

# AN INTRODUCTION TO ECONOMIC ANALYSIS OF LAW

UMA INTRODUÇÃO À ANÁLISE ECONÔMICA DO DIREITO

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## ABSTRACT

The purpose of this article is to deal with the introductory aspects of Economic Analysis of Law (AED). To reach the objective, the research started by the interaction between the sciences of Law and Economics, their differences and convergences. Then it was about the origin of the movement, passing to the methodological premises of the economic theory based on the scarcity of resources, the maximizing rationality, the incentive structure and the question of efficiency. The research converges to demonstrate the need for dialogue and cooperation between the disciplines of Law and Economics. It is concluded that the AED, in its pragmatic and consequentialist bias, helps the jurist to understand the application of the legal norm (descriptive sense) providing the keys for understanding the choices made by the legislator on the different themes aiming at the improvement of legislation (predictive sense). The article is inserted in the branch of Legal, Social and Environmental Sciences, in the areas of Environmental Law, Water Law and Civil Procedural Law, being analyzed in a holistic perspective. The methodology adopted was bibliographic and documentary, in a qualitative analyses.

**KEYWORDS:** Law. Economy. Economic Analysis of Law.

## RESUMO

*O presente artigo tem por objeto tratar dos aspectos introdutórios da Análise Econômica do Direito (AED). Para o alcance do objetivo a pesquisa iniciou pela interação entre as ciências do Direito e da Economia, suas diferenças e convergências. Em seguida se tratou da origem do movimento, passando às premissas metodológicas da teoria econômica calcada na escassez de recursos, na racionalidade maximizadora, na estrutura de incentivos e na questão da eficiência. A pesquisa converge para a demonstração de necessidade de diálogo e cooperação entre as disciplinas do Direito e Economia. Conclui-se que a AED, em seu viés pragmático e consequencialista, auxilia o jurista a compreender a aplicação da norma jurídica (sentido descritivo) fornecendo as chaves de compreensão das escolhas feitas pelo legislador sobre os diferentes temas visando o aprimoramento da legislação (sentido preditivo). O artigo se insere no ramo das Ciências Jurídicas e Econômicas, na área do Direito Econômico, sendo analisada em uma perspectiva holística. A metodologia adotada foi a revisão bibliográfica e documental a partir de uma análise qualitativa.*

**PALAVRAS-CHAVE:** Direito. Economia. Análise Econômica do Direito.

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### Como citar esse artigo/How to cite this article:

BORBA, Rogério. MÔNACO, Rafael de Oliveira. *An introduction to economic analysis of law*. Revista Meritum, Belo Horizonte, vol. 15, n. 1, p. 218-228, jan./apr. 2020. DOI: <https://doi.org/10.46560/meritum.v15i1.7844>.

# 1 INTRODUCTION

Law, as a mode of social ordering, in the systems of Roman-German tradition, is traditionally conceived based on the concept of sanction.

In coercibility, in the subsumption of fact to the norm and in pure methodology (COELHO, 2001, p. 02)<sup>3</sup>, without the contamination of other knowledge, that Law, as a science, was revealed.

However, as the complexity of the social phenomenon grew, notably from the first half of the 20th century, legal positivism was in crisis. It was no longer possible to close the legal norm to the legal text, nor to confuse the law (rule) with the Law itself. The legal formalism with a hermetic, legalistic and sterile profile did not meet the demands of society.

Social pluralism demanded new knowledge that the science of law, by itself, was unable to offer. New answers to old problems were therefore called for. Thus, new archetypes emerge as a reaction movement to the so-called juspositivism.

Unlike the European system, which walked with an emphasis on constitutional principles, the North American model turned to an approximation of 'social reality' or 'pragmatics of law', working, instead of abstract values, with concrete answers, endowing the Law with syncretic or interdisciplinary knowledge based on new interpretive tools from the Economy (GICO JÚNIOR, 2012, p. 07)<sup>4</sup>.

It's in this context, then, that the economic theory of law is developed, marked by interdisciplinarity and shaped in a new methodology. The economic, theoretical and empirical instruments are used, aiming to improve the legislative elaboration, the doctrinal interpretation and the jurisprudential application of the legal norms based on the analysis of the results and consequences. Therefore, a new model was inaugurated, shaped by the so-called 'economy *jus*'.

