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LAW AND ECONOMICS IN SWEDEN

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Abstract

The European law and economics movement started early in Sweden. However, the dialogue between economists and lawyers has developed slowly, if at all. The reluctance toward economics in the law schools can be explained by the strong influence emanating from 'legal realism and positivism'. Moreover, scholars with a law degree have most limited training in social sciences. Although law and economics has only exerted a marginal impact on legal education, it has nonetheless influenced the Swedish political debate.

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1. Introduction

During 1974-77, a Law and Economics seminar took place at the Department of Economics and at the Faculty of Law at the University of Lund. The first international conference in Law and Economics in northern Europe was held in 1977, and a conference volume ensued, *Acta Societatis Juridicae Lundensis* (1977). Thus, the European law and economics movement started early in Sweden.

The first doctoral dissertation in law and economics in Sweden was defended at the University of Lund (see Skogh, 1973). Thereafter, several dissertations have been presented by economists, for example Soeria-Atmadja (1983), Bjuggren (1985), Schuller (1986), Fahlbeck (1996), Bolin (1996), Berggren (1997), Hägg (1998) and by lawyers, for example Samuelsson (1991), Runesson (1996) and Domeij (1998).

Nevertheless, the dialogue between academic economists and lawyers has developed slowly, if at all. Nowadays, there are no regular law and economics seminars at any Swedish university. Nonetheless, there are three fully accredited law schools in Sweden: at the universities of Lund, Stockholm and Uppsala. Other universities and colleges offer partial programs in law. There is one chair in Economics (shared with the economics department) at the Faculty of Law at the University of Stockholm. There used to be a similar chair

in Economics at the law faculties of the Universities of Lund and Uppsala, but the chairs have been withdrawn.

Law students traditionally take an obligatory introductory course in economics. This course was reduced in the 1970s from around ten weeks to four weeks of full-time study. Swedish textbooks in economics for law students are Skogh (1977), Werin (1982, 1997), Höglund (1984), Bjuggren and Skogh (1990), Skogh and Lane (1993), and Bergström and Samuelsson (1997). Also international textbooks are used. Law students are, thus, to some extent acquainted with the economics of property rights, risk-sharing, and so on. The normal period of study for a law degree is four-and-a-half years. Swedish law students have no previous university training (such as the bachelor's degree in the USA). Hence, the Swedish lawyer gains very little training in the social sciences.

2. Scandinavian Realism

The reluctance to include more than rudimentary courses in economics in the law schools can be explained by the strong influence emanating from the 'legal realist' school in Sweden. Scandinavian legal realism is sometimes called the 'Uppsala School'. Its founding father was Axel Hägerström, a philosopher at the University of Uppsala during the first decades of the century. Hägerström's attention was directed to law and ethics as sources of metaphysics, which he found meaningless and unscientific. Important members of the Uppsala School were Alf Ross (1968, 1971) and Karl Olivecrona (1939). For an overview of Scandinavian realism, including selected translations into English, see Lloyd (1972, pp. 497-560), and Ryssdal (1995).

According to Olivecrona, the scientific study of the law should be a study of empirical facts. He dismissed notions such as the existence of (natural) individual rights or property rights as fantasies of the mind. Scandinavian realists were extreme positivists in that they tried to eliminate all metaphysical, ideological and normative elements in the study of the legal order.

Scandinavian legal realism has influenced legal thinking and legal education for most of the twentieth century. Lawyers and legal philosophers who wanted to protect natural, traditional, or moral rights were regarded as conservative, backward, or sometimes even misled by legal or moral metaphysics. Teaching at the law faculties was largely the positive study of actual law *de lege lata*, while the study of the philosophy of law and the social function of law *de lege ferenda* was limited. Courses in jurisprudence were short and were dominated by legal realism, at least until the mid 1970s. The possibility of using scientific principles to study general (natural) principles of law was ruled out in elementary textbooks (see Malmström, 1986). Thus, the

academic lawyer was trained as a technician, a specialist in knowledge of the actual legal documents and in interpretation of the aims of legislators. The study of law in society was left to sciences and arts outside the law faculties, such as Philosophy, History, Sociology, Political Science and Economics. This does not say that the Scandinavian realists did not take part in the legal policy debate. Indeed, from the 1920s to the 1960s, several of the most influential realists were members of Parliament and/or ministers in several Social Democratic governments.

