

GIACINTO PARISI*

PIERO CALAMANDREI, *OPERE GIURIDICHE*, I-X,
RIST., ROMA, 2019

Anyone who reads any of the essays written by Piero Calamandrei and collected in the ten volumes of the *Opere giuridiche* – re-published in 2019 by the publishing house Roma TrE-Press (romatypress.uniroma3.it) and freely available online – can appreciate the depth and the originality of his thoughts, the elegance of the prose style and the vibrant modernity of the outlined ideas.

Indeed, the essays of the famous Florence-born jurist – who was full Professor of civil procedural law, Dean of the University of Florence, President of the Italian Bar and member of the Italian Constituent Assembly – cannot be reduced to a meticulous and tedious review, as such would be in disagreement with the extraordinary nature of his human and scientific existence.

Therefore, we believe it is useful to point out only some of the most relevant milestones of his scientific work, which can be considered a common heritage, also thanks to the further developments operated by other scholars, of the present procedural law: such are related to the nature of the Court of Cassation, the idea of the trial seen as a game, the purpose of the precautionary measures, the notions of truth and plausibility within the trial.

Many of the essays present in the sixth, seventh and eighth volumes of the *Opere* are dedicated to the Court of Cassation, which is considered the highest body of the Italian law system and set to regulate the intertwines between the different jurisdictions. Such essays represent one of the most relevant and important results of the scientific work of Piero Calamandrei, who in 1933, whilst commenting the ten-year anniversary

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of the foundation of the sole Court of Cassation in Rome, wrote that «la porta, per la quale la scienza del diritto entra più liberamente nelle aule di giustizia, è quella della Cassazione unificata» (the door through which law as a science can more freely enter the courtrooms is the one of the unified Cassation).

Such “door”, which Piero Calamandrei concurred in opening and that he celebrated in the ten-year anniversary of the sole Cassation, has been kept open by the ongoing discrepancies in case-law and on the most problematic judicial issues. The control over the correct application of the law, which Article 111, § 7 of the Italian Constitution has bestowed upon the Supreme Court, also on the basis of Calamandrei’s thoughts, is based on the idea that, as the law dictates, judgments are the result of a collective decision-making process and are supposed to benefit from ongoing discussions, not only in case-law but also involving external bodies.

It can also be stated that an undoubted merit of Calamandrei’s essays, which makes them particularly attractive, is the very well-sorted union between the high level of his scientific work and his “practical” experience in the courtrooms: in relation to this, the essays on the legal professions collected in the second volume of the *Opere* and the assortment of closing arguments which are held in the tenth volume are particularly poignant, as they show how he fully understood that the trial experience has a concrete and emotional impact on the individuals involved.

The most relevant example of such can be appreciated in his renowned and fascinating essay called “*Processo come giuoco*” (Trial as a game), published in 1950 in the *Rivista di diritto processuale* and included in the first volume of the *Opere*, where he states that «se il giurista ‘puro’ può prendersi il lusso di trattar le leggi come congegni di precisione», solo a questo non può limitarsi l’avvocato, «il quale deve ad ogni istante ricordarsi che ogni uomo è una persona, cioè un mondo morale unico ed originale, che dinnanzi alle leggi si comporta secondo i suoi gusti e i suoi interessi, in maniera imprevedibile e spesso sorprendente» (if a ‘pure’ jurist can allow himself to treat the legal provisions as precise tools, a lawyer cannot do the same, as he needs to remember that every man is a person, and so a unique and original moral world, which acts before the law according to his preference and interests, in unforeseeable and often surprising ways).

The uniqueness of each individual can be fully appreciated in the game of the trial, which is formally aimed at administrating justice, but that at the same time is the

place where minds challenge one another. Therefore, it is to be considered particularly poignant the old say which claims that several ingredients are needed in order to succeed in a law-suit: to be right, to be able to state one's case, to find someone who understands and appreciates it and, finally, that the debtor is in the position to pay. Basically, the result of the fight which rages within the trial depends not only on which party is right, but also on their ability in playing the game, on their behaviours, their intelligence, their talent in surprising the enemy. However, such agonistic vision of the trial cannot be considered complete, given that – as stated by the same Calamandrei – the freedom of the tactics employed in the trial is limited by the obligation that the parties and their counsels have to behave with “*lealtà e probità*” (loyalty and honesty). However, the interpretation of such general phrase is still controversial and thus several issues – such as malicious litigation, the liability connected to unfair behaviours by the parties, the possibility to appreciate as evidence the conducts of the parties, the obligation of the parties of the trial to tell the truth – are still thoroughly discussed among scholars and in case-law nowadays.

Also some of the less-known essays of Calamandrei are to be considered extremely relevant as highly influential over the scholars who in the following years studied the same issues and relied on his thoughts. That is the case, as means of example, of the essay *Introduzione allo studio sistematico dei provvedimenti cautelari* (Introduction to the systemic study of the precautionary decisions) of 1936 and his last essay regarding civil procedural law called *Verità e verosimiglianza* (Truth and verisimilitude), which are respectively collected in the ninth and fifth volume of the *Opere*.

