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When Law & Economics violates the rule of law: Three illustrations

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ABSTRACT

Law & Economics scholarship movement continues to be an important methodological approach to the positive and normative analysis of law since its inception in the second half of the 20th century. However, Law & Economics has been criticized on various grounds, from its over-reliance on consequentialist arguments against deontological arguments to its indifference towards the fundamental concepts of law such as the Rule of Law. This latter argument is scrutinized and further illustrated in this article. Here, we demonstrate that despite the common theoretical underpinnings between Law & Economics and the Rule of Law (I), it is argued that Law & Economics conflicts with the Rule of Law principles on three major instances, namely the Coase theorem, the theory of efficient breach of contracts and the influential rule of reason in the field of competition law and policies (II). We therefore conclude that there cannot be a practical convergence between Law & Economics and the Rule of Law at the universal level unless Law & Economics revisits some of its normative conclusions that conflict with the Rule of Law as exemplified in this article.

Keywords: Law & Economics, Rule of Law, economic analysis of law, Coase theorem, efficient breach, Rule of Reason.

ملخص:

لا تزال حركة المنح الدراسية في مجال القانون والاقتصاد تمثل منهجا مهمًا للتحليل الإيجابي والمعياري للقانون منذ نشأتها في النصف الثاني من القرن العشرين. ومع ذلك، فقد انتقد القانون والاقتصاد لأسباب مختلفة، ابتداءا من الاعتماد المفرط على حجج العاقبة ضد حجج الأخلاق الواجبة إلى عدم اكتراثها بالمفاهيم الأساسية للقانون مثل حكم القانون. وسوف يتم التدقيق والتوضيح في السبب الأخير في هذه المقالة. وفي هذه المقالة يتم توضيح أنه على الرغم من الأسس النظرية المشتركة بين القانون والاقتصاد وحكم القانون الا انه لازال هنالك جدل بأن القانون والاقتصاد يتعارضان مع مبادئ حكم القانون في ثلاث حالات رئيسية: نظرية كوس (Coase)، نظرية الخرق الغير تعسفي، وقاعدة حكم السبب في مجال القانون والسياسات المنافسة. وتخلص هذه المقالة إلى أنه لا يمكن أن يكون هناك تقارب عملي بين القانون والاقتصاد وحكم القانون على المستوى العالمي إلا بإعادة النظر في بعض الاستنتاجات المعيارية للقانون والاقتصاد التي تتعارض مع حكم القانون كما هو مذكور في المادة.

الكلمات المفتاحية: القانون والاقتصاد، حكم القانون، التحليل الاقتصادي للقانون، نظرية (كوس)، خرق غير تعسفي، حكم السبب.

I. INTRODUCTION

In this section, we will provide some definitions of the Rule of Law (a), as well as envisage and define Law & Economics as a scholarship movement.

A. Definitional aspects of the Rule of Law

As *'existing constitutional principle'*[1], the Rule of Law is one of these expressions that are used in the law with a precise meaning but without a clear definition. Indeed, Lord Bingham admits that while an appealing concept, the 'Rule of Law' has admittedly no specific definition of its own. Historically, the Rule of Law has emerged as a substitute to the rule of might, to the rule of the Crown, to the rule of arbitrary powers – in a nutshell, to the rule of injustice[2].

On the one hand, the Rule of Law refers to the well-functioning of the legal order from a vertical relationship, whereby the rulers are also bound by the rules enacted. This is the Rule of Law as obedience to the law, that is, *the procedural justice of the Rule of Law*. On the other hand, the Rule of Law refers to the fact the law rules – *lex suprema est*[3]. The Rule of Law in that facet refers to the rule of justice since there are peaceful, voluntary and horizontal commitments by individuals to individuals where abidance to the law is essential[4]. Rule of Law is here approached as meaning protection of individual rights, *i.e. the substantive justice of the Rule of Law*. The dual etymological origin of the Rule of Law[5] has produced what can be identified as the three main legal characteristic of the Rule of Law:

1. Equality before the law: this requires the law to be indistinctly applicable to the rulers and individuals. The Rule of Law therefore entails the lack of discrimination not only between the rulers and the individuals but also among individuals. The law rules equally to persons in similar situations[6].
2. Liberty in the law: this is historically the most ancient element of the Rule of Law as illustrated in England, for instance, by the Magna Carta of 1215, followed by the Habeas Corpus of 1679, the Petition Rights of 1628 and the Bill of Rights of 1689. The Rule of Law ensures liberty in the law by granting fundamental personal rights (freedom from unfair trial and illegal detention, etc.) and fundamental economic rights (property rights, contractual rights, liability rules, etc.).
3. Certainty of the law*:* this is guaranteed by the Rule of Law with respect to the protection of vested interests and rights of individuals and with respect to quality requirements of the law. Law must be of sufficient certainty and quality in order to protect both the well-functioning legal order and individuals' rights to know and rely on the law. The legal certainty derived from the Rule of Law requires the law to be intelligible, of sufficient clarity, and of necessary predictability. Individuals must also put legitimate expectations onto the law for the law to be aligned with the Rule of Law principle.

These three characteristics of the Rule of Law correspond not only to ethical imperatives[7], but also to economic objectives[8]. Indeed, the Rule of Law is engrained with economic reasoning since it has been one of the prerequisites for the development of modern economies. As Zywicki argues, '*the rule of law should not be understood as a mere means to a social order predicated on limited government, freedom, and prosperity. Instead, the rule of law is an inherent part of a free, peaceful, and prosperous society*'[9]. More specifically, the Rule of Law encompasses the following features essential for a legal system to be conducive to prosperity:

The Rule of Law as rules of interdiction: the State is not permitted to be outside the ambit of an equal

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1 Lord Bingham, *The Rule of Law*, 66 Cambridge L.J. 67, 67 (2007) (arguing that this principle has been '*too clear and well understood to call for statutory definition*').

2 'If Aristotle, Livy and Harrington knew what a republic was; the British constitution is much more like a republic than an empire. They define a republic to be '*a government of laws, and not of men.*' J. Adams *Novanglus Papers* No 7, *in* The Works of John Adams (Charles Francis Adams ed., Little, Brown, & Co. 1851). The idea that the Rule of Law is the government of laws and not of men is however an often-quoted expression whose origin is attributed to Chief Justice Marshall's opinion in *Marbury v. Madison*, 5 U.S. (I Cranch) 137, 163 (1803).

3 Indeed, the second meaning of Law comes from its second etymological origin: Law refers to the Latin word '*Ius*', which means the '*bond*', the '*connection*' and the '*lien*' with which individuals commit themselves to one another. *Ius*' comes from the verb '*iurare*', which means '*to swear, to commit oneself*' while expecting an '*ans-swear*' (or *'to speak in turn*'). '*Iustitia*' is the institutional protection of the '*ius*'. The opposite to '*iurare*' is '*iniurare*', which leads to warlike actions such as *'inflicted injuries and insults'* by destroying the social bonds of individuals.

4 *See* Brian Z. Tamanaha, *The Primacy of Society and the Failures of Law and Development* 9 (Legal Studies Research Paper Series No 09-0172, St John's University, School of Law, 2009).

