

Variety of Options for the Economic Analysis of Law as a Prerequisite for the Integration of the Methodology of Economic Theory and Jurisprudence

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Abstract

One of the brightest and most successful phenomena in the social sciences of the XX century was the school of the economic analysis of law originated at the University of Chicago (USA), which founder is considered to be R. Posner. Scientists who have made a significant contribution to the development of economic analysis of law, repeatedly became winners of the Nobel Prize in economics (M. Friedman (1976), J. Stigler (1982), R. Coase (1991), G. Becker (1992) D. North and R. Fogel (1993), D. Nash (1994)). At the same time the integration into the jurisprudence of research methodology used by them is facing with charges of its own internal heterogeneity and contradictoriness. However, in this exact right economy pluralism not its defect but rather its dignity is rooted, allowing law of each country, as an element of internal culture, to integrate into its system of scientific knowledge the very version of the economic analysis of law, which is most appropriate to the given conditions, sticking at the same time to the context of today's global science of an interdisciplinary paradigm. This article provides an review of the most relevant and important branches of economic analysis of law through the perspective of their applicability in the context of continental legal systems.

Keywords: law and economics, approaches, methodology.

1. Introduction

Nowadays the state of modern legal theory, both in Russia and abroad, is often described in terms of crisis. It is pointed to the inextricable link of the stated phenomena with global cultural processes, especially with the collapse of the old modernist ideological paradigm and the formation of a new system of values (Zhdanov et al, 2015, p.75). Among the various legal theories, variously describing the legal reality, the economic theory of law is the most interesting one.

The variety of the range of tasks that can be solved by the economic analysis of law, stipulates for invariance, and in some measure even for the polymorphic character of that "multidisciplinary research schools» (Timofeev, 2015, p.198). Firstly, the economic analysis of law can detect, capture and examine the existing patterns of interaction of economics and law (in this case its predictive function is implemented – the economic analysis posses tolls for the prediction of the results of impact of legal norms on the behavior of subjects to whom they are addressed; as well as heuristic and descriptive function - economic analysis allows one to understand and describe the economic background and the mechanisms of action and the implementation of legal regulations). Second, the economic analysis of law has the potential to develop proposals for changes in the regulation in accordance with the criterion of efficiency. Depending on the task given, the tools of research, and, ultimately - a relatively independent version of the economic analysis of law (in the first case - a positive one, and the second – a normative one) are formulated. That already in itself provides a sufficient diversity within the economic analysis of law. However, this variation is not reduced because within each of the sectors there are also their own approaches to the evaluating of the effectiveness (the dispute about the criteria for its measurement according to Pareto, Kaldor-Higgs or Rawls), the priorities of legal regulation (the creation of new markets, transsanctions costs reduction, property rights maximum specification and so on.), the role of institutions assessing, etc. Finally, the interaction with related scientific trends, such as game theory, public choice theory, sociology of law, the theory of bounded rationality and strategic behavior is associated with the search of criteria of their mutual demarcation.

This diversity, multiplied by the initially unequal conditions for the application of economic analysis of law in continental law countries (where the legal system was formed based on the reception of Roman law, which led to the hegemony of dogmatism), and in common law countries (where judicial authority, independent of legislature from the judiciary, creating a "market of precedents", originally favored scientific understanding is "real law": legal realism, a critical legal studies school) involves the cautious attitude to the law and economics methodology in an academic environment in continental Europe, in particular in the Russian Federation. We ourselves believe that it is exactly the variety of variants of economic analysis of law allows one to suggest its global applicability (albeit with some reservations) in the conditions of any legal system, and the beneficiary of that scientific creativity development direction, both for legal theory and for economic theory itself. Although there is a quite witty remark expressed in the literature saying that the idea to understand all the intricacies and varieties of the economic analysis of law, while isolating the relevant methodology, is no more successful than trying to eat spaghetti with a spoon (Duxbury, 1995, p.314), we yet will still try to shed light on that tangled issue.

