

# **To what extent is the opposition civil law / common law relevant for law and economics?**

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*Abstract: the distinction between common law and civil law has been used in the law and economic literature at an epistemological, methodological and prescriptive levels. The present article will focus on the epistemological level. Is this divide relevant for assessing the relative value of law and economics in a legal system? It will be shown that this divide is largely irrelevant but that some characteristics of legal systems (instrumentality of law, autonomy of legal reasoning and freedom of judges) are relevant. This article also advocates to distinguish between functions of law and economics and between agents involved in order to gain a better understanding of the role of law and economics in a legal system.*

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## 1. Introduction

The opposition between civil law and common law systems is well known by the legal academia. Indeed, it is mandatory in any introduction to comparative law and it is often believed that most legal systems follow one or the other of these legal traditions... apart from exotic systems such as Japan's or China's, and atypical one's like Quebec's, Israel's or Louisiana's. This opposition is of course more relevant regarding "private" law than, for example, constitutional law (Ponthoreau, 2010).

This does not mean that a clear-cut definition of either exists (or is possible, since it has been created; or even that there is no debate) except by stipulating a precise definition which is, of course, schematic at an empirical level. In general – and to keep the flavor of a "real" opposition – the common law is defined as "*large body of rules founded on unwritten customary law evolved and developed throughout the centuries*" (De Cruz, 1999, p 36) whereas the civil law is characterized by "codification" and "systematization". Some precisions will be added in the second section but this crude distinction is sufficient at this level.

This opposition between legal traditions has been – and is still – used in the law and economics' literature. Three different levels can be identified.

First, at an epistemological level, this distinction has been mobilized – among others (such as ideological and political climate (Jamin, 2003, p 280), path dependence in legal analysis (Schäfer, 2006, pp 194-97), the limited role, in Europe, of judge made law (Mattei & Pardolesi, 1991, pp 267-69), the under-theorization of the common law (Hatzis, 2000; Garoupa & Ulen, 2008, p 1588), etc.) – to explain the difference between the U.S and Europe regarding the reception of law and economics (Weigel, 1991; Kirchner, 1991; for data concerning the reception of law and economics in Europe, see for example Gazal-Ayal, 2007 & contra Depoorter & Demot, 2011). Since the U.S belongs to the common law tradition and Europe to the civil law tradition (except UK & Ireland), legal traditions could be a plausible reason. For example, Mattei argues that « *Because the common law was the legal framework in which most law and economics contributions were developed, anyone interested in discussing the chances of success of this approach in Europe finds himself or herself in need of checking the differences between common law and civil law that may be relevant to his or her problem* » (Mattei, 1997, p 77; this divide is also mobilize by Dau-Schmitt & Brun, 2006, pp 613-14, 617, 619). Recognizing that the legal side of law and economics is relevant for the use of this kind of analysis is significant and too often disregarded; however, the relevance of a purely legal distinction was not questioned enough.

Once it has been recognized that "*The law and economics movement is genuinely international, and has as much relevance to civil law and developing countries as it does to the Anglo-American common law countries*" (Posner, 2004: 67) or that "*efficiency, as a way of reasoning about law is no longer limited to the common law world and is diffused among civil law countries as well*" (Mattei, 1997, p 17), it was possible to inquire about differences in each legal tradition at a methodolog-

ical level. For example, are the questions raised by a scholar who belongs to a civil law system the same that are raised by her counterpart in a common law system? Is there a civil law “style” in law and economics’ studies? Is the same as those raised by scholars interested in law and economics? Except for few articles, this dimension has not produced a reaction from scholars either in article or discussion. Posner mentioned a “*distinctive ‘civilian’ law and economics movement that focuses on rule of law issues*” (Posner, 2004, p 67) without trying to suggest any reason for this “fact”. Data collected by Gazal-Ayal can be used to investigate the “type” of scholars interested in law and economics but do not reveal essential differences in civil law and common law systems (Gazal-Ayal, 2007, pp 806-9). Few books emphasize the civil law system in their approach (Schäfer & Ott, 2005; Deffains & Kirat, 2001) without explaining precisely the specificities of civil law systems for the use of law and economics.

More recently a prescriptive use has also been made which states that common law systems are more efficient (i.e. better for the economic growth) than civil law systems. This thesis is known as the legal origins thesis (La Porta, Lopez de Silanes, Shleifer and Vishny (LLSV), 1997 and 1998; see also La Porta, Lopez de Silanes and Shleifer (LLS), 2008). Even if the concept of legal origins has been extended to extra-legal parameters (such as human capital or the beliefs of the respective participants), it still relied on a common law civil law divide. However this opposition has been redefined for their purpose by the inclusion of economic parameters: “*common law stands for the strategy of social control that seeks to support private market outcomes, whereas civil law seeks to replace such outcomes with state-desired allocations*” (LLS, 2008, p 286). This thesis has created a vast amount of literature and numerous criticisms. For our purpose, it has been advanced that their understanding of the divide is often crude and that their assignment of a legal system to one or the other legal tradition is thus often faulty (Siems, 2007, pp 65-70). Moreover, they did not take into account the evolution of comparative law regarding this divide (*infra* and Schlesinger, 1995; Michaels, 2009, pp 780-783; contra Legrand & Samuel, 2008; Legrand, 1999).

My objective in this article is neither to enter directly into the debate over a normative use of this opposition (for some critics, see Michaels, 2009), nor to identify specificities in each legal tradition (I believe that this cannot be answered adequately for reasons that will become clear in the article). My purpose is more modest and lies at an epistemological level. To what extent is a difference in the legal architecture – a formal legal aspect – relevant for law and economics? Can this distinction portray a disparity in the use or acceptance of law and economics? Is this distinction only a proxy for more profound legal characteristics that could explain the reception of law and economics in a particular system?