5 Historically, the Rule of Law has emerged in the writing of lawyers and scholars, in modern times, from John Locke who vouched for governing through *'established standing Laws, promulgated and known to the People'*. He contrasted this with rule by *'extemporary Arbitrary Decrees'. See* J. Locke, Two Treatises of Government § 135–7 (P. Laslett ed., Cambridge University Press 1988). Locke added that the law cannot violate private property rights: *'The Supreme Power cannot take from any Man any part of his Property without his own consent.' Id.* at § 138. Then, Montesquieu considered that 'things that depend on principles of civil right must not be ruled by principles of political right', where 'civil right' is defined in Montesquieu as private law, which itself is the 'palladium of property rights *See* C. Montesquieu, *The Spirit of the Laws* 510 (A. Cohler, C. Miller & H. Stone eds., Cambridge University Press 1989). The first conceptualization of the Rule of Law in England remains the one proposed by Dicey who precised that the law is so that *'[N]o man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land'*. A.V. Dicey, Introduction to the Study of the Law of the Constitution 110 (McMillan & Co. 1982). *Dicey added that equality before the law is a fundamental trait of the Law : '[W]ith us no man is above the law [and] every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.' Id.* at 114. *Dicey defines the Rule of Law with three principles, namely: (a) 'law prevails over arbitrariness and discretionary power', (b) 'every man is subject to the ordinary law of the realm and amendable to the jurisdiction or the ordinary tribunals' and (c) 'the general principles of the constitution (as, for example, the right to liberty, or the right of public meeting) are […] the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts,' rather than the result of legislation.*

6 For, the rule of law requires 'not only that no man is above the law, but (what is a different thing) that (…) every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.' *See* Dicey, *supra* note 6, at 114.

7 Or a morality of law, *see* Lon L. Fuller, The Morality of Law 39 (Yale University Press 1964), where Fuller elaborate eight principles of legality that embodies the essence of the rule of law: 1) laws must be of general application (i.e. specifying rules prohibiting or permitting behaviour of certain kinds), 2) laws must be widely promulgated or publicly accessible to ensure that citizens know what the law requires, 3) laws should be prospective in application, 4) laws must be clear and understandable, 5) laws must be non-contradictory, 6) laws must not make demands that are beyond the powers of the parties, 7) laws must be constant and not subject to frequent changes, 8) congruence between rules as announced and their actual administration and enforcement. *See also* Joseph Raz, *The Rule of Law and Its Virtue, in* The Authority of Law: Essays on Law and Morality 214-18 (Joseph Raz ed., Clarendon Press 1979), who add to Fuller's principles a requirement on institutional design (namely, quality and independence of the judiciary).

8 Most authors try not to define the Rule of Law as this concept is presumably self-explanatory to them, or explained by references to scholarships. For instance, T. Zywicki (2012) argues that '*it is not necessary to specifically define the rule of law; it is adequate to adopt a functional shorthand definition. At its heart the value of the rule of law is Hayekian. Simply, the world is in a state of constant flux.' See* T. Zywicki, *Economic Uncertainty, the Courts, and the Rule of Law*, 35 Harv. J.L. & Pub. Pol'y 195, 196 (2012), who concludes that *'it is precisely in times of crisis that we must adhere to the rule of law.' Id.* at 212. The unanimity regarding the Rule of Law may well be caused by its lack of clear definition. S. Chesterman (2008) hence argues that *'high degree of consensus on the virtues of the rule of law is possible only because of dissensus as to its meaning'. See* S. Chesterman, *An International Rule of Law?*, 56 Am. J. Comp. L. 331, 332 (2008); *see also* Richard H. Fallon, Jr., *The Rule of Law" as a Concept in Constitutional Discourse*, 97 Colum. L. Rev. 1 (1997).

9 T. Zywicki, *The Rule of Law, Freedom and Prosperity*, 10 Sup. Ct. Econ. Rev. 1, 6 (2003). Free states enjoy the Rule of Law as engine of prosperity, *see* Friedrich A. Hayek, *The Origins of the Rule of Law*, in The Constitution of Liberty, 162 (1960); Anthony I. Ogus, *Economics, Liberty and the Common Law*, 18 J. Soc'y Pub. Teachers L. 42 (1980).

implementation of the law across individuals[10], to illegally detain individuals, to prosecute them without charge, to judge twice the same facts, to seize and/or trespass property without a legal basis and so on.

The Rule of Law as rules of direction: strong protection of property rights, the lay down of liability of rules for deterring those having involuntarily entered in inefficient exchanges, the lay down of contractual rules for securing voluntary and efficient exchanges, the lay down of a competitive order protecting the contractual freedom of economic actors and so on[11].

The Rule of Law as rules of procedure: the judiciary and the constitutional system guarantee the separation of powers whereby the government is submitted to both parliamentarian sovereignty and independence of the judiciary; courts' procedures are designed transparently and applied equally, trials are fair, and intrinsic qualities[12] are attached to the law such as the clarity and the predictability of the law.

These three qualities of the Rule of Law are cumulative qualities because a legal system grossly lacking one or two of these three qualities will not be considered as respecting the ideals of the Rule of Law.

B. Definitional aspects of Law & Economics

Economics studies the prices put on human actions and compares the costs and benefits derived from the social ordering of things with a fictional – 'natural' or alternative – ordering of things. Both law and economics deal with the study of the behaviours of individuals in a world of scarcity of resources[13]: because resources are scarce, human actions are to be constrained by legal determinants and/or by economic necessities[14]. The interactions between law and economics are therefore apparent with respect to the impact of legal interventions onto market exchanges and to the necessary scientific study of humanly designed legal norms. The law refers to the social ordering of individuals restricted in their means of actions by sanctionable and enforceable norms[15]. The law puts a price on human actions that impairs the natural ordering of market exchanges in favour of a generally accepted social ordering of things[16]. Economics refers to the scientific study of the human actions by the individuals. If economics is focused on the maximization of wealth (or of utility), the efficiency rationale of economics can be compatible with the justice rationale of the law (or juridical sciences) because if a legal rule is not necessarily efficient, an inefficient rule can hardly be a legal rule. Indeed, an inefficient situation, at its cornerstone, yields more costs than benefits and therefore infringes upon more rights than it protects or creates existing rights[17].

The two disciplines – law and economics – have been comprehensively analysed under the Law & Economics scholarship, which has been a major trend of legal and economic literature from the second half of the 20th century[18]. The lessons of the Law & Economics movement have participated in increasing the efficiency of the legal rules and institutions. While Law & Economics scholarship has been very rich in the diversity of approaches it generated – from Austrian economics[19] to utilitarian economics through public choice school[20] and behavioural economics[21] – and

10 Some define the Rule of Law only by this feature. For example, *see* N. Mandela, *The Rule of Law – Cornerstone of Economic Progress, Address at the IBA South Africa Conference*. InterAlia, Spring, 1996, at 41, 42, (arguing *'But what is "rule of law" and the characteristics desired in this regard? The question of the precise meaning of the rule of law has been much debated. At its most basic, the rule of law has been held to mean simply that the government is required to act in accordance with valid law.'*) This definition of the Rule of Law is the 'narrow conception' of the Rule of Law according to O. Chukwumerije, *Rhetoric versus Reality : The Link Between the Rule of Law and Economic Development*, 23 Emory Int'l L. Rev. 383, 400 (2009). J. Raz has been one of the main proponents of such narrow conception of the Rule of Law when it defines it as meaning: *'The rule of law means literally what it says: the rule of laws. Taken in its broadest sense this means that people should obey the law and be ruled by it,' see* J. Raz, The Authority of the Law 212 (1979).

11 For a discussion of the Hayekian view on the Rule of Law, which requires the existence of substantive rules with Posner's view on the Rule of Law, which denies the fact that the Rule of Law contain a set of legal rules, *see* T. Zywicki, *Posner, Hayek and the Economic Analysis of Law*, 93 Iowa L. Rev. 559 (2008).

