An Introduction to Juergen Backhaus's "Lawyers' economics vs. economic analysis of law"

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Juergen Backhaus is undoubtedly one of the founders of law and economics in Europe (Josselin, Marciano and Ramello, 2016; Marciano and Ramello, 2019). Partly because of his editorial activities and, of course, because of his writings. Among the latter, one can count the article that is reproduced below, "Lawyers' economics vs. economic analysis of law". Although it was published forty years ago in the *Munich Social Science Review*, the article should still be read by people interested in law and economics or economic analysis of law. Indeed, it provides a synthetic and critical presentation of "Chicago approach to law and economics" or "Chicago-type 'analysis of law'" or "Chicago legal economic analysis", emphasizing one of its most important, indeed central, aspect: efficiency and the role of the legal system in trying to promote it.

Actually, to be more precise, in his article, Backhaus only discussed one example given by one of the representatives of Chicago economic analysis of law – the evaluation of the compensation to be given to a truck-driver victim of an accident used by Richard Posner in his *Economic Analysis of Law* (1972b).[2]

Aware that he could have been blamed for "criticizing an entire approach by reference to a single author," Backhaus defended himself by saying that Posner was "a leading as well as a representative scholar in the field of legal-economic analysis of the Chicago type." Thus, he assumed that Chicago law and economics were perfectly represented by Posner's work – that was certainly exact, even though one can say that Ronald Coase, another representative of Chicago law and economics, was already very different from Posner. Also, he explained

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[2] Backhaus used the second edition of Posner's book, published in 1977.

having chosen a "specific example" because his "paper [wa]s not intended to give complete critical assessment of Richard Posner's economic analysis of law." He was *only* targeting the idea that efficiency should not be used as "an important rationale of the law," what he called "lawyers' economics" – that is a way of envisaging economics as a means to ''determine the proper content of legal rules and evaluate the performance of the legal system as a whole'' (Ackerman, 1977: 11, quoted in Backhaus).

With regards to this latter point, Backhaus was too modest or too cautious. One easily understands that his criticism goes largely beyond the case of this sole example. The claim he was criticizing was that the legal system – courts, judges, juries – should use efficiency as a normative criterion, as a goal or an end; that the legal system should try to promote efficiency, that "the logic of the law is really economics" (Posner, 1975: 764). Or, that the law should mimic the market. That was precisely the cornerstone of Posner's economic analysis of law – Backhaus noted it: "in Posner's economic analysis of law … economic efficiency sometimes seems to be assumed to be the goal of the entire legal system." And one can find it in his *Economic Analysis of Law* or in various articles published in the 1970s.[3] That was also the idea that Posner would push further under the form of wealth maximization (1979) and that would trigger a huge controversy – in particular with Ronald Dworkin (1980), Anthony Kronman (1980), and Guido Calabresi (1980). In other words, Backhaus had anticipated and made explicit what Posner would explicitly write one year later. His answer can also be said to have anticipated the criticisms made by others: efficiency – wealth – is not a value.

Indeed, Backhaus was one of the very firsts to claim that the law should not aim at promoting a Pareto efficient allocation of resources as the economy or markets do. The problem with this analysis, as Backhaus explained in his paper, is that it considers that efficiency should be the goal or end of the legal system as well as the end of the economy, and that forensic deliberations – such as made in courts – and economic negotiations – that took place in markets – were two different, alternative, means to reach this only goal. This, as Backhaus noted, "implies that at least in a theoretical sense the relationship between law and economics is one of substitutability." Thus, in the case of the accident of the truck-driver, the

[3] From this perspective, one may be surprised by the fact that Backhaus did not chose to discuss other examples – and in particular the decision made by Judge Learned Hand (see Posner, 1972a).

efficient compensation should be determined by the Court as it would be determined on the market, that is if the driver had not been the victim of an accident. The role of the Court, of a judge or a jury, was to compute and calculate "the precise amount of compensations to be paid in this case to the truck-driver."

To Backhaus, that view was wrong. These two procedures could and should not be put on the same footing, as if they were having the same role. The law and the economy complement each other. The role of forensic deliberations was not to do what markets would have done. It was not to decide on what was an efficient compensation. The "forensic procedures" – that take place in courts – "fulfill a pacifying social function." And, in order to fulfill this function, "the forensic process has to generate a solution which appears to be just to those concerned and is acceptable to any citizen who might find himself potentially in the situation of one of the interested parties." Or, as Backhaus wrote, its purpose was to decide what was a "fair and just" compensation.[4] Once such a compensation has been decided, then, the economic part of the process could take place: that is, an efficient means to reach that "fair and just" compensation could be decided. In other words, efficiency was not a goal that should be pursued by the legal system; it was a means, a "technique" that could be used to reach a goal that had been decided elsewhere. This argument was particularly original. One should not forget that Backhaus was one of the firsts to make it. Publishing this article in the late 1970s was daring. Republishing – and reading – it today is important.

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[4] Let us note insist that Backhaus's claim was not normative. He did not say what "fair and just" meant. He seems to have favored a "contractarian" definition *à la* Buchanan (he cited him), that is, a solution is fair if it is accepted by the "individuals involved in the situation which poses the problem to be solved."

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