

# Istituto Bruno Leoni Rothbard Seminar

Law as individual claim in  
Bruno Leoni:  
A game theoretical approach

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# Introduction

- A critique of the kelsenian theory of the norm as a **sanction**
- Characteristics of Law as individual claim
  - **claim**
  - **legal claim**
- Originality and limits from a **game-theoretical** viewpoint
- Possible applications for a theory of law as **equilibrium of the game**

# Bibliography of Leoni

- Lezioni di filosofia del diritto (1959)
- Law and Economy in the making (1963)
- Law as Claim of the Individual (1964)
- **Appunti di filosofia del diritto** (1966)
- Freedom and the Law (1961)

## Leoni's **critique** of the kelsenian theory of norm as a sanction

- Kelsen proposed the theory of **norm as sanction**, i.e. in its linguistic context the norm must include a sanction
- For Leoni,
  - 1) there are norms including a sanction but are not legal
  - 2) there are fields, like constitutional law, administrative law and international that are not based on sanction
  - 3) if sanction is not decisive as an act there's no reason to be decisive in the linguistic context

Finally, sanctions **don't create** the law, just **support** it.

Kelsen deduces the law from the **state** (which posits the Grundnorm), Leoni from the **individual**.

## What does GT says about sanctions?

- There has a been a debate on the effectiveness of sanctions
- Tsebelis (1989) shows that an increase in the penalty leaves the frequency of violation of law **unchanged**
- Bendor & Mookherjee (1990) show how in a repeated PD sanctions are effective only under **very limited** conditions (intermediate degree of turnover and closeness of contact).
- Basu (2001) states a core theorem:  
“**Whatever** behaviour and outcome in society are legally enforceable are also enforceable through **social norms**”  
Corollary: “**If an outcome is not an equilibrium of the economy, it cannot be implemented through any law**”

## Theory of law as individual claim

- Characteristics of an individual claim:
  - 1) **Probability** judgement
  - 2) **Intervention**
  - 3) **Power** to intervene
  - 4) **Interest** of the individual who claims

**Definition: Demand of someone else's behaviour judged by the claimant as likely and corresponding to his own interest, and achievable via some sort of intervention, whenever such behaviour does not take place spontaneously, by virtue of a power the claimant thinks to be endowed of.**

La pretesa è la richiesta di un comportamento altrui considerato da chi lo richiede come probabile e corrispondente a un proprio interesse, cioè utile, nonché come determinabile con una qualche specie di intervento, qualora esso comportamento non si verifichi spontaneamente, sulla base di un potere di cui chi pretende si considera dotato.

## Characteristics of a **legal claim**

- A claim is **legal** if it is satisfied or is highly likely (from an objective point of view)
- The claimant **lays claim** with a high probability (demand its fulfilment) (1966)
- Obligation is a derived juridical category. **Law stems from claim**, obligation has just an instrumental function. An individual abides by an obligation to get his claim satisfied.

# Parallel between **norm** formation and **price** formation in the market

- Leoni applies a **praxeological** approach to the law: as the **price** comes from the match between **demand and supply** for a good, so the **law** is the result of the **encounter of individual claims**
- A subjective claim is not a legal claim because it could not be satisfied. To the contrary, **when it is really satisfied** then it becomes a **legal claim**
- The norm is nothing but the linguistic formulation of the encounter of legal individual claims

# Implication for the legal order

- In Kelsen the legal order proceeds from the fundamental law
- In Leoni the order comes from the **co-ordination** of individual claims
- The legal order derives from the co-ordination of individual legal claims
- Debt towards **hayekian** notion of **equilibrium as co-ordination of mutually compatible plans**

# Criticisms

- Barberis: Leoni pretends to substitute conflict for cooperation, but ends up **hiding conflict**. Physical conception of property. The theory doesn't hold for non-owner
- Lottieri – Rothbard, from a **natural law** perspective, question Leoni reliance on **common law**, for it would justify any norm that emerged

# Overtaking the difficulty

- Leoni's theory seems to be unsatisfactory because it presumes that when there is a high probability of being satisfied it becomes legal. **But** then in certain contexts any outrage could be judged as legal, and in general burglar's claim would be legal!
- This **misses** the point that in an interchange **both parties must have an interest** in its fulfilment.

