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ECONOMICS AND LAW: AN IRRESISTIBLE COMBINATION

ALAN PEACOCK

*(Delivered at the ceremony of award of the Doctor
Honoris Causa at the Universidade de Lisboa, 10 May
2000)*

It is a great privilege and pleasure to have been nominated by this famous University as its latest though not its youngest graduate. It is fitting that anyone receiving such a great honour should indicate publicly that they have some claim to it by a short reply. This is bound to unnerve the speaker somewhat and unsettle his distinguished audience who will be aware that there could be a positive correlation between a professor's age and the length of discourse. Not even a glass of malt whisky would enable me to steady my nerves completely and in any case whisky is known to induce Scotsmen to break into song and verse — and that would hever do today! I think I have a serious, but not too solemn, message which should not take too long to impart.

I begin with a confession. I have no legal training though as a graduate in political economy and political science of Scotland's oldest University —, St Andrews — a 15th Century foundation — I was obliged to attend a course on Constitutional Law. It is astonishing that a such a unique mediaeval institution should not have established a Faculty of Law. This may have had something to do with the worries of the theologians who taught Canon Law that the teaching of Civil Law would produce radical tendencies especially during the turbulent days before the Reformation. This would have encouraged further the disputatious nature for which Scotsmen are noted. I regret to report that in the early days of St. Andrews inter-faculty rivalry once led to a dreadful incident during which the students of Theology attacked members of the Faculty of Arts with bows and arrows! I cannot be blamed for not having access to legal training, but some years later I had a unique opportunity to make amends and made a radical mistake in rejecting it. My first professorial appointment was to the Chair of Political Economy at Edinburgh in 1956 at the rather tender age of 33. Knowing that I had become dissatisfied with being an offshoot of the Department of History, sympathetic academic lawyers approached me informally to transfer my department to the Faculty of Law. I did not have the foresight to realise what a splendid combination of disciplines would result. Instead, being young and impulsive, I accepted a tempting invitation to help in founding the new University of York where Economics was to become a major subject. But that had one particularly fortunate result. It was there that I first met your august colleague, Professor Pitta e Cunha, who has pleaded my cause today.

Novr I know better. Anyone engaged in investigating the links between the theory and practice of public policy is lost if they lack and understanding of the links between law and economics. This is particularly true in any attempt to maintain the efficiency of the economy where the pre-condition is the establishment of an acceptable distribution of property rights which can only be exercised within a proper legal framework. The conventional demonstration of the interplay of economics and law is found in industrial policies designed to preserve competition through prevention of monopoly and encouragement to freedom of entry into markets. I have advised on such matters but today I illustrate my attempts at self-education in legal matters with two other examples.

One of the most discussed legal matters under discussion in the EC and, indeed, world-wide is what view to take of the determination of intellectual property rights, and in particular rights in artistic creation and performance. I was once asked to give an opinion in a case involving a dispute between broadcasting companies and composers of music over royalties. I examined the sparse economics literature on artistic rights and found that economists began by asking the question: what difference will it make to the supply of creative works if these are not protected by copyright law? The general answer — still given today — is that supply would be largely unaffected, presumably because the satisfaction derived from artistic activity is a sufficient driving force. Therefore, the case for copyright protection of publication, performance and display of such works is a slim one. Such a conclusion contains the implicit judgement that allocational efficiency is all that matters, but this is to ignore the issue of distributive justice. If rights to physical property and its fruits are accepted, why should returns to intellectual property not enjoy a similar form of protection? Of course, the length of time covering such rights, the form of protection, raise practical issues of great importance concerning their regulation, particularly in any age of rapid technological change. Economists may be heard on such matters, but only if they recognize that they will only be listened to if they display an understanding of jurisprudence.

My personal involvement resulted in an amusing experience. A music publisher invited me to a very good lunch, anxious to make me aware of the complexities of copyright protection. Afterwards, we walked down London's Regent Street when, suddenly, an ambulance swept by blasting out that satanic two-tone noise with which we are all familiar. The music publisher grabbed my arm and exclaimed: "My God! I could make a fortune if I owned the copyright of that tune!". (The musicians amongst you will realise that it would be impossible to establish such rights when there must be so many tunes that begin with the interval of a minor third!).

My second example brings me more into line with the Scottish political economy tradition associated particularly with David Hume and Adam Smith, Adam Smith regarded jurisprudence as an integral part of the study of political economy defining it in normative terms as "the theory of the rules by which civil governments ought to be directed". The development of commerce was to be governed by such rules which must have as their objective minimizing the costs of enforcement of contracts. In our day the increase in the volume and complexity of economic transactions associated with world economic growth makes his maxim of particular relevance. Although sympathetic to equalisation of access to justice, he could not have foreseen the growth in legal aid schemes designed to help the disadvantaged which has added to the growing costs of resolving legal

disputes. The rise in costs in many areas of economic activity is mitigated by increased productivity and by competition, but here we face a dilemma in the case of provision of justice. Productivity gains through technological innovations are bound to be limited in the case of legal services which are claimed to be inherently labour-intensive. The nature of justice is such that market forces cannot be utilised to make it more efficiently provided — as Adam Smith put it, deciding cases by an auctioning process would destroy the product. Other means have to be found to ensure that legal disputes can be resolved without the costs of enforcement becoming an oppressive burden on commerce. Economists have become increasingly interested in this problem and have not been slow to point out that the long-standing monopoly of the judicial process is being challenged by the growing use of voluntary dispute resolution, and that managerial economics may have a contribution to make to improving the organisation of courts of law. Lawyers have replied by claiming that any attempt to increase their productivity by speeding up case procedures will simply reduce the quality of the product. To someone as interested in music like myself, there is a striking parallel here with symphony orchestras asked to improve their productivity by playing a Beethoven concerto at twice the normal speed — the product is destroyed! No confrontation is necessary between economists and lawyers over such matters and any intellectual disputes should be possible to resolve by a cool look at the facts and some careful analysis. I am encouraged by the extent to which far-sighted legal experts realise that business and public opinion would move rapidly against their profession if the problem of rising costs is not resolved.

I therefore feel that I can conclude on an optimistic note about growing cooperation between law and economics in many areas of mutual interest in which practical advice on policy questions should be sought. In the case of economists it requires not only investment in analytical techniques but a balance of judgment which only detailed study of institutions can provide. An old dog like myself is too old to learn new tricks and so can only wish my successors well. However, I can provide them with a motto provided by Jeremy Bentham who you will recall combined the skills of an economist, political philosopher and legal luminary. He wrote: "It is a vain and false philosophy which conceives its dignity to be debased by use". I would like to give world-wide prominence to this maxim — but I have not yet beaten my computer into submission sufficiently to know how to promulgate it on the Internet!