

Lawyers *cum* Economists: Did they Bring about Law & Economics? Gierke, Schmoller and the German Civil Code

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ABSTRACT

This essay traces the question whether the key figures in the development of Law & Economics have been both lawyers and economists, or whether they rather were one or the other and the field emerged from close cooperation, partially in order to find out how to institutionally organize Law & Economics studies. A defining moment in the history of Law & Economics was the genesis of the German Civil Code of 1900, which profoundly changed shape due to the interaction between lawyer Otto v. Gierke and economist Gustav v. Schmoller. This story is narrated and analyzed, and lessons are drawn for today.

Key words: Law & Economics; German Civil Code (BGB); Otto v. Gierke; Gustav v. Schmoller.

1. Lawyers *cum* economists

Lawyers *cum* economists, i.e. people who were lawyers and economists at the same time: Did they bring about Law & Economics as a scholarly field? Among the many biographies in the *Elgar Companion to Law and Economics* (Backhaus 2005), there are very few lawyers, and in some cases, the classification is difficult. Among the lawyers clearly are Franz Böhm (1895-1977), Otto v. Gierke (1848-1921), Friedrich August v. Hayek (1899-1992), Rudolf v. Jhering (1818-1892), Franz Klein (1854-1926), Pietro Trimarchi (*1934), Max Weber (1864-1920) and Christian Wolff (1679-1754). But should Plato (427-349 B.C.) be seen as a lawyer? Can Wilhelm Roscher (1817-1894) really be counted as an economist, as he spent almost his entire adult life in law schools? Are his descriptions of economic practices and processes not more adequately described as those of a lawyer for lawyers rather than economic theory?

Among those described as lawyers, only one is undoubtedly an economist, as he received the Nobel Prize in economics. The basis for the hypothesis expressed in the title of this paper – "Lawyers *cum* Economists: Did they Bring about Law & Economics?" – then appears to be somewhat weak. Not weak enough, however, to

forego the investigation altogether. But let us look at some more important figures who were lawyers and economists at the same time.

Adam Smith (1723-1790), on the strength of his lectures in jurisprudence, must clearly count as a lawyer, and he is, as Kenneth Boulding used to crack, both the Adam and the Smith of economics. Yet in my lectures on the roots of and schools in Law & Economics, he can safely be missing. He did not contribute a single major paradigm or puzzle to Law & Economics, such as the Coase Theorem or Posner's Wealth Maximization Hypothesis.

John Stuart Mill (1806-1873) was so widely taught in Economics, the Classics and the Humanities by his father and others in the house and library of Jeremy Bentham that he must also qualify as having been both a lawyer and an economist. When working at the office of the British East India Company, his letters to India actually dealt with legal issues. Mill is an academic author who appears to us in two different persons, before and after he met Harriet Taylor, who held a strong sway over his thinking. Yet neither the early nor the late John Stuart Mill made any particular contribution to the sub-discipline of Law & Economics.

Carl Menger (1840-1921) dealt with economic matters before he became a professor at the Vienna Law School, but by training he was a lawyer, since Economics was an integral part of the legal curriculum at the time. Again, there is no lasting contribution to Law & Economics by Menger. A visit to his library at Hitotsubashi University in Tokyo revealed no interest in Law & Economics issues whatsoever. (This is incidentally much different in the case of the library of Karl Bücher; see Backhaus 2000.)

2. What does this mean for the organization of inquiry?

The relevance of asking the question is, of course, largely academic and therefore carries its own justification. There are, however, very practical reasons to engage in this investigation as well, and they concern the organization of inquiry. If Law & Economics is to be taught, should it be done in a genuinely interdisciplinary, formal context, or should lawyers and economists stay separate but join ranks to conduct Law & Economics together? This question is, of course, of great importance for the question of how to arrange the study of Law & Economics in the Governance context as well – should it be done by Governance experts, who also know Law & Economics or by lawyers and by economists dealing with Governance issues?

