

JUSTICE AGAINST «LAW AND ECONOMICS»

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Abstract

The main issue of the paper is the problem of adaptivity of «law and economics» as universal doctrine. For example some cultural specificity of Russia put barriers on the development of economic analysis of law in the country. However it pointed in that all problems are not crucial and there are some tools to solve it. The most popular argument against the «law and economics» is that efficiency which is the main category of this field, sometime contradicts Justice as the main category of law. Nevertheless it was proved that there is no «gap» between Justice and efficiency.

Another problem of «law and economics» in some countries is the doubtfulness of rational behavior assumption which is very important part of «law and economics». Although some oncoming investigations of this theme are required, it does not look as a big problem.

The conclusion is that economics analysis of law is a science field which is universal, although it can be some variations because of national specificity.

Keywords: Efficiency, Justice, corporate law, economic analysis of law, freedom of contract

Introduction

Economic analysis of law is a science tendency that has been developing quite extensively in the US and Western Europe since 1960-Th. It dates back to Adam Smith, Jeremy Bentham, Cesare Beccaria. However, in its present form economic analysis of law appeared in the works of Ronald Coase, Guido Calabresi, Richard Posner, Gary Becker, etc (Posner, 1998, p. 2-4).

No wonder, therefore, that western scholars are ahead of this field. Many problems discussed for example in Russian science currently, were investigated a few decades ago by R. Posner, G. Calabresi and their prominent associates.

However, to be considered as a universal theory economic analysis of law has to prove its applicability in different parts of the world, not only in the West. Thus, the hypothesis of this paper is: whether economic analysis of law is self-sufficient, powerful science field of activity its methods and theoretical models could be used in different countries regardless of political, cultural, historical and religious backgrounds. Certainly, the factors mentioned above, determine specificity of economic analysis application in the definite state, however the general application is the same. I will demonstrate it on the example of the Russian Federation.

I.

Russia is very difficult country. There are few hundred ethnic groups; all confessions are represented in our country. We also have not an easy political history. During the tsar's time state power was closely linked with the church, in the soviet period, on opposite, the church was persecuted. Of course, all that was reflected in the law.

The present legal system as well as legal science follows of the soviet ways and habits. Surprisingly, but soviet science, despite its economical determinism, did not accept economic analysis of law. It was quite conservative system of knowledge.

Generally there are two models, two conceptions of legal consciousness. In European tradition the historical school of law is very powerful. It formed dogmatism and internalism of legal thinking. That means treating law as separate, independent part of humanitarian science. The lawyers look responds to the questions they face in practice, in the intrinsic logic of law. If the law has gaps a judge or another practitioner applying to dogmatic methodology, has to cover the gaps based on intrinsic rules of the legal system.

The other type of legal consciousness is American tradition to consider the law externally, «from the outside». Lawyers based on this approach can find practical solutions of their problems by means of economic analysis of law.

Such a specificity of American legal practice caused creation and development of the special science fields. For example, «law and economics» deals with strategic economic decisions taken by official state agencies. Economic analysis of law investigates efficiency of such decisions.

European science due to the little language barriers, better academic mobility, accepted American standards rather soon and began to develop «law and economics». However the Soviet science (and respectively the Russian science) being isolated, overcomes dogmatism very problematically.

The first interpretations of American papers appeared in 1990-th. The first experts of this problem also came into being 20 years ago only.

No wonder that this tendencies faced strong opposition. For example the new Civil Code was worked out for last five years. During this period, the contradictions between «old school» and economic analysis of law were clearly revealed. In order to explain the nature of this contradiction I have to make some explanations.

R. Posner characterizing economic analysis of law, points out that it has 2 branches. The first one (and the older one) deals with laws regulating economic activity. The other one (relatively new) analyses nonmarket activity (Posner, 1998, 4).

So the economic analysis of law treats the legal phenomena using economical methodology. The cornerstone of this method is category «efficiency». «Law and economics» sees the law system through the lens of efficiency. Based on this viewpoint experts suggest the most effective way of regulation.

This is exactly the point which is highly criticized by some Russian experts. They consider law to reflect some moral values and imperatives, not only efficiency. The thesis often noted is that efficiency contradicts Justice, and the latter is endogenous to Russian law (due to many historical, religious and other reasons).

