

The Legitimacy of State Intervention in Economic Activity Through the Concept of Economic Public Law

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Abstract:

The primary objective of this study is to substantiate the legitimacy of state intervention within the realm of economic public law. Economic public law emerges as a legal branch concerned with regulating the state's intervention in economic activity. Although the state has the right to participate in economic activity, this right must be consistent with the principle of legality, so it may not infringe on economic rights and freedoms, and it must comply with the various legal texts framing this field.

Keywords: Economic public law; Intervening state; Regulatory state; Legitimacy; Economic activity.

1. INTRODUCTION

Economic public law, also referred to as the public law governing economic activities, is a legal framework intrinsically associated with the evolving roles of the state—from its inception as an intervening entity to its current characterization as a regulatory authority. Irrespective of the economic ideology embraced by the state, its role within the economic domain remains pivotal and indispensable. The state's endeavors are directed towards the provision of public services and the realization of the public interest under all circumstances.

Therefore, the principles of a free market economy and neo-liberalism do not imply a complete abdication by the state from economic matters. The nexus between the state and economic affairs is steeped in history, forming an interdependent relationship where neither can function effectively without the other. The state exercises its intervention through the prerogatives of public authority vested in it, alongside various institutions that oversee and administer market dynamics. This is accomplished through a myriad of regulations and directives promulgated in this arena.

In this context, economic public law emerges as a legal branch concerned with regulating the state's intervention in economic policy. Although the state has the right to participate in economic activity, this right must be consistent with the principle of legality, so it may not infringe on economic rights and freedoms, and it must comply with the various legal texts framing this field. Based on this, this research addresses the topic of economic public law as a framework for organizing public intervention in economic activity, by posing the following question:

Do the tenets of economic public law confer upon the state adequate legitimacy to engage in economic intervention?

In addressing this matter, both the descriptive and analytical methodologies were employed. These methods serve to delineate the relationship between economic public law and the state, as well as to dissect the various mechanisms that endow the state with the requisite legitimacy for economic participation. This legitimacy is manifested both directly, through the construct of public institutions and their endeavors to safeguard the economic public order, and indirectly, via the concept of economic regulation and the autonomous administrative entities it engenders.

Consequently, the research was partitioned into two primary sections: the first focusing on the conceptualization of economic public law, and the second on the legitimacy of public intervention within the economic domain.

2. Conceptualization of Economic Public Law

Economic public law represents an emergent legal discipline that encapsulates a plethora of meanings and scholarly perspectives, attributable to its interdisciplinary essence. It amalgamates the triad of law, politics, and economics, thereby embodying a multifaceted domain. Within the legal sphere, it derives its statutes from both public and private law, rendering it a cross-sectional legal framework that governs state intervention in economic policy. To elucidate the concept of this branch of law, it is imperative to first articulate its definition and subsequently expound upon its diverse attributes.

2.1 Definition of economic public law

The genesis of economic public law is rooted in the state's incursion into the economic arena. The statutes of this legal domain specifically address the state's involvement in economic affairs, as they orchestrate the economic administration and delineate its role and interplay with economic entities, both public and private. This body of law emanates principally from administrative edicts, contracts, and accords forged with various economic operatives. These are frequently ratified by the legislator in legislative texts, thereby endowing them with a compulsory nature.

It is paramount to distinguish between 'economic law' and 'the law of economics.' The former should not be misconstrued as merely the existence

of legal provisions pertaining to economic matters. Economic law is defined from multiple perspectives, including that of the institution. It is perceived as the law governing organizations and reciprocal economic advancement between the state, private initiatives, economic actions, or endeavors. From this vantage point, economic law is deemed to be the law of contracts and unilateral administrative acts, applied across both macroeconomic and microeconomic scales¹.

It is also the law of state intervention in economic activity, as it is defined as a set of legal rules that aim to achieve a balance between the private interests of private or public economic agents and the general economic interest².

The economic public law expresses the public presence in the economic field, as it is the law applicable to the interventions of public persons in the economy, and it is also the law of public intervention in the economic substance, or what is called the determination of the economic policy of administrative persons, through legal methods.

