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Value and Exchange in Law and Economics: Buchanan versus Posner[*]

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Abstract

Meir Kohn's *Exchange and Value* claims that economics can be characterised around two opposed paradigms, the exchange and the value paradigms. In this paper, we apply this dichotomy to characterise the analyses proposed by economists in the field known as "law and economics". We compare and contrasts the perspectives proposed by two prominent scholars – James Buchanan and Richard Posner – and argue that they respectively represent the exchange and the value paradigm in law and economics. More precisely, we show that Buchanan sticks to a definition of economics based on the exchange paradigm, and this leads him to define law and economics in a rather specific, different, narrower than Posner's way to define law and economics – a definition that corresponds to a conception of economics based on the value paradigm.

Key words:

Political economy, law and economics, economic analysis of law, subject matter, Buchanan, Posner, exchange, value

JEL: B31, B25, B41

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1. Introduction

Meir Kohn's discussion of exchange and value, the two alternative frameworks within which economic theorizing develops, suggests that there is something paradoxical about "law and economics". On the one hand, the field is one of those – along with public choice and Austrian economics – in which the exchange paradigm rules (Kohn, 2004, p. 307). In effect, neo-classical economics – constrained by the conceptual limits of the value paradigm – is usually viewed as a-institutional but also as unable to take seriously institutions into account; the methodology neo-classical utilises is an obstacle to an understanding of institutions (Coase, 2005). Therefore, an analysis that focuses the impact of (legal) institutions on activities clearly represents an attempt to develop theories that overcome the limits of the value paradigm. However, on the other hand, "law and economics" developed and its importance undeniably grew, among economists and jurists as well, but as an "economic analysis of law". In other words, "law and economics" developed within the very limits of the neo-classical assumptions of the value paradigm. Thus, one of the most important and famous promoter of an economic analysis of law, Richard Posner, also happens to be considered by Kohn as a representative of the value paradigm: for Posner, "economic theory and the value paradigm are the same" (Kohn, 2004, p. 334). Hence, an interrogation arises: how could a field be, at the same time, the locus of the emergence of a "different way of thinking about the economy" (ibid., p. 307) and an instance of a successful application of the value paradigm? Or, how the conceptual framework of neo-classical economics can be at the same time an obstacle (to the understanding that and how rules and institutions are important) and a means (for a better understanding of why rules and institutions are important)?

An answer is that so different approaches can indeed exist because they rest on different conceptual frameworks. In other words, and this corresponds to what Richard Wagner suggests in his introduction, "law and economics" and the "economic analysis of law" examine the same 'object' – legal phenomena and matters – through different conceptual lenses or "windows" (Wagner, this issue, p. XXX). These approaches use different tools and assumptions to analyse the same object. This is how we interpret what Coase, for instance, argued when he stated that

> "As I see it, the subject is divided in two parts. One is … the use of economics to analyse the law, the economics analysis of law. Now

> an economist really isn't much interested in this part of law and economics – at least this economist isn't me. I am interested in the working of the economic system … I am interested in the effect that the working of the legal system has on the working of the economic system" (in Epstein and al., 1997, p. 1138; see also, e.g., Coase 1996).

And, undoubtedly, the use of distinct conceptual frameworks is important to understand why there are differences between distinct approaches in "law and economics". But, and this is the argument we propose, there is another explanation to the existence of two approaches, and to the ensuing differences between them. They use different tools because they do not retain the same definition of economics and then, this is one important consequence we would like to emphasize, they do not analyse at the same object. More precisely, the exchange and value paradigm do not adopt the same definition of legal rules *because* they do not use the same definition of economics.

To illustrate this twofold argument we compare the perspectives that the two outstanding representatives of each paradigm, Buchanan and Posner, adopt on law and economics. We thus show that the reason of the differences between their respective positions comes, rather than from the differences between their conceptual frameworks (exchange and value), from the fact that they use different definitions of economics (respectively, by subject matter and by method). It then appears that, first, in Buchanan's views, the application of the exchange paradigm implies limitations as to what economists can legitimately analyse as "law and economics". Then, legal rules, defined as the product of exchange activities, legal rules do not belong to the subject matter of the discipline. By contrast, Posner no longer reasons in terms of subject matter but defines economics as a set of tools. The use of a different conceptual framework also entails a transformation in what Posner proposes to study: rules are transformed into *objects* that lawyers produce and economists can analyse; in other words, economists can analyse legal rules *because* they are transformed into objects. In other words, a move from the exchange to the value paradigm in "law and economics" implies a change in the law and legal rules.