Before presenting my theses, a few distinctions have to be made concerning the notion of “use” of law and economics.

The first distinction regards the “which”. I will not use the classical descriptive, predictive, prescriptive distinction. Indeed description in law and economics is in general an abductive demarche (assuming the economic framework, how is it pos-

sible to explain one particular phenomenon? And then it is followed by a “judgment” about the “proposed” hypothesis), prediction is simply an analytical truth that derives logically *ceteris paribus* from a model (empirical testing helps to accept one hypothesis but cannot be conclusive if we abide by popperian or lakatosian criteria) and prescription missed the link between the model and reality so that this use is merely rhetorical (for more developments, see Lanneau, 2010). I will use instead an abductive, heuristic and rhetorical divide. The abductive / hermeneutic function uses law and economics to inquire about legal phenomena; Law and economics is seen as a tool box to gain a “better understanding” about the world. It helps to ask questions and to envisage consequences of legal rules and institutions. The heuristic function is used in order to make a decision; law and economics does not “decide” but is used to help to decide. It is more than the abductive function since it relies more on law and economics’ results. The rhetorical function understands law and economics as a tool of justification. The problem is not to be “scientific” but to use the “prestige” of science to influence decision makers in the legal arena (it is a doctrinal use of law and economics). Of course, these three functions are linked: heuristic and rhetorical functions for example imply the abductive / hermeneutic function (but the reverse is not true).

The second distinction regards the “who”. Law and economics can be exploited by different kind of agents: legislators, judges, lawyers, scholars (both as critics and teachers). When the question of the relevance of law and economics is asked, this distinction is relevant. Indeed, there is a flaw if we focus our attention only on judges’ behavior even if “*the most important focus of law and economics, on both positive and normative grounds, is the judge’s behavior*” since law and economics is also a “*scholarly paradigm*” (Mattei, 1997, p 88; see also p 78).

With the help of these distinctions, it will be possible to prove that:

1) Legal traditions are irrelevant for the use of law and economics. Clearly, the abductive / hermeneutic function does not depend on them. Regarding the hermeneutic and the rhetorical function, legal traditions impact on the “who”: these functions are present but are not activated by the same agents. Moreover, the focus on legal tradition cannot explain differences inside one legal tradition. For example, how to explain that Australia, Ireland or New Zealand have not been influenced as much by law and economics than the U.S? How to explain differences inside civil law countries (its relative success in the Netherlands and its relative failure in the French legal academia – principally because of the introduction of a constitutional obligation of impact assessment in April 2009 (LO 2009-403))?

2) The question of the impact of legal tradition on the “relevance” of law and economics leads to the identification of three legal parameters that are relevant in order to assess the perceived value of law and economics in a particular legal system: the perceived instrumentalism, the perceived autonomy of legal reasoning and the perceived relative freedom of judges. That is, the more the perception of a legal system is close to the implicit conception of law endorsed by scholars in law and economics, the more the law and economics approach is judged favorably. Indeed, when inquiring into a specific legal tradition, scholars in

law and economics are focusing not only on the legal tradition itself but also on some of its perceived characteristics.

Before developing these two theses, one question might also be raised. Because law and economics adopts economic lenses to inquire into legal phenomena, are legal categories or distinctions adapted to these lenses or should law and economics develop some new categories adapted to its problematic? This question is linked to the limits of interdisciplinary works which have not sufficiently been considered in literature in the law and economics even though they are fundamental.

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## **2. The relative irrelevance of legal traditions for assessing the value of law and economics**

As Schanze observed: “*if this factor [the difference between judge made common law and codified civil law] had been of high significance, we would have seen a quick and effective reception in England and Scotland, and for example, a slow reception in Germany*” (Schanze, 2006, p 103). And, of course, it wasn’t the case. This “fact” alone, and asymmetries inside one or the other legal tradition regarding the reception of law and economics, could prove the relative irrelevance of legal traditions in assessing the reception and the value of law and economics.

In this section, my point is to demonstrate this irrelevance at an epistemological level. There is no impediment to the reception of law and economics in civil law countries even if a very crude conception of legal traditions is adopted (2.1); adopting a more modest view (2.2) helps to explain that only agents are changing but the three functions of law and economics can be used. Legal traditions are indeed a legal distinction that can’t fit with distinctions between legal systems that are relevant from the law and economics’ approach. However, this inquiry will be of some help in developing the framework in the third section (since, at least it justifies a new framework); and is relevant to gain a better understanding of what law and economics is doing and what is at stake.

### **2.1. Law and economics in a crude conception of legal traditions**

a. Following traditional comparative law, the key difference between common law and civil law lies in codification and in the role of judges (Mattei 1997, p 78).

a.1. “*The civil law tradition is the oldest, the most influential, and the most widely distributed around the world*” (LLS, 2008, p 289) Civil law systems are rooted in the roman *ius civile* and in the rediscovery of the *corpus iuris civilis* in the twelfth century by medieval scholars in continental Europe. Legal definitions and classifications from Gaius and Justinian had a tremendous influence on how to reason about the law and promote legal reasoning attached upon “legal categories”. Ro-

man law also advances a reliance upon writings that were supposed to promote unity, coherence, rationality and certainty in the legal system (for a short historical review, see Ponthoreau, 2010, pp 130-131). Modern legal codes materialized this tradition. These codes, even if inspired by customary law, are a “rational” product of the State (and State in continental Europe appeared through an affirmation of its monopoly in the creation of law) and law tends to be viewed as “the expression of the general will” (art 6 Declaration of the Rights of Man and of the Citizen). Mahoney noted *“that quite apart from the substance of legal rules, there is a sharp difference between the ideologies underlying common and civil law, with the latter notably more comfortable with the centralized and activist government”* (Mahoney, 2001, p 505)

