



The *liability rule* for workers' salaries in subcontracting: a conversation with Guido Calabresi

by Giovanna Carosielli

I met Guido Calabresi, a senior judge on the U.S. Court of Appeals for the Second Circuit and former dean and Sterling Professor Emeritus at Yale Law School, in a warm afternoon of September, during the presentation of his last book, *The Future of Law & Economics*. In a crowded classroom of law students and professors, Guido – as he let me call him right from our first meeting – described the key aspects of his essays on Law & Economics, of which, together with the Nobel prize for Economics Ronald H. Coase, is one of the main exponents. Unlike the economic analysis of law, Law & Economics does not consider reality irrational in case it does not fit with legal models – as Bentham did, according to Mill's criticism, dismissing ideas not satisfying his utility test –, but asks two questions. The first one is addressed to lawyers and their approach to reality, which often let them misunderstand it. The second one regards an enlarged use of economic theories, whose application could help to better understanding of the law, in a useful mutual relationship, between the two scientific domains.

The attempt to observe reality the way it is inspired Professor Calabresi's **classification** between **property, liability and inalienability rules**, explained in a famous essay, which is **one of the most quoted among academic studies**. According to this theory, an entitlement is protected by a property rule when its alienation is allowed only by the owner's consent at the price he decides, and nobody can obtain that entitlement in a different way; on the contrary, under a liability rule, if someone tries to get the entitlement without the owner's consent, he is obliged to pay a compensation, whose price is collectively set up. Finally, under an inalienability rule, every kind of alienation of the entitlement is forbidden, even in the case of consent, and if it happens compensation is the mandatory consequence.

This type of classification caused my visit to Yale University and some conversations with our famous fellow citizen, naturalized as an American citizen a long time ago. Indeed, since I tried to offer a systematic view of the changed function regarding chain liability in subcontracting, I used this famous tripartition, arguing that **social security contributions are protected by a property rule, while workers' salaries are protected by a liability rule**: thus, my aim was to check if my theory was correctly formulated as it is the basis of my Ph.D. research project. Professor Calabresi met me in his office on the eighteenth floor of the Financial District in New Haven: it actually was a big flat, from which you could enjoy the whole University, the Yale Law School library - «in this way I can control if you are studying», he tells me friendly – and, during bright days, from there you could see Long Island too. Still enjoying the panorama, I sat in front of Guido: I was immediately impressed by his smile, expressing rare kindness, and by his eyes, revealing a sort of curious acceptance of other human beings.

You could think that a person who was still a child when he had to leave his country because of the fascist racial laws could be rancorous and/or pessimistic towards human beings: on the opposite, everything in his behaviour, in his words, in his tone of voice, expresses love for life and confidence towards others, held together by an endless passion for teaching. Even when, remembering the 9/11 attack, he passed part of his lesson proposing to his students to think about the meaning of having a possibility of choice, which was stolen to the innocent victims of that massacre, and, vice versa given to him seventy years before when he came to U.S.A., and to all of us, I felt so excited by his words that I envied his students, who, having him as a professor, are so privileged to live such a rare educational experience.

Since the first lesson on tort law he lets me follow, I realized that teaching is what Guido prefers most: in addition to a very original way of making others interested in what he is talking about, with jokes, stories of personal, familiar and historical anecdotes, I understood he really cares about his students, with whom he talks every morning or invites for a Sunday picnic at home, giving directions to get to his house with a handmade map drafted by his wife.

The analysis of reality lets Professor Calabresi critically rethink his famous tripartition, noticing that «In most of the literature on the liability rule and perhaps, albeit unconsciously, in Melamed's and my original article itself, there is a seeming assumption that the collectively set price, on the basis of which compelled shifts in entitlements will be allowed to take place, should mimic or approach the negotiated price that would obtain in a free market. The very use of the term "price" than "penalty" or "assessment" to describe the collectively set amount that must be paid to shift entitlements reflects the same market-mimicking underlying assumption» (G. Calabresi, *The Future of Law & Economics*, Yale University Press, New Haven, 2016, 118). He explains his considerations during our conversation, inspiring many insights regarding the prosecution of my Ph.D. thesis.

In short, in the reality **liability rules gain the same goal of inalienability or property rules:** this happens more likely in the situation when the entitlement's compensation is so high that its alienation does not fit efficiently, as it could happen if that entitlement was protected by an inalienability rule. Vice versa, especially in eminent domain, the amount of compensation given to the entitlement's owner makes a property rule preferable. Professor Calabresi uses a familiar memory to explain his thoughts.

An uncle of his had a farmland near Bologna: either because of affection or because of a utilitarian thought that the area's development could raise the value of his land, he decided not to sell it or to change its use. However, as public authorities decided to build an airport in that area, his uncle's land was expropriated, and he didn't receive a sum referred to the market value price, but a sum which was much lower than the price of which his uncle could have sold it if he had decided to do so. Ironically, Professor Calabresi thinks that this situation does not depend on how difficult it is for the law to understand economics – like perhaps his uncle would have said –, but on the aim of law to favor the more productive use of land. Thus, **reality tells us situations in which liability rule swings between property rule and inalienability:** in a way, establishing a so low compensation that the entitlement's owner thinks alienation is better; in the other way, fixing a so high compensation in case of spoliation of the entitlement that nobody would be keen on doing so.

I keep thinking about this considerations while walking through the Cross Campus of Yale University and while visiting the wonderful Beinecke library, reflecting about how **flexible liability rules are**, and trying to use them to **classify the workers' salary liability in subcontracting:** indeed, if liability rules can gain typical goals over the other two, what, at the beginning of my PhD project research seemed to be a sad observation – i.e. workers' salaries are protected by a liability

rule instead of a property rule for insurance contributions – now it becomes potentially different. In fact, the «methods and control and check procedures of overall regular subcontracting» with which, according to article 29, subparagraph 2, legislative decree n. 276/2003, **collective bargaining can derogate to workers' salaries liability**, is the way this type of liability **can be used at its best**, using the flexibility of liability rules, establishing alternative and/or compensative ways granting concrete and effective protection.

This is because, even if appearance can suggest differently, clients, as final users of the services provided, are not always the cheapest costs avoiders, using Professor Calabresi' language in his famous *The Costs of Accidents* and trying to compare an accident to not paid workers' salaries. Indeed, we should consider that not always outsourcing is chosen to circumvent the law, but more often it is due to the necessity to recur to skilled workforce that the client and/or the principal contractor do not have at their disposal: in these situations, **the pure salaries' liability could be inefficient, above all considering the subsidiary nature of this kind of protection**. That nature, indeed, would oblige entitlement's owners – workers employed in subcontracting – to fill a claim, because of which not only the employer's assets but also those of subsidiary debtors, could be spoilt or decrease.

What Professor Calabresi suggested more than fifty years ago comes to my mind by the end of my stay in the U.S.A.: if, in some situations of not compliance with law, the damaged could be the best decision maker – for my Ph.D. research, workers employed in subcontracting – instead of tortfeasor, i.d. the client of a work or a service, there would be two consequences. The first, general, leads me to **exploit national collective bargaining**, neglected by or of which Italian legislator is wary; the second one, more personal, regarding my Ph.D. research project, whose conclusions were totally different before meeting Professor Calabresi and now must be modified.

But I am not worried about that. After all, Teachers are important also for this: to let you full of doubts exactly when you think you have reached certainties.

Giovanna Carosielli
 @GiovCarosielli

Doctoral School in Human Capital Formation and Labour Market
ADAPT, University of Bergamo