
ECONOMIC ANALYSIS OF LAW: INTERNATIONAL EVOLUTION AND NATIONAL PERSPECTIVES

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Abstract: The thriving interdisciplinary research field of Law and Economics keeps being extremely successful. Its forty year existence (out of which more than twenty years have been of utmost formal recognition), the vast amount of theoretical research and the important practical legal implications it produced (via regulations as well as court decisions), and also the fact that it spread way beyond its birthplace borders are all reasons for it. In its specificity, it strives to explain and predict the behaviors of social participants. It also tries to align laws with desired consequences in areas such as economic efficiency, the distribution of income and wealth, or other values. Law and Economics should become a driving force in any national social change, decisions regarding the rules of the social game should be reached only upon a prudent and mature process including widespread debate, and Romania should carefully express the way it chooses to persevere and be regarded by other nations. This movement has influenced legal reform in a number of important areas, and in Romania's case it has the potential to crucially positively-impact the entire legal and economic system, through the discussion and application of its principles to the process of adopting the New Constitution. This is the main reason for which this paper will analyze the field of Economic Analysis of Law from its origins to the present and seek to reconcile this foreign framework with the specificities of the Romanian system.

Keywords: Romanian Constitution, Chicago School, Economic Analysis of Law, international history, economic perspectives.

The thriving field of Law and Economics has been dubbed "a success story of interdisciplinary research" (Hsiung, 2006, p. 2). Its forty year existence (out of which more than twenty years have been of utmost formal recognition), the vast amount of theoretical research and the important practical legal implications it produced (via regulations as well as court decisions), as well as its spreading way beyond birthplace borders are all reasons for which "to say that, among the numerous outward expeditions of economics since the 1960s, law and economics has been the most successful"¹. In its specificity, it strives to "explain and predict the behavior of ... persons regulated by the law" (Posner, 1998, p. 2). It also tries to align laws with desired consequences in areas such as economic efficiency, the distribution of income and wealth, or other values. This movement has influenced legal reform in a number of important areas², and in Romania's case it has the potential to crucially positively-impact the entire legal and economic system, through the discussion and application of its principles to the process of adopting the New Constitution.

We refer to the existence of this field as it was conceived, accepted and disseminated in modern times by the fertile American scholarly research movement. As it was drafted in the late 1950s in the United States of America and accepted by the scientific community due

¹ See Richard A. Posner and Francesco Parisi, *Introduction*, in Richard A. Posner and Francesco Parisi eds. *Law and Economics* (1997), at ix apud. *Ibidem*. For a more detailed analysis of this scientific field's importance and how it sometimes becomes daunting in its complexity, in theory as well as practice, see *Idem*, pp. 2-4.

² For more details on the matter, see *Idem*, pp. 2-3.

to the efforts of Richard A. Posner from the 1970s onwards, it was sometimes presented as a revolutionary way of merging the fields of Law and Economics, by applying the concepts and methods of the latter to the analyses of the former. However, recent historical research concluded that a broad movement of scholarly research was responsible for applying economic ideas in the quest for a better understanding of the legal field as early as the 1880s, especially in the work of Oliver Wendell Holmes, Jr. (Mackaay, 1999, p. 66) A fact also worth mentioning is that the economic analysis was at that time present in the historical endeavors coordinated by lawyers interested in researching the past. As such, from that time on, the lines that separated history, economy and law became increasingly more blurry (Schumpeter, 2006, pp. 749-750). A strong case is more recently being made to actively revitalize the union of Law and Economic analyses with a more historical approach in gathering the information to base the former upon (Harris, 2003, p. 696). But following these crucial historical acknowledgement, the more relevant evolution of the field of the Economic Analysis of Law stems from the developments originating in the University of Chicago.

Although many publications state that Law and Economics was born in 1933, the year Aaron Director and Henry Simons offered economics courses at the University of Chicago Law School, in fact 1902 and the views of Professor Ernst Freund should be given proper credit. The latter believed in what amounted to be a controversial degree at the time in the interdependence between law and social sciences. (Mordfin, Nagorsky, 2011).

1961 was a pivotal year in the history of this school of thought. The pioneering tort law works of University of Chicago's Ronald Coase and Yale's Guido Calabresi initiated the developments that led Economic Analysis of Law to be omnipresent in American legal discourses (Winkler, 2005, p. 1035). The contemporary and most ardent proponent of accepting Law and Economics into mainstream scientific research is University of Chicago's Richard A. Posner. His cornerstone thesis is that judicial activism can be, is and can be further on infused with economic reasoning in order to better the legal process (Zywicki, Sanders, 2008, pp. 563-564).

