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Law & Economics: application of the law and legislation. Polish and foreign experiences

DR HAB. KRZYSZTOF KOŹMIŃSKI

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dr hab. Krzysztof Koźmiński

Abstract:

The article focuses on the practical aspects of economic analysis of law. The areas of legal reflection and specific issues that are the subject of analyses conducted in the spirit of law and economics were indicated. Examples of evaluating selected legal institutions, comments on the "economization" of judicial legal reasoning and the regulatory impact assessment critique in the legislative process were presented.

Keywords:

law and economics, effectiveness, costs, socio-economic effects, regulatory impact assessment, American jurisprudence

1. Law and economics: introductory remarks

Over the last few decades, there has been a steady growth of interest in law and economics (hereinafter: "law & economics") not only in Western European, continental theoretical and legal reflection, but also in Poland, as evidenced by the fact that law & economics is increasingly becoming the subject of lectures, courses and summer schools, scientific publications, and even a starting point for the creation of university units dedicated to it within the faculties of law, economics or management[1].

Despite the fact that law & economics is accompanied by a number of doubts, unsolved (and probably unsolvable - including, inter alia, definitions[2], philosophical inspirations, controversies concerning the scientific status of law & economics, its precursors, contemporary representatives, historical stages of development and particular "schools" and their specifics[3]) disputes and frequently severe criticism on the part of its adversaries[4], its position in the academic world is strengthening. Law & economics is primarily an interdisciplinary (both in terms of research subject matter and the research method applied[5]) approach to law,

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[1] On this subject, i.a.: J. Bełdowski, K. Metelska-Szaniawska, L. Visscher, *Law and Economics in Poland – the Past and Present at a Glance*, "Polish Yearbook of Law and Economics" 2010, vol. 1; Ł. Hnatkowski, *O potrzebie nauczania ekonomicznej analizy prawa* [in:] *Ekonomiczna analiza prawa*, ed. T. Giaro, Warszawa 2015, pp. 261–264.

[2] Katarzyna Metelska-Szaniawska and Jarosław Bełdowski aptly note that the definitions of law and economics can be divided into those that attempt to present its subject matter and those that refer to the applied research method. J. Bełdowski, K. Metelska-Szaniawska, *Ekonomiczna analiza prawa - wprowadzenie* [in:] R. Cooter, T. Ulen, *Ekonomiczna analiza prawa*, Warszawa 2011, p. XVII.

[3] On this subject, i.a.: E. Mackaay, *History of Law and Economics* [in:] *Encyclopedia of Law and Economics*, eds. B. Bouckaert, G. De Geest, Cheltenham 2000; E. Mackaay, *Schools: General* [in:] *Encyclopedia*...; A.J. Field, *New Economic History and Law & Economics*, [in:] Encyclopedia...; R. A. Posner, *The Law and Economics Movement*, "American Economics Review" 1987, vol. 77, no. 2.; H. Pearson, *Origins of Law and Economics. The Economists' New Science of Law Movement 1830-1930*, Cambridge 1997; C. Rowley, *An Intellectual History of Law and Economics: 1739-2003*, [in:] *The Origins of Law and Economics. Essays by the Founding Fathers*, eds. F. Parisi, C. Rowley, Cheltenham-UK: Northampton 2005; J. Bełdowski, K. Metelska-Szaniawska, *Law & Economics - geneza i charakterystyka ekonomicznej analizy prawa*, "Bank i Kredyt", 2007, no. 10, pp. 51-69; J. Boehlke, *Charakterystyka nurtu prawo i ekonomia we współczesnej myśli ekonomicznej*, "Ekonomia i Prawo", 2005, vol. 1, no. 1.

[4] On this subject, i.a.: D. M. Driesen R. P. Malloy, *Critiques of Law and Economics* [in:] *The Oxford Handbook of Law and Economics: Volume 1: Methodology and Concepts*, ed. F. Parisi, Oxford 2017, pp. 300-320; R.C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, "Chicago-Kent Law Review", 1989, no. 23, pp. 23–55. K. Koźmiński, *Krytyka ekonomicznej analizy prawa*, "Przegląd Prawniczy Uniwersytetu Warszawskiego", 2016, no 1, pp. 31-60; R. Tokarczyk, *Jednostronność ekonomicznej analizy prawa*, "Ruch Prawniczy Ekonomiczny i Socjologiczny 2007, br. 4, pp. 175–184.

[5] K. Osajda [in:] *Interdyscyplinarność z perspektywy młodych badaczy*, "Nauka", 2015, no. 4, p. 162.

an example of "external integration" of the science of law with other scientific disciplines[6], overcoming traditional divisions within the social sciences[7].

This is accompanied by a tendency (in reforming public institutions, making as well as applying law) to assess binding legal provisions in the context of dynamically changing socio-economic environment, describing legal solutions with the use of methods characteristic for economic science[8], applying econometric methods to study forms, structures, processes and legal institutions[9]. Law & economics also finds practical application in the creation of economic policy[10] and the verification of the effectiveness of solutions adopted[11].

While analysing foreign and domestic literature on law & economics, it appears that there are no limits to intellectual reflection in this spirit, both in the context of analysed issues and cases, and when it concerns branches and divisions of law. Thus, the representatives of law & economics discuss the issue of typically "economic" (property, serving the protection and realisation of material interests of legal entities) legal relations, traditionally qualified as the domain of:

- civil law[12];
- commercial law[13];
- intellectual property law[14];
- consumer law[15];
- tax law[16];
- labour law[17];

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[6] K. Opałek, *Problemy „wewnętrznej" i „zewnętrznej" integracji nauk prawnych*, "Krakowskie Studia Prawnicze", 1968, br. 1-2, p. 10.

[7] This issue is considered, i. a., in: P. Chmielnicki, *Wspólne spojrzenie na katedrę. Mocne i słabe strony ruchu Law & Economics z punktu widzenia nauk prawnych*, "Przegląd Prawa Publicznego", 2012, no. 6, pp. 107-121.