Economic public law constitutes the compendium of juridical regulations within public law that delineate and structure the economic pursuits of public entities. This delineation accentuates the presence of distinct elements inherent to the notion of economic public law, specifically:

- Economic public law is an integral component of public law, which orchestrates the state's role as a public authority within the economic sphere.
- It is a legal framework that encapsulates public economic activities, embodying a neutral construct that can accommodate both direct and indirect modalities of state intervention in the economy. The scope of this law can fluctuate extensively or be confined, contingent upon the prevailing economic doctrine of the state at any given juncture. Should the doctrine be interventionist, the provisions of economic public law are expanded; conversely, if it is liberal, these provisions are constricted. Consequently, the

contemporary jurisprudential inclination is to characterize economic public law as the law of economic policy, irrespective of its interventionist or liberal nature³.

Economic public law is acknowledged as a subdivision of public law. Initially termed 'economic law,' it is perceived by some as an autonomous legal field, while others regard it merely as an amalgamation of pre-existing elements tailored to economic contexts⁴. Consequently, questions arise concerning the degree of autonomy of this legal domain and the extent of its distinctiveness.

In this context, certain legal scholars contend that economic public law does not constitute a novel branch of law but rather represents a fresh legal perspective that has assimilated its statutes and methodologies from established laws. Thus, it is viewed as a new paradigm or vision, signifying the incorporation of traditional legal methods that possess attributes congruent with economic mechanisms.

Given that the regulations governing economic law are not intrinsically disparate from those pertinent to the traditional branches of law, this legal framework facilitates a reinterpretation of classical legal norms within the ambit of economic jurisprudence. Moreover, since this domain enables the transcendence of the stark dichotomy between public and private law, it also substantiates its publicist attribute, particularly in instances where public administration intersects with economic activities⁵.

Indeed, the statutes of economic public law diverge only marginally and conditionally from the tenets of classical administrative law, as evidenced by its concepts, which are devoid of novelty and absolute distinctiveness. It can be posited that economic public law is not devoid of all uniqueness in relation to administrative law, nor does it possess full-fledged autonomy. Rather, it is a legal field in an ongoing quest for such distinctiveness⁶.

2.2 Attributes of Economic Public Law

Economic public law is distinguished by an array of traits, particularly as it is deemed both venerable and nascent in its formation. It possesses a malleability that facilitates its rapid evolution and transformation. Furthermore, its horizontal dimension endows it with a transdisciplinary nature. These aspects will be expounded upon in the ensuing discourse

2.2.1. Economic Public Law as an Ancient and Newly Formed Discipline

The notion of economic public law was first promulgated in Germany during the twentieth century, spurred by the escalation of international intervention. It did not emerge in France until 1971, through the scholarly work of Gérard Farjat. He posited that economic public law is a logical and indispensable adaptation of legal frameworks to economic fluctuations. Thus, it encompasses the aggregate of laws pertinent to matters within the economic sphere, amalgamating subjects from both private and public law that relate to economic affairs. This implies that it transcends the rigid demarcation between these two legal domains and is characterized by its horizontal orientation⁷.

A demarcation is drawn between the classical rendition of economic public law, deemed archaic, and its modern iteration, which is marked by the freshness of its constitution.

The classical variant of administrative law pertains to the segment of administrative jurisprudence governing economic affairs, colloquially termed “economic administrative law.” This branch emerged concomitant with the inception of state intervention in economic pursuits, employing the conventional instruments and methodologies of administrative law.

Conversely, the contemporary iteration encompasses a compendium of juridical norms, which, while distinct from the tenets of administrative law,

are tailored to the economic context. Thus, economic public law is envisaged as a nascent legal discipline⁸.

2.2.2. The economic public law as a flexible law

The economic public law is characterized by its inherent flexibility, which mirrors the confluence of jurisprudence, fiscal science, and polity—a triad renowned for its dynamism and perpetual flux. The statutes within this domain are in a state of continual evolution, adapting to the vicissitudes of the empirical world. The instruments of public economic endeavor are manifold, encompassing aspects of economic governance, intervention apparatuses, and methodologies of engagement⁹.

