CAMMINO DIRITTO
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DIALOGUES UPON RIGHT: JUSTICE, CERTAINTY AND PROCESS

The strong relationship between justice and legal certainty has always been a fascinating topic. What kind of relationship and certainty are they? Can we trust the law? Ludovica Di Masi, law student and author of Cammino Diritto, discussed these questions with Prof. Jordi Nieva-Fenoll, full professor of Procedure Law at the University of Barcelona.

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In the following article, starting from the concept of legal certainty, the two interlocutors discuss the face of modern justice and whether "Legal Science" can help citizens have a sense of legal certainty.

Considerations upon procedural strategies, judge formation, and the so-called "human element" are required to reach a conclusion, being crucial points of applying the law.

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Ludovica Di Masi: "Legal certainty has always been considered as a permanent element within law and as a warranty for justice. By legal certainty we mean absolute transparency of law, so that a citizen could be able to know the juridical consequences of his/her actions and omissions.

Legal certainty can also be considered in matters of criminal law ("*nulla poena sine lege*" - no penalty without law): punishment is confirmed only if the guilty is punished according to the sentence established by the law.

The feeling of certainty undoubtedly builds a common sense of justice among citizens, a sense of formal justice that is not completely concerned with details of real cases, but which guarantees the application of general laws based on the equality principle and the general law of real cases within abstract cases: in other words, **certainty gives people a sense of protection.**

Nowadays, we should ask ourselves if the principles of legal certainty and the certainty of penalty just remain empty formulas, if this formal justice is sufficient or we have to look forward to substantial justice."

Jordi Nieva-Fenoll: *I agree upon the fact that legal certainty is needed and* I believe that *law stability contribute*s *to generating this certainty. However, I do not think that the presence of law, particularly criminal law, gives citizens this sense of justice. Unfortunately, citizens do not know Law because it is not a school subject. We learn*

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literature, mathematics, physics, history and so on, but no attention is paid to Law within pre-university studies.

Therefore, in my opinion, citizens' sense of justice derives from their parents' ***education*** *and* ***religion,*** *because, as I said, juridical thinking is not taught in school, certainties of natural sciences are only transmitted. Instead, thanks to religion they learn* ***moral values*** *on which legal regulations are certainly based. But the approach of religion is not scientific. On the contrary,* ***juridical thinking must be not only scientific, but also argumentative,*** *and argumentation is less used both by religion and (surprisingly) by natural sciences.*

I think that this educational method in a certain way lacks efficiency and causes the disorientation of citizens as far as the creation of their sense of justice is concerned.

LDM: In Italy, Law teaching starts before going to university, undoubtedly first of all with Civic Education. However, being Italy the cradle of Christianity, faith influences students' "juridical conscience".

I do not think that this is the proper place to examine in depth this topic and I believe that we first need to understand which type of certainty we are talking about in order to find out a solution about the relationship between certainty and justice.

Kelsen already maintained that legal certainty was an **illusion**, because it is impossible for a citizen to foresee the judge's decision, considering the percentage of **discretionary power** which lays behind the interpretation of the norm.

JNF: *Sure. As a matter of fact, everything depends on the judge. A regulation can be as precise and certain as possible, but* ***we are always in the hands of the judge,*** *a thing already demonstrated, among others, by realists. I think that the judge's decisions are quite often misunderstood because of two main factors. First of all, even the judge is influenced by the traditional education I mentioned before, with all its lacks. Secondly, even when the judge is right and uses the scientific method when applying the law,* ***people do not approve the sentence if it does not correspond to their expectations****. And e****xpectations depend on education.*** *Consequently, a dangerous vicious circle, in*

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which we have played the role of victims for ages, is created.

***LDM**:* That is right, citizen's cultural background and education represent an enormous weight for the judge, especially in a time period during which media processes are quite outspread.

But there is to say that in the past legal experts always tried to simplify and make the judge's work as neutral as possible. They always tried to elaborate methods and techniques in order to reach legal certainty. Law scholars always wanted to combine juridical science with other sciences that use an automatic and precise practical method like mathematics. Since Galileo in "The Assayer" stated that the Book of Nature is written in the "**language of mathematics"** (1), a mathematical process, which involves not only physics and chemistry but also human sciences and, in my opinion, juridical science, began. A great number of people maintain that mathematics is a precise science, hence it must be applied to law.

Like mathematics, Law has its methods (inductive and deductive methods), and the legal expert must have his/her own method, which is made of intellectual procedures used firstly to make norms and secondly to interpret them. However, having a method does not necessarily mean that the procedure will allow us to get out of the complexity of the norms.

