

To reject Marx's and Weber's positions—that all causes of social and legal events are to be found in economic experience or economic and political experience—is not to say that the causes of social and legal events can be fully understood without reference to such experience. Dean Cervera gives examples of the influence of economic conditions upon the development of law and, in turn, law's influence upon economic conditions. He considers the relations of reciprocal influences between nature and law, as well as economics and law. Dean Cervera then explores in depth the various meanings of "the economy" as a dynamic process, not just as a static structure. He also addresses the difficulties of intellectual explanation of economic legal events.

ON THE ECONOMIC CONDITIONING OF THE LAW*

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It is now common to state that the law depends, at least in part, on economic relationships and circumstances. The argument follows that any attempt to explain laws and institutions —as well as any attempt to intervene deliberately in the succession of some laws by others— must take economic circumstances into account. Implicit in this argument is the idea that the law changes as the economy changes.

The fact that the circulation of such thoughts is commonplace is not extraordinary. It seems evident, for example, that as diversification of oil exploitations increases so must the complexity of the sector dedicated to regulating such exploitations. Similarly, as agriculture improves its yields or its possibilities, agricultural law becomes correspondingly more complex.

Nevertheless, it is apparent that neither the verb "to depend" and the expression "economic circumstances" raise many questions. As to the first expression, not only is it unclear how we are to interpret this "dependence," but we must also question the degree of that "dependence."

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In fact, it is not enough to affirm this "dependence." Even if the Law offers opportunities to affect the economic situation, it is because the Law is in some way derived from the economic situation. On the other hand, the expression "economic circumstances" is imprecise. We must consider whether "economic circumstances" allows degrees of interpretation of meaning and the extent to which we will use the expression.

The expression "the law" on the other hand, is a much more precise way than the previous expression. It can be used with no more introduction than mentioning that the origin of the law is found in the moment when individuals within a group become aware of the patterns of behavior within that group, and that certain sequential patterns are imposed on the individuals who try to avoid such patterns. If we do not establish a point from which to begin using the expression "the law," we would perhaps be forced to talk about organizational patterns among the gorillas, elephants, etc. The behavior of many superior animals reflects certain patterns which are imposed by force if not observed voluntarily. Some of these animals may have a beginning of such awareness, but only when there is a certain level of knowledge is it proper to say that "the law" has begun.

I. "DIALECTIC MATERIALISM"

Undoubtedly, as a consequence of the above mentioned difficulties many authors attempted to achieve a more precise conception of the extent to which the law depends on the economy. These authors have declared that the economy either influences, or directly affects the law. Alternatively, they claim that the law results from the economy, or that the economy conditions, determines, or predetermines the law.

The insistence on this high —close to fatal— degree of dependence corresponds to the so called dialectic materialism, which also uses verbs such as "to condition" or "to determine" to characterize such a degree. Dialectic materialism also has made the greatest effort to determine precisely what factor the law depends upon in order that we might attribute continuous changes to that factor. In this respect many nuances exist within dialectic materialism that are reflected in an ever changing nomenclature. Instead of the expression "the economy" dialectic materialism uses terms such as "conditions," "production," "ways of producing goods," "production relationships," "material conditions," "material order," "life," "social issues," "circumstances," "economic structures," "productive forces," "the economic base," etc., alone or in any of their

multiple combinations. This plurality of names grows even greater when it is combined with expressions that stress a high degree of dependence and with expressions synonymous with "change." This is significant if we realize that such expressions can be used as verbs, nouns, adjectives, etc.

The lack of definition in nomenclature reveals a deeper ambiguity in attempts to define what the law depends upon. The use of expressions of differing scopes reveals that if dialectic materialism wants or is forced to extend the scope of "what the law depends upon," such latitude is bound to affect the conciseness of its thesis.

The above ambiguity in terminology also reveals that dialectic materialism responds to the necessity for internal boundaries (analogous to developing stages in the womb) marking the developmental stages of that factor from which the law is derived. This obviously increases the difficulties involved. Difficulties arise because this ambiguity affects the number of stages to be observed, the scope of such stages, the manner in which they are connected, and similar concerns. Certain authors attempt to define two stages; others three; others four or more stages within the area of dialectic materialism. Therefore, the number of stages is never clearly defined, their fluctuation appearing, indeed, rather general.