2. Buchanan: law and economics from the perspective of the exchange paradigm

The 1986 laureate of the Nobel Prize, Buchanan is known for being "the main founder of the field of public choice or the new political economy" (Sandmo, 1990, p. 50), and for that matter responsible for the "the rebirth of political economy as a scholarly agenda" (Boettke, 1998). In effect, Buchanan defines economic theory in a way that leads him to include political phenomena and institutional matters into the subject matter of the discipline (2.1). Thus, what Buchanan writes on law and economics, essentially in a set of papers published when Posner's economic analysis of law becomes conspicuous, is important: the differences with Posner he puts forward result from his methodological views on economics and political economy. It is thus, from this perspective, as a result of a specific definition of his discipline, that Buchanan's views on law and economics make sense and have to be understood (2.2).

2.1. Exchange and political economy

To the question, *why should economists analyse political problems or institutional phenomena?* Buchanan basically answers by pointing out the limits of political theory as a science: "little, in any, positive science is to be found in this tradition" (Buchanan, 1966, p.132). In effect, and this rapidly became a *lieu commun* (see Medema, 2000, for more quotations), non-economic approaches to institutional matters have poor predictive capacities. The problem can be explained by the absence of a theory of human behaviour, of a behavioural postulate that economics can precisely provide. As a consequence, economic theory, its assumptions and technique, are indispensable to assist a discipline that can exist as a science only under the form of an economic analysis of institutional or political phenomena and public choices.

The point of departure admitted, a second question has to be asked: under which conditions is the use of economic tools possible and legitimate? There are two possible answers, each corresponding to the alternative forms new or modern political economy took during the second half of the 20th century.

From the first perspective, that of the value paradigm, that is through the postulates of rational choice economics, theorists assume that actors behave as rational utility maximisers and then build rigorous, formal, mathematical[1] models of institutional phenomena and public choices, all kinds of objects that usually were treated as

exogenous to the scope of economic theory[2]. This does not imply that the new analyses put forward by economists are illegitimate. To the contrary: they are legitimate, and the exogenous objects they analyse are endogenised, because economics, defined as the *science of choice*, is viewed as capable of analysing any kind of behaviour and problem.

Thus, the use of the conceptual framework of the value paradigm to analyse political matters cannot be separated from the definition given by Lionel Robbins, who "marks a turning point" (Buchanan, 1975 a, p. 225) in the evolution of the discipline. Buchanan is more precise with regard to the changes Robbins initiated. He suggests that "his all too persuasive definition of our subject field has served to *retard*, rather than to advance, scientific progress" (1964, p. 214; emphasis added). Economics took "the wrong turn" (Buchanan, 1975 a, ibid.) because, after Robbins, economists have essentially focused on calculus, on maximisation and minimisation, on allocation of resources among alternative activities and efficiency; in brief, economics has progressively evolved into "applied mathematics" (see Buchanan, 1964; see also, for instance, 1969 b: 1028-1029). And this evolution obviously results from the definition of economics in terms of choice constrained by scarcity that Robbins proposes. From this perspective, in effect, the economic problem – "*the problem*" notes Buchanan (1964, p. 216) – is the allocation of resources among alternative activities, *whatever these activities are*. From this perspective, that of Robbins and those who follow his methodological path, the tools and technique determine the problems that economists may or may not analyse. The definition of a subject matter is (at best) of secondary importance and (at worse) of no importance at all: it no longer exists; there is no such thing as the "economy" that would form the subject matter of a science. As Buchanan notes Robbins "left economics open-ended, so to speak" (ibid., p. 214).

And this is exactly where Buchanan's views differ from those of the "value paradigm" theorists of politics, and that leads Buchanan to develop a second perspective on political economy, based on the exchange paradigm. While others perceive open-endedness as valuable, Buchanan clearly envisages this "this lack of identification" (Buchanan, 1964, p. 215) of a subject matter or of an object of study as problematic. In implies that economists fail to face one of "their basic responsibilities" (ibid., p. 213), namely "to know their subject matter" (ibid. p. 213) and then to

misunderstand what is their task. In effect, in Buchanan's view, a reference to economic tools does not suffice to define *what economists should do*. The domain in which these tools can be applied has to be precisely delineated. Or, in other words, the definition of a subject matter remains indispensable. Buchanan then comes back to a definition of economics in which the discipline is identified with its *subject matter*, an identification that implies limitations in the use of economic tools.

