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Economics of law on the effectiveness of compensating social equilibrium

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Abstract

The article provides a scientific analysis of economic approaches reflected in economic doctrines on the effectiveness of compensating for social equilibrium while optimizing the costs of precautionary measures to prevent tort liability via the method of systematic analysis. As a result, the approach of French lawmakers seems to be interesting, having embarked on the path of supplementing the classical views on tort liability with new rules. In conclusion, the development of a standard of behavior will always accompany not only tort law from the perspective of both general approaches.

Keywords: Economics, law, efficiency, equilibrium, optimization.

Economía de la ley sobre la eficacia de la compensación del equilibrio social

Resumen

El artículo proporciona un análisis científico de los enfoques económicos reflejados en las doctrinas económicas sobre la efectividad de compensar el equilibrio social al tiempo que optimiza los costos de las medidas de precaución para prevenir la responsabilidad extracontractual a través del método de análisis sistemático. Como resultado, el enfoque de los legisladores franceses parece ser interesante, ya que se han embarcado en el camino de complementar las opiniones clásicas sobre responsabilidad extracontractual con nuevas reglas. En conclusión, el desarrollo de un estándar de

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comportamiento siempre acompañará no solo al derecho de daños desde la perspectiva de ambos enfoques generales.

Palabras clave: economía, derecho, eficiencia, equilibrio, optimización.

1. INTRODUCTION

1.1 Nature and scope of the problem

Modern legal science reveals an ever-increasing need to use the methods of economic science to study many legal phenomena. The sources of this idea should apparently be sought in the notion that court decisions determining the distribution of disputed ownership rights and determination of responsibility, procedures for reviewing decisions of legal disputes, methods for calculating losses and the appropriateness of exemption from injunctions are elements of the legal systems that can easily be understood as attempts to efficiently distribute limited resources. The problem of the effectiveness of legal requirements in economic theory is considered from the point of view of identifying their pursuit of general interest or private interest. In this format, the non-economic concept of the effectiveness of legislation is considered in the article in the light of the relationship between the balance of interests and welfare as an example of cost optimization of precautionary measures aimed at preventing tort liability.

In this regard, the objective of the study consists of reviewing and analyzing legal regulations in the field under study. Results obtained during the study and the undertaken analysis shows, that it is

impossible to completely ignore the achievements of representatives of economic science that support the considered view of assessing the economic efficiency of legislation. It is most correct to consider the problem of efficiency as a complex scientific problem, in solving which various means, methods, concepts, etc., including those considered in this article. Since only their sum can give some more or less reliable picture of effectiveness.

As for tort liability, the duality of one of its criteria, implying its occurrence either with or without fault in practical terms in the modern period, is based on the recognition of the sufficiency of the fact of the unlawfulness of the actions committed by the injurer of no-fault for the objectification of innocent liability. It is justified by the teleological desire of the legislator to combine imposition of objective responsibility in the case of a strictly determined need to compensate for the loss caused by delinquent due to the independence of responsibility from the precautionary measures taken by it with subjective responsibility.

2. LITERATURE REVIEW

The issue of applying the methods of economic theory to the law has become and is becoming the subject of attention of both lawyers and economists, among which are CALABRESI (1970) with his The Cost of Accidents; HECKMAN AND BROOK (1989) and their Determining the Impact of Federal Antidiscrimination Policy on the Economic Status of Blacks: A Study of South Carolina, the

American Economic Review. Posner R.A. and his work Economic Analysis of Law and Some Uses and Abuses of Economics in Law; SHAVELL (1987) with his works, such as: Economic Analysis of Accident Law; Model of the Optimal Use of Liability and Safety Regulation; Liability for Harm versus Regulation of Safety; Strict Liability versus Negligence, etc.; TAMBOVTSEV (2005; VILLALOBOS, RAMÍREZ and DÍAZ-CID, 2019). Law and economic theory, etc. (SHAVELL, 1980). Considering law theories, VILLALOBOS, GUERRERO, and ROMERO (2019), VILLALOBOS and RAMÍREZ (2018) and HERNÁNDEZ, VILLALOBOS, MORALES and MORENO (2016), propose that the history of life in society in the West is the story of how the organization of the polis has been given to favor the majority governed by a minority in the exercise of political power, especially in those systems governed by the Law, although not direct and necessarily by force (HERNÁNDEZ and CHUMACEIRO, 2018a; HERNÁNDEZ and CHUMACEIRO, 2018b).

3. METHODOLOGY

The author in this paper proceeds from the objectively subjective assignment of any phenomena and processes of the external world and applied general scientific and special research methods, such as formal and dialectical logic combined with induction and deduction, hypothesis and analogy, analysis and synthesis, systemic analysis. Thus, the method of systematic analysis, along with such operations as induction and deduction, is used in the course of consideration of the

provisions of relevant economic and legal doctrines in the field under study. It clarifies its interrelation and influence and the relationship with other regulations; methods of formal and dialectical logic also help to understand this connection. The materialistic view of the processes and phenomena of the external world as a whole makes the study proceed from the fact that the transformation of legal provisions under the influence of economic doctrines - is a new reality.

