INTRODUCTION: THE IMPACT OF GUIDO CALABRESI ON LAW AND ECONOMICS SCHOLARSHIP

On November 7, 2008, the Erasmus University Rotterdam conferred the title of Doctor *honoris causa* upon Guido Calabresi, Judge of the US Court of Appeals for the Second Circuit, Sterling Professor Emeritus, and former Dean of Yale Law School. With the awarding of this doctorate, the Erasmus School of Law wanted to honour Guido Calabresi for his extraordinary intellectual achievements in the field of Law and Economics. This special issue of the *Erasmus Law Review* is published on the occasion of the award of the honorary doctorate to Guido Calabresi. The issue contains four contributions, all written by European authors, which show how Calabresi's writings have had a profound impact on legal scholarship and judicial decision-making not only in the US but also in Europe.

Guido Calabresi is unanimously recognised as a founding father of the Law and Economics movement. Economic analysis began to penetrate the legal debate in fields of law that are usually referred at as 'economic law', such as competition law and economic regulation of sectors of industry. It later became apparent that economic insights are equally relevant for analysing problems in other areas, including private law. Meanwhile, economic analysis of law has proven to be an extremely powerful methodology to better understand the ways in which legal rules develop their outcomes and to assess their real-life effects. Guido Calabresi's seminal publications on private law significantly contributed to the beginning of this new intellectual enterprise. His insights have become established as indispensable for understanding the rationale of legal rules and his analytical toolkit has become prominent in legal scholarship. Indeed, any student wishing to embark on the field of Law and Economics must become familiar with the work of two intellectual heroes: the first is Ronald Coase, who received the Nobel Prize in Economics in 1991; the second is Guido Calabresi, who elaborated on Coase's central ideas and integrated them into a general framework for discussing legal problems.

It is not possible within the limited scope of this Introduction to provide a full overview of Calabresi's impressive intellectual work. Instead, the focus will be on two contributions, each of which had a decisive impact

on the development of Law and Economics research. Calabresi's first groundbreaking article is entitled 'Some Thoughts on Risk Distribution and the Law of Torts';[1] together with a later article co-authored by Jon Hirschoff,[2] it is one of the most cited articles of the *Yale Law Journal*. In these articles and the ensuing book *The Costs of Accidents,* Calabresi laid the foundations of the economic analysis of tort law.[3] Tort lawyers tend to see compensation as the main goal of liability rules. In Calabresi's view, the major goal of liability rules is to minimise the costs of accidents. These costs can be divided into three categories: primary accident costs are determined by the number and severity of accidents; secondary accident costs materialise in the absence of optimal risk-spreading; and tertiary accident costs are the costs incurred by the legal system to establish and enforce liability. This powerful framework of analysis is able to accommodate concerns of both efficiency and justice. Efficiency is enhanced by deterring harmful activities and thus reducing primary costs of accidents. Justice considerations find their place when the goal of optimal risk-spreading (in other words, the reduction of secondary costs) is assessed. To reduce primary and tertiary costs, Calabresi developed his well-known concept of the 'cheapest cost avoider'. Liability should be the responsibility of the actor who is in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs and to take preventive measures if they are cheaper than the avoided accident costs. Up until the present, the framework developed in *The Costs of Accidents* has provided a powerful structure to organise discussions on the strengths and weaknesses of diverging liability rules in various areas of tort law, ranging from traffic accidents to medical malpractice and environmental harm.

Guido Calabresi is also the main author of the most cited paper in Law and Economics. Together with Douglas Melamed, he wrote the seminal contribution 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral'.[4] This article is an important extension of the original ideas of Ronald Coase, which have became known as the Coase Theorem. Coase's insights can be best understood as a criticism of the Pigouvian approach towards externalities. In Pigou's view, externalities could be internalised by levying taxes on harmful activities. Coase criticised this view, arguing that externalities are reciprocal and that the initial allocation of property rights

---

[1] G. Calabresi, 'Some Thoughts on Risk Distribution and the Law of Torts' (1961) 70 *Yale Law Journal* 499.