The basic premise, the further analysis is based on, is a dialectical hypothesis of existence of potentially being studied (with the help of economic analysis of law) and repetitive patterns of interaction and mutual influence of basic economic mechanisms and any legal system. Taking into account the magnitude and the abundance of accumulated material on the subject, it seems necessary to retreat from the historical methods of research in favor of the use of the functional methodology and the application of the techniques for scientific classification building, with comparative method as an auxiliary one using. In our view, the use of the illustrated methodology will allow to select and review the most significant kinds of law and economics in their systematic relationship by the current moment, at the same time will allow to assess their potential utility in a Roman-Germanic legal tradition.

2. The Classification of the Economic Analysis of Law

2.1 Positive and Normative Law Economics

The division of the economy of law to the positive and regulatory branch has its origins in a research tradition of the economic theory itself, turning into economic analysis of law, as it were "inherited". Positive economics of law is a more empirical science, which describes the society for what it is, and in this sense it is an objective discipline that in addition allows to make predictions in respect to the way of how to change people's behavior in response to the changes in the legislation. Economic Analysis of Law in such a way – is an *ex ante* approach, considering the legal system as a system of incentives that determine the behavior of economic agents, rather than as a mechanism for dispute resolution (although this understanding is typical for the classical dogmatic jurisprudence of Roman-Germanic tradition).

The task of the positive economy of law is to create a set of verifiable (meeting the criteria of falsifiability) predictions that can be proved or disproved by empirical facts and to assess the extent to which the existing legal doctrines correspond to the criterion of efficiency. Layers alertness is produced by simple, reductionist character of the models created by that way, their conventionality and reliance on unrealistic, counterfactual background, cut off from the variety of concurrent real-life factors. Critics of positive analysis emphasize that excessive concentration only on economic factors may result underestimation of many unintended consequences of legal intervention, which makes political decisions based solely on economic theory simply dangerous (Parisi, 2004, p.264).

Thus, the positive economic analysis allows, as indicated by Hirsch, deal with the assessment of legal consequences (effect evaluation). For example, using this methodology the analysis of criminal activities, in particular the issues of deterrence of crime through the death penalty, was carried out (the author of this work was Isaac Ehrlich) (Veljanovski, 1980, p. 158). If the crime is considered as a reasonable action then it is influenced by the expected level of profit directly affects income that has its "price" as a punishment consisting of the degree of severity of the sanctions and the frequency of its use (the principle of the punishment inevitability). Positive Economy of Law can answer not only the question of what "price" will have the greatest deterrent effect, but also the question of the change of which of parameters at the moment will be of the most effective for legal policy. Of course, this kind of data is extremely useful while making legally significant decisions during the invasion of social processes through their legal regulation.

In contrast to the positive theory, regulatory economics of law (theory of welfare) focuses on the issues of allocative efficiency, determination of situations deviating from the principle of efficiency and search for corrective solutions. This approach requires not only the evaluation and implementation of predictive functions, but also the modernization of the legal regulations, the changes in the legal system on the basis of the conclusions drawn within the economy of law. For example, G. Calabresi in his "Costs of accidents" criticizing the existing system of liability for accidents as an ineffective one, offers a different structure of legal regulations and institutions, which in his view would be more effective, as it will redistribute the damage to the side that tries to avoid it with minimal costs (Calabresi, 1970).

Allocative efficiency reflects the concept of unimprovability or no possibility of the conversion of productive activity or distribution, which would increase the welfare of society, as measured by the prices in a competitive market (for a given distribution of income and wealth).

Normative economic theory of welfare is based on the concept of market failure. If the assumptions underlying the concept of "perfect competitive market" is not met, the market either cease to exist, or is not effective (there is a market failure take place, the cause of which may be a number of factors with externalities which are of the most importance to the economy of law), which is viewed as an essential criterion for legal intervention.

Normative economics of law attaches great importance to the effectiveness, which R. Posner considered as a general purpose of the legal system, and, therefore, as a desirable and positive characteristic of legal regulations themselves. Such logic of reasoning leads some scientists to conclusion that the economy of law this or that way possesses a normative connotation, which is of the obvious benefit for the legal reforms as V.A. Tambovtsev points out (Tambovtsev, 2005, p.16).