For instance, after Marx mentions in a certain passage of *Das Kapital* "the objects nature offers [man] for his life", he goes on to affirm that "productivity of labor depends upon a series of *natural conditions*." But with those "natural conditions" Marx elaborates on the one hand, the stage concerning "means of life" (natural resources such as soil fertility, fishing resources, etc.), and on the other hand, the stage referring to "means of labor" (natural resources such as waterfalls, navigable rivers, wood, minerals, coal, etc.). These stages remain inserted in the "conditions," since Marx points out that "in the beginning of civilization the first kind of natural resource is fundamental and decisive," and that "when a certain degree of development is achieved, the second kind [of resources] has primacy." Thus a hierarchy exists within the stages. Later, when referring to capitalist production as a "given factor" and adding that "it presupposes man's control over nature", Marx argues that such a "factor" is not very radical.¹

1. MARX, *DAS KAPITAL*, vol 2. book I, (Madrid: Cenit, 1934) pp. 535, 539-540. Spanish translation by W. Roces from the German edition published by the Marx-Lenin-Engels Institute, Moscow.

II. RECONSIDERATION

Therefore, neither the definition, nor the consistency, nor the reach and scope of that factor which determines the law appears completely clear; nor is the level of dependence defined. Is it possible to further define these matters? Let us begin by using the expression "the economy" to refer to the set of activities that correspond to a group and seek to achieve the material necessities of that group. This agreed upon, the expression is precise enough to start our analysis until we can define it with greater clarity. With this presupposition we can argue the thesis that the law depends, at least in part, on the economy.

III. THE RELATION OF RECIPROCAL INFLUENCE

The opposite thesis — that the economy depends, at least in part, on the law, thus creating a dependence inverse to that discussed above — is less frequent. However, the economy undoubtedly relies to a certain extent on the law. For example, for many years the majority of merchant ships were equipped for passenger transportation. This created the need for medical services on board; eventually, a law was passed requiring the presence of a physician in all ships equipped for more than twelve passengers. As a consequence to this law, ships for more than twelve passengers ceased to be built. Successful mine production also depends greatly on appropriate mining legislation. In addition, land credit depends on mortgage legislation. A legal ceiling on gold prices often paralyzes gold mining operations. Likewise, successful agricultural production is affected by the corresponding agrarian law.

The above examples illustrate that a relationship of mutual dependence exists between the law and the economy, at least partially. A mutual relationship, however, does not amount to complete dependence. For if one depends on the other and the other depends on the one, to the extent that these dependencies coincide at a certain point (even though they might follow opposite paths) then neither depends exactly on the other. It is therefore not possible to sustain the idea that in this particular relationship there is any fatality or determination, provided we understand "determination" as something fatal. Nor is it proper to classify such a relationship as "conditioning" in either of the two directions involved, since it is more appropriate to reserve "conditioning" to refer to dependence. Let us then say that between the law and the economy there is a relationship of reciprocal influence, in two exactly opposite direc-

tions, following one and the same relationship. Therefore, to the extent that there is a coincidence in the areas where these influences take place nothing less than a partial connection can be said to exist.² Thus, other relationships can be perceived between the law and other fields outside the law.

IV. NATURE

Even less frequent is the attempt to leave the circular explanation concerning the above problems. If we explain the law in terms of the economy or vice versa we have explained nothing; let's not act like the famous Baron Münchhausen who tried to get out of the marsh by pulling himself up by his hair. If we become aware of the need to do away with a circular explanation it will be necessary to step backwards in the legal and economic fields. Perhaps we will encounter certain priorities or determine simultaneities between those two areas.

Moving backwards into the legal field leads us to phases where its volume, that is diversification, tends to zero. With just this discovery we have to exclude the idea that the law is placed at the most radical point in this sequence of mutual influence. Regardless of the point of retrocession—even at the zero degree of codification—we always find other circumstances which existed before the law or before any kind of activity conducive to the elaboration of the law. Since some of those circumstances appear to be foreign to economic activity, again relationships involving the law result, which extend beyond the scope of this investigation.

