Many convergence theorists state that nations are shifting towards internationalization and globalization. They also assume that legal transplantation becomes easier, thanks to, e.g. technological and economic changes, thereby collapsing regional differences.<sup>45</sup>

Cultures differences can make convergence more difficult. Within the context of family law, it is clear that such differences exist between countries. At the same time, countries throughout the world are confronted with similar global developments. The application of economics promises to be particularly valuable in providing explanations for the convergence of legal systems because, in a globalized world, numerous countries encounter similar developments that influence economic motives in comparable ways - e.g. technological and educational improvements often lead to comparable

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<sup>44</sup> An example of this approach in family law is given by: Antokolskaia, Masha (ed.) 2007. *European Family Law Volume 18. Convergence and Divergence of Family Law in Europe*. Antwerp: Intersentia.

<sup>45</sup> Gillespie, John. 2001. Globalisation and Legal Transplantation: Lessons from the Past. *Deakin Law Review* 6(2): 286-311. and Pistor en Wellens, as in note 6 of aforementioned publication.



influences on individual incentives. For example, from its inception the CEFL has acknowledged European laws supporting European integration, also had implications for family law.<sup>46</sup> This can lead to the convergence of legal systems, or at least the development of legal systems in a similar direction (more liberal, or more conservative on a certain topic).

This observation implies that, from the outset, even though legal systems might have very different rules, the way in which they evolve can be similar. This is shown by the observation that the common core of European divorce law did not develop via pressure from institutions such as the ECtHR, but resulted from comparable social developments.<sup>47</sup> When restrictive divorce law is in place, couples will often collude to obtain divorce.<sup>48</sup> Scherpe signals a trend towards more liberal divorce laws in Europe, even in traditionally more conservative countries, and reasons that European jurisdictions have accepted divorce as a fact of life and are focusing on regulating the procedure for and consequences of divorce, rather than continuing to consider divorce grounds tools to socially engineer desirable behaviour.<sup>49</sup> In religious, conservative countries, legal changes can also be linked to economic developments.<sup>50</sup>

*Example 7: Becker, A Treatise on the Family...<sup>51</sup> Rules on divorce and the position of non-marital children differ widely between countries. However, there seems to be a trend towards more liberal divorce laws and less alimony. Several societal factors can explain why systems are developing in this manner. They revolve around the incentives that exist to marry and divorce. Emancipatory*

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<sup>46</sup> Boele-Woelki, Katharina. 2019. The Commission of European Family Law, Taking stock after 20 years. In eds. Katharina Boele-Woelki and Dieter Martiny, 3-16. *European Family Law Volume 45. Plurality and Diversity of Family Relations in Europe*, 3-16. Antwerp: Intersentia.

<sup>47</sup> Antokolskaia, Masha. 2006. Convergence and Divergence of Divorce Laws in Europe. *Child and Family Law Quarterly* 18(3): 397-422. As cited by Scherpe (see footnote 51).

<sup>48</sup> Dethloff, Nina. 1994. *Die einverständliche Scheidung. Eine rechtsvergleichende und rechtshistorische Untersuchung zu Umfang und Grenzen der Privatautonomie im Scheidungsrecht*. München: CH Beck as cited by Scherpe (see footnote 51).

<sup>49</sup> Scherpe, Jens. 2016. *The Present and Future of European Family Law*, 67-69. Cheltenham: Edward Elgar Publishing.

<sup>50</sup> Esposito, John. 1976. Muslim family law reform: towards an Islamic methodology. *Islamic Studies* 15(1): 19-51; Mallatt, Chibli. 2006. Comparative Law and the Islamic (Middle Eastern) Legal Culture. In: *The Oxford Handbook of Comparative Law*, 2nd ed., eds. Mathias Reimann and Reinhard Zimmermann, 1089-1109. Oxford: OUP.

<sup>51</sup> Becker, Gary. 1991. *A Treatise on the Family: Enlarged Edition*, 350-355. Cambridge (MA): HUP.

trends can, for example, explain more liberal rules around marriage. Becker's economic research shows that greater female participation in the labour market happened at a time when divorce rates and the number of non-marital children also rose.<sup>52</sup> These developments strengthen the financial position of women, and make it financially less problematic to divorce. Just as was the case in example 4, these socioeconomic factors can have an explanatory role when it comes to divorce law. Here, they can be used to explain trends, but in example 4 they were used to explain differences that currently exist between laws.