However, in our opinion, persuasion in the success of normative economic analysis of law in the context of continental legal systems is a bit utopian, but not because of blameworthiness of the scientific approach, but rather because of the prevailing conditions in which it is supposed to be used. In continental law countries interdisciplinary research is often perceived by lawyers as a threat of their independence, as a challenge to a "pure" law, legal dogma having in their view a completely autonomous content based on justice rather than efficiency. As consequence, the use of economic analysis in Russia meets with the accusation of an inadmissible simplification of the reality, the fallaciousness of research method, relying on counter-factual assumptions (pragmatic legal scholars somehow believe a conception of the subject of law as rational maximizers of their welfare, working in resource-limited settings to be an idealistic one). For example, M.V. Antonov believes that "notwithstanding different, diametrically opposite ideological slogans the supporters of economic analysis of law used the same methodological tools as the Marxists - the reduction of the legal pluralist reality to one of its aspects, to the economic factor" (Antonov, 2011, p. 19). However, the inevitable reductionism and counter-factual nature of positive economic analysis of law are presented as not so significant or irremovable defect of the theory. As the Nobel laureate in economics Milton Friedman pointed out, the main thing in any theoretical design is not its conformity to the reality, but the predictive ability, which is often higher in the theories that are frankly based on counter-factual assumptions (Friedman, 1966).

The evaluation of quantifiable measured effectiveness, instead of searching a justice interpreted in different way by different people, is the basic contradiction of the economic theory of law with the representation of the right entrenched in the minds of the continental law lawyer, which in our opinion prevents from adopting the normative economic analysis of law (Dworkin, 1980). The attempt to building in "efficiency" to the system of legal values conflicts with the dogmatic jurisprudence, it is perceived as an intervention of economists and even more as a threat to their legal sovereignty.

It seems that in these conditions the perception of the economy of law in its "positive" version (emphasis on analytical and predictive capabilities approach) that is more compatible with the continental legal system is more probable. The formulation of testable hypotheses about the consequences of this or that legal decisions, and also the possibility of measuring of legal solutions costs including the variants of legal regulation interpretation - these are the areas in which the economic analysis of law can be most effective, and even indispensable, including in Russia.

2.2 *The Evaluation of the Effectiveness: the criteria of Pareto, Kaldor-Hicks and Rawls*

In any of its varieties, and especially in the context of regulatory options, the economic analysis of law is faced with the need to evaluate the effectiveness. The task of assessing the effectiveness of the legal regulations requires their comparison and evaluation in terms of the results they need to maximize at minimum cost. As such a result it is supposed to use the total utility (aggregate utility) or total wealth (aggregate wealth) (Odintsov, 2007, p. 30).

The utilitarian model of legal policy evaluation dominated until the 1930s was based on the ideas of J. Bentham stated that all people equally possess the ability to happiness and one can directly compare their winnings ("pleasure") and loss ("sufferings"). The greatest happiness for the greatest number of people - that was believed to be the goal of the legislation. Jeremy Bentham's ideas inspired many politicians and lawyers in England for over a century (Ostroumov al, 2015).

However, after the criticism of Robbins, questioned the possibility of interpersonal comparisons of utility and their quantitative measurement in general (the principle of cardinalism), new criteria of effectiveness evaluation were developed.

According to Pareto criterion, if the law (the judgment) will improve the situation of at least one of the members of society and at the same time does not worsen the situation of any member of society, it is efficient. According to Pareto-

optimal results the further improvement is impossible without harm. The advantage of the criterion is in avoiding the problem of preference aggregation and utilities comparison. It is also logical that effective legal (judicial) decisions, according to Pareto, must be made unanimously by all members of society, which is hardly feasible in practice.

Ignoring of gains from changes in the state with excessive concentration in emerging losses draws the fire of criticism of Pareto-efficiency. Members of society preferences are not evaluated (the useful for drug addicts and the useful for scientists here are in the same plane), and the existing distribution of resources in society is understood as a firm basis and any relationship is regarded as a market one. In addition, the results of the criterion application initially dependent on the distribution of wealth in a society, and thus with different distribution of resources and income many Pareto-efficient solutions that cannot be compared with each other. are possible.

In reality, the application of the Pareto criterion for the analysis of legal regulation is extremely difficult due to its idealistic character. For example, the introduction of the compulsory third party liability insurance is certainly an achievement of civilized society, allowing effectively redistribute risks and losses caused by auto users as a result of the accident. Victims of accidents receive compensation, the repair of damaged vehicles is faster, insurance companies make enormous profits, the overall level of danger on the road decreases. However, the decision to introduce the system of compulsory third party liability insurance is not efficient according to Pareto, as it entails deterioration for car owners who have to pay for insurance.