In turn, our retrocession in the economic area leads us to more simple economic stages which force us to recognize the existence of something still untouched prior to any historical moment, and present before the beginning of an economy. We have reached what is referred to as the realm of natural circumstances or conditions—to distinguish it from subsequent moments, no longer untouched nor radically original, for which we are going to reserve the expression “the economy.”

Nature also existed prior to the initiation of legal activity. In fact, circumstances created by nature, previous to any laws or normative legal thought, are to be found before the elaboration of any law, at the very origin of all regulatory activity and law. These circumstances also ex-

2. Although the thesis stating that the economy depends at least in part on the law is less frequent than the one defending a dependence in the opposite direction, it is often concluded that “the economic and legal areas are mutually and intimately related.” See e.g., MAX WEBER, *ECONOMY AND SOCIETY*, I (Fondo de Cultura Economica, 1964) p. 252.

isted prior to any individual or any group of individuals. For instance, the lack or availability of oil, the existence of less or more oil fields, the abundance or shortage of water, the availability and quality of arable land, the accessibility of minerals, the existence of a sea outlet, the characteristics of the coastal area, etc.

As a consequence, legal codes will show certain traits from the onset. For instance, the desert areas call for laws pertaining to nomadic peoples; cold weather will create laws conducive to seeking and storing heat; the abundance of snow will enforce regulations of its proper disposal, etc. Thus we can conclude that natural circumstances are at the root of the subject of this investigation; in other words, such conditions are found to be previous to legal and economic activities.

V. NATURE AND THE LAW

Once the elaboration of the law begins, an influence originating in legal activity arises that crosses over to nature. Through this influence the legal activity may—and in fact does—alter nature, thus creating a sequence of natural stages. In fact, certain laws make it possible for deserts to receive water, for access to coastal areas to be improved, and for the weather to be controlled to a certain degree. By means of legal measures we can promote or halt the exploitation of natural resources. Thus, legal activity reworks nature.

Since these natural conditions necessarily continue to influence legal developments, two parallel sequences are articulated, to wit: the sequence of legal stages and the sequence of natural stages. Laws channel our activity with respect to nature, influencing it at the same time. In turn, the natural sequence of stages calls for certain stages in developing the law. It is, again, a question of reciprocal influence, which has its historical origin in nature.

Obviously, the natural stages separate from the beginning into as many substages as relevant natural circumstances exist at any particular moment. In turn, each substage acts as the starting point of partial sequences referring to the substages. This separation continues as other relevant natural circumstances appear for the first time. Thus we find the partial stages of agricultural activity, mining activity, iron, gold, etc., some of which are more relevant than others. Because all of these substages influence and are influenced by the rest, the relationship between natural and legal sequences results from an infinite number of subrela-

tionships of reciprocal influence, in diversification and in rearrangements of variable scope.

VI. LOGICAL PRIORITY OF NATURE

In the connection of reciprocal influence between legal and natural stages, the influence originating in nature maintains a special preeminence. First, any natural subrelation will be halted without remedy as soon as the originating circumstance disappears. This does not occur if a subrelationship originates in the law: a mining exploitation will cease when the mineral is exhausted or when that product loses importance in the market; on the other hand, the exploitation cannot be realistically stopped just by passing a law to that effect. Second, the sequence of legal stages must respect certain limits that nature imposes, such as the abundance or shortage of certain natural resources corresponding to the group affected by the law.

Another permanent influence of nature on legal activity results precisely from man's attachment to space and land. Man's attachment to space and land produces another means by which nature permanently influences legal activity: as all natural resources are found in limited quantities, the possibilities for a certain group to regulate these resources are always limited to a certain degree. Consequently, groups insist on selecting and limiting for their exclusive use those areas thought to be more adequate to their needs; the more energetically they pursue this objective, the more oppressive these limitations seem. Thus, the defense of such areas from claims by other groups is born. Many animals also stake out their territories for subsistence and fight for them. As a consequence of this, boundaries are developed that attach certain regulations to certain areas.

It seems clear, therefore, that nature always maintains a preeminent position in the relationship of reciprocal influence that exists between the sequence of legal and natural stages. We can then say that natural circumstances remain previous to any moment of the relationship through what we will call a "logical priority." In this manner nature exerts a type of "natural control" over all stages of the relationship through a ubiquitous demand and incessant survival of nature as the origin. At any historical moment, the relationship of reciprocal influence that concerns this study is born again from that particular natural stage, relying also on certain natural circumstances, to which it is always subordinated.

