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The Sin of Unreasonable Doubt in the Age of Unfair Trial: Comparative Perspectives

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In order to best understand judicial decisions following evidentiary findings supported by testimony, it is necessary to start with two questions: In the case of an acquittal verdict, why was the defendant acquitted? In the case of a guilty verdict, how should the defendant be punished? The first prejudice lies in this. The witness, who is aware that his or her word may affect these two outcomes, is in turn judged without bias by the assessors. The second prejudice stems from the function of punishment: to educate by punishing, or by infringing the rights of all does not conform to the canons of social reintegration of the possible convict. This contribution, therefore, aims to find the scientific degree of moral certainty that is based on the use of rational methods of research and evaluation of evidence, oriented towards the discovery of the truthfulness of the incisive facts of the case.

Keywords: *Civil law and common law; Epistemology and reasonableness; Evidence; Logic; Legal certainty; Fair trial*

Introduction

The judicial process can be interpreted as a dynamic context in which different narratives are presented by various actors with different positions and different functions. The fundamental problem is to establish which statements are true and which are not. A factual hypothesis supported by adequate evidence does not satisfy the judge's certainty as to its truth, since such a conviction still has a subjective connotation that differentiates it from the rational and objective assessment of the evidence[1]. In particular, the problem arises as to the judge's narratives, since the final decision is based on them. Human perceptions of agents and their actions are informed by motivational conditioning concerning what types of actions are ethically required in different types of situations. A strongly inquisitorial system places the onus on the defence, so that if there is no evidence to acquit, one convicts, or if the evidentiary picture is contradictory, one acquits for insufficient evidence, with permanent negativity on the defendant[2]. In contrast, in the accusatory system, which is based on the presumption of innocence, the prosecution bears the burden of proof so that, on the one hand, insufficient or contradictory evidence leads to acquittal, also regarding justification. Furthermore, conviction must be pronounced when responsibility has been established beyond

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[1]Nobili (1974); Gaito (1975) at 517.
[2]Dinacci (1984) at 73; Pasta (2016) at 200.

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reasonable doubt[3]. However, it is necessary to emphasise how it is often stated in the operative part of the judgment that the decision was taken pursuant to Article 530(2) of the Code of Criminal Procedure (with consequent opacity as to the position of the acquitted). Likewise, in civil proceedings, the (deficient or contradictory) evidentiary results in the liability judgment are invoked[4]. The judge's need to know the facts to determine and motivate his/her decisions obligates him/her to indicate the assessment criteria to which he has referred in the grounds of the judgment, (excluding assessment parameters based on scientific data or long-established opinions, and the maxims of experience and laws of logic)[5]. The correct treatment of the facts is an indispensable condition for an adequate and fair legal response.

The Difficult Coexistence of Orality and Adversarialism

This fact brings out a further profile of the trial philosophy about the issue of evidence: the relationship between orality and cross-examination. This relationship replaces 'strict legality' with an eminently discretionary datum, verifiable and controllable only through the assessment of the reasonableness of the motivation[6]. Here, the problem is not only the issues of applicative uncertainty that characterise free conviction, reasonable doubt, and the rules of judgment; But the moment the evidentiary fact is invoked, as a constituent element of the case, rather than legal proof it becomes privileged proof[7]. In this way, however, an undue evidentiary shortcut is in fact introduced; and it is achieved not by violating the rules of procedure but by taking advantage of an ascertainment to be conducted on a hypothesis of a substantive criminal case[8]. Moreover, in the Italian system, there is a threat to constitutional guarantees. In fact, the burden of proof originates from the presumption of innocence provided for in Article 27, paragraph 2, of the Italian Constitution. At the time of assessment, Italy assigns the function of an epistemological rule to the burden of proof, where it is pointed out that qualifying the defendant as innocent implies both that the sanction must follow the sentence of conviction, and that the defendant's guilt must be proved in the manner prescribed by law[9]. Hence, the recognition of the principle that evidentiary uncertainty must be resolved in favour of the defendant simply because the demonstrative object of the trial is conviction and not acquittal[10]. In fact, in order to arrive at a formal declaration of guilt, it is necessary to await the outcome of the last trial. The object of the ascertainment can only be the guilt of the defendant with repercussions at the level of the burden of proof[11]. Also in the European