As for juridical formalism - a method which tends to see Law more as a form rather than looking at its content - we can find dogmatism, which considers norms just as **dogmas** and considers them as valid simply because they exist. Even in this case, a reference to mathematics, and other sciences, is clear. A dogma is an absolute truth that cannot be demonstrated, it can be found in theorems and their demonstrations, where the only certain starting point to solve a geometric problem is the dogma itself.

Over time, people tried to collocate the legal system in a position of certainty: the use of codes, titles, norms, articles and paragraphs is a clear example of this never-ending will to schematize the system.

A hard and misleading terminology has the aim to create an autonomous language:

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the **juridical language.**

In particular, the latter presents expressions that come from natural sciences: just think about terms like physiology, pathology, dogma, legal transaction, authority, regulation, juridical system.

But Law is different from other sciences.

JFN: *I really like it that you are talking about "other sciences", because* ***Law is a science like all the others.*** *Law must use the so-called "scientific method". Until now, this method distanced itself from our studies, because a reference to "****authoritative arguments****" was made, i.e. the educational method with its undoubted religious origin.*

I don't like it when legal experts say that a statement is true just because another author says so, ***or because law confirms this result.*** *This method is based on* ***a wrong statistical calculation of coincidence of opinions:*** *it is wrong because it does not allow to have an overall view: few authors, but not all of them; a part of Law, but again not all of it. But even when you make a full statistical calculation of opinions, the result will still be based on an authoritative fallacy. Considering a conclusion as true just because it is told by an "authoritative" person or by people is wrong: can a conclusion be considered as true because everybody thinks it is so? Epistemology demonstrated how these thinking strategies are wrong.*

Law is a science that formulates hypothesis that must be proved by an analysis based on experimental reality, *without forgetting to use an accurate argumentation. The day when people will realize that, laws will be formulated in a better way because they will be preceded by field research which applies law to experimental situations before being approved. If we follow this mindset, I think that it will be easier for citizens to know what Law and Justice really are.*

LDM: With reference to the **covering scientific laws,** the so-called "*subsumption under scientific laws"* is still largely debated. When we have no universal law to help us understand if that condition has to be considered as the cause of the event (heuristic limited efficiency), the only possible solution is to make reference to a statistical law and

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have a look at its probability. It is important not to stop at a statistical probability, but to continue with a logical judgement that verifies the credibility of the application of the statistical law to a particular case (Franzese Sentence). Therefore, **the judge's work requires a wider effort which goes over the simple application of a scientific law.**

The judge's effort is also greater because he/she always has to consider one element (the most important one), which makes Law different from the other sciences: **the human factor, the person.**

While the mathematician's task is to calculate, think and reach a conclusion that is always valid, the jurist's solution will never be valid for other situations. In the Anglo-Saxon countries, the legal precedent criterion is valid and binding: being no other fact equal to the other, it is just an exemplification. Professor Pietro Perlingieri is right when he states that analogical application consists just of an obligatory passage imposed by interpretation, but a solution may be valid today but not tomorrow. That is why Law does not have an end in itself, it is not free from the other sciences.

Hence, I agree with you that juridical science is a Science, but I also think that we should **configure it as *tertium genus,*** halfway between mathematical-logical sciences and humanistic sciences.

I consider statistical and/or authoritative methods as completely inadequate. First of all, because **"statistical fallacies in investigations tend to appear with high frequency"** (Ray Hill), also because lawyers and magistrates often have insufficient statistical knowledge. Secondly, legal certainty cannot derive from the use of the language of mathematics (2), if we think about the fact that in mathematics **"each measurement is affected by fallacy"**.

Hence, juridical language cannot be considered in the same way as the language of mathematics.

JNF: *I agree, but I think that Law cannot be "precise" or more precise because we have to consider the **"human factor".** When we talk about human factors, we refer to **such intricate reactions and situations of the person that are incomprehensible.** I believe*

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that we have to give up the idea that the human factor is completely uncontrollable. Cognitive psychology (Tversky e Kahneman, among others) demonstrated how ***basic our thinking*** *is****,*** *how the decisions we normally make are based on some – few – statistical generalizations. We always decide what we believe is the most frequent and normal case because we always acted that way or because we saw others doing it. Or we often believe that a fact is more frequent because we can remember it, and the memory is often brighter because the fact is more striking than others (for example, just think about a serious car accident). That is the reason why people are more scared when they fly rather than when they drive, even if driving is statistically more dangerous.*

The knowledge of "human factors" strictly depends on the knowledge of those stirrings, on the awareness of ***how the human mind works****. When a real situation is not known, the only thing missing is an investigation upon reality. This study leads closer to the truth, to the right solution and finally to* ***the so-called*** *"justice". We must never give up knowledge.*

LDM: Sure. But I think that further clarifications are necessary here.