However, the dialogue between 'Law' and 'Economics' has not always been facilitated. On the other hand, due to scientific isolation, academic specialization and the diversity of objects, this bridge for a long time it stopped being crossed. There was, in this position, a certain prejudice on both sides, which caused great noise between the exchange of knowledge

3 Such was the influence of Hans Kelsen, who under the column of legal positivism, defended a pure conception of Law, having as its object, exclusively, the sanctioning legal rule on the one hand, and the neutrality value on the other, supported by the single criterion of validity, thus moving away (given the scientific nature of the law) from issues related to ethics, morals, politics, sociology and, also, economics. The law scientist must deal exclusively with the norm. The interfering factors in the production of the norm, as well as the values contained therein, are strictly foreign to the object of legal science. It would be up to sociology, psychology, ethics or political theory to examine the connection between law and facts specific to the object of each discipline. Pure theory does not deny the connection, but its importance or even pertinence in the study of the content of the legal norm. On the other hand, legal knowledge to be scientific must be neutral, in the sense that it cannot issue any value judgment about the option adopted by the competent body for the edition of the legal rule. (COELHO, 2001, p. 02) (Our translation into english)

4 "In North American legal realism, the reaction to juspositivism resulted in a clamor for interdisciplinarity with other sciences to bring law closer to social reality, moving away from its sterile formalism. This movement ended up generating several interdisciplinary schools of legal thought, not necessarily converging, that tried to see the world in a more realistic and pragmatic way through science, such as Economic Analysis of Law and Critical Legal Studies, among other movements. In countries with a European-continental tradition, including Brazil, one of the late reactions to juspositivism was neoconstitutionalism, which proposes to denounce the inability of logical-formal reasoning to deal with highly controversial issues, to which there is no single answer and takes up the position according to which a reference to law would not be possible without an evaluative connotation. (GICO JÚNIOR, 2012, p. 07) (Our translation into english)

(PINHEIRO; SADDI, 2005, p. 04). There are several factors that contributed to ward off these sciences.

It's possible to say that: while Law is discourse (rhetorical language), Economics is mathematics (econometric language); Law has as its value the ideal of Justice (abstraction), while Economics aims for effective results (concreteness); Law is dogmatic and hermetic (closed system), unlike economics which is empirical (open system); Law is legalistic (formal), but Economics is utilitarian (pragmatic); Law operates in the world of duty to be (prescriptive sense), however Economics operates in the world of being (descriptive sense) (SALAMA, 2017, p. 12).

However, this methodological antagonism is in the past, since both sciences deal with problems of organization, stability and efficiency of the system. Furthermore, there is no right that doesn't reflect an economic cost, and doesn't work: an economic system unlinked of legal institutions that promotes a guise and that guarantees the fulfillment of transactions (NUSDEO, 2008, p 39)<sup>5</sup>. Therefore, both knowledges correspond as the verse and reverse of the medal.

Therefore, currently, there is no reason to be the imprisonment of these two scientific knowledge. Law and Economics go together, hand in hand, they are fields that cross and interpenetrate each other. There is, therefore, a dialectical interaction, with reciprocal influence, between the economic and the legal, and it is not possible to conceive this - legal - as an ideological superstructure of that - economy, nor to reduce it to that - economy - as an exclusive source of legal norms.

This is so true that the Constitution of the Federative Republic of Brazil (*Constituição da República Federativa do Brasil*) enshrined an entire chapter regarding the Economic Order, demonstrating the perfect harmony that exists between such sciences, transforming the economic phenomenon into a legally appreciable object, just like the Midas touch (REALE JUNIOR, 2002, p. 29)<sup>6</sup>.

Indeed, the importance of both disciplines for social ordering is beyond doubt, since the relationship between Law and Economics has always been a novel that has shaken the foundations of the civilized world, since the dawn of human history (LEWIS, 2005, p. 23).

It's necessary, therefore, to understand both aspects within an approximate perspective of scientific knowledge without sterile constraints, in view of the reciprocity of effects that derive from this relation.

Therefore, it shows intimate connection, so that, more than confrontation, cooperation is needed, above all.

This article is part of the branch of 'Legal and Economic Sciences', in the area of Economic Law, being analyzed in a holistic perspective.