[3]De Caro (2016) ; Stella (2003) at 195; Marzaduri (2010) at 326.
[4]Di Bernardo (2016) at 64; Di Bernardo (2010) at 466.
[5]Ferrajoli (2016) at 172-175.
[6]Nobili (1995) at 650; Padovani (1999).
[7]Taruffo (2018) at 1307.
[8]Sgubbi (1990) .
[9]Cordero (1967); Capograssi (1959).
[10]Di Donato (2008).
[11]Ho (2008) at 212; Tuzet (2013) at 27.

context, with specific reference to the trial ascertainment, it is emphasised that the presumption of innocence implies a precise rule of evidence and judgment: the guilt of the defendant must be proved beyond all reasonable doubt; and the burden of providing such proof rests exclusively on the prosecution[12]. Moreover, on the subject of rules of evidence, the European Court of Justice has made it clear that the presumption of innocence requires that, in carrying out their duties, the members of the judging body do not start from the preconceived notion that the defendant has committed the offense for which he/she is being prosecuted; the burden of proof rests on the prosecution and the doubt is for the benefit of the accused. Furthermore, the prosecution has a duty to indicate to the person concerned what charges are being brought[13].

Unpredictability and associated Problems

The formulated observations highlight a situation of serious unpredictability as to the consequences of conduct. Unpredictability, which in addition to finding its origin in the descriptive vagueness of a criminal offense, also transmigrates into the content of the decision. This, moreover, is the inevitable result when moments of discretionary assessment of the historical facts are introduced among the 'types' of offense, further filtered by attitudes elusive of the onus probandi of an orthodox probative method[14]. We are, therefore, in the presence of an unpredictability that is not limited to the descriptive deficiency of the offense, but extends to the "treatment" that such a situation entails at the trial level, producing the following general problems:

a. Witness sensitivity sees inductive rationality as the fundamental source of justification for the hearing officer's response, which we find to be the most attractive component in the inferential model. Prejudice often manifests itself through stereotypes[15]. In fact, a prejudicial stereotype is a stereotype that is the product of a motivated maladaptation to the evidence[16]. Stereotypes may take the form of an implicit generalisation[17]; Alternatively, it may take the generic form in which there need not be a statistically significant number of cases, but only a simple association expressing the salient features of some characteristic[18].
b. In the Anglo-Saxon trial, the judge is the guarantor of the regular course of the confrontation between the parties, extraneous to the decisive moment that is assigned to the jury, which, however, lacks evidentiary powers. The codified system, typically of civil law, gives the judge investigative and decisional powers that inevitably culminate in favouring incursions into

[12]ECtHR *Mangano v Italy*, on the grounds about the admission of the appeal, at 4-6.
[13]ECtHR *Salabiaku v France*.
[14]Pagliaro (2005) at 1042.
[15]Ainis (2010).
[16]Twining (2006) at 310-334.
[17][“all/most/most X are F”], Marconi (2007) at 49.
[18]["X is F"] Greene & Ellis (2007) at 183-200.

the field of evidence, aimed at his/her greater cognition necessary to motivate the judgment. This is relevant, considering that the judgment will be subject to possible appeals, i.e. censure by the public and the parties[19]. This element has an impact on the manner in which the judgment is conducted, characterised by the failure to comply with the stipulated deadlines, such as in the matter of cross-examination, with very frequent and profound incursions made by the judge. This datum is favoured by the lack of sanctioning profiles when the rules, laid down by the legislator in the matter of evidence, are violated.