Buchanan defines economics, and delineates the subject matter of the discipline, around a set of activities that are specifically of economic nature. To identify these economic activities, Buchanan refers to the "much-neglected principle enunciated by Adam Smith": the human 'propensity to barter and exchange'" (1964, p. 213). As a consequence, Buchanan insists to adopt a "sophisticated 'catallactics'" (1964, p. 214). Thus, from this "catallactic perspective" (Buchanan, 1988, p. 136), economics is defined as the science of exchange rather than the science of choice: "the exchange paradigm should take precedence over the maximizing principle" (ibid., p. 135); or, "the institutional model [which] is the starting point for all that I have done … [is] the single exchange of apples and oranges between two traders" (1992, p. 17; see also 1974 and 1979 [1969]). He thus considers himself closer to what Austrian economists do than to what most economists, including public choice theorists, do[3]. This is the reason why Buchanan utilises the rather tautological definition of economics already stressed by Frank Knight, claiming that "economics is about the economy". Interpreted from the perspective of his reference to Smith, this implies that there exist a specific subset of individual activities that delineate the subject matter of the discipline. In other words, this expression makes sense, while for Robbins it does not.

Buchanan is then nonetheless more precise. He links the "propensity to barter and exchange" to the institutional setting within which individuals barter and exchange or to which these activities relate. In effect, individual economic activities do not develop in an institutional vacuum. They take place within institutional constraints and, reciprocally, influence these constraints. As a consequence, economists do not only analyse specific economic activities but activities within institutions: 'the essential subject matter for the economists consists of human behaviour in social institutions, not of human behaviour in the abstract" (1979 [1966], p. 134). Economists, because they have to focus on exchange, must also "concentrate their attention on a particular form of human activity, *and* upon the various institutional arrangements that arise as a

result of this form of activity" (1964: 213-215; emphasis added). This is where lies the "primary function" of economists: "to explain the workings of these institutions and to predict the effects of changes in their structure" (1979 [1966], p. 120). Hence, the definition of economics: "Economics is about … that complex of institutions that emerges as a result of the behaviour of individual persons who organise themselves to satisfy their various objectives privately, as opposed to collectively" (1979 [1968], p. 146).

From the above, the role attributed to institutions both in the economic process and, consequently, in the definition of what is the subject matter of economics appears as decisive. In effect, individual exchange activities – that is economic activities – require an institutional setting to develop; from this perspective, institutions in a broad meaning, rather than the State as such, are considered as a requisite for the formation, maintenance and increase of transactions. The analysis of political phenomena is then crucial because they determine the institutional setting in which economic activities develop. Economists are political economists, and economics is political, because they are concerned with investigating how economic activities are affected by political institutions. The latter are thus endogenous variables; they fall into the subject matter of the discipline. Thus, no surprise if Buchanan considers that the "contractarian" and the "exchange" program are close to each other: "our subject matter is centrally a 'science of exchange' or a 'science of contract'" (1988, p. 135).

Therefore, Buchanan reverses the perspective that results from the use of the value paradigm in political economy. He criticises the perspective that consists in arguing that phenomena come within the scope of economics because they can be analysed by economic tools. To the contrary, his perspective on political economy rests on the claim that phenomena can be analysed by economic tools because and when they belong to the subject matter of economics.

Then, the main question is: what belongs to the subject matter of economics? More specifically, to understand the place Buchanan assigns to legal rules in economics, do legal rules fall into the subject matter of economics?

2.2.Law, legislation and political economy

The answer Buchanan proposes depends on the differences he identifies between the various rules within which economic activities take place. He first establishes a

distinction between three kinds of rules: "(1) the constitution … (2) the institutions of the 'law' … and (3) the collective decision making process of the ordinary legislative variety, which presumably promotes 'public good', but again within the rules laid down in the constitution" (1974, p. 491). And, then, once the distinction is put forward, Buchanan insists that "a *conceptual* separation" (ibid.) or "a categorical distinction" (1972, p. 447) must be made between these different kinds of rules[4].

Differences between "law" (legal rules) and "legislation" or "regulations" (political rules) are strict because of the strict separation that exists between two stages in decision making: on one stage, decisions about the rules that constraint activities and, on the other stage, decisions within the rules or under constraints. In other words, the differences between legal and political rules correspond to a separation between "constitutional" and "ordinary" politics (see Buchanan, 1967, p. 307 or 1988, p. 136). In this view, at the constitutional level or at the constitutional stage, are determined the rules of the social game. These constitutional rules are thus part of the structure of societies. These are "the constitution and the institutions of the law" named by Buchanan. These are "all those rules and constraints, laws conventions, customs and institutional arrangements that jointly constitute the social order" (Brennan and Hamlin, 2001, p. 117). In other words, constitutional rules frame the behaviours that take place at the "ordinary", that is, post-constitutional level. At this level, rules result from the behaviours or activities of elected officials and bureaucrats – legislations and regulations. These rules are produced and designed within the limits established by the constitution or the social contract.