To make it clearer let's examine a definite case.

The corporate law was changed significantly in the current edition of Civil Code of the Russian Federation. One of the most important changes is a possibility of non-proportional representation in the equity capital of the legal entity. Previously, the Civil Code permitted only proportional representation, i.e. the amount of corporate rights depended on the sum invested in the corporate's capital. The current edition of Civil Code suggests to the shareholders to decide if they use proportional or non-proportional representation.

This idea faced very strong opposition in the Russian academic circles. One of the most respectful civil law expert in the country, professor E.A. Sukhanov wrote: «it is obvious the injustice and immorality of such a conception which allow to limit the rights of minority shareholders in any way» (Sukhanov, 2013, 8). He continued: «the justice and morality are the base of the law...The attempts to give unreasonable privileges for one group of shareholders to the prejudice of another, including minority shareholders cause violation of private and public interests» (Sukhanov, 2013, 8).

To generalize the position of E.A. Sukhanov, I will quote the following: «the law should be based on the noneconomic features of morality and justice. The parties of monetary

dispute wait a fair decision from the court, but not a transaction cost cut» (Sukhanov, 2013, 6).

So we see a conflict between the economic analysis of law supporters and their opponents. Their initial positions are clear. For economic analysis the efficiency is the main value which could be provided by the freedom. Therefore the Constitutions of all leading countries suggest the freedom of economic activity as a tool of achieving the efficiency. The antagonists of such a way emphasize that a Justice must be taken into considerations. Moreover, it is more important value than efficiency. As far as Justice and efficiency can contradict sometimes, one has to remember that law is a tool of providing Justice, not efficiency.

Here arisen a question, whether efficiency and Justice contradict and is it possible to find a balance between them? If the conflict is real, it seems an obstacle on the way of «law and economics» in such countries as Russia.

In order to answer this question first of all we need to define the Justice. It is an uneasy task. The matter is that Justice is more philosophical definition, than legal. However, many laws mention this term. For example there are the goals of American Constitution in its preface, and among these goals is stated «establish Justice». German Constitution, declaring the recognition of human rights, proclaims they are the base of peace and Justice in the World. Preface of Brazil Constitution states that National Constituent Assembly promulgates the Constitution with the aim of providing Justice.

Such a non-legal definitions are used in the many law fields. For instance the civil law of many jurisdictions prescribes to act prudently and with a good faith.

The obvious question is how to determine a good faith in economic agents' behavior? Which benchmark a judge possess, investigating this question? Historically the western law was based on the religious ideas. Consequently the Justice was Christian oriented. However the secular states were established in the West in 18-19-th century, therefore it is impossible to use religious rhetoric nowadays.

So the problem of Justice is a philosophical question, the question of ideology of the society.

There are two concepts of Justice in the philosophy: deontology and consequentialism. The first one insists on that there are some basic moral values to be taken into account regardless of the consequences. Meanwhile the consequentialism points that the results of some actions is the only criteria for the moral estimations of this actions (Michaels, Alexander, Larry & Moore, 2012).

The first-class minds have been working on this problem for few millenniums. However, they failed to achieve a clear understanding. In the light of mentioned above, it looks too strange that lawyers claim something as fair or not. It is really an uneasy task to determine the fairness of something, except some clear cases, such as slavery. Lawyers often accuse economists in the so-called «economic imperialism». This term addressed by attempts to use economic methodology to all science problems. However the spreading of legal understanding of Justice to all aspects of life looks like «legal imperialism». Is this kind of imperialism better than economic imperialism? It is dubious.

Moreover if one examines economic agents in dynamic, not in static, he will see there is no strong contradiction between Justice and efficiency. It could be illustrated by the example of Professor E.A. Sukhanov, mentioned above. If one considers non-proportional representation in the equity capital of the legal entity in static, it really could look not fair. However in dynamic the situation is different. The person, who agrees to have a non-proportional representation, obviously has some reasons to do this. Arguably that reduction of corporate rights let him to benefit from some extraordinary skills or knowledge of his partner. Another possibility - the owner of the company can make good incentives for the top-

management of the company by means of this scheme. Probably the social status of the person on its own benefits his partner.