c. The trial also ultimately suffers from the overlap of the so-called media trial that takes place parallel in the press. This carries repercussions regarding the information detached by the media, fabricated during the investigation phase, prior to the procedures of the hearings, clearly violating the terms of trial document publication [20]. These are moments behind which different interests operate also in relation to different situations: reinforcement of the accusatory hypothesis; defensive strategies of the defence and of the offended persons; political and economic interests; the certainty of conjecture. This is often completely unmotivated and lacking any rational justification[21]. Not infrequently, if someone is asked why they are certain of something, the answer has no rational justification, but rather psychological or fideistic explanations[22].
d. The conduct of the cross-examination before the jury in the Anglo-American system and in the Assize Court (in the Italian judicial system), also manifests numerous critical aspects, prefiguring an evidentiary development not lacking aspects such as emotionality, suggestion, tension, aggressiveness. These profiles are not present in the development of the taking of declarative evidence before a professional judge, who is called upon to conduct a vast number of trials, often on the same issues. The problem lurks, above all, in criminal trials in the civil law system because cross-examination is dissociated from orality, since the assignment of validity may result from the evidence obtained during cross-examination of the parties, even before another judge[23]. Indeed, on this point, the wording of Article 111 of the Constitution does not appear to be exhaustive. To the extent that it emphasises the adversarial aspect, it essentially puts the profile of orality in the background. This encourages the circulation of evidence even between different proceedings, the so-called regime of evidence in special cases (Art. 190 bis Code of Criminal Procedure), the circulation of evidence from other proceedings to assess facts contained in irrevocable judgments (Art. 238 bis Code of Criminal Procedure). This element undermines the principle of immediacy, (whereby the decision

[19]["*aspettiamo di leggere le motivazioni della sentenza*" - "We are waiting to read the grounds for the judgment"] Eusebi (2016) at 1668.
[20]Dinacci (2008).
[21]Donini (2016) at 14.
[22]Betti (1958).
[23]Aliseda (2006).

must be taken by the same judges who took part in the trial) by affecting a different regime of orality or a regime of readings, even though the trial formation of the evidentiary material must be observed in both situations[24].

Epistemology of Testimony between Certainty and Uncertainty

The dissociation between orality and cross-examination is confirmed at the constitutional level, providing that evidence must be formed in cross-examination. That evidence also may not be formed in cross-examination by consent, by proven unlawful conduct, as well as by impossibility of an objective nature. The guilt of the accused cannot be founded on the statements of those who have always voluntarily evaded questioning (Art. 111 Const.). In essence, certainty does not presuppose the use of any method of checking the rational or cognitive basis of what is certain[25]. On the other hand, the use of expressions such as moral certainty is falling into disuse in common law doctrine and jurisprudence, although the reference to certainty remains widespread in the everyday language of jurists. This is especially the case in the field of criminal law, where it is believed that a conviction is justified only if the judge is certain of the defendant's guilt. However, the idea that in general the judicial decision must be based on a 'certain' conviction concerning the facts to be decided is recurrent[26]. Not infrequently, this idea is expressed in strengthened terms, with the addition of adjectives such as moral or absolute, to indicate that the certainty must not be based on a superficial opinion but must derive from a particularly deep conviction. Thus, allegedly, if the judge achieves moral, or absolute certainty, he/she is in a position to decide properly[27]. This type of certainty is based on a truthful conviction, i.e. a claim to truth: if I say that I am certain that X implies that I am certain that X is true, certainty as to the facts could be understood as synonymous with the truth of the facts. This occurs especially when this certainty is stated as absolute, moral certainty as to the facts of the case and can only be attained on condition that the judge researches all the facts that can identify the truth, acquiring all the evidence and information necessary for this purpose[28]. Moreover, moral certainty is identified in the condition in which the judge, rationally assessing the elements of judgment available to him/her, reaches a conclusion based on the facts that allow him/her to exclude any 'reasonable doubt' and thus determine a 'maximum probability'[29]. Some uncertainties, however, concern the method on which it is based. On the one hand, it deals exclusively with how the members of the jury reason in common law systems above all. Even assuming, for the sake of argument, that it reliably describes what goes on in the minds of jurors, one can justifiably doubt that it can automatically apply to the reasoning of a professional judge, skilled in the critical

[24]Pardo & Allen (2008) at 223.
[25]Tversky & Kahneman (1980).
[26]Vidmar (2011) at 58-62.
[27]Klein & Mitchell (2010); Koehler & Meixner (2015) at 749-774.
[28]Tversky & Kahneman (1974) at 1124-1131.
[29]Tversky & Kahneman (1983) at 293-315; Zenker (2013).