In this system, the judges are supposed to be a “mere interpreter of law”: they have to implement solutions provided by enacted law without “choosing” the content of law which is a “given”. If a problem appears, they must refer to the intention of the legislator. They are supposed to be entirely limited by legal codes; their role is reduced to that of a mere “technician”. To quote Montesquieu: *“the national judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour”* (Montesquieu, 1748, book 11, chapter 6). Judges have to apply a beccarian methodology in their reasoning: *“The major should be the general law; the minor, the conformity of the action, or its opposition to the laws; the conclusion, liberty, or punishment. If the judge be obliged by the imperfection of the laws, or chooses to make any other or more syllogisms than this, it will be an introduction to uncertainty”* (Beccaria, 1764, chapter 4). Beccaria drew a clear opposition in task between judges and legislators. The former has *“no right to interpret”* (ibidem); the latter is the sole master of legal contents (he chooses the law). Of course, this idealistic conception should be taken as an ideal type and not as a description of how the law is working in a civil law system. It represents a crude conception of this legal tradition.

a.2. By contrast, *“The common law is formed by appellate judges who establish precedents by solving specific legal disputes”* (LLS, 2008, p 288). It is uncoded; it is not founded on a rational compilation of legal rules. Holmes summarized: *“The life of the law has not been logic: it has been experience”* (Holmes, 1881, p 1). This tradition emerges out of the history of England and especially with the evolving powers recognized to the King. The story began with the Norman Conquest in 1066. It led to the creation of royal courts and the system of *writs* (royal orders that dealt with specific “wrongs”; for example the writ of Habeas Corpus). In the fourteenth century, courts of equity emerged; they did not replace courts of law, they coexisted until the mid nineteenth century (until the writ system was abolished). These courts were allowed to judge according to principles of equity. Their aim was to achieve a “just” outcome which rests on *“the idea of an immanent justice”* (Legrand & Samuel, 2008, p 18). Of course, statutory law exists in common law countries, however, their aim is to complete or rectify the common law; they did not “form” the majority of common law rules: *“Historically, com-*

mon law statutory canons were developed originally for “special statutes”, in other words, statutes passed by the legislature to cope with specific urgent problems of the day, and these statutory maxims were, therefore, limited to specific problems” (De Cruz 1999:, p 266). To cope with a profound uncertainty, the common law is largely based on precedents. If a “new” case arrives in front of a judge, she has the power to determine the precedent (jurisdiction hierarchy must be taken into account). Moreover, according to Mahoney, “English common law developed because landed aristocrats and merchants wanted a system of law that would provide strong protections for property and contract rights, and limit the crown’s ability to interfere in markets” (Mahoney, 2001, p 504).

In this system, judges “are concerned with finding the applicable rule within the body of law made up of legal precedents” (Mattei, 1997, p 78); judges takes part in the creation of law. Judges and legislators are both decision makers; they “shape” the law (and the former more than the later). The law is then supposed to evolve more “smoothly” (which is a problem when circumstances require speedier amendment of the law) and is more related to the will of the parties.

b. If these models are taken in this extremely crude conception, law and economics is still relevant. However each type of agent is not concerned in the same way.

b.1. Concerning judges, Mattei notes: “if the traditional picture of the gap is correct, in a common law system one may trust a judge to be a decision maker who is always concerned with the policy impact of his decisions, while in a civil law system one may simply not make such an assumption” (Mattei, 1997, p 79). It is then clear that heuristic and rhetorical functions of law and economics can be manipulated by common law judges but not by civil law judges.

Indeed, if civil law judges are applying law like mathematicians are resolving classical mathematical problems (with only one technical solution), there is no need to mobilize economic reasoning in order to “find” a solution to one dispute and, *a fortiori*, to justify its solution: “in systems belonging to the civil law tradition, the outcome is determined, and should only be evaluated, in terms of the logic of its deduction from the provision of written law” (Mattei, 1997, p 79). For example, explicit economic reasoning is rare – not to say absent – in the decisions of the French cour de cassation and would have been criticized if present. In that case, the abductive / hermeneutic function might be used by judges outside their courts as an intellectual game but not in their practice of law.

Common law judges, by contrast, are shapers of law and can take into account the policy impact of their decisions (except if we agree with what has been called a langdellian approach to law or a dworkinian view; according to these views, judges discover the law without creating it) . Economics can help them first to gain a better understanding of what is at stake (abductive / hermeneutic function) and second to “choose” one option (heuristic function). There is also no impediment to using law and economics in order to justify their solution. This last use depends upon standards established by higher courts regarding the justification of a decision (which is linked to the debate about the autonomy of law, *infra*).

b.2. For lawyers, the situation is close to that of a judge. Civil law's lawyers will search for legal solutions in "codes" and not outside the law (using economic or sociological or psychological argument). The heuristic function will then be of no help: they have to "apply" the law, not to "decide" it. If judges conceived their role as "applier of legal rules", lawyers would not refer to economic argument to justify advocated solutions because it would not have any influence on judges. Indeed, in this crude system, there is no need for lawyers, except to establish facts. Like judges they are allowed to use the abductive / hermeneutic function of law and economics as a mental game or to "make sense" out of what they are doing but this use is not necessary for their daily practice.