12 The intrinsic qualities of the law required by the Rule of Law are tantamount to the eight principles of Fuller's 'inner morality of the law', where the law is said to have the following characteristic traits for being moral: generality, publicity, prospectivity, intelligibility, consistency, practicability, stability and congruence. *See* Fuller, *supra* note 7. Fuller added that *'Every departure from the principles of law's inner morality is an affront to man's dignity as a responsible agent. To judge his actions by unpublished or retrospective laws, or to order him to do an act that is impossible, is to convey (…) your indifference to his powers of self-determination.' Id.* at 162. Similarly, J. Raz attributed to the Rule of Law the qualities of clarity, accessibility, stability and predictability of the law. *See* Raz, *supra* note 10, at 214-19.

13 *See* F. Easterbrook, *The Inevitability of Law and Economics*, 1 J. Legal Educ. 3 (1989) (Easterbrook simply and rightly argues, at 5, that *'Economics is the study of rational behaviour under constraint. All good things are scarce (…) Laws are, or alter, constraints'). See also* R.J. Heilman, *The Correlation Between Law and Economic Science*, 20 Cal. L. Rev. 379 (1932); Karl N. Llewellyn, *The Effect of Legal Institutions upon Economics*, 15 Am. Econ. Rev. 665 (1925).

14 See Heilman's insightful discussion on the relationship between law and economics in terms of scarcity of resources in the world: Heilman *supra* note 13.

15 *See* F. Fukuyama, *Development and the Limits of Institutional Design, in* Political Institutions and Development: Failed Expectations and Renewed Hopes 21, 24 (Natalia Dinello & Vladimir Popov eds., (2006).

16 Robert D. Cooter, *Prices and Sanctions*, 84 Colum. L. Rev. 1523 (1985).

17 A. Portuese, *Principle of Proportionality as Principle of Economic Efficiency*, 19 Eur. L.J. 612 (2013) for a discussion on efficiency rationale of the balancing exercise of the proportionality principle.

18 For a general introduction to Law & Economics, *see* E. Mackaay, *History of Law and Economics*, *in* Encyclopedia of Law and Economics, Volume I. The History and Methodology of Law and *Economics* (Boudewijn Bouckaert & Gerrit De Geest eds., 2000). *See also* L.A. Kornhauser, *L'analyse Économique Du Droit (The Economic Analysis of Law)*, 313 Revue de Synthese 118, 118-19 (1985); L.A. Kornhauser, *Economic Analysis of Law*, 16 Materiali per una Storia della Cultura Giuridica, 233 (1986); L.A. Kornhauser, *Economique (Analyse - du droit)*, *in* Dictionnaire Encyclopedique de Theorie et de Sociologie du Droit, Librairie General de Droit et de Jurisprudence (André-Jean Arnaud ed., 1988); Richard A. Posner, *The Economic Approach to Law*, 53 Tex. L. Rev. 757 (1975). Richard A. Posner, *Some Uses and Abuses of Economics in Law*, 46 U. Chicago L. Rev. 281 (1979); Richard A. Posner, *The Law and Economics Movement*, 77 Am. Econ. Rev. Papers & Proceedings 1 (1987); Cento G. Veljanovski, *The Economic Approach to Law - A Critical Introduction*, 7 British J. L. & Soc'y 158 (1980).

19 *See, e.g.*., Friedrich A. Hayek, Law, Legislation and Liberty - Volume 1: Rules and Order (1973); Friedrich A. Hayek, Law, Legislation and Liberty - Volume 2: The Mirage of Social Justice (1976); Friedrich A. Hayek, Law, Legislation and Liberty - Volume 3: The Political Order of a Free People (1979); Bruno Leoni, Freedom and the Law (3d ed. 1991); Randy E. Barnett, *The Function of Several Property and Freedom of Contract, in* Economic Rights 62-94 (Ellen Frankel Paul Jr., Fred D. Miller & Jeffrey Paul eds., 1992); Randy E. Barnett, The Structure of Liberty - Justice and the Rule of Law (1998); Mario J. Rizzo, *Uncertainty, Subjectivity, and the Economic Analysis of Law*, *in* Time, Uncertainty, and Disequilibrium - Exploration of Austrian Themes 71-95 (Mario J. Rizzo ed., 1990); Mario J. Rizzo, *Change in the Common Law: Legal and Economic Considerations (Symposium)*, 9 J. Leg. Stud. 189 (1980); Stefan Voigt, *On the Internal Consistency of Hayek's Evolutionary Oriented Constitutional Economics - Some General Remarks*, 3 Journal des Économistes et des Études Humaines, 461 (1992); Henri Lepage, Pourquoi la Propriété (Why Property?) (1985); Anthony I. Ogus, *Economics, Liberty and the Common Law*, 15 J. Soc'y Pub. Teachers L. 42 (1980); Anthony I. Ogus, *Law and Spontaneous Order: Hayek's Contribution to Legal Theory*, 16 J. L. & Soc'y 393-409 (1989).

20 Anthony Downs, An Economic Theory of Democracy (1957); James M. Buchanan & Gordon Tullock, The Calculus of Consent - Logical Foundations of Constitutional Democracy (1962); Towards a Theory of the Rent-Seeking Society (James M. Buchanan, Robert D. Tollison & Gordon Tullock eds., 1980); A. Allan Schmid, Property, Power, and Public Choice - An Inquiry into Law and Economics (1978).

21 *See, e.g.*, David D. Friedman, Law's Order: What Economics Has to Do with Law and Why It Matters (2000); Robin Paul Molloy, Law and Market Economy (2000); Eric Posner, Law and Social Norms (2000); Behavioral Law and Economics (Cass Sunstein ed., 2000). For a recent account of this evolution from a founding scholar of Law & Economics, see G. Calabresi, The Relationship of Law and Economics (2016), *available at* http://blog.yalebooks.com/2016/01/26/%EF%BB%BF%EF%BB%BFeconomic-analysis-of-law-or-law-and-economics/.

while some make the distinction between Law & Economics and economic analysis of law, we will refer to Law & Economics scholarship as the traditional (and influential) Posnerian Law & Economics[22]. On the basis of rational self-interestedness and welfare maximization criterion, Posnerian Law & Economics claims that common law rules tend to be economically efficient (*positive claim*) and that legal rules ought to be economically efficient (*normative claim*). The notion of economic efficiency itself has been the subject of much controversy[23]. However, in general, Law & Economics scholarship 'survived' and economic efficiency remains the prime normative criterion for Law & Economics.

In that regard, Law & Economics has allegedly identified efficiency-enhancing rules in modern economies, and relied classically on neoclassical liberal theory and utilitarianism.

After having introduced the Rule of Law and Law & Economics scholarship, we now turn to the common theoretical convergence between the Law & Economics movement and the Rule of Law requirements. More specifically, the rationale of the law and economics are reconciled, balanced and analysed into a common methodological approach under the Law & Economics scholarship movement.

II. THEORETICAL CONVERGENCE: TWO ILLUSTRATIONS

A. Philosophical convergence: Law & Economics and the rule of law

Law & Economics have been argued against the political (if not populist) use of the law in favour of economically motivated legal rules. In that respect, the Rule of Law can be seen as echoing Law & Economics to the extent that Rule of Law principles aim at rationalizing the legal rules by stating the principles of law which are independent from any political volatilities or from any populist agenda.

