

## Exchanges, Claims, and Powers: About Bruno Leoni's Social Theory

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The main intellectual contribution of Bruno Leoni is usually connected to his analysis of the opposition between legislation and law: between the order built by the lawmakers on one side, and the set of norms defined by the jurists (as in Roman *jus civile*) or by the courts (as in ancient English common law) on the other side.<sup>1</sup> But at the core of his analysis is what he wrote about *individual claims*: the idea that the legal order is the outcome of specific individual activity when people demand something from the other members of society.<sup>2</sup>

Following Leoni, the legal order is basically the outcome of the actions of individuals and their intersections.

Developing some lessons of the Austrian school of economics, he found a strong analogy between prices and norms. Both are the results of many social exchanges in spite of the fact that in modern times they are frequently the simple consequence of political decisions: because prices are too often influenced by tariffs and norms are mainly regulations imposed by a majority. But prices decided by authority can work only if they are not too far from the prices that would emerge on a free market, exactly as legislation is respected when it meets the shared expectations of people. So if in the market we exchange goods and services, in our interpersonal relationships we demand from others that they accept some fundamental rules.

For this reason, at the origin of the legal order there is the action of people *claiming* some behaviors expected of other people, and Leoni thought that the “claim of each individual contains, at least in essence, the idea of an entire ‘legal’ order (intended as the convergence or exchange and at least as a connection of claims) which can more or less coincide with similar ideas contained in the essence of somebody else’s claims.”<sup>3</sup>

Using a metaphorical language, Leoni spoke of an *exchange of claims*, but we may be sure that in these social relations, at the origin of the legal rules, we have really an exchange. To what extent this analogy between law and market can be accepted? When Leoni suggested that exchange (of claims) played in the legal field a similar role to what exchange (of goods and services) played in the economy, his intention was to emphasize the centrality of trade. And this raises many criticisms.

Underscoring the omnipresence of exchange, Leoni adopts a perspective quite efficient. Compared to a gift, exchange doesn’t imply human beings devoted to generosity and altruism. On the market, people are able to interact even if they are self-interested. For this reason, anyone who wants to explain the emergence of social rules from actions based on solidarity can design a model useful to understanding the familial and tribal microcosms, grounded on strong communitarian feelings, but he will be unable to justify the birth of wide and complex social interactions. Focusing attention on exchange, one will understand the legal order from its crucial element: the individual’s activity. When

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<sup>1</sup> Bruno Leoni, *Freedom and the Law*, expanded 3d ed., edited by Arthur Kemp (Indianapolis, IN: Liberty Fund, 1991 [1961]).

<sup>2</sup> Bruno Leoni, “The Law as Individual Claim” (1961), in *Freedom and the Law*, pp. 189-203.

<sup>3</sup> Bruno Leoni, “Law and Politics” (1961), in *Law, Liberty, and the Competitive Market*, ed. by Carlo Lottieri (New Brunswick, NJ, & London: Transaction, 2009), p. 176.

people make claims, they act and interact: in this way they build rules and principles that help people to live together.

Leoni sought to elaborate a theory able to interpret the entire society. His idea was that exchange is crucial not only for economic life but also for law: moreover, he believed that it had a similar role in politics because the political order is a consequence of many negotiations, where each individual employs his small or big power.

For this reason, in Leoni's social theory we have three dimensions: *exchange* in the strict sense (crucial in economy), *exchange of claims* generating norms, and, finally, *exchange of powers* that structures the political order. These three areas are at the same time distinct and related.<sup>4</sup>

From a prescriptive point of view, it is easy to understand why a libertarian scholar like Leoni gave so fundamental a role to exchange, which is based on voluntary relations and is a positive-sum game. When we have a deal or a contract, there is no winner and loser but two or more people who gain from the interaction. Leoni emphasized the role of the exchange because his theory, as Mario Stoppino remarked, "is not only a theory of the society as it is; on the contrary, it is also a description of the society as it should be: an *ideal model* of society."<sup>5</sup> However, it is questionable whether the notion of *exchange* can explain, at the same time, the origin and development of economy, law, and politics.

