

## THE LAW BETWEEN PHILOSOPHY AND ECONOMICS IN THE FIELD OF JUDGE'S DECISION ON MORAL DAMAGE'S AMOUNT

BENIAMINO SCUCCES MUCCIO  
Italia

1. Since Law cannot be considered something unfounded, in comparison with Philosophy and Economics (because, on the contrary, it constitutes the historical precipitate of the ideas and principles, which aim at guaranteeing a real interests balance, within living together), every judge's decision must be imbued with the innermeaning of rules, gone down the juridical relationships, that the daily experience tenders to judgement.

Therefore, Law itself can be conceived as the most accomplished expression as possible of Ethics, on the background of clearcut respect of human person's dignity, so as to meet its moral and material requirements. Only by this presupposition, Law can never remain "in book", nor become oppression deed, in the name of misunderstood social needs.

In my opinion, we ought, in order to the above, to go back the Natural Law, that descends from the Christian *Weltanschauung*, according to which man is to be recognized like "aim", but not like lifeless "blind instrument of keeneyed robbery".

Thus, Law is to be defined the irreplaceable catalytic agent of social order, "in his *quae sunt ad alterum*".

2. Truly, the basic problem the judge is called to solve consists, as to say, in "qualifying quantity, and quantifying quality", in order to render quite effectual the spirit of the law. Obviously, if the start-point of the judge's decision is anchored to materialistic conception, the standard, leading to valuation, is characteristic of economic terms; on the other hand, if the judgement's standard draws its inspiration from shaping man as *rationalis naturae individua substantia*, endowed with moral worth, transcending the material angle, it's possible to attain a solution, getting spiritual terms done.

I believe the above mentioned definition, particularly, bears upon the settlement, concerning the moral damage's amount.

For example, the Italian Supreme Court's steady jurisprudence, as regards the 2059 civil code's article, decrees: since a moral harm doesn't cause, neither directly, nor indirectly, patrimonial detriment by economic terms calculable, the judge has to realize the importance of offence, the plaintiff's age, sex, the economic condition both of damaged and offender, and so forth, above all in relation to the worry, caused by negligent or malicious illicit fact, with regard both to physical, intellectual and moral sphere, even if the plaintiff isn't able to realize the offence's consequences because insanity. Likewise, as regards the 185 article of the penal code, both the patrimonial and the moral damage is to be indemnified. Even if the offence dies away for all legal purpose, in consequence of amnesty, the judge can settle on moral damage in the ambit of the civil trial.

3. Anyway, the judge has to adduce the reasons for judgement, by the equity principles and the exertion of discretionary power, in order to put the amount of *praeti doloris*. Of course, the above shows the following:

a) also in legal "closed system", within the written law prevails, nevertheless, the importance of so called "particular case's justice" is acknowledged;

b) among several parts of Italian codification (e.g. on the subject of labour's lawsuit) the equity judgement in order to value the moral damage, perhaps, is the most important, because it calls for touching —as to say— the plaintiff's heart, and taking in consideration the privacy, on the all of primary human person's worths;

c) especially in this field, more than in others, the judge's decision cannot consist of mere logical framework: on the contrary, its necessary to perform a deep analysis, where psychology, ethics, concrete dialectic have to join, in order to put in practice the valuation of fair damage's amount. On this condition, economic point of view cannot be conceived something, going before of Philosophy in its logical, ethical and spiritual constituents, less than ever like a philosophy itself; rather, the economic terms are nothing but something quite subordinated. Thus, the judge is able to reject both the Shakespeare's warning: "There are more of stars in the heaven, than our philosophy", and marxistic idea, according to which economics become the keystone of social life, while Ethics and Law come to simple superstructures. Instead, Law planes itself well as basic logical and ethical category; at the same time, it hinges economics into Ethics.<sup>1</sup>

4. No doubt, it's easier to reach to determine the *praetium dolo-*

<sup>1</sup> Scuces Muccio, B., *Autorità, libertà, certezza giuridica*, Ciranna, Roma, 1970, p. 41.

ris, with regards to physical detriment, which harmfully reverberates on living together, as when the damaged must pay for a permanent visible scar; whereas, when it's necessary to fix the amount of recouping the damaged only because of psychological detriment, relating to the feeling range (sense of honour, affection towards relatives, and so forth), unavoidably the judge's decision must carry out a clear spiritualistic conception of human values, that only approximately can be quantified. Nevertheless, the judge, in this field more than in other, is to be inspired by the *esprit de finesse*, even if *les raisons du coeur* are to be lied down logical base of decision's motivation. I think the above brings to light the right *ratio essendi* of Equity, according to the philosophical and juridical point of view, that is, like "Law in action", taking root in the deepest human needs. So, the well turned questions about the theoretical conception of Equity diminish in value; indeed, the good use of discretionary power entirely depends on the judge's open mindness, inspiring by the noblest feeling of loving sympathy.

This is, where the touchstone of profitable effects of a juridical order stays, through a timely method for redressing an injury, in the measure the real cases claim, as they arrive. According to the Sicilian philosopher and jurist Giuseppe Maggiore, nothing breaks as much Justice, as the dozing nonchalance of a judge administering the one, by means of engine automatism without love, no realizing the nearly priestly weightness of the acts he achieves.

To love Justice, believe and hope in the one: on these virtues' triad, the feeling of Law blooms; they are flowers, that neither mere knowledge, nor simple action bear in their own branch, without the heart's divine impulse. Nobody can deny that juridical universe throughly crumbles, if there isn't any faith in the substancial justice: this faith trascends mere rationality, without being irrational.<sup>2</sup> Michel Villey seems to echo the Maggiore thought, when writes: "*sin embargo, ninguna respuesta se podría ofrecer a la pregunta ¿qué es el derecho?*" (*quid iuris?*), *si no tenemos alguna idea de lo que es el derecho (quid ius?)*.<sup>3</sup>

Briefly, any judge ought to choice the highest role of "Law's worker" (according to the Carnelutti's subtle definition), no affording to reduce the juridical system to a big heap of meaningless words.

<sup>2</sup> "Il sentimento del diritto", in *L'Eloquenza*, Roma, 1968, fasc. 3, p. 290.

<sup>3</sup> *Compendio de filosofía del derecho*, Eunsa, Pamplona, p. 34.