Therefore, a philosophical convergence exists between the Law & Economics methodological approach and the Rule of Law principles only to the extent that Law & Economics is compatible with these principles whenever they bear an economic rationale such as the protection of property rights, the protection of the freedom of contract, the protection of the competitive order and the absence of unjustified discrimination. These values strongly enshrined into Rule of Law principles have been defined by Law & Economics scholars as being efficiency-enhancing. While the Law & Economics scholarship justifies these rules with arguments pertaining to consequentialist ethics, the Rule of Law principles are justified on the basis of arguments pertaining to deontological ethics. Consequently, while Law & Economics scholarship uses consequentialist arguments to justify liberally minded rules such as property rights protection and individual freedom in a market economy, the Rule of Law has recourse to deontological arguments to also justify market economy principles.

B. Universalist convergence: Law & Development, Law & Finance

Law & Economics movement has even generated a sub-trend of research wherein Law & Economics approach is applied to the developing world – the so-called 'Law & Development' and 'Law & Finance' approaches[24]. The Rule of Law, from its inception, had a universalist ambition. The guarantee of procedural and substantive rights from one country, *i.e.* England, had quickly been the source of inspirations for popular claims requesting similar rights. Thus, the French Declaration of Human Rights of 1789 has an explicitly universal ambition, inasmuch as the American Bill of Rights of 1791 and other international and constitutional texts[25]. Interestingly enough, the Rule of Law principles and Law & Economics have so far remained quite isolated from one another. The Rule of Law has been a crucial constituent of the law and development practice in the late 20th century[26]. *'[I]t is the efficiency logic of law and economics that is the real novelty act here with the rediscovering of the Rule of Law*', argues Newton[27].

For the United Nations, the Rule of Law are principles of governance in which all 'persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated and that are consistent with international human rights norms and standards'. The UN posits that application of the Rule of Law requires 'measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency'[28].

Also, The World Justice Program (WJP) uses a working definition of the rule of law based on the following four universal principles: i) the government and its officials and agents are accountable before the law; ii) laws are clear, publicized, stable and fair, and protect fundamental rights, including the security of persons and property; iii) the process by which the laws are enacted, administered and enforced is accessible, fair and efficient; and iv) justice is delivered by competent, ethical and independent representatives and neutrals who are of sufficient number, have adequate resources and reflect the makeup of the communities they serve[29].

The export of the Rule of Law principles[30], historically a Western heritage of legal culture, has dramatically increased with the fall of communism in the late 1980s and the early 1990s[31]. Indeed, the prevailing model of capitalism, combined with the Rule of Law principles, has gained the sufficient political and legal legitimacies for a legal transplant of the fundamental principles commanded by the Rule of Law[32]. Historically[33], the modern development theories started in the second half of the 20th century with what Newton calls the '*Inaugural Moment*' of the '*Developmentalist Démarche*' of

22 *See, e.g.*, Richard Posner, Economic Analysis of Law (1st ed. 1973); Richard Posner, *Utilitarianism, Economics and Legal Theory*, 8 J. Leg. Stud. 103 (1979); Richard Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 Hofstra L. Rev. 487 (1980); Richard Posner, *Wealth Maximization Revisited*, 2 Notre Dame J.L. Ethics & Pub. Pol'y 85 (1980); Richard Posner, The Problems of Jurisprudence (1990); Richard Posner, *Wealth Maximization and Tort Law: A Philosophical Inquiry, in* Philosophical Foundations of Tort Law (David G. Owen ed., 1995).

23 See for instances of decades-long intellectual debates, Rizzo, *supra* note 19; Victor P. Goldberg, *Toward an Expanded Economic Theory of Contract*, 10 J. Econ. Issues 45 (1986); C. Edwin, *The Ideology of Economic Analysis of Law*, 5 Phil. & Pub. Aff. 3 (1970).

24 For a detailed account of the rise of the Law & Development movement as sub-discipline of the Law & Economics, *see* Chukwumerije, *supra* note 10, at 288-99.

25 G. O'Donnell, *Why the Rule Of Law Matters*, 14 J. Democracy 15 (2004).

26 *See* The New Law and Economic Development: A Critical Appraisal (D.M. Trubek& A. Santos eds., 2006); K. *Dam*, *The Law-Growth Nexus: The Rule of Law And Economic Development (2006)*; K.E. Davis & M.J. Trebilcock, *The Relationship Between Law and Development: Optimists versus Skeptics*, 56(4) Am. J. Comp. L. 895 (2008).

27 *See* Glaeser et al., *Do Institutions Cause Growth?*. ; S. Haggard & L. Tiede, *The Rule of Law and Economic Growth: Where Are We?"*, 39(5) World Dev. 681 (2011); S. Newton, *The Dialectics of Law and Development*, *in* The New Law and Economic Development: A Critical Appraisal 174, 192 (D.M. Trubek& A. Santos eds., 2006).

28 U.N. Office of the Sec. Gen., The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (2004), http://www.unrol.org/doc.aspx?n=2004%20report.pdf.

29 *See* M.D. Agrast et al., *Rule of Law Index 2012-2013*, The World Justice Project (2013), http://worldjusticeproject.org/sites/default/files/WJP_Index_Report_2012.pdf.

30 *See* Trubek & Santos, *supra* note 26; *Dam, supra note 26:* S. Stacey, Promoting the Rule of Law Abroad: In Search of Knowledge (Thomas Carothers ed., 2006).

31 Haggard & Tiede, *supra* note 27.

32 J. Reitz, *Export of the Rule of Law*, 13 J. Transnat'l L. & Contemp. Problems 429, 432 (2003).

33 For an historical outlook, *see* L. Nader, *Promise or Plunder ? A Past and Future Look at Law and Development.* 7 Global Jurist 1 (2007).

1960–1974[34]. This approach is characterized by 'decolonization', and the 'statist principles and prescriptions of first-generation development economics are routinely and ubiquitously deployed'. In the early 1970s, the 'Political Economy' approach of the 'Critical Moment' from 1974 to 1985 prevailed: *'the oil shocks, international economic slowdown, collapse of international monetary regulation (floating currency exchange rates), and the advent of the Third World debt crisis, [t]hese form the backdrop of the rise of the family of antidevelopmentalist theories'*[35]. The need for a more political economy approach was derived from these macroeconomics shocks, therefore leaving only an incidental role for the law in development theory.

Also, the Critical Moment has been internationalized with national economic policies substituted to a more encompassing approach of global economic development via the growing role of the International Monetary Fund[36]. With an increasing impact of Law & Economics in the late 1980s, with the rise of the so-called 'Washington consensus' with the World Bank[37] and the International Monetary Fund, the late 1980s and the early 1990s have experienced the rediscovering of the Rule of Law in development approaches. To demonstrate this great interest, the World Bank, for instance, is said to have alone *'spent $2.9 billion dollars on some 330 projects in its pursuit of the ROL since 1990'*[38]. The export of Rule of Law principles only might trigger criticism of legal imperialism. Indeed, the less political objectives are encompassed in Rule of Law reforms, the more such reforms will portray an intellectual valence disconnected with reservations of legal imperialism[39].