Accordingly, the inherent malleability of the economic milieu, particularly pronounced in the epoch of advanced technology, has rendered economic public law a body of legislation subject to rapid progression and transformation. This presents a pivotal challenge for legislative bodies: reconciling this intrinsic flexibility with the imperative of legislative constancy, or what is termed the principle of legal certainty. Such certainty has burgeoned into an exigent requirement for the stabilization of commercial interactions and a prerequisite for international investment¹⁰.

The phenomenon of normative chaos manifests within the realm of economic subject matter, attributable to its inherently technical character. The obscurity, intricacy, and voluminous expansion of legal regulations that govern economic content contribute to this disarray. Consequently, such normative chaos necessitates the assurance of legal security for economic agents amidst the regulatory activities of public authorities¹¹.

2.2.3. Economic public law as a horizontal discipline

Since 1954, scholars Joseph Hamel and Gaston Lagarde have argued that economic public law may occupy an intermediary position amidst public and private law. This perspective intimates that the oscillation of this legal

field between the public and private domains is a longstanding debate, with no definitive resolution. Examination of various scholarly works on economic public law reveals its interdisciplinary essence, existing within an amalgamated sphere of public law, private law, and economic theory¹².

Hence, economic public law is distinguished by its horizontal or transversal character, which facilitates transcending the traditional dichotomous classification of law into public and private sectors. This is necessitated by the metamorphosis of contemporary economic activities, which frequently incorporate elements from both legal spheres. Illustrative of this is the engagement of private legal entities in the administration of public industrial and commercial establishments under concession agreements, as well as the enforcement of competition law statutes upon public entities¹³.

It is pertinent to acknowledge that the distinction between public and private law is rooted in a Roman tradition, predicated on a philosophical dichotomy. Private law is purported to codify parity amongst individuals, whereas public law is deemed the jurisprudence of disparity, favoring public authority. Public law endows the state with an array of prerogatives, empowering it with the requisite instruments to execute public policies that aspire to fulfill the collective welfare¹⁴.

3. The Legitimacy of Public Intervention in Economic Affairs

The discourse on state intervention within the economic domain has undergone extensive and notable evolution, becoming more adaptable subsequent to the abrogation of conventional methods mandated by administrative law. The adoption of methodologies operative within the private law sphere, under the rubric of “privatization of public authority’s intervention methods in the economic sector,” has marked this transition. The debate surrounding state involvement in economic matters is inherently progressive, characterized by evolution rather than revolution¹⁵. State

intervention in economic activities manifests in two principal modalities: the first being direct, as elucidated by various jurisprudential theories, notably those propounded by Keynes, coupled with the state's enduring endeavor to maintain economic public order; the second being indirect, as encapsulated in the theory of economic regulation and its supervisory entities within this arena.

Consequently, this concept will be explored by initially examining the state's direct intervention in economic activities, followed by an analysis of its indirect intervention as a subsequent point of discussion.

3.1 Direct State Intervention in Economic Activities

The disciplines of legal and economic sciences engage in a symbiotic relationship; the statutes of law serve to complement economic endeavors, while the latter informs the crafting of legal provisions aligned with the objectives underpinning this enterprise. Thus, the economic intervention by public authorities must be conducted within the legal framework, adhering to the principle of legality, and without infringing upon the economic rights and liberties of market actors, particularly in the exertion of its punitive authorities. The intervening state's objective is to mitigate and curtail any disequilibria that may arise within the free market. Such intervention may manifest as direct (a productive state) or indirect (via influencing the decisions of economic agents).

In a market economy, the state currently fulfills four fundamental functions:

- **Production Function:** The state is responsible for the provision of public goods and services, such as national defense, justice, education, and healthcare, in addition to offering other profit-oriented services, including telecommunications and air transport.
- **Redistribution of Income and Wealth:** The state and public institutions execute a substantial reallocation of resources from certain economic agents,

who contribute through taxes and social levies, redistributing these to others in the form of grants and subsidies. This reallocation is of paramount importance as it constitutes at least half of the public revenue.

- Economic Stabilization Function: This includes the regulation and stabilization of prices and the maintenance of external economic stability.
- Regulatory Function: This role exerts a profound influence on economic activity¹⁶.