[8] M. Bednarski, J. Wilkin, eds., *Ekonomia dla prawników i nie tylko*, Warszawa 2007, p. 473.

[9] Charles Rowley attempts to put law & economics in this way. C. Rowley, *Public Choice and the Economic Analysis of Law*, [in:] *Law and Economics*, ed. N. Mercuro, Boston 1989, p. 125.

[10] A. Barteczek, *Wykorzystania ekonomicznej analizy prawa w polityce gospodarczej* [in:] *Kapitał praca człowiek Księga jubileuszowa Profesora Jana Wojtyły*, ed. A. Witosz, Warszawa 2016, pp. 7-17.

[11] On this subject, i.a.: W. Rogowski, W. Szpringer, *Problemy metodologiczne oceny skutków regulacji w Polsce: czy powstają nowe perspektywy ekonomicznej analizy prawa?*, [in:] *Ocena skutków regulacji*, ed. eidem, Warszawa 2007, pp. 3 et seq.; A. Młynarska-Sobaczewska, *Między oczekiwaniami a efektami. Analiza skutków regulacji ex post jako instrument w procesie legislacyjnym*, "Przegląd Prawa Konstytucyjnego", 2018, no. 5, pp. 73-92.

[12] M. Tenenbaum, *Instytucja prawna zadatku z punktu widzenia ekonomicznej analizy prawa*, "Acta Universitatis Wratislaviensis", 2008, no. 16, pp. 259-286; R. Stroiński, *Ekonomiczna analiza kary umownej jako instrumentu efektywnej alokacji ryzyka niewykonania lub nienależytego wykonania zobowiązania umownego* [in:] *Ekonomiczna...*
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[13] As an example: R. Stroiński, *O kosztach transakcyjnych i potrzebie analizy ekonomicznej w prawie handlowym*, „"Przegląd Prawa Handlowego", 2004, no. 6, pp. 36-45.

[14] As an example: A. Nowak-Gruca, *Cywilnoprawna ochrona autorskich praw majątkowych w świetle ekonomicznej analizy prawa*, Warszawa 2013.

[15] On this subject, i.a.: M. Czarnecka, *Ekonomiczna analiza prawa ochrony konsumentów*, "Studia Ekonomiczne", 2017, no. 321, pp. 118-135.

[16] J. Pomaskow, *Ekonomiczna analiza podatku akcyzowego na wyroby alkoholowe w świetle teorii gier*, "Studia Ekonomiczne", 2017, no. 311, pp. 135-145.

[17] On this subject, i.a.: M. Raczkowski, *Rola prawa pracy w generowaniu kosztów transakcyjnych u małych pracodawców.* [in:] *Ekonomiczna...*; J. Lewkowicz, *Efektywność regulacji zbiorowych stosunków pracy w Polsce*, Warszawa 2018.

- competition law[18];

but they also remain active in fields of law that are intuitively considered less economic or even "non-monetary", i.e.:

- criminal law[19];
- misdemeanour law[20];
- constitutional law[21];
- administrative law[22];
- environmental law[23];
- procedural law[24];
- public international law[25].

However, regardless of the division of law into branches (which is generally followed by the systematisation of dogmatics), law & economics deals with the examination and consideration of diverse problems and cases, including peculiar (atypical) ones, for instance:

- interpretation of law in the light of law & economics[26];
- application of behavioural economics to the analysis of law[27];
- law & economics of armed conflict[28];
- human rights in the perspective of law & economics[29];
- evaluation of the death penalty through the prism of law & economics[30];
- economics and "efficiency" of alternative dispute resolution (ADR)[31];
- the phenomena of the so-called law-making application of law by the courts[32];

[18] K. Mathis, A. Tor, eds., *New Developments in Competition Law and Economics*, Berlin 2019.
[19] B. Brożek, *Ekonomiczna analiza prawa karnego* [in:] *Analiza ekonomiczna w zastosowaniach prawniczych*, eds. J. Stelmach, M. Soniewicka, Warszawa 2007.
[20] K. Szczucki, *Problem przepołowionego czynu zabronionego*, [in:] *Ekonomiczna ...*
[21] On this subject, i.a. in: K. Metelska-Szaniawska, *Konstytucyjne czynniki reform gospodarczych w krajach post-socjalistycznych*, Warszawa 2008; P. Buława, K. Szmit, *Ekonomiczna analiza prawa*, Warszawa 2012, p. 57.
[22] J. Kabza, *Koncesje i zezwolenia. Analiza ekonomiczna*, Warszawa 2014.
[23] K. Negacz, *Ekonomiczna analiza prawa środowiska: zastosowanie i perspektywy rozwoju*, Warszawa 2016.
[24] A. Sobota, *Ekonomiczna analiza ograniczenia rozprawy w postępowaniu cywilnym*, "Forum Prawnicze", 2014, no. 3; M. Rogacka-Rzewnicka, *Koncepcje ścigania przestępstw jako czynnik ekonomizacji postępowania karnego*, [in:] *Ekonomiczna...* .
[25] M. Kenig-Witkowska, *Ekonomiczna analiza prawa międzynarodowego*, "Państwo i Prawo", 2013, no. 3.
[26] M. Podhalicz, *Wykładnia przez pryzmat ekonomicznej analizy prawa – na przykładzie prawa restrukturyzacyjnego*, [in:], *Ekonomiczna analiza prawa. Zastosowania*, eds. B. Biskup, S. Osmola, Kraków 2018, p. 80.
[27] M. Małecka, *Prawo, ekonomia, ludzkie działanie. Dyskusja nad zastosowaniem ekonomii behawioralnej do analizy prawa*, "Archiwum Filozofii Prawa i Filozofii Społecznej", 2011, no. 1(2), pp. 15-28.
[28] J. L. Dunoff J. P. Trachtman, *The Law and Economics of Humanitarian Law Violations in Internal Conflict*, "The American Journal of International Law", 1999, vol. 93, no. 2, pp. 394-409.
[29] J. Pae, *Sovereignty, Power, and Human Rights Treaties: An Economic Analysis*, "Northwestern University Journal of International Human Rights", 2005, no. 7.
[30] As an example: I. Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Dea*th, "American Economic Review", 1975, vol. 65(3), pp. 397-417.
[31] S. Shavell, *Alternative Dispute Resolution: An Economic Analysis*, "The Journal of Legal Studies", 1995, vol. 24, no. 1, pp. 1-28.
[32] M. Golecki, *Marginalizm instytucjonalny wobec prawotwórczego stosowania prawa*, Warszawa 2011.