evaluation of evidence and the application of law[30]. Similarly, the risks of overstating evidence that involve the cognitive consistency approach for jurors do not arise, or arise in different terms, for the judge[31]. On the other hand, what if the evidence is taken into account by the trier of fact for the purpose of ascertaining whether the statements concerning the facts of the case (taken individually or taken as a whole) are or are not true? One is thus concerned with how the jurors construct their narratives, but not with the issue of whether and to what extent these narratives correspond to the reality of the facts they relate[32]. Thus, the focus is exclusively on the coherence of the narratives the jurors construct, and not on their truthfulness. Here too, it should be noted that there can be perfectly coherent narratives and completely false ones, which is of no interest in the context of a trial.

Reasonable Unfair Testimony

Reasonable testimony is the assurance of truth that the speaker gives to the listener. It is the non-evidential characteristic of their interpersonal relationship that gives value to testimonial beliefs, the exact connection between a speaker giving a listener the assurance of the truth of his/her utterance, or inviting a listener to trust him/her, and the truth itself[33]. In other words: What is the scientific value of such interpersonal characteristics? For the speaker, by presenting an utterance as an assertion, by the power of saying something to the listener, presents him/herself as responsible for the truth of what he/she says and, in so doing, offers a kind of guarantee for this truth[34]. But even if a speaker explicitly offers his listeners a guarantee of the truth of his assertion, what does this have to do with truth itself? Trust is only a source of epistemic assurance when it is epistemically reasonable[35]. Trust is scientifically reasonable when the thing trusted is trustworthy, provided there is no evidence to show that it is not trustworthy. Witness injustice, on the other hand, occurs when prejudice drastically reduces the credibility attributed to someone's word[36]. This means finding fault regardless of whether one

[30]Guthrie, Rachlinski & Wistrich (2007); Posner (2010); Scholars who have dealt with legal reasoning have traditionally focused on the decisions made by juries and individual jurors, which play a central role in systems of the Anglo-Saxon tradition, particularly the English and American systems. The result is that, from the point of view of empirical studies on the subject, 'the behaviour of judges remains something of a mystery'; and, from a theoretical point of view, none of the many models of judicial reasoning in the field is satisfactory. And it is precisely the latter presided over by the principle of legality, to which the notion of the case is correlated, that limits the operation of judicial reasoning. "Judges too are human": like other experimental subjects and ordinary people, they rely more or less consciously on heuristics and reasoning shortcuts that can lead them to draw wrong conclusions or make irrational decisions.
[31]Weinshall-Margel & Shapard (2011).
[32]Wistrich ,Guthrie & Rachlinski (2005) at 1277-1293.
[33]Zenker, Dahlman & Sarwar (2016) at 173-196.
[34]Viscusi (1999) at 26-62.
[35]Fricker (2016a) at 144-159.
[36]Fricker (2007).

benefits from the fault[37]. Indeed, it means justifiably believing the word of a speaker, but being culpably negligent with the evidence[38]. The listener ends up with a false belief, but the history of epistemic guilt is such that the responsibility is discharged and we regard the error as being solely the fault of the original speaker: After all, it is 'X' who was negligent with the evidence, whereas the listener made no error of reasoning in believing 'X'. The evaluator is a faultless (and therefore blameless) conduit for bias[39]. If the reception of 'X's' word is negatively influenced by prejudice (testimonial injustice), then it cannot be challenged; or if 'X's' account is rejected because it has to recount a form of social experience for which there are insufficient shared concepts due to interpretive marginalisation (hermeneutic injustice), then it still cannot be challenged[40]. When the level of credibility attributed to a speaker's word is reduced by the bias operating in the listener's judgment, the speaker suffers testimonial injustice[41]. The bias that drives every case of testimonial injustice may or may not be a conviction, operating specifically in the listener's credibility judgment. Judgment may be unreflective and spontaneous, a matter of ingrained habit, or testimonial sensitivity[42]. Witness injustice not only blocks the flow of knowledge, it also blocks the flow of evidence, doubt, critical ideas and other epistemic inputs that are conducive to knowledge[43]. If a speaker knows something that the listener does not (and if the level of credibility deficit is such that the listener does not accept what he or she is told), the listener's ignorance is preserved[44]. Alternatively, if the speaker offers evidence that has a bearing (positive or negative) on something the listener already believes but does not know, then the listener loses his/his ignorance[45]. Thus, the listener loses reasons that (if positive) may make his belief knowledgeable or at least give it greater justificatory weight; or that (if negative) may dissuade a false belief, or at least turn out to be less solid than it seemed. In both cases, an opportunity for scientific improvement is lost and ignorance prevails. The plausibility and credibility of a narrative depends on the extent to which it corresponds to criteria of 'normality' or 'familiarity' of what is being narrated with respect to the way of thinking of those reading the narrative, but not on whether the narrative is or is not true[46]. This implies that the narrator (the judge) or the user of the narrative, may take as true facts that have not been proven, as long as they are normal or familiar. This would, in the name of narrative coherence, fill in the gaps that may have arisen in the evidentiary verification of factual statements: that is, one would take as true what one actually knows nothing about[47]. This, however, assumes that the judge can base the decision on unproven