The aforementioned text and example show that legal systems can develop in similar directions. It is nevertheless true that, while the aforementioned global developments have significant influence on family law, there are also countries returning or adhering to more conservative views on family law. Economic theory can also be valuable in explaining the forces leading to the divergence of legal systems. The following example relies partly on the influence of religion and partly on market failure to explain different developments between countries.

*Example 8: Facchini, Economic freedom...<sup>53</sup> Western countries tend to have more liberal laws than Muslim countries. This is especially true when it comes to family law. When religious, conservative societies are confronted with western ideas, people might experience loss of control and think that moral standards are dropping. Individuals might then expect more benefits from conservative legislation, which could explain stricter laws on pre- and extra-marital sex, and on LGBT-relationships.<sup>54</sup> This might apply to the lawmaking elite in particular. They might expect less economic benefits from liberalization, if that means the loss of power over trade and losing the capacity to purchase legitimacy.<sup>55</sup>*

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<sup>52</sup> Ibid.

<sup>53</sup> Facchini, François. 2011. Economic freedom in Muslim countries : an explanation using the theory of institutional path dependency. *European Journal of Law and Economics* 36(1): 1-29.

<sup>54</sup> On these developments: KITL, Seminar on Criminalising and Emancipatory Trends in Family Law in Indonesia and other Muslim Majority Countries. [https://www.kitlv.nl/event/call-papers-criminalising-emancipatory-trends-family-law-indonesia-muslim-majority-countries/#\\_ftn1](https://www.kitlv.nl/event/call-papers-criminalising-emancipatory-trends-family-law-indonesia-muslim-majority-countries/#_ftn1). (last accessed on: 01-09-2021).

<sup>55</sup> Facchini, François. 2011. Economic freedom in Muslim countries : an explanation using the theory of institutional path dependency. *European Journal of Law and Economics* 36(1): 17-18.

*Other explanations for differences in family law can be found by path dependence theory. This economic theory turns towards the institutional characteristics of a society, to explain why certain developments take place (or do not take place). Muslims have proven to be less favourable than others toward private property, and they have a more pronounced taste for redistribution. They more often than several other groups favour different institutions than the free market.<sup>56</sup> As the existing organization forms the structure in which family law functions, the chosen path continues to influence how family law develops. It can at least partly explain why countries differ in their historical, but possibly also their future, economic and legal development.*

## **V. EVALUATIVE ECONOMICS (PHASE 3 OF COMPARATIVE LEGAL RESEARCH)**

In the *evaluative* phase, comparative legal researchers say something about the merits of the different legal systems. They often attempt to formulate conclusions about which law functions best. In this stage, the methodology of comparative law is sometimes criticized for lacking an overarching framework or hierarchy of principles.

It can be difficult to evaluate systems and draw normative conclusions. Every legal system strikes a balance between different interests. There is no universally accepted hierarchy of principles that helps to evaluate legal systems. The researcher can limit evaluation to describing the advantages and disadvantages of each system, and it will often be difficult (if not impossible) to state that any one system is better than the others. More often, he or she will make normative statements, for which a subjective standard is inevitably used.<sup>57</sup> This might not be as problematic as it can seem at first glance, especially if researchers reveal the evaluation criteria which they are applying in the evaluative phase.

Again, it should be noted that no rule is universally optimal. A correct evaluation takes into account the specific aspects of a legal system. In general, it might be more beneficial to have Rule A, but if one country has very different

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<sup>56</sup> Ibid, 17-20.

<sup>57</sup> Boele-Woelki, Katharina. 2008. What comparative family law should entail. *Utrecht Law Review* 4(2): 1-24.

characteristics, the rule might be less efficient for its specific circumstances. Hence, when using comparative legal research to discover what improvements can be made to a specific legal system, the researcher should also take into account the consequences of applying a rule from one country in another country. If the rule is transferred to a different country, there might be different costs and benefits.