VII. ECONOMIC LAW

The fact that there is a succession of natural stages implies at the same time that our relationship with nature gradually loses its initial simplicity. This loss is unavoidable. In order to take full advantage of natural resources man develops mechanisms such as money and other means of payment, methods of development, manufactured products, the media, resources for financing projects, machinery, industrial plants, and an endless number of increasingly complex techniques. The original utilization of goods is followed by the utilization of those goods for the acquisition of other goods; this process is in turn followed by the utilization of goods to acquire money and then the use of money to purchase other goods. Later, money is used to acquire titles representative of those goods. Inevitably, the notion that titles are representative of goods is forgotten, which in turn leads to titles being utilized to obtain other titles, as if the titles had nothing to do with the original goods (consider the Stock Exchange, for instance). Even the makeup and skills of the population can be affected, resulting in an ever increasing level of industrialization. Moreover, man loses sight of the original economic subject, focusing instead on the necessary collective economic subjects of large entrepreneurial efforts. With all of these developments the specific weight of manufactured goods begins to predominate.

Now we can begin to understand better the succession of natural stages; many natural resources begin to have more or less utility or influence at a certain moment in the relationship of reciprocal influence with which we are concerned. For instance, the fact that there may be gold many miles below the surface, is relevant only at the particular moment when technology for its extraction is made available. The same is true of the presence of oil at sea. Other resources may lose their influence, such as was the case with coal extraction when it became possible to extract oil.

All the above activities are inevitably interposed between law and nature, widening the distance between the two areas. Their relationship of mutual influence acts like convection currents moving from one area to the other, increasing in depth and differentiation. Let us consider the difference between a person occupying and excavating a mine, a person related to that mine through a purchase, a person who enters such a relationship through the concession of property, and a person who gains an interest with the mine through the purchase of stock. All of these

people expand the relationships of influence, which are now more complex because of the consequent differentiation.

Thus, the expression "the economy" in its most common use appears to refer to nature as it is influenced by the law, along with that which is concurrently interposed between nature and the law. We could attempt from now on to sanction this use of the expression, thinking that in such an attempt we are achieving the absolute meaning common use postulates but fails to achieve. Despite this, other uses of that expression — however vague — obscure the relationships we are studying. This obscurity results in conclusions dependent on the meanings, more or less deliberately given, to its words. This is why the use of "the economy" has been and continues to be the source of numerous misunderstandings. Correspondingly, if the expression "the law" is used differently from the meaning that has been established, different conclusions will be reached.

For example, conclusions will be different: 1) if we reserve the expression "the economy" to designate the subsequent phases that originate in a particular moment in the succession of stages found in the relationship between law and nature; in such a case to start talking about "the economy" is equivalent to making a specification within that succession. Such specification should be used with discretion because the sequence with which we are concerned is continuous; 2) if the expression "the economy" is used equally to refer to the exploitation of natural resources at an imaginary moment, when, because only one individual is present, the elaboration of the law has not yet begun; 3) if by such an expression we also mean what we understand as nature.

At this point it should be clear that the last two uses of the expression have to be rejected. It is crucial to distinguish between what we call nature (with a meaning which is probably acceptable to everyone) and later developments originating in nature. This failure to distinguish between nature and later developments of nature would result in misleading conclusions. It would also create an obstacle to understanding what is involved in this study. If the considerations made above are correct, those would in fact be the dangers.

Since it is possible that the elasticity in the use of the expression "the economy" derives partly from a defective penetration in the areas involved in this study, we could conclude that the law is not just distancing itself from nature. What actually happens is that the law intervenes in the economy as an articulated ingredient. Our relationships with natural elements are inescapably articulated by the law. Without the intervention of

the law no occupation dealing with natural resources can exist, let alone progress. Such development progresses only to the extent to which it is articulated by the law; the law, in the succession of its stages, makes possible such a development. The law is constantly inserted into the economy, without the simultaneous risk of being left on the outside; somewhat similar to the blueprints of a house that are inserted in it and outside of it at the same time. Consequently, it is objectionable to talk about the law as only being situated outside of or facing the economy.

