

0365

LAW AND ECONOMICS IN PORTUGAL

Miguel Moura e Silva

Assistente, Faculdade de Direito da Universidade de Lisboa

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Abstract

This short chapter presents an overview of the current state of law and economics in Portugal. Whereas no specific courses are taught on this subject, researchers in the field have been relatively active. An account is given of some of the research done so far in Portugal.

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1. Introduction

At present, law and economics seems to remain the province of a few scholars, mainly teaching at the University of Coimbra and University of Lisbon Law Schools and the Economics departments of the University of Coimbra, Universidade Nova and Universidade Católica, as well as the ISEG - Economics and Business School. With a few exceptions, such as a special issue by a law review, *Sub Iudice*, dedicated to Law and Economics, published in 1992, there seems to be a lack of institutionalized communication channels between scholars, particularly between lawyers and economists.

2. Law and Economics Courses

No specialized courses on law and economics exist in the current curricula at undergraduate level in either Economics or Law degrees. In Portugal, Law is taught as a five year degree following high school. The Economics degree has the same structure (although it may be completed in four years in some universities). The legal curriculum is mandatory during the first three years and there is no possibility of undergraduate interdisciplinary studies in other university departments. The economic training of law students consists, in most law schools, in a first-year, two semesters, course on Political Economy and a second-year, one semester, course on International Economic Relations. These courses tend to focus more on institutional and historical aspects rather than on

applied economic theory even at an elementary level. No formal economic theory is normally taught and only a few law schools adopt elementary textbooks such as Nordhaus/Samuelson. This is hardly surprising as lecturers and assistants of economic subjects are usually lawyers with no specific economic background.

On the other hand, economics students are typically taught two law courses of one semester each. The first course consists of an introduction to law, a simplified version of a similar subject taught to first-year law students. The second is an upper-class course, normally dealing with basic corporate and trade regulation law.

At graduate level, to my knowledge the only experiment so far has been in the Masters degree at the University of Lisbon Law School where a research seminar was held two years ago on basic game theory concepts by Emeritus Prof. Soares Martinez.

Despite this bleak outlook, law and economics basic concepts are fairly well known among legal scholars and they are reflected in their academic work.

The introduction of a specialized Law and Economics course in undergraduate curricula at law schools seems to be a remote prospect. A traditional approach to legal education tends to keep curricula unchanged for many years and there is at present no proposal for change in existing law schools. This may yet change as the Universidade Nova in Lisbon is in the process of setting up a new law school opening in 1997. Since this university has a well reputed economics department one may expect a greater inclination to innovate legal education by incorporating law and economics. At the time of writing the curricula was not yet available for comment.

As to the use of law and economics as a tool in specific subjects taught at law schools, this is greatly undermined by law students' general lack of any serious undergraduate economics background.

3. Research

3.1 Methodology and Fundamental Concepts

Professor Jorge Sinde Monteiro of the University of Coimbra Law School is one of the pioneers of law and economics in Portugal. In an article published in 1981 (Sinde Monteiro, 1981) he considers several methodological questions regarding the place of economic analysis of law in the context of the 'science of law' (jurisprudence). The author considers the role of values, and concludes that 'justice' as defined by law and economics scholars such as Guido Calabresi is not the same as lawyers' 'justice'. For the latter 'justice' is what the author terms a constitutive and regulative principle and not a merely empirical fact. His conclusion is that the economic analysis of law may usefully constitute an auxiliary science of law, but not science of law itself.

Professor Sousa Franco, of the University of Lisbon Law School and the Portuguese Catholic University Law School, emphasizes the role of economic analysis of law in overcoming legal positivism by providing a framework for the analysis of the content and purpose of legal rules (Sousa Franco, 1992). Nevertheless, he cautions against an excessive enthusiasm for economic analysis of law due to what he terms its materialistic and individualistic bias. The preservation of the particular values established by the legal system is necessary to prevent an instrumentalization of law and the replacement of non-economic or 'supra-economic' values. Despite these methodological issues, the author argues cogently for the role of economic analysis in overcoming a certain narrow-mindedness of legal studies and in bringing together law and its practice.

3.2 Civil Procedure

In the field of civil procedure, Justice Ribeiro Mendes of the Portuguese Constitutional Court has written one of the most interesting pieces of economic analysis of Portuguese law (Ribeiro Mendes, 1992). Setting out from Richard Posner's analysis of civil procedure, Justice Ribeiro Mendes examines some of the economic effects of the Portuguese rules regarding debt collection (executive procedure). The division between declarative procedure (mandatory for creditors that do not have an executive title) and the increased costs of this two-tier procedure create incentives to look for alternative ways of securing debt, such as guaranty cheques, hidden property guarantees, negative guarantees and withholding of title. Another significant problem examined by Justice Ribeiro Mendes is that of the sale of debtors' assets. In Portugal this sale is made by order of the courts and the tender takes place before a judge. According to the author, this system has developed into a collusive market, where bid-rigging is rampant, thus defrauding creditors and the State. The author envisages central sales agencies, managed by the State or by specially-regulated firms.

3.3 Antitrust

Moura e Silva (1993) attempts to show the tension and the interplay between intellectual property law with its concern for the protection of incentives to innovate and antitrust with its goal of maintaining competitive markets. The 1991 EC software directive incorporated this concern in the form of a decompilation exception which allows access to the elements of a computer program which are necessary to achieve interoperability. However, this delicate balance may be upset by the use of EC competition law in order to prevent the exercise of such intellectual property rights as a mean to foreclose competitors, as evidenced by the Magill case. Using the tools of economic analysis of intellectual property, he argues for moderation in the use of antitrust when

competitive concerns have already been reflected in the mechanism design of intellectual property laws, as is the case of EC software protection.

Moura e Silva (1994) analyses the application of the EC merger regulation until 1993, under the light of current industrial economics and compares the Commission's approach to that used by US antitrust enforcement agencies under the 1992 Merger Guidelines. An argument is made for greater use of economic analysis, especially regarding market definition, and for an explicit efficiencies defence.

3.4 Consumer Protection

Teixeira (1994) sets out from MacNeil's relational contract theory to study the structure of contracts involving different legal orders from the perspective of the choice of law and consumer protection. The impact of consumer protection goals in the context of rules on conflict of laws on the contractual balance between the parties is then analysed. The author argues, from a conflict of laws point of view, that the concept of market plays a pivotal role in defining the applicable law in the case of international consumer contracts within the European Union, particularly in light of the regime of the Rome and Brussels conventions, as this market construct is not merely economic but also has a social content protecting the legitimate expectations of consumers regardless of their nationality or country of origin.

4. Conclusion

In conclusion, law and economics is well disseminated among academia, particularly in those fields with greater contact with economic science, such as tax law or public finance. A growing number of private law scholars use economic analysis of law in their research work as evidenced in some of the research reviewed above. However, at academic level, law and economics in Portugal seems to suffer from two communication problems. One is the lack of a 'workshop' tradition in legal academia which could contribute to bring together the different scholars working in the field. The other is the divide between lawyers and economists in academia. Furthermore, the growing interest of academia in law and economics has yet to translate into a more common use of law and economics as a teaching method at both undergraduate and graduate levels.

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