Theoretical Inquiries in Law

Volume 23 January 2022 Number 1

ISSN 1565-1509

Printed in Israel
By Elinir

Theoretical Inquiries in Law is a biannual English-language law journal published by the Cegla Center for Interdisciplinary Research of the Law at the Buchmann Faculty of Law, Tel Aviv University. The journal, founded by Prof. Ariel Porat in 2000, specializes in the application to legal problems of insights developed in other disciplines, such as moral and political theory, epistemology, history, cultural studies, social sciences, economics and game theory, probability theory, and cognitive psychology. The range of issues dealt with by the journal is virtually unlimited, in line with its commitment to the cross-disciplinary cultivation of ideas. Contributors to the journal are distinguished legal scholars working in different "law and . . ." areas. The journal also strives to offer a forum for contributions to legal theory by scholars working in disciplines outside of law.

The previous issues of the journal have been devoted to the following topics: Restitution and Unjust Enrichment; Judgment in the Shadow of the Holocaust; Contemporary Legal Scholarship: Achievements and Prospects; Protecting Investors in a Global Economy; Economic Analysis of Constitutional Law; Negligence in the Law (Parts 1 & 2); Writing Legal History; Liberty, Equality, Security; The Palestinian Refugees and the Right of Return: Theoretical Perspectives; The Role and Limits of Legal Regulation of Conflicts of Interest (Parts 1 & 2); The Excessive Use of Force; Personal Bankruptcy in the 21st Century: Emerging Trends and New Challenges; Critical Modernities: Politics and Law Beyond the Liberal Imagination; Why Citizenship?; Moral and Legal Luck; Legal Pluralism, Privatization of Law and Multiculturalism; Community and Property; Histories of Legal Transplantations; Money Matters: The Law, Economics, and Politics of Currency; Comparative Tax Law and Culture; Copyright Culture, Copyright History; Rights and Obligations in the Contemporary Family: Retheorizing Individualism, Families and the State; Back to the State? Government Investment in Corporations and Reregulation; International Courts and the Quest for Legitimacy; Public and Private, Beyond Distinctions?; New Approaches for a Safer and Healthier Society; Sovereignty as Trusteeship for Humanity: Historical Antecedents and Their Impact on International Law; Labor Organizing the Law; The Constitution of Information: From Gutenberg to Snowden; Law, Economy and Inequality; Sovereignty and Property; Fifty Years of Class Actions – A Global Perspective; The Tragedy of the Commons at 50: Context, Precedents, and Afterlife; The Problem of Theorizing Privacy; Freedom, Choice & Contracts; Elder Law and its Discontents; Historical Justice in the Israeli-Palestinian Context; Legal Discontinuity; How Law Changes What You Want: Positive and Normative Effects of Law on Values and Preferences.

Forthcoming issues will include: Bilateral Labor Agreements; Private Law Meets the Law of Work; Regionalism: Shifting Scales Beyond Cities and States.

An online version of the journal, as well as comments on articles published in the journal, are available on the *Theoretical Inquiries in Law* website (http://en-law.tau.ac.il/til). All articles are also indexed and available on HeinOnline, LegalTrac, Lexis-Nexis, and Westlaw.

Contact Information: Theoretical Inquiries in Law, The Cegla Center for Interdisciplinary Research of the Law, The Buchmann Faculty of Law, Tel Aviv 6997801, Israel. Tel.: 972-3-6406697; Fax: 972-3-6405849; email: cegla@tauex.tau.ac.il.

Theoretical Inquiries in Law

Volume 23 January 2022 Number 1

Contents

The Global Law Market

INTRODUCTION

In this issue of *Theoretical Inquiries in Law*, we seek to add a collection of significant contributions to the evolving academic discussion and research on the economic and empirical analysis of private international law. While the study of law & economics has become very important in recent years, its application and that of empirical approaches to private international law is still advancing. This issue aims to further explore this novel aspect of private international law and to establish a community of researchers in this field. In times of increasing globalization, the importance of the continuous development and improvement of private international law, based on sound empirical findings, cannot be understated.

This issue offers various perspectives on and approaches to the empirical analysis of private international law along three central axes. Baum and Solomon, Shakargy, as well as Klerman and Shortland present an array of advances concerning the analysis of choice-of-law clauses and rules. The contributions by Solimine and Baumgartner and Whytock offer important insights into the enforcement of foreign judgements. Klement and Parisi investigate the relationship between choice of law and choice of forum, while Shill explores the challenges of "Big Law" clustering and its effects on the substance and practice of private international law.

The issue opens with Ido Baum and Dov Solomon's contribution, which offers an in-depth analysis of Israel's two decade-long effort to bring its corporate law into as close as possible alignment with that of the State of Delaware, which is considered the leading corporate law in the world. The authors argue that Israel has been motivated by interjurisdictional competition over incorporation and the choice of governing law in investment and M&A agreements. Inspired by Delaware's Chancery Court, Israel has emulated Delaware's primary legal institutions by establishing its own specialist court to adjudicate corporate law disputes. Israel has also tried to bring its legislation, case law, and regulatory infrastructure into conformance with those of Delaware. The Article examines the assumptions underlying Israel's project and evaluates its success through a qualitative analysis of multiple interviews with M&A practitioners from the United States, the United Kingdom, and Israel. The authors find mixed opinions amongst practitioners regarding the success of the project, although among its benefits the project has increased familiarity with Israeli corporate law and thus has reduced reticence about its adoption. The study further indicates that jurisdictional competition over transnational business flows is not necessarily reduced by approximation efforts but rather relocates to another playing field.

