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*Economics, Law and Humanities: Homo-what?*

*An Introduction*

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*Abstract:* This introduction explains the reasons behind this Special issue and discuss the organization and content of it. The difficulty of a genuine dialogue and understanding between economics, law and humanities, seems to be due not only to the fragmentation of reflections on man, but to a real ‘conflict of anthropologies’. What kind of conceptions of man and human values are presupposed by and / or privileged by economics, law, economic approaches to law and social sciences? How and when do these conceptions come into conflict within and between disciplines? How do these conceptions of man and his values influence the conceptions of economics, law and institutions, and vice versa, how do these last conceptions influence the former? What are the normative, regulatory and practical implications of assuming an anthropological and / or axiological perspective instead of another? This Special issue aims at exploring the possibility of finding a common ground for discussion between economics, law and humanities, through the analysis and comparison of both the conceptions of man, human action and values assumed by economics, law and humanities, and their normative implications. The contributions to this Special issue and its organization are outlined at the end of this introduction.

*Keywords:* Economics; Law; Humanities; Conceptions of man; Conflict of anthropologies

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## 1. The premise: a ‘conflict of anthropologies’?

This Special Issue on “Economics, Law and Humanities: Homo-what?” collects a selection of articles submitted to a Call for Paper in view of a Workshop with the same title – organized for the 29th World Congress of the International Association for the Philosophy of Law and Social Philosophy, University of Lucerne, Switzerland, 7-13 July 2019 – and then further selected by the Journal *Teoria e Critica della Regolazione Sociale*.

The Workshop aimed to explore the possibility of finding a common ground for discussion between economics, law and humanities, through the analysis and comparison of both the conceptions of man, human action and values assumed

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by these disciplines, and their normative implications. As such, the workshop was open to all those working in the fields of economic philosophy, philosophy of law, social sciences and economic approaches to law, with an interest in anthropological and axiological questions broadly understood.

We started from the assumption that the difficulty of a genuine dialogue and understanding between disciplines seems to be due not only to the fragmentation of reflections on man – from the models of *homo-(economicus, juridicus, politicus, sociologicus, reciprocans, etc.)* to conceptions of human dignity – but to a real ‘conflict of anthropologies’, each with the claim of being ‘truer’ than the other.

Economic approaches to law and institutions – among them: Economic Analysis of Law, Public Choice, Constitutional Economics, Institutional Economics, Behavioral Law and Economics, Nudging and Libertarian Paternalism – have long dominated, albeit with different strength and influence, the analysis and discussion of legal-economic issues and the regulation of increasingly extensive areas of human relations, including non-market relations and behaviours. Faced with such ‘domination’, legal and humanistic disciplines have often lamented the lack of genuine openness and dialogue on the part of economics, if not a real form of ‘economics imperialism’<sup>1</sup>. It is also true, however, that legal and humanistic disciplines have remained quite silent most of the times. They have simply stayed watching the show of the ‘colonization’.

On closer inspection, however, economics, law and economic approaches to law and institutions do not move from identical methodological approaches and epistemic values<sup>2</sup>, nor, above all, from identical conceptions of man and his values. For example, much of their respective assumptions – that individuals respond to incentives, the various notions of scarcity, exchange, private property, self-interest, efficiency or wealth maximization, cost-benefit analysis, the conception of institutions as ‘constraints’, of constitution as contract, or of laws and sanctions as rewards and punishments, ‘econs’ and ‘human’ in nudging approach etc. – implies specific and different conceptions of man, his motives and values, his freedom and equality. At best, some values are simply presupposed by economic models – i.e.: freedom of contract and autonomy, private property, etc., are implicit values of the perfect competition model – but these assumptions are not always spelled out or discussed or compared with other anthropological or axiological perspectives. Moreover, the emphasis on some aspects or motives of human behavior inevitably ends up by overshadowing, neglecting or crowding out other motives, such as altruism, the sense of justice and fairness, mutual trust, civic virtues.

In addition, economic approaches to law and institutions have rarely developed a philosophical reflection on human dignity, which is (perhaps) the last bastion not

1 Indeed, the expression ‘Economics imperialism’ is full of nuances and ambiguities. For an attempt to clarify it see at least Mäki 2009.