In accordance with the Kaldor-Hicks criterion "a state A is preferable to a state B if those who benefit from the transition to a state A may indemnify for those who suffered from this transition, and still stay in the win" (Odintsov, 2007, p. 35). Later on Sitovski completed the criterion with the condition of impossibility of returning to the initial state.

It is easy to notice that the Kaldor-Hicks criterion involves comparing the benefits of some with the losses of some others, so again the comparison and summation of preferences, carrying out a full analysis of gains and losses (cost-benefit analysis). As a measure of the intensity the willingness to pay for the benefit measured in money can be used (the right is transmitted to the side, which will pay a higher price for it). As a result, society in general seeks to maximize not total utility, but the total wealth (wealth maximization). The criterion of wealth maximization was proposed by Posner as the main one to assess the effectiveness in the economics of law (the wealth as a measure of utility maximization). However, for example, R. Dworkin pointed out that this criterion is also wrong, because originally a rich person is not in need of any good (right) as far as a poor one needs it, and still he is able to pay more for it, and, based on the maximization of wealth, he must obtain it. In our opinion, the criterion of Kaldor - Higgs is more useful and applicable in practice for economic analysis of legal solutions, enabling thinner, compared with Pareto's, analytics. Thus, Higgs-Kaldor criterion allows to discuss the possibility of the initiation of protective duties on the import of goods by comparing the winnings of local producers with the losses of importers, not rejecting this idea only on the grounds that one of the subjects will inevitably incur costs.

However, dissatisfaction with the conclusions that follow from the principles of utility maximization (the transition of all the resources to the people who enjoy life) and maximization of wealth (the transition of all the resources in the hands of the rich), had led Rawls to the development of another criterion that would allow one to take into account the injustice of impact of the distribution of resources on the welfare of society. He proposed to assess the welfare of society for the welfare of the weakest of its members. A fair decision in this case, is such a decision that the individual makes without the influence of personal interests - in comparing societies the choice will fall on one of them, in which the individual would feel better if he turns to the poorest members of society (a similar principle of the game theory is called the maximin principle).

Thus, there is no single criterion for assessing the effectiveness of the economy of law, and each of the variants described above, in practice faces a number of difficulties and objective limits of applicability, finding at the same time both supporters and critics. At the same time at present the Kaldor-Higgs criterion is the most applicable to the current realities of the legal systems of continental Europe. Rawls' position can probably be useful for the development of a policy of the law in the countries, which are pronounced "social state", for example, in Sweden. If, however, a legal solution meets the criterion of Pareto, it is very likely correct and worthy of attention, as the improvement according to Pareto, in principle, is allowed only if all parties benefit (win-win strategy).

2.3 *The Chicago and the Austrian Schools of Economics of Law*

A definition of the science "school" commonly refers to a group of scientists who share a common approach to the research in any field of knowledge. Due to the subjectivity of such a determination, the problem of allocation of different schools within such a vast and dynamic study of the economy of law is quite debatable.

So, there is a point of view that, in connection with an unlimited flow of mainstream, all the tendencies which are

available in the economic analysis of law are well within the mainstream of the Chicago School, which is able to understand the criticism of the scientists using different methods or exploring other objects (De Gest) (Balsevich 2007, p. 247).

However, Mckay says about the presence of the four main schools in the economy of law (after the economy): the Chicago School, the old and the new institutionalism, and the Austrian school. This division is based on the fundamental differences in views and approaches of their supporters (Mackay, 2000, p.108). At the same time Tecl and Holtshauer guided by the conception of research programs (Imre Lakatos), came to the conclusion that there is a "hard core" in the Chicago and the Austrian school of economic analysis of law.

The Chicago School of the economics of law, which, in fact, is the "classic" (and for a long time was the only) version of this scientific field, is based on the theory of rational choice. R. Posner in his basic work "Economic Analysis of Law" (1972) formulated the basic prerequisites and conditions, based on which further studies were based. The starting point of his argument is that people constantly, even when making non-market solutions (e.g. choosing driving speed), seek to maximize profits, taking into account the possible costs. The legal system in its term establishes a right implicit price accompanying the adoption of this or that decision. Therefore, the alteration of such a system of prices affects the amount of behavior that the individual is ready to consume. Finally, the achievement of efficiency is understood by the supporters of the Chicago school as the overall objective of the whole system of common law (according to Pareto or Kaldor-Higgs).