[37]Fricker (2013b) at 49-53.
[38]Fricker (2013a) at 1317-1332.
[39]Holroyd (2012) at 274-306.
[40]Medina (2012).
[41]Fricker (2015b).
[42]Ibid.
[43]Fricker (2016b) at 33-50.
[44]Ibid.
[45]Ibid.
[46]Lackey (2020) at 43–68.
[47]Nagel (2014) at 219-241.

facts, and thus excludes that the judicial decision must be based only on the facts that have been proven at trial, even when this leads the judge to construct a narratively inconsistent or incomplete version of the facts[48].

The Judge against Prejudice: The Intervention of Logic

The judge and all the other subjects of the process stop to rethink what has already been, to return to the present with intelligence, with the feeling of having had a moment in the past. But they merely make present what is not present. And so the process is always proceeding through signs which signify but are not the thing signified[49]. This occurs when the judge, instead of 'discovering' the meaning of the norm, tends to 'construct' it[50]. In essence, the interpretation of facts and, in particular, of legal facts is not a mere 'evaluative approach', all the more so in a system, in which the semantics of legal language is multi-interpretive. Hence the recourse to criteria of discretion which, although admissible in the legal system, must nevertheless be kept quite distinct from arbitrariness insofar as it is bounded by the control of a rational justification in which the judge is always in a position to scrutinise within the limits of the contested charge[51]. In essence, every argumentative passage of the judge, leading from the evidentiary fact to the fact to be proved, must be supported by a logical apparatus[52]. Judges rely heavily on intuitive reasoning to evaluate legal disputes. They systematically use "simple mental shortcuts as a guide to reasoning about legal materials" and for this reason, while occasionally employing more deliberative forms of reasoning, "remain exposed to errors of judgment".[53] Examples of this are the distortions introduced by procedural constraints, bureaucracy, and the legal environment, as well as the emotions and other psychological factors that influence judges' decisions[54].

The risk posed by the crisis of the law results in some correspondence to the facts in the dispositive power of creating new law on the part of the judging authority. This is due to a corresponding weakening of the law in its role of limiting arbitrariness, played by the principle of legality, now characterised by an indeterminate language.

This reality is flanked by a normative production generated for the solution of specific cases and, therefore, necessarily lacking the requirements of generality and abstractness[55]. Hence the crisis of the law's regulatory capacity, which distorts

[48]Medina (2012) at 201-220.
[49]Schauer (2009).
[50]Teichman & Zamir (2014).
[51]Canale (2013).
[52]Gigerenzer (2014); Selten (2001).
[53]Sunstein, Kahneman, Ritov & Schkade (2002)..
[54]Frederik (2005) at 25-42.
[55]It thus emerges how the expansion of judicial law also originates from the dysfunctions of legislative law. whereas 'generality' means the reference of the normative provision to a series of persons who are not individually determined, the requirement of abstractness is characterised by the indeterminability of the subjects who may find themselves in the situation described by the norm. In essence, the rule, in its physiology, must be configured as a will to will, a preliminary will directed to give rise to a concrete will when the conditions provided for therein occur, since this follows from