2 Identities and differences between the main economic approaches to law are well highlighted in Mercurio, Medema 2006. For an introductory comparison between Law and Economics, Institutional Economics and Libertarian paternalism see Silvestri 2019b.

yet ‘colonized’ by the economic world-view, and in which the legal-philosophical and humanistic disciplines appear to find shelter. But this, rather than throwing a bridge, digs a deeper gap between economics and legal-humanistic disciplines, as if economics and economy had nothing to do with human dignity. In this regard, however, it must be remembered that even some (ideological) versions of human rights have been accused of ‘imperialism’.

Nonetheless, this is only part of the story, since if it is true that economic science has long been the queen of social sciences, it is also true that in the last twenty years different reflections, approaches and alternative paradigms have been developed towards research paths that seem to open up to a more fruitful interaction between economics, law and humanities. And it is not just about the systematic destruction of the (now) old paradigm of *homo economicus* and its substitution with more ‘realistic’ model of man.

Just to cite a few examples: the capability approaches and their intersections with the reflections on human rights (Sen 1999a, 2005; Nussbaum 1997, 2011) as well as the appeals made by some Nobel prize economists for a more ‘human’ economy, ‘beyond GDP’ (Stiglitz, Sen & Fitoussi 2009)<sup>3</sup>; the various attempts to reintroduce ethics and reflection on values in economic analysis and public policies (Anderson 1995; Sen 1999b, Hausman, McPherson, & Satz 2016) – an attempt that, it is worth remembering, had already been prefigured in the 1943, in times of prevailing scientific positivism, by Luigi Einaudi (2017), one of the last great humanist-economists of the twentieth century, who “proudly placed” economics, and himself as an economist, within the “humanities” (Einaudi 1959: ix)<sup>4</sup> –; the most recent reflections on the moral limits of markets (Satz 2010, Sandel 2012)<sup>5</sup>; the various attempts to rethink the role of history, morals and customs in the approaches that have taken up some of the themes of the Old Institutional and Evolutionary Economics (Hodgson 2001, 2013) and the criticisms addressed to New Institutional Economics for its anthropological assumptions and the inability to think of a real “humanomics” (McCloskey 2016a)<sup>6</sup>, or the criticisms of Nudging from a liberal-contractarian perspective (Sugden, 2018); the attempts to rethink the role of individual values and “moral costs” in the future of Law and Economics (Calabresi 2006)<sup>7</sup>; the attempts to rediscover alternative paradigms to economic science, such as that of “civil economy” (Bruni & Zamagni 2007), or to thematize the role of the third sector, reciprocity and philanthropy<sup>8</sup> beyond the market/state or market/welfare state dichotomy, as well as the

3 But see also, more recently, Stiglitz 2013a, 2013b.

4 Cf. Silvestri 2018, and the essays collected in Heritier & Silvestri 2012 as an attempt to rediscover Einaudi’s ‘complex anthropology’, and, in particular, Heritier 2012 and Silvestri 2012.

5 *Contra* see Brennan & Jaworski 2015.

6 Cf. also the following debate on the *Journal of Institutional Economics* and the reply by McCloskey (2016b).

7 See also the essays collected in the *Global Jurist* Special Issue (3/2019), and Silvestri 2019 on the issue of values.

8 See, for example, Zamagni & Bruni 2013.

approaches developed by the fervent field of study of Social Economics<sup>9</sup>; the various attempts to rethink the anthropological meaning of gift and gift-giving and its ‘place’ in social sciences as a “third paradigm” (Caillé 1998, Godbout & Caillé 1998) between methodological individualism and methodological holism; and last, but not least, the attempt to develop a ‘new’ “Humanomics” (Smith, Wilson 2019) inspired by the thought of Adam Smith.

This ‘return to man’, these attempts to rethink the ‘human’ foundation of the social sciences, is undoubtedly to be seen as a positive sign, even though the above-mentioned ‘conflict of anthropologies’ seems to persist, albeit more attenuated and with significant signs of openness between the various disciplines.