5 "Economy and Law are inextricably linked, since the basic relationships established by society for the use of scarce resources are instrumental, that is, legal. On the other hand, economic needs influence institutional organization and law-making. Anyway, there is no economic phenomenon not inserted in an institutional niche". (NUSDEO, 2008, p 39) (Our translation into english)

6 "We would say that the law is like King Midas. If, in Greek legend, this monarch converted everything he touched into gold, annihilating himself in his own riches, the Law, not by punishment, but by ethical destination, converts everything its touches into legal, to give its conditions of guaranteed realization, in harmony with other social values". (REALE JUNIOR, 2002, p. 29) (Our translation into english)

Then, the following question arises: Is there a scientific relation between Law and Economics? The worked hypothesis not only recognizes the relationship, but also foresees its articulation as a new scientific branch.

With this, the objective is to evaluate the relationship between these two types of knowledge, developing a new scientific line. The methodology adopted was bibliographic and documentary, in a qualitative analysis. The academic relevance of this research is demonstrated in the sense of contributing to the recognition / consolidation of Economic Law as an autonomous branch of science.

## 2 HISTORICAL ORIGIN

This movement takes historical roots in Human empiricism (BITTAR, 2019, p. 85)<sup>7</sup>, in philosophical pragmatism (CHAUI, 2000, p. 132)<sup>8</sup> and is clearly reflected in the legal realism (FONTES, 2014, p. 86-87)<sup>9</sup> (GODOY, 2012)<sup>10</sup>, rejecting the metaphysical concepts of 'Justice' to seek the criteria of experimentation, utility, consequentialism, social well-being and efficiency for the pillars of this novel school.

For Richard Posner, considered one of the founding fathers of this current of thought, at the American School of Chicago, from the 1970s onwards, the economic analysis of law corresponds to the most important development of legal thinking in the last quarter of a century, with Economics spread to a growing range of legal issues not traditionally linked to it (POSNER, 1986, p. 17).

It's true that when it comes to economic analysis, it's intuitive to think about issues of great national repercussion, such as interest rates, inflation, exchange rate policies, savings and markets. In short, we think of money. This, however, is half true. Economic science does not deal exclusively with monetary issues, it goes much further.

The modern economy has gone beyond the limits of production and distribution of goods and services, to focus on non-market human behavior, in the decision-making process, in a

7 "David Hume's philosophy has its foundations based on practical experience, which figures as the great matrix of knowledge, fitting into the English and Scottish empiricist philosophies, moving away from the prevailing jusnaturalist rationalism". (BITTAR, 2019, p. 85) (Our translation into english)

8 For empiricist philosophers, the truth, besides being always in fact, must be obtained by experimentation, having as its effectiveness or practical utility. Knowledge is considered to be true not only when it explains a fact, but especially when it allows observing practical and applicable consequences.

9 "Legal realism or pragmatism is the chain of jusphilosophy according to which the law, at least the valid law, is that effectively observed and applied in a given society. This current departs both from jusnaturalism and from normative positivism. (...) Legal realism is influenced by philosophical pragmatism and also utilitarianism, recommending that the judge be concerned above all with the practical consequences of his decisions". (FONTES, 2014, p. 86-87) (Our translation into english)

10 There is substantial criticism about the lack of knowledge of jurists, regarding legal realism, in countries with a positivist matrix. The author states that: "Realists abandoned metaphysics and romantic constructs of natural law, in favor of pragmatism, practical utility, and factual performance. North American legal realism is related to pragmatism, as well as some expressive nuclei of contemporary legal thought, such as the law and economics movement (Law and Economics) and critical legal studies (critical theory of Law). Little known in Brazil, because it's confused with legal tradition supposedly refractory to ours, the North American legal realism isn't a subject that has worried the Brazilian jusphilosophical inquiry, which has already been the victim of chronic and pathological monoglossia, centered on translations of European texts. We are still hostages to analytical philosophy, German metaphysics, French foundationalism and an incipient Portuguese constitutionalism. It is a common place for the association of the cultural environment of the United States with the imperialism that nuances the capitalism of that country and with consumer media products. Therefore, the neglect towards a substantially very dense thought, which we need to somehow study". (GODOY, 2012) (Our translation into english)

rational world in which resources are limited in view of personal needs and where people aim to promote their own interest.

According to the concept of Lionel Robbins (2014), economics must be understood, then, as “the science that studies human behavior as a relation between ends and scarce means that have alternative uses”.

Hence the correct sentence by Edmund Burke (2019), according to which “the economy is a distributive virtue and consists not in saving, but in choosing”.