Buchanan is then clear that the rules that are produced by elected officials and bureaucrats – namely, legislations and regulations – are endogenous variables. Two reasons can be put forward. A first explanation is that economic behaviours do not differ from "ordinary" political ones and the provision of ("ordinary") political rules: they are exchange activities that take place at the post-constitutional stage, within the limits of the constitution. Second, political rules result from and influence individual economics (exchange) activities. Therefore, the activities of elected officials and bureaucrats do not differ from other economic activities; in particular, they can be viewed through the lenses of the economists' behavioural assumptions. Their outcome thus logically falls into the subject matter of economics, and can legitimately be analysed with economic tools. This is the only situation in which an economic

analysis of rules is legitimate; that is when "law and economics" is limited to the analysis of the rules produced by elected officials and bureaucrats. This rather restrictive view on "law and economics" is not so different and not so distant from the "old" perspective on law and economics similar to that adopted during the early stages of the development of the field at the University of Chicago. But his view differs from the new and extensive version of law and economics developed by Posner.

Buchanan opposes to any perspective that considers possible an economic analysis of legal rules. These rules are not endogenous variables that economists are entitled to analyse. Law and, more broadly legal phenomena, are exogenous to the subject matter of economists and have to be taken as *given*. This does not mean that law does not change and or that it does not influence individual economic behaviours. However, legal rules are beyond the boundaries of economics and should not be considered as an object to be studied by economists or with economic tools. And there are two reasons that explain that economists have no legitimacy to investigate the origin, evolution and efficiency of these rules. The first explanation refers to the nature of legal rules. Undoubtedly, these rules are (or should be considered) of constitutional magnitude: they are the *by*-product of individual activities and interactions, and cannot (or should not) be viewed as a product. These rules should not be created or modified "neither by ordinary legislatures nor by courts" (Buchanan, 1975 b, p. 904). Legal rules must not be put on the same footing with like political rules, which indeed are the outcomes of the decisions taken by the legislative or bureaucrats.

The claim that judges may be in charge of such extraordinary a task as creating or changing the law reveals a confusion as to the nature of legal rules and also as to the role and functions of judges. In effect, and this is the second reason Buchanan gives to explain that legal rules do not fall into the scope of economics, the role and function of judges only consists in clarifying[5], interpreting or enforcing[6] rules that *already exist*[7]. Certainly, Buchanan does not neglect the problems raised by legal "incompleteness" and does not claim that legal rules always exist. But, when rules *do not* exist, Buchanan claims, the design of a "new" rule is a *political* task that goes beyond the domain of action of judges. Buchanan then takes the example of the absence of anti monopoly statues. In such cases, and although "Monopoly is a recognized source of inefficiency in an economy, with a relatively few offsetting social virtues", the acknowledgement of "major transactions costs thresholds" does

not provide "the justification of explicitly judicial intrusion in the legislative process" (Buchanan, 1974, p. 490). Then, Buchanan concludes, the judge "would explicitly abandon his role of jurist for that of legislator. He would be making law" (ibid.). In other words, "the judiciary oversteps its proper limits when it takes on the task of changing the basic legal rules within which the socioeconomic-legal game is played" (Buchanan, 1988, p. 137).

Then, when rules *exist*, judges can rely on their own criteria, "intra-legal criteria" (Buchanan, 1974, p. 489), that "provide ample searching-ground for the imaginative jurist even in hard cases, criteria that are wholly consistent with the functional role of the jurist" (ibid.). They can thus base their decisions on "precedents, custom, tradition, expected ways of doing things, predicted patterns of behaviour" (ibid.); in other words, judicial decision making indeed consists in respecting what emerges from trading and exchange processes:

> "the function of the judiciary is protection of that which is, which remains perhaps the most critical function for the maintenance of order and stability. The judicial branch properly serves a stabilizing rather than a reformist or restorationist role. The courts should protect what is rather than try to promote what might be, or try to restore what might have been" (1988, p. 139).

