THE ECONOMICS OF LEGAL RELATIONSHIPS

VOLUME 6

LAW AND ECONOMICS IN CIVIL LAW COUNTRIES

BRUNO DEFFAINS
THIERRY KIRAT
Editors

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EDITED BY

BRUNO DEFFAINS
Université de Nancy, France

THIERRY KIRAT
IDHE – Ecole Normale Supérieure de Cachan, France

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Series Editor: Nicholas Mercuro
Michigan State University

LIST OF CONTRIBUTORS

Benito Arruñada	University of Barcelona (Spain)
Eric Brousseau	Université de Paris X-Nanterre (France)
Gerrit De Geest	Gent University (Belgium)
Bruno Deffains	Faculté de droit-économie-gestion, Université de Nancy 2 (France)
Myriam Doriat-Duban	Faculté de droit-économie-gestion, Université de Nancy 2 (France)
Michael Faure	Maastricht University (Netherlands)
Nuno Garoupa	University of Barcelona (Spain)
Sophie Harnay	Université de Reims-Champagne Ardennes (France)
Thierry Kirat	IDHE – Ecole Normale Supérieure de Cachan (France)
Roland Kirstein	Center for the Study of Law and Economics, Universität des Saarlandes (Germany)
Ejan Mackaay	Centre de recherche en droit public, Faculté de droit, Université de Montréal (Québec)
Alain Marciano	Université de Corte (France)
Anthony Ogus	University of Manchester (U.K.)

Arianna Pretto — Oxford University (U.K.) and University of Trento (Italy)

Dieter Schmidtchen — Center for the Study of Law and Economics, Universität des Saarlandes (Germany)

Evelyne Serverin — IDHE – Ecole Normale Supérieure de Cachan (France)

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(2) A monograph may be a collection of refereed articles derived from the Series Editor's "call for papers" on a particular legal-economic topic.
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Professor Nicholas Mercuro
Institute of Environmental Toxicology
Michigan State University
East Lansing, MI 48824
PHONE: (517) 353-6469
FAX: (517) 355-4603
e-mail mercuro@msu.edu

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INTRODUCTION

Bruno Deffains and Thierry Kirat

This book is devoted to *The Law and Economics in Civil Law Countries*. Up until now, Law and Economics was essentially developed in countries in which common law is prevalent, with the aim of re-thinking judicial functions from an economic standpoint. The method consists in giving a dynamic view of the rule of law and enabling the finalities and changes in the judicial system to be understood. The purpose of the book is indeed to encourage thought concerning the manner in which this method may be widened within those civil law countries where law displays the particularity of being codified.

For many years, the two fields have advanced quite independently from one another. Today Law and Economics is an important vector for convergence between these two subject areas. The Nobel prize awarded to Ronald Coase in 1991 attests to the increasing importance of this field of research, with numerous writers ranging from Richard Posner to Gary Becker as well as Guido Calabresi, Douglas North, James Buchanan, William Vickrey venturing into it. All of them demonstrate that Law and Economics can provide tools for scholars interested in understanding the law regulating human behavior. Richard Posner's achievement was to use economic axioms and instruments to illuminate the forces at work in the Anglo-American legal system. He laid bare the architecture of the common law by showing how much of it could be derived from the axioms of economics. The claim was never that only these mattered, but rather that even by themselves they showed that the law could have a logic and coherence that before we had only known intuitively. Of course, the posnerian approach is not exclusive and as, some papers will demonstrate, relations between law and economics can be tackled from different points of view. Here, we want to

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understand to what extent we are founded to have an economic lecture of law in the civil law countries tradition as well as in common law tradition.

The aim of this book is twofold: first of all to highlight the interest of confronting law and economics in civil law countries and secondly to establish an initial review of research done into this area to date.

We particularly wish to emphasise the following questions: to what extent have the existing codes in civil law countries been designed to incorporate economic considerations? Can the modifications made to codified rules over time be explained by a will to react to new economic constraints? Which economic problems are at the root of the revision of codes? Of course, the Code is not the only source of law in civil law countries. This aspect will also be a subject of reflection regarding the relationship between law and economics in both legislative and courts contexts.

Contributors from a wide range of countries are being invited to compare points of view in two directions: one being the theoretical possibility of transposing the approach and categories of Anglo-Saxon Law and Economics to civil law countries whilst the other is the development of empirical analyses concerning the content and the economic effects of rules of law in civil law countries. The book is meant to be open to theoretical, empirical, normative and positive thought in the different branches of law.

Generally speaking, Law and Economics views the legal system as a means of defining rights *ex ante*, and creating incentives to govern behaviour *ex post*. In most civil law countries, law is mainly formulated by Parliament, complemented secondly through the refinement of law in the course of judicial decisions. These decisions are essentially concerned with the interpretation of legislation contrary to common law countries where judicial decisions are concerned in priority by the development of legal rules through the production of precedents. Of course, the differences in legal systems are largely based on both political and historical considerations. For example, the legal systems can be viewed as indicators of the relative power of the State vis-à-vis property owners. In particular, common law has developed in England to some extent as a defense of Parliament and property owners against the attempts by the sovereign to regulate and expropriate them. Civil law, in contrast, has developed more as an instrument used by the sovereign for State building and controlling economic life.