In every society people have many different types of relations. In addition to trade relationships, they have other links. Leoni was aware of this, but he thought exchange had a peculiar role in society -- and not only in the economic realm. In fact, he criticized economists because they understood "the exchange of goods, but not the behavioral exchange that makes possible an exchange of goods, regulated and occasionally enforced for that purpose by the law of all countries."<sup>6</sup> And about politics he added that "there is a sense in which you can exchange power as well as you can exchange commodities or services."<sup>7</sup>

To a large extent, this centrality of exchange is true in the economy. As we have remarked, an alternative model explaining productive activities as starting from gift (or other interactions different from the exchange) would be confronted with many problems. The reason is that while the butcher, the brewer, and the baker may be benevolent, they usually give us what we need if we give them something in return.

When we analyze a developed economy, it is difficult to deny the central role of exchange as well as the fact that this implies a not very optimistic anthropology. To have wide cooperation, people need not be altruists: it is enough that individuals learn to recognize some rules (*alterum non laedere e pacta sunt servanda*, above all), whose respect produces relevant benefits. But things are not so easy if we consider exchange in the areas of law and politics.

About law, Leoni's idea is that people have reciprocal claims. For instance, Crusoe doesn't want to be aggressed against and neither does Friday. In a tacit way, in time they introduce the norm that neither may use violence. When this rule is accepted, both can sleep peacefully.

Basically, in this perspective, the recognition of fundamental legal norms coincides with the approval of those premises that permit exchange: respect for private property and voluntary contract. But if we

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<sup>4</sup> For an introduction to this general theory about economics, law, and politics, see Bruno Leoni, "Law and Politics," in *Law, Liberty, and the Competitive Market*, pp. 167-82.

<sup>5</sup> Mario Stoppino, "La grande dicotomia diritto privato – diritto pubblico," *Il Politico*, 1982, p. 130.

<sup>6</sup> Bruno Leoni, in *Freedom and the Law*, p. 52.

<sup>7</sup> Bruno Leoni, "The Economical Approach to the Political" (1961), in *Freedom and the Law*, p. 225.

look more closely at Leoni's reconstruction, we understand immediately that we face quite serious problems.

What are the most problematic aspects of this reduction of law to the exchange (of individual claims)?

Each economic trade occurs among a few people. What is Leoni called "exchange of claims," on the contrary, is my will that all the other people around me will behave in a specific way and the fact I am subject (from all the other people!) to similar claims. Economic exchange implies law, but the legal context is a horizon – sometimes based on basic principles – that rarely is the outcome of negotiation, well-defined in time and space, where we know who are the actors. When I buy or sell a car I enter a real and voluntary contract, but when we consider the so-called "exchange of claims," we are forced to admit that it is not really an exchange. There is no moment when, as in a trade, people living in a territory stipulate that none will kill other human beings. The norm against murder tends to conform to general principles accepted as objective, natural, and timeless, and it emerges historically: it is tradition and custom. When this rule is violated by a criminal, it is confirmed by the search for the culprit, by the trial, and by the penalty.

Why, in this situation, did Leoni use the notion of *exchange*?

He employed this term because any individual could have unlimited claims, but he has to consider the existence of other similar people. Every person "trades" the renunciation of attacking and robbing others in exchange for reciprocal behavior from others. But write "*trades*" using the quotation marks because it is not an exchange in the strict sense.

Leoni was right when he criticized Kelsenian normativism and he tried to understand the origin of rules. But from a descriptive point of view, Leoni's theory is not totally persuasive, and from a prescriptive point of view, hypothetical consent cannot legitimate – especially when we have explicit dissent – the use of coercion and the imposition of some people's will of on others. In a society where some wrong opinions are well accepted by the large majority, we could have the emergence of unjust rules oppressing a minority of wise and moral people. Following Leoni, the claims are juridical when they are in harmony with the set of values and interests prevailing in a specific society; in other words, claims are correct when they have a high probability of asserted and satisfied. In consequence, according to Leoni's theory, we could have laws supporting militaristic values when people share values and interests oriented toward war.