As corollary, because judicial criteria are sufficient, economic tools are (at best) of no interest: "there should be relatively little comparable value of the economic input" (ibid.). More probably, the use of economic tools to inform judicial decision making is dangerous because it implies the negligence of what emerges from individual interactions.

Therefore, any perspective that ignores the specificities of legal rules and includes them into the subject matter of economics makes a crucial double mistake as to their nature and as to the role of judges. Or one could say, adopts a definition of legal rules that does not fit into Buchanan's exchange framework. And this is exactly what Posner does: the definition he gives of an economic analysis of law, from the perspective of Robbins' definition and from the perspective of the value paradigm, at the same time requires and makes possible a change in the definition of the law.

3. Posner's economic analysis of law: the value paradigm and the economic analysis of the law

When he stresses the differences that separate his own approach from Posner's, Coase notes that in "the development of the *economic analysis of the law* … Posner has clearly played the major role" (Coase, 1993, p. 251; emphasis added; on this point, see also Medema, 2005) and insists on the differences between "law and economics" to which he associates his researches, and an "economic analysis of law" that corresponds to Posner's[8]. The difference between these two perspectives is that the an "economic analysis of law" utilises economic tools to analyse legal rules and legal phenomena, what "law and economics" does not. In others, it engodenises legal rules. And indeed, Posner contributes to transform "law and economics" into an "economic analysis of law" because and when, in the early seventies, he transposes the definition given by Robbins to the field. Economics is then defined as a set of tools and not in terms of subject matter (3.1). This allows Posner to develop a new approach which also rests on a new definition of what legal rules are (3.2).

3.1. Economic tools and Posner's evolution towards an economic analysis of law

Usually, a *new* perspective in law and economics is associated with the publication in 1960 of Coase's *The Problem of Social Cost*. In fact, during the sixties, the focus remains put on the influence of rules on economic activities, as revealed by articles and books that are almost similar to those published before Coase (see Medema, 1998). Within the field thus defined, Posner is no exception. His works do not differ from the articles that are published at that time in law and economics. His contributions, along with that of Coase, to what is known as "Stigler Report"[9] and the articles he published in the late sixties (1969 a and b) and early seventies (1972) are about anti-trust, oligopolies and monopolies, market regulation. Obviously, these works treat institutions and legal rules (and more specifically 'regulations') as part of the frame in which economic activities develop, and the questions analysed remain circumscribed to a subject matter: economic activities and the functioning of markets. The field had largely remained immune to the influence of Robbins.

Then, in the early seventies, Posner modifies his perspective and inaugurates a genuinely new approach, which is evidenced by the launching in 1972 by Posner of

the *Journal of Legal Studies* as well as the publication in 1973 of his *magnum opus*: tellingly entitled the *Economic Analysis of Law*. The move, away from "law and economics" towards a new perspective, the emergence of a new approach in law and economics factually dates to Posner's involvement in a program in Law and Economics established, under the auspices of the National Bureau of Economic Research in 1971, by Gary Becker along with two of his Ph.D. students, Isaac Ehrlich and William Landes. Posner himself has insisted on the role played by Becker, who "helped solidify my own commitment to law and economics by signing me up as a research associate of the National Bureau of Economic Research" (1993 a, p. 214; see also 1986)[10]. In fact, Posner might certainly have written "change" rather than "solidify" since Becker's methodological conception on economics indeed allows a new perspective on law and on how economists should deal with legal matters. In effect, by the late sixties and the early seventies, Becker was already one of the leading representatives of the economic analysis of non-market behaviours. Now, from this perspective, economics has no precisely delineated domain of investigation. Becker's analyses of non-market behaviours are possible because it is assumed that there are no specific activities around which the discipline could be organised. Becker thus notes, "the economic approach is clearly not restricted to material goods and wants, nor even to the market sector (1976, p. 6)". In other words, the discipline must not be defined by its subject matter, the limits of which would imply limitations in the use of economic tools. Rather, economics is defined as a set of tools that can be applied without limitations.

This is the reasoning that, following Becker, Posner adopts. First, he criticises attempts made to define economics by its subject matter. He opposes to economists who tend to focus on the subject matter as a necessary condition for defining economics. This position is, in particular, at the core of Posner's charge against Coase, who believes that "the binding force of a field is the subject matter rather than the theory" (Posner, 1993 a, p. 207) and that "a discipline is defined by its subject matter rather than by its theories or method" (ibid., p. 208)[11]. And, Posner claims, this position is flawed because it rests on a classification between economic and non-economic activities, between market and non-market behaviours. Now, to believe "that the proper domain of economics is markets" (ibid. p. 213) "reflects a misconception of language" (1987 a, p. 1); it reflects an erroneous conception of

economics in which the word "economics *means* the study of markets, so that nonmarket behaviours is simply outside its scope" (ibid.; emphasis in original). Thus, the domain of economics is and should not be restricted to certain type of activities or behaviours.

