Abstracts

Giustizia & Giustizia / Justice & Justice
di Francesco Riccobono
Starting from a semantic reconstruction of the word "Justice", the author explores the relationships between Justice and Law. In particular, the author analyzes, in historical perspective, the concept of Justice, compared both to "natural law" and with respect to the culture of positivism which prevailed in the nineteenth century. From that moment on – which marks a fundamental theoretical break inside modernity – the word "Justice" will stay linked to that of law. This raises the problem of distinguishing between fair and unfair law: a problem that has been at the centre of the legal and philosophical debate during the XX century, and it is still central also in the State constitutional law.

Che cos'è una società giusta (nell'epoca delle società complesse) / What is a Fair Society (in the Age of Complex Societies)
di Fabrizio Barca, Alessandro Ferrara, Maurizio Franzini, Elena Granaglia, Giacomo Marramao
Some of the members of the editorial board debate with Fabrizio Barca about two of the most significant works on Justice in a complex society of the last decades: John Rawls' *Theory of Justice* and Amartya Sen's *The Idea of Justice*. The debate aims at proposing a rethinking of the concepts of justice and fair society, in order to try to re-actualize the idea of "social progress" – which, interrupted for over thirty years, had characterized the western democracies in the second half of the Twentieth Century – so to enlarge the democratic spaces that the economic crisis has put severely to test in recent years.

In cerca della disuguaglianza (economica) giusta e delle sue condizioni / In Search of Fair (Economic) Inequality and of Its Conditions
di Maurizio Franzini
After a long silence economists have started again to research and study economic inequality. Over the last two decades remarkable advances have been made on various issues related to economic inequalities. However a

poorly debated question is why economic inequality is a problem. Indeed, economists have put forward several arguments in support of the idea that inequality is not a major problem. Such arguments span from the positive impact of inequality on economic growth, to the consideration that poverty not inequality is the problem and, finally, that we should care only about equality of opportunity. This essay provides a critical assessment of all these ideas and offers an attempt at defining the conditions under which economic inequality can be considered just or, at least, less unjust than it is today.

La giustizia tra deontologismo e consequenzialismo / Justice between Deontologism and Consequentialism
di Piergiorgio Donatelli
The contemporary scene opposes deontological and consequentialist views on the nature of justice. The article goes back briefly to early modernity, and to Hobbes especially, to see that things were not always so. In Hobbes we find an understanding of justice tied to the obligation we owe to the sovereign, which is based though on the knowledge of the tendencies of the actions. At the same time such knowledge depends upon the availability of ordinary experience as opposed to the reasoning and the language of the learned. It is a novel scene from our contemporary perspective. Justice may be tied to tendencies (which is not our notion of consequences), yet this requires a rehabilitation of the concept of the ordinary life.

Legislatore e giudice nella protezione dei diritti fondamentali. Il caso dell'Unione Europea / The Legislator and the Judge in the Protection of Fundamental Rights. The Case of the European Union
di Gaetano Azzariti
The essay analyzes the growing central role that the European Court of Justice has gained in setting the limits of the European legal order and in defining the European system of fundamental rights. By taking the cue from some recent decisions of the EU Court of Justice, the essay criticizes the growing "jurisprudentialization" of the European political order and how this transition has been strengthened by the proclamation of the European Charter of fundamental rights. As a consequence, in the current economic crisis this judge-made system has pushed towards the subordination of fundamental rights to the market.

La giustizia civile oggi / The Civil Justice Today
di Claudio Consolo
The paper addresses the issue of the methods through which the function of civil justice is currently administered. The Author acknowledges that the civil process is increasingly departing from its ultimate goal, which should be to

end up with a decision the more adherent as possible to the case at hand. The Author, therefore, enquires the consequences of such a manifest shift towards procedural instead of substantive outcomes of the litigation. The point of departure is a reflection upon the evolution that the so called procedural legal relationship has gone through. The first instance trial has become more and more crucial, whereas appeal trials have become the object of recent legislative amendments which constrained the chances that upper courts will look at the merits of the appeal. As a result of such a trend, the stabilisation of first instance decisions is becoming more frequent, not for substantive reasons, rather for procedural grounds. The resulting procedural model closely resembles other legal systems' models (such as the English one), however it is affected by the role of our first degree justices and by the substantial incompatibility between the typical institutions of a legal system and the very different cultural traditions rooted into another one. A glance to the alternative dispute resolution methods, in particular arbitration and mediation, is also given, focusing on the reasons why, today, those methods are scarcely appealing and incapable of providing a real alternative with respect to civil justice administered by ordinary courts. The paper ends with some proposals, focusing on how the civil justice system should be organised, without further and useless (and even harmful) amendments to the rules of conducting trial.

Giustizia privata. Il caso degli arbitrati in materia di investimenti esteri / Private Justice. The Case of Arbitrations on Foreign Investments
di Maria Rosaria Ferrarese

In the widespread phenomenon of "judicial governance" that contributes to the global legal order, an important role is played by various private courts and alternative methods of dispute resolution. International arbitral tribunals in particular, in dispensing legal decisions based purely on the contracts they service, boost the de-politicization and de-centralization of the current legal scenario. However, arbitral awards, particularly in the field of foreign investments, can generate negative externalities. This effect is due to the fact that the investment protection afforded by international treaties, especially TRIPS, are all too often interpreted by arbitral tribunals in ways that support rent-seeking attitudes in companies, while limiting states' regulatory powers in areas of public interest.

***Mater Iuris*. La rappresentazione della giustizia nella prima modernità / *Mater Iuris*. The Iconographic Representation of the Law in the Early Modernity