## Cont.

- Leoni considers only the interest on the side of the claimant, e.g. the lender
- It **doesn't take into account** the into account the **recipient** of the claim, e.g. the borrower
- A **claim** is to be considered **legal** if it is in the **interest of both** (or n's) parties to an agreement to satisfy the object of the claim

# Cont.

- Leoni **goes out of the actual bi(multi)lateral relationship** among individuals
- Leoni: creditor's claim is legal because the debtor will have the same claim when he becomes a creditor
- But the **debtor could never become a creditor** and thus there should be no relationship (time inconsistency)
- What creates the relationship is **creditor's expectation** that the debtor will return the loan because it is in **debtor's interest** to do so. For he wants to build a **reputation**
- Thus there would be an encounter between lender's claim to get back the loan and debtor's claim to receive the loan

# Cont.

- Finally Leoni still includes **coercion** as *ultima ratio* even though weakened, but if there is a third party intervention, outside mutual agreement, then all the encounter of claims loses its bite right at the beginning.
- **Sanction** can be admitted but only if it is agreed on by the parties to overcome co-ordination problems
- These criticisms imply as well that **probability** should be interpreted from a **subjective** point of view, not objective.

# Restatement

- More precisely, in a probabilistic context, a claim is to be considered as legal, if in addition to the characteristics highlighted by Leoni, has the property that **the one who lays claim (claimant) to an action considers highly likely that it is in the interest of the person who should satisfy the claim to carry out such an action.**
- This may be thought of as an application of a **Perfect Bayesian Equilibrium**

# Cognitive validity

- In Leoni's theory, the decisive element is not coercion but the **willingness of the claimant** (creditor) to obtain from other agents (borrowers) a behaviour judged (foreseen) as highly likely (probabilistically).
- This theory helps explain the existence of **implicit contracts in the international context** (sovereign borrowing) and **informal economy** relationships (microcredit, e-bay) via **reputational mechanisms**.

# Cognitive validity

- But it is in agreement with the rational choice approach to institution formation that sees **institutions as an equilibrium of the game**
- Schotter (1981) and **Calvert** (1995) more recently and extensively use methodological individualism and rational actor

# Rational choice paradigm and institutions

- Characteristics:
  - methodological individualism
  - self-interest (not necessarily selfishness)
  - preferences are exogenous
  - preferences are complete, stable and transitive
  - interactive decisions (influence on others' choices)
- This approach doesn't assume institutions as given (rules of the game) backed by external sanction. It requires the behaviour of each actor, including who's applying sanctions, be **consistent with self interest**

Cont.

- The equilibrium notion is **Bayes-Nash self-enforcing equilibrium**. An institution of reciprocity emerges when failure to co-operate (abide by the agreement) is punished by other players
- Institutions are defined as equilibria in which **individuals' actions** are **dependent** upon past action of many others and **expectations** about **future** reactions of many others, to one's present actions
- It must be **rational** for (nearly) every individual to (almost always) **adhere to the behavioural prescriptions** of the institution given that (nearly) all other individual are doing so.

## Contrasting alternative approaches to the law

- Irti ('05) and other institutionalists and legal theorists see **market economy as dependent from the legal order**. Thus there should be no claim for a free economy outside the law, because m.e. is created by (and needs) the law (proceeding by the state)
- They **miss** the fundamental point that **law** like **m.e.** is **created by human interaction**, and so individuals possess all the right to claim to change the law if it is in their mutual interest to do so. Any violence (state) in the long-run is not an equilibrium and is deemed to failure.
- All the debate on law as coordination Waldron ('99), Landa ('07) (and critics Finnis ('89), Benditt ('04)), fail to see that **law** can co-ordinate only if it is the **outcome of a co-ordination**

# Final remarks

- Contrary to Barberis, this theory is **fully non-cooperative** and still holds among non owners (ownership might derive as a consequence of a self-enforcing equilibrium agreement)
- As to Lottieri & Rothbard, the mutual interest that defines the legal claim prevents violence by one side and it creates order based on mutual consent. And it is an order among natural persons
- **Competing legal systems** to choose from

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