- analysis of single price book systems[33];
- the admissibility of the "marketisation" of human bodies[34];
- policies and the (dubious) effectiveness of drug policies[35];
- economic justification of torture or sexual perversion[36];
- assessment of the potential legalisation of polygamy in the context of economic efficiency[37];
- management of personal data[38];
- issues of family law, marriage, child custody[39];
- economisation and economic evaluation of democratic procedures or the democratic system in general[40];
- admissibility and potential consequences of deregulation of adoption procedures[41];
- assessing the economic effectiveness of the phenomenon of discrimination[42] (including, for instance, consideration of regulation that would permit certain forms of racial, ethnic and religious segregation)[43];
- the use of law & economics (including game theory) to assess the legitimacy of legislative intervention in the case of mass litigation[44];
- the economic analysis of criminal law to debate the cost of crime, state criminal policy, the penitentiary system and expenditure on uniformed forces and security systems[45];
- law & economics as an inspiration for reforming the judiciary and legal professions[46];

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[33] J. Maciejewski, *Ekonomiczna analiza systemów jednolitej ceny książki*, [in:] *Ekonomiczna analiza prawa. Zastosowania*, eds. B. Biskup, S. Osmola, Kraków 2018, pp. 103-127.
[34] G. Becker, *Should the Purchase and Sale of Organs for Transplant Surgery be Permitted?*, The Becker-Posner Blog: http://www.becker-posner-blog.com/2006/01/should-the-purchase-and-sale-of-organs-for-transplant-surgery-be-permitted-becker.html , (accessed: 10.05.2017).
[35] P. Waszkiewicz K. Gradoń, *Skuteczność kryminalizacji posiadania środków odurzających - przykład Polski w kontekście tzw. dopalaczy*, [in:] *Ekonomiczna…* .
[36] On this subject, i.a. in: J. Stelmach, B. Brożek, W. Załuski, *Dziesięć wykładów o ekonomii prawa*, Warszawa 2007, p. 43.
[37] R. Posner, *Should Polygamy Be Legal?*, The Becker-Posner Blog: http://www.becker-posner-blog.com/2006/10/should-polygamy-be-legal--posners-comment.html (accessed: 10.05.2017).
[38] W. Krówczyński, *Wybór formy koordynacji (governance mode) dla gospodarowania z danymi osobowymi pacjentów w podmiotach leczniczych*, "Studia Ekonomiczne", 2017, no. 2.
[39] G. Becker, *A Theory of Marriage* [in:] *Economics of the Family: Marriage, Children, and Human Capital*, ed. T. Schultz, Chicago 1974.
[40] As an example: A. Downs, *An Economic Theory of Democracy*, New York 1957.
[41] R. Posner, *The Regulation of the Market in Adoptions,* "Boston University Law Review", 1987, no. 59.
[42] G. Becker, *The Economics of Discrimination*, Chicago 1971.
[43] R. Posner, *The Economics of Justice*, Cambridge-Massachussets-London 1981, p. 85.
[44] As an example: J. Bełdowski, *Spory frankowe a Ekonomiczna Analiza Prawa – wybrane zagadnienia z wykorzystaniem teorii gier* [in:] *Procesy frankowe w Polsce po wyroku TSUE w sprawie C-260/18*, eds. M. Jabłoński K. Koźmiński, Warszawa 2020, pp. 11-124.
[45] M. Cohen, *Ekonomiczne podejście do przestępczości i wymiaru sprawiedliwości*, https://www.rpo.gov.pl/pliki/1197460053.pdf, (accessed: 1.04.2017).
[46] This theme is discussed, i. a., by Paweł Skuczyński in his paper: P. Skuczyński, *Trzy wizje reform sądownictwa i zawodów prawniczych*, [in:] *Etyka prawnicza: Stanowiska i perspektywy. Tom trzeci*, eds. P. Skuczyński, H. Izdebski, Warszawa 2013, p. 195.

- law & economics as a starting point for simplifying and accelerating judicial procedures (e.g., reducing the number of hearings, increasing procedural economy, efficiency of the judicial process in terms of costs)[47];
- law-making procedures[48];
- morality and ethics of law & economics[49];
- philosophical assumptions and inspirations of law & economics[50];
- the interrelationship between law & economics and the sociology of law[51];
- confrontation of law & economics with the influential Critical Legal Studies movement in the USA[52];
- considerations on the closeness of selected concepts of Leon Petrażycki to law & economics[53];
- conclusions drawn from the behavioural law & economics as regards more and less effective interventions by public authorities in the face of the coronavirus pandemic[54].

[47] As an example.: A. Sobota, *Ekonomiczna analiza ograniczenia rozprawy w postępowaniu cywilnym*, "Forum Prawnicze", 2014, no. 3, pp. 38-45; A. Orfin, *Sprawność postępowania karnego a jego koszty*, Warszawa 2020.
[48] W. Szpringer, *Metodologia oceny skutków ekonomiczno-społecznych zmiany prawa – wprowadzenie do dyskusji* [in:] *System stanowienia prawa w Polsce. Zielona Księga*, Warszawa 2013, p. 48.
[49] R. Posner, *Law and Economics is Moral*, "Valparaiso University Law Review" 1990, no. 24, p. 170.
[50] B. Polanowska-Sygulska, *Użyteczność a maksymalizacja bogactwa: Filozoficzne zakorzenienie poglądów Chicagowskiej szkoły law & economics*, "Archiwum Filozofii Prawa i Filozofii Społecznej" 2011, no. 1.
[51] R. Swedberg, *The Case for an Economic Sociology of Law*, "Theory and Society", 2003, no. 1, pp. 1-37.
[52] G. Wycichowski-Kuchta, *Wrogość czy pokrewieństwo? O ekonomicznej analizie prawa z perspektywy Critical Legal Studies* [in:] B. Biskup, S. Osmola, eds., *Ekonomiczna analiza prawa. Zastosowania*, Kraków 2018, p. 26.
[53] T. Giaro, *Petrażycki jako prekursor law & economics*, "Studia Iuridica", 2018, no. 74, pp. 135-153.
[54] D. Teichman K. Underhill *Infected by Bias: Behavioral Science and the Legal Response to COVID-19*, Working Paper no. 646 (revised April 07, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3691822, (accessed: 20.12.2021).

