Chapter 10
Conclusions

When inefficiency reduces general productivity, worsens the structures of distribution and destroys the economic and political flexibility of the system as a whole, then one of the foremost victims is justice.[1]

Jeremy Bentham's utilitarianism can be commended for its orientation to human needs and its equal treatment of every person, rich or poor. Under a system of wealth maximization, this is different: *the utility of the rich is privileged*. Moreover, the same objection must be raised to wealth maximization as to utilitarianism: the individual as such is not taken seriously, a flaw which is brought into particular focus by the *question of basic rights* and the *problem of distributive justice*. This impelled John Rawls to develop his two principles of justice. According to the first, the liberty principle, every individual must be endowed with basic rights. In the second, the difference principle, he offers a distribution criterion which is intended to prevent unduly large income disparities. As we have seen, however, the difference principle is not particularly effectual. In the Swiss system of law, basic rights are guaranteed by the constitution and the bulk of redistribution is negotiated through the ongoing political process.

Yet the critique of wealth maximization does not necessarily mean that the demand for efficiency is fundamentally unjustified. Efficiency and justice are by no means mutually exclusive; in fact, they stand in a complex interrelationship. Although this relationship is not without its strains, it is reasonable to conclude that the endeavour to realize both goals need not always be a competitive trade-off, and can in fact be undertaken cooperatively to large extent.[2]

The material crux of the positive correlation between efficiency and justice is the trivial point that it is only possible to distribute what is earned. If inefficiency reduces the domestic product, this also has repercussions for justice. This issue is particularly topical in relation to the state budget: higher economic growth would generate more tax revenues for the public purse. These in turn would enable the state to perform its functions better, thinking particularly of the promotion of education and training (equality of opportunity) and the financing of social security (social

[1] Kersting, *Soziale Gerechtigkeit*, p. 108.

[2] Kersting, *Soziale Gerechtigkeit*, p. 106.

K. Mathis, *Efficiency Instead of Justice?*, Law and Philosophy Library 84,
DOI 10.1007/978-1-4020-9798-0_10,

justice). *Thus, efficiency is always one of the precepts of justice*. It is the irony of history that the accomplishments of the social state can only be secured through economic growth – that is, more market activity and greater economic efficiency.

Turning the table, however, it is equally possible to assert the demand for justice on the grounds of efficiency. If injustice diminishes people's productivity and will to work and undermines the legitimacy of the social system, then justice is proven to be a basic prerequisite of efficiency.[3] Besides justice and efficiency, however, legal certainty is another important principle of law. Moreover, in the long run, legal certainty is often conducive to efficiency. For it would hardly be worthwhile to engage in economic activity if one lived in fear of being deprived of one's duly-acquired rights at any moment for short-term reasons of efficiency.[4]

As these considerations show, the goal relations between the different legal principles are more intricate than they may appear at first glance. *Therefore the economic efficiency arguments need to be incorporated into a method for resolving value conflicts. In a democracy, this has to happen as part of the political decision-making process*.[5] Hence, in the Swiss legal system with codified law, the efficiency goal should be given due attention at the level of legislation and not delegated to the judicial process.[6]

According to Gustav Radbruch, the law should be guided by the following three principles: justice, expediency and legal certainty.[7] *Efficiency should be added to that list as a fourth principle of law*. This entails arranging the legal system so as to foster economic efficiency. Laws should thus be subjected to an 'efficiency test', which means that any given draft bill should be analysed, in the course of the legislative process, to establish its likely impacts on economic efficiency. *This should be done as part of a legislative impact assessment regime whereby the economic consequences of legal regulations are systematically examined*. For if the legislative process has regard for the economic consequences of laws, this is bound to have an effect on the judicial process as well.

In the United States, cost-benefit analyses have long been standard practice in relation to major new regulations. Since 1995, the OECD has recommended that its member countries should carry out Regulatory Impact Analysis (RIA) as part of the legislative process. Also, in the wake of the Mandelkern Report (2001), the European Union passed a plan to simplify and improve the regulatory framework. This imposes impact analysis for the most important legislative proposals.[8]

Since the year 2000, Switzerland has had its own instrument of regulatory impact analysis at the Confederation level which is geared towards the recommendations

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[3] Kersting, *Soziale Gerechtigkeit*, pp. 106 ff.

[4] von der Pfordten, p. 352.

[5] von der Crone, pp. 46 f.

[6] Taupitz, p. 166.

[7] Radbruch, pp. 73 ff.