Recently, joint doctoral programs have appeared, e.g. in medicine and economics at the University of Tennessee and in Law & Economics at George Mason University in Virginia. This has to do with rather practical needs. George Mason University supplies the American legislature and bureaucracy with specialists in crafting and criticizing legislation. The University of Tennessee probably saw a need mostly for the health-oriented industries such as pharmaceuticals, medical implements and artificial body parts to provide help in securing the requisite patents and permits. The applications required there are sometimes not measured in thousands of pages but in yards. This is not necessarily waste. Paracelsus already knew that what is medicine in a proper dose can be poison in another. The thalidomide crisis, which set off a wave of regulation, taught a very painful lesson. (Backhaus 1983) Can, hence, substantial

advances be expected from setting up integrated programs, or would the history of thought in Law & Economics rather suggest a different strategy?

Currently, the center of research and teaching in Law & Economics, the University of Chicago, is characterized by the team work of lawyers and economists. Economists would be appointed to the Law School Faculty and teach the law students side by side with their law professor colleagues. Research workshops involve professors of the Economics Department and the Law School. At Yale, Bruce Ackerman and Susan Rose-Ackerman actually make up a husband-and-wife team. At the University of Hamburg, the legendary team of Schäfer and Ott with their established textbook in German unites an economist (Hans-Bernd Schäfer) and a lawyer (Claus Ott). (2005) So, perhaps such team work provides the most promising strategy.

3. Gierke, Schmoller and the German Civil Code

If we look at the history of Law & Economics, one of the founding events of the scholarly field was the genesis of the German Civil Code (*Bürgerliches Gesetzbuch*; BGB) and its aftermath.

3.1. Otto v. Gierke and Empirical Jurisprudence

Economists have a long tradition of influencing legislation. Gustav v. Schmoller (1838-1917), the most eminent and influential economist of the German Empire, called his journal the “Annals of Legislation, Administration and Political Economy in Germany” (*Jahrbücher für Gesetzgebung, Verwaltung und Volkswirtschaft im deutschen Reich*). Hence, it is no surprise that economists would intervene in the debates about large legislative projects. Outstanding examples are the great codifications, such as Napoleon’s *Code Civil* and the BGB. The BGB can actually even be considered an explicit attempt at efficient legislation. In its ultimate form, it was passed with the explicit input of the leading economists of their time in Germany, notably Schmoller, and based on explicit economic reasoning. Otto v. Gierke played an important role in this process.

Otto v. Gierke (1841-1921) was born the son of a Prussian official in Stettin. He studied law at the University of Berlin and held professorships at the universities of Breslau (1872-1884), Heidelberg (1884-1887) and Berlin (1887 until his death). Gierke is generally described as having formulated, based on the writings of Jacob Grimm (1785-1863), a specific Germanist school of law as opposed to the Romanists.

At the beginning of Gierke’s career, German legal scholarship was dominated by the Romanist school of Savigny; but Gierke began and remained a strong Germanist. The Germanists, like the Romanists, were historically minded; their research, however, did not take them back to the Roman empire, Justinian’s code, and the reception, but followed the path marked out by Jacob Grimm to the law of the ancient German *Mark* and the *Gemeinde* (local community) to feudal records, town charters, the rules of guilds in search of ‘truly German’ and legal principles. The first volume of Gierke’s

Das deutsche Genossenschaftsrecht (1868-1913) ... was the first product of his self-imposed task of broadening the foundation for a German theory of associations by a detailed study of successive types of organizations in German history. (Lewis 1968, 178)

From an economic point of view, the emphasis should not be on the specific nationality of the German law. The emphasis of this empirical research is rather on the law as it has developed by itself, instead of the law as it has been imposed by church or state, both drawing on Roman law, which is thereby transported through time without recognition of the immediate history where it is to be applied. The working hypothesis is that the law can be empirically found in the customs, charters, contracts and the like of identifiable associations of men, be these commercial, political, charitable, professional or other associations. In establishing contractual relationships of one with the other, persons actually create a new legal entity, such as a corporation. Here, the view is distinct from the Roman tradition, which has to create the fiction of a legal identity being granted by the state through *fiat*. Hence, the research is firmly embedded into identifiable economic practices.