2. Evaluation of classical institutions of the legal system in the light of law & economics

It should be emphasised that in the case of law & economics - similarly as in the case of the sociology of law - the qualification for law & economics is not yet determined by the author's application of an econometric or empirical method. In practice, it frequently turns out that the comparison of socio-economic costs and profits resulting from regulations, the determination of the effectiveness of a particular institution or the estimation of the "price" of indicated normative solutions for its recipients cannot be reduced to a specific numerical value, a monetary amount, a mathematical formula or a strict and certain rule.

In other words, although it is typical for publications developed in the spirit of law & economics to use tables, diagrams, mathematical models or charts (e.g. in this way attempts are made to illustrate the systemic principle of the tripartition of power, where the points on the numerical axis represent possible legislative solutions, entailing different amounts of expenditure on a particular legislative solution; the chart enables to show the law-making process as a kind of tender between the executive and the legislature, the accompanying transaction costs, and the potential dominance of one centre of public power compared to the existence of an economic monopoly)[55], it is not essential to prove that the author conducts research within law & economics.

The application of law & economics criteria to the evaluation of the civil institution of acquisitive prescription (Article 172 et seq. of the Civil Code)[56], i.e., acquisition of ownership of a thing as a result of its long-term possession, may be an interesting example. Although such a solution may be opposed by the intuitive sense of justice and the absolutely understood subjective right of the owner (as allegedly sacred and inviolable), the justification of this legal institution is usually accepted, linking it to the necessity of permanent ordering of property relations[57].

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[55] On this subject, e.g.: G. Brennan, A. Hamlin, *A Revisionist View of the Separation of Powers*, "Journal of Theoretical Politics", 1994, no. 3.
[56] The Act of 23 April 1964 – the Civil Code (Journal of Laws of 2020, item 1740, as amended).
[57] So, e.g.: E. Gniewek, *Komentarz do art. 172* [in:] *Kodeks cywilny. Księga druga. Własność i inne prawa rzeczowe. Komentarz*, Lex.

Meanwhile, in the light of law & economics directives and methods, the acquisition of ownership rights is justified by the aim to ensure efficient use of limited assets, such as both movable and immovable property. To put it figuratively, the owner's lack of interest in his/her property (who accepts or at least tolerates the infringement of his/her rights by third parties) results in its actual wastage. In this situation, if, alternatively, another legal entity (the infringer and at the same time a potential future owner) is interested in it and would take care of it (would be able to manage it more effectively) instead of the originally entitled one - legal norms should respect this fact. An effective (in the sense of law & economics) legal system is the one whose application is not conducive to wasting resources, but to their utilisation. When comparing the advantages of the institution of acquisitive prescription, primarily the following should be pointed out:

- reducing the cost of establishing legal title,
- preventing the occurrence or persistence of the state of long-term non-use of certain assets,
- minimising the likelihood of the state of undesirable passivity on the part of persons entitled to use the property (owners),

while a potential drawback of this solution is the necessity for owners to control their own property so that it is not lost through acquisitive prescription[58].

A good illustration of the application of law & economics to the existing legal constructions may be a reflection on the structure (systematics and legislative technique) of the Civil Code, especially on the separation within the abovementioned normative act of the provisions concerning the so-called named contracts, i.e., contracts whose frameworks (including the rights and obligations of the parties) have been established by the legislator, i.e. an exchange contract (Articles 603-604 of the Civil Code), a contract for specific work (Article 627 et seq. of the Civil Code) or a contract for construction works (Article 647 et seq. of the Civil Code).

Law & economics - based, inter alia, on the theories of the English economist, Nobel Prize winner Ronald Coase - refers, inter alia, to his concept of transaction costs (in this view, these are the costs of "exchange, which involves three stages. First, one must locate an exchange partner, which requires finding someone willing to either purchase what one wants to sell or sell what one wants to purchase. Second, the exchange partners must strike a bargain. This is achieved by successfully concluding negotiations, which may include drafting an agreement. Third, once a bargain is struck, its terms must be enforced. The enforcement includes monitoring the parties' performance and punishing any breach of the agreement. (...) 1) search costs, 2) bargaining costs, 3) enforcement costs"[59]), exposing the importance of the "price" of entering into and enforcing contracts.

[58] P. Buława, K. Szmit, op.cit., p. 104.
[59] R. Cooter, T. Ulen, *Ekonomiczna analiza prawa*, Warszawa 2011, pp. 107-108.

Bearing in mind Coase's findings, it is desirable to reduce transaction costs, and one of the instruments to achieve this is the appropriate shaping of legal regulations, favourable to counterparties and consensual execution of the contractual relationship created by them. In this context it is worth to present a reflection by Rafał Stroiński: "From the economic point of view, the rules of law applicable to contractual obligations perform a number of important functions. First and foremost, they enable the reduction of transaction costs associated with the negotiation, conclusion and control by the parties of the performance of their obligations under the contract concluded, including the enforcement of their performance (...) representatives of the doctrine of law & economics point out that the rules of the law applicable to contractual obligations allow, on the one hand, to avoid the need to negotiate each time the majority of typical contracts enabling the functioning of society (separation in the civil codes of the countries of the Romano-Germanic order of a set of rules on named contracts), as well as to leave the parties free to negotiate those provisions which they consider essential"[60].