In his Article, Alon Klement examines the dynamics of the law market in Israeli-American dual-listed companies. The law market consists of a pre-dispute market for the listing of publicly traded companies in the local stock market, and a post-dispute market in securities class actions of dual-listed companies. The Article identifies the potential adverse effects of the law market on Israeli shareholders. In the post-dispute market, Israeli courts apply American law to dual-listed companies

in order to incentivize them to list their shares on the Tel Aviv Stock Exchange. As a consequence, American courts have allowed the representation of Israeli-traded shares in American class actions. Competition between Israeli and American lawyers for the representation of Israeli shareholders in these class actions has had adverse effects on Israeli investors and reduced their expected compensation. The Article calls the attention of Israeli courts to these problematic dynamics and urges the implementation of an optimal tradeoff between attracting foreign firms in the pre-dispute market and protecting local investors in the post-dispute market.

Francesco Parisi, Daniel Pi and Alice Guerra examine the effects of liability rules, legal presumptions, and discovery rules on evidence technology. The writers ascertain how the allocation of the burden of proof and the imposition of adversarial discovery affect the investment in evidence technology and the risk of frivolous litigation. The writers draw a comparison between the European and American approaches to the burden of proof and discovery. The authors argue that the different approaches are coherent in and of themselves and that each system constitutes an optimization that prioritizes different objectives. Parisi, Pi and Guerra then proceed to examine the consequences of their finding for private international law. The writers show the peculiar effects that the combination of the European and American approaches through private international law has on investment in evidence technology, and put forward a persuasive argument for treating the burden of proof as a procedural rather than a substantive rule.

In his Article, Michael E. Solimine presents a normative case for extending the law market model to the recognition and enforcement of foreign judgments in American courts. The Article shows how the law market model, primarily applied through contractual choices of forum and governing law clauses, could apply to the American law of recognition and enforcement of foreign judgements. The Article further explores and tackles the political and cultural hurdles that challenge American courts' inclination to permit the contractual waiver of foreign judgements. Finally, Solimine offers a normative perspective, showing how the application of the law market model, which allows for parties to contractually select or waive recognition and enforcement rules *ex ante*, may promote party autonomy and optimal jurisdictional competition.

Samuel P. Baumgartner and Christopher A. Whytock set out to shed light on the practice of "systematic calibration" in the U.S. According to statutory law, U.S. courts should refuse to recognize or enforce foreign judgments originating from judicial systems that do not comply with modern standards for a fair legal system. Baumgartner and Whytock review recognition and enforcement decisions in the United States during the last twenty years and find that, although that rule is rarely explicitly invoked by courts, there is a strong positive correlation between indicators for judicial adequacy on the one hand, and recognition and enforcement probability on the other hand. Therefore, the integrity of a judicial system may predict whether its judgments will be recognized. The empirical evidence presented by the authors thus points toward a prevalent practice of implicit systematic calibration.

Sharon Shakargy's contribution examines various choice-of-law issues that emerge in the context of matrimonial property. Based on a data-driven analysis, her Article pinpoints the existing rules prevailing in Israel and uncovers a conflict between the existing strict legislative arrangement and case law. Shakargy also uses the data to examine whether courts' use of *lex fori* is the underlying reason for this conflict. Shakargy leaves her readers with a realist perspective: Israeli judges do not necessarily favor a single choice-of-law rule, nor any specific gender, nationality, or economic status; rather, they prefer to apply their own, judicially created law: community property.

In his Article, Gregory H. Shill offers a novel perspective on the geographical distribution of "Big Law" firms within the urban landscape. Given the previously documented unwavering tendency of "Big Law" firms to cluster around metropolitan commercial areas, the COVID-19 pandemic presents an interesting opportunity for a change in locational strategy. At first glance, "Big Law" clustering is puzzling, considering the high costs of real estate and labor in large, primarily coastal, cities, as well as the apparent ease with which legal work could be done remotely. Drawing on concepts from urban economics, Shill dissects the managerial considerations that contribute to the firms' persistent locational strategy, in-person culture, and spillover implications. According to the author, the universal mandated shift to telework during the pandemic was an opportunity for firms to explore unfamiliar territory in their daily operations, and this experience has influenced their broader strategy vis-à-vis employees and clients. Rather than try to predict the likelihood of a fuller post-pandemic shift to telework, the Article offers an examination of the potential outcomes of such a shift, paying special attention to the possible technical and material implications for private international law, an area of practice particularly concentrated in "Big Law."

Dan Klerman and Anja Shortland's Article examines the significant impact of choice-of-law-rules on the global art market. Klerman and Shortland show how American courts' aggressive application of "modern" choice-of-law analysis has led to the increasing application of pro-owner American law, and how this has pushed the art market into being more careful about provenance, especially as regards works confiscated or transferred under coercion during World War II or antiquities looted from archaeological sites. Moreover, the development of institutions, such as the Art Loss Register, a centralized database for stolen art, in conjunction with the application of American choice-of-law has contributed to norms that help prevent the circulation of stolen art.

***

The Articles collected in this issue are the product of the conference on "The Global Law Market," held at Tel Aviv University, Buchmann Faculty of Law, in January of 2021. *Theoretical Inquiries in Law* thanks Alon Klement and Dan Klerman, the organizers of the conference, for bringing together an outstanding group of contributors and for

serving as guest editors of this issue; Ruvik Danieli for style-editing the articles; Michal Semo Kovetz for graphics; and all the conference participants and commentators for a most fruitful discussion. We also thank our Managing Editor, Sharon Vered Shaked, for her wonderful work. Finally, we thank the Editor in Chief, Yishai Blank, for his trust and guidance. The Articles published in this issue are available online at the *Theoretical Inquiries in Law* website (http://en-law.tau.ac.il/til).

The Executive Editor, Junior Editors,
and Assistant Editors