The distinctive nature of the functions executed, as well as the spheres within which they are operationalized, renders the state a unique economic agent that significantly influences the overall economic dynamics. On one hand, there exists no purely public economy that functions outside market norms or where its presence is merely ancillary. Conversely, there is no entirely private economy predicated solely on market principles; rather, public oversight mechanisms for private activities are in place, such as state intervention in decisions autonomously made by economic agents. From this vantage point, the concept of a mixed economy has emerged.

The notion of interventionism was introduced by Keynes during the profound economic crisis of 1929. He attributed its causation to liberal theories advocating for market equilibrium without external interference (the invisible hand in the market). Consequently, Keynes advocated for the necessity of state regulatory activity to manage growth and combat unemployment.

Keynes considered that state economic intervention is the sole avenue to avert the collapse of economic institutions and to bolster private enterprise in fulfilling its role optimally. According to Keynesian theory, the state operates on the premise that the narrow objectives of individuals do not suffice for achieving collective aims or what is termed the public interest. Thus, the state is compelled to intervene through various means, such as price stabilization.

The inherent nature of the functions performed, as well as the domains in which they are executed, establishes the state as a prominent economic agent that influences the entire economic dynamic. On one flank, there is an absence of a public economy that operates outside market norms or where its role is merely peripheral. On the opposite flank, there is no purely private economy that relies solely on market principles; instead, there are public oversight mechanisms for private endeavors, such as state intervention in decisions made independently by economic agents. It is from this standpoint that the concept of a mixed economy has arisen.

The principle of interventionism was brought forth by Keynes in response to the severe economic crisis of 1929. He ascribed its origin to liberal theories that advocate for market equilibrium without any external intervention (the invisible hand in the market). Hence, Keynes underscored the necessity for state regulatory action to steer economic growth and combat unemployment¹⁷.

Keynes postulated that state economic intervention is the solitary strategy to forestall the disintegration of economic institutions and to augment the efficacy of private enterprise. The Keynesian paradigm is predicated on the notion that the limited aspirations of individuals are insufficient for the attainment of collective objectives, or what is termed the public interest. Consequently, the state is necessitated to employ various interventions, such as price stabilization.

Thus, Keynes highlighted the imperative for state involvement across all economic sectors, endowing it with all essential means for such intervention. From this perspective arose the welfare state, distinguished by its direct market intervention¹⁸.

Keynes' doctrine regarding the essentiality of state intervention in guiding markets and economic activities has been effectively implemented in several major capitalist nations. In the United States, President Franklin D.

Roosevelt adopted this approach within his New Economic Policy framework, aimed at equipping the American economy to confront the ramifications of the Great Depression, an initiative known as the New Deal. This policy encompassed initiatives to escalate public expenditure on infrastructure projects like roads and bridges, institute unemployment insurance, diminish tax rates for low-income groups while elevating them for the affluent, and enhance pensions for public sector employees.

Numerous economists have acknowledged the intricate interplay between the state's role and market mechanisms. Just as there are instances of market failure that necessitate state intervention, there are also instances of government failure that warrant the pivotal role of market forces and mechanisms. The Nobel laureate economist J.E. Stiglitz articulates that the essence of this relationship is rooted in integration and collaboration, rather than competition. The true challenge resides in establishing an equitable equilibrium between the functions of the state and market mechanisms, and between governmental and non-governmental activities¹⁹.

The concept of “economic public order” stands as one of the paramount justifications for the legitimacy of state intervention in economic activity. This notion gained prominence during the economic crises witnessed globally, particularly in the United States of America, where the state mobilizes all its resources and means to prevent the collapse and insolvency of its economic institutions.

The concept of economic public order has experienced significant evolution to encompass a multitude of domains. The economic crises that sporadically emerge, along with their impacts on the social fabric of individuals, have prompted an expansion of state intervention into the economic sphere under the guise of preserving public order. Consequently, the notion of economic public order has surfaced, signifying state involvement in the economic realm to supervise and regulate the activities of economic agents, thereby mitigating economic risks and issues²⁰.

Scholars of public law contend that the economic public order assumes a distinct connotation from its interpretation in private law. The premise of economic public order rests on the belief that liberalism alone is inadequate for ensuring collective security, and that state intervention is imperative to rectify economic and social imbalances. The potential for social unrest has been a catalyst for state interference in sectors where it previously refrained from involvement, barring periods of crisis, an occurrence characterized as economic disturbances within the public order²¹.