3. The Legal and Economic Profession

As noted above, the study of social sciences at law schools is minimal. Consequently, most scholars with a law degree have limited knowledge of social sciences, mathematics, or statistics. This may appear somewhat paradoxical, given realism's advocacy of a purely positive and empirical legal science.

The recruitment of lawyers to the courts is made within the judicial system. Besides legal training, other qualifications have low value, which tends to isolate judges from other professional groups (see Ryberg, 1989). Lawyers in high-level positions in public administration are to a large extent recruited from the courts. Hence, there may be a similar bias in public administration. There may also be a political bias among lawyers - all higher positions are filled through appointment by the government. Loyalty to the general ideology on which the welfare state is based may thus be maintained. The same tendencies exist in law schools. Law professors are commissioned to appoint professors to faculties of law, which may favour the preponderance of traditional, welfare-oriented lawyers. There are no private law schools.

The separation of the study of economics from law is mainly a post-war phenomenon. Earlier, research in economics, and especially in public finance, took place at law faculties. For instance, Knut Wicksell (1958), who made seminal contributions to the economics of constitutional and tax law, was professor of Economics at the Faculty of Law in Lund in the beginning of the twentieth century. The presence of economics at law faculties might have helped to spread the law and economics movement in Sweden. However, just the opposite has occurred. The common pool of knowledge between lawyers and economists diminished as economics became more and more influenced by mathematics and statistics. For a long time now, the two disciplines have isolated themselves from each other, even though they once coexisted within the same faculty. Economics research has adapted Anglo-American scientific values, with results normally published in international journals. Most law professors, on the other hand, do not publish in English. Their writing is generally limited to legal investigations and to textbooks written in Swedish (see Ståhl, 1989). Because of this difference, some economists occasionally question the competence of lawyers. Lawyers, on the other hand, are critical of

economic analysis of law. Exceptions, however, are Hellner (1988) and Roos (1981, 1990) that notes the relevance of economic analysis of law. One reason for the reluctance may be that Swedish academic lawyers lack understanding of economic methods, and another may be that the contributions Swedish economists have made to law have been limited.

The mutual distrust has to some extent been transmitted to law and economics research. Economic analysis of law is not regarded as mainstream economics. Nevertheless, there is an interest in institutional economics, and as long as the analysis of institutions is based on generally accepted methods, economic analysis of law is accepted within the profession.

Applied economics, in cooperation with lawyers or adapted for them, has little professional status among academic economists. Similarly, cooperation with economists is of low professional value in the legal profession. Nevertheless, a number of scholars are working on law and economics problems at various institutions. In addition to what has been mentioned above, work by Holmén (1993), Eklund (1995) and Bjuggren (1992, 1995) should be noted. Moreover, the Stockholm School of Economics has an Economics Department and a Law Department interested in the field. Some smaller business schools and universities have also shown an interest in law and economics, especially Linköping University and Jönköping International Business School. Finally, the private Center for Business and Policy Studies (SNS) has conducted a number of law and economics projects: see, for instance, Bergström and Rydqvist (1992) and Macey (1994).

4. The Impact of Law and Economic Thinking

The Political Debate

Although law and economics has only exerted a marginal impact on legal education, it has nonetheless influenced Swedish society in a number of ways.

Legal rule-making is based mainly on legislation, prepared by public administrators and adopted by Parliament. Politics, lobbying and public opinion are important determinants of the outcome of this process. Here, economics plays an important role. The impact of lawyers on legal rules is mainly indirect, occurring through administration and through the wording and interpretation of statutes. To the extent that lawyers participate in the general political debate, they do so either as specialists in a defined field of law or as contributors to the general political debate.

