

0305

LAW AND ECONOMICS IN AUSTRIA

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Abstract

This note concentrates on the state of 'law and economics' in Austria after the emergence of the economic analysis of law. The long tradition of research in bringing together legal and economic aspects particularly in the field of regulation and dating back to the eighteenth century is also addressed. Moreover, some reasons why modern law and economics have encountered a fairly weak reception for almost two decades are suggested. Finally, the quite encouraging development both in teaching and research during the 1990s is emphasized.

JEL classification: A12, K00

Keywords: Austria, law and economics, Paradigms, Teaching, Research

1. General Observations

In Austria, the mutual dependence of economics and law has been recognized literally for more than two hundred years. However, from the beginning, public law and, more specifically, regulation - or 'Wirtschaftsverwaltungsrecht', to use the appropriate German term - received much more attention than civil law. Evidence for this assertion is provided by a textbook, entitled *The Principles of Police, Action and Finance*, written by one of the most influential counsellors to the sovereign of the Austrian empire, Joseph von Sonnenfels, which was published in three volumes beginning in the year 1765, where the term police refers to public administration, action to private trade and finance to fiscal issues of government. Here, and in most of the later work treating these issues, however, there was no common denominator in terms of a distinct methodology. On the contrary, one of the particular features of modern law and economics is that legal issues are approached by means of the tools of microeconomic theory. Taking the latter characteristic as the essential feature of law and economics, as it is understood nowadays, contrary to the general concern about economic issues in legal reasoning, the interest in that field of research in Austria is not very great.

Its reception in the academic sphere is, however, considerably ahead of that in the secular world. Among scientists, lawyers appear to be more concerned than economists. This is not surprising, since it is mainly for lawyers that the

methodology involved gives rise to a radical change in the way of approaching legal problems, whereas economists are traditionally more accustomed to deriving policy conclusions from their analysis, which may very well comprise changes in prevailing regulations. A typical example is the work on opening hours of shops by the economists Clemenz and Inderst (1989). Following the said tradition, among lawyers those working in the field of public law (constitutional law, administrative law as well as regulation) are generally more interested than those in private law. In the latter, the main attitude is scepticism if not prejudice, as can be seen from quotations by, for example Mayer-Maly (1991, p. 220, note to p. 129) and Bydlinski (1988, pp. 282 passim). This conclusion rests upon three sources: first, the examination and classification of existing literature; second, quotations by leading scientists; and third, the response to a mail survey in the course of the preparation for this paper.

The information which follows will illustrate and explain the views expressed above.

2. Predominant Paradigms

One reason for the weak impact of law and economics both in the academic sphere and civil practice of law seems to be the predominant role of distinct paradigms in educational training. Legal scholars are basically brought up in the spirit of legal positivism. Even more recent ideas such as that of a value-related understanding of law (Bydlinski, 1982) leave hardly any space for the economic approach to law. Dissenting approaches are rarely considered. Even in applied research conventional juridical craftsmanship is used; one typical example is that by the lawyers Aicher and Lessiak (1989) on discount and competition, which does not contain even one single reference to the economic analysis of law.

Economists in turn are mainly trained in neoclassical economic theory, as far as microeconomics is concerned, whereas late Keynesian views predominate in macroeconomics until recently at least (see Frey and Kirchgässner, 1994, p. 477). Nevertheless, the research programs suggested by scholars of modern law and economics are occasionally adopted. This can be inferred from the lists of publications submitted to the present author following a call for submission: in many of the accompanying letters it is stated that the publications enlisted are understood as being related to law and economics, without taking into account the methodology underlying the economic approach to law.

3. Professional Structure

Lawyers play a predominant role in the Austrian economy. They still hold most of the leading positions in public administration and in private business. More recently economists have caught up to some extent, but most of them received their degrees in business administration, not in economics proper.

However, lawyers receive educational training in basic economics (both macro and micro) whereas economists are taught basic private and public law in turn. Moreover, civil servants, who seek achievement to higher posts, must take supplementary courses in economics as well as distinct fields of law at the federal academy of administration, irrespective of their university degree.

4. Prejudices and Ignorance

One reason for the weak reception of the economic approach to law seems to be a general lack of knowledge about the state of the art. More specifically, the entire approach is generally associated with the 'Chicago school', which is held to be primarily efficiency-orientated, taking the Pareto-efficient allocations of competitive markets as a reference standard. It is generally agreed that therefore issues of (social) justice do not receive the attention they deserve in legal reasoning. These conjectures are supported by the fact that the predominant references which can be found in the literature are to criticise Richard Posner, as, for example, in the writings of the most influential authors, Bydlinsky (1988) and Mayer-Maly (1991).