The concept of transaction costs and the demand to reduce them is also applicable in public law. For instance, it is emphasised that the principle of openness of public registers (especially in the context of socially widespread use of information and communication technologies as well as progress in implementation of e-government) - allows to save time and costs (previously incurred in connection with a frequently complicated and bureaucratic procedure of verification of persons authorised to represent a business entity or identification of a real estate owner and its legal status, which frequently required engagement of a lawyer, etc.) of acquiring information important from the point of view of legal transactions[61].

The "economic" approach to repressive law (especially criminal law, misdemeanour law and tax law) is clearly illustrated by the following anecdote: "One British study compared improvements in street lighting in two cities. In a controlled experiment, street lighting was improved in certain areas and left unchanged in others. Crime levels were studied in both areas for one year. (...) The improved street lighting was estimated to reduce car theft, vandalism, theft and burglary by 12 to 46% compared to the control areas. The cost of street lighting included energy, bulbs and maintenance as well as equipment and installation costs. The researchers found that the annual benefits of the decrease in crime rate exceeded the annual costs of lighting by a ratio of 24 to 1 in the first city and 54 to 1 in the second one. Such a high benefit-to-cost ratio means that the costs of the interventions were reimbursed - taking into account the cost of capital - in one year or even less"[62]. On the other hand, however, it cannot be excluded that - despite a measurable, noticeable decrease in crime rate - the costs of improving security will increase to such an extent that the local community will consider

[60] R. Stroiński, *Ekonomiczna analiza kary umownej jako instrumentu efektywnej alokacji ryzyka niewykonania lub nienależytego wykonania zobowiązania umownego* [in:] *Ekonomiczna*..., p. 90.
[61] K. Lewandowski, *Zmniejszą się koszty transakcyjne*, "Rzeczpospolita" of 2.04.2014.
[62] M. Cohen, *Ekonomiczne podejście do przestępczości i wymiaru sprawiedliwości*, https://www.rpo.gov.pl/pliki/1197460053.pdf, (accessed: 10.02.2021)

it unprofitable, and the actions of the decision-makers in this field as a Pyrrhic victory. It must not be forgotten that the expenses (costs) incurred in connection with the activities of the police, the prosecutor's office, the judiciary as well as the penitentiary system are also financial expenditures, a kind of "price" that has to be paid for security and public peace[63].

Economic analyses of profits (benefits) and losses (costs) may be considered not only from the general social perspective, but also from the perspective of particular legal entities, including taxpayers, employers, offenders and contractors. Jakub Kabza provides an example - this time in the context of administrative-legal concessions and permits (licences) - presenting the following case study: "let us assume that an entrepreneur is considering whether to undertake business activity in a concession sector, which in the entrepreneur's assumed time horizon of 5 years will generate PLN 100,000 profit, where the estimated risk of non-receipt of the concession is 10%, and the costs connected with the concession procedure amount to PLN 10,000. The entrepreneur's economic calculation will be as follows: PLN 100,000 x 0.9 - PLN 10,000 = PLN 80,000 (...) Let us assume that the entrepreneur has the alternative of being able to undertake non-concessional activity, where the expected profits are to be PLN 90,000, while the entrepreneur has the certainty of starting the activity and not incurring the costs associated with the admission procedure. As 90,000 > 80,000 the entrepreneur will be more likely to undertake a non-concessional activity"[64].

Thus, taking into account transaction costs (as well as other theories and concepts fundamental to law & economics: the Pareto optimum, the Kaldor-Hicks criterion, the Coase theorem, marginal analysis), new, hitherto unknown, perspectives open up for theoretical-legal reflection.

[63] B. Brożek, *Ekonomiczna analiza prawa karnego*, [in:] *Analiza ekonomiczna w zastosowaniach prawniczych*, eds. Stelmach, M. Soniewicka, Warszawa 2007, p. 88.
[64] J. Kabza, *Koncesje i zezwolenia. Analiza ekonomiczna*, Warszawa 2014, p. 99.

3. "Economic reasoning" and legal reasoning in the process of judicial application of law

The practical impact of law & economics on legal reasoning in the process of applying the law by the adjudicating panels of state courts (ordinary courts, administrative courts and supreme judicial institutions, not including "private" arbitration courts) is a difficult to verify and relatively scarcely recognised issue. The reasons for this state of affairs are numerous, including, inter alia, the fact that the examination of judges (aimed at verifying their attitudes, motivations, emotions, deductive processes) encounters obstacles that are difficult to overcome[65], and it seems unlikely that the circumstances of the facts and elements of the procedural tactics of the parties (e.g. arguments raised by the parties to the trial or evidence presented), which ultimately influenced the adjudicating panel to issue a particular decision, will be identified in a certain manner.

While not entering into a dispute as to the extent to which the common law tradition is the foundation, how strongly it is connected with law & economics, and to what extent Anglo-Saxon judges "sense" and promote economic efficiency in their judicial activities[66] - a specific *credo* of law & economics may be the words of Oliver Wendell Holmes, uttered over a hundred years ago, about the vocation of future judges: "for the rational science of law, a careful interpreter of regulations may be a man of the present, but a man of the future is a statistician and a master of economics"[67]. It is also significant that some representatives of law & economics - including the leading ones, sometimes treated as the founders of modern law & economics: Richard Posner and Guido Calabresi - have practical jurisprudential experience, having served as judges in the American justice system.

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[65] On this subject: Ł. Markiewicz, A. Markiewicz-Żuchowska, *Skłonności poznawcze sędziego wpływające na wysokość wymierzonej kary*, "Decyzje", 2012, no. 12, p. 76. These themes have been developed, e.g. in: M. Jabłoński, K. Koźmiński, *Odpowiedzialność majątkowa władzy publicznej względem obywateli. Badania empiryczne. Studia nad orzecznictwem*, Warszawa 2015; K. Koźmiński, *Instytucja odpowiedzialności odszkodowawczej władzy publicznej w poglądach sędziów i urzędników – wyniki badań empirycznych* [in:] *Odpowiedzialność majątkowa władzy publicznej*, eds. E. Gierach, M. Jabłoński, K. Koźmiński, Warszawa 2016, pp. 203-222.

