Law and Economics in Italy

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Abstract

Law and economics in Italy is still an underdeveloped subject. Despite the early contributions of the 1960s and 1970s, most Italian lawyers and economists have displayed a marked indifference towards the economic approach to law. After reviewing some initiatives which promise to foster the spread of law & economics, we show that the hindrances encountered by the economic analysis of law stem from a misconception of both the economic and the comparative method.

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1. Introduction

The origins and subsequent development of law and economics in Italy can be described as a history with some lights and many shadows. In the following sections we shall see that since the 1960s the economic approach to law has attracted increasing attention, but it has not succeeded becoming a prominent part of Italian legal doctrine. The second section briefly reviews the earliest Italian contributions to EAL and summarizes the debate on its transplantation to a civil law country. Sections 3 and 4 discuss the reasons why large sectors of the legal and economic profession have chosen not to follow the path that has proved so fruitful in the United States.

2. Italian Law and Economics Between the Past and the Future

At the same time as Ronald Coase and Guido Calabresi were working on their seminal articles, an Italian scholar, Pietro Trimarchi, published a pathbreaking
book on strict liability (Trimarchi, 1961) entirely based on concepts such as the allocation of risks to the least cost insurer or recourse to strict liability to induce potential wrongdoers to adopt optimal precautions. A later article, also translated into German, applied the tools already employed in the field of tort law to breach of contract cases (Trimarchi, 1970).

These contributions marked the first appearance of EAL in Italy. However, they did not prompt an immediate reaction. It was not until the late 1970s that systematic EAL research and teaching began in Italy. Even at this late stage, moreover, the economic approach to law was largely confined to the margins of the legal profession.

Some years ago the spread of the economic approach to law in Italy was the subject of a detailed analysis by Ugo Mattei and Roberto Pardolesi (1991). The authors remarked that the hindrances encountered by the economic analysis of law stemmed, above all, from a misconception of both the economic and the comparative method.

With regard to the former, Mattei and Pardolesi stressed that Italian economists had devoted their energies mostly to the study of post-Keynesian economics. Yet, it is well known that the law and economics movement sprang from the development and revision of the neoclassical paradigm during the decades following the end of the Second World War. The choice of a different line of research was probably one of the factors that most seriously hampered the dialogue between lawyers and economists.

As far as the comparative method is concerned, Mattei and Pardolesi dismissed the claim that EAL is useless in civil law systems because of its American origin. To be sure, the great dichotomy between civil law and common law is still a distinctive feature of the Western legal tradition. Today, however, few scholars (if any) would be willing to reject the doctrines developed on the other side of the Atlantic because of fundamental differences in the American legal system. The phenomenon of legal transplants, which modern comparative studies have emphasised and explored (see for example, Watson, 1974; Sacco, 1991; Ewald, 1995) is the best evidence that each tradition borrows from the other when confronted with the same problems.

If common and civil lawyers are able to communicate in many fields, explanation is still required as to why, in the late 1990s, the economic analysis of law has still not gained widespread acceptance in Italian legal culture. In the following two sections we shall see that the answer probably differs between lawyers and economists. Both groups of social scientists may have been heavily influenced by EAL, but each chose not to cultivate the interaction between algebra and pandects. The reasons why lawyers and economists have been deaf to the lessons of Coase et al. shed light on the evolution of these two branches in Italy.
3. Why Italian Lawyers do not Listen

Lest we give a distorted portrayal of the Italian situation, we must immediately specify that recent years have witnessed a growing interest in the economic approach to law. As the Italian Bibliography makes clear, the number of authors applying the microeconomics categories to the study of legal problems is now much greater than it was in the recent past. Even more importantly, the subjects dealt with by these writings are highly diversified, ranging from classical antitrust themes to environmental issues to the market for works of art.

Other initiatives have been planned to foster the spread of EAL. Il Mulino, a prominent Italian publisher, is about to issue a journal entirely devoted to law and economics. This undertaking will be backed by a textbook on law and economics, presently being compiled, which should link with the Italian translation/adaptation of the second edition of the famous textbook by Cooter and Ulen. The purpose of the Italian version is to enable Italian students to grasp the main features of the economic approach to law through their application to the Italian legal system. However, the courses in comparative law and private law offered by the Law Faculties of Rome and Trento are already being taught with an eye to the concepts arising from law and economics. As further evidence of interest in this subject we may cite the law and economics meetings held in Siena in 1992 (see the papers collected by Mattei and Pulitini 1994) and 1996, attended by more than one hundred Italian lawyers and economists, and the conference organized in Milan in October 1995 with the joint participation of American and Italian lawyer-economists (see the papers by Monateri, 1995; Gambaro, 1996; Pardolesi, 1996).