4. RESULTS AND DISCUSSION

For a long time, the economic doctrine has been using its methods and categories to evaluate phenomena originating from the sphere of law. Back in the XVIII century, Adam Smith raised the issue of the economic implications of trade law. The English lawyer Jeremiah Bentham also asked this question, although from a slightly different perspective. Within the framework of his teaching, presented in the works an excerpt about the government, Introduction to the foundations of morality and legislation, etc. based on the principle of hedonism, connecting moral goodness with pleasure, pleasure, and the measure of correctness is the greatest happiness of the greatest number (SELIGMEN, 1968).

The economics of law direction developed two approaches, the application of which has led to a branching of the direction into positivistic and normative. The positivist branch focuses on the application of methods of economic analysis to predict the consequences of applying various rules of law. It is believed that the

positivist economic analysis of tort law has made it possible to predict the greater effectiveness of the norms on the innocent liability of delinquents compared to the norms that apply liability for fault. In this sense, the normative branch of the law economy goes further than the positivistic one, striving to develop recommendations for the legislator based on assessing the economic results of a particular rule-making policy. The key to this branch is the issue of efficiency.

A number of economists who developed V. Pareto's teaching on efficiency tend to conclude that in practice such an ideal situation cannot work since it is almost impossible to carry out broad changes in economic policy without worsening the situation of at least one person. These included, in particular (JOHN & HICKS, 2019; BELIKOVA ET AL., 2018; HARIADI ET AL, 2019; BELIKOVA ET AL., 2019).

They put forward the idea that compensation paid by those whose situation has improved, to those whose situation has deteriorated, allows in this way to achieve an optimum on the basis of Pareto. In other words, the result of even such measures, the implementation of which is accompanied by the deterioration of the situation of some individuals, is effective according to Kaldor-Hicks. The key difference between the Kaldor-Hicks concept of efficiency and the Pareto concept is the idea of compensation, the latter not necessarily having to be paid, but the very possibility of its implementation is sufficient, while the sign of Pareto effectiveness requires either improvement for everyone, or at least, to prevent the deterioration of the situation of any persons.

Based on a mathematical model, K. Arrow substantiated the perniciousness of direct state intervention in the functioning of the market mechanism in the form of price controls and other measures aimed at redistributing income. Governments were encouraged to use other means that did not constrain market forces. His other works made a significant contribution to the theory of optimal stocks, stability analysis of market models, mathematical programming, and the theory of statistical solutions.

However, some economists researching the effectiveness of legal norms, including economists, who specially dedicated their work to the effectiveness of government programs in the form of a normative act (insurance of disabled and unemployed citizens; numerous non-discrimination laws; laws on corporations and securities in relation to the turnover and volatility of securities) note that some fundamental presumptions of traditional economic analysis may show a far-fetched picture of human behavior. It is of no surprise that models based on such assumptions often give incorrect, erroneous forecasts, which requires the development of other approaches to assessing the effectiveness of legal norms.

At a certain point in society, the need to measure, evaluate the effectiveness of legal regulation and legal norms, begins to be realized, which requires, as a matter of priority, the development of theoretical provisions for the effectiveness of the law, its branches, individual norms and institutions. In this article, we turn to the study of the effectiveness of legislation on liability arising from loss - tort liability.

Legal liability arising from harm is an institution through which society seeks to reduce the risk of harm by threatening potential injurers to oblige them to pay potential victims the damage that injurers can cause as a result of their actions (AUTOR, 2003).

From the point of view of economic analysis of law, the main social function of tort liability is to provide incentives to prevent damage. From the point of view of the economy, compensation paid as a result of harm to the victim is a redistribution of the created value, and actions that prevent the occurrence of damage are productive, which gives and provides products with higher quality and safety when using it. From the point of view of economic analysis of tort liability, the fundamental idea is that each of the parties is able to take precautions that completely exclude the possibility of an incident, although, of course, with inconsistent costs. With this view, it was shown that the party capable of preventing an incident with the least-cost avoider can be both the injurer and the victim (ZWEIGERT & KETZ, 2000).

At present, along with the so-called negligence rule, under which the injurer should pay the damage caused to him only if they caused harm through negligence, - there is a rule of the so-called strict liability rule, according to which, regardless of fault, the injurer must compensate for the damage that arose as a result of actions.