Therefore, if human conduct is subject to choices for the use of scarce resources in an alternative way, regardless of the nature of the decision, they involve the economic method (GICO JÚNIOR, 2012, p. 13)<sup>11</sup>.

With this focus, economic analysis offers useful tools to the legal world, since it's based on a theory about human behavior that does not exist in Law. Thus, it assists in the understanding of social facts, either through a diagnosis of objective reality (positive analysis), or through a prognosis (normative analysis) of how agents will respond to certain legal incentives (GICO JÚNIOR, 2012, p. 18).

The Economic methodology applied to Law must answer, in summary, four basic questions in relation to the legal system:

- 1) What is the objective to be achieved with a certain legal norm?
- 2) Does the legal standard achieve the expected results?
- 3) What are the consequences of applying the legal standard?
- 4) How should the legal standard be applied?

### 3 METHODOLOGICAL PREMISES OF ECONOMIC ANALYSIS OF LAW

In order to provide answers to such questions, the economic method is supported by some premises or postulates that provide a theoretical framework for the model. They are: a) the scarcity of resources, b) the rationality of the agents, c) the incentives offered, and d) the economic efficiency.

The first one portrays a dilemma marked by the dichotomy between the scarcity of resources in the face of unlimited human needs. In fact, the drawn desires of the human heart have no limits unlike resources, which are finite in nature. The law of scarcity is a constancy, from which man, although he tries to overcome it, cannot escape (NUSDEO, 2008, p 27)<sup>12</sup>.

11 “In this sense, economic science, previously associated only with that part of human activity that we normally call economics, today investigates a wide range of human activities, many of which are also studied by other social sciences such as political science, sociology, anthropology, psychology and, of course, the law. It is this interaction between law and economics that was conventionally called Economic Analysis of Law”. (GICO JÚNIOR, 2012, p. 13) (Our translation into english)

12 “In contrast to what happens with human needs, the resources that humanity has to satisfy them are finite and seriously limited. Such a limitation is insurmountable, despite the successes of technology in always pushing forward the breaking point, when the exhaustion of the goods available to the human species would lead, if not to collapse, at least to the progressive stagnation of the entire economic process, which, in the end instance, consists of the management of scarce resources

Therefore, if there were abundant resources, there would be no social friction. There would be no dispute, as a qualified conflict of interest, thus making both, Law and Economics, meaningless.

By way of conclusion, it's due to the insufficiency of goods that everyone is forced to choose between possible alternatives, but excluding each other.

The decision-making process thus starts from a second assumption, namely, that economic agents are rational.

Maximizing rationality represents, within the scarcity of resources, the attempt to promote self-interest (SMITH, 2019)<sup>13</sup>, that is, it presupposes that individuals act to satisfy their personal goals, whatever they may be.

This decision-making model that maximizes interest, so to speak, encompasses the most imaginative human actions, from carrying out economic activities to the simplest choice processes, such as the decision to consume or leisure, and even the most elaborate decisions, such as entering into contracts and settling disputes (SALAMA, 2017, p. 27)<sup>14</sup>.

It's clear that this economic approach is not to be confused with selfishness or greed. *Juseconomy* (*juseconomia*) is not intended for material gain, but focuses on how people behave in order to satisfy their own interests or maximize their personal preferences.

In other words, people act in ways that achieve personal benefits, regardless of what object it is, whether pecuniary, political, altruistic or even familiar (GICO JÚNIOR, 2012, p. 23)<sup>15</sup>.

Adopts the image of *homo economicus* anchored in the philosophy of utilitarianism (BENTHAM, 1984, p. 09-13)<sup>16</sup>.

Under the amalgam of this principle, human decisions are seen as the result of a calculated mental process, in which the person ponders, like an accountant, the gains to be obtained from his conduct, less any losses to be avoided, maximizing the enjoyment of utilities to the point of being translated into well-being and happiness (HUNT; LAUTZENHEISER, 2013, p. 193-194).