Therefore, if our first attempt to refine our use of the term "the economy" leads to employing the term to refer to the sequence of our relationships, direct and indirect, with nature from the point at which the law articulates these relationships, (i.e., from the moment somebody utilizes a natural resource thinking of another person — when the existence of a rule can be postulated the proper way to refer to what is interposed between the law and nature, is to use the expression "economic law." This seems like the best way to prevent a separation of law and nature that may force us to forget that nature originates in the law and vice versa, or that one is unthinkable without the other. Such a separation would make it difficult for us to see that neither has priority over the other. In fact, both are therefore equally radical. Besides, the common use of "the economy" seems to suggest something complex. The initial affirmations that the law influences the economy and vice versa now become rather prosaic, and the illustrative examples of such an influence become too undifferentiated.

VIII. SPECIFIC MEANING OF "THE ECONOMY:" A CONSEQUENT PRIORITY

In the mass of more or less differentiated circumstances that we call "economic law" it is impossible not to develop stages that group these circumstances in some manner. To manage such an area we have to establish limits within the group, separating it in an effort to either define more stages or to attempt new groupings among them.

Clearly the definition of stages is an inconvenience that leads to the concept that relations of influence take place within stages, that a certain number of them are involved in more stages than others, that they are refracted differently at each particular stage, and that they are endowed with different kinds of energy according to the original stage or to the stage from which they have departed. The variations are almost infinite.

The need for defining stages results from the fact that sometimes eco-

conomic law is relatively close to nature — like the technology for the extraction of minerals — and sometimes economic law is closer to the law, as in the case of organizing meetings to manage a mining enterprise. Based on this fact, we have the tendency to reserve the term “economic law” for activities that are more nature-oriented; the more rigorous the use the more the activity will be perceived as close to nature. Therefore, as the economy, using now its second meaning, participates more in nature-related activities, its approximation of such activities increases. Thus through the preeminence of nature in this area, we can justify, somewhat, the separation of the law from the economy, enabling us to claim that the latter carries more weight. This then leads to the conclusion — without denying an influence in the opposite direction — that the economy has priority over the law.

In law we also notice a stratification that accompanies the law’s intervention as an ingredient of the economic law. This stratification implies a greater separation from the economy (using its second meaning). In ordinances the individual legal subject, a copy of the economic subject, is relegated in certain cases to a secondary position in favor of the legal entity (corporation) for which the ordinances provide special consideration. Such is the case for the law of corporations. In this field the operations dealing with stock activity from a corporation are now so removed from the economy that the derivational chain has to be explained very carefully to beginners and investigated by experts.

Let us consider, for example, real rights (*jus in re*). The Law considers the direct relation of utilization of a resource and elaborates Real Property rights. To face the needs arising from the utilization of resources the Law dictates one real right law after another. To protect real rights the Law institutes the Registry of Property (real-estate record office), thus elaborating “registered real rights,” with a life span within the Registry that does not have to coincide with its life span outside it. There is a well known thesis stating that ordinances sometimes establish rights over other rights.

It is possible that all of the above is more or less conceptualized by the theses stating that the economy is the basis and the explanation of the law. The differentiation between “superstructure” and “infrastructure” probably comes from this argument, since it is a distinction that results from drawing a single line of separation in the economic law. This distinction, however, is continually used in a manner that leads to the erroneous conclusion that a differentiation in essence exists between the

superstructure and infrastructure. This results because no discretion is used in determining where to draw the line. One may conclude that two or more lines can be drawn without breaking the continuum of economic law that begins to manifest itself. The possibility that any number of lines may be drawn indicates that a continuum does exist. This leads to the conclusion that a point is reached where drawing a great number of lines amounts to drawing no lines, since resorting to such differentiation amounts to making no real differentiation.

Thus, the difficulties in classifying economic law within either the infra- or superstructure is explained.³ If we add synonymous terms that are used with equal imprecision to the problems that result from this defective use of the terms "infra-" and "superstructure," it becomes evident that any conclusions that rely on these terms will be somewhat unrefined.