It Is hard to manage social life (from which Law cannot be excluded). When a new norm is created, it is already old because the needs for which it was introduced have changed. The point is that it is easier for the judge to apply the norm by extending or narrowing it.

Both in civil and criminal processes, several computer programmes were developed. Based on probability rules, these programmes can compare the case that needs to be solved to already solved cases and can provide a possible discharge or sentence. Since the 17th century, "the fundamental role that mathematics could play in simple cases was recognized." (3) Many definitions of probability have been provided, but **possibility always remains a possibility.** By that time, Jerome Frank was right to say that there is no such thing as legal certainty, because Law is based on **unpredictable judicial decisions**.

Law is full of **"mutable factors",** hence it is naturally uncertain.

JFN: *As I have already said, the statistical approach seems to be right. But it shall not*

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be based on the solution of other cases. This modus operandi (binding juridical precedent) may represent a clear example of how a right idea – statistical study – may be contaminated by argumentative fallacy: "authority fallacy". The decisions made by judges are not right just because they are judges. On the contrary, ***trying to understand the social circumstances on which each judicial case is based will lead to the study of these "mutable factors"****. If we do not give up knowing what we really can know, we will fall into a dogma, in a "mystery", or more precisely, in the fallacies committed by people and consequently by judges.*

LDM: The point here is that even if legal certainty leads to a sense of injustice, paradoxically **even if the certainty criterion is fulfilled, citizens might still feel a sense of injustice.** I am talking about certainty conceived as slavish application of the norm, which derives from formal justice, as the legislator's attempt to free the judge from his/her responsibilities.

In my opinion, the more we use juridical science as a natural science, the more difficult it will be for us to achieve justice.

Taking into account the natural relationship between justice, process and legal certainty, I refer to Article 111 of the Italian Constitution, which in the first paragraph states that jurisdiction can be performed through a proper process regulated by the law. Hence, criminal proceedings can be considered right when they follow the norms. Consequently, a model of justice based on the certainty of the norms is achieved.

Are we satisfied with this idea of being right?

How can a process be considered right, when it firmly follows the norms, formulated by naturally limited beings? At this point, **the judge's conscience** must intervene: as "peritus peritorum", the judge must often overstep juridical schemes, reach the heart of controversy, consider the Person – and not the party – and question him/her about his/her needs and satisfy his/her interests. I think that a process can be considered as "fair" just when it satisfies the victim, the offended person.

JFN: *In Law, norms can be interpreted by using the grammatical, logical, historical,*

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systematic and theological methods. Nevertheless, when we judge, we tend to use exclusively the ***grammatical method****.*

As you said, a judge always has to take into account the ***Person.*** *It is curious to observe how in the attempt to be more fair and predictable, we did not use correctly what natural sciences taught us. If we do not apply the norm mathematically, we are not sure that the factors we are considering are absolutely correct. We simply copy the easiest part of mathematics, rejecting to consider the harder task to demonstrate factors, or better, as you said "the heart of controversy".*

This heart is represented by the already-mentioned "mutable factors". Those factors were widely studied by sociology, psychology and medicine. Legal experts should have studied these subjects. "Justice" is strictly connected to its scientific essence. Only by considering such scientific essence will we be able to focus on the protection of the guilty (never forgetting the victim), seeing the penalty not as a punishment or revenge, but more as a restoration of the life status preceding the crime. ***The greatest effort should concern the inclusion of the guilty within society.*** *But, again,* ***never forget to protect the victim.***

LDM: I agree.

Sometimes the process tends to from historical truth, and quite often "it is caused" by Law. Law is an articulated world which builds an artificial truth thanks to its process-tool. We know that the truth we reach with the person who is being judged is different from the historical one, but putting aside which type of truth we are dealing with, the **judge's decision must have the aim to restore order between the associated.** If this should not happen, I cannot see how decision and process may be considered as fair.

JFN: *In my opinion, the process, or better the judgement, should never be far from historical truth. The* ***education of the judges*** *and the other members of justice – police, public prosecutor– should be concerned with* ***non-juridical sciences*** *(as the ones I mentioned before) – psychology, sociology, medicine and criminalistics in the penal procedure – thus generating a well-prepared team that is ready to investigate and find*

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the historical truth. By doing this, together with a proper application of the law, sentences will be fairer. We cannot just believe in legal assessors ' opinions that we, as jurists, do not understand.

