

On the Use of Economic Analysis in Legal Methodology

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Abstract

Scholars using economic analysis of law and the doctrinal study of law rarely have a meaningful dialogue. This article attempts to incorporate economic analysis into the doctrinal study of law, the traditional legal methodology, in the following ways. First, economic analysis is not only essential in the textual and historical interpretations in certain statutes but also a type of teleological argument in purposive interpretations of statutes. Hence, economic analysis of law can be integrated into the traditional canons of interpretation, rather than serving as a stand-alone interpretive approach. Second, efficiency, the normative goal of economic analysis of law, can be categorized into first order and second order. First-order efficiency is a substantive goal, such as allocative efficiency and production efficiency. Second-order efficiency is a tool for weighing competing values, goals, interests or principles; put differently, second-order efficiency optimizes or maximizes a set of potentially incompatible purposes. First-order efficiency can explain and justify most immanent principles of private law and thus constitute the unity foundation of the internal system of private law. Since legal principles have the structure of optimization requirements, second-order efficiency is embedded in the application of every principle. Finally, economic analysis can play the role of meta-methodology, justifying a choice of one among multiple conflicting interpretations from different interpretive approaches. Efficiency can be employed as a normative reason to justify a choice of legal interpretation and to create judge-made law.

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Keywords: economic analysis, the doctrinal study of law, efficiency, incentive, legal methods, statutory interpretation, judicial development of law, meta-methodology (second-order methodology)