For a long time the main issue in Swedish politics has been the public sector. The Social Democrats in power have expanded the public sector, while the conservative (non-Socialist) parties generally argue in favour of a smaller public sector, decentralisation and increased reliance on markets. The

opposition also favours protecting private property and constraining the government through constitutional reforms. Economists have been influential in this debate. Arguments resting on public choice, the economics of regulation, the theory of property rights and law and economics have frequently been used to attack the Social Democrats. A few years ago, when the bourgeoisie parties came into power, they included the protection of property rights in the constitution. This has contributed to giving law and economics an image of being right-wing.

Criminal Law

Economic reasoning has also influenced specific legal fields. Until the early 1970s, the criminological debate was dominated by 'sociological' and 'medical' schools, which held that the purpose of sanctions was to treat the individual and to make the criminal less inclined to commit crimes. Punishment did not appear to deter, and general deterrence was not analysed in detail. In the mid 1970s, the 'classical' school experienced a renaissance: punishment was to be proportional to the harm of the crime and not only related to the criminal's need for treatment. General deterrence was again regarded as important (see Brottsförebyggande Rådet, 1975), and the criminal code was adjusted, accordingly.

Although it is not possible to identify clearly the connection between changes in criminal policy and the economics of crimes, it can be argued that the connection existed. The first publications in law and economics in Swedish were on the economics of crime (see Skogh, 1973; Skogh and Stuart, 1982a, 1982b). Swedish criminologists and criminal lawyers in the Ministry of Justice were familiar with Gary Becker's (1968) work and the subsequent empirical literature on deterrence. The Swedish debate was also influenced indirectly through international changes in favour of the 'classical' school's belief that punishment should parallel harm.

National factors also had an impact on the rapid change in Swedish attitudes toward general prevention. One such factor was that criminals formed an association, KRUM, which claimed to represent prisoners. KRUM rejected the idea that criminals were mentally ill or incapable of rational decisions. It wanted prisoners to be regarded as rational and argued in favour of time-limited sentences instead of time-unlimited treatment. In the 1970s, there was also an increased interest in white-collar crimes, drug-related crimes, tax evasion, and other 'calculated' crimes. For such crimes, deterrence may be the most obvious reason for punishment.

Tort law

One of the major goals of the Social Democratic party has been to build up an extensive public insurance system. Health insurance, disability insurance, unemployment insurance, and pension schemes today cover most personal economic losses. Such insurance is mainly financed through taxes and is

independent of negligence.

Opponents have argued that damages are an important tool for preventing accidents. The counter-argument from Social Democratic politicians and some influential lawyers has been that the tort system is slow, unsophisticated, and expensive. It has also been argued that the preventive effect of damages is unproved, (see Hellner, 1985).

Economic analysis of accident law was introduced in Sweden two decades ago, (see Skogh, 1977, 1998a, 1998b). In general, there has been a political reluctance to change the public system of undifferentiated, no-fault insurance schemes. However, attitudes have changed among lawyers, (see Roos, 1990). One reason for the change in political attitudes is that costs of compensating people for losses of earnings due to sickness have increased sharply. A reform instituting deductibles for employees and employers has been introduced and extended. An immediate effect was a significant reduction in the absence at the workplace. The traffic and disability insurance systems are now under debate (see Bladini, 1994).

5. Concluding Remarks

Although law and economics came to Sweden more than two decades ago, it has not yet become an integral part of legal research. The Scandinavian doctrine of legal realism, together with various institutional obstacles, may explain why. There is no reason, however, to be overly pessimistic about the future of law and economics in Sweden. Several positive factors ought not be overlooked. First, especially young academic lawyers are interested in applying economics to law. In the law schools, there appears to be dissatisfaction with traditional legal realism and formalistic positivism. Second, membership in the EU and the presence of international common law trends influence the legal scholars. Third, the application of economic analysis to ongoing legislation is fruitful, which is likely to have an impact on legal education and research in the long run.

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