the cognitive role of jurisdiction. The reference to evidentiary relevance that guarantees the right of defence, implies the right to evidence and the right to cross-examination even through a limitation of ascertainment[56]. It thus emerges how the 'fixing' of a subject of investigation does not merely fulfil bureaucratic functions of 'procedural order', but instead constitutes an expression of fundamental values of the criminal process[57]. In any event, this aside, it is essential to point out how the insufficient clarity of the normative perimeter of the evidentiary theme leads to the effect of evidence tending to replace its object in the sense that the element in which it consists becomes significant at the same time on the real level (as an element of the *notitia criminis*, as *corpus delicti*). This happens as on the symptomatic level (as an element that presumptively refers to a broader and more significant context), with an interchange such that the procedural factors through their symptomatic-probative relevance replace the relative elements lacking in identification and determination[58]. Having overcome the opposing orientations that considered it sufficient to resort to a probabilistic scientific law, there has been a move towards a logical probability supported by a high degree of rational credibility. Even if the scientific law has low probability, and those that required a high probability law close to certainty, this move also occurs even in the wake of North American jurisprudence[59]. The data must emerge from the cross-examination of the experts so as to allow the judge to determine the validity of the evidence and the applied scientific method. In essence, the degree of decidability of a pronouncement of legal truth is directly proportional to the degree of taxability of the rule applied by it and inversely proportional to the space required for interpretive argumentation[60].

Is Logic Sufficient?

In civil law systems, the method of interpretation is deductive based on the Aristotelian syllogism: a) all men are mortal (major premise); b) Socrates is a man (minor premise); c) Socrates is mortal (conclusion). The above conclusion is based on the deductive method; it is free of logical flaws; it is in line with our civil law system (rule - fact - effect i.e. judgment). Unlike common law where it is predominantly inductive: a) Socrates is mortal (conclusion);b) Socrates is a man (minor premise);c) all men are mortal (major premise). The inductive method has at least one logical flaw because it generalises (major premise) from a conclusion.In fact, that Socrates is mortal and is a man does not necessarily imply that all men are mortal. However, it is in line with the common law system (effect i.e. judgment - fact i.e. rule). In essence, the judge's reasoning should lead him to

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the need to ensure, in addition to the greatest possible legal certainty, equality of treatment for all those who find themselves in the same situation. Danziger, Levav & Avnaim-Pesoa (2011) at 6889-6892; Dhami,(2003) at 175-180; Diamond, Rose, Murphy & Meixner (2011) at 148-178.

[56]Tuzet (2010); Engel (2012); Englich, Mussweiler & Strack (2006) at 188-200.

[57]Ferrajoli (2011) at 36.

[58]Tuzet, (2006); Josephson (2002) at 287

[59]Simon (1997); Fenton, Neil & Berger (2016) at 51-77; Festa (1996); Garbolino (2014).

[60]Kahneman, Slovic & Tversky (1982) at 84-98.

determine which are the possible reconstructions of the facts of the case on the basis of the available evidence, and to choose the narrative that is 'better' than the others for the final decision. However, the hypothesis taken into consideration by the judge would not in itself be evaluated, but would only be evaluated in comparison with the other hypotheses. The result of the evidence would be the determination of which is the 'best' narrative, through the comparison between this narrative and the other possible hypotheses, aimed at establishing which hypothesis is to be preferred to the others[61]. The judge must first assess the degree of corroboration obtained by each of the hypotheses in play, considered in isolation and not in comparison with the other hypotheses. Accordingly, then, the judge must discard those hypotheses that do not have a sufficient evidentiary foundation to be considered. The inference to the best explanation is not, when considered on its own, an acceptable criterion for the final choice of the version of the facts to be used as the basis for the decision. One conception of the decision states that the judge should choose the version of the facts that is relatively plausible: The choice of hypothesis must be based on the relationship between the best resultant hypothesis and the degree of evidentiary corroboration relating to the facts on which the hypothesis is based[62]. One can certainly agree that the conditional explanation must correspond to the facts, but one can observe that this calls into question, and essentially abandons, the entire construction of the other criteria indicated for the choice of the best explanation. For if it is said that the explanation, having considering all the available evidence, turns out to correspond to the facts that must be chosen, this constitutes an autonomous and sufficient criterion for identifying the best explanation. Then the consistency of the explanation ends up being a secondary, if not entirely irrelevant criterion: Consequently, one ends up saying that the explanation is best if it is true. The bulwark of the predictability of the decision should preserve (not replace) legislative legality. Thus, the (albeit important) perspective of jurisprudential stabilisation cannot be enforced outside the connection to prior legislation. Understanding legal reasoning and its peculiar characteristics thus serves both to shed light on human reasoning in general and to test various 'theories of rationality' in relation to the systematic and predictable deviations of human thought from the rules of correct reasoning theory (logic and probability theory in particular)[63]. In this regard, an alternative between two possible hypotheses seems to emerge: a) only the coherence of the narrative is taken into account, believing it to be the most important factor, or the only factor on the basis of which the narrative is to be taken as the basis for the decision, thus eliminating any reference to the truth of the narrative itself; b) the narrative is held to be true because it is coherent, thus understanding coherence as a synonym or demonstration of the truthfulness of the narrative. Both of these hypotheses are, however, highly problematic. The first hypothesis can only be accepted on condition that it is assumed that the trial is not aimed at establishing the truth of the facts on which the decision is based, but only at having the judge choose a