[66] On this subject, e.g.: T. J. Zywicki, E. P. Stringham, *Common Law and Economic Efficiency* [in:] *Encyclopedia of Law and Economics*, eds. F. Parisi R. Posner, pp. 10-43, http://ssrn.com/abstract_id=1673968, (accessed: 10.02.2018) and the literature cited therein.

[67] O.W. Holmes, *The Path of the Law*, "Harvard Law Review", 1897, vol. 10, no. 8, p. 457.

Anglo-Saxon discussions on the importance of law & economics in the process of judicial application of law emphasise, inter alia, the following themes: the importance of the "economic (business) reasoning" within the litigation, the substantive competence of judges to carry out a reliable and credible profit and loss balance (and generally consider the economic argumentation), the participation of the substantive factor consisting of external experts (specialists, appraisers) presenting the general social and economic context of the case examined by the court, the need to train judges and develop their competences in the field of economic knowledge, as well as the appropriate (effective) shaping of court procedures and organisation of court work in order to achieve the state of optimal use of resources and highest efficiency of the judiciary[68].

The above themes are also frequently the subject of studies by national authors, in works concerning the Polish judiciary and the directions of its potential reform, they consider, inter alia, the issues of: economic models of judges' behaviour and courts' organisation, potential "incentives" influencing judges' attitudes and actions, optimal work organisation and the influence of remuneration rules on the efficiency of adjudication[69]. They frequently become the point for strong criticisms - for instance: "I have on my desk a couple of rulings precisely on distribution contracts. The courts completely fail to understand basic economic principles, the law of supply and demand, as well as the law of value. I am sorry to say that our judges are economically illiterate. When I compare their work with the rulings of the Arbitration Court, where practitioners of law often sit, this is like heaven and earth, the level of jurisprudence cannot be compared (...) My comment is therefore: let us organise such conferences for judges and educate them"[70].

Tomasz Stawecki formulated an interesting remark in this context. According to him, the relatively limited knowledge of the practice of economic life and caution towards the instruments offered by law & economics is the result of, inter alia, a "judicial career path", differing from that in the United States, (in general, law studies followed by judicial application, and therefore the lack of experience in working for clients, including entrepreneurs, bankrupts, tax evaders, or participation in negotiations), few economic and legal-economic subjects in the curricula of legal studies, weak rooting of utilitarian philosophy and liberalism in the Polish ground, as well as "conservative attitude" of legal circles that are used to thinking in a formalistic manner (possibly in terms of "fairness and justice"), not in terms of the *homo*

[68] On this subject, e.g.: E.R. Becker, *The Uses of "Law and Economics" by Judges*, "Journal of Legal Education", 1983, no. 2, pp. 306-310; P.M. Wald, *The Limits on the use of Economic Analysis in Judicial Decisionmaking*, "Law and Contemporary Problems", 1987, no. 50, pp. 225-244.
[69] As an example, the study: P. Banasik, *Ekonomiczna analiza motywacji polskiego sędziego i czynniki wpływające na jego decyzje związane z wyborem zawodu i efektywnością*, "Zarządzanie Publiczne", 2015, no. 4, pp. 66-84.
[70] W. Kocot, *Głos w dyskusji*, *Ekonomiczna*..., p. 128.

oeconomicus model (a man rationally operating in the world of prices and markets), economic efficiency and maximisation of achieved benefits[71].

The above opinion is difficult to disagree with, especially in view of the "formalist" attitude, which can be primarily summarised as compliance with the legal norms in force, decoded from the text (law in the books, textualism) by means of methods (seemingly) rooted in logic (legal logic). Such type of reasoning is initiated at the level of legal studies: "the claim that the essence of legal education is to shape lawyers in the spirit of formal-legal reasoning, at least in the current model of education, is true. This legal reasoning is to be associated with legal positivism and the idea of the rule of law"[72]. Instead of "effect-based" reasoning (oriented towards socio-economic consequences as well as the "price/profit" relationship) and taking account of the dynamically changing reality as governed by law, the predominant position among lawyers is the one that focuses on the legal text, since "[t]he legal text provides the clearest premise for interpretation, whereas recourse to extra-textual premises involves possibility of their selective choice (due to their multiplicity) as well as their misunderstanding (due to their indefiniteness)"[73].

Figuratively speaking, while for the 19th century formalist, the starting point in the discussion of law was the reconstruction of a general and abstract norm of conduct on the basis of the legislator's statement reflected in the text of a particular legal act, whereas among the American lawyers of the last century - i.e. legal realists or sociologically oriented lawyers - the thesis gained popularity, according to which the facts of a specific case (sometimes as trivial as the age or sex of the judge, or the decor of the courtroom where the dispute between the accused and the prosecutor took place) are no less important for the final decision and the fate of the accused. The importance of the distinction between law in action and "law on paper" or "law in the books". Moreover, it was emphasised that extra-normative circumstances (perceived by a sociologist or psychologist, ignored by a lawyer-formalist) provide more insight into the surrounding legal reality than strictly written, rigid provisions. Furthermore, the knowledge of such extra-normative factors allows to predict the verdict much more accurately than reading legal texts (the prediction theory of law)[74]. However, the superiority of sociological, realistic and economic approaches to law is based on the fact that they are not only not "separated" from the surrounding reality (in search of clear and static norms), but they make the application of law vital (more comprehensible for its recipients, parties to the process, citizens and entrepreneurs), cost-effective (economically efficient), adequate

[71] T. Stawecki, *Sędziowie w procesie reformowania prawa* [in:] *Analiza ekonomiczna w zastosowaniach prawniczych*, eds. J. Stelmach, M. Soniewicka, Warszawa 2007, p. 189.
[72] W. Staśkiewicz, *Rozumowania prawnicze w procesie legislacyjnym* [in:] *Rozumność rozumowań prawniczych*, ed. M. Wyrzykowski, Warszawa 2008, p. 94.
[73] M. Matczak, *Summa Iniuria. O błędzie formalizmu w stosowaniu prawa*, Warszawa 2017, p. 114.
[74] The flagship expression of this approach was the famous concept of "bad-guy theory" authored by Oliver Wendell Holmes, in which a bad person (recidivist, a person who knows the law "from practice" - from experience) will be much better at forecasting a future judgment than a lawyer-academic or formalist.

to the current needs and socio-economic challenges (taking into account the conditions of dynamically changing reality).

