UNIVERSIDAD TORCUATO DI TELLA
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Individual Opinions and Collective Deliberations

According to the most widespread opinion amongst legal experts, the judge's judgment should essentially consist of an "act of the mind" that is explained through a simple logical operation, that is to say, a syllogism from which, assuming as a major premise the general rule, as a lower premise a certain information of fact, a given conclusion applicable to the specific case is deduced.[1] [2]

This isn't the case of restating the process according to Formal Logic, showing how small and illusory the contribution that it can provide (outside of its applications with new and more rigorous methods in the fields of Pure Mathematics) to the kinds of reasoning that are more frequently found, and that by themselves have some actual effectiveness in ordinary life.[3]

However, it is unquestionable that, while still wanting to recognize the logical value of the syllogistic procedure, the latter cannot endure if both premises do not have a character of absolute certainty.[4]

Let us consider the syllogism:

All A are B;

All B are C.

"Therefore", this A (that we examine particularly) is C. Now, If I am not absolutely sure that "all" the A are B and that "all" the B are C, the premises of my syllogism are, in fact, translated into these others:

Lots of A are B;

Lots of B are C.

[1] Schmid Lehrbuch des zivilrpozessrecht Leipzig 1906, p. 9.
[2] Rocco, La sentenza civile, Torino, 1906, p. 34

[3] By the way see, especially. Schiller, Formal Logic, London, 1912, p. 6.

From which I cannot at all deduce that such A by me considered be C; moreover, neither can I exclude that "no" A be C.

Also, and always outside the mathematical field, all the syllogisms that are made habitually, and to which we pretend to attribute a logical value in everyday life, are more or less this type.

Thus, going back to the case of the judge, he can almost never be absolutely sure neither about the interpretation of the "rule", nor about the existence of the "fact". Furthermore, in most cases, his judgment (as he is always obliged to form one) will be the consequence of long hesitation and he will not, therefore, be able to constitute, even for himself, but the expression of a higher or lower degree of probability.[4]

Were we to translate into figures the condition of uncertainty corresponding to such a degree of probability, the resulting "premises" could, for example, be formulated like thus:

There are 6 out of 10 probabilities that the "rule" must be interpreted in such a way:

There are 6 out of 10 probabilities that the "fact" has occurred under these terms:

The conclusion, therefore, is no longer that which could be deduced from an apparent application of the syllogistic procedure and which would be: there are 6 out of 10 probabilities that a fact thus established exists, to which a rule thus interpreted must be applicable, but such probabilities will, be on other hand, 6 x 6 out of 10 x 10, that is 36 out of 100.

Let us consider a specific case:

The judge is "in the condition of uncertainty" or is "insecure" (so "slightly inclined" to the "yes answer") as to whether the individual A has committed the fact B.

The judge is "in the condition of uncertainty (and always tending "to be slightly inclined towards the "yes answer") as to whether the fact B constitutes a crime.

[4] It remains necessary to bear in mind that often the judge, after prolonged vacillations, and after finally choosing any solution, will forget about his preceding doubts and hesitations, and his convincement about the chosen solution will gain strength (cf. my prec. Notes "Sulla imortanza psicologica dlla motivazione nele sentence colletive" in "Psiche", 1912 p. 392, and 1914 p. 281) Howver, this does not advance at all the objective probability that such a solution is really the best one.

Now, if it is so intended that his judgment proceeds by "degrees", and, that is to say, that he rules successively, and in absolute way, "first" one and "then" the other issue, the judge must then inevitably come to the defendant's conviction, whom, in the other hand, he would have probably acquit had his persuasion been the direct result of the comprehensive and simultaneous analysis of the two issues.

There could exist some doubt about the issues of Pure Law. If we were to accept, for instance, the theory according to which the judge would, in some way, in some way, also have the functions of the legislator, it could be assumed that his judgment, whatever had his earlier deliberations been, acquires indubitably a condition of certitude , just like a law, be the law good or bad, after it had been duly passed, also after much opposition and with just the necessary majority.[5]

However, every doubt disappears when we face two issues of "pure fact".

For instance: it is uncertain that the defendant has committed the fact;

it is uncertain if at the time the defendant was conscious of his acts or had the freedom to choose his actions.

If for each of these particular judgments, the affirmative conclusion is such so as to only "just" the priority over that one, the negative conclusion, it seems evident that the syllogistic procedure could not be applicable without the most serious of offences to both Logic and Justice, and also to mere common sense.

Let us take into consideration an example from a different domain, that of everyday life.

A doctor visits an sick patient. The doctor believes that is probable that the patient is affected with carcinoma, but the doctor is not "sure".

If the illness were "certain", the doctor considers it appropriate for the patient to undergo surgery, albeit one of doubtful success, which in this case could bring forward (or "accelerate") the patient's death.

Now, no sensible doctor would reason thus:

First I will decide, in an absolute and definite way, if the patient is or not affected with carcinoma.

Next I will decide if that kind of carcinoma is or not operable.