Common law's lawyers are in an opposite situation. Since judges are aware that they are shaping the law, policy arguments used by lawyers can be of some influence (once again, it will depend upon what is "accepted" by higher courts). Thus, rhetorical and heuristic functions can be activated if accepted by judges. Since these two functions imply the abductive / hermeneutic function, all three functions of law and economics can be set in motion.

b.3. Concerning legislators, the situation is quite similar in both common law and civil law countries. Since they have power to decide, they have power to choose and economics can be introduced in order to make this choice (at an abductive / hermeneutic level or at a heuristic level). Of course, the rhetoric of economics can also be used to signal that they are pragmatic; or won't be used to signal that they have "values" (which does not mean that the decision was made only according to these values; indeed rhetorical and heuristic functions are not necessarily linked). To take the example of France, impact assessments (consequentialist reasoning), like cost benefit analyses, are tools both for inquiring into the problem at stake, for justifying the need for legislative action (in that case, the rhetorical function is recognized), and for deciding what is the "best" legislation regarding one specific problem (for this interpretation of CBA, see Posner and Alder, 2006).

b.4. Concerning scholars, the situation is also the same. Economics can be a mobilizing force to criticize existing rules, to prescribe reforms or to interpret the working of the legal system (all three functions can then be activated). However, the acceptance of this kind of reasoning will depend on what is conceived as "valid" reasoning by the scientific community (Kuhn, 1962) and the link between "valid" reasoning and how courts appear to decide a case should be taken into account. Indeed, if scholars are using economics, it is because they believe that it is a powerful tool which can be used by legislators or judges in order to make (better) decisions or at least to have a better understanding of what is at stake.

Even in a very crude appreciation of legal traditions, it is quite clear that law and economics can be used. What is changing is simply the "who". In common law systems all agents are concerned; in civil law systems, law and economics can be



especially useful to legislators and exploited by scholars. The abductive / hermeneutic function (EAL as an interpretive system) however can influence all types of agents.

## 2.2. Law and economics in a less crude conception of legal traditions

The extremely crude conception of the common law / civil law divide laid out in the previous section has to be refined since the ideal type is far from the actual working of law in each legal tradition (see for example De Cruz, 1999; Mattei, 1997; Ponthoreau, 2010; for a divergent view see Legrand & Samuel, 2008). The blurring of differences can be explained by a transformation in comparative law: *“Under the impact of a dramatic worldwide intensification of a trans-national exchange and the movement of persons, goods, services, and capital, the work of all branches of the legal profession tends to become globalized. Legal scholarship has begun its search for a common core of legal systems, and thus has sought to redirect the emphasis of comparative law toward similarities rather than differences”* (Schlesinger 1995, p 479). In this section, I will concentrate on the main arguments but I won’t present an exhaustive view (see references for more details). Since differences are blurring (except regarding procedure, see Chase & al., 2007), it will be clear that this divide is irrelevant with respect to the use of law and economics.

a. In civil law systems, *“codes are no longer the most significant sources of law”* (Mattei, 1997, p 83). Portalis was aware of some limitations of the civil code. He said: *“A code, however complete it may seem, is no sooner finished than thousands of unexpected questions present themselves to the magistrate. For these laws, once drafted, remain as written. Men, on the other hand, never rest. They are always moving; and this movement, which never ceases and whose effects are variously modified by circumstances, continually produces some new fact, some new outcome. Many things are therefore necessarily left to the authority of custom, to the discussion of learned men, to the arbitration of judges”* (Portalis, 1801).

Moreover, written laws cannot be more precise than their medium, the language; and natural language is far from being unambiguous (the role of the philosophy of language that was developed in the last nineteenth century cannot be disregarded). Judges are thus also shapers of the law since they have the power to transform normative propositions into norms through their power of interpretation which is not unconstrained (Troper, 2001, pp 9-11; see also Troper, 2011). They have to interpret a legal proposition that refers to “the reasonable man”, “causality” or “fault” (they are sometimes “forced” to refer to them, but the law does not entirely constrain the “meaning” of each of these legal categories). Judges are “co-legislators” and plainly participate in legal changes. Indeed, it is now impossible to practice property law or contract law without knowledge of relevant legal deci-

sions; what is then published as a french “code civil” includes relevant legal decisions adopted principally by the French Cour de Cassation (which represents more than 70% of what is in this “code civil”).

However, in order not to sound arbitrary, the best strategy for judges is to “show” that this or that interpretation is the sole possible, reasonable, or acceptable one. Sometimes, judges are “creating” new rules: in France it is the case of “les principes généraux du droit” (general principles of law), “les objectifs à valeur constitutionnelle” (goal that are recognized as constitutional ones). French civil liability law has been developed mostly by judges, so that civil law judges are also making laws. Nevertheless, an important difference still survives regarding justifications that are considered as valid (in France for example, the idea is to find the solution and not a solution to a legal dispute).

Conversely Calabresi noted that *“we have gone from a legal system dominated by the common law, divined by courts, to one in which statutes, enacted by legislatures, have become the primary source of law”* (Calabresi, 1982, p 1). Statutes have to be applied and, as such, economics can only be used when their interpretation leads to at least two different options (so law and economics is more relevant for appellate judges and more generally higher courts). In common law, some codes are present: for example the uniform commercial code. Restatements are of a different nature but the general philosophy is to “clarify” the common law.