## 2. This Special Issue

Without claiming to have a privileged point of view on man, the Workshop from which this Special Issue was born intended to address the following questions: 1) what kind of conceptions of man and human values are presupposed by and / or privileged by economics, law, social sciences and economic approaches to law? How and when do these conceptions come into conflict within and between disciplines? 2) How do these conceptions of man and his values influence the conceptions of economics, law and institutions, and vice versa, how do these last conceptions influence the former? 3) What are the normative, regulatory and practical implications of assuming an anthropological and / or axiological perspective instead of another?

The content of the Special Issue is organized as follows. The first group of articles revolves around the tension between individual and society and/or individual and institutions.

In *Identity and Consciousness in Economics*, Salvatore Rizzello (2019) attempts to clarify two controversial theoretical issues: how are economic agents aware of the decision making process? How are they aware of the relationship between individual identity and social identity? The concept of consciousness is of course crucial in the debate on the role of identity in economics. With the help of some ideas borrowed from quantum physics, which are at the basis of the microbiological processes of human consciousness and generation of knowledge, Rizzello focuses on the cognitive path from which diversity emerges, on the imperfect predictability of human behaviour as well as on the interactive connection between individual and social dimension.

Stefano Solari (2019), in his *Practical Reason, ‘Civil Prudence’ and the Law: Vico’s Epistemology and Economic Action*, moves from the assumption that adopting a single and credible model of man and common philosophical approach in both law and economics would help the study of an appropriate legal framing of markets. Hence his attempt to re-read both Vico’s epistemology, based on a *practical approach* and on uncertainty, and Vico’s anthropology. Vico’s thought and his

9 For an Introduction see Davis & Dolfsma 2008.

open-ended view of man and society are particularly suitable to establish an original connection between economics and the law, assuming normative theoretical elements as relevant items in economic reasoning. Vico introduced also a vision of what our society ought to be, some *civilising* value that can constitute a bridge between law and economics. Solari also shows how the political economy approach most compatible with Vico's epistemology – besides those of his friends Genovesi and Galliani – is Austrian economics, broadly intended. It shares a similar view of rationality and of the evolving order of society. However, it lacks a theorisation of *collective awareness* that was one of the major achievements of Vico.

In *The aspects of human action*, Domagoj Račić (2019) tries to re-join the divide between 'homo economicus' and 'homo sociologicus' and the corresponding divide existing in the conceptualisation of institutions. Maximising behaviour and a fixed and independent preference function on the one hand, and adaptive behaviour, and flexible but socially influenced preferences on the other, signify not only characterisations of possible courses of interpretation and action, but also the 'ideal types' assumed by economics mainstream and macro-sociology. Challenging this divide, Račić attempts to link the concepts of rational and interpretive action in the context of the 'agency/structure' or 'participant/social whole' debates. He provides several new or recontextualised answers at the basic level of individual understanding and interpretation of purposes of action in general, and the action taking place within institutional and organisational contexts in particular. At the same time, Račić introduces an analytically separable 'interface' that links individuals and institutions by providing four interrelated aspects of human action – habituation, deliberation, participation and reification, and constitution of norms. The paper attempts to offer insights into the internal dynamics of these processes, and to explore the links between them, including their simultaneity, partial overlapping and inherent tensions.

The following two articles are mainly concerned with an attempt to read some law and economics approaches (broadly understood) in a legal-philosophical perspective. Silvia Zorzetto (2019), in her *Rational, Reasonable and Nudged Man*, develops an enquiry into three main models of individual – the Reasonable Person, the Biased Nudged Human, the Homo Œconomicus (or the Economic Rational Man) – in order to explain and clarify their differences and similarities. Zorzetto puts forward two basic claims: (i) a closer dialogue between the literatures regarding such models of the individual and, in particular, those concerning reasonableness and nudging, are of value from a theoretical point of view; (ii) a significant distance exists between legal discourse and uses of these models and the related theoretical and philosophical speculation. This is particularly true with regard to the Reasonable Person and the Homo Œconomicus. Although legal scholars refer to them, such references mostly serve to enhance the discourse and are often nothing more than embellishments. In many instances, they import concepts and conceptions from other fields of investigation or literature by making a spurious and superficial analogy.