Although these projects confirm the impression of lively debate, explanation is still required for the indifference displayed by most of the Italian legal doctrine (not to mention the courts). A host of reasons apparently hamper complete acceptance of the economic approach to law. None of them, however, is compelling.

To begin with, lawyer-economists must still contend with the perennial claim that the notion of efficiency is politically biased. The choice of efficiency as the reference point or crucial paradigm of a value judgment is regarded with suspicion by those who believe that the law cannot neglect distributive concerns (see, for example, Zaccaria, 1995). Suffice it to say that the traditional distinction between positive and normative economics is now in crisis and the notion of efficiency is no longer regarded as neutral (see Blaug, 1992; Hovenkamp, 1990). It is worth noting, moreover, that even an influential scholar clearly extraneous to the law and economics movement acknowledges the possibility of a reconciliation between cost-benefit analysis and the principles of egalitarianism (Dworkin, 1986, p. 276ff.). Hence, in economics as well as in law, the usefulness of the concept of efficiency should be judged
according to the problem at hand.

However, rejection of the ideologically oriented approach believed to be prevalent in Chicago-style law and economics hampers thorough understanding of other currents of thought which shape the economic analysis of law. In other words, it is a mistake to identify EAL with Posner and his followers. The success of law and economics is largely due to the variety of research programs on which it is able to draw. The neoclassical paradigm of the Chicago school, for example, is now - at least, from a certain point of view - far less interesting than the comparative institutional analysis conducted by Oliver Williamson and other scholars in the area of new institutional economics (for discussion of the relationship between new institutional economics and law and economics see Williamson, 1993). It is worth mentioning that many Italian economists are now deeply involved in this research program (see, for references, the survey by Rizzello, 1996).

There are those who already suggest the existence of post-Chicago law and economics (see Symposium, 1989; Rubin, 1996). We prefer to speak of numerous competing lines of inquiry which sometimes yield conflicting results. A prominent role is now played by game theory, whose first applications to legal problems date back to the early 1970s. The analysis of strategic interactions among individuals, the main concern of game theory, has progressively undermined traditional beliefs about the role of the market and governmental regulation (see, for example, Ayres, 1990; Hovenkamp, 1995; for an updated list of game theory applications to legal problems see Huang, 1995).

In the light of these developments, nothing could today be further from the truth than the monolithic vision of EAL often displayed by Italian scholars.

These remarks take us to another debated aspect of the reception of EAL in Italy. In many quarters the economic approach to law is regarded as simply irrelevant to better understanding of legal problems. Why study economics, the argument goes, if the solutions it provides are more or less coincident with the ones reached by means of the familiar legal methods? Statements of this kind reveal a patent misconception of the purposes that EAL seeks to accomplish. The prestige which surrounds economics - often regarded as the leading social science - may have prompted the belief that the economic approach to law is able to provide a definitive answer to any doubtful matter. By contrast, it is more realistic to recognize that law and economics provides useful tools with which to check the arguments that lawyers employ by shedding light on the economic contest in which a legal dispute arises. Therefore, the main contribution of law and economics is the enhanced understanding of the interests at stake it supplies.

A brief survey of the Italian literature lends support to this view. In nuisance cases, for example, the notion of externality explains why Italian courts grant a sum of money to the injured party even when the wrongdoer is allowed to
pollute (Pardolesi, 1977 and, more recently, Mattei 1995; Gambaro, 1995). In tort law the age-old debate on the content of fault gains a new and stimulating meaning when analysed through the lens of economics (Cafaggi, 1996). Needless to say, the new Italian antitrust law of October 1990 would be impossible to understand without the support of an economic apparatus (see Pardolesi, 1993).

Although its results are hardly original law and economics exerts a powerful influence on the style of legal reasoning. The new rhetoric of EAL is best seen as a device which shows the lawyers which elements of a legal controversy are relevant and which are not (see Ackerman, 1984; McCloskey, 1988). This feature, however, can be regarded as a primary reason for its appeal as well as for its uneasy reception in Italy. Indeed, the economic argument compels lawyers to look at legal disputes from an unprecedented point of view, one almost at odds with the supposedly orthodox attitude. Instead of talking about rights and entitlements, lawyers are forced to assess the consequences of each rule on the allocation of resources. Apart from the complexity of the analysis, it is clear how far it diverges from the traditional reasoning of the Western legal tradition. The clash between the Western legal tradition and the Posnerian version of law and economics has recently been highlighted by Monateri (1995). By contrast, the usefulness of instrumental reasoning in the Italian legal system has been reaffirmed by the constitutional judge Mengoni (1994).