When Calamandrei publishes the essay *Introduzione*, which is dedicated to Giuseppe Chiovenda, he has just turned forty-seven and he is at the highest peak of his scientific life. The Florence-born scholar warns his readers that the essay is not devoted to the issue of the protection of rights through precautionary measures, but it is rather an introduction to a course on the precautionary measures meant for the students of the second two-year period of the Faculty of Law of the University of Florence. Although the essay has then an educational aim, it adopts a very interesting new and modern approach in tackling the issue of the precautionary measures and shows full awareness of the tight relation between this particular protection and the issue of effectiveness of the judicial functions.

First of all, Calamandrei states something that is now considered essential among procedural civil law scholars, which is that «in un ordinamento processuale puramente ideale, in cui il provvedimento definitivo (del giudice) potesse essere istantaneo, in modo che, nello stesso momento in cui l'avente diritto presentasse la domanda, subito potesse essergli resa giustizia in modo pieno e adeguato al caso, non vi sarebbe più posto per i provvedimenti cautelari» (in an ideal procedural civil law system, where the final decision of the judge is immediate, so that when the plaintiff presents his request he immediately receives justice, there would be no room for precautionary measures).

Therefore, precautionary measures find their origin in the need to ensure that the final decisions, whose issuing is the main aim of the judicial system, are effective and not impacted by the obstacles that can develop in the time needed for the delivering of the judgment and that threaten its effectivity. Calamandrei is clear on the fact that such tight relation between the precautionary measures and the need to guarantee the effectiveness of the decisions means that such measures are to be considered a direct emanation of the right to access to trial. Given that, due to its very nature, any trial needs more or less time before releasing its final decision, it is easy to understand that the regulation of such measures are intended has a sort of «corsa contro il tempo» (race against time): thus, they cannot last more than needed (in light of the principle of the reasonable length) but at the same time need to serve their purpose.

A direct consequence of all the above is that precautionary measures need to be attributed to an autonomous judicial function: in this sense, the scientific work of Calamandrei has been decisive.

The contribution that Calamandrei offered to the issue of the creation of the internal conviction of the judge with the very famous essay *Verità e verosimiglianza* is also very relevant. In such essay the author reviews – more than fifty years later – the scientific work of Adolf Wach, according to whom the trial is not aimed at assessing whether a fact is true but if it is plausible and then states that «anche per il giudice più scrupoloso e attento vale il fatale limite di relatività che è propria della natura umana» (also the most careful and meticulous judge is bound to the fatal limitation of relativity which is typical of the human nature).

When one says that a judicial fact is true – the Florence-born scholar states – «si

vuol dire in sostanza che esso ha raggiunto, nella coscienza di chi lo giudica tale, quel grado massimo di verosimiglianza che, in relazione ai limitati mezzi di conoscenza di cui il giudicante dispone, basta a dargli la certezza soggettiva che quel fatto è avvenuto» (what one really wants to say is that such fact has reached, in the conscience of the judging subject, the highest level of plausibility that, in relation to the limited knowledge-related instruments of the judging subjects, is sufficient in order to give him the subjective certainty that that fact took place); thus, nothing more than a «un surrogato di verità» (a surrogate of truth), dependent on the experience, the culture and the capacity of the judge.

In such sense, the judgment based on probability is functional in measuring the capacity of a given allegation to represent a concrete factual reality, on the basis of «l'ordine normale delle cose» (the natural order of things) and considering that, in the modern civil procedural law, the judge is expected to wait for the parties to present their case and provide the necessary evidence. This, in the end, can be considered as the reaffirmation, also in relation to the verification of evidence, of the garantistic idea of the trial, typical of the “processual liberalism”.

PIERO CALAMANDREI was born in Florence on April 21st, 1880. After graduating in Law at the University of Pisa in 1912, he undertook further studies in Rome under Giuseppe Chiovenda. He was professor of civil procedural law at the universities of Messina (1915-1918), Modena (1918-1920), Siena (1920-1924) and Florence (1924-1956). At the University of Florence he taught, after the second World War, also constitutional law.

In 1924 he co-founded the *Rivista di diritto processuale civile*, of which he was the first supervising editor and then, since 1927, co-editor in chief together with Giuseppe Chiovenda and Francesco Carnelutti. In 1926 he created, with Enrico Finzi, Silvio Lessona and Giulio Paoli, the journal *Il Foro Toscano*.

In 1945 he founded and directed until his death the journal *Il Ponte*, which had political and literature-related contents. He created and directed the collection *Studi di diritto processuale* (first series, twelve volumes, Padova, Cedam, 1932-1938; second series, five volumes, Padova, Cedam, 1940-1942). He directed, together with Alessandro Levi, the *Commentario sistematico alla Costituzione italiana* (two volumes, Firenze, Barbera, 1950).

From 1945 until 1946 he took part in the *Consulta Nazionale*. In 1946 he was elected deputy of the Italian Constituent Assembly. In 1948 he was elected deputy of the parliament for the first republican legislature (1948-1953). He was dean of the University of Florence from September 1944 until October 1947. From 1946 until his death he was President of the Italian Bar. From 1946 until his death he was member of the *Accademia Nazionale dei Lincei*. He was vice-president of the Italian Association of the scholars of the civil trial; he was a member of the *Accademia Colombara* of Florence and of other Italian and foreign academies.

He died in Florence on September, 27th 1956.