In *Homo Ludicus: Expected Strategies and Jurisprudence*, Alessio Sardo and Fabrizio Esposito (2019) start from the concepts of joint intentionality and shared intentions on which several scholars has relied either to account for how legislatures can have intentions (Ekins) or for explaining the normativity of legality (Shapiro). Sardo

and Esposito propose an alternative view called “expected-strategies approach”, combined with a team-reasoning approach to legislation. Based on a game-theoretic perspective, such approach anchors normativity to our capacity of coordinating our actions, both at the level of the law-maker, and at the level of the legal subjects. They show that for this coordinating function, an understanding of other players, expected strategies is sufficient. The expected-strategies approach portrays the rational agent as a *homo ludicus*, whose key social virtues are stability and predictability.

The last two articles return on the tension between individual and institutions, but shifted on the market and state dichotomy, the need to overcome their dualism and the related assumptions regarding human values such as altruism, freedom, sociality and trust.

Paolo Silvestri (2019), in *The All Too Human Welfare State: Freedom Between Gift and Corruption*, starts from the following dilemmatic puzzle that can be traced back to the conclusions of the celebrated Marcel Mauss’ *Gift*: can taxation and the redistribution of wealth through the welfare state be conceived as a modern system of circulation of the gift? But once such a gift is institutionalized, regulated and sanctioned through legal mechanisms, does it not risk being perverted or corrupted, and/or not leaving room for genuinely altruistic motives? Again: if the market’s utilitarian logic can corrupt or ‘crowd out’ altruistic feelings or motivations, what makes us think that the welfare state cannot also be a source of corruption? To explain the standard answers to the abovementioned questions as well as their implications, Silvestri first re-examine two opposing positions assumed as paradigmatic examples of other similar positions: on the one hand, Titmuss’ work and the never-ending debate about it; on the other, Godbout’s position, in-so-far as it shows how Titmuss’ arguments can easily be turned upside down. He then introduces and reinterprets Einaudi’s “critical point” theory as a more complex and richer anthropological explanation of the problems and answers considered in the paper.

Through the analysis of these paradigmatic positions, Silvestri develops two interrelated arguments. 1) The way these problems are posed as well as the standard answers to them are: a) subject to fallacies: the dichotomy fallacy and the fallacy of composition; b) too reductive and simplistic: we should at least try to clarify what kind of ‘gift’ or ‘corruption’ we are thinking about, and who or what the ‘giver’, the ‘corrupter’, the ‘receiver’ and/or the ‘corrupted’ party are. 2) The answers to these problems cannot be found by merely following a theoretical approach, nor can they be merely based on empirical evidence; instead, they need to take into account the forever troublesome, ambiguous and unpredictable matter of human freedom.

In *Leaving Town for the Market: The Emergence and Expansion of Social Trust in the Works of Elinor Ostrom and Henry Sumner Maine*, Marc Goëtzmann (2019) questions the claim that social trust is the product of market exchanges. He uses the evolutionary frame provided by the Victorian jurist Henry Sumner Maine to describe the process by which trust can be seen as the product of a gradual development that starts with small-scale communities and later allows market exchanges to develop themselves. By resorting also to the work of Elinor Ostrom, Goëtzmann argues that trust emerges first within small-scale communities, where first- and second-degree collective action problems need to be resolved. The development

of a social disposition to trust is closely linked with an institutional context that encourages individuals to take the externalities of their actions into account. This is made possible by customary mechanisms, as the development of social trust at this stage cannot rely on a mighty “Leviathan”. Moreover, as the literature on contract law shows, focusing on sanctioning mechanisms can be highly counterproductive.

Market exchanges might favor the further growth of social trust, hands in hands with the right institutional frame. However, this growth is not just the transposition of a previously acquired disposition to trust. Both Ostrom’s and Maine’s perspectives underline the fact that trust and trustworthiness are complementary and question a-rational perspectives on trust.

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