June, 1991

Economic Analysis in Civil Law Countries: Past, Present, Future

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The nineteenth century was an age of systematic legal theory, but theory of the sort we now describe as "conceptualist" or "formalistic." As many rules as possible were to be deduced from the smallest possible number of definitions and concepts. In the early twentieth century, this conceptualism was discredited, leaving a theoretical vacuum that we are only beginning to fill. The most dramatic effort to do so may well be the economic analysis of law, a movement that began after 1960, when legal sanctions began to be analyzed as if they were market prices. In contrast to nineteenth-century conceptualism, economics provided a theoretical approach that was instrumentalist and policy-oriented. In the United States the common law subjects were reworked using techniques of comparative statics, with profound effects on legal education and scholarship.¹

Is this success being repeated in other countries? This symposium is the first systematic attempt to find out. The idea of the symposium began with a discussion at Berkeley in which Professor Christian Kirchner presented his thoughts on impediments to economic analysis in Germany. Professors Robert Cooter and Ugo Mattei subsequently contacted scholars from different countries who are actively engaged in law and economics research and invited them to participate in a symposium called "Economic Analysis in Civil Law Countries: Past, Present, Future." The symposium was held in Rome in August 1990 as part of the European Law and Economics Association's seventh annual meeting. Authors were each asked to review the state of law and economics scholarship in their own country and describe its impact (if any) on law and public policy. After providing such a description, the authors were to give their views about the future of the subject in their country.

The reports cover most Western European countries and Japan. In the case of the Netherlands, we have no report, but J. Backhaus prepared an excellent eighteen-page bibliography of law and economics research that the editors of this journal will supply upon request. Professor Backhaus observes that four introductory textbooks have appeared over the last three years, that most of the publication outlets are traditional law publications, which shows that much of the research is applied and thereby already rooted in legal practice.

There are some glaring omissions of countries. We were unable to identify an active law and economics scholar in France. Eastern Europe, Africa, and Latin America were omitted because we know of no country where the economic analysis of law has taken root. Asia presented a different kind of problem. Japan has

¹The growth of law and economics in America is charted quantitatively in Robert C. Ellickson, "Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law-and-Economics," (Symposium on Post-Chicago Law-and-Economics), 65 *Chicago-Kent Law Review* (1989):23-55.

a substantial group of law and economics scholars. We were pleased that Professor Ota could travel to Rome to bring us a report from Japan. Law and economics also enjoys some following in Korea, Taiwan, and Singapore. A Canadian institute under the direction of Professor Knetch has offered a summer course in law and economics for legal scholars from Pacific rim countries such as Thailand and Micronesia. Some law and economics scholars are also active in Australia. (Antarctica remains untouched.) In the end, however, problems of distance and finance precluded our obtaining reports from these countries.

The scholars in this symposium are assessing the extent to which national legal cultures resist economic theory. Certain obstacles were mentioned by nearly everyone. One is language: difficulty with English, occasionally, but of far greater importance, difficulty with mathematics. A second problem is the inertia of traditional legal education, which is magnified when professors are trained by apprenticeship in traditional specializations. A third obstacle is that many people associate economic theory with conservative politics.

These barriers were once significant in the United States. Few American lawyers have a mathematical background. Few traditional law school courses once incorporated economics. Even today, people associate economic approaches more with the conservatism of Richard Posner than with the liberalism of, for example, Guido Calabresi. An important question is whether there is a more enduring reason why civil law traditions should be generally more resistant to economics than common law traditions.

According to Professor Kirchner, one such reason is the survival in Germany and perhaps in continental Europe generally of the legal formalism of the last century. Legal formalism is conceptual, concerned more with definition than with the purposes of legal rules. The economic approach to law is instrumental, concerned primarily with how the ends sought by members of society can be achieved. Legal formalism encourages judges to think that once the terms of a rule have been properly defined, either by a code or by legal scholars, the court need only determine whether a particular case falls within the terms of the rule. The economic approach to law constantly requires a judge to consider the purposes a rule serves. It blurs the distinction between the making and the application of law. According to Kirchner, the revolt against formalism in the first half of the twentieth century was less successful in Germany than in the United States because it was associated with the Nazi regime. Moreover, an instrumental approach to law by the judges supposes a political stature, an independence vis-à-vis statutory law, and a flexibility that German judges lack.

In his report on economic approaches in Italy, Professor Mattei disagrees. Whatever they may have claimed, continental judges have never been able to apply mechanically rules defined for them by codes or legal scholars. In any case, codes are no longer the most important source of continental law. Moreover, whatever survivals there may be, the formalistic approach of the nineteenth century has been intellectually discredited. Its downfall has created a need for theory.

Both Kirchner and Mattei, however, see the economic approach to law as the opponent of what remains of nineteenth-century formalism. For the economic approach to be successful, then, it must convince its critics that it can avoid the evils of formalism without causing new evils of its own. Its success, then, may require not only openness by traditional legal scholars to a new method, but also creative adaptation of that method by its practitioners. Must the economic approach to law be purely instrumental, or, by illuminating the implications of the definitions of legal terms, can it be conceptual as well? Must the economic approach be wholly concerned with how ends are to be achieved, or can it be concerned as well with which ends are worth achieving? According to Professor Ota,

Japanese scholars fear that this approach may have nothing to say about justice. Might it have something to say? In short, if this approach is to flourish, will its spread be like that of an imported species that drives indigenous varieties from their habitats, like the rabbit in Australia, or will it be like an evolving species, which flourishes by adapting to new surroundings, like the horse in Asia?

After a decade has elapsed, perhaps we can hold this symposium again in the year 2000 and see how good we are as prophets. There will probably be some congratulations and a lot of laughter. Yogi Berra, a baseball player famous for his malapropisms, is reputed to have said, "The future ain't what it used to be." That is our hope for legal scholarship.