[8] On impact orientation in law, see e.g. Weigel, pp. 194 ff., and van Aaken, pp. 146 ff.

of the OECD.[9] Its constitutional basis is given in Art. 170 of the Swiss Federal Constitution, according to which the Federal Assembly has to ensure scrutiny of the effectiveness of Federal Government measures.[10] The specific statutory hook for prospective analysis of draft legislation is found in Art. 141 (2g) of the Parliament Act. Under this provision, the notices to draft bills proposed by the Swiss Federal Council[11] must include statements on the legislation's anticipated impacts on the economy, society and the environment, insofar as substantial comments on these aspects can be made. According to the decree and guidelines of the Swiss Federal Council of September 15, 1999, all legislation must now be subjected to an economic impact analysis before it is enacted. The analysis should include scrutiny of the following five points:

(1) Necessity and possibility of state action
(2) Impacts on individual social groups
(3) Impacts on the whole economy
(4) Alternative regulations
(5) Expediency in enforcement

So far, regulatory impact analysis in Switzerland has been utilized prospectively in the context of finalizing the details of legislation at Confederation level. Supplementary use is made of another instrument, the small and medium-sized enterprise (SME) compatibility test. For major regulations, a cost-benefit analysis is also required.

The strength of *cost-benefit analysis* is that it attempts a comprehensive evaluation of the economic impacts of a measure or a project. But attention should also be given to this method's weaknesses: the insistence on monetarization means that a financial value must be attached to all impacts, even those for which no market prices are available. Whilst it is relatively easy to evaluate costs in monetary terms, benefits must often be assessed using ad hoc reference data and rough approximations. These uncertainties produce valuations with rather broad scope for interpretation, which can cast doubt on the meaningfulness of the results. Moreover, future costs and benefits must be discounted to a reference point in time. Here the choice of the discount rate has significant implications for the result.[12]

A further point to bear in mind is that in a cost-benefit analysis, essentially it makes no difference which social groups are the beneficiaries of a legal regulation and who will have to bear the likely costs. As long as society's balance sheet is positive after all costs and benefits have been accounted for, that is sufficient. In the terminology of welfare economics, it is sufficient if the Kaldor-Hicks compensation criterion is satisfied. It would therefore be a desirable objective for all legal

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[9] See OECD, *Regulatory Impact Analysis*.

[10] On the general situation in Switzerland, also see Mader, pp. 100 ff.

[11] The Swiss government.

[12] On the problems of cost-benefit analyses, see Lave, 'Benefit-Cost Analysis'.

regulations to be analysed with regard to their *impact on income distribution*, to enable political decision-makers to form a rounded overall judgement.

Less problematic than the normatively-laden efficiency criteria of welfare economics are the *analysis methods of positive economics*. In particular, it is helpful, to begin with, if analysis of the impacts of laws takes account of the *incentives* they exert on economic subjects. Even purely qualitative consideration can prove very useful in this regard. Such a review should be made the minimum standard for absolutely all legislation – not just at central government level, but also at subordinate levels of the state.

Under common law, it is principally the role of the courts to bring economic rationality into judgements. Under a codified law system, however, this is only possible within very narrow confines due to considerations of legitimization, given the principle of separation of powers and the legality principle. *Unless legitimized by the legislature, any recognition of economics-based argumentation strategies within the judicial process should be viewed with caution*.[13] Nevertheless, in certain legal circumstances, it is already possible for the legislator to instruct the administration and the courts explicitly to give due regard to efficiency as a legal principle.[14] In doing so, however, care must be taken not to overload the relevant enforcement authorities with the associated information procurement and processing work.

Either way, it is very important for lawyers to be sensitized during their training to the economic aspects of the law. Therefore, another desirable objective is to include economic analysis methods on the curriculum of law faculties – although this should come under a broader heading, like 'Law and Economics'. Such a subject is undoubtedly an enriching element of a legal education. Economic legal theory cannot and should not take the place of traditional methods of jurisprudence, but is an important complementary facet.

When asked what he found most interesting about the economic analysis of law, one of Posner's teachers is said to have replied, 'Its limits'.[15] In any critical reflection on the potential and the limits of economic analysis of law, the philosophical foundations play a key role. With that in mind, the author hopes this work will prove useful as a contribution to the interdisciplinary discourse.

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[13] See esp. Eidenmüller, pp. 414 ff.; for criticism, also Janson, p. 152. On the economic analysis of court rulings, nevertheless, see Kötz and Schäfer, *Judex oeconomicus*.

[14] Swiss federal judge Hansjörg Seiler and Laurent Bieri take the view that in Switzerland, application of the 'Hand rule' in liability law would already be a fundamental possibility *de lege lata*. See Seiler: 'Wie viel Sicherheit wollen wir? Sicherheitsmassnahmen zwischen Kostenwirksamkeit und Recht'; also Bieri: 'La faute au sens de l'article 41 CO – Plaidoyer pour une reconnaissance explicite de la "règle de hand" '.

[15] Posner, 'Economic Approach', p. 772.