Moreover, this book wants to explore some of the ways in which economic analysis can contribute to an understanding of some key aspects of the relationships between legal systems and thus provide a useful methodology for comparative law and economics. This objective seems to be crucial for economic analysis of law in civil law countries. This remark specially holds in the

European context characterized by the coexistence of different national orders influenced sometimes by common law tradition and sometimes by civil romano-Germanic tradition. So, in the context of European harmonization, we have to understand if the competition between legal systems will generate a tendency for national legal principles to converge in the different domains of the law (environmental law, contract law, liability law, criminal law, procedural rules, . . .). The answer to this question will contribute to answer to the fundamental question concerning the method of law and economics in civil law countries.

The different chapters pose important legal questions and have been studied using economic analysis. Together, they opened up the civil law to economic inquiry. These researches show that we can learn from applying economic analysis to the problems in different domains of codified civil law. To us, it symbolizes the coming of age of the field of Law and Economics in civil law countries and comparative law. The Law and Economics of the civil law has now progressed to the point at which some law faculties have courses in the area and many universities offer courses for graduate students in economics. For anyone wanting to learn where we stand concerning economic analysis of european civil law, we hope that this book provides a fairly comprehensive summary of the state of the art. If we draw a conclusion from the state of the art in Europe, it could be said that it does not give the picture of a unified framework. Taken together, the fifteen chapters joined together in this book illustrate the richness and diversity of viewpoints on Law and Economics. They also confirm, in a certain sense, that Law and Economics has not yet reached in Europe the same degree of development it has in North America. It can even be considered that the interpenetration of legal and economic processes does not follow a smooth and linear path of development in European countries; the understanding of the rationale of such a diversity and openness of legal-economic studies deserve interest by itself.

The chapters of the book, written by a majority of economists and a significant number of jurists, share a common project: showing the interest of scientific exchanges between practicers of the two academic fields concerned. They advocate the necessity of a radical evolution in the relations between economists and jurists. Concerning that issue, we would like to stress four questions that, among others, deserve a particular interest.

- First, one can try to explain the traditional poor development of interdisciplinarity between economists and jurists in legal studies in Europe. Actually, a current opinion within the legal community is that Law and Economics is a discourse on law that does not allow to understand what is really going on with legal regulation in societies. Apart from epistemological and theoretical

issues, the reluctance of jurists towards economic analysis is also based on unfortunate ideological considerations: economists and jurists practising economic rhetorics have been largely suspected in the past to systematically argument in favor of market-based mechanisms and against the "irrationality" of regulatory schemes or even legislation as a tool for public policy.

- The second remark we would like to make is that the traditional gross substitute to the analysis of the economic content of legal rules and institutions has been economic law (or *droit économique*), that is to say a branch of private and public law applied to economic issues (e.g. securities, competition, taxation, etc.). Such a perspective is currently used by continental jurists who for the most part raised the issue of the necessary adaptation of law to the needs of a changing capitalism, but it should however be worth rediscovering a way of practicing economic law that a jurist, G. Schrans and an economist, A. Jacquemin stated almost twenty years ago in the following terms: "Economic law is not a new field within legal analysis; it is instead new on traditional matters. . . . It is a way to address law from the viewpoint of its consequences; in others words a new way to take law into consideration".[1]
- The third point we would like to make is that a fruitful exchange between economists and jurists can be built in the field of positive and empirical approaches aimed at providing a scientifically grounded understanding of law in action. That leads to open two broad lines of enquiry: the first is theoretical, since economics should then be assessed as a provider of tools for empirical research on law. In a sense, it is unavoidable to question what is behind the curtain of economic analysis, namely the implicit institutional and legal background of American Law and Economics. If one admits that American Law and Economics has been tailored to provide insights into American common law, it becomes useful to study in what way it may become appropriate to civil law contexts. The second line of enquiry we would like to stress is methodological. Actually, quantitative studies of law in action in Europe are rather rare; one reason of that fact probably lies in the complexity of legal and judicial statistics available. If we take the example of France, the legal data published by the Ministry of Justice provide information on the activity of courts (such as: duration of litigation, legal claims) that are built on legal terms; that means that the statistical apparatus is directly connected with the institutional features of the French judicial system, and has nothing to do with behavioral features of agents when acting regarding law. May we conclude that the future development of pluridisciplinary studies in law will require economists to go further with the institutional detail of legal systems?

[1] G. Schrans and A. Jacquemin. 1982. Le droit économique. Paris: Presses Universitaires de France.

- As a fourth and last remark, we would like to stress that the future development of Law and Economics will very probably crucially depend on the legal skills of economists. What is at stake as long as European economists are concerned is to determine if it is necessary or not for them to be trained in regulation when practising regulatory economics, or in private law when practising economic analysis of contracts, torts and property. The poor development of pluridisciplinary academic programs in Economics and Law in Europe in general, in France in particular, is a challenge for the future. One dimension is particularily crucial: economists tend to implicitly consider that the implementation of legal rules consists in a smooth process of application of statutory or regulatory rules. They are led to underestimate two important issues: first, the weight of judicial interpretation and, second, the interconnection and systemic aspects of legal rules and procedures. If one admits that statutory and regulatory rules are not performative statements (i.e. they do not make it appear in a mechanical way the world they describe), it becomes then unavoidable to question the process by which they are mobilized by economic actors and, finally, are implemented and enforced.

The structure of the book is aimed at covering the range of issues raised by the current and future expansion of economic approaches to law in Europe. The first part regroups chapters that share a common line of enquiry into the relevance of Law and Economics in civil law contexts, but exhibit different viewpoints and arguments. The second part joins together chapters devoted to the implementation of tools provided by Law and Economics for the enlightenment of legal issues in the fields of private, criminal, and administrative law.