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[5] In my opinion, this thesis would be admissible but in the case of a unique kind of judge like, for example, the roman "pretor" whose decisions had both the character sentence for the particular case, and of law for other similar cases. Nonetheless, given the multiplicity of judges, and the various degrees of the trial, it seems to me inevitable that we must be recognize the uncertainty of solutions when chosen case by case, compared to a general criteria of justice that could act as a guide for citizens regulating their behavior. Otherwise, it is acknowledged by the very same grounds of a large number of sentences, and also for practical purposes that the solution of a given issue, even if final, remains by and large uncertain, and so, for example, as a "specific motive" for reaching the compensation of the costs.

After that I will have no other choice than to reach the syllogistic conclusion whether the operation should or should not proceed.

Nonetheless, it is precisely this "kind" of reasoning that is being asked of a judge.

Luckily, in practice, things develop usually in diverse ways. A judge who already found himself already in the condition of uncertainty as regards ruling in the first issue of fact, will not analyze the second issue any further (even though it being completely independent from the first issue) as if he should decide on it in a fresh case; however, the condition of uncertainty that after all stayed with him after his first decision, will also show in the ruling of the second issue, albeit unknowingly.[6] Also, we can often corroborate this kind of compensation between an issue of fact and an issue of law.[7]

This compensation is, however, no longer possible, and the logical procedure imposed by the legislator explains the most absurd effects, when it's about a collective ruling.

Let us consider three judges that must rule in a lawsuit put forward by A against B, and that such lawsuit implies an issue of fact and an issue of law.

Two of the judges determine the issue of law in favor of A, likewise, two of the judges determine in favor of A the issue of fact, in this way:

Judges	I	II	III
Law	A	A	B
Fact	A	B	A

Conclusion: two out of three judges, had they had to decide by themselves, would have rule in favor of B (that is to say, reject A's lawsuit), one of the judges for a reason of fact and the other one for a reason of law. The final ruling, then, pronounced in favor of A, does it correspond maybe to a higher presumption of justice?

Let the simple calculation of the probabilities respond:

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[6] Cfr, Pacchioni, *I poteri creativi della giurispr., en Riv. Di Dir. Commerc.* 191, page 44, Otto, *Die Gewissheil des Richterssprucb*, Hanóver, 1915, page 18 .

[7] As the rule of law is generally formulated after the consideration of multiple cases of fact that are presented under as "average" kind of cases, when, on the other hand, a judge finds himself before a case presented as a "extreme" kind of case, his generalization can not be but biased. For example, let us suppose there exist some doubt about the existence of a given right. It is probable that the case can be decided in various ways if, in fact, it resulted that the observance of an imminent prescription would have, without a doubt, sanctioned the disputed right. We can find an unconscious reflection of similar concerns in a large number of sentences(for example "*Casac. Roma*, 2 junio 1919, *Foro Ital.*, 1919, pág. 627")

There are 2 out of 3 probabilities that A is right about the first issue, and 2 out of 3 probabilities that he is right about the second issue.[8] However, the probabilities that A is simultaneously right about the first and second issue are no longer 2 out of 3, but 4 out of 9 (2 x 2 out of 3 x 3), that is to say, according to the highest probabilities his lawsuit does not seem justifiable being there one probability out of 9 that B is right about two issues, and 4 out of 9 that he is right about one or about the other issue.

Going back to the example cited supra, if, during a consultation of 3 doctors, two of these doctors consider that the patient is affected with a carcinoma, and, at the same time, 2(that might not be the previous two consider) that if that be the case the patient is operable, and, therefore, in the case that 2 of the doctors out of 3 advise conclusively against the operation, albeit for different reasons, we believe that no patient of common sense (given that he trusts all three doctors equally), would allow the operation to be performed.

Similar ways of proceeding must necessarily lead to more serious mistakes whenever the judges are more than three and the issues to decide on more than two.

Let us consider the case that the following issues are proposed to a jury of ten members:

1. - Whether the defendant has committed the fact.
2. - Whether he was found to have acted in legitimate self – defense.
3. – Whether he was acting on freewill or was conscious of his acts.

Also, let us suppose that the individual opinions of each of the jurors are divided like this: (A= acquittal; C= conviction)

Jurors	1	2	3	4	5	6	7	8	9	10
Issue one	A	A	A	A	C	C	C	C	C	C
Issue two	C	C	C	C	A	A	A	A	C	C
Issue three	A	A	C	C	C	C	C	C	A	A

Like it can be seen clearly, if each of the ten jurors had had to decide by themselves on a single and definitive judgment, the accused would had been acquit

[8]This calculation can not really be called exact, being as it is based on the presumption that the unanimity of all three judges would be equivalent to a certainty. A more precise psychological analysis, which I will save for a future occasion, should take this factor into consideration as well. Anyhow, it can be affirmed that such probabilities will always be less than 2 out of 3.

unanimously, just missing for the acquittal the favorable response to one of the three issues.

On the other hand, if we were to proceed with the voting system in the manner imposed by the Law, and this resulted in the affirmative answer (by majority of the jurors) about the existence of the fact, and the negative answer (always by majority of the jurors) about each of the settled issues, the accused will necessarily be convicted.