4. Law & economics and law-making

Finally, law & economics is applied in the legislative activity, in particular in the framework of the Regulatory Impact Assessment (hereinafter: "RIA"), the essence of which may be summarised as an analytical procedure that allows "to determine as precisely as possible all consequences - both benefits and costs - of a planned state intervention. (...) In the framework of the RIA, methods of law & economics as well as methods of social research are applied"[75].

The postulate to carry out the RIA (both *ex ante* and *ex post*), as well as to use other instruments favouring improvement of the legal environment, gains in popularity the more the crisis of law is perceived, including in particular the phenomena of law inflation, its overregulation and shortcomings of the legislative process[76]. It appears, however, that irrespective of the American provenance of law & economics, the innovative (allegedly difficult to reconcile with the traditionally positivistic "thinking" typical of the continental legal culture) approach promoted by the representatives of law & economics, as well as its strong roots in the common law, also in Poland, and not only in recently adopted legal regulations, there are solutions coherent with the assumptions of law & economics. Moreover, the search for analogies between the contemporary RIA and Petrażycki's policy of law[77] or coherence with the attempts (made during the communist era) in order to improve and rationalise the legislative process, seems to be well-founded[78].

Primarily, attention should be drawn to the provision of Article 118 paragraph 3 of the Constitution of the Republic of Poland of 2 April 1997[79], in which the Constitutional legislator formulates a specific formal requirement with regard to the entities exercising the right of legislative initiative:

[75] J. Osiecka-Chojnacka, *System oceny skutków regulacji w Polsce*, "Infos", 2008, no. 2, p. 1.
[76] On this subject, e.g.: K. Koźmiński, *Technika prawodawcza II Rzeczypospolitej*, Warszawa 2019, pp. 280 et seq.
[77] According to Leon Petrażycki, legal policy is: "scientifically justified anticipation of the consequences that should be expected in the case of the introduction of certain legal provisions", and the development of "such rules whose introduction into the system by the legislative (or other means, e.g., in the international domain) would cause certain desired effects". L. Petrażycki, *Wstęp do teorii prawa i moralności*, Warszawa 1930, p. 3.
[78] As an example: J. Wróblewski, *Teoria racjonalnego tworzenia prawa*, Wrocław 1985; E. Kustra, *Racjonalny ustawodawca. Analiza teoretycznoprawna*, Toruń 1980.
[79] The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws of 1997, no. 78, item 483, as amended).

Art. 118.

(...)

3. Sponsors, when introducing a bill to the Sejm, shall indicate the financial consequences of its implementation.

The Regulations of the Sejm[80] further specify the requirements for the project promoter:

Art. 34.

(...)

2. A bill shall be accompanied by a justification which should:

1) explain the need for and purpose of enacting the law,

2) present the actual state of affairs in the area that is to be regulated,

3) indicate the difference between the existing and the drafted legal status,

4) present the expected social, economic, financial and legal effects,

5) indicate the sources of financing, if the draft law involves a burden on the state budget or budgets of local government units,

6) present the assumptions of the draft basic executive acts,

7) contain a statement on the compliance of the draft law with the law of the European Union or a statement that the subject of the draft regulation is not covered by the law of the European Union.

2a. The justification of the draft act, which concerns property rights and obligations of entrepreneurs or rights and obligations of entrepreneurs towards public administration authorities, presents, as a separate part of the justification, an assessment of the expected impact of the draft act on the activity of micro-, small- and medium-sized entrepreneurs.

Similarly, in the case of the Regulations of the Council of Ministers[81], which regulate the governmental stage of the legislative process:

§ 27.

1. Together with the draft of a normative act the proposing body shall develop a justification of the draft.

2. Justification of the draft government document other than the normative act shall be prepared as necessary.

3. The justification of the draft normative act should:

1) explain the need and purpose of issuing the act;

[80] The Resolution of the Sejm of the Republic of Poland of 30 July 1992. Regulations of the Sejm of the Republic of Poland (Monitor Polski of 2021, item 483).

[81] The Resolution of the Council of Ministers of 29 October 2013. Regulations of the Council of Ministers (Monitor Polski of 2016, item 1006).

2) present the actual state of affairs in the field to be regulated;

3) indicate the difference between the hitherto and proposed legal status (the anticipated legal effects of the act being enacted);

(...)

§ 28.

1. A separate part of the justification of the draft normative act is the impact assessment, which presents the results of the evaluation of the expected socio-economic effects, as referred to in § 24 paragraph 3, hereinafter referred to as "RIA".

2. The RIA shall include, in particular:

1) indication of entities affected by the proposed normative act;

2) information about consultations conducted before the development of the draft, as well as of the scope of public consultations and issuing opinions on the draft; including the obligation to consult certain entities under separate provisions;

2a) information on the results of analyses of the possibility of achieving the project objective by other means;

3) presentation of the results of the analysis of the impact of the draft normative act on the entities referred to in item 1, and the impact of the draft on significant areas of influence, in particular on:

a) public finance sector, including the state budget and budgets of local government units,

b) labour market,

c) economic competitiveness and entrepreneurship, including the functioning of entrepreneurs, in particular micro-, small and medium-sized entrepreneurs,

d) economic and social situation of the family, as well as persons with disabilities and the elderly;

4) indication of financing sources, especially if the project involves a burden on the state budget or budgets of local government units;

5) indication of data sources and assumptions adopted for calculations.