Moreover, precedents are “binding” and have to be interpreted in order to identify what a relevant “precedent” is for the legal problem at stake. Thus judges in common law systems are also relatively limited, even when no statute is relevant, but their constraints do not lie in “codes” but in “precedents” (that they have to interpret) and in justification methods that are more “open” (the logic of equity is not the logic of a rational “code”). Constraints, then, reside in justification methods and not in “real” reasons. Holmes remarked: *“but in fact lawyers, like other men, frequently see well enough how they ought to decide on a given state of facts without being very clear as to the ratio decidendi”* (Holmes, 1870, p 1).

b. This blurring of differences leads to an extension of the “who” can use law and economics (and to a necessary critic of the normative use of these differences between legal traditions). Of course, nothing changes for legislators or for scholars except that the recognition of inevitable policy decisions can lead to the acceptance of the rhetorical function of law and economics. It will also bring them to be more careful in drafting laws (the more precise they are, the more judges are supposed to be limited). But for judges, law and economics is now a possible tool. Indeed, in a civil law system, judges sometimes have to create law or to decide between two different interpretations; In order to make choices, they can use law and economics both at an abductive / hermeneutic level and at a heuristic level.

If law and economics can be used in both legal traditions, this legal aspect is not what matters. If it were the case, it would be difficult to explain differences inside each legal tradition. My objective in this article is to focus on legal characteristics that influenced the perceived value of law and economics. The use of this divide

was misleading but revealed legal characteristics that matter with respect to the acceptance of law and economics within a legal system.

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### 3. The relevance of legal characteristics for assessing the perceived value of law and economics

*“Since the economics side of law and economics is the same all over the world, it is on the legal side that we may find resistance to the worldwide expansion of this scholarship”* (Mattei, 1997, p 78; contra Ramseyer, 2010, pp 14-15). However, the legal side does not restrict itself to legal traditions. In order to assess the perceived (because reality cannot be “proved”) value of law and economics, three key characteristics might be advanced are perceived: instrumentality (of law), autonomy (of legal reasoning) and freedom (of judges). In this section, I will review each of them (sections 3.1; 3.2; and 3.3) and assess their possible influence on law and economics’ reception. Only the last one was addressed in the civil law / common law explanation of the relevance of law and economics (but not in all of its aspects).

Ideally it could be possible to map the “perceived” legal systems around these three “axes” to predict the “future” of law and economics in each legal system. Nonetheless, the traffic is not “one way” since what is perceived is also influenced by theory (one extreme view is developed by Sapir, 1985, p 69 and more generally by “constructivists”). The fact that law and economics has an influence on how the law is perceived is self-evident. Posner, for example, stated that *“When I was a student the law seemed an assemblage of completely unrelated rules, procedures and institutions. Economics reveals a deep structure of law that has considerable coherence”* (Posner, 2001, p 40), which means that it “transforms” his views and approach to law. A better view would be a dynamic interaction between perception, theories and facts which is far too complex to be developed in this paper.

Of course, these three characteristics can be linked. For example, if judges are believed to have some freedom in their decisions but the law is not seen as instrumental (at a “norm” level, *infra*), law and economics might have difficulties to prosper in the system (at least for its rhetorical function). However, for our argument, it is not necessary that it be so and each characteristic offers a possibility to use law and economics. I am trying to develop a possible “mapping” of legal systems by reducing the problem to each of the identified dimensions; but the “global” view has then to be interpreted.

### 3.1. The relevance of perceived instrumentality of law

Focusing on the common law / civil law divide missed a determinant legal characteristic for the acceptance of law and economics: instrumentalism. Instrumentalism is neither a common law phenomenon (it is perfectly possible to envisage a non instrumental approach to common law; indeed it was the case before the nineteenth century (Tamanaha, 2006, pp 11-23); instrumentalism is then an “historical” product nor an U.S. product even if “*legal culture there is strongly instrumental*” (Kornhauser, 2010, p 31). It also inspires civil law countries at least at the legislative level (impact assessment is a manifestation of this way of thinking about the law) and, in a way, also at the adjudication level. Tamanaha remarks also that “*an instrumental view of law is so taken for granted today that it rarely evokes comment, but in the 1960s and 1970s its novelty in legal education was recognized and prompted expressions of concern*” (Tamanaha, 2006, p 101; see also Posner, 1987, p 761). This remark is particularly interesting for our purpose since law and economics developed its approach in the 1960s and 1970s. In the same vein, Posner remarks: “*The difference from Langdell’s day – a difference that was the legacy of Holmes and the legal realists – was that law now was recognized to be a deliberate instrument of social control, so that one had to know something about society to be able to understand law, criticize it, and improve it*” (Posner, 1987, p 763)

Instrumentalism means, crudely, that law is trying to promote something outside itself, in general social purposes (it is a means to an end and not an end in itself). A stronger definition of instrumentalism adds the idea that these social purposes are “deliberately” targeted (but determining who the architect is is often difficult). To be more precise, it is possible to distinguish between different forms of instrumentalism: rule instrumentalism (each rule is a means to an end), institutional instrumentalism (institutions are designed to “promote” social purposes) and systemic instrumentalism (the legal system as a whole is considered as instrumental) (Kornhauser, 2010, p 33). These different levels pointed out the difficulty of saying that something is efficient or inefficient: a rule can be inefficient *ceteris paribus* in a system that is, as a whole, considered efficient; a rule can be inefficient *ceteris paribus* even if the institution whose purpose is to product norms is considered efficient (and the reverse is also true).

Adopting an instrumental view of law will certainly promote the acceptance of law and economics; undeniably law and economics is “*monotonously instrumental, examining in every context whether law is an efficient means to designated ends*” (Tamanaha, 2006, p 118). If law is seen as a means to an end, each legal rule or institution has a purpose; their consequences cannot be disregarded and economics furnish tools to think about these consequences (of course, it is not the only one: sociology, history or psychology can also be used; economics is especially relevant when a bad man’s view is adopted and when there is only a prudential normativity of law); the problem is not only what “is” the law but what “are”

the consequences of deciding in favor of one option (not only regarding the problem at stake but also regarding the legal system as a whole). Brian Bix indeed observed that *“Part of the power of economic analysis is that it presents a largely instrumental approach, which fits well with the analysis and evaluation of law: it forces the question, do these legal rules achieve the objectives at which they aim, and would alternative rules do any better?”* (Bix, 2004, p 190).