A noteworthy aspect arises – judicial activism is bound to the constraints that the judicial system and existing legal framework impose on the activity of the courts (Sutton, 2010, p. 868). We argue that this issue will definitely have to be addressed by a normative Law and Economics approach in the process of rethinking Romania's Constitutional Framework in such a manner that national judges will be able to justifiably use economic reasoning in reaching their decisions, as it is a crucial and complementary factor towards Law and Economics going hand in hand both in the legal arena as well as in the jurisprudential one. However, we are not going so far as to support fully-empowering judges to substitute tax and spend democratic consensus in the arena of achieving distributive objectives. The legislature should keep its main role in this matter, with judges carefully balancing out imperfections. Otherwise, economic efficiency could be harmed more than aided (Newman, 1998, p. 469).

Steven Shavell, an economics and then law professor at Harvard University is one of the most popular scholars in the modern Economic Analysis of Law movement, and considered to be the most representative figure in the third generation of researchers in this field. His treatise contributed immensely to the process of allocating economic consequences and properties to choices of legal doctrines and institutions (Posner, 2006, p. 405).

Today, the evolving interdisciplinary approach has led some of the most prestigious institutions of higher education in the world (including the London School of Economics) to conduct ample research and to offer programs that bridge the gap between Law and Economics. It was Calabresi's work that set the foundations for economic analysis of law to become a discipline within law schools (Hylton, 2005, p. 106). Romania does not lag far

behind in this regard, with the Bucharest Academy of Economic Studies recently having established a Legal Education Department³. European law and economics remains to be primarily driven by economists to this day (Gelter, Grechenig, 2014, p. 5). It has been considered that new directions could be explored in legal scholarship and teaching in these ripe times. These searches should not only build on, but move beyond the recent achievements of the field (Dubber, 2014, p. 1).

It is now important to consider the two main directions that Law and Economics scholars pursue in their scientific research endeavors. Some of them analyze the role that economic tools play in the process of pursuing legal policy. Part of the ‘normative’ branch of the field, they are concerned with using economics to determine the most efficient legal rules. The other branch, the ‘positive’ one, is rather preoccupied with using economics to analyze the effects that actual legal rules produce. (Hovenkamp, 1995, pp. 331-332) We will refer to the normative aspects from now on, especially in relation to their compatibility with the specificities of the Romanian system. We argue that because they are pre-systemic in nature, economic processes of thought can easily be applied in the process of choosing legal frameworks.

In organizing democratic systems as welfare states, it has been considered that the government receives the role of providing public services, maintaining security and ensuring equal treatment before the law through an agreement between the nation’s citizens and its authorities (Johnson, Minis, 1996, p. 1). Even though potentially compatible with the traditionally social-democratic modern welfare state Romanian approach, two important aspects that affect the way in which economic analysis can be applied to policy choice have to be noted. The first is that an economic analysis approach inevitably tries to link the notion of general fairness with individual welfare. The second is that case law, and even arguably legislation, are affected by notions of fairness. (Kaplow, Shavell, 1999, pp. 79-81) In these respects, the challenge lies in achieving fairness not through a victory on the moral battlefield, but on the grounds of optimal societal efficiency. Also, it has been convincingly argued that a combination of law and equity elements in the legal decision making endeavor is likely to be superior to using only one or the other (Smith, 2010, p. 3).

Over the course of this short, but detailed analysis, we have shown that the evolution of the scientific field of Law and Economics is rooted further back in time than was originally thought of. This fact only increases its legitimacy and allows for a historical approach to be applied in further discovering the ways in which it could benefit the analyses of modern times. Its current applications are numerous and we consider it to be pivotal in the process of rethinking the Romanian Constitutional framework. Especially due to the influence it currently exerts in the international arena and because the national scholarly research shows it is open to importing its approaches, it will definitely play an important part in crafting the national legal institutions and constructions of tomorrow. Because of the fact that the normative process is pre-systemic, we showed that no impediments would affect applying Economic Analysis of Law principles in the process of deciding future policy and legal frameworks. Also, we showed that Romania is in line with the modern European openness towards allowing this scholarly research field to flourish in the higher education arena. Because of these facts and developments, we strongly believe Law and Economics could positively impact the laws of our country. And as we have previously shown, it should do so not only in the process of enacting them, but also in the process by which judges subsequently

³ For more details on this expansion, as well as a very interesting analysis of the worldly aspects that lead scholars to pursue Law and Economics research, please see Gazal-Ayal, 2007, pp. 803-805.

administer them, by allowing the latter to more adequately and lawfully integrate economic reasoning in the equity considerations that should accompany any sound court decision.

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