3.2 Indirect State Intervention in Economic Activity

During the 1970s, the global economy was beset by a novel crisis, prompting a reevaluation of Keynesian principles and the subsequent gradual retreat of the state from the economic arena at the onset of the 1980s. Certain factions attributed the crisis afflicting capitalism to state agencies, advocating for their exclusion from economic matters. This stance facilitated the emergence of what is known as the regulatory state.

To comprehend how regulatory states mediate in economic activities, it is essential first to explore the concept of economic regulation as a contemporary legal mechanism devised to resolve the crisis of the interventionist state. Subsequently, we will delve into independent administrative authorities, with a particular focus on economic regulation authorities.

3.2.1 Economic Regulation as a Modern Legal Mechanism to Resolve the Crisis of the Intervening State

The concept of regulation has been employed to underscore the legitimacy of state intervention within the economic domain. Regulation is not aimed at precluding state intervention; rather, it is regarded as a novel modality of state engagement in the economic sphere²².

The discourse on economic regulation brings to the fore the dialectical interrelation between the state and the economy. For proponents of liberalism, the notion of a free economy is predicated on an individual's veneration for economic liberty and the market mechanism, devoid of any external encroachment upon its functionality and equilibrium, thereby negating any role for the state in the management of economic affairs. Conversely, a market economy does not imply an absolute absence of the state and legal frameworks in delineating this liberal freedom.

The imperative for state intervention is dictated by the existence of non-economic objectives within the marketplace, such as the public interest, public utility, and the safeguarding of economic public order. The state, as a public authority, remains the exclusive custodian of these imperatives, notwithstanding the inclination towards disengagement from the direct administration of economic activities and ceding economic initiative freedom to private entities. Within this debate's context, the law of economic control has surfaced as legislation that harmonizes competition as an economic aim with other non-economic objectives²³.

Consequently, the inception of economic regulation is situated within the new paradigm of the state-economy relationship that materialized post the waning of socialist economic ideology and the ascension of neoliberal thought. This shift precipitated a decline in the rationale of the interventionist state and gave rise to the regulatory state's logic. Hence, this concept hinges on the state's withdrawal from direct economic intervention in favor of instituting an innovative form of public engagement. In this model, public authority is confined to acting as a regulator or mediator among diverse interests within the competitive market²⁴.

Regulation stands as one of the most enigmatic and nebulous constructs within the doctrine of administrative law. To date, there exists no definitive or precise delineation of this concept, attributable in part to its interdisciplinary essence, and in part to its exogenous origins²⁵, having been

assimilated from the Anglo-Saxon legal system. Regulation is fundamentally a functional notion with economic roots, wherein its Anglo-Saxon interpretation denotes the incursion of public authorities in supervising economic activities, aimed at ameliorating market inefficiencies²⁶.

French jurisprudence has proffered various interpretations of the concept of regulation. The organic perspective perceives economic regulation as a prerogative of independent administrative authorities. The legal perspective regards it as a novel form of normativity. The economic perspective views it as an inherently economic function. Lastly, the collective perspective deems it an institution that necessitates a composite definition incorporating both substantive and organic criteria²⁷.

In this sense, economic regulation is an administrative function carried out by independent administrative authorities with normative and conflicting powers, whose purpose is to preserve economic public order by establishing a balance within the free market between economic and non-economic objectives.

It is worth noting that economic regulation finds its theoretical basis in the debate on the crisis of the interventionist state, as it requires a new conceptualization of the state and a new form of public activity, a state that does not take the form of an actor, but an arbitrator by ensuring a balance between different interests, in addition to that, regulation requires the passage to a new form of law, a law characterized, unlike the traditional norm, by flexibility, negotiation, and effectiveness²⁸.

Economic regulation, represented by independent regulatory authorities, is the legal mechanism adopted by economic public law, which regulates state intervention in various fields, including the economic sphere.

