LAW AND ECONOMICS
What's in it for us Civil Lawyers

DERECHO Y ECONOMÍA
¿Qué nos aporta a los juristas del Derecho Civil?

DIREITO E ECONOMIA
O que a área de Direito Civil oferece?

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Abstract

This article examines two questions that may hinder the development of law and economics scholarship in civil law jurisdictions. The first concerns whether law and economics provides insights to civil law scholarship that are as compelling as those observed in common law countries. I will argue in the affirmative. The second question explores whether legal scholarship can contribute to economics. This inquiry is grounded in recent research addressing the puzzle of the critical factors behind the unprecedented economic growth first observed in north-western Europe and subsequently exported to other regions of the world. If the pivotal factor is a shift in ideas and values that underpin individual liberty and dignity, thereby fostering radical innovation, then legal institutions play a crucial role in framing and supporting such transformative changes.

Keywords: Civil law countries; Common law jurisdictions; Legal thought; Legal institutions; Legal research; Roman law

Resumen

Este artículo examina dos cuestiones que podrían frenar la labor investigadora en Derecho y Economía en los países de Derecho romano. La primera es si el Derecho y la Economía ofrecen a la investigación en Derecho romano perspectivas tan prometedoras como las que se observan en los países de derecho consuetudinario. Argumentaré una respuesta afirmativa. La segunda cuestión es si la investigación jurídica tiene algo que ofrecer a la Economía. El punto de partida es una investigación muy reciente que propone una reflexión acerca de cuáles son y cuáles no son factores críticos para explicar el crecimiento observado primero en Europa noroccidental –como nunca antes en la historia de la humanidad– y luego en otras regiones del mundo. Si el factor crítico es un cambio en las ideas y valores que garantizan la libertad y la dignidad para intentar caminos radicalmente innovadores, el Derecho puede ofrecer perspectivas sobre las instituciones jurídicas que enmarcan ese cambio.

Palabras clave: Países de Derecho civil; Derecho consuetudinario; Pensamiento jurídico; Instituciones jurídicas; Investigación jurídica; Derecho romano

Resumo

Este artigo analisa duas questões que podem dificultar o desenvolvimento da pesquisa em Direito e Economia nos

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países de Direito Romano. A primeira refere-se à possibilidade de que o Direito e a Economia ofereçam perspectivas tão promissoras para a pesquisa em Direito Romano quanto aquelas observadas em países de Direito Consuetudinário. Argumentarei a favor dessa possibilidade. A segunda questão questiona se a pesquisa jurídica tem algo a oferecer à Economia. O ponto de partida é uma investigação recente que propõe uma reflexão sobre quais fatores são ou não críticos para explicar o crescimento observado, primeiramente, na Europa Ocidental –algo nunca antes visto na história da humanidad– e, posteriormente, em outras regiões do mundo. Se o fator crítico for uma mudança nas ideias e valores que garantem liberdade e dignidade, possibilitando a adoção de caminhos radicalmente inovadores, então o Direito pode oferecer insights relevantes sobre as instituições jurídicas que estruturam essa transformação.

Palavras-chave: Paises de Direito Civil; Países de Direito Consuetudinário; Pensamento jurídico; Instituições jurídicas; Pesquisa juríduca; Direito romano

INTRODUCTION

What is known as the economic analysis of law started in the United States about half a century ago.[1] It took off as a playful venture by economists outside their usual turf but turned out to be much more than that. In the legal community, it was an answer to the formalist view of the law, holding that all one needs to know about the law to apply it can be found in legal texts. The American Realism movement of the first half of the 20th century had already criticized that view (Twining 1973).

The book that opened economic analysis of law for the legal community was Posner's Economic Analysis of Law (Posner 1973). It proposed a precise and operational framework, across a broad scala of legal fields, to look at the effects of any legal rule amongst citizens affected by it.[2] It was written by a lawyer for other lawyers, in language lawyers were used to. It triggered a good deal of debate yet became the dominant tool from the social sciences to look at the common law. It outraced the other social science disciplines (sociology, criminology, anthropology) and became, as one senior observer put it, "the colonizer of legal scholarship" (Rose 2010, 369).

In thinking recently about the future of law and economics, one of its founding scholars, Guido Calabresi (2016), expressed the view that we should look not only at how economics can help legal scholarship, but also, symmetrically, at how law can help economic scholarship. In what follows, I look at both strands.[3]

1 I would like to extend my regards to Professor Mendez Reátegui (Universidad Autónoma of Chile) and Professor Romero Jarrín (Universidad Católica de Cuenca) for their kind invitation to collaborate on the LATAM Law and Economics scholarship (in general) and the Cálamo Law journal (in specific and very insightful terms). Final version prepared for Cálamo Law Journal based on the keynote lecture prepared for the 2023 Meeting of the Latin American and Caribbean Association for Law and Economics (ALACDE), in Bogota and Cali, Colombia, 23-27 October 2023.