[2] G. Calabresi and J.T. Hirschoff, 'Towards a Test for Strict Liability in Torts' (1972) 81 *Yale Law Journal* 1055.

[3] G. Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (New Haven: Yale University Press 1970).

[4] G. Calabresi and A.D. Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 *Harvard Law Review* 1089.

has no impact on efficiency in the absence of transaction costs.[5] Consequently, the legal system may contribute to efficiency by decreasing the size of the transaction costs. If transaction costs are prohibitively high, the initial allocation of property rights will be final and inefficiencies cannot be corrected through the market mechanism. Guido Calabresi carried this approach further by introducing the distinction between property rules and liability rules and by assessing the efficiency of either rule in the presence of transaction costs. This distinction, which can be seen as a sophisticated development of the Coase Theorem, has become one of the most prominent analytical tools for analysing protection of entitlements in various fields of law.

Property rules and liability rules are alternative ways to protect legal entitlements to scarce resources. A property right entitles the owner to stop infringements of his or her right without prior consent. The property rule guarantees that the transfer of a right is voluntary, and transactions can take place only if they increase the utility of the parties concerned (joint welfare maximisation). Liability rules do not prevent entitlements from being infringed, but the infringer is forced to pay compensation. In the latter case, the court will fix the amount of damages due for carrying out an involuntary transaction. If transaction costs are low, property rules allow consensual transactions, and the price for the transfer of the right will reflect both parties' subjective valuation and the relative bargaining power. If an entitlement is protected only by a liability rule, this gives incentives to third parties to take the entitlement upon payment of damages whenever its value for the third party is higher than the damage compensation. In principle, this compensation should be equal to the reservation price of the holder of the entitlement. Calabresi and Melamed have argued that such involuntary transactions are desirable whenever transaction costs are high and the market for the transfer of rights does not work efficiently. As the most cited article in Law and Economics scholarship, 'One View of the Cathedral' has initiated a very broad literature. The distinction between property rules and liability rules has proven to be useful for understanding different types of legal protection of entitlements in various fields of law, ranging from nuisance and environmental to intellectual property law and the legal protection of privacy. Differences in the size of transaction costs or difficulties in calculating amounts of compensation may explain differences in legal protection by means of either a property rule or a liability rule. This distinction also informs the normative debate about the most appropriate way to protect legal entitlements.

---

[5] R.H. Coase, 'The Problem of Social Costs' (1960) 1 *Journal of Law and Economics* 3.

Several decades have passed since *The Costs of Accidents* and 'One View of the Cathedral' were published. Since the time of Calabresi's early writings, different approaches have meanwhile established themselves in the Law and Economics landscape. One branch of literature focuses on the question of whether legal rules achieve the goal of economic efficiency. A strong emphasis on efficiency as a normative goal of the law was absent in the earliest Law and Economics contributions. Ronald Coase criticised traditional economic theories for their inability to explain real-world phenomena. He became interested in the study of law because knowledge of legal rules and institutions may enable economists to refine their economic models and increase their explanatory power. Whereas, in the Coasian approach, legal rules are analysed to enrich economic analysis, the relation between the legal and the economic thought changed in later writings that are often associated with the Chicago School. For Chicagoans, the central question is whether the law achieves effects that are in conformity with the goal of economic efficiency. According to this approach, economic criteria tend to become dominant and law risks being reduced to a passive object of study. Thus far, Guido Calabresi has steadfastly opposed any ranking of the two disciplines. In his view, it is crucial to reconcile economic approaches inspired by efficiency concerns and legal approaches that rely mostly on concepts of justice. By contrast, if efficiency is seen as the dominant value, many lawyers may be unwilling to engage in an interdisciplinary debate with economists.

