

# 0325

## LAW AND ECONOMICS IN FRANCE

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### Abstract

Even if economic reasoning applied to law is sometimes used by economists, the majority of jurists in France have some difficulties in accepting this tool as a complement to legal thought. So, there is no chair in law and economics in our French University of law, even though an effort seems to be made by the University of law in Montpellier, which includes some lectures in law and economics in its training for postgraduates students in law. But, in spite of that, prejudices and a lack of knowledge of law and economics, among jurists have slowed down the process of development of this matter.

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### 1. Introduction

Even if the economic analysis of law has been developed well in most common law countries, as well in countries such as Germany or Sweden on the European continent, it must be noted that in France this tool is still underestimated by lawyers. Initially put forward by economists (A) the economic approach to law did not have the hoped-for success. As the matter of fact, we just have to look at the number of works published in this field, to see that the challenge has been ignored by the legal community (B).

#### A. Economic Analysis of Law: A Challenge for the French Jurist

The economic analysis of law aims at a better understanding of the logic of legal rules and judicial decisions. It is supposed to enlighten the jurist, whatever his or her discipline, as to the construction and the finality of the law. However, in France this tool was developed by economists and not by jurists (section 2), and the legal community did not examine the assets of such an instrument until some time later. In studying questions traditionally dealt with by lawyers, economists raised a real challenge that has been taken up only in

the last few years by certain authors from Montpellier and Aix-en-Provence (section 3). Despite those efforts, the majority of the legal profession today seems to remain insensible to this tool.

## **2. The Economist and the Law**

Economics is defined by Lionel Robbins as ‘the science which studies human behavior in terms of the relationships between ends and means’. Therefore, it is evident that the rules of law, in so far as they organize the means in a world of scarcity and uncertainty, will sooner or later also become the object of study by economists in France. As elsewhere, this is precisely what happened, and in that process important notions, such as the notion of transaction costs, were established that shed light on legal doctrines. Different fields, until now the private domain of jurists, have come under the scrutiny of the economic community. Hence the development of an economic approach to property rights (Lepage, 1984), contract law or matrimonial law (Lemennicier, 1991). Nonetheless, this was not enough to stimulate the curiosity of the French legal community, at least not until 1986 when a symposium was organized on the economic analysis of law at Aix-en-Provence. For the first time, a degree of enthusiasm for applying economic reasoning to law became apparent.

Indeed, Professor Savatier in his lesson on the theory of liabilities in economic private law (Savatier, 1974) had already underlined the utility and the efficiency of economic tools in the development of legal reasoning. Professor Mouly, too, was convinced, especially after the 1986 conference, that a reflection on the mutual contributions of economy and law was both necessary and beneficial (Mouly, 1987, p. 413). But, in spite of this, and contrary to what was happening in other European countries, law and economics was still not taken up in France. If economists show a continued interest in this subject, very few legal authors refer directly to this instrument, even if incontestably they sometimes use a Posnerian approach to law in their writings (see Mousseron, 1987). Among the few exceptions, mention should be made of authors such as Mouly (1995, p. 377), Atias (1987, p. 477) or Chérot (1987a, p. 443), who occasionally use this tool. But, to this day, no work has been written by a jurist in this domain. The only existing work remains that of Lemennicier (1991), Professor of Economics.

## **3. The Jurist and the Economy**

In the early 1990s one began to see an implicit recognition by various legal authors of the utility of the economic analysis of the law as a complement to legal thought, on the same level as sociology or morality. Hence, in the last edition of his civil law treaty, Ghestin (1994, pp. 84-85) dedicated some pages

to law and economics in order to better situate the position of civil law among the legal disciplines. Fabre-magnan, in her thesis (1990, pp. 50-117) on the obligation of information in contracts, suggests an economic analysis of this obligation after having explained the basics of the economic analysis of law. Also, Cabrillac (1995, p. 23) in his general introduction of law, summarizes in a few lines the three functions (normative, predictive, critical) of an economic analysis of law. Finally, on the initiative of economists in Aix-en-Provence, '*Le Journal des Economistes et des Etudes humaines*' was founded, including, and this is noteworthy, some professors of law in its scientific committee.

In 1994 an important event occurred that led us to believe that the challenge set to the legal community more than thirty years ago had finally been accepted. Indeed, while the economic analysis of law was not taught in any of the French universities of law (except, perhaps, the 'DEA Analyse économique des institutions' which, however, depends on the University of Economics and is intended for students in economics), Professor C. Mouly started to introduce his postgraduate students to the utilization of economic tools in legal reasoning, and at the same time took part in the third-term university Erasmus (now called Socrates) Program in law and economics. The department of economic theory of law at the university of law in Montpellier, of which he was the creator and the director, became the privileged meeting place for economists and jurists whose common research on the economic approach to contract law and property rights, augured a much awaited success. Unfortunately, two years later, Professor Mouly's tragic and premature demise was to slow down the process of development of law and economics in the French legal culture.