2 This is so, since as i explained in Institutions are rules in a broad sense. Heiner (1983) has attempted to formalize the reasons for using rules, both heuristic rules in individual decision making and social rules in human interactions. Their virtue lies in the relative fixity they provide. But the fixity is also their weakness. At the time of its creation, an institution may be chosen to provide generally the best trade-off in the face of the circumstances of the moment. As circumstances change, institutions may come to represent less than optimal trade-offs and yet their fixity prevents them from being instantly adjusted. The benefit of fixity and predictability is bought at the risk of ill fit over time. […] Institutions constitute an enrichment of the law and economics agenda. The research programme they imply is not radically incompatible with the "optimization" 'efficiency) idea inherent in the neo classical agenda. But rather than assuming immediate optimization to be the goal of all decisions within the economic system, an institutional agenda would admit institutions as constraints on optimization and would consider change of institutions an independent goal. The general effort to take account of information asymmetry and other transaction costs, while preserving the assumption that individuals maximize utility, is coming to be called neo-institutional economics.

3 In a previous work i explained that:

> The function of the law is to articulate non-violent solutions to disputes and conflicts that may arise in the interaction amongst individuals in society, and to define the institutions whose mission it is to make those solutions prevail. Those institutions contribute to the nonviolent coordination of individuals' plans and actions. It is important to know whether legal rules in fact fulfil that function. To that end, one must determine the social effects of existing rules and to predict those of planned reforms. Knowledge of those social effects may show the wisdom of some existing rules and temper our fervor to reform them. At the same time, it may bring to light rules that produce harmful effects and whose braising d'être should be questioned. (MacKaay 2021, 9)

As regards the first, one may ask whether law and economics holds as much promise for civil law systems as it has shown to have for the common law (Part I). As for the second, are there puzzles in economic science where law can shed new light? (Part II)[4]

EAL AND CIVIL LAW SYSTEMS

From the outset, Posner's 1973 foundational book was read not only in the United States, but also in other English-speaking countries (Canada, the UK, Australia) and in several civil-law countries, which led the European Association of Law and Economics to be formed in Sweden, in 1984.

What is specific about civil-law systems and is there anything in it that makes them inherently less amenable to law and economics? What sets civil-law systems (besides Scotland and South Africa) apart is that core rules of law are spelt out in Codes. One ostensible purpose of Codes is to make the law more accessible. A Code should provide the rules covering all relationships within the field of law it governs. Any legal problem arising in that field should be soluble by reference to, and interpretation of, one or more provisions of the Code.

For the Code formula to work, several constraints must be observed. The Code must be relatively concise (beyond 4000 articles it becomes unwieldy, even with computer help). It should use ordinary language, as citizens use it. Yet it may have to use some abstract concepts summarizing a multitude of conceivable cases (one of the talents civil lawyers are trained to have been to relate abstract formulas to concrete cases and vice versa). The rules must fit together without gaps and without contradictions.[5]

Yet unforeseen, changed or novel circumstances do arise, and Codes must use some open-ended or fuzzy concepts (such as *good faith* or *abuse of rights*) to deal with them on the fly. Of course, where a radical change occurs (such as what we seem to be going through now in family law and the law of persons), some Code segments may have to be reframed.

Throughout all this, it is important to remember that law is not just a logical system, but a living framework enabling cooperation, coordination and resolution of conflict in society. It falls to legal scholarship to systematize the rules and show underlying principles and trends. In addition, as we also explained before:

> Over the past half century, the spectacular development of information technology has provided lawyers with most effective means instantly and easily to find relevant legal documents from amongst ever-increasing masses of them throughout the world. For any given legal problem, one can now in little time and in one spot –the screen of one's computer, tablet or smart phone– bring together all relevant law texts and case law.
> […]
> Where, a century ago, the quantity of documents that could be effectively considered for any legal question was practically bounded by that to which one could have physical access, that constraint has popped today. That development has made viable the unbridled multiplication of law texts we observe today, reinforcing a positivist view of the law that sees it as exhaustively described in