For Leoni law is basically *effectiveness* related to the prevalence of some ideas of what we can do or not. Public opinion is the outcome of social interactions, but it is not the result of free agreement, as it is in the market. If in the market none is in the situation of a political minority, the legal realism adopted by Leoni always puts in the minority one who makes claims that only a few people accept and that, by consequence, are considered anti-juridical.

When we identify law and shared claims, we realize that in every society, there are prevailing norms of which the majority admits the legitimacy. They correspond to the values and interests of the larger and/or more influential part of society, but this forces us to consider all the objections to the majoritary rule.<sup>8</sup>

Moreover, we can satisfy our fundamental needs and desires with *economic* activities (as when we produce and trade) or with *political* initiatives, giving us the possibility of controlling the time and goods of other people. It means we can obtain resources by working and exchanging, but also by using the violence and exploiting other human beings.

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<sup>8</sup> Leoni himself was very critical about this rule: Bruno Leoni, *Freedom and the Law*, pp. 95-111, 112-132.

Classical-liberal scholars have underlined how public institutions favor many forms of parasitism. The creation of state power has allowed some people to exploit others. For this reason it is possible to recognize a class struggle between people controlling power (and using it to steal from others) and people who cannot really influence political decisions. In the formula introduced by John C. Calhoun, we have a conflict between those who give more than they receive (tax-payers) and those who receive more than they give (tax-consumers). The former are systematically exploited by the latter.

These considerations help us to realize how politics is connected with the economy and how difficult it is to separate these two worlds. For this reason, if it is not easy to understand the legal order as a simple outcome of the exchange of claims; it is even more difficult to reduce the political realm to the exchanges of powers.

When Leoni talked about the negotiation of individual powers, his idea was to contrast the politics with the modern state, conceived as a concentration of sovereign decision-making in the hands of the rulers. Emphasizing that everyone had a portion of power, he wanted to restore the original notion of the *state* (*stato*, in Italian) as a situation characterized by independent forces contrasting each one. The modern state, as the central institution of European modernity, was understood as starting from the complex situation implied by every political order.

Against the abstraction of vertical sovereignty, Leoni emphasized the polycentric structure of power. Once again, he described social phenomena with the aim to understand how they depend on many dimensions (economic, cultural, etc.) and how the decision-centers are always somehow decentralized and dispersed. However, this *description* also implies a *prescription* because Leoni pursued an *integral individualism*, based on freedom and pluralism, and he rejected violence and uniformity imposed by modern state institutions.<sup>9</sup> But his libertarian political philosophy often conflicts with his legal realism.

In this case, as in the case of law, we have to decide if it makes sense to talk about exchanges when we consider power relations.

Leoni thought that each individual had a portion of power and that the political order was a composition of all the coercive relationships. Evoking classical analyses, he recalled that there was a negotiation even between master and slave: the master imposes his will, but at the same time the master knows that without the agreement and cooperation of the slave, everything would be difficult. Dissatisfaction and frustration could lead the slave to work inefficiently; in some situations he could even leave the relationship, especially when he can do so without consequences.

Somehow the dominated has power, and the master knows it, and he must keep this in mind. However, the resulting relationship is not really an exchange. In this tension between a bigger and lesser power, there is only the awareness, in those who are stronger, that domination is never absolute. The owner of a slave does not control him 100 percent because it is technically impossible to monitor and control all the gestures and activities of his “property”; therefore he evaluates what he can make his supremacy more effective.

Anyway, we have to admit that there is no real exchange (as voluntary choice) where we have a power situation; by its nature, the situation is asymmetric and unbalanced.

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<sup>9</sup> This formula (*integral individualism*, in Italian: *individualismo integrale*) has been used by a student of Leoni, the political scientist Mario Stoppino, who edited one of the first anthologies of Leoni’s writings: Bruno Leoni, *Scritti di scienza politica e teoria del diritto*, ed. by Mario Stoppino (Soveria Mannelli: Rubbettino, 1997).

