

VALUE JUDGMENTS IN ECONOMIC IMPERIALISM

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JEL Classification: K1

Keywords: Analisi economica diritto

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The case of Law & Economics

(intervento al convegno *Searching for New Models in the Economic Analysis of Law*, Messina, 25-27 maggio 2007)

Summary: in this paper we analyze the role of deontology versus consequentialism, and of complexity versus simplicity in the context of the economic analysis of law.

1. Law as a conquest land, and its defenders – 2. Complexity versus simplicity – 3. Value judgments: deontological ethics versus consequentialism - 4. Conclusion: the cobbler's limits.

1. Law as a conquest land, and its advocates

The purpose of the present workshop is “Searching for New Models in the Economic Analysis of Law”. However, before searching for innovations, it might be wise, at the outset of our meeting, to apply the popular French saying: *reculer pour mieux sauter*. This is why we offer here a brief contribution on the limitations of the “imperialistic” applications of economics to law.

Imperialism is defined, in general, as the extension of control and authority by one country on foreign entities. When transferring the historical experience to the economic analysis we refer to “cultural imperialism” which takes place between different fields of study. In particular, economic imperialism is the adoption of conceptual instruments of economics (in particular the prevalent neoclassical economics) to examine other disciplines, in order to reach innovative conclusions, which sometimes are even subversive with respect to the traditional ones. Such imperialism is being applied first of all with regard to law, but also on sociology, religion and other subjects. This tends to foster on the one hand a feeling of omnipotence with regard to the ability of neoclassical economics to analyze heterogeneous social phenomena, but on the other hand it may also create a suspicion about the actual ability of a supposed nearly all-embracing instrument, i.e. economics, to interpret many phenomena without excessively simplifying them.

The use of the box of tools offered by economics has been successful particularly in analyzing juridical problems. Nevertheless certain conclusions have been deemed unacceptable because they do not take into account value judgments on which such conclusions should be based. In this connection we remind that law already experienced several attempts, with different success, to be “colonized” by various disciplines like psychology, biology, etc. However we remind in particular that Hans Kelsen (1881-1973) - one of the preminent jurists of the 20th century – lays claim to the autonomy of the legal order, which in his opinion is characterized by a structure which has no reference to either market, or religion, etc.

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Kelsen writes, in fact: “in a most uncritical way jurisprudence has been mixed with psychology and biology, with ethics and theology. Today nearly no specific science exists in which a law scholar does not feel to be competent; on the contrary, he believes he can increase his scientific fame by borrowing elements from other disciplines. In this way, of course, the true juridical science goes lost.”¹

Other scholars are of the same opinion. Although in a specific context, on a separation line is also Michel Villey (1914-1988) who writes: «le premier mérite des fondateurs de la science du « jus civile », la première pierre de la fondation, fut d’isoler: “Isolierung” – de clairement distinguer le

¹ *Reine Rechtslehre*, 1934, reprinted 1960

domaine de la science du droit de ceux de la politique, de la moral en général – évitant un confusionnisme où les modernes théories générales du droit nous on fait retomber²».

On the contrary Gary Becker, an early and pre-eminent contributor to economic imperialism states: "...the horizons of economics need to be expanded. Economists can talk not only about the demand for cars, but also about matters such as the family, discrimination, and religion, and about prejudice, guilt, and love. ...I am an economic imperialist. I believe that good techniques have a wide application."³ The imperialist's methodological approach is revealed in particular by the final statement according to which "good techniques have a vast field of application". Therefore, according to Becker, they should be widely applied without any great concern for the values connected to non economic fields of studies.

2. Complexity versus simplicity

In an often quoted article by Lazear⁴ economic imperialism "is defined as the extension of economics to topics that go beyond the classical scope of issues, which include consumer choice, theory of the firm, (explicit) markets, macroeconomic activity, and the fields spawned directly by these areas. The most aggressive economic imperialists aim to explain all social behavior by using the tools of economics. Areas traditionally deemed to be outside the realm of economics because they do not use explicit markets or prices are analyzed by the economic imperialist."

The case of economics is not unique. Borders among different disciplines move or become uncertain: zoology and botanic have been partly absorbed by biology, and physics and chemistry as well are mixing⁵. In the case of economics, it could enlarge its domain particularly when in the 'thirties a wide-ranging definition by Lionel Robbins (1898 – 1949) was widely accepted: "Economics is a science which studies human behavior as a relationship between ends and scarce means which have alternative uses."⁶ The reference to human behaviour in general - not limited by exclusive reference to production, distribution and consumption of wealth – opened the frontiers to the conquering expeditions.