The '*Revivalist Moment*' of 1985–1995 is the moment when the Rule of Law has become the main tool for development economics[40]. The '*revival*'[41] of the Rule of Law is rapid and irresistible both in the literature and in practice. Bolstered by the rise of the theory of new institutional economics[42], the importance of the Rule of Law applied in developing countries has been seen as a new way to develop economies after the failures of the previous developmental approaches to the Third World[43]. The Revivalist Moment has been characterized by:

- Legislative best practices;
- Analyses of proposed or existing commercial legislation, or regulatory approaches, from an economic efficiency or institutionalist standpoint;
- Evaluations of the implementation of new legislation;
- Institutional capacity building of the legal sector;
- Dispute resolution;
- Legal education reform;
- Rule of Law;
- Review articles and studies[44].

Advisors should therefore focus on the narrow understanding of the Rule of Law in order to implement such principles of law for the improvement of both the legal and economic orders of a particular society. The narrow version of the Rule of Law, focusing only on the legal and institutional improvements, can claim universality more easily[45]. The protection of the Rule of Law principles in developing countries is 'measured' through data sets such as the one proposed by the World Justice Programme Rule of Law Index, which takes the four previously mentioned WJP principles as its basis and disaggregates these into 48 sub-factors to inform the following nine dimensions of the rule of law: limited government powers, absence of corruption, order and security, fundamental rights, open government, regulatory enforcement, access to civil justice, effective criminal justice and informal justice[46].

The export of Rule of Law through the current 'Revivalist Moment' of Law and Development has also been reinforced by another trend of Law & Economics scholarship called 'Law & Finance'[47]. The theoretical ramifications of Law & Economics with the Rule of Law are most exemplified in this 'Law & Finance' research agenda where it has been evidenced that countries that most protect the Rule of Law principles are those having the most efficient rules and most prosperous economies. While being debated and contested, the 'Law & Finance' trend of researches has been influential in fostering the justification of Rule of Law principles in developing countries.

Indeed, Law & Finance has participated in the Law & Development's Revivalist Moment, where legal theory came to the conclusions that rather than detailing precise legal rules, the promotion of the principles derived from the Rule of Law would most be conducive to the prosperity of developing economies. Indeed, most human rights enshrined in Rule of Law principles are efficiency-enhancing[48]. Institutional rules and legal rules are conducive to economic efficiency whenever Rule of Law principles,

34 Newton, *supra* note 27, at 170.
35 *Id.* at 182.
36 Haggard & Tiede, *supra* note 27.
37 *See* G. Barron, *The World Bank & Rule of Law Reforms* (LSE Development Studies Institute Working Paper n°05-70, 2005).
38 *Id.* at 9.
39 For discussion on such suspicions, *see* Reitz, *supra* note 32, 460, that *'It is true that some legal exporters, especially the World Bank, have exerted strong financial pressure on importer countries to adopt neo-liberal reforms for their economies by eliminating or greatly reducing state subsidies and other forms of welfare. This could be viewed as a form of economic coercion. Such economic reform has no necessary relationship to the rule of law, I have argued, but it has regrettably generated some opposition to rule of law reforms'.*
40 Newton, *supra* note 27, at 187.
41 T. Carothers, *The Rule of Law Revival*, 77 Foreign Aff. 95 (1998).
42 Nobel Prize winning economic historian Douglass North is a prime example of the rise of this economic theory. *See* Douglass C. North, Institutions, Institutional Change, and Economic Performance (1990).
43 *See* R. Cooter & H.-B. Schaefer, Solomon's Knot: How Law Can End the Poverty of Nations (2011).
44 Newton, *supra* note 27, at 190.
45 Reitz, *supra* note 32, 442-43.
46 *See* Agrast et al., *supra* note 29. *See also* U.N., U.N. Indicators of the Rule of Law (2011), http://www.un.org/en/events/peacekeepersday/2011/publications/un_rule_of_law_indicators.pdf. On the scientific difficulty to collect such data, *see* Haggard & Tiede, *supra* note 27.
47 This trend of literature has been developed by R. La Porta et al., *Legal Determinants of External Finance*, 52 J. Fin. 1131 (1997); R. La Porta et al., *Law and Finance*, 106 J. Pol. Econ. 1113 (1998); R. La Porta et al., *The Quality of Government*, 15 J.L. Econ. & Org. 222 (1999); R. La Porta et al., *Government Ownership of Banks*, 57 J. Fin. 265 (2002). This trend of literature expressly or implicitly concludes that common law countries are superior in terms of efficiency than civil law countries because the former upheld Rule of Law principles more vigorously. This claim has been criticized, for instance, by M. Graff, *Law and Finance: Common Law and Civil Law Countries Compared - An Empirical Critique*, Economica, 75(297), 2008, at 60–83; A. Musacchio, *Can Civil Law Countries Get Good Institutions? Lessons from the History of Creditor Rights and Bond Markets in Brazil*, 68(1) J. Econ. Hist. 80 (2008).
48 On the relationship of rule of law principles and efficiency of legal rules in developing countries, *see* Trubek & Santos, *supra* note 26; Davis & Trebilcock, *supra* note 26; M. Trebilcock, & J. Leng, *The Role of Formal Contract Law and Enforcement in Economic Development*, 92 Va. L. Rev. # (2005); L. Blume & S. Voigt, *The Economic Effects of Human Rights*, 60(4) Kyklos 509 (2007); S. Knack & P. Keefer, *Institutions and Economic Performance: Cross-Country Tests Using Alternative Institutional Indicators*, 7(3) Econ. & Pol. 207 (1995); on de facto judicial independence, *see* B. Hayo & S. Voigt, *Explaining De Facto Judicial Independence*, 27(3) Int'l Rev. L. & Econ. 269 (2007).

notably property rights protection[49], are upheld[50]. Convincingly and empirically evidenced, the study conducted by Kaufmann et al. demonstrates that 1-point increase on the 6-point of their Rule of Law scale is correlated with a 2.5- to 4-fold improvement in per capita incomes of developing countries[51].

As a result, one would wonder what are the remaining differences between the Rule of Law principles and Law & Economics scholarship in general. Despite the common underpinnings between the Rule of Law principles and Law & Economics both theoretically and apprehended in their universalist dimensions, the following section argues that Law & Economics scholarship still conflicts with the Rule of Law principles, as evidenced by three instances of legal issues.

III. PRACTICAL DIVERGENCE: THREE ILLUSTRATIONS

The Rule of Law shares common grounds with the Law & Economics movement. This hypothesis theoretically developed in the previous section will now be tested in practice. We will demonstrate the fundamental conflicts between the Rule of Law principles and Law & Economics teachings using three illustrations chosen from three different legal issues, which are presented below.

A. The Coase Theorem in property rights protection

The so-called *'Coase theorem'* refers to Nobel Prize Laureate Ronald Coase's seminal article '*The Problem of Social Cost*' published in the Journal of Law & Economics[52], wherein Ronald Coase demonstrated that nuisance disputes will always be efficiently resolved regardless of the legal rule chosen, provided that the parties in the dispute can negotiate with zero transaction costs.

We will now discuss the essence of what has subsequently (and curiously) been called the '*Coase theorem*'. Ronald Coase has demonstrated that in a hypothetical world of zero transaction cost, parties with a conflict would bargain and achieve efficient allocation of resources, independently of the legal rules allocating rights between them. Property rules are normally protected by injunctive reliefs, namely rules that stop trespassers to encroach on individuals' properties. Liability rules are normally governed by damages – financial compensation, whereby the victim is compensated for the harm caused. Ronald Coase demonstrates that legal rules ascribing property rights are irrelevant with respect to efficiency if parties can costlessly bargain over their rights in a hypothetical world of costless transactions.