Now, and this is the second feature of Posner's reasoning, since economics must not be defined by its object of study, by its subject matter, it has to be defined by it is tools or method. More precisely, Posner insists on tools as the means upon which has to be grounded a definition of what is economics, *independently* from a subject matter or a domain on which use these tools. Posner cannot be more explicit than when he explains that "About the best one can say [about economics] is that there is *an open-ended set of concepts*" (1987 a, p. 2), the use of which defines or delineates economics "*regardless of its subject matter* or its author's degree" (Posner, ibid.; emphasis added). A definition that echoes Robbins' conclusion: "there are no limitations to the subject-matter of Economic Science" (1981, p. 16) and Buchanan's criticism.

From this perspective, an economist is *not* someone who devotes specific scientific resources to deal with questions that arise in a specific area: "one cannot say that economics is what economists do, because many non-economists do economics" (Posner, 1987 a, p. 1). Rather, an economist is any scholar who consistently utilises specific tools to investigate whatever questions that is likely to arise. In other words, the cohesive and unifying force that creates a profession comes from the tools that are employed; not from the object s/he studies.

Then, the question is: how to use them in legal issues?

3.2. An economic analysis of law

Having eventually adopted a new definition of economics, Posner develops his own specific approach in law and economics. This is clearly put forward by the very first sentence of his *Economic Analysis of Law*, in which Posner links the possibilities offered to legal theory to a specific definition of economics as a set of tools: "This book is written in the conviction that economics is a powerful *tool* for analysing a vast range of legal questions" (1974, p. 3; emphasis added). In other words, to insist on tools in which they can be applied means that there are no longer limits to what economists are legitimate to investigate. Specifically, the range of legal questions to which economic tools can be applied does not restrict, as in Buchanan's perspective,

to anti-trust, regulations of market and legal rules produced by political officials: "the legal system has never thought to limit itself to regulating markets" (Posner, 1993 a, p. 213). To the contrary, a virtually unlimited approach, economics, is capable of dealing with the almost unlimited number of problems that fall within the "subject matter of law". Any kind of legal problem – of problem that can be related to the legal system broadly defined – can be investigated with the help of economic tools. Just like Robbins claimed that "there are no limitations to the subject-matter of Economic Science", Posner argues that the "new" approach he proposes, and that he names an "economic analysis of the law", is virtually unlimited. The "new" law and economics he proposes, under the form of an economic analysis of law, does not recognise the limitations that "old" law and economists accept:

> "Whereas the 'old' law and economics confined its attention to laws governing explicit economic relationships, and indeed to a quite limited subset of such laws (the law of contract, for example, was omitted), the 'new' law and economics recognizes no such limitations on the domain of economic analysis of law" (Posner, 1975, p. 39) [12]

An illustration of the change in perspective is given by the topics analysed in the *Economic Analysis of Law* or listed in different Posner's methodological papers as belonging to *new* law and economics (cf e.g. Posner, 1975, 1977).

The same list of topics also indicate that the change is not only methodological. It entails a new perspective on the nature of legal phenomena: they are no longer taken as given, or considered as exogenous variables. Thus, Posner notes that:

> "the hallmark of the 'new' law and economics is the application of the theories and empirical methods of economics to the *central institutions of the legal system*, including the common law doctrines of negligence, contract and property; the theory and practice of punishment; civil, criminal, and administrative procedure; the theory of legislation and *of rulemaking*; and law and enforcement and judicial administration" (1975, p. 39; emphasis added).

In other words, Posner stresses as legitimate the economists' attempts to account for the legal organisation of the society; now these questions were absent from old law and economics and excluded from Buchanan's approach. An economic analysis of law does not only mean a change in the method. It does not only entail a modification in the number but also in the nature of the questions that can possibly and legitimately be analysed to be investigated with economic tools. Thus, are affected the nature of law, the judicial decision making process, the role of lawyers and economists in the

functioning of the social organisation. And, more broadly and more fundamentally, the corresponding conception of social order changes.