Gierke's concept of 'social law' enables him to construe the internal rules of churches, trade unions, business corporations, etc., as independent of state determination and to put such bodies on an equal basis with human persons in claiming areas of freedom into which the state cannot intrude. (Lewis 1968, 180)

This specific approach to legal research was similar enough to economic research into the history of the time that it could be merged with the economic research into a powerful critique of legislation, and the economic research dominant in Germany at that time was the one headed by Schmoller.

3.2. The Genesis of the German Civil Code

In 1848, when the first German democratic parliament convened in the Church of St. Paul in Frankfurt, there were no less than 56 different legal systems governing bills of exchange. This exceeded by far the number of Member States of the German Federation at that time. It is obvious that such a splintering of the legal system stood in the way of the rapidly developing market economy, and there was therefore already an initiative of the Frankfurt parliament to pass a common German Civil and also Commercial Code. However, the parliament had a short life span, and it dissolved before it had even seriously started the task. There were new initiatives in 1866 and 1869 in the Northern German Federation, the pre-cursor of the *Reich*, but only after the unification of the German states as a confederation of principalities in 1871 could the task be resumed, and this happened with initiatives in 1873 in both the Imperial Parliament and the Imperial Council (the representation of the confederated princes). In 1874, a pre-commission of five members was established, and in the same year, a commission of eleven was established under the chairmanship of the eminent jurist Heinrich Eduard von Pape (1816-1888). This commission issued a

report in 1887, and the “act of introduction” with various drafts of by-laws was also issued in 1887 and 1889 in order to provide for a broad discussion.

However, it was at this juncture that Schmoller, together with his colleagues in the German Economic Association (Verein für Socialpolitik), argued that the draft was impractical because it did not build on established economic practices and their respective legal counterparts, rather providing a deductively reasoned set of norms based on the Roman law tradition, and hence not corresponding to the economic practices of a developed industrialized market economy. Entire issues of the journal were devoted to critiques of the draft act, with the articles by Gierke having the strongest influence. (See, e.g., Gierke 1888-1889).

This unsolicited advice led to the establishment of a second commission in 1890, which provided a completely revised draft Code in 1895 that was duly passed, after stormy discussions in the Imperial Parliament, on 1 July 1896 with 222 votes in favor and 48 against, on 14 July in the Imperial Council, and ratified by the Emperor on 18 October. The Code took effect on 1 January 1900; it is still in force today. This shows that efficient legislation is possible, although it also illustrates that, had the economics profession not intervened, legislation would probably have been imposed that would have burdened the German economy with high and persisting transactions costs. The Code would not have become the export article it actually proved to become, still today.

4. Consequences and lessons

Gierke’s approach proved to be important well after the Civil Code had been passed. In building on his criticism of the first draft of the Code, he further developed his criticism into a full theory of German private law, consisting of the three pillars of the law of persons 1895, the law of things 1905 and the law of obligatory relations 1917. (Gierke 1895-1917) It was this coherent body of legal theory, based on empirical research, which allowed for consistent interpretations of the Code in the vicissitudes of the different economic and social environments of first the Empire, second the war economy of 1914-1918, the challenge of the hyper-inflation that it posed to private contracts, the corporatist economy established by the national socialists, the war economy again, the post-WW II barter economy, and finally the reconstruction period in Germany after the currency reform of 1948.

The episode described here proved to be the defining moment for the emergence of Law & Economics as an empirical discipline. Gustav v. Schmoller, of course, was a radical empiricist. The group which worked for him is called *The Younger Historical School* as a label of denigration and in order to distinguish it from *The Older Historical School*, the implication being that the older school is the group of the good ones, and the younger consists of the bad guys. However, by looking systematically at the established customs and forms of contract as they had emerged, more than an ad-hoc criticism was provided. Rather, an analytical paradigm had been defined which is likely to grow in importance as the process of European harmonization of law is gaining momentum.

In the European Union today, we do not just have the 27 different legal systems of the, currently, 27 member states. Rather, there are three different legal cultures

(*Rechtskreise*) which can only be harmonized by systematically engaging in empirical Law & Economics research. Ultimately, only efficient law will survive, and finding the efficient solution is not to be expected as the outcome of legal theorizing, but rather the outcome of legal practice and empirical Law & Economics research – not by design, rather by experience.

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