4 Law & Economics is a well-developed theoretical framework (microeconomics); it provides currently the most advanced application of the rational choice model to the law, which is one of the elements unifying the study and research in the social sciences arena. The Law and Economist movement originated amongst economists. Prominent amongst them were the Germans belonging to what came to be known as the 'German Historical School. The conjunction of political economy and law in the discipline called *Staatswissenschaft* may have stimulated their contribution. There were contributions in many other countries as well: Austria, Belgium, England, France, Italy, the Netherlands, the United States. Pearson lists more than one hundred names of participants in the movement. Only some of these are still remembered today: John R. Commons, Gustave de Molinari, Carl Menger, Gustav Schmoller, Werner Sombart, Adolph Wagner. (MacKaay 2021)

5 For instance, "at the time of their adoption, the statutory or case-based rule presents a legal arrangement that lifts the uncertainty that would paralyse individual action, allowing individuals to go ahead with their projects. Contractual rules prospectively present gains for all contracting parties. For the certainty effect to produce its effect, persons concerned must be able to rely on it for a reasonable time" (MacKaay 2021, 28).

> officially adopted written texts. At the same time, it may have led lawyers to move to the background any consideration of the social effects of rules. The social sciences, that should provide lawyers with the tools to assess the social effects of rules, have not evolved at the spectacular pace of information technologies, that would have balanced the different components of lawyering. Speaking of the social sciences, it is important to stress the essential unity underlying them, as Elster has done recently.
> […]
> They all seek descriptively, or positively, to understand how humanly created institutions (including laws) affect behavior, and, normatively, to understand how changes in these institutions would affect behavior. (MacKaay 2021)

In a superb article, just out, Schäfer has shown how this has been the European *ius commune* tradition since the revival of Roman law starting in Italy in the 12th and 13th centuries and spreading throughout Europe. (Schäfer 2024) The Codification movement of the 19th and 20th centuries "nationalized" the law, but comparative law and now also law and economics shed light on what unites the national laws. In all cases, civil-law courts felt able to interpret provisions of codes *contra legem* if other readings gave dysfunctional results or went against the principles of the system.

Though the citation analysis suggests Posner's book was read throughout Europe over the period 1973 to 2014, its acceptance proceeded by no means at the same pace everywhere. My own experience is with the transition to the French-speaking world. I picked up law and economics in Toronto in 1976-1977, where Professor Trebilcock was introducing it, having just picked it up himself in Chicago. In returning to Montreal in 1978, I felt it was incumbent upon me to help present it to a French-speaking readership, and in France, still then the centre of fundamental debates on the French civil–law tradition (Mackaay 2023).

At the time Posner's book came out, there was in France a treatise on civil law by a well-known civil law scholar and legal sociologist, Jean Carbonnier (1955). At first blush, it seemed to have some similarities with Posner's book. It presented an overview of all the civil law, in a language and with a structure familiar to lawyers. It interspersed this presentation with pointers to publications in legal theory, sociology and anthropology of law, political economy, adding depth to one's understanding. The book had been first published in the 1950s as part of a reform process of legal education in France, after WW II, when voices were raised seeking more input from the social sciences. But the reformers did not get far; French legal education remained relatively formalist. All along his career, Carbonnier was careful in framing his observations not to alienate the mainstream of French legal education. Perhaps his very minimalist endorsement of law and economics should be seen in that light.

One might have hoped that Posner's ideas would find their way into Carbonnier's observations on what lawyers could take away from neighboring sciences, but that get-together never happened. In the 1980s, law and economics remained in France the preserve of economists (Harnay 2015). For lawyers, American legal culture seemed too far removed to learn anything useful from.

By the 1990s, perhaps under the influence of movements elsewhere in the EU (and outside Canada) (Mackaay 2021), French legal scholars came around. Here is senior scholar Oppetit:

> Essentially, the economic analysis of law provides the lawyer with a method designed to enable him to rethink the functions of legal institutions: it focuses on a dynamic vision of law, envisaged in its historicity and its perfection, as opposed to the statics of a system closed in on itself, in which the lawyer tends only to make an exhaustive inventory of the rules of established law and to seek solutions to new legal problems within his discipline. (1992, 23)

From then on, French legal scholarship joined the fray and took an active part in the European Law and Economics Association. French law and economics association (AFED) was set up in 2016 and is flourishing. In 1992, a then young, now quite senior civil lawyer voiced what might be the leitmotiv for law and economics working in civil law systems:

> In fact, many authors seem to us to be a little frightened of the consequences that might result from the introduction, in France, of such a way of thinking, which is so fundamentally different from our own. This is why we have tried to show that economic analysis is in fact not so alien to our traditions and that, very often, the reasoning used by Anglo-Saxon authors is perfectly identical to ours, even if they prefer to give them the label of economic analysis, whereas we prefer to justify them on the grounds of equity. (Fabre-Magnan 1992, 116)