Economics can be used for example to gain a better understanding of how people will possibly respond to the introduction of a new rule or to assess the relative efficiency of different options that are considered to “solve” a problem (and traditional legal reasoning does not offer tools – when it does – that are as systematic as economics’ tools). In such a system, the aim of law shapers is to (tend to) choose “rationally”, which means according to consequences (and this shift in paradigm is a consequence of the new scientific spirit that developed from the seventeenth century which explains the world in terms of cause and consequences). Note that this does not necessarily imply that judges have to decide cases with this instrumentalism in mind; it may be perfectly the case when the law is seen as instrumental but institutional instrumentalism requires that judges “apply” the law without considerations of policy analysis (this view is developed by Hayek, 1973; for example, to promote legal certainty); However, it is clear that adopting an instrumentalist view of law will lead to the development of tools in order to inquire into consequences and will justify the use of these tools. Moreover, such an approach to law will lead to question existing legal rules and institutions to assess their relative efficiency or to reveal what “goal” they are promoting (we presuppose then that law has a reason; this inquiry can be mostly a scholarly task). If law is a tool of social engineering, it will also be possible to explain choices through the rhetoric of efficiency and rationality (which seems more “scientific”); of course, to use this rhetoric the power to “decide” in such a way must be accepted (*infra*).

Even if I emphasized rule instrumentalism (because it is the one most promoted by mainstream economic analysis of law which, in general, assumes that shapers of law are promoting the general interest; called policy analysis by Kornhauser), other instrumentalist dimensions can be (and have been) questioned by law and economics (for example the relative efficiency of common law versus civil law systems; the reason for an independent judiciary power, the efficiency of the legislative power – can this institution promote general interest? –, and more generally if one specific institution is efficient regarding one specific goal). These dimensions are mainly analyzed by the political economy school (see Kornhauser, 2010, pp 39-45).

By contrast, *“it is characteristic of non-instrumental views that the content of law is, in some sense, given; that law is immanent; that the process of law-making is not a matter of creation but one of discovery; [...] that law is, in some sense, objectively determined”* (Tamanaha, 2006, p 11). In such a case, law and economics is irrelevant because there are no choices in this natural law’s view (the question is still problematic when considering Aristotle’s view of “natural law” because con-

sequences are not disregarded). Taking into account consequences of a legal rule or speaking the language of efficiency is incompatible with a non instrumental view of law; what matters is “justice” and not its consequences (death penalty is not criticized for being inefficient but for being cruel, inhuman, etc.); the problem of course, and the reason why this view tends to decline, is the impossibility to prove “scientifically” what justice stands for. In a sense, a non instrumental system focuses its attention on the content of law and not on the reasons or consequences of this content (categorical imperatives are incompatible with law and economics reasoning). According to this view, the question “why” is problematic since it signifies that law is a “means”; asking this question forces us to look outside legal materials: *“a defense of law in purely legal terms would be circular, and therefore we need to look outside the law for a defense”* (Sunstein, 1997, p 93). Of course a legal theorist can use law and economics to hypothesize about the efficiency of such a view but judges, lawyers and legislators won’t look at law and economics in order to decide or to interpret the legal system.

This distinction between instrumental and non instrumental conception(s) of legal systems can also be applied to micro-divides regarding branches of law. The less a branch of law is conceived as linked to “morality” or “justice” (so the more it is conceived as purely instrumental), the more the law and economics’ approach will be considered as valid. For example, Fiscal law is conceived as a purely instrumental branch of law; so is competition law or procedural law. Economic reasoning will then be more probably considered as relevant and indeed is not really criticized on these matters. By contrast family law or civil rights law is more closely linked to moral views (marriage is not purely a legal status and a contract, it is more than legal consequences for some people; liberty cannot be “defended” through consequentialist reasoning without depriving it of its “value”) and its acceptance is more difficult (for citizens, lawyers or judges). Labor law is also reticent to law and economics since most of its practitioners do believe that economics is losing “important values”.

The problem of acceptance of law and economics concerned much more the heuristic and the rhetorical function of law and economics (since they are used to decide or to change things). There is no impediment to use the abductive / hermeneutic function in all areas of law, even if not conceived from the point of view of its users as instrumental. Moreover, I believe that this function is vital when a non instrumental view of law is dominant since it will force legal agents through reflexivity to inquire about their own methodology(ies) and to answer to tradeoffs that are pointed by the economic analysis of law.

### **3.2. The relevance of perceived autonomy of legal reasoning**

The influence of the autonomy of legal reasoning on the perceived value of law and economics is related directly to its rhetorical function (obviously if the auton-

omy of law means the impossibility to use the rhetoric of economics in justifying a legal position, this function of law and economics wouldn't have any practical relevance) and indirectly to its heuristic function (because a perfect autonomy of law will lead to only one solution; which means that justification and decision cannot be separated). The question of the autonomy of law is irrelevant to the possibility of use of the abductive / hermeneutic function. As far as legal reasoning is concerned, the question of autonomy will focus mostly on judges and lawyers. It will also have an impact on legal scholars (especially regarding their publishing activities). The autonomy of legal reasoning is indirectly relevant to legislators because they will have to take into account this "fact" in order to draft their statutes.