In the framework of the unilateral accident, it is customary to distinguish between two subjects: the injurer and the victim, which are assumed to be risk-neutral and not connected with each other outside

the scope of the incident, i.e. not in a contractual relationship. The risk of a traffic accident can only be affected by the actions of the injurer. However, such cases are quite rare. Much more common are situations in which the likelihood of an accident depends on the behavior of the injurer, as well as on the behavior of the victim. In such cases, it is customary to talk about a bilateral accident.

In order to identify the type of liability that has arisen — responsibility for fault in the form of negligence or innocent, strict liability — it is necessary to answer the question of whether proper forethought measures were taken by the injurer and the victim to prevent the situation of loss. When applying the rule of strict liability in the event of an incident, the injurer must compensate for the losses and, of course, bear the costs of precautions. Choosing the level of precaution, the injurer minimizes the amount of damage and, in accordance with it, selects the amount of costs.

When applying the rule of fault-based liability in the form of negligence liability, the logic of choice is somewhat complicated. Suppose that the court in the course of the proceedings determined a certain standard of precaution, which is a consequence of the costs that determine it, which are set at a certain level. This means that the injurer will recover damages if their actual precautionary costs are below this established level, but will not refund anything if they are higher. Under these assumptions, it is clear that the injurer will choose costs higher than the established level since at the same time they will not be liable.

That is why both the normative regulations on wine in the form of negligence and the provisions on innocent liability help the parties to the tort obligation to achieve the maximum possible mutual precautionary measures. The existence of a legal rule of fault-based liability provides injurers with the potential opportunity to take effective precautions, as a result of which they are not liable for an accident if it occurs, because they, within the framework of their precautionary measures, comply with the established standard of behavior. Consequently, the residual costs of the accident are borne by those affected by it for the simple reason that they have a priori the same effective incentives for taking precautionary measures as the injurer, for their part.

As for the rule of strict liability, in the conditions of its application, the injurer will have incentives to optimize precautionary measures. The normative order fixed by the legislator in this regard encourages injurers to take precautionary measures and restrict their dangerous activities, because they are obliged to pay compensation for the loss done to the victim, and its expected value is determined by the precautionary measures taken and the taken precautionary measures, and precautionary measures, undertaken by the victim. However, the victim will not have any incentives to take appropriate measures, because, in accordance with the accepted rule of responsibility, the injurer must fully compensate for all its losses resulting from a fault. In this regard, in relation to bilateral accidents, the strict liability rule is transformed into a strict liability with a defense of contributory

negligence. This rule means that the injurer is considered liable for the damage only if the victim did not neglect the necessary precautions.

They are supplemented in some cases by an injunction against the injurer, as well as fines. When comparing the advantages of security regulation and tort liability in terms of four basic characteristics, it is seen that in real life the methods of controlling the activities of sources of increased danger are applied there where economic theory recommends using them. Two characteristics — knowledge of the specifics of the case and administrative costs — usually favor the application of civil liability standards (HERNÁNDEZ, CHUMACEIRO, RAVINA-RIPOLL and DEL RÍO, 2019; HERNÁNDEZ, CHUMACEIRO and RAVINA-RIPOLL, 2019). Administrative costs arise only if an accident has occurred, and bringing the injurer to administrative responsibility - regardless of the existence of damage. With regard to knowledge, private parties have an advantage in this regard, since they can better assess the benefits of their activities and are able to assess the risk no worse than administrative bodies. The insolvency of the injurer does not matter, since the requirements for observing safety precautions may be presented before the start of their activities. In the case of legal liability, if the assets of the parties are less than the potential damage, then the incentives to take adequate precautionary measures will be insufficient.

In this regard, the approach of French lawmakers seems to be interesting, having embarked on the path of supplementing the

classical views on tort liability with new rules, the combination of which over time has formed a special procedure for compensation for tort damage, which provides for the obligatory provision of compensation. Such a binding is explained in French civilistic literature as the automatic provision of compensation within limits wider than those indicated in the classical period of development of the civil liability doctrine. These limits were first extended to cases of damage in everyday life, then to road traffic accidents. Later, they began to cover special, we can say exceptional, circumstances, accompanied by infliction of especially significant damage, which included industrial accidents and technological disasters, as well as damage caused by the actions of terrorists, or specific cases of damage, such as that arising from infecting with AIDS as a result of a blood transfusion.

5. CONCLUSION

In the framework of one article, it is impossible to set out with the necessary breadth the content of the regulation of relations arising in connection with the application of economic methods to law, even tort. Some components of such relations require special consideration; others require a generalization of the results of the discussions they provoke. Nevertheless, the authors note that the development of a standard of behavior will always accompany not only tort law from the perspective of both general approaches, and determining the effectiveness of its norms in the context of choosing the optimal level

of precautionary measures and enforcement. At the same time, they will not lose their significance, but, on the contrary, the incentives created by legal norms on strict responsibility, on negligence, etc. will only be improved.

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