The Coase theorem is the cornerstone of the Chicago School, which include all of the premises stated above. It says that "if the ownership is fully specified, and the transaction costs are equal to zero, then the parties of the conflict can agree on an effective result that is independent of the initial distribution of rights." Thus, in a world where transaction costs are always positive the problem of the legislative distribution of property rights becomes actual one.

The Austrian school of economics of law differs from the Chicago School due to its initial preconditions of the analysis, the range of tasks and the final conclusions. The methodology of the Austrians, which in its content closer to mathematics rather than to the natural sciences, is based on the ideas of Mises, who, in turn, bases on the Kant teachings of synthetic aprioristic judgments.

Praxeological method used by the Austrian school is characterized by subjectivism (the evaluation by consumers for goods and services based on their preferences is deeply subjective and closed to others, preferences change with time), the uncertainty of the future and the instability of the environment, the uncertainty of outcomes of social processes, individualism and the presence of natural property rights. The market is considered in dynamics, not statics, the processes leading to balance but not the balance is in the center. Individuals operate in the condition of the incompletes of information, uncertainty, expectations of the future. The evaluation of effectiveness which is based on a constant structure of preferences and institutions does not make sense.

Many authors, including lawyers, for example, Schwartzstein believe that the central principles of the Austrian school allow better understanding of the legal institutions (Schwartzstein, 1994, p. 1050). However, the application of the methodology of the Austrian school is associated with a number of difficulties, in particular to the fact that its approach supposes avoiding value judgments and concentration on the laws (positive economics of law) and makes it difficult to obtain legal recommendations.

At the heart of the Austrian school is the theory of natural law. As a result of its refraction through the lenses of praxeological methodology, the thesis that the "transfer of ownership from one agent to another may be carried out only as a result of voluntary exchange; any other redistribution of property rights in favor of the more efficient use do not meet the principles of the Austrian school approach" became true (Balsevich, 2007, p. 17). So, in the context of this approach the main idea of the Chicago school of economic analysis of law, based on the Coase Theorem, is incorrect.

However, from the standpoint of R. Posner, in the course of time the Chicago school will modify, will enrich itself with matters which are now outside. At that this diversity of approaches makes it possible to look at the situation as a whole, and specific areas allow one to analyze the specific questions quantitatively. Leaving the question of the future of the Chicago school open, we note only that the application of the Austrian school version of the economic analysis of law in continental Europe, concentrated mainly on a positive methodology, as we have seen, fully meets the conditions existing in the Roman-Germanic legal tradition without its interference to the process of legal regulation, but at the same time providing predictions possessing sufficient reliability and fixing existing laws.

3. Conclusions

In addition to the varieties of economic analysis of law that we have discussed above there are other classifications. Thus, for example, A.V. Shmakov guided by functional criteria identifies prescribing (they propose rules which are

necessary to achieve formulated goals without the assumption that such rules are mandatory), predictive (or instrumental, aimed at the prediction) and narrative (or descriptive, accented on the building of models and the description of their premises) varieties of economic analysis of law (Shmakov, 2005 p.77).

In the result of the study carried out it can be concluded that despite some difficulties with perception, in economic analysis of law has a future not only in the common law countries, but also in the countries of the continental law. The real cause of the difficulty is not a different system of law sources, as it might seem at first glance, but the predominant type of "legal thinking." The undeniable advantage of the economic analysis of law with its high potential in the quantification makes it perspective even for the supporters of the legal dogmatists on terra incognita of multidisciplinary research. The success of the continent's branch of positive trends, based on the Kaldor-Higgs criterion, cost-benefit analysis and focuses on the predictive and descriptive (heuristic) function is most probable. The fears of lawyers of the encroachment on the sovereignty of law as an element of national culture must be overcome with time, as the economic analysis of law is merely trying to understand the forces that act in the law as a universal phenomenon of social organization, and not just in the law as a particular legal system (Mattei, 1997).

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