LDM: Consequently, we should not intend justice as a perennial application of the norm, on the contrary we have to do our best to reach a situation where **the subjects involved in the process consider themselves satisfied**. And by subject involved in the process I mean even the guilty, the accused and the investigated ones. We can say that **the decision is fair only when the accused accepts or at least respects the sentence**. Here, the basic principles of the system, which should also be applied in relation to the person, became important, i.e. the reason of the crime is considered. As Article 27, paragraph 3 of the Italian Consitution states, rehabilitation is insufficiently applied after the promulgation of the sentence – which represents a problem itself – but this principle should also permeate the whole process. For example, when the investigated confesses his/her crime, we may start immediately with a programme of rehabilitation. But under other circumstances, **the rehabilitation may represent something imposed on the guilty**. Let us suppose that an absent-minded housewife accidentally blows up her house and that in the explosion her son dies. In this case, the rehabilitation may be useless because the woman's shock will automatically turn her into a more aware, cautious person. (4) Hence, we must consider the fairness of the punishment, therefore the syllogism **"if you do x, then pay y" cannot be considered under the same criteria as those of a mathematical equation**. A formula that is suitable for each case cannot exist.

Furthermore, the punishment is never the one mentioned in the norm. Nowadays, a few people (among others Andrea Castaldo) talk about "**virtual penalty**", because of the existence of a few mechanisms (fast-track, plea bargain, reduced sentence, suspension of enforcement of a sentence, etc.) that reduce the penalty or nullify it. All these aspects can be considered as the consequence of the uncertainty of penalty and of the feeling of injustice.

JFN: *First of all, the accused himself/*herself *does not represent a problem, he/she is a necessary guarantee of justice: double jeopardy ban. But I agree with you on what you said about the guilty, I always prefer defining him/her so – etymologically "involved with "res", the cause, the judgement - because it is a more neutral categorization than*

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accused or investigated, which refer to different stages of the process, preserving his/her "innocence". I believe that this way of thinking is wrong because it causes the opposite result. Is an "accused" person less innocent than an "investigated" one? Is not everybody equally innocent until the final condemnation?

As I said, I agree with you upon the guilty. From the beginning, he/she must be treated in a *proper manner.* ***Our aim during the process is to help the guilty accept his/her situation****, and we can do it by letting him/her understand the advantages of defence and presumption of innocence and by dealing with the dangerous social consequences that will affect him/her when the process comes to an end. After the sentence, we should go on with a non-invasive and imposive rehabilitation.*

LDM: I do not agree with you upon the identification of the guilty, the accused and the investigated. I prefer preserving the distinction between the terms because it implies that human beings have prejudices, and in everyday language the term "guilty" has a bad connotation. In my opinion, it is better to firstly use the term Person and then the term guilty only after the sentence.

Anyway, in my opinion, by considering the "satisfaction of the associated" and the "resignation of the condemned", justice becomes the perennial application of constitutional and international principles. **Only principles will guide us far away from the idea of justice conceived as revenge.**

My thoughts are closer to a personal view, where **the judge, as a good doctor, must establish the proper treatment for the subjects involved in the process.** And this is how the idea of substantial justice seems to exceed the one of formal justice.

JFN: *Even if the comparison between the judge and the doctor seems valid, I think it should be extended generally to all jurists.* ***Jurists' call is to heal conflicts, which are the illness of society.***

It was a pleasure having this discussion with you.

LDM: *This conclusion seems to be perfect. Obviously, the pleasure was mine.*

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Notes and Bibliography

(1) Quote from Galileo Galilei's "The Assayer" (Pisa,1564-Arcetri,1642): "Philosophy is here described in such a perennial open book in front of the eyes (I mean, the universe), but we will be never able to understand it if first we do not learn the language and its characters. It is written with the language of mathematics, its characters are triangles, circles and other geometrical figures, without which it is impossible to understand a word; without them, it is like wandering in an obscure maze". Galilei is considered the founding father of experimental method and modern science.

(2)*"Matematica per la vita. Anche dove non te l'aspetti", M.Degiovanni, R.Lucchetti, A.Marzocchi, M.Paolini. FONDAZIONE ACHILLE E GIULIA BOROLI, Studio CREE-Milano, REDINT Studio s.r.l.,2009 page 36*

(3)*Page 64*

(4)The following example can be found in professor Andrea R. Castaldo's course: *Diritto Penale Parte Generale dell'Università degli Studi di Salerno dal prof. Andrea R. Castaldo.*

Cover "Giustizia", by Ludovica Di Masi, tempera, 2016.

Work description: Justice is not proud and blindfolded any more. Her scale plates are not equal and she cannot finish her job.