The question of the autonomy of legal reasoning is a recurrent question in legal theory. It will not be possible to give an exhaustive view of this debate. Simply put, the problem is to determine whether law is a discipline (with a specific methodology) or a domain (and in that case any methodology for analyzing an object "law" is doing a "legal" analysis). More precisely, Bix identified four distinct claims, "*legal reasoning is different from other forms of reasoning*", "*legal decision making is different from other forms of decision making*", legal reasoning and decision making "*are sufficient to themselves, that they neither need help from other approaches nor would they be significantly improved by such help*" and "*that legal scholarship should be about distinctively legal topics*" (Bix, 2003). I will address the question of the autonomy and its relevance for law and economics through developments made by Posner.

In 1987, Posner wrote "the decline of law as an autonomous discipline" to promote the development of social sciences as legal tools. The importance of autonomy for law and economics was made clear. Indeed, if law is autonomous (according to his definition) it would be "*a subject properly entrusted to persons trained in law and in nothing else*" (Posner, 1987, p 762) so that law students only need to study "*authoritative legal texts*" and uniquely their content. In such a case, economic reasoning will be considered as "outside the realm of law" and will not be used by judges, lawyers; they have to apply the law, not to judge it, and to accomplish this task the knowledge of economics is of no relevance. Of course, even in such a case, it would be possible that normative propositions use economics references or "impose" the use "economics". However, this legal use of economics transforms the meaning of economic references; it is no more economics but law (the concept of market power for example is different used in the realm of law and in the realm of economics, see for details Le Berre, 2006; Zevounou, 2011).

If law is completely autonomous, it would be possible to decide a case only with knowledge of relevant laws and no two answers could be given to a legal problem (which presupposes the existence of good tools for interpreting legislative texts, precedents, etc.); legal reasoning would be like doing mathematics, it would be purely mechanical. Indeed, if two answers are possible (it is impossible to say that one is right and the other is wrong according to a common "standard" of evaluation), the choice of one answer could not be explained through law alone – by def-

inition – so that “*we cannot rely on legal knowledge alone to provide definitive solutions to legal problems*” (Posner, 1987, p 767). Judges will then have to use something outside “purely” legal reasoning. Thus, the problem of autonomy is related to the problem of indeterminacy of law and the perceived freedom of judges (*infra*).

Of course this conception was developed by the realists in the beginning of the twentieth century and Posner is not saying more. They also asked for a better knowledge of social sciences and especially economics: “*for a rational study of the law, the black letterman may be the man of the present, but the man of the future is the man of statistics and the master of economics (...) As a step toward that ideal it seems to me that every lawyer ought to seek an understanding of economics. The present divorce between the schools of political economy and law seems to me an evidence of how much progress in philosophical study still remains to be made*” (Holmes, 1897, p 469, 474); or “*a lawyer who has not studied sociology and economics is very apt to become a public enemy*” (Brandeis, 1916, p 470). Other asks for a more “humanistic” formation: “*it is important to a judge called upon to pass a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject*” (Hand, 1960, p 81).

The fact that there is more in legal reasoning than law is widely accepted. The problem remains to identify when and to what extent it will be possible to mobilize such “outside knowledge” and more generally its domain of validity (which is not our purpose in this article; only few comments will be made regarding this problem). Even if law is considered as non autonomous, it is “obvious” that legal agents have to have knowledge of procedures, sources of law, principles, etc. for the quality of legal debate (Posner, 2002, p 1324). The problem then is not the autonomy or the non-autonomy, it is the relative perceived autonomy.

With autonomy (conceived as Posner did), law and economics is restricted at a practical level; without it, law and economics could be used or have a practical importance both in deciding and justifying a decision; its abductive / hermeneutic function will also be promoted to grasp the practical problem. However, the “could” is important; indeed, the fact that law needs to use materials that are considered as “outside of it” does not mean that law and economics will be used. It will then depend on the conception of law (and especially instrumentalism, *supra*) and on what is accepted as a “valid argument” (the relative autonomy of legal reasoning).

If law is not autonomous, the heuristic function could be used even though it would be impossible to “know” if it had been used. For example it is possible to choose a solution according to efficiency and try afterwards to justify it according to moral philosophy or a specific interpretation “legal materials” that is not justified... because at one point we are forced to encounter the problem of choosing. It



could also perfectly be the case that the same reasoning could have been made according to non-economic considerations. In that case, the abductive / hermeneutic function will try to shed light on the possibility of such use by judges.

Regarding the rhetorical function, the real question then is not the autonomy but the perceived autonomy. Which kind of arguments can be mobilized (is accepted as a relevant argument) by lawyers and judges? Consequentialist reasoning for example is not absent of traditional legal reasoning (see Ihering, 1913; Maccormick, 1994) and identifying clearly the difference between a consequentialist reasoning and an economic analysis is not clear (so accepting the former did not imply the acceptance of the later). Is the problem simply one of vocabulary? Is the distinction only the consequence of the rise of economics as a discipline? This problem is even harder when the problem is to inquire into legal decision making before economics arose as a discipline. Backhaus remarked that *“For Wolf, for instance, applying an economic analytical argument to a legal question was still a standard approach. Only after the disciplines had gone their separate ways would it seem natural for an economic problem to be met with an economic analytical tool, and a legal problem with the proper legal analytical tools”* (Backhaus, 2005, p 1). However, what does it mean to apply an “economic analytical argument” and how to identify it? The problem is solved when courts are explicitly using doctrinal work in social sciences or are directly using (legalized) social sciences (even if the field in which it was used is certainly relevant, *supra*). When they do not, to which extent will they be “sensitive” to such elements? I believe that this question cannot be solved without a clarification of what “judging” means and if judging means using practical reason, economic arguments cannot be disregarded but should not be overestimated (Lanneau, 2010).