### **B. The Economic Analysis of Law: a Challenge Ignored by the French Jurist**

The study of legal questions often requires the use of different elements taken from sociology, history or logical analysis. The jurist uses these for the same reason that he/she refers to legal linguistics or philosophy of law. But curiously enough, the utilization of the economic approach to law is neglected. Some authors assign this marginalization to the absence of publications in French (see Mackaay 1987a), but this imbalance, we believe, is also, and firstly, due to a bias jurists have against economics (section 4) and the specific choice of economic instruments made by the advocate of an economic analysis of law (section 5).

### **4. The Subjective Obstacles to the Development of an Economic Analysis of Law**

The intuitive perception of what is economics, acquired through the multitude of economic acts that they accomplish every day, leads most jurists to believe that they have enough knowledge of economics to fulfill their task. For others,

the economic analysis of law is too narrow in its approach, and so must be excluded from legal discussions.

Such attitudes are easily explained. A first reason is the separation of the legal and economic disciplines in our academic system; jurists have little knowledge of economic analytical tools. Today, a law student does not receive the basic economic training that he had in the past. Also, the internal division within the legal discipline increases the effect of a separation between law and economics. Thus, the only jurists who use economics are those who follow a training in patrimonial law or in antitrust law.

Secondly, the jurist dislikes in modern economics what he perceives as a utilitarian approach. Convinced that economists are motivated only by the study of efficiency, he quickly turns away from their works. This belief is also reinforced by the use of mathematical or rationalistic language in economics, and tools that from the point of view of most jurists are incompatible with social studies. Not having completely mastered the tools of law and economics, legal authors therefore prefer to ignore this challenge.

Finally, due to insufficient knowledge of the field and his a priori judgment, the jurist was not in a position to appreciate the latest evolutions in economics. Hence, he was unable to notice the new conceptions, such as the Austrian School, according to which, for example, the criteria of efficiency used in law and economics must not be static but should be dynamic (Centi, 1987). So, according to this new view, one cannot appreciate the quality of legal rules only through its capacity to organize the efficient management of the scarcity. One must also verify whether our legal system adjusts itself appropriately to change in our environment. Through its recent development the economic analysis of law could thus oblige the jurist to question the foundations of institutions, instead of dogmatically affirming solutions directly translated from Latin adages which are sometimes obsolete.

## **5. The Objective Obstacles to the Development of an Economic Analysis of Law**

The idea of a commercial activity whose object would be the persons themselves provokes a strong hostility from classical jurists. There are border lines which should not be crossed, and a law regarding persons cannot be analysed in the same way as law to be applied to ordinary assets. However, even if, for example, the prohibition to sell civil clienteles and ministerial offices is constantly affirmed, the jurisprudence did not hesitate to allow their indirect commercialization. Does not the patronymic name, which in France is imprescriptible and not transferable (inalienable), become itself the object of transactions which sanction this commercialization ? In view of this fact some economists proposed to submit the law of persons and the law of assets to the economic approach, without discrimination, with the risk of violating this *summa divisio* to which every French jurist is so attached. The American origin

of the movement, as well as its slight respect for legal assumptions was, therefore, the object of diatribes from the legal community. The economic approach was blamed for being an imperialistic tool like sociology under the influence of Durkheim. But if we look at today's economic analysis of law, this argument is no longer true; Posner himself has moderated his positions (see Posner 1992, p. 25) and other movements have been born admitting that the economic analysis of the law is just a means among others to appreciate the quality of certain legal rules.

However, the neoclassic foundations on which the movement is founded further add to the reasons to ignore the economic analysis of the law. The rationality of the economic agent who is perfectly aware of prices, and operates calculated choices in order to maximize his pleasure at the least cost, is a disconcerting model for one who searches solutions in equity and not in utility. *Homo economicus* would not be the model of jurists who think the law and economics to be incompatible, and presume the collaboration between jurists and economists to be impossible through lack of a common language.

As Mackaay 1987a has written, the language represents a further obstacle to this collaboration. Indeed, depending on the disciplines, words have different meanings. The 'exchange', for example, represents for economists the general act by which a person gives up a good against another good, whereas for the jurist it defines a very particular contract. Inversely, some equivalent notions are expressed using different words: depending on whether the contract allows one to get rid of uncertainties or not, the economist will use the terms 'complete' or 'incomplete' contract where the jurist will use the terms 'perfect' or 'imperfect' contract. Finally, the legal vocabulary finds its origins in Roman law whereas the economist uses a more recent terminology adapted to a present and evolutionary world.

### C. Conclusion

The lack of communication and the existence of prejudices are regrettable stumbling blocks to the development of law and economics in France. In spite of the efforts of economists to propose a fruitful collaboration in the development of the field, only some jurists have responded. Others still prefer to ignore this tool and the situation will remain thus so long as the French Law Universities do not make an effort to demonstrate an interest in the use of this tool of analysis, a natural complement to the conventional training of a lawyer.

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