IX. THE PRIORITY OF FACTUAL RELATIONS

The priority of the economy over the law (in the specific meaning of the expression "the economy") carries with it the priority of the factual relationship over the legal relationship. It seems evident that the priority of the economy must yield to the fact that the non-legal relationship established with nature—the maximum degree of closeness to nature—also has priority over the legal relation. This priority can be enforced without seeking support from the economic priority: logically speaking the digging of a mine must precede any right over the mine's production or over the mine itself. In general, the use or control of any resource must precede the legal configuration of the use or control.

The same sequence results from the relation between the real right (*jus in re*) and factual relationships with things: the real right influences the factual relation and is influenced by it; but real rights precede the factual relation, both at the initial moment and at any moment thereafter.⁴ The same applies to any legal relation, which is always preceded by the fac-

3. Since the majority of authors coincide, we can do away with quotations alluding to cases in which other conflicts are inserted within "the conflict found between productive social forces and production conditions." The former apparently is included in the superstructure and the latter in the infrastructure. But a distinct clarification is still far from being made.

4. That the beginning can be found in the factual relation is without doubt alluded to in the affirmation which states that all transference of a thing by its previous owner "always presupposes that somewhere in the world a previous relation of ownership has already been established." Adolf Reinach, *Zür Phänomenologie des Rechts, DIE APRIORISCHEN GRUNDLAGEN DE BÜRGERLICHEN RECHTS*, 123 (K. ser Verlag, Munich, 1953); (first edition published in 1913).

tual relation. Legal relationships designed to direct factual relationships necessarily take these factual relationships into account.

X. DIFFERENCES OF PHASE

The above discussion explains in part certain inadequacies in ordinances. It is inevitable for example, that between the succession of legal developments and the succession of economic stages (using the second meaning of the expression "the economy") some break-down will occur. We often refer to this problem when talking about differences in phase or lack of synchronicity.

As an example of maladjustments we can quote the regulation given by the right of option, which does not adequately meet the economic needs that the code was meant to direct. Anti-monopoly laws always follow monopolistic conditions. Regulatory problems of conflict of interests that stem from oil exploitation are still tackled through the framework of techniques established for real estate relations. For a long time the assignee of rights has been classified as an agent (mandatory), which implicitly places his situation, as well as the economic activities involved in the transfer of rights, within the contract of mandate. Today such a framework would imply a barrier for this type of economic activity. In general, such maladjustments translate into an inadequacy on the part of the law to adequately regulate the economic activities at which the law was focused.

Taking into account the said differences in phase and the extent to which the expression "the economy" has been reserved to designate what is close to nature, we can now say that the law normally lags behind the economy, and that the economy allows in part for the succession of laws. In other words, the law's role is to constantly react to constantly changing economic conditions. Although legislators make an effort to anticipate economic sequences, their efforts have to be considered a reaction to the economy.

XI. THE INTERVENTION OF INTELLECTUAL ACTIVITY

In the above studied relationships the legal activity is only partially determined. There is no fatality. It is already clear that there is only a logical priority in favor of nature and of the economy (using its second meaning). To this we must add that influences, along with those relationships already discussed, intervene in the elaboration of the law. Indeed,

the law is also inserted in these "other influences." As if this was not enough, in the elaboration of law the presence of regularities or law that preside over intellectual activity must remain evident, and these interfere constantly with nature and the law.

Considering this interference by intellectual activity, of which we have seen some examples, it is convenient to make a general comment: the influence of nature over the sequence of regulatory activity is never direct. The needs or demands from which we proceed to elaborate laws are just that — needs and demands. Water shortage creates certain attitudes which in turn are thought of as needs or demands. By the same token, natural resources are only considered assets when they are thought of as such. The influence of nature is thus modified by intellectual activity. Rules are, therefore, not elaborated directly from those resources but indirectly through thought processes concerning such resources. There cannot exist necessary sequences: somebody thinks his country does not offer opportunities and therefore he emigrates; his brother though, thinks the country does offer opportunities and stays; a third brother may consider the country's lack of opportunities, yet he decides to stay; a fourth brother emigrates however promising the opportunities in his country appear to be. The country, however, is still the same.