Ronald Coase takes a simple example to illustrate his argument, that is, a cattle-raiser and a farmer operating on neighbouring properties. It is inevitable that the cattle would stray onto the farmer's property and destroy crops. An increase in the quantity of meat produced corresponding to an increase in the size of the cattle herd increases the crop loss to the farmer so that the case may be summarized as follows:

Cattle Meat Output, in tons	Additional Profits	Total Profits (P)	Additional Damage, in £	Total Damage (D)	Total Net Profits (P-D)
0	0	0	0	0	0
1	10.000	10.000	1.000	1.000	9.000
2	4.000	14.000	15.000	16.000	-2.000
3	2.000	16.000	20.000	36.000	-20.000

In terms of property rights, entitlements are either for granting the farmer a right to have undamaged crops or for granting the cattle-raiser a right to raise cattle, including a right to damage the farmer's crops. If the farmer holds the entitlement and if he is protected by injunction, then he can stop the cattle-raiser from allowing his cattle to damage the crops. If the cattle-raiser holds the entitlement, then the farmer has to buy him off to be free from damage.

The more efficient solution with respect to the opportunity cost of not maximizing outputs would be to negotiate damages rather than injunctive reliefs. The cattle-raiser will have to pay damages for the harm caused by his cattle. Conversely, if the cattle-raiser holds the entitlement, protecting him with damages as remedy would mean that the farmer will have to compensate the cattle-raiser for his 'damages' (lost profits) in order to restrict his cattle raising.

In the current situation, the efficient solution from the example above would be to produce only 1 ton as it maximizes overall net profits with £9.000. However, if transactions are costless, information is full and damages of liability rules are being preferred over injunctions for property rights issues, then as Coase argues, it becomes possible to reach a completely different outcome than the one delivered by the current state of law. Indeed, in the example given above, the cattle-raiser stands to gain a £10.000 profit from producing 1 ton of meat while the farmer only loses £1.000 worth of crops. Thus, it would be efficient to reach an agreement under which the cattle-raiser would pay the farmer a sum between £1.000 and £10.000 in return for a right to produce 1 ton of meat. Production will remain at the optimum level of 1 ton. To produce 2 tons, the cattle-raiser would have to buy the farmer off with at least £15.000, whereas he

49 *See* specifically D. Acemoglu & S. Johnson, *Unbundling Institutions*, 113(5) J. Pol. Econ. 949 (2005; D. Acemoglu et al., *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 Am. Econ. Rev. 1369 (2001); D. Acemoglu et al., *Institutions as the Fundamental Cause of Long-Run Growth*, *in* Handbook of Economic Growth Vol. 1A 385-472 (P. Aghion, and S. Durlauf eds., 2005).

50 *See* Stacey, *supra* note 36; Trubek & Santos, *supra* note 26; Dam, *supra* note 27; Acemoglu et al., *supra* note 49; E. Neumayer & L. Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment*, 33(10) World Dev. 1567 (2005); John Ahlquist & Aseem Prakash, *FDI and the Costs of Contract Enforcement in Developing Countries*, 43(2) Pol'y Sci. 181 (2010). But compare Haggard & Tiede, *supra* note 47; A.J. Perry, *The Relationship Between Legal Systems and Economic Development: Integrating Economic and Cultural Approaches*, 29(2) J. L. & Soc'y 282 (2002).

51 D. Kaufmann, A. Kraay & P. Zoido-Lobaton, *Governance Matters* (World Bank Policy Research Working Paper Series 2196, 1999). In a similar vein, *see* Rodrik, Subramanian & Trebbi, *Institutions Rule: The Primacy of Institutions Over Geography and Integration in Economic Development*, J. Econ. Growth 131 (2004) who demonstrate that property rights protection and rule of law protection ensure higher per capita incomes in developing countries.

52 R. Coase, *The Problem of Social Cost*, 3 J. L. & Econ. 1960).

stands to gain only £4.000. Similarly, it would not be sensible to produce the third ton.

The resulting production level would be the same if a damage remedy were chosen instead. It would be beneficial to both parties for the cattle-raiser to pay the farmer 1.000 £ in damages to produce 1 ton of meat. Again, there would be no incentive to bargain for a higher level of production. The efficient amount of meat would still be produced if the cattle-raiser held the entitlement instead. The cattle-raiser would have the right to produce meat at maximum capacity (*i.e.* 3 tons) without having to compensate the farmer for the damage to his crops. Because of zero transaction costs, the farmer would negotiate with the cattle-raiser to reduce the output of meat. The farmer would buy off the cattle-raiser with some amount between £6.000 and £35.000. The cattle-raiser would reduce output from 3 tons to 1 ton and thereby reduce damage to the farmer by £35.000. It would not be beneficial to negotiate for a further reduction in the production of meat since the farmer would have to pay the cattle-raiser £10.000 to reduce damage of only £1.000. The efficient amount of production would be reached, as argued by Coase.

The Coase theorem, by emphasizing the disturbing role of transaction costs in reaching efficient solution, has seminally pointed out the problem of the social costs generated by transactions. From a normative perspective, the Coase theorem, applied in a positive cost world, justified institutions' roles, not only paved the way for the New Institutionalism personified by economists such as Nobel Prize Laureate Williamson, but also has been foundational to the Law & Economics scholarship[53].

With respect to the Law & Economics teachings examined from the Rule of Law principles' perspective, one can ask the following question: to what extent the solution provided by the so-called '*Coase theorem*', aimed at reaching an efficient solution, contradicts the Rule of Law? Let us ignore the economic feasibility of the assumptions under which the Coase theorem can realistically take place[54], there are a number of reasons for seeing the Coase theorem, albeit fundamental to the Law & Economics scholarship, as encroaching upon the fundamental principles commanded by the Rule of Law.

First, property rights are not, under Coase theorem, protected by injunction reliefs but by simple damages: trespassers are not estopped from violating individuals' properties. They are only asked to compensate the victims for such trespasses. The moral imperative of prohibition of trespasses, given the violation of the fundamental property rights, is disregarded. The ethical requirement of adherence to the law is jeopardized for the sake of efficiency and consequentialist-loaded arguments. The justice of the Coase theorem solution is highly questionable. Second, the economic rationale of the Coase theorem can be questioned on the very economic side: the dynamic approach of the benefits of property rights is denied in favour of a static approach to social production. Indeed, what if the property owner, here the farmer, planned to invest in his property and have long-term projects that require free disposal of his own property? The social cost, à la Coase, is considered only from a static perspective without the long-term perspective of negative impact on property investments[55].

Consequently, the enforcement of fundamental rights and the claim of one's property rights can be seen, in Coase's eyes, as uncooperative behaviours creating extra transaction costs. This 'inefficient' behaviour is nothing less but the enforcement of constitutional rights that every individual is entitled to claim. Therefore, the whole theory of rights and wrongs, of principles and torts, is being weakened for the attempted attainment of an efficiency goal wherein the 'social cost' is minimized. The individual constitutional property rights protected by injunctive reliefs are curbed in favour of a collective objective derived from utilitarianism of 'economic efficiency'.

The theory of rights, according to which 'rights matter', is where Rule of Law principles are given full effects. Rule of Law principles do not scrutinize onto the respective costs and benefits of negotiating trespass between the tortfeasor and the victim. Rule of Law principles are limited to the fundamental first stage of analysis, namely whether or not the human action breaches an individual his/her fundamental property rights. Because the answer to this question in the Coase theorem would be positive, injunctive reliefs would be issued so that the Rule of Law empowers the victim to have his/her private property rights freed from any intrusion irrespectively of the costs and benefits of each involved party or of the society.