Economic imperialism has been often considered a success story. Lazear, a convinced imperialist proudly states: "By almost any market test economics is the premier social science. The field attracts the most students, enjoys the attention of policy makers and journalists, and gain notice, both positive and negative, from other scientists. In large part, the success of economics derives from its rigor and relevance as well as from its generality. The economic tool box can be used to address a large variety of problems drawn from a wide range of topics...the ascension of economics results from the fact that our discipline has a rigorous language that allows complicated concepts to be written in relatively simple, abstract terms. The language permits economists to strip away complexity. Complexity may add to the richness of description, but it also prevents the analyst from seeing what is essential."⁷ "Of course simplicity has the advantage to offer quick understanding and

² Michel Villey, *Signification philosophique du droit romain*, in Archives de philosophie du droit, tome 26, l'utile et le juste, Paris, Sirey, 1981, pp. 381-392, citaz. p. 389

³ Interview to Gary Becker in "*Religion & Liberty*", avril 1993, also on Internet.

⁴ See Edward P. Lazear, *Economic Imperialism*, Hoover Institution and Graduate School of Business, Stanford University, 1999, also on Internet, p. 6. In 2006 professor Lazear was appointed chairman of the US President's Council of Economic Advisers.

⁵ See George J. Stigler, *Economics-The Imperial Science?*, "Scandinavian Journal of Economics", 1984, p. 301

⁶ See Lionel Robbins, *An Essay on the Nature and Significance of Economic Science*, London, Macmillan, 1935, p. 16.

⁷ See Lazear, cit. pp. 1-2.

simple solutions to problems, but complexity is, in general, an unavoidable reality. This is why there is no a priori reason to always favour simplicity. Rather, some sort of benefit cost analysis between simplification and complexity should be made before choosing the one or the other approach. Probably, simplification could be in general a first step, to which a deeper analysis should follow. Remember the mathematician and philosopher Alfred N. Whitehead (1861 -1947): “Seek simplicity, and distrust it”.

In this connection consider the case of the Coase “theorem”, as stated by Guido Calabresi: “if one assumes rationality, no transaction costs, and no legal impediments to bargaining, all misallocation of resources would be fully cured in the market by bargains⁸”. The strong message by Coase is that negotiation among the parties involved can usefully substitute public intervention aimed at correcting externalities, like pollution. This message was a surprise at the time it was stated, since economists thought that relevant externalities should be corrected by public intervention. This conviction is based on the teaching of Pigou, strongly, and sometimes unfairly criticised by Coase, who put words in the mouth of Pigou, stating also ad personam criticisms⁹.

Referring to value judgments, we note that Coase’s theorem is, on the contrary, coherent with the classical liberal tradition, characterized by distrust in the State, so that to even demand, in the 19th century, the abolition of the Government monopoly¹⁰. This philosophy is in agreement with the subsequent anarcho-capitalism, whose main scholar was Murray Rothbard (1926-1995), who with respect to pollution abatement stated arguments similar to Coase (though with a less brilliant analysis)¹¹. In fact, scholars in law and economics generally tend to assume that markets determine efficient situations, whereas regulation often damages consumers, instead of favouring them.

In any case, if we avoid complexity, we stick to Coase’s assumptions, in particular the absence of transaction costs and, de facto, the limitation of transactions to two subjects. Ignoring other interesting aspects of the theorem (e.g. the “discovery” of the importance of transaction costs) this simplification has led some scholars to compare it, rather brutally, to the “invention of the wheel”¹². If, on the contrary, we choose to accept complexity, we discover that Coase’s faith in bargaining (as opposed to state intervention) in order to reduce externalities, gives rise to useful solutions paradoxically only when extended bargaining is made possible by state intervention. Coase is in fact one of the scholars at the root of the discovery by Dales of the creation of markets for the sale of pollution rights¹³. A market simulation scheme which in practice can be applied only through active public

⁸ See Guido Calabresi, *Transaction Costs, Resource Allocation and Liability Rules: A Comment*,