We cannot then foresee individual attitudes, but as we take into consideration a greater number of individuals the possibility of forecasting increases. Similarly, we cannot say exactly which houses are going to burn this year, but we can expect for instance, that approximately five percent of all houses in the country will burn down. The more individuals affected by the prediction that are taken into account, the more predictable the repercussions of nature-related activities will be; so much so, that a point is reached where it appears we are facing necessary sequences. Yet people can escape the prediction on an individual basis. From all this we more or less come to know that, depending on the degree of this knowledge, intellectual activity always adds an additional factor that results in the response to the sequences of nature-related activities becoming increasingly more complex.

XII. THE ECONOMIC PREOCCUPATION AND EXPLANATION

Considering the above exceptions, the preoccupation with explaining legal institutions and regulations from the economic point of view is understandable. The accuracy of such an attempt will vary in relation to the institution for which the explanation is offered. Moreover, legal ac-

tivities concerned with nature-related activities are as removed as other circumstances that also intervene in the elaboration of the law. This is why certain institutions find it more satisfactory to resort to the economic explanation than to resort to other circumstances or influences. For example, economic considerations help explain mining rights more effectively than Family Law. We can argue, then, that natural circumstances and the economy contribute to the elaboration of the law in a manner that allows for the elaboration of specific regulations.

The acquired body of knowledge also aids the successful intervention in the sequence of those regulations. It explains, for example, that it is possible to achieve a successful intervention. Through management of the law we can influence everything else. This is possible through the continuous rewriting of the law. Also, individuals can profit from such a process. For example, a paid mortgage credit tax still in the Registry can be used against the person who paid it, allowing for an interference in a mining exploitation. Once it is explained that the owner of a small amount of stock can control a company, a technique for such control is already provided.

In general, the result of the above knowledge is that big differences of phase have to be corrected or prevented if we want the Law to reach its goals satisfactorily. Of course, not every difference in phase requires law substitution, which would imply the continual substitution of one law by another without ever arriving at the perfect arrangement, since changes in activities are usually never-ending. Fortunately, many of these differences in phase can be obviated through the interpretation of current regulations.

Other consequences are derived from the idea that the efficiency of a regulatory activity presupposes a certain adequacy of the economy. For instance, it is very clear that the importation of laws from other countries must be preceded by the conviction that those imported laws are relevant to the economic phase of the importing country. It is equally clear that if an approximation between the legal systems of two countries is to be achieved, a certain similarity between their respective economic systems must first be achieved. Along the same line, any disturbance in the regulatory sequence must be retracted if it results from a differences of phase between the laws and the economic situation. The intensity of the disturbance is related to the degree of the differences of phase.

Only by taking into account our acquired knowledge can we attempt goals with a variable success rate that corresponds to the extent of our

penetration into the above relationships. A failure to consider such knowledge could result in very disagreeable consequences. The investigation mentioned here proceeds in regard to all institutions and regulations, even if the economic explanation concerning certain institutions or norms seems to be limited.⁵ To refer to this interpretation we shall utilize the expression "the economic explanation."

What Noyes calls *institutional economics* is without doubt the study of the law from the economic point of view. Noyes adds that it is not a coincidence that this "method" (as he calls it) did not reach its proper characteristics until the twentieth century, or that this "method" has not considered property in particular, "including the contract." Only recently has "the texture of these realities" become truly complex.

It is a concern that touches on what Noyes calls "institutions which make up the economic organization of society," especially property. That is, institutions that are involved in today's main social and philosophical battles.

Those who are quick in diagnosing the evils of society, attributing them to its institutional makeup, and suggesting major intervention, do so despite their almost complete lack of knowledge on these matters. It is advisable to understand Institutional Economics as the beginning of an effort to obviate this deficiency and for such purposes to extend the scope of the science beyond its classic limits; or perhaps, an effort to consider the same themes from another and different perspective.⁶

XIII. SOME ECONOMIC EXPLANATIONS

The economic explanation often has the effect of a cold shower regarding the aspirations of those who believe that the succession of laws is relevant only to what they might call idealistic considerations or considerations of "pure justice." In the following examples we will apply the "idealistic" explanation and the economic explanations to the sequence of laws.