The fundamental premise upon which Law & Economics movement has flourished – the consequentialism of the Coase theorem's contribution to property rights – therefore contradicts the fundamental premise upon which the Rule of Law has emerged – the deontological protection of private property rights. The Coase theorem contradicts the Rule of Law because the Rule of Law principles cannot be superseded by the economic principle of efficiency with respect to its ethical superiority. After property rights protection, it seems that Law & Economics scholarship may contradict the Rule of Law principles when it comes to its idea of an 'efficient breach' of contract law.

B. The 'efficient breach' in contract law

'Central to law and economics of contract law'[56], the notion of 'efficient breach' contradicts the principles underpinning the Rule of Law. The notion of 'efficient breach' of contracts flows from the belief that breaches of contracts should be deterred, via specific performance or compensatory damages, only when such breaches are inefficient.

Breaches of contracts are said to be inefficient whenever the value generated by the respect of the contractual promises is lower than the associated costs. However, the assessment of both the 'value' and the 'costs' of a specific contract is subject to controversy as the conclusion may dramatically differ whether or not one takes only the breaching party's perspective, two contracting parties' perspective or the whole social costs into account. Consequently, the mathematical computation of the realisticness of the 'efficient breach' pares down to an impossible calculus.

Indeed, according to law and economics thinking, '*if the breaching party has to pay the other parties' loss then the breach can be subject to a comparison of gains and losses. If the gains from breach plus expectation damages are small or negative, then*

53 *See* Warren J. Samuels, *The Coase Theorem and the Study of Law and Economics*, 14 Natural Resources J. 1 (1974).

54 Guido Calabresi has famously restated the Coase Theorem by stating that: *'If one assumes rationality, no transaction costs, and no legal impediments to bargaining, all misallocation of resources would be fully cured in the market by bargains,' see* G. Calabresi, Comment, *Transaction Costs, Resource Allocation, and Liability Rules*, 67 J. L. & Econ. 67 (1968). But, there is no such a world with costless transactions and with full information – assumptions made however necessary for the Coase Theorem. For a full discussion of the Coasean unrealistic assumptions, *see* Robert D. Cooter, *The Cost of Coase*, 11 J. Leg. Stud. 1 (1982).

55 *See* Cooter, *supra* note 54.

56 C. Veljanowski, Economic Principles of Law 126 (2007).

the breach will not occur, and should not occur from an economic viewpoint. However, if there are gains, then it would be efficient to release the resources to alternative uses'[57].

According to law and economics, there can be situations when efficient breach can be called for. For instance, in light of the change in price between the time of the signing of the contract and the time of the performance of the contract, the seller could breach the contract whenever the higher price is less than the original buyer's valuation price. The instability, unpredictability, increased insurance costs and increased deterrence in contracting such concept of efficient breach would structurally far outweigh any conjectural and relative gain from the seller's viewpoint. Irrespectively of the economic rationale of such measure, the 'efficient breach' concept drastically undermines the premises of the Rule of Law, according to which obedience to the law, in general, and obedience to the law of any contracting parties (*i.e.* the contracts), in particular, are both an ethical and legal imperative.

C. The rule of reason in competition law

Competition law is a fundamental area of law and policy allowing for the emergence and reinforcement of a competitive order through regulatory interventions of the economic freedoms of market actors. The reduction of the economic freedoms of the market actors is such a sensitive issue that strong legal and economic argumentations must be ex ante developed in order to justify subsequent regulatory restrictions upon the market actors' economic freedoms.

Historically, competition law (or 'antitrust law' in North America) had had recourse to 'economic structuralism' in order to identify which business practices were susceptible to distort competition in the market and hence be made illegal. Economic structuralism refers to the need for identifying the key fundamental market structures for achieving a high level of competition. Outside these market structures, the actions of the market actors would become dubious with respect to their willingness of not distorting competition in the market.

Economic structuralism had numerous advantages and limitations with respect to the application of competition law. Economic structuralism allowed for competition authorities not to be warned when business practices were not outside the structural criterion. For instance, if the abuse of dominant practice can only occur when a firm has 50% of the market shares of its relevant market, a firm with 45% of the market shares, regardless of its presumably abusive practices, would not be scrutinized by competition authorities. Certainty and predictability in the law helped market actors to understand competition law, which therefore remained clear, accessible and predictable. These are the intrinsic qualities of the Rule of Law. Indeed, economic structuralism resembled a principled approach to the law, where competition law was focused on potential infringements by markets actors only when principles of law and of the competitive order were to be breached. Economic structuralism has generated the '*per se* rule', whereby some specific behaviours under certain specific circumstances (market structure) were deemed to be anticompetitive. Outside such circumstances, no minor charges against market actors could be found, therefore providing for greater legal certainty and hence greater economic freedoms.

Interestingly, because some scholars considered that economic structuralism was catching not too little but too many behaviours of market actors, scholarship moved away from a strict economic structuralism approach to competition in favour of a more behavioural approach. Under the economic behaviourism of competition law, it no longer matters whether the market shares are detained by each market actor in order to conclude whether each of them was willing to be under the scrutiny of competition law. However, it has become the anti-competitive behaviour of market actors as such, which has become the interest of competition authorities. Irrespective of the market shares of market actors, some behaviours can infringe or not onto the level of competition in a specific market. Therefore, some market actors with high market shares have started being excused and justified under economic behaviourism, whereas economic structuralism would have fined them. The outcome has been increased uncertainty as the competition authorities' investigations were possibly targeting any market actors. Behaviours of market actors have become increasingly suspicious as the lines between the legality and illegality of behaviours under competition law are blurred. The principles of law being weakened, the practice of law more importantly relies on a casuistic approach. The intrinsic qualities of the Rule of Law are lacking, the equality before the law is jeopardized, the liberty in the law for market actors is constrained under constant fears of administrative investigations and legal certainty is no longer achieved.

Economic behaviourism has tentatively tried to legitimize itself with the so-called 'rule of reason', which was preferred over the '*per se* rule'. According to the rule of reason, competition authorities are fining market actors according to the criterion of reasonableness. The main and historical proponent of the rule of reason – the US Supreme Court – has gradually departed from the *per se* rule in favour of a rule of reason. Indeed, in the United States, according to Section 1 of the Sherman Act, *'every contract (...) in restraint of trade or commerce (...) is declared to be illegal (...)'* and there is no legal exception to this prohibition. Certain agreements which are considered very likely to be anti-competitive are automatically found to be illegal, and for other types of agreements, the anti-competitive and pro-competitive aspects of the agreement are weighed before an agreement is condemned as illegal[58]. The first time a rule of reason has explicitly been applied in the United States is when Justice White in *Trans-Missouri Freight Association*[59] argued that there needs to be a criterion of '*reasonableness*' in the interpretation and application of Section 1 on the basis of the fact that *'it is not the existence of the restriction of competition, but the reasonableness of that restriction'*.

Unlike in the United States, the European Union has adopted a more formalistic approach with Article 101 of the Treaty on the Functioning of the European Union (TFEU), which involves both prohibition and exemption provisions for agreements in restriction of competition, with Article 101(1) and Article 101(3), respectively. Article 101(3) can be applied to all types of agreements, whether they have the restriction of competition as their object or effect. There is no such possibility in the US antitrust law, since an equivalent of Article 101(3) does not exist. Article 101(3) provides for a sort of European rule of reason where pro- and anti-

57 *Id.* at 156.