To sum up, law and economics proposes a *functional approach* to law:

a) Legal institutions serve a *purpose*,
b) that should contribute to human *wellbeing* and
c) be amenable to *measurement.*

That approach should be useful in civil law systems as much as in common law systems. The economic analysis of law articulates legal intuitions and thereby helps the civil law. It can legitimise many civil law concepts that are the core of legal scholarship.[6]

Consider, by way of example, civil liability law (torts). If you wonder what function that law serves and turn to doctrinal works for an answer, you are likely to find that its purpose is to compensate victims of accidents and thereby to re-establish some equilibrium. Now look at that law as aimed not only at indemnifying victims, but also at providing to those who might cause accidents the (financial) incentive to adopt the appropriate care to avoid accidents or reduce their damage where the cost of care is lower than the cost of the accident, discounted by the probability of its occurrence. In this light, the concepts of fault (*faute*), causality, damage done and others make eminent sense. With this conceptual apparatus in hand, you are now equipped to tackle such matters as products liability and other no-fault liabilities, punitive damages, etc.

For the civil law, let us use the economic analysis of law to trace the economic sense we can make of the grand principles and concepts underlying our Codes.

THE CHALLENGE FOR ECONOMICS:
Explaining the Great Enrichment

Over the course of the last century, economic science has made great strides in explaining the functioning and role of markets, through equilibrium models, the workings of money and inflation, entrepreneurship and modest growth. For a closer look at it during the first half of that century, turn to Caldwell's superb biography of Hayek (Caldwell 2022) and follow up with Burns' biography of Friedman (Burns 2023). Are there important puzzles it has not solved? In a new book, McCloskey argues there are: What economics needs to explain properly is The Great Enrichment, how over the past two centuries, starting in Western Europe and then spreading to other parts of the world, wealth available to citizens has been multiplied by a factor of 30 to 100. (McCloskey 2022)

The question of what can stimulate growth started to be seriously debated during the Great Crisis of the 1930s, with some arguing that capitalist economies were no longer viable and should be replaced by planned

6 Also, as I explained in an earlier contribution: "with respect to the earlier attempts at law and economics, it should be observed that they had declined by the 1930s and find no clear echo in the current movement, outside the work of modern institutionalists such as Samuels and Schmid. Various reasons are given: their methodology became increasingly fuzzy; in the end they failed to convince lawyers, in the absence of a straightforward methodology and telling insights into the nature of legal phenomena. Perhaps, too, the problems they addressed and the solutions they proposed–generally more government intervention–no longer appeared relevant to the legal community. These observations feed into the second finding, the astounding variety of viewpoints now represented within law and economics broadly written. Will this cacophony drive law and economics into oblivion? It ought not to, since law and economics of whatever stripe still offers insights into a broad range of legal phenomena from contracts, torts and property to commercial law, constitutional law, criminal law and even family law. The task is to convince lawyers that this is a useful, indeed an essential, supplement to traditional lawyering skills. Where law changes rapidly, as it does in our day, lawyers are inevitably involved in policymaking of some sort. The record of lawyers managing such change on the strength of legal skills and legal practice alone is disappointing at best." (Mackaay 1999, 92)

economies. Against this view, Mises and Hayek, on the contrary, argued that no central planner could ever have access to all the knowledge of time and place of the individual participants in a market. That debate was definitively settled only 1989 … After World War II, an urgent demand appeared for "recipes" to create the institutions and other conditions for rapid economic growth in the decolonized countries.[7] Many formulas were tried: socialism, state planning, protectionism, foreign aid. Most had mixed if not outright disastrous effects. In a broad scale 2019 study comparing growth rates, encompassing a significant number of countries, Acemoglu and Robinson conclude that differences in wealth are not due to culture, climate, geography or colonial heritage, but are due to institutional differences. Countries where government can be made to abstain from despoiling citizens (security of property rights) will outperform those with "extractive" governments; in the former, conditions are met for the accumulation of capital, risk-taking and innovation. (Acemoglu 2019) The institutional factors are surely essential *enabling* factors for growth. But do they explain *jump growth*?