1. Through a number of legal channels women have reached the center of social tensions. The feminist movement credits itself for this situation, maintaining that it was their idealism that allowed for the

5. For instance, see Beard's ambitious attempt to explain the Constitution of the United States from the economic point of view in *ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1911). In his numerous lectures and writings Beard has always stressed the importance of the economy in the elaboration of current U.S. institutions.

6. C. REINOLD NOYES, *THE INSTITUTION OF PROPERTY* 1 (1936).

achievement. But the economic explanation sustains that such a success is related to the succession in economic stages of development. If the increasing volume of economic activities had not allowed women a place in the work force, nothing would have changed. But as economic developments allow for their participation in society, nothing will prevent corresponding changes in the law. That is, women have new opportunities because the economic life requires their participation. As long as the economic scenario offers no role for women, the female sector will remain at home; but when the need arises, the head of the family will encourage the incorporation of his female dependents into the work force. The developing changes, which the short-sighted observer calls "concessions" of rights to women (when men are considered to be granting them) or "conquest" of those rights (when those changes are perceived as occurring despite male opposition) are just a continuous succession of economic phases of development which demand incessant readjustments of men and women's positions within the group.

2. Obscenity has overcome certain barriers previously established by the law, or better said, things formerly thought obscene are no longer categorized as such. Thus, they may be presented in public. Some people consider this an achievement of their efforts in favor of the right to freedom of expression, the pursuit of happiness, etc. But from the economic point of view it can be considered a consequence of the risks taken by some large economic interests seeking new avenues of expansion. In a snowball effect, the greater their involvement in the exploitation of obscenity, the more forceful the claims to legalize it. So much so, that, in favor of a certain initial laxness, the claim becomes too great to be supported by enormous economic investments. Thus, the development of a new, more permissive legal situation results largely from yielding to economic pressures.

3. The abolition of slavery has always been accompanied by voices claiming credit for such a situation, stating that thanks to altruistic efforts based on principles of human rights, freedom and the like, legislation abolishing slavery was able to develop. But the economic explanation insists that slavery eventually disappears because it becomes economically unprofitable, and, to the extent that slavery results in profits, any efforts tending to abolish it will be useless. As long as there is no other technology capable of producing goods more economically, slavery will be inevitable, since the need is for free labor and thus for compulsion of labor. The Law comes to the aid of this need: to the degree that tech-

nology evolves, slavery gives way to serfdom, etc. Of course a big difference exists between the succession in the development of technology — almost imperceptible because of its continuity — and the succession of laws that are more spectacular, like those suppressing slavery, serfdom, etc. The changes in the latter sequence are clearer than those in the former. Changes in the sequence of norms also frequently take place after disturbances, in part as a consequence of difficulties in the ability to measure productivity, in part because slavery is usually related to other considerations.

4. The quality of life for workers has improved greatly. The Labor movement claims credit for this since salaries have improved due to its efforts. But the economic explanation sustains that such an improvement results from the increase in work productivity, so much so, that without this increase all efforts to improve salaries would have failed. Given such an increase in productivity, the movement's efforts are not necessary. It follows that efforts to increase real salaries are lost to the price increase unless an increase in the productivity is simultaneously achieved. The importance of the labor movement fades away except to the extent that it contributes to an increase in work productivity. Without these conditions the most workers can expect is improvements in the standard of living for certain groups of workers at the expense of other groups' standard of living, and this is in no way a general improvement.

5. The increase of all types of government subsidies and the fact that all governments are competing to promise and give more benefits does not result from a sudden, general socialization, but from a huge production increase. These changes are most permanent in countries experiencing a production boom. What is produced must be consumed and the more there is to consume, the greater the necessity to develop the buying power of those who can absorb the excess of sugar, beef, etc. Thus, the great increase in all types of subsidies does not result from a concern for certain groups, but from a preoccupation with finding an outlet for excess production.

6. The credit for the advancement of egalitarian trends is claimed by many groups, who maintain that those achievements occurred because of an increased awareness of the equality of the human race. But the economic explanation insists that to a large extent it is a consequence of overcoming shortages: the more dire the shortage the more intense the fight for the greatest possible participation in production; the smaller the shortage, the weaker the struggle and the less the inequalities in partici-

pation in production. Many would argue, perhaps, that the situation should be the reverse; to that I would respond that the reciprocal courtesy from the passengers of a sinking boat should also be greater.