### 3.3. The relevance of perceived freedom of judges

The common law / civil law divide was considered as relevant for the reception of law and economics through a distinction in the role of judges. In common law countries they were considered as co-legislators (so policy arguments where “acceptable”) whereas in civil law countries they were supposed to be mere “interpreters” of legal materials (and should not make policy analysis of their decisions). This crude divide has been criticized in part 2 of this paper: judges in both legal traditions participate in shaping the law and are in part constrained by law.

They are restricted by law when the law is sufficiently determinate – when it provides justification only for a unique outcome. Cardozo noted in this sense that *“in countless litigations, the law is so clear that judges have no discretion. They have the right to legislate within gaps, but often there are no gaps. We shall have a false view of the landscape if we look at the waste spaces only, and refuse to see the acres already sown and fruitful. [...] Judges have, of course, the power, though not the right, to ignore the mandate of a statute and render judgment in spite of it”* (Cardozo, 1921, p 129). This absence of discretion might derive direct-

ly from the law (e.g. your request must be filled within two months and you filled it in the third and there is no dispute as to the point of departure; however in such a case the law is supposed to exist before interpretation) or from the law plus a shared convention as to how to interpret it – which explains why even if the law is theoretically not determinate, it might be believed to be “practically” determinate because of shared view as to how discretion is exercised (so shared that they are not perceived as a freedom). Posner said regarding this point that “*I shall argue for objectivity as a cultural and political rather than epistemic attribute of legal decisions*” (Posner, 1999, p 26). So, epistemic indeterminacy of law (and also absence of theoretical autonomy in legal reasoning) does not necessarily mean discretion (or perceived freedom). In these cases, law and economics tools are difficult to refer to (for their heuristic and rhetoric functions).

Nonetheless, the abductive / hermeneutic function of law and economic can be used. Assuming that judges are rational decision makers, they will not abide by the law if it is not efficient to do so (they are assumed to be free to choose) and they will consider that “*The past is repository of useful information, but it has no claims on us. The criterion for whether we should adhere to past practices is the consequences of doing so for now and the future*” (Posner, 2003, p 6). Thus it is possible to reinterpret a strict adherence to “past practices” (the respect for legal “conventions”) as a “strategy” that promote efficiency or judge’s goals. For example, they will respect legislative statutes or conventional interpretation of precedents because “*for judges to conduct guerrilla warfare against legislatures and higher courts is destabilizing, and in general a bad thing, but it is not always worse than the alternative*” (Posner, 2003, p 71). They will also respect the “*plain meaning of a statute or contract in order to protect expectations and preserve ordinary language as an effective medium of legal communication*” if “*the consequences are not catastrophic*” (Posner, 2003, p 82). This approach is a “rationalization” of judge’s behavior which is assumed to be free to “*to ignore the mandate of a statute and render judgment in spite of it*” (*supra*). However, any judge’s behavior can be reinterpreted in this way so that this explanation will seem “relevant” only if we subscribe to a certain conception of their behavior (using it is not describing, it is merely hypothesizing). This view also assumes that theoretically judges are free to do what they want even if constraints exist... and the problem is to identify these constraints and to assess their relative value, a task that has not yet been done. Moreover, Posner recognized that different judges might weight consequences differently (Posner, 2003, p 71). I then believe that the task of the abductive / hermeneutic function is really to identify these constraints. The assessment of their relative value however seems a far more difficult task and assumes that there is one. Posner recognized indeed that: “*there is no algorithm for striking the right balance between rule of law and case specific consequences, continuity and creativity, long term and short term, systemic and particular, rule and standard*” (Posner, 2003, p 64).

Of course, when the consensus began to weaken (that is a certain freedom is accorded to judges), economic reasoning could be used in order to promote different

solutions or in order to back status quo (e.g. develop a new rationale). Heuristic and rhetorical functions can then be used. Indeed, since the law is not sufficient to “justify” one solution, something else has to be used. It will also be easy to explain through the abductive / hermeneutic function why a judge is “breaking” status quo.

When discretion is fully accorded to judges because of a recognized causal indeterminacy of law (especially emphasized by realists, Leiter, 1995) that cannot be solved through shared conventions, economic reasoning can be used to promote a solution (because it is a way to “justify” it); especially if “pragmatic decision making” is valorized. This pragmatic decision making recommends “*bas[ing] action on facts and consequences rather than on conceptualisms, generalities, pieties, and slogans*” (Posner, 2003, p 3). Of course, this view is linked to an instrumentalist conception of law. If only judges or lawyers are favoring this, they will decide (or advocate) according to consequences but they will justify (or advocate) according to a different rationale (e.g. they will mask their freedom or the foundation of their choice behind a “legal” necessity; only abductive / hermeneutic and heuristic functions will be mobilized). If the rhetoric of economics is accepted (judges are free to justify in their own ways), they will also make use of the rhetorical function.

\* \* \*

## 4. Conclusion

The common law / civil law divide appears irrelevant for assessing the relative value of law and economic in a legal system. Indeed, even in a very crude understanding of this divide, law and economics reveals itself useful, at least at some levels or for some agents. Using this divide however required research into legal determinants of law and economics acceptance.

I tried in this article to identify these determinants that transcend the civil law / common law divide: instrumentalism of law, autonomy of legal reasoning and freedom of judges. I also show that the abductive / hermeneutic function of law and economics is relevant whatever the legal system considered. So, there is no theoretical legal impediment to a wider reception of law and economics in European civil law countries and especially in law schools.

The framework developed in this article is a theoretical framework. Nonetheless it could be tested and I believe that it could also explain differences in the reception of law and economics in different legal systems. This work however remains to be done.

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