In short, Italian legal culture finds itself caught in a paradox. Law and economics promises valuable insights into legal problems, but at the same time it requires in-depth understanding of its techniques. Lawyers can take advantage of the economic approach to law only if they choose to invest in this field. Unfortunately, though, they lack the data with which to gauge the benefits available until that investment is made. This paradox is largely due to the scant attention paid to economics in lawyers’ training. The Italian law faculties normally include only one course of economics on their programs, which is clearly inadequate to tackle the complexity of modern mathematical economics.

Of course, Italian lawyers have occasionally displayed deep understanding of the economic issues underlying legal matters. For their part, many Italian economists have been keenly aware of the interaction between law and economics (for references to the works of nineteenth-century Italian lawyers and economists see Cosentino, 1990). It is clear, however, that this tradition has been unable to lay the basis for more systematic study. It may be that one of the reasons for this lack of communication has been the role played by social scientists in Italian society and culture, but we believe that the present situation can be explained mainly by the shortcomings of academic training.

In short, the lack of a formal training is a problem that cannot be postponed any longer. It is at this point that Italian economists should enter the scene. Unfortunately, they have listened no more than Italian lawyers have done.
4. Why Italian Economists do not Listen

About two decades ago Ronald Coase suggested that the expansion of economics into contiguous fields would come to an end when social scientists in those fields were able to master its techniques. The number of American lawyers who now have a PhD in economics seems to confirm his forecast (Coase, 1978, 1996). Nevertheless, it is clear that law and economics in the United States would have had less impact if economists had not involved themselves in the enterprise. It is hardly an exaggeration to state that the cooperation between lawyers and economists has been a fundamental factor in the development of the economic approach to law (for information on the involvement of economists in law and economics see Ellickson, 1989; Landes and Posner, 1993; Stigler, 1992).

What about Italy? The indifference of economists towards legal institutions is so manifest that it is not worth dwelling upon. Suffice it to say that a recent introduction to a collection of papers by Ronald Coase does not include the slightest reference to his influence on the economic analysis of law or to Italian contributions in that field (Grillo, 1995, pp. 7ff.). Judging from these writings, it seems that economics and law in Italy do not communicate at all.

This situation is even more surprising if we look at the training provided by Italian schools of economics. Their programs include a wide range of law courses, and economics students have ample opportunity to become fully conversant in both disciplines. Why this does not happen is not clear. One might suggest that the jobs market is highly specialized and young graduates with hybrid skills do not find employment easily. Whatever the case may be, on the eve of the twenty-first century the Italian Bibliography of Law and Economics lists only a few contributions by Italian economists.

It is difficult to say whether the present situation will change in the near future. Since the last century, political debate on the reform of administrative agencies and governmental regulation has been the main concern of economic thinkers in Italy (see, for example, the essays on market and democracy collected in Bocciarelli and Ciocca, 1994). In accordance with this tradition, current analysis appears to be dominated by macroeconomics issues (for a recent survey of the Italian situation by a French economist see Bartoli, 1996).

This is not to say, however, that hopeful signs of a renewed interest in legal institutions are entirely lacking. The presence of economists in the law faculties has recently begun to yield fruitful interdisciplinary studies. Some courses in economics, for example, have applied insights from law and economics to Italian laws and institutions (see Chiancone and Porrini, 1996; Galeotti 1995), and there are encouraging signals from the already mentioned Italian economists working in the field of the New Institutional Economics. Even more importantly, modern economics textbooks are now devoting more space to such
subjects as transaction costs, asymmetric information, strategic interactions and institutional constraints (see, for example, Del Bono and Zamagni, 1996).

Since the 1980s, moreover, there has been a growing interest in game theory. The activities of the Interuniversity Centre for Game Theory and Applications, established in 1990 in Florence, range from the development of research programs to the spread of game theory in the scientific community. Unfortunately, Italian economists at work in this field are unaware of the applications of game theory to legal problems. For example, a recent introductory textbook notes that game theory has been applied outside economics in such areas as political science, philosophy, computer science, engineering and evolutionary biology (Costa and Mori, 1994, pp. 10ff.). Law, of course, is not even mentioned.

Italian scholars are equipping themselves with the theoretical instruments employed in the economic analysis of the American legal system. In the short period the institutional dimension - be it the theory of the firm or the structure of administrative agencies and public utilities - will probably attract more attention than private law topics like contract, tort and property. Needless to say, even this development would be a giant step towards the interdisciplinary study of law and economics.

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