The evolution can be illustrated by a change in the definition of what is a Constitution. Still a set of rules that shape individual behaviours, the Constitution is nonetheless viewed differently in Posner's perspective than in Buchanan's. Posner thus transforms Buchanan's constitutional contract into a "long term contract" (Posner, 1987 b). This changes has two implications: on the one hand, it means that the two radically separated stages upon which Buchanan "builds" the social order melt into a certainly long but nonetheless single period; on the other hand, the political constitutional contract that defines the rules of the social game is transformed into a legal contract. From the first implication, one draws that rules – even constitutional – are no longer given or fixed and, from the second, that the social contract leaves the scope of elected officials to the domain to fall within the area of lawyers, jurists and judges. In other words, in contrast with Buchanan's perspective, Posner argues that the rules of the social game are not fixed or given by the constitution but may legitimately be altered by judges and lawyers. Thus, the role judges and lawyers play changes. By contrast to what Buchanan argued, Posner promotes a perspective in which judges are capable of playing a political role. Posner endorses a conception that Buchanan criticises, that of judges-*cum*-legislators. This position results from his observation that most of time, judges are in an "open area"; no existing statute or precedent and no constitutional rule provide a guide for the decisions to make (see in particular 1999). Then, when left to themselves, judges are entitled to undertake what Buchanan considers as "political behaviours" and to complete the set of legal rules. In fact, judges are granted with political responsibilities or, put in other words to change and even create rules is viewed as being a legal rather than a political task. The behaviour of judges is similar to that of supposedly rational elected officials or bureaucrats: judges also behave in order to maximise their utility function (1994)[13]. Thus, and beyond questions of method, it seems all the more legitimate to consider legal phenomena, and specifically judicial behaviours, as part of the subject matter of economics that legal rules are viewed as the product of a maximising behaviour.

Second, Posner goes one step beyond the *simple* acknowledgement that judges are legislators or have to be considered on an equal footing as any other rule-maker. He also proposes, following and modifying Holmes' prediction theory, an "activity theory

of law". Law is then defined as "*something* that licensed persons, mainly judges, lawyers, legislators, do, rather than a box they pull off the shelf when a legal question appears, in the hope of finding the answer in it" (1995, p. 225; emphasis added). In other words, not only do judges make law, but law is equated to what is produced by the legal profession exclusively. Therefore, the relation between individuals and the rules in which these interactions take place is reversed. To a catallactic, and bottom-up, conception of law such as Buchanan's – in which law is an emergent attribute of the individual interactions that take place within the economic order – Posner opposes a theory in which law is an "output" the outcome of professional activities or practices, similar to any other marketable good. More precisely, the rules that are produced by judges in their decision making processes represent an informational good, "a stock of *knowledge* that yields services over many years to potential disputants, in the form of *information* about legal obligations" (Posner, 1986: 509; emphasis added) – one may add that legal rules convey low cost information to other judges as well as to litigants, thus being at the same time an output and the input for other judicial decisions. Assuming in Stigler's way that "information" and "knowledge" are synonymous terms to designate brute data, legal rules are viewed as nothing more than the output of the functioning of a "licensed" profession. It is therefore particularly legitimate to consider legal rules as variables for which economists have explanations that these are goods that judges supply and, on the other side of the market, "bought" by (potential) litigants like any other available good on any other market. Neither suppliers nor buyers are preoccupied by moral or normative problems with regard to law. The process of endogenisation thus goes along with a de-legalisation of the law and its assimilation to a good that bears no "normative" nor `"moral" meaning.

4. Conclusion

In this paper, we have proposed a methodological comparison of the conception of economics respectively defended by Buchanan and Posner, through their respective views on legal matters. On his side, Posner proposes an "economic analysis of law" that consists in viewing legal matters through the conceptual window of the value paradigm. This means using certain economic assumptions and tools because economics is defined as a method or a set of tools; tools that can be used without any

limitation to analyse any problem, including legal ones. Then, and this an important element in our demonstration, an economic analysis of the law is possible because rules are defined in a very specific way. From this perspective, in effect, legal rules can legitimately be analysed because these are objects that judges produce; in other words, legal rules, like political ones, are viewed as the outcome of maximising behaviours.