New developments in Law and Economics entail an additional risk that may cause lawyers to be reluctant. Another branch of recent Law and Economics literature is dominated by economists who bring into play highly sophisticated economic models and who are intolerant of non-formalised arguments. This approach runs the risk of losing the link with the legal component and of being totally devoid of practical relevance for legal policy-making. By going back to the origins of the economic approach to law, as it was developed by Coase and Calabresi, both above-mentioned impediments to a fruitful interdisciplinary dialogue may be overcome. Lawyers should be open to economic arguments, but at the same time economists should bear in mind that economic approaches must accommodate concerns for justice. Moreover, it should be avoided that Law and Economics becomes a playground for highly skilled theoretical economists who no longer draw their inspiration from the desire to clarify legal practice.

This special issue of the *Erasmus Law Review* includes four articles that highlight the impact of Calabresi's writings on legal scholarship and judicial decision-making, not only in the US but also in Europe. The first contribution, by Roberto Pardolesi and Bruno Tassone, aims to trace the impact of Calabresi's ideas on Italian tort law. The authors present and comment on opinions that display the influence of Calabresi's thought on

Italian case law. It appears that Italian judges are quite sensitive to Law and Economics insights. While in some judgments their reasoning only implicitly reveals economic wisdom, in others the reference to economic analysis is explicit and the Calabresian 'cheapest cost avoider' principle is mentioned overtly. Moreover, in nuisance cases, judges opt for property right protection when transaction costs are low. This is fully in line with the insights contained in Calabresi and Melamed's 'View of the Cathedral'.

The second and the third contribution in this special *Erasmus Law Review* issue illustrate the strength of the property rule/liability rule distinction as an analytical tool for explaining changes in legal protection of entitlements. In their contribution, Claus Ott and Hans-Bernd Schäfer discuss two examples from German civil law. At the beginning of the 19th century, land owners enjoyed property rights protection against polluters. However, when it became clear that private transactions were often impossible and that the injunctions caused huge economic losses, legislation and case-law gradually replaced the property rule with a liability rule. An opposite evolution took place in German privacy law. This is a field in which private transfers of rights are easy and transaction costs are low. Since privacy was only weakly protected, the development of modern mass media led to an ever increasing number of involuntary transactions. Ott and Schäfer show that this evolution triggered a wave of claims and caused a series of far-reaching court decisions, which aim at making involuntary transactions unprofitable.

In the third article, Ben Depoorter describes an emerging shift from property rule protection to liability rule solutions in US patent law and analyses more generally the causes of this trend in patent law. He argues that this shift is best understood by considering the relative impact of property and liability rules on economic welfare. A number of factors that work against liability rules similarly affect property rules and private bargaining. These factors include difficulties in valuing innovation, as well as difficulties in establishing the boundaries of patents and resolving the externalities involved in patent licensing. Depoorter concludes that patent market failure strengthens the case for liability rules that provide follow-up innovators access to patents, while eliminating the detrimental effect of the anti-commons.

The fourth contribution is by Michael Faure, who establishes a link between Calabresi's work and the recent Behavioural Law and Economics literature. Decision-making often takes place in a different way than is assumed by traditional economic models, which rely on the rationality assumption. Current economic approaches to tort law are more differentiated and flexible than the early formal economic models. This allows taking into account different kinds of cognitive limitations. Faure demonstrates that Guido Calabresi was already aware of cognitive limits in his early

publications, which led him to balanced normative conclusions. Since Calabresi anticipated future criticisms of the rational choice model, he may be considered a 'behaviouralist avant la lettre'. In summary, the four contributions in this special issue confirm Guido Calabresi's role as an intellectual hero in the development of Law and Economics. It is for his extraordinary achievements that the Erasmus University has chosen to confer upon him the doctorate *honoris causa*.

Roger Van den Bergh[*]

[*] Guest editor, Professor of Law and Economics and Director of the Rotterdam Institute of Law and Economics (RILE), School of Law, Erasmus University Rotterdam.