[61]Gigerenzer (2008); Howson, & Urbach (1993).
[62]Posner (2010); Rachlinski, Wistrich & Guthrie (2013) at 1586-1618.
[63]Crupi, Dell'Utri & Rainone (2016) at 81-98; Taroni, Biedermann, Bozza, Garbolino & Aitken (2014).

narrative of those facts[64]. The second possibility must also be excluded for several reasons. On the one hand, to say that a description of a factual matter is true because it is consistent implies the premise that one considers the reality being described to be consistent (in whatever meaning of the term)[65]. This presupposes ontological, or even metaphysical assumptions. There is, therefore, no necessary correspondence between the narrative coherence of a description and its truthfulness. As a rule, it is consistency, not completeness of information, that leads one to accept a story as true, even if it is not. On the other hand, it is not true that the most coherent stories are the most probable ones, and 'the uninformed easily confuse the concepts of coherence, plausibility and probability'[66]. It is no coincidence that inductive logic is used to explain the structure of evidentiary inferences, and special attention is paid to the rules of evidence and the criteria that must guide a rational evaluation of evidence in general, and witness statements in particular[67]. We are confronted with a perspective hinged on the values of rationality, the logical validity of the judge's reasoning, and the analytical and intersubjectively verifiable evaluation of evidence; an evaluation that must be oriented essentially towards ascertaining the truth of the facts[68].

Conclusion

The smooth functioning of a country's legal and juridical system depends, to a significant extent, on the quality of the decisions and choices of its protagonists: judges, prosecutors, jurors, lawyers, experts, witnesses, investigators, etc. Moreover, to the extent that legislation is the product of choices and deliberations, individual and collective, of legal professionals, these also determine the quality of the very system of norms and laws that regulates actions and interactions. For this reason, the study of legal reasoning is the set of Judges, jurors, investigators and prosecutors who must assess daily the relative probabilities of different events based on clues, testimonies, reports, and ambiguous information, under conditions of high uncertainty and scarcity of time and resources (including cognitive). These are the ideal conditions that favour a 'fast', intuitive and heuristic-based thinking style, to the detriment of 'slow' and deliberative thinking. Judges are undoubtedly expert reasoners, careful to avoid traps and hasty conclusions and explicitly instructed to carefully consider the different aspects of each decision problem. A judge might assess the defendant's guilt as highly probable even if the available statistical data do not justify this conclusion, but the precautionary principle that it is better to acquit a guilty person than to convict an innocent one always remains.

[64]Gilovich, Griffin & Kahneman (2002).
[65]Guthrie, Rachlinski & Wistrich (2002).
[66]Rachlinski, Wistrich & Guthrie (2011) at 72–98.
[67]Kerstholt & Jackson (1998) at 445-454; Kaye (1979).
[68]Guthrie, Rachlinski & Wistrich (2001); Guthrie, Rachlinski & Wistrich (2007); Guthrie, Rachlinski & Wistrich (2009).

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