*Example 9: World Bank's report...<sup>58</sup> All this gender-based legal discrimination restricts women's opportunities to choose and take decisions about what is in their own best interests and that of their families, and this has major economic consequences. The inequalities limit women's participation in the workplace, and result in lower economic growth. The World Bank's report, Gender Equality and Development, estimates that eliminating employment barriers to women in certain industries and occupations would increase labour productivity by up to 25%. Existing gender gaps in women's entrepreneurship and employment currently account for estimated revenue losses of 14% in Latin America and 10% in Europe.*

If researchers are only interested in acquiring a specific outcome, they can evaluate different systems based on the extent to which those systems achieve the preferred outcome. This can be done by qualitative reasoning, but again, economic figures can provide more insight into the different national systems. Economics can function as a *tertium comparationis* - a standard by which legal systems can be compared. When this is the case, the standard provides insight into which system is best in terms of efficiency for achieving a certain goal.

However, as was the case in the descriptive phase, researchers and policy makers will probably not only be interested in (only achieving) a specific goal, but will also have an eye on other interests. In legal terms, no one interest is all-important, but the legislator has to balance different interests. In economic terms, not only a specific benefit, but also the costs related to achieving a goal, are relevant. Therefore, the researcher probably not only wants to consider one specific outcome of a national system, but the costs and benefits associated

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<sup>58</sup> <http://www.fundacionmicrofinanzasbbva.org/revistaprogreso/en/10153/>. (last accessed on: 01-09-2021).

with regulation within that system. Economics can be used to illustrate other advantages and disadvantages connected to a solution.

*Example 10: Shamir, The State of Care.<sup>59</sup> This research compares the welfare regimes of Israel and the United States, to examine their impact on the behaviour of families. It evaluates both systems, with the goal of increasing women's equality and decreasing class stratification (the structure in society that shows the differences between people's social citizenship). Israel has a wide availability of migrant workers. The government has stimulated migrant employment via visa and other welfare arrangements. The availability of migrant workers providing lower-cost support allows households with all kinds of income levels to get household help. This, in turn, can facilitate the emancipation of women in the labour market.*

The economic discipline itself also provides norms by which systems can be evaluated. For society, advantages are benefits, and disadvantages are costs; the goal is to maximize utility for all of society. This necessitates that the researcher clarifies the framework by which he or she evaluates different systems. Applying economic reasoning in order to formulate normative conclusions which favour the optimal outcome from an economic viewpoint is called *normative economics* and, although this is considered more controversial than the more descriptive approach of *positive economics*, it can improve the evaluation of different laws.

Two forms of efficiency have received wide support from the law and economics movement: Pareto efficiency, and Kaldor Hicks efficiency. The first kind of efficiency is achieved when no transactions are possible that make at least one person better off, while making no one else worse off.<sup>60</sup> The functioning of the market should lead to this kind of efficiency, as people will voluntarily engage in these transactions. If inefficiencies exist, the theory implies that the state should transform society in ways that make at least one person better off, while not disadvantaging someone else. However, this kind

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<sup>59</sup> Shamir, Hila. 2010. The State of Care: Rethinking the Distributive Effects of Familial Care Policies in Liberal Welfare States. *American Journal of Comparative Law* 58: 953-986.

<sup>60</sup> Montesano, Aldo. 1997. Pareto's Analysis of Efficiency and its Interpretation. *History of Economic Ideas* 5(3): 7-18.

of efficiency is often irrelevant in political or legal debates, as government intervention usually makes at least one person worse off. The second kind of efficiency is more widely debated, as it entails a kind of utilitarianism. It states that not everyone has something to gain from policy changes. The norm should be that action is preferable when the winners from intervention gain more than the losers lose. The losers can, but do not have to, be compensated. In practice, moral questions naturally arise when deciding if it is acceptable for the state to use coercive or compulsive action to achieve such efficiency.<sup>61</sup>

This normative approach to law and economics is more controversial than positive law and economics. In family law especially, it is often the case that maximizing utility will lead to unacceptable outcomes for individuals. This does not mean that economics cannot play a role. When economic interests are the most important, it makes sense to let economic parameters be the decisive factor. This is the case when, for example, it comes to the question of business continuity or takeover, or to matters relating to the time at which someone should be able to claim his or her inheritance rights (and whether or not this should be delayed because of economic reasons).