This is exactly where Buchanan disagrees – "'That which emerges' from the trading or exchange process is 'that which emerges' and that is that" (Buchanan, 1975 a, p. 226) and cannot be conceived as "the solution to a maximising problem" (ibid.) – and why he adopts another position on what economists can legitimately say about legal rules. The latter emerge from interactions between individuals engaged in trading and exchange activities. These are very specific rules – different from political rules – and must not be considered as a product. As a consequence, they do not fall into the domain of economics. In other words, Buchanan defines economics by its subject matter; this means that the inclusion of legal matters in the scope of economics is possible but nonetheless restricted to certain type of phenomena; namely, legal rules can be analysed as long as they are connected to political and post-constitutional behaviours. In other words, Buchanan acknowledges limits as to what economists can legitimately analyse. In this sense, his perspective is close to Frank Knight's conception of economics. As Warren Samuels reminds us, precisely when discussing an article written by Landes and Posner (1975), Knight wrote that "there is no more important prerequisite to clear thinking to economics itself than its recognition of its limited place among human interests at large" (1951, quoted in Samuels, 1975, p. 907).

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Notes

[1] Up to the point that, as Gordon Tullock argues, an economic reasoning can lead to a mathematics of politics. He thus tellingly entitles one of his books *Toward a Mathematics of Politics* (1967).

[2] Significantly, one of the first economists having proposed an economic analysis of political phenomena – Anthony Downs – regrets, in the first sentence of his 1957 paper, that "In spite of the tremendous importance of government decisions in every phase of economic life" (1957, p. 135), economic theorists "have treated government action as an exogenous variable" (ibid.; emphasis added) and "have never successfully integrated government with private decision-makers in a single general-equilibrium theory (ibid.).

[3] Buchanan contrast his approach with "most of what most economists do" (1992, p. 17), namely "the choice between apples and oranges in the utility maximising calculus of Robinson Crusoe" (ibid.)

[4] Buchanan explains that he is "aware of the absence of any firm dividing line between these in any empirical or descriptive sense. [He] also recognize[s] that the hierarchical structure of the American court system promotes rather than retards judicial intrusion into legislative process. [His] emphasis is on the desirability to keep the two conceptually distinct, despite the practical difficulties that may be confronted" (1974: 490-491).

[5] "The courts clarify ambiguities; they lend precision; they draw black and white lines in grey areas" (Buchanan, 1972, p. 442)

[6] "Ideally courts interpret and enforce the rules, both for private parties and for legislative and executive branches of government" (Buchanan, 1975b, p. 904); the judiciary "is, and must be, restricted to interpretation" and "the enforcement of the *rules that exists*" (Buchanan, 1988, p. 137; emphasis added)

[7] This is a particular important element in Buchanan's framework. He repeats the role of the judiciary is limited to these situations: "I want an independent judiciary to enforce the rules that exist, however these might have emerged … I want the courts to start once again to take a hard look at the constitutionality of legislative and executive actions, but in terms of the existing rules of the game, not in terms of the judges' own social and ethical ideals" (1975 b, p. 304)

[8] "As I see it, the subject is divided in two parts which are separating more and more as time goes by. One is … the use of economics to analyse the law, the economics analysis of law. Now an economist really isn't much interested in this part of law and economics – at least this economist isn't. I am interested in the working of the economic system … I am interested in the effect that the working of the legal system has on the working of the economic system", Coase in Epstein and al., 1997, p. 1138). See also, e.g., Coase 1996.

[9] The Report of the President's Task Force on Productivity and Competition (also known as the "Stigler Report") was written for the incoming Nixon Administration that denounced the feasibility of attacking conglomerates using the existing antitrust laws.

[10] Landes notes: "adding Posner filled a critical hole in the program. In order to apply economics to areas of law other than crime and the courts we needed some expertise in law. Posner seemed ideal. He had a strong interest in economics, had already published several widely regarded papers in antitrust, and was starting to apply economics to tort and judicial administration"

(Landes, 1996, p. 10).

[11] Coase insists that "economists do have a subject matter: the study of the working of an economic system, a system in which we earn and spend our incomes" (1998, p. 93). He thus regrets that "economists think themselves as having a box of tools but no subject matter" (1998, p. 93) and tends to forget that "In the long run, it is the subject matter, the kind of question which the practitioners are trying to answer, which tends to be the dominant factor producing the cohesive force that makes a group of scholars a recognizable profession" (1978, p. 204).

[12] One may also mention Landes' similar definition of new law and economics: "The 'new' law and economics applies the tools of economics to the legal system itself. It uses economics to explain and illuminate legal doctrines in all fields of law … The 'new' law and economics is not limited to areas of law that only impact explicit markets. It is a theory of both the legal rules themselves and their consequences" (1996, p. 7).

[13] There are differences between judges and legislators – "judges are not just legistors in robe" (Posner, 1993 b, p. 22), in particular their utility functions differ (ibid.). The difference is not qualitative: judges and legislators are utility maximising individuals.