⁹ Sui convincimenti antistatalisti a priori di Coase vedi l’ottimo saggio di Brian Simpson, *Coase vs. Pigou Reexamined*, *Journal of Legal Studies*; 1996, pp. 53-97, spec. p. 92. Inoltre del medesimo A. e nello stesso luogo *An addendum*, pp. 100-101, e, di Ronald Coase, il polemico: *Law and Economics and A. W. Brian Simpson*, pp. 103-119

¹⁰ Vedi ad esempio, di un seguace di Frédéric Bastiat, Gustave de Molinari (1819-1912), *Les soirées de la rue Saint-Lazare, 1849*, rintracciabile anche su Internet

¹¹ Cfr. Murray N. Rothbard, *Per una nuova libertà*, Liberilibri, Macerata, (1973) 1996, pp. 350-58

¹² See David De Meza, *Coase Theorem*, “The New Palgrave Dictionary of Economics and the Law, vol. I, p. 280

¹³ John H. Dales, *Pollution Property & Prices*

regulation. Perhaps the most successful emission trading system to date is the SO₂ trading system under the framework of the Acid Rain Program of the 1990 Clean Air Act in the USA. The European Union Emission Trading System (started in January 2005) is the largest multi-national, greenhouse gas emissions trading scheme in the world, and it is heavily regulated by the European Commission. Therefore we note that Coase's faith in the success of negotiations among parties to check pollution and external diseconomies in general, reaches a relevant practical result only when such negotiations are made possible by a public intervention aiming at the reduction of information costs and at making possible contacts among the different parties, so as to overcome Coase's restrictive assumption which limits negotiations to two subjects¹⁴.

3. Value judgments: deontological ethic versus consequentialism

One of the basic reasons why the "conquest" of law by economics is partially unsuccessful is the difference in value judgments which form the benchmarks on which the two disciplines are based¹⁵. For economics such benchmarks are, in particular, efficiency and equilibrium. Reference to economic equilibrium (e.g. when the market price reaches the level at which demand and supply balance) contains a value judgment, since it implies the preference for a stable situation. The connected reference to efficiency in the productive use of resources (allocative efficiency), refers to a market situation in which productive factors are allocated so as to maximize their net benefit. This concept implies the value judgment according to which the optimum allocation of resources is privileged in various situations.

Law studies use benchmarks in an even more explicit way. The main points of reference in this area are three, and we list them in order of importance:

- justice is the most important benchmark. It requires that all people receive a loyal and ethically correct treatment. In general deontology is applied, to which we shall refer below. Note that "When referring to objectives dictated by justice per se (as distinguished by distributive justice), subordination of justice to efficiency cannot be accepted. Actions and behaviours are right per se independently from their consequences, since an ethical positive value is attributed to them. In this case right is synonym of good, and wrongful is synonym of evil. Good and evil, right and not right are ethical categories which have a priority on the characteristics which define efficiency both of the process and of economic results. Actions and behaviours which have a positive ethical value may be considered as constraints in any efficient economic process. A virtuous interdependency can also take place between justice and efficiency. Performing right actions per se increases not only personal welfare, but gives rise to a climate of enhancement of the quality of life to the common benefit. This improvement may be measured also in terms of a greater quantitative result of the market, since a lower number of evil acts is performed, society will spend less for prevention and punishment"¹⁶.

¹⁴ In passing, let us note that this remark corrects the at least partially unfair treatment by Coase with regard to Pigou, who is at least partially unfairly accused on the basis of words which Coase puts in Pigou's mouth, with some sort of distaste extending to Pigou's personal behaviour and sexual preferences¹⁴.

¹⁵ See e.g. B. Hsiung, *The Commonality Between Economics and Law*, "European Journal of Law and Economics", 2004, pp. 33-53

¹⁶ See Ignazio Musu, *Commento to Emilio Gerelli, Sui confini dell'imperialismo economico*, "Rivista di diritto finanziario e scienza delle finanze", 2005, p. 489-92