3.2.2 Independent Administrative Authorities as an Institutional Mechanism to Mitigate the Crisis of the Interventionist State

The metamorphosis of the state's role from an interventionist "welfare state" to a regulatory state transpired within the ambit of economic and trade globalization. This shift engendered novel modalities for market regulation, concomitant with an escalating propensity towards privatization, economic activity deregulation, and the inception of new entities that facilitate market intervention by public authority, known as independent administrative authorities²⁹. In the economic realm, these are referred to as economic control authorities.

The advent of control authorities represents a distinctive configuration within the international framework, marking a significant revolution that altered the classical architecture of the state. As a hallmark of contemporary times, these authorities have provoked extensive discourse among legal scholars, particularly in France, in pursuit of understanding the rationale behind their emergence, the diversity of their functions and competencies, and the breadth of their authority.

The historical roots of regulatory authorities date back to the Anglo-Saxon countries. During the 17th and 18th centuries, in Britain, entities known as semi-autonomous councils surfaced, entrusted with responsibilities that diverged from those of public administration, such as philanthropic endeavors. However, the true genesis of these authorities occurred in the United States of America with the establishment of the Interstate Commerce Commission in 1887. This commission was tasked with overseeing railroad transportation companies, curbing their propensity to impose exorbitant ticket fares on farmers and other patrons. Subsequent to this, Congress instituted analogous entities, including the Federal Trade Commission in 1914 and the Federal Communications Commission in 1934, which played pivotal roles in regulating communications and the content disseminated via radio, television, and internet broadcasts³⁰.

In France, particularly, the rise of these authorities is intertwined with the imperative to rationalize state withdrawal in pursuit of the public interest. Such retraction is invariably coupled with the advent of novel state functions that traditional administrative mechanisms are ill-equipped to fulfill. Consequently, the state's transition from an active intervener to a regulatory entity is the principal impetus behind the establishment of bodies dedicated to economic regulation. This is in response to the insufficiency of conventional administrative institutions and their inability to acclimate to market evolutions, rendering them ineffectual in satisfying emergent regulatory needs and safeguarding liberties³¹.

Thus, the independent regulatory authorities are predicated on a liberal political philosophy that aspires to extricate political authority from the direct oversight of certain activities. Through specific measures, this philosophy seeks to integrate more economic and social actors into the economic domain, all within the ambit of validating the legitimacy of public intervention in economic affairs³².

The paradigm shift in the state's interventionist philosophy has been manifested at the functional institutional level by the advent of the policy known as deregulation. The independent regulatory authorities epitomize the institutional embodiment of the economic regulation activity predicated on this policy.

In an initial, conventional perspective, deregulation signified the removal of legal statutes from economic engagement, as regulation in its economic essence was perceived as an inherent detriment, and fundamentally antithetical to economic principles due to its propensity to escalate production costs. Therefore, the foundational premise of deregulation, according to this liberal doctrine, is predicated on the notion that the market serves as the most efficacious and logical mechanism to modulate economic conduct. This necessitates the neutralization of regulatory measures in favor of market self-regulation.

In a subsequent intellectual discourse, deregulation is construed as the diminution of the corpus of legal texts applicable to economic matters. This implies that the focus is not on regulation per se, as an inescapable phenomenon to structure economic activity, but rather on its arbitrary or haphazard proliferation³³. This perspective is congruent with the ethos of the regulatory state.

4. CONCLUSION

Through our study of “The Legitimacy Of State Intervention In Economic Activity Through The Concept Of Economic Public Law”, it becomes evident to us that regardless of the state’s operational guise (be it as guardian, intervener, or regulator) and notwithstanding the economic doctrine it adheres to (be it restrictive or liberal), its engagement in the market sphere is crucial and its total abdication is nearly impracticable.

Economic public law embodies an array of legal directives that orchestrate the state’s participation in economic policymaking. As a jurisprudence that intersects various legal disciplines, drawing its tenets, characteristics, and statutes from both public and private law domains, it stands, albeit nascent and frequently revised, as the optimal structure that the state employs to vindicate the legitimacy of its economic interpositions.

This justification is palpable within its various legal stipulations, especially those accentuating the necessity for the state to sustain economic public order and to maintain its market presence through the economic supervisory function. This function is administered via modern entities, specifically the economic control authorities, which strive to maintain equilibrium among diverse market forces and to ensure fair competition.

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5. Endnotes

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