Should we consider this kind of judgment to be more in accordance with the Law?

I. – There are 6 out of 10 probabilities that the accused has committed the fact.
II. – There are 6 out of 10 probabilities he was not found as acting in legitimate self- defense.
III. – There are 6 out of 10 probabilities that he was acting with freewill or was conscious of his acts.

However, the probabilities that all these three circumstances had been verified simultaneously are no longer 6 out of 10, but rather 6 x 6 x 6 out of 10 x 10 x 10. That is, 216 out 1000. We should then consider that there are 216 out of 1000 that the sentence will be just.

We must therefore realize that such an absurd logical procedure can have not only leaded to unfairly damaging consequences for the accused, but also to unjustly favorable ones.

Thus, supposing that three judges agree on admitting that the accused has committed a certain fact; that for each of the judges this fact constitutes different crime (for example, for one of the judges the fact is a theft, for the other judge it is fraud and third one thinks it is embezzlement), at the point where the three issues are submitted to simultaneous voting, the accused end up by being acquitted, while his culpability will not be a matter of discussion.[9]

[9] It is precisely on the basis of such subtleties that one or more judges, also in agreement, can eventually exclude the existence of a crime. That is, whenever a case being analyzed does not withstand being classified into the limited catalogue of juridical concepts that they are used to employ, just like, for example, the well-known sentence of the supreme court of Leipzig, which declared that the theft of electricity did not constitute a crime, in regard to which DANZ observed: "The legal expert must always bear in mind that juridical concepts constitute just the means to facilitate his job, but that these concepts, however, do not allow for real situations and that these situations should not be regulated by them. Thus,

Meanwhile, if from the objective side we must necessarily recognize that this manner of searching for the truth trough successive verifications does not pertain at all to a higher probability justice; from a subjective side we will find even more noticeable inconveniences.

We already seen how absurd is to think that any judge, after having ruled on a matter, and after having experienced great doubts and vacillations about a first issue, should indubitably transform certain and sure that such judgment is an absolute truth.

Nonetheless, it is even more absurd to think that, if a judge is absolutely convinced that a first issue should be ruled in certain way, he can later, following the vote of the majority, not only reverse his judgment, but also to continue voting in the successive issues presupposing that alleged truth which he first failed to recognize as such.

It is in this way that, for instance, being the judge convinced that the accused has not committed the fact, and at the same time that the accused's mental state might not have been altogether normal, after the opposing vote of the majority about the first issue he must, as Carrara[10] claims, totally disregard his proceeding opinion while answering about the second issue, and this manner exclude mental disorder or inebriation, contributing this to the defendant's conviction, or to a more severe punishment than deserved by he whom he considers completely innocent.

This excessive significance assigned to the logical procedure in what concerns the judge's sentences must, in my opinion, be related to that tendency to extend to the Law, in this and also in other other aspects, the dogmatism of Pure Philosophy.

Dogmatism in Philosophy needs to reach true conclusions, and, because of that, it also needs true premises. Legal experts find in forcibly taking the concept of "res judicata" (legally settled matter) from the field of practice, where we can find its origins and the reasons for its existence, into the field of Formal Logic, a convenient means of reaching such certainty.

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when aware that by these means he is moving away from the people's sense of the Law, he should provide himself with another altogether more suitable instrument.

[10] *Opuscoli*, v. II, Lucca, 1870, pág. 184.

The scientific method is completely the opposite. It has replaced dogmas with "hypotheses". No physicist today feels the need to define with complete certainty what electricity is before studying its effects or looking for its applications.

Now, while the dogmatic tendency leads precisely to assigning a decisive importance to the formal procedure, the scientific tendency should, on the other hand, lead to considering the instrumental value of the sentence, that is to say, to worrying about whether the sentence corresponds subjectively to the intimate conviction of the judge, and objectively to the requirements of that given moment in History.

Also, notice that is precisely the dogmatic tendency that one that leads later to the incongruities and abuses of the called "free law", through which they try to reduce into theoretical formulas and to dogmatize that process of adaptation that goes from the theory to the practice and which holds a psychological value, mainly because unconscious.

Roman law and English and American law do not know of any disputes of this kind, precisely because the application of the law in these law systems has always been conceived as a social function, and not like a logical exercise.

In this sense, the usefulness of collective trials consists mainly in allowing the single judges to contact each other, and in this way, indirectly to get in touch with public's frame of mind. Discussing motives and also particular parts of the sentence could specially serve this purpose. However, to consider these motives and these parts separately, and to expect to reach a decision trough through successive majority verdicts would somehow resemble the work of someone who, desiring a perfect statue, orders one of its arms from one sculptor, one of its legs from a second one, and its head from a third one, hoping in such a way to recreate the whole statue.

Nonetheless, the psychology of the collective trials, which is very different from the mass psychology, has not been examined thoroughly yet.[11] We will return to it, and particularly to the importance of discussion (which with so little psychological criteria they want to abolish in the trials of the jurors of the new penal procedure code) in a future article.

ROBERTO VACCA

[11] Cfr Schmitz, *Gesetz und Urieil*, Berlin, 1912, page 75.