- schools of thought. A reference point of intermediate level may be offered by various schools of thought. An important benchmark is deontological ethic, according to which the fairness of an action is intrinsic, and does not depend on its consequences. In other words, a person's behavior can be wrong even if it results in the best possible outcome. And, an act can be right even if it results in a bad outcome. Deontological ethic sets itself against regulatory utilitarianism (see below), which, concerning law, is linked to consequentialism, referring to those moral theories that hold that the consequences of a particular action form the basis for any valid moral judgment about that action. Thus, for example, where a deontologist would always see lying as immoral, a consequentialist would see it as moral if it led to good consequences. Another reference point is natural law theory (*giusnaturalismo*) a law whose content is set by nature and that therefore has validity everywhere; laws are immanent in the nature of things (and not created, for instance, by constitutional rights). They can emerge by the natural process of resolving conflicts, as embodied by the evolutionary process of the common law. Another reference point is positivism, a philosophy stating that the only authentic knowledge is scientific knowledge, and that such knowledge can only come from positive affirmation of theories through strict scientific method. Juridical positivism maintains, in contrast with the natural law theory, that a juridical system can be defined independently from terms or propositions linked to value judgments¹⁷;

- doctrines to deal with concrete law cases. For example one of such doctrines is negligence, a type of tort civil in nature. Negligence means conduct that is culpable because it misses the legal standard protecting individuals against foreseeably risky, harmful acts of other members of society.

The fact that benchmarks are used both in law and in economics may represent a cultural identity, which however shows also important differences. The benchmarks we have mentioned are in fact based on different value judgments. However economic “imperialists” do not take into account this fundamental fact. For instance Hsiung notes that in dealing with bilateral relationships among individual with conflicting and restricted interests, law and economics have independently reached a similar analytical approach based on benchmarks. However according to him “the major difference is that economic benchmarks are sustained by a powerful theory of behaviour, whereas juridical benchmarks (the concept of justice, various schools of thought, and many doctrines), do not possess such a theoretical background”¹⁸. This is a representative but wrong judgment. Neoclassical economic principles (centred on maximization of utility and profit by a rational subject with knowledge under certainty) have the advantage to be based on relatively simple assumptions. However it does not follow from this that they should be necessarily preferred to juridical principles, which are based on moral philosophy, on juridical decisions and on formal laws.

In this connection it is important to stress, as mentioned above, that an important part of the legal doctrine is based on the ethics of deontology, i.e. on the conviction that ethics allows, or on the contrary prohibits, a given action, without compromises. In this connection let us quote, for example, Kant’s negative reply to the question as to whether we might lie and reply negatively to the question of the potential murderer who asks us if a friend of ours, which he wants to kill, has taken refuge in our house (which the potential victim has done in fact). Neoclassical

¹⁷ This is the “methodological” juridical positivism; “ideological” juridical positivism maintains that the law must be enforced whatever its content (which is considered unacceptable from a philosophical point of view).

¹⁸ B. Hsiung, cit., p. 41

economic thought, as we mentioned, is based instead on the theory of utilitarianism, an ethical doctrine which maintains the coincidence of the good with the useful, and is a form of consequentialism, according to which the acceptability of an action depends on its consequences, and therefore on the circumstances in which it is performed. For this reason the attainment of an objective is planned independently by the way it is attained (e.g. by not holding to a promise, because the cost of holding it is greater than the advantage deriving from it).

As a consequence, strictly sticking to these principles Steven Shavell writes: “...the notions [of morality] should not be given importance in social welfare evaluation beyond that associated with their functionality and with our taste for their satisfaction - no deontological importance should be accorded to them – for doing so would conflict with social welfare and lead to its reduction...The view that a moral notion, such as the duty of promise keeping, matters in itself to the evaluation of social welfare is the deontological view that is shared, at least in part, by virtually all philosophers. Such views conflict with a fundamental assumption of welfare economics, which is that social welfare depends exclusively on utility of individuals...If independent weight is given to a notion of morality under a measure of social welfare, then in some situations the utility of every single individual will be lowered as a result of advancing that measure of social welfare.”¹⁹

This approach may give rise to unacceptable results:

- Take the case of interpreting the choice to procreate children, comparing it (according to Becker) to the demand of consumer durables. This approach may have some limited economic value in understanding such an important choice, although the Becker’s interpretation might seem to apply better to agricultural societies where children contributed to production at a very early age, rather than in our post-industrial society in which they cause a heavy cost for education (at least in advanced countries). However, given the limitation of this approach, a psychologist defined as “caricature” Becker’s interpretation of the family²⁰. Other extreme cases are:

- a drunk car driver runs a pedestrian down. Since the damage is caused by the interaction between two subjects, according to economic logic there would be neither victim nor aggressor. Ronald Coase remarks that, had the pedestrian not gone out for a walk, the accident would not have taken place. And since the unlucky victim is probably more reasonable and more sensitive to disincentives than the drunken driver, according to economic criteria it would be more expedient to allocate to him the costs of the accident, in order to create a disincentive to its repetition. Of course this denies the elementary values of justice, which dictate an equitable and ethical treatment with regard to all persons. Furthermore, if we extend the evaluation from the micro to macroeconomic point of view, we find that the contention is wrong, because by favouring the drunkard we give incentive to alcoholism (the consumption of or

¹⁹ Shavell’s position is similar to that of Bentham who states that the task of the supporter of deontology is to teach men as to how they should direct their emotions so that they are subordinate as much as possible to their welfare. Cfr. Bentham: *Deontology or the Science of Morality*, 1834 reprinted by Elibron Classics, 2000.

²⁰ See Paolo Legrenzi, *Felicità*, il Mulino, Bologna, 1998, p. 48 and 50.

preoccupation with alcoholic beverages to the extent that this behavior interferes with the alcoholic's normal personal, family, social, or work life), which causes enormous costs, since with the exception of nicotine addiction, alcoholism is more costly to most countries than all other drug use problems combined.. Estimates of the economic costs of alcohol abuse, collected by the World Health Organization, vary from one to six per cent of a country's GDP. One Australian estimate pegged alcohol's social costs at 24 per cent of all drug abuse costs; a similar Canadian study concluded alcohol's share was 41 per cent^l. A study quantified the cost to the UK of all forms of alcohol misuse as £18.5–20 billion annually. And in North America yearly alcoholism costs amount to about \$170 billion

- with the same logic, if a number of rapes are perpetrated by night, the more efficient way to minimize the cost of repetition of the crime would be to forbid women to go out by night since it would be more expensive to control criminals than women. An example of economic fundamentalism, which denies human rights: the ethical and juridical behaviour rules which should be implemented because of their essential role in putting justice to practice. Such rights, at least in the western tradition, are deemed unalienable and necessary with regard to freedom and for the guarantee of a “reasonable” quality of life.
- advocates of natural rights, and in particular of freedom of speech will certainly oppose Richard Posner’s opinion, according to whom the limitation of such right would be justified by the objective of securing political and social stability in the initial phases of economic development, in which citizens are poor and less well-schooled²¹ (a contention which should be proved, taking into account traditional forms of wisdom).
- ???

5. Conclusion: the cobbler’s limits

Therefore to the Socratic “question: how should we live?”, he who replies using the value judgment of deontological ethics will reject at least one part of the conclusions drawn by law and economics which uses consequentialism. Furthermore, keeping to deontology may create economic benefits ignored by Shavell, since, as we mentioned, deontology may favour economic growth. This happens also because transaction costs are inversely correlated to generalized trust, defined as the probability that any two subjects feel reciprocal trust in a specific interrelation; a situation fostered by deontology²². Thus, for example, 66% of Norwegians, who have a per capita income of \$ 37.020, stated in an opinion survey that they trust other subjects, whereas a majority of Brazilians, whose income per capita is only 7,510 stated that: “one is never careful enough when dealing with other people”.

²¹ R. A. Posner, *Wealth Maximization Revisited*, “Notre Dame Journal of Law, Ethics and Public Policy”, 1985, p. 85-105

²² Cfr. Paul J. Zak, *The Neuroeconomics of Trust*, in Roger Frantz (ed.) *Two Minds. Intuition and Analysis in The History of Economic Thought*, Springer, London, 2005.

To conclude, we remind that John Stuart Mill (1806-1873), one of most influential utilitarians, recognizes the prevalence, at least in certain instances, of the deontological approach: “Justice remains the appropriate name for certain social utilities which are vastly more important, and therefore more absolute and imperative, than any others are as a class (though not more so than others may be in particular cases); and which, therefore, ought to be, as well as naturally are, guarded by a sentiment not only different in degree, but also in kind; distinguished from the milder feeling which attaches to the mere idea of promoting human pleasure or convenience, at once by the more definite nature of its commands, and by the sterner character of its sanctions.”²³

In view of these constraints scholar of law and economics should remember the wise advice by Pliny the Elder (23-79 AD): *ne supra crepidam sutor iudicarem*, the cobbler should not judge above the shoe.

²³ This is the last paragraph of *On the Connection Between Justice and Utility*, in *Utilitarianism*, 1863, also on Internet