58 The rule of reason has been applied in cases dealing with restraints of trade (Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 96–97 (1911)); vertical non-price restraints (Continental T.V., Inc. v. GTE Sylvania, 433 U.S. 57 (1997)); vertical maximum resale price maintenance (State Oil Co. v. Khan, 522 U.S. 3, 15 (1997)); for vertical minimum resale price maintenance (Leegin Creative Leather Prods. Inc. v. PSKS, Inc. 127 S. Ct. 2705, 2712 (2007)).

59 United States v. Trans-Missouri Freight Assoc., 166 U.S. 290, 350–52 (1897).

competitive effects of practices are weighed out with an economic approach that increases legal uncertainty and confusions. However, the major shifts in the EU institutions' practices towards a more 'economic' approach, which is favourable to a rule of reason, can be witnessed with the *'White Paper on the Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty'*[60] and with the Merger Regulation 1/2003[61]. The rise of the rule of reason in the EU has started with judgements taking into consideration the *'legal and economic context'* of the firms' practices of the economic analysis of the pro-competitive effects of the defendants' arguments[62].

For instance, in *Wouters*[63], the ECJ balanced anti-competitive effects with other public policy considerations – notably, the restrictive effect of bar admissions for lawyers with the objective of ensuring useful effects of professional regulations. The ECJ concluded that public policy considerations outweighed harm to competition: the rule of reason is broadened to other public policy considerations. The ECJ can be said to have favoured a *'partial rule of reason'*[64], where a balancing test between pro- and anti-competitive effects is carried out, but with some aspects of a *per se* rule with respect to the restrictive object of agreements.

With the rule of reason, the question becomes as follows: can one provide a reasonable justification for the behaviours of the market actor under scrutiny? If the answer is yes and/or if the justification with respect to the economic efficiency of the contested behaviours is provided, the investigations will cease. If the answer is no and/or if the justification with respect to the economic efficiency of the contested behaviours are considered by competition authorities as being not sufficiently convincing, the investigations will ban these behaviours. If the line is thin, the consequences are dramatically opposite. It is sufficient for competition authorities to be convinced regarding the supposed economic benefits of the behaviours and such behaviours will be deemed pro-competitive. If not, the behaviours will be deemed anti-competitive.

The principled-based approach to competition law under economic structuralism has therefore been substituted to a behavioural approach to competition law where the rule of reason has outplayed the Rule of Law[65]. The rule of reason *'embraces antitrust's most vague and open-ended principles, making prospective compliance with its requirements exceedingly difficult'*[66]. The flexibility, and hence unprincipled approach of the rule of reason, has sometimes been acclaimed[67]. However, the rule of reason is not an ancillary rule in competition law. It is a fundamental bedrock to current competition practice inasmuch as the 'efficiency defence' (or the economic justification based on the supposed pro-competitive effects of contested behaviours) has developed into an essential element of justification in competition cases. In contrast to the original intent of scholars vouching for a departure of economic structuralism in favour of economic behaviourism with the rule of reason in order to exempt some market behaviours from competition authorities, this evolution has tended to increase the number of competition investigations, the extent of market behaviours caught under competition law and the legal uncertainty in relying upon competition law. The Rule of Law is here undermined. The efficiency defence therefore has worked as an engine of disintegration of the Rule of Law in competition law. The Law & Economics teachings in competition law, which naturally favours the efficiency defence of the rule of reason as part of the economic behaviourism this movement has actively promoted, are contrary to the principle-based approach of the Rule of Law to competition law.

However, competition law is one of the main areas of law where Law & Economics applications have largely been uncontested. Therefore, even in one of its core elements, Law & Economics favours ideas and concepts that contradict the clarity and predictability required by the Rule of Law principles. In light of the pitfalls generated by the luring rule of reason, some attempts have been made to vouch for a more '*structured* rule of reason', which would be something in-between the rule of reason and the *per se* rule, and their respective economic approaches, namely economic behaviourism and economic structuralism. It is nothing else but an increased level of justification, which yields no particular benefit in terms of legal certainty, but increased costs in terms of discovery and argumentative discourses[68]. Indeed, M. Strucke (2009) rightly wonders: *'so how does the rule of reason (…) standard for evaluating conduct under the Sherman Act fare under these rule-of-law principles? Poorly'*[69]. The Rule of Law principles require the predictability and the clarity that the rule of reason fails to address and hence give up these qualities of the law for supposedly efficiency gains. The conceding of the Rule of Law principles for elusive efficiency gains is contrary to the very essence of Rule of Law principles. Consequently, Rule of Law principles can only accept *per se* rules of competition law, rules continuously criticized by Law & Economics scholars.

These three illustrations have evidenced the claim according to which the lessons derived from the Law & Economics scholarship are not always compatible with the Rule of Law principles. This claim is even more telling since the above illustrations have been chosen among the fundamental lessons of Law & Economics movement in three fundamental areas of law, namely property rights (Coase theorem), efficient breach (contract law) and rule of reason

60 *White Paper on the Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty* [1999] OJ C132/1; *see also* Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C 101/97.

61 Council Regulation (EC) no. 1/2003 of 16 Dec. 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, OJ 2003, L1/1. Regulation 1/2003 became effective on 1 May 2004.

62 *See, e.g.*, Société La Technique Miniére v. Maschinenbau Ulm GmbH, (56/65), [1966] ECR 235; Delimitis v. Henninger AG, Case C-234/89 [1991] ECR I-935 ; SA Brasserie de Haecht v. Consorts Wilkin-Janssen, Case 23/67 [1967] ECR 407 ; European Night Services, Case T-374/94 ECR II-3141; Métropole Télévision SA v. Commission, Case T-112/99 (2001) ECR II-2459.

63 J.W. Savelbergh Wouters, Price Waterhouse Belastingadviseurs BV & Algemene Raad van de Nederlandse Orde van Advocaten, Case C-309/99, (1999), ECR I-1653.

64 *See* E. Steindorff, *Article 85 and the Rule of Reason*, 21 Common Market L. Rev. 639, 646 (1984).

65 M. Strucke (2009) rights call this a '*disturbing trend*', according to which *'antitrust are straying from rule-of-law principles', see* M. Strucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 UC Davis L. Rev. 1375, 1378 (2009).

66 *Id.* at 1379.

67 For instance, the Antitrust Modernization Commission said *'advances in economic learning have persuaded courts to replace [their] per se rules with a more flexible analysis under the rule of reason', See* Antitrust modernization commission, report and recommendation (2007).

68 *See* Strucke, *supra* note 65, at 1384-86.. The understanding of the dangers of a rule of reason applied in competition law was clear as early as at the time of President Wilson who, during his presidential address, rightly pointed out the need for legal certainty in competition law: *'The business of the country awaits also, has long awaited and has suffered because it could not obtain, further and more explicit legislative definition of the policy and meaning of the existing antitrust law. Nothing hampers business like uncertainty. Nothing daunts or discourages it like the necessity to take chances, to run the risk of falling under the condemnation of the law before it can make sure just what the law is. (…) And the business men of the country desire something more than that the menace of legal process in these matters be made explicit and intelligible. advice, the definite guidance and* information which can be supplied by an administrative body, an interstate trade commission'. See Woodrow Wilson, U.S. President, Address to a Joint Session of Congress on Trusts & Monopolies, Jan. 20, 1914.

69 Strucke, *supra* note 65, at 1421.

(competition law). Furthermore, this incompatibility contradicts our former claim, according to which both theoretical and universal perspectives justify that the Rule of Law principles and Law & Economics scholarship should be more aligned to each other.

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