2a. The RIA of a draft normative act, which determines the principles for undertaking, performing or termination of economic activity, also includes:

the results of the analysis of the project's compliance with the provisions of the Act of 6 March 2018 – Entrepreneurs' Law (Journal of Laws item 646, 1479, 1629, 1633 and 2212);

information on the application of proportional restrictions of administrative obligations towards entrepreneurs or justification of the non-applicability of such restrictions referred to in Article 68 of the Act of 6 March 2018. – Entrepreneurs' Law.

3. The RIA of the bill shall also include:

1) identification of the problem being solved;

2) identification of the purpose and essence of the intervention;

3) comparison with solutions adopted in other countries.

4. The RIA of a draft act or draft regulation which is not submitted to public consultation shall include an indication of the reasons for abandoning public consultation.

5. The RIA is presented on a form, the specimen of which is published by the Head of the Chancellery of the Prime Minister in the Public Information Bulletin on the website of the Chancellery of the Prime Minister.

Irrespective of the aforementioned provisions, the obligation to carry out cost-benefit analysis of regulations is provided for in the Rules of Legislative Techniques[82]:

§ 1.

1. The decision to draft a bill shall be preceded in particular by:

1) determination and description of the state of social relations in the area requiring intervention of public authorities and indication of the desired directions of their change;

2) analysis of the current legal status, taking into consideration the law of the European Union, international agreements by which the Republic of Poland is bound, including agreements on protection of human rights, and legislation of international organizations and bodies of which the Republic of Poland is a member;

3) determining the possibility of taking measures of intervention of public authorities, alternative to the adoption of the act;

4) determination of the expected social, economic, organisational, legal and financial effects of each of the solutions considered;

5) consulting the entities included in the scope of intervention of public authorities.

2. When deciding to prepare a draft law, if the draft is not prepared on the basis of assumptions, it is necessary in particular to:

1) determine the effects of the existing legal regulations in force in the particular area;

2) determine the objectives to be achieved by the enactment of the law;

3) identify legal alternatives that can effectively serve to achieve the assumed objectives;

4) formulate forecasts of the primary and secondary effects of the intended alternative legal solutions, including the impact of these solutions on the legal system;

5) identify the financial consequences of particular legal alternatives and determine the sources of their financing;

6) select the optimal legal solution under the respective conditions.

[82] The Regulation of the Prime Minister of 20 June 2002 on the "Rules of Legislative Techniques" (Journal of Laws of 2016, item 283).

Despite the fact that the aforementioned provisions set a legal framework that could result in a real improvement of the legislative process, the actual functioning of the RIA is subject to criticism. Not only in Poland has it been noticed that the tool, which in theory is supposed to ensure that the entities responsible for the law-making are aware of the socio-economic consequences (of the planned legal act), is in fact sometimes ignored, has only a facade character and becomes a (completely unreliable) "propaganda tube" of the project promoter. Instead of presenting evidence-based research conclusions, the project promoter makes unsupported assertions such as: "*the proposed regulation will not have an impact on the labour market*", "*a positive effect for entrepreneurs is expected*", "*the law is in compliance with the regulations of European law*", "*analogous solutions are already in force in other countries of the European Union*", etc[83].

Although the assumption of the RIA opens lawyers to cooperation with other representatives of social sciences, as a thoroughly conducted regulatory impact assessment requires interdisciplinary cooperation with sociologists, economists, psychologists, as well as the involvement of stakeholders (representatives of entrepreneurs, NGOs) in the decision-making process and provides the opportunity to make it less "political" and more "substantive", on the other hand it complicates and prolongs the legislative procedure. Thus, a paradoxical situation arises: despite the fact that the regulatory impact assessment enables identification of future benefits and costs of changing the law, and consequently allows to take an optimal and effective (best from the point of view of limited resources) decision, the very institution becomes an additional cost, delaying and formalising activities of public authorities[84].

The scope of the present paper does not allow for more extensive comparative remarks[85] or enumeration of current national shortcomings of the RIA system. Therefore, it should be limited to pointing out that - against the background of foreign experience - Polish solutions stand out particularly negatively due to the deficit of procedures and institutions intended for *ex post* the RIA, as well as the lack of the RIA at the local level[86].

[83] On this subject, e.g.: I. Lipowicz, *Uwagi o polskim systemie stanowienia prawa*, "Państwo i Prawo", 2012, no. 7, p. 18.
[84] J. Szymanek, *Ocena skutków regulacji w procesie tworzenia prawa*, "Infos", 2021, no. 5, p. 4.
[85] As an example (partially out of date) publications: M. Sakowicz, ed., *Ocena skutków regulacji w świetle doświadczeń wybranych krajów Unii Europejskiej*, Warszawa 2010; W. Brzęk, *Regulation Impact Assessment (RIA) at Poland and at some EU countries*, "Social and Behavioral Sciences", 2014, no. 109, pp. 45 – 50.
[86] M. Dulak, *Uwarunkowania w projektowaniu oceny skutków regulacji na poziomie lokalnym* [in:] *Ocena skutków regulacji w gminach*, ed. M. Dulak, Kraków 2020, p. 36.

Conclusion

Summarising the above, it should be noted that:

- law & economics is not limited to theoretical, purely intellectual considerations, having a substantial application potential in the field of law application and law-making;
- despite its Anglo-Saxon provenance and strong links with the American common law tradition, selected practical postulates of law & economics (including, in particular, strengthening competences in the field of economics and knowledge of economic turnover by judges, participation of financial experts and experts in the field of law & economics in precedential court proceedings, as well as *ex ante* and *ex post* regulatory impact assessment in the law-making process) can be successfully applied in the countries of the continental European legal tradition;
- in Poland there are already in force (some of them for a number of years) legal regulations (e.g., the Constitution of the Republic of Poland, the Regulations of the Sejm, the Rules of Legislative Techniques and the Regulations of the Council of Ministers), which may provide in practice the legal basis as well as the framework for the improvement of law & economics in the application and law-making process.

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