Since Thucydides, the political-realism tradition viewed the legal-political order as something unrelated to ethics. One of the consequences of this analysis is that we cannot have law where force is used to impose someone's power over other people. In the well-known dialogue between the Athenians and Melians, the former adopted an immoral and cynical attitude when they said that "right, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must."<sup>10</sup>

So even if it is true that the strong are not omnipotent and the weak are not totally disarmed, the conclusion that in these situations there is no supremacy or oppression is highly debatable.

If in the legal field the effectiveness of prevalent claims and opinions *makes law*, pushing the minority into illegality, this is even more true in the political field, where an order of unequal forces leads to the domination of a part of society. If this is the typical political relationship, then talking about an exchange of powers is misleading.

Are there situations where we see real exchanges among political entities? Are there circumstances where we have proper exchanges of power?

In some cases in the political realm we have negotiations and contractual relations. Part of recent libertarian research has focused on (abstract) models of protection markets, but maybe it is more interesting to call the attention to the reality of a wide network of *private cities*: market companies offering the basic services of a political order in competitive markets, such as protection of property and many other utilities.<sup>11</sup>

This is true at a *micro* level because we can have city institutions develop in a consensual way. In addition, at a *macro* level we have the tradition of the original federalism (the mutual-aid agreements on a voluntary basis). These political orders were leagues and alliances; members of federal compacts had the same status and accepted only the solutions agreed to by all.

In some respects, the political society of federations in the late Middle Ages was governed by *economic* relations: that culture preceded the modern state, and the parties to those contracts were cities or small regions, as in the case of Hansa, United Provinces. or the Swiss Confederation.<sup>12</sup> The parties to the agreement of 1291 on the Rütli meadow exchanged powers, but they did so accepting mutual commitments, forcing each contractor to offer services to the other members of the league. Those rural communities were small, and each one (unlike the "negotiation" between the Athenians and Melians) had a similar military force.

Leoni's social theory doesn't correctly explain the relation between real exchanges (including those in law – i.e., contract law – and in politics – i.e., the shared properties and in federal orders) and "exchanges" of claims and powers that are incompatible with the libertarian perspective that inspired the Italian scholar -- because they are not based on true agreements.

Leoni intended to combine description and prescription. In his theory, exchange was the central institution of society, the basic element explaining how economy, law, and politics work, and the relationship necessary to lead towards a polycentric order. His intuition is interesting because there is a link between this analysis of society and the necessity of drawing an ethical-political perspective. Aristotle taught that nothing can be morally imposed if it is not possible because there is a crucial nexus between *Sein* and *Sollen*, between *as it is* and *as it ought to be*.

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<sup>10</sup> Thucydides, *History of the Peloponnesian War*, book V, 89.

<sup>11</sup> Fred Foldvary, *Public Goods and Private Communities* (Cheltenham, UK: Edward Elgar, 1994).

<sup>12</sup> Hendrik Spruyt, *The Sovereign State and Its Competitors: An Analysis of Systems Change* (Princeton, NJ: Princeton University Press, 1994).

But two aspects of Leoni's theory are quite problematic.

First, a philosophy identifying law with the most common claims cancels the tension between legality and legitimacy, between what is and what it should be. At the same time, a philosophy of liberty cannot accept any historical order and cannot justify any social institution, rejecting the distance between the real and the rational, between what can emerge by the evolution of societies and what is just according to the basic universal principles of law.

Second, from the perspective of a general theory of law, it seems reasonable that human coexistence can be better explained if in the framework we introduce something *more demanding* than simple exchange (the gift coming from generosity, the unilateral promise, the will to share something with a community) and at the same time something that is *less demanding* but no less important: as when we realize that it is impossible to understand politics if we don't recognize in this area a permanent presence of violent behavior.

Leoni emphasized the role that exchange plays in any society, but in this way he belittled the importance of gift and theft, help and aggression. The variety of forms of social interactions is very wide. Leoni's simplification doesn't account for this complexity.

Exchange is at the core of every society at an advanced stage, but even in the economy it cannot explain the complexity of the logic governing commerce and production. And if the exchange relation is not enough to understand how industry, trade, and money are organized in a society, even less can it help us to understand law and politics.