Consequently it is generally ignored that many outstanding scholars of law and economics have taken a much broader view than that of the Chicago school for a long time. It is disturbing to see that their basic ideas have hardly yet entered university classrooms. Fortunately, there is one exception: the closely related 'property rights - public choice approach', as it has been termed by Goldberg (1980, p. 402) is actually being promoted now in the economic departments of the universities of Linz, Innsbruck, and Vienna and also in the department of sociology of the University of Graz. From here, it would only be a short step to adopt law and economics more generally. With the exception of the University of Vienna, where regular lectures and seminars are held, this step has not been taken.

Unfortunately, responses to the questionnaire mentioned earlier show that the situation with respect to teaching is even worse in law schools. There, the ideas underlying the economic analysis of law are taught only occasionally in the course of classes held on topics which are traditionally in the domain of law and economics, such as corporate law, environmental law and criminal law.

5. Challenges by Legal and Economic Practice

Contrary to the weak overall interest in modern law and economics, the Austrian economy would offer itself as an ideal playground for scholarly work in that field. It is still highly regulated, with regulations applying to competition, barriers to entry and administered prices, to name but a few issues. There is also growing concern about environmental standards accompanied by an ever-increasing number of legal measures.

More recently predominant policy issues such as privatization of public utilities and deregulation, as well as the harmonization of the Austrian legal framework with that of the European Union, create new challenges for both economists and lawyers. The problems associated with these newly emerging issues would call for appropriate tools of analysis and advice. Therefore, time may prepare the ground for a larger perception of the fruitfulness of the economic approach to law.

6. A Necessarily Brief History

In addressing the history of economic thought in the field of modern law and economics, one must be aware that it is both rooted in and therefore closely related to a variety of other fields of research. These are nowadays frequently summarized under the label of New Institutional Economics, and they comprise many very important contributions, for example on the evolution of social order and the economic theory of democracy. The most prominent authors associated with these contributions are Hayek and Schumpeter respectively. Unfortunately it is beyond the scope of this article to take full account of their work. Moreover, although they are Austrians by birth and from origin, these authors - like several others - received adequate acknowledgement for their pathbreaking contributions abroad only after their emigration from Austria. Therefore, their pioneering work should be attributed to Austria only with reservations.

But even with respect to law and economics in a narrow sense, despite its generally weak reception, Austria may be looked at as an important post of forerunners: as far back as 1897, Herrmann published a book on *Theorie der Versicherung* (Theory of Insurance), in which he introduced ideas which are quite close to those which a century later became known as the Coase theorem. Another pioneering work was *Rechte und Verhältnisse vom Standpunkt der Volkswirtschaftslehre* (Rights and Relations from the Point of View of Economics) by Eugen Böhm-Bawerk in 1881. In this small book, Böhm-Bawerk acknowledges rights and entitlements to be valuable assets. The title of Victor Mataja's book *Das Recht des Schadenersatzes vom Standpunkt der Nationalökonomie* (The Law of Damages from an Economic Perspective),

published in 1888, ought to sound familiar to present day scholars. Finally, the work of K.G. Wurzel deserves attention here. Writing at the time of World War One, Wurzel strongly advocated interdisciplinary reasoning for lawyers (see also Weissel, 1991).

After World War Two, questions of property and wealth were discussed in the course of both the adoption of ORDO-liberalism and a newly emerging general interest in the catholic doctrine on social justice and the distribution of private property (see for example Streissler, 1973). These writings can be seen as loosely linked to the subject at hand.

During the 1980s, the first writings were published which explicitly contained reference to the economic analysis of law. A landmark for Austria, unfortunately with weak impact on the interest in general, however, was the 7th annual conference of the European Association for law and economics, held in Vienna in 1989, arranged by the author. It was not until the early 1990s, though, that the economic analysis of law was explicitly taught for the first time in classes in the economics department of Vienna university. Occasionally interdisciplinary seminars were held, and in the Technical University of Vienna, a group of scientists who had assumed Neoinstitutionalism started a critical dispute about the relevance of the modern property-rights doctrine.

In Vienna as well as Graz, books by Hafner (1987), Huber (1995) and Gimpel-Hinteregger (1994) were published, which were basically revised versions of 'Habilitation' theses and contained reflections on law and economics.

A research program on 'Dynamic Models of Optimal Law Enforcement' was established at the Institute for Econometrics, Operation Research and Systems Theory, University of Technology, which is devoted to the application of game theory and operations research to the economics of crime, more specifically corruption and illicit drugs.

Also, more recently, the first doctoral theses have been written explicitly addressing the approach: Grabenwarter (1994) and Freyer (1994).

Law and economics was finally accepted as complementary course for the study of both law and economics in 1994. Approximately 20 to 25 scientists are now working in this field.

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