In a massive trilogy the concluding volume of which appeared in 2016, McCloskey returns to what caused jump growth in North-Western Europe just two centuries ago. (McCloskey 2016) It was not accumulation of capital, as Marx thought and as "capitalism" implies; nor was it a variety of technical advances: China has for centuries been way ahead of Europe on this score; nor could it be explained by "material matters of race, class, gender, power, climate, culture, religion, genetics, geography, institutions, or nationality" (McCloskey 2016, 11); nor by:

> deeply erroneous pseudo–discoveries of the nineteenth century– Benthamite utilitarianism, Comtean positivism, nationalism, socialism, historical materialism, social Darwinism, scientific racism, theorized imperialism, eugenics, geographic determinism, institutionalism, social engineering, progressive regulation, the rule of experts, and a cynicism about the force of ethical ideas. (McCloskey 2016, 14)

Nor can the protection of property rights be the explanation, since cities and states have always provided it, the alternative being chaos and disintegration of realms (McCloskey 2016). Stable property rights and enforceable contracts are essential *enabling* conditions.

The critical difference lies, in her view, at the level of ideas. Through fortuitous circumstances, first in Holland, then England, then North America, it became accepted and respectable to make a fortune through innovation and trade in the market –you needn't be an aristocrat, a politician or a clergyman, everyone could have a go at it– bourgeois equality. In her 2022 book, McCloskey labels these ideas *liberty* and *dignity* (McCloskey 2022). Once their virtues were there for all to see, they could be –and were– imitated elsewhere.

Besides the institutions that frame a market economy (Cooter 2012, Prado 2021), what needs to be done is to liberate the inventive and innovative forces of all individuals, by ensuring people's dignity and space to improve their lot (within bounds of legality), McCloskey's (2022) liberty and dignity. These are the very factors that Fabre-Magnan studies in a recent book (2023).

Human rights ensure the liberty and dignity that will allow people to change beliefs and aim for innovative activities that may disturb existing patterns of doing things but help jump growth. Here we have an area of the law which may have been left somewhat in the shadows in the law and economics research but now

7 Moreover, it is necessary to link the following thought. To understand what an institution is, start with the neoclassical model. The model supposes that agents are informed about potential trades, that profitable agreements are reached without delay or posturing and that deals are faithfully performed. These are, to be sure, simplifying assumptions to make the model manageable. They allow one to construct arguments about how social optimal arrangements (efficiency) come about. In this model there is no need for the fixity that institutions provide: "Because most of the formal economic models of competition, exchange, and equilibrium have ignored ignorance and lack of costless full and perfect information, many institutions of our economic system, institutions that are productive in creating knowledge more cheaply than otherwise have been erroneously treated as parasitic appendages. The explanation of use of money, expertise with dealing in a good as a middleman specialist with a trademark or brand name, reputability or goodwill, along with advertising of one's wares (and even unemployment) is often misunderstood. All these can be derived from the same information cost factors that give rise to use of an intermediary medium of exchange'. 'If human beings were omniscient, most markets would make no sense. After all, there's no reason to trade stocks if everyone knows the true value of every company. But people are not omniscient. And markets are the best way yet devised to overcome human limitations in deciding what to build, buy, or sell". (Mackaay 1999, 82)

needs our attention. Let us investigate precisely how it may help to enable the factors that made the essential difference for jump growth.

For law and economics scholarship, there are several implications. Besides the study of market enabling legal institutions, we must now also look at those that ensure the critical soft factors that clear the deck for jump growth. As jumps in growth can now be observed in a host of Asian countries, do we see a change in ideology that must have been necessary, if McCloskey is right, for that creative surge to take place?

What happens if the ideological factor comes to be questioned, as Ferguson fears is happening in the West, where jump growth started? (Ferguson 2012). He takes as indices the public debt crisis (free riding at the expense of future generations) and the inability of Congress and the US President to agree on how to fund public expenditures.

CONCLUSION

Our deliberations lead to two three conclusions. The first is that there are no good reasons to think that law and economics has anything less to offer to civil law scholars than it does to their common law colleagues. Law and economics should go here hand in hand with comparative law.

Besides taking insights from economics, law can also offer some to economists. McCloskey emphasizes "soft" factors (ideas, ideology) as driving forces behind the jump growth of the last two and a half centuries, unique to human history. If that thesis is right, legal scholarship can point to the legal institutions that support those soft factors of liberty and dignity: human rights. That area of law should now be pulled into the limelight.

To properly understand the law, it is not sufficient only to know all the legislative texts, international treaties and the associated case law, and to ensure that they form a seamless web without internal contradictions. The function of the law is to articulate non-violent solutions to disputes and conflicts that may arise in the interaction amongst individuals in society, and to define the institutions whose mission it is to make those solutions prevail. Then, it is important to know whether legal rules in fact fulfil that function. Law and Economics as a functional approach helps to determine the social effects of existing rules and to predict those of planned reforms.

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