To make a long story short: the freedom of contract provides efficiency. This formula is widely recognized by the experts. Thus, Cooter and Ulen underlined that «the presumption for freedom of contract is supported by its conduciveness to welfare...» (Cooter & Ulen, 2012, 341). Peter Cserne also emphasized that freedom of contract has been traditionally supported by its likely benefits in terms of social welfare (Cserne, 2014, 2).

Recurring to the non-proportional representation in the equity capital, it could be mentioned that: «Most people look after their own interests better than anyone else would do for them» (Cooter & Ulen, 2012, 342).

One more citation: «If two parties are to be observed entering into a voluntary private exchange, the presumption must be that both feel the exchange is likely to make them better off, otherwise they would not have entered into it» (Trebilcock, 1993, 7).

Moreover, the economic analysis of law has internal resources for modification in accordance with specificity of definite country. Let's consider the example from the contract law. The freedom of contract is a cornerstone of this field; however the limits of freedom of contract are the main subject of investigations in contract law. One of the reasons of such a limits is so-called externalities, i.e. a cost or benefits imposed by contract to the third parties who are not involved in the transaction. As far as there are many externalities of different kinds, the question arises: what externalities must be taken into consideration and what must not. For example there are «moral externalities» when some people find certain type of contracts morally offensive. Mainstream economics is unlikely to provide help in this matter (Hatzis, 2006).

However this position is not a dogma. If the scholars of some countries suppose this conception is not acceptable under the circumstances of local culture, they can modify it, saving the theoretical models of «law and economics». Thus, the contradiction between Justice and efficiency is mainly illusory. Consequently this is not an obstacle on the way of «law and economics».

There is one more difficulty with «law and economics» in many countries. Richard A. Posner put forward very interesting question. Is it plausible to suppose that only inhabitants of modern Western (or Westernized) societies are rational? (Posner, 1998, 1-2).

The assumption of rationality of human behavior is very important for «law and economics». Many its principles, conceptions and models were deduced from this assumption. If maximization of wealth is not an obligatory requirement of non-Western societies, the «law and economics» is not an appropriate method of investigating their legal system.

Once again we face the problem which runs over the scope of the legal field. Psychological, culturological, philosophical researches are required. The conceptual apparatus constructed by «behavioral economics and law» could be used in such works.

Nevertheless in the absence of such results some theoretical conclusions could be made. No doubts, that cultural difference between people of different countries is significant. However this difference mainly concerns the non-market behavior, such as marriage, religious, human rights etc. In the economy people of all countries are more or less the same. They can produce some goods and they want take as much money for it as it possible. This is exactly what is called maximization of utility or maximization of people satisfaction. The obvious evidence of this assumption is the fact that market economy can work effectively in completely different countries. The majority of countries which tried to build socialistic economy failed to do it and began to create «market». It proves that basic necessities of people are the same regardless of some cultural differences.

In the light of mentioned above the validity of «law and economics» at least in its «market» part (i.e. in analysis of market behavior) is not depended on the countries historical background. As for the analysis of non-market behavior it is more complex issue. It could be supposed that economical tools are not appropriate in some cases. Additional examinations of this problem on base of «Behavioral economy and law» methods are required.

Conclusion

It was shown that «law and economics» faces many antagonists on the way of its development in some countries, particularly in Russia. Their typical argument is that efficiency contradicts Justice. However it was proved in this paper that idea of efficiency is very close to the ideas of freedom and social wealth. It is unlikely to be said that freedom and wealth are not fare. So the thesis that Justice and efficiency contradict each other is not correct.

However it could be accepted that every country has its own cultural specificity and certainly, this fact can determine the difference in the way of «law and economics» application. Nevertheless it is also not a critical point, because there are some internal resources of law and economics for modification in accordance with specificity of definite country.

A more difficult problem is to define if the assumption of rationality of human behavior is right for non-Western societies. If it is not, «law and economics» is not really applicable in such countries. In the light of mentioned above additional investigations in this field are required. From theoretical perspectives it could be said that market behavior of people is more or less equal regardless of cultural differences. Consequently «law and economics» is valid method of research at least in its «market» part all over the world.

The conclusion is that economics analysis of law is a science field which is universal, although it can be some variations because of national specificity. It is also important to stress out that there is no strong contradiction between the values of efficiency and Justice.

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