Additionally, society, the legal discipline, or political discussions, can all clarify what outcomes are unacceptable. Afterwards, the economic approach can be used to evaluate which system is the most efficient, and which also fulfils the conditions set by the legal discipline or society in order to guarantee acceptable regulation. This makes it possible to answer questions that have been written in the following way: *Which system maximizes total utility, given the condition that the minimum level of protection has to be X?*

By taking into account the moral, legal, or political conditions that have to be fulfilled, the economic approach can evaluate systems in multiple ways. System A may be the best when it comes to maximizing total societal utility, whereas System B might be best at doing so when taking into account certain conditions set by the legislator. So, while traditional comparative legal research is regularly criticized for lacking an overarching framework, economics can provide a multitude of these frameworks.

*Example 11: Brinig, From Contract to Covenant. This research describes the*

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<sup>61</sup> Wight, Jonathan. 2017. The ethics behind efficiency. *The Journal of Economic Education* 48(1): 15-26.

*incentives that are present in foster care. It relies on agency theory to do so. This theory demonstrates that people sometimes let others do work for them in order to pursue a certain interest, but that these other people might have incentives that are additional to doing the thing that they are supposed to do. It shows that there are a number of principal-agent problems in foster care. This means that the market is not functioning well. Under ideal conditions, the goal would be the maximization of total utility. In foster care, the interests of the foster child should also play an important role, but the child does not have much say regarding the procedures employed. Many of the parties work in the interests of others, in part. At the same time, they have their own interests which are not similar to the interests they are supposed to be pursuing on behalf of the person they are working for, or representing. They have incentives to follow their own interests instead (thus, 'shirking' their duties). Brinig advises making the incentives of people compatible, in order to take away the problems that are present in foster care. This takes away the principal-agent problem.<sup>62</sup>*

Economic reasons could also partly have inspired the requirement in a Dutch law reform proposal on surrogacy. This proposal introduces the option to contract on surrogacy, as such contracts are considered void under the current legal system. However, the law requires the proposed contracts to be reviewed by judges. This may be required in order to provide certainty, thereby preventing lawsuits. It might solve principal-agent problems, such as those mentioned in the previous example, in which there are also different parties with different interests involved.<sup>63</sup>

## **Conclusion**

When comparative family law became a widely acknowledged area of scientific research, the economic approach to family law also received more and more attention. Both lines of research initially met with criticism, but have proven their value in science. It is therefore curious that these disciplines have not worked together more on the issues present in comparative family law.

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<sup>62</sup> Brinig, Margaret. 2000. *From Contract to Covenant*, 49-57. Cambridge (MA): HUP.

<sup>63</sup> Beuker, Mark and Kolkman, Wilbert. 2019. Legal Relationships between Adults and Children in the Netherlands. In *Adults and Children in Postmodern Societies*, eds. Jehanne Sosson, Geoffrey Willems and Gwendoline Motte, 446. Cambridge (UK): Intersentia.

The maturity of the law and economics movement in other fields of law provides rich sources of inspiration for interdisciplinary research in the field of comparative family law. Combining these disciplines can improve understanding of family law. Descriptions of economic impact and predictions of human behaviour increase awareness of the practical implications of the law. Although many disciplines are relevant when explaining any legal differences, similarities, and developments between national legal systems, economics has also proven itself useful in this phase. Lastly, normative economics provides a framework for evaluating laws on a more value-neutral basis than is often applied in comparative family law.

The examples throughout this contribution demonstrate the added value of an economic perspective for legal researchers. However, combining disciplines is a gradual process. It is not necessary to involve economics in all the phases of a comparative legal research project; it would even be unrealistic to assume this. Just as the traditional, comparative legal researcher has to limit his or her research by making choices, so too must the interdisciplinary researcher make choices. This contribution aims to inspire researchers to make use of economic concepts, but it does not prescribe a specific method for doing so. As long as the scientific standards for both disciplines used are not compromised, it is up to the researcher to choose how and when to use economic concepts. The examples also show that many researchers who have successfully applied economic reasoning in their legal research do not have an extensive academic background in economics.