This rational ideal, based on the choice of alternatives that mutually exclude each other, due to the restriction of resources, entails a comparative analysis between the cost and the

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available to the inhabitants of this planet. (...)The law of scarcity is an iron and unavoidable law, having subjected men to its yoke forever, leading them to organize and establish specific relationships among themselves, in order to face it, or better, live with it, mitigating it your serenity as much as possible". (NUSDEO, 2008, p 27) (Our translation into english)

13 As Adam Smith already predicted: "It's not from the benevolence of the butcher, the brewer and the baker that we expect our dinner, but from the consideration that they have for their own interests. We appeal not to humanity, but to self-love, and we never speak of our needs, but of the advantages they can obtain". (SMITH, 2019) (Our translation into english)

14 "This maximizing behavior is therefore taken to encompass a huge range of actions, ranging from the decision to consume or produce a good, to the decision to contract with someone, to pay taxes, to accept or propose a settlement in a litigation, to talk on the cell phone while driving and even to vote against or in favor of a bill". (SALAMA, 2017, p. 27) (Our translation into english)

15 "(...) the juseconomic approach does not require supposing that individuals are selfish, greedy or motivated only by material gains, it's only assumed that agents are rational maximizers of their usefulness, whatever that means for them. In this line, for example, they are fully subject to economic analysis situations in which human behavior has as its central motivation immaterial or psychological elements, such as prestige (e.g., gym), power (e.g., politics) or even altruism (e.g., family). Still, it's the individual who acts and from it we begin our search for understanding the collective". (GICO JÚNIOR, 2012, p. 23) (Our translation into english)

16 Jeremy Bentham is considered the great precursor to the principle of utility, in the sense that people seek to maximize their own well-being by recognizing that mankind is under the control of two masters: pleasure and pain. Therefore, it's in the desire to obtain happiness and get away from pain that the key to human motivation can be found. (BENTHAM, 1984, p. 09-13)

benefit to be obtained with the committed behavior, which in economic language is translated by the expression *trade-off*.

That is to say, in order to obtain something it's necessary to give up another, in a relationship of loss and gain. In other words, the delight of any benefit entails the renunciation / waiver of the equivalent not chosen or deprecated. Life, therefore, is seen as a permanent process of exchange, whether with explicit prices or not (GICO JÚNIOR, 2012, p. 20)<sup>17</sup>.

Herein rest the fundamental aspect of the behavioral model of Economics applied to Law. Methodological individualism is used as a starting point, by deducing that the individual behavior that maximizes its usefulness is projected collectively in companies, organizations, institutions and in the State itself.

As a related development, the question arises that: all human conduct responds to incentives. Here is the third postulate of the Economic Analysis of Law – EAL (*Análise Econômica do Direito – AED*).

The idea of incentive is common in both, Law and Economics. The entire legal building is built on the premise that people will observe legal norms, that is, they will respond to legal incentives, positive (premium) or negative (sanction), depending on the marginal weighting of the costs and benefits that derive from the behavior.

Transporting this thought to the legal world, the conduct of: to fulfill or not a contract, to violate the law, to commit civil or criminal infractions will depend, precisely, on the rational balance of the individual, on the incentives offered, about the costs or benefits that each action will result (PINHEIRO; SADDI, 2005, p. 90)<sup>18</sup>.

It's no different in the economy, however, the focus of incentives is on price figures. Therefore, it's assumed that people will react to legal sanctions, such as consumers and agents would behave in relation to market prices. If low, the behavior will be encouraged with the expansion of the offer. If high, the tendency is for it to retract with the increase in cost, which will inhibit the behavior, given the rationality of the agents.

COOTER and ULEN (2010, pag. 25) summarize the issue as follows:

Lawmakers often ask: How will a sanction affect behavior? For example, if punitive damages are imposed on the manufacturer of a defective product, what will happen to the product's safety and price in the future? Or, will crime decrease if offenders who break the law for the third time are automatically arrested? Jurists answered these questions in 1960 in much the same way they had 2.000 years ago - by consulting intuition and whatever facts were

17 "Every choice presupposes a cost, a *trade off*, which is exactly the second most interesting feasible allocation for the resource, but which has been neglected. This cost is called the opportunity cost. So, for example, if we decide to buy fighter planes to strengthen our Aeronautics, we abdicate another allocation that these resources could have (e.g., build schools). If you choose to read this chapter, you will stop doing other activities such as being with your children, walking with your girlfriend or watching television. The usefulness that each one would enjoy with one of these activities is its opportunity cost, i.e., the implicit or explicit price paid for the good. Note that saying that something has a cost does not imply that it has a monetary value. Now you know that there is a lot of wisdom in the popular saying "everything in life has a price", just look to the side". (GICO JÚNIOR, 2012, p. 20) (Our translation into english)

18 "Applied to the universe of law, it implies that the decision to terminate a contract, to engage in activities originally not provided for in the contract, or to behave illegally, will depend on a rational balance of the benefits and marginal costs of each action. For example, the cost of accidents. The driver of the vehicle only respects the norm of stopping at a red light because this is more economical than receiving a traffic ticket. Those who violate the law or contracts, according to this conceptual premise, do so with the objective of maximizing their liquid satisfaction, as they perceive benefits that are greater than the costs, widely understood to include the negative utility resulting from the loss of freedom, ostracism social etc.". (PINHEIRO; SADDI, 2005, p. 90) (Our translation into english)

available. Economics provided a scientific theory to predict the effects of legal sanctions on behavior. For economists, sanctions are similar to prices, and presumably people react to sanctions, in large part, in the same way they react to prices. People respond to higher prices by consuming less of the most expensive product; thus, they are supposed to react to tougher legal sanctions by practicing less of the sanctioned activity. Economics has mathematically accurate theories (price theory and game theory) and empirically sound methods (statistics and econometrics) of analyzing the effects of prices on behavior. (COOTER; ULEN, 2010, p. 25) (Our translation into english)

The incentive structure, therefore, is the essential piece in understanding the Economic Analysis of Law. The change in social behavior, by means of legal rules, depends precisely on the incentives adopted in the norm / law, its objectives and results that can be evaluated concretely by economic reading<sup>19</sup>.

With this north, a legal system must be more concerned with the structure of incentives than with values abstractly considered, in order to achieve the desired objectives.

In view of this panorama of scarcity, rationality, maximization of utilities and comparative cost-benefit relations, to induce choices and behaviors, economic analysis strives for an efficient allocation of available resources. Efficiency, it can be said, is the core or touchstone of Economic Analysis of Law.

In economics, this postulate leads to broad results. Efficiency aims at maximizing utility or social well-being and minimizing the social costs involved, which can be understood within an individual and collective conception.

The first concept of economic efficiency fell to Vilfredo Pareto; for this author there would only be efficiency in the allocation of resources in the market when there was a balanced situation in the transactions. That is, efficiency would correspond to an improvement in the situation obtained among economic agents, as long as it did not cause any loss, decrease or worsening for others. (SALAMA, 2017, p. 86)<sup>20</sup>. In this context, there would be an optimum allocation of resources, a "Great' Pareto" or a "Pareto-efficient" ("*Ótimo de Pareto*" or "*Pareto-eficiente*").

The great criticism of this criterion rests on the individualistic, consensual aspect, and on the demand for unanimity in its conforming balance, which leads to an unreal application of its requirements, given that, in a capitalist economy, exchanges can be unequal, being possible that losses occur between the parties and undesirable effects are projected to third parties.

19 An emblematic example, as a structure of normative incentives for the reduction of traffic accidents, is the so-called "Operation Dry Law" ("*Operação Lei Seca*"), resulting from Law nº 9.503/97, which has worsened over time. The legislation brings serious administrative (art. 165) and criminal (art. 306) penalties, prohibiting the driving of a motor vehicle, under the influence of alcohol or other psychoactive substance, with the imposition of financial losses resulting from the application of fines, cost of opportunity in view of the suspension of the right to license, in addition to emotional distress and expenses with criminal defense and eventual serving of sentences in case of conviction.

20 "The conception of the Italian economist Vilfredo Pareto aimed to resolve an issue arising from the utilitarian philosophy concerning the problem of measuring happiness or general well-being. For this to be observed, it would be necessary for all participants involved in the transaction to experience an improvement in their situation, when compared to the original conditions prior to the relationship. Paretoian happiness or well-being requires everyone to win, but no one to bear losses". (SALAMA, 2017, p. 86) (Our translation into english)



Pareto's criterion is criticized, as it's not exempt from subjective valuation, which prevents an objective analysis. Pareto guides efficiency under an individual subjective bias, that is, in relation to personal well-being (in which social well-being is confused with individual well-being), so that the efficiency criterion would be subjectified, since it's based on the concept of well-being of each one. However, an optimal solution depends on each party's point of view.

Meeting this equalizing need, the compensation method was developed by Nicholas Kaldor and John Hicks. In the Kaldor-Hicks criterion, the allocation efficiency is not supported by the consensus, nor are unanimous gains required.

What matters is that the socially earned benefit (general well-being) is able to make up for the losses with the possibility, in theory, of compensating the losses borne by the losers (compensation for losses incurred by losers). Hence it is called "Pareto-Superior".

In fact, in a real world of exchange economics, Pareto's criterion isn't the most appropriate. The ideal of well-being cannot be linked to an equality process. Since people are maximizing their own interest and there is a scarcity of resources at the other end, the entire gain can correspond to a hypothetical or real loss, current or future, individual or diffuse for the system.

With this guise, the criterion of economic efficiency cannot remain based on the absence of losses, as they naturally exist. But rather in the possibility of compensation, where the general gains outweigh the losses, with the maximization of the collective wealth/ riches and the fulfillment of the dictates of the Constitutional Economic Order (*Ordem Constitucional Econômica*) (MARTINS, 2017, p. 31).

For Law, efficiency, traditionally, has always been linked to the reach of Justice. The Roman brocade *fiat justitia et pereat mundus* well mirrors this facet, so Justice couldn't be measured or quantified, but felt. However, doing justice, even if the world perishes, reveals a total lack of commitment to the social reality that surrounds us. The old adage forgets that rights have costs, they don't grow on trees.

In fact, Justice entails value. In this spectrum, the economic tool cannot reliably x-ray this valuation he cannot say what is fair.

However, in a scenario of scarcity of resources, with the constitutional need for the realization of fundamental rights of all kinds, a legal rule that generates waste, unjustified losses and disregard for legitimate claims, can be reprimand, because its unjust and, therefore, inefficient.

In that sense, the lesson of GICO JUNIOR (2012, p. 27):

In a world where resources are scarce and human needs potentially limitless, there is nothing more unfair than waste. In this sense, EAL can contribute to (a) the identification of what is unfair - any rule that generates waste (is inefficient) is unfair, and (b) any weighting exercise is impossible if those who are doing it doesn't know what is effectively on each side of the scale, that is, without understanding the real consequences of this or that rule. Juris-economics helps us to discover what we will really achieve with a given public policy (prognosis) and what we are giving up to achieve that result (opportunity cost). Only holders of this knowledge will we be able to carry out a cost-benefit analysis and make the socially desirable decision. (...) As stated, if

resources are scarce and needs are potentially limitless, all waste implies unmet human needs, so any definition of justice should have as a necessary condition, even if not sufficient, the elimination of waste (i.e., efficiency). We don't know what is fair, but we know that inefficiency is always unfair, so I can't see any conflict between efficiency and justice, quite the opposite, one is a condition for the other's existence. (GICO JUNIOR, 2012, p. 27) (Our translation into english)

It is thanks to Economic Analysis that the concept of efficiency, within the scope of Law, is realigned to the consequentialist bias<sup>21</sup>. In legal language, care is about functionalizing efficiency with the scope that the normative system can meet individual and collective claims without losing the north of economics.

## CONCLUSION

As seen, Law and Economics don't live in separate worlds. They are complementary social sciences. Both focus on the system's organization, stability and efficiency.

In fact, if in the past your knowledge remained separate, due to academic specialization and the diversity of objects, today, this isolation is no longer justified.

The traditional conception of Law, influenced by legal positivism, strong in the idea of pure methodology and scientific neutrality, is not going to prosper modernly in face of the demand to meet the new social issues, within a scenario of scarcity of resources.

In reaction to this panorama, *jus economics* (*jus economia*) arises, as a result of philosophical pragmatism and legal realism, giving rise to the Economic Analysis of Law movement.

Based on its methodological premises, it seeks to evaluate the descriptive meaning of the legal standard/rule in its real application, with regard to the content and concrete effects, as well as to establish a prognosis of how the standard/rule should be elaborated/applied, in order to achieve the desired objectives, based on economics and the incentive structure.

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21 This seems to be the new horizon of the legal system brought by Decree-Law nº 4.657/62 - Law of Introduction to the rules of Brazilian Law (*Lei de Introdução às normas do Direito Brasileiro*). The wording of art. 21 states that: The decision that, in the administrative, controlling or judicial spheres, decrees the invalidation of an act, contract, adjustment, process or administrative rule must expressly indicate its legal and administrative consequences. Art. 23 states that: the administrative, controlling or judicial decision that establishes a new interpretation or orientation on a norm of undetermined content, imposing a new duty or new condition of law, should provide for a transition regime when indispensable for the new duty or condition of law to be fulfilled proportionately, equally and efficiently and without prejudice to general interests. (Our translation into english)

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**Recebido/Received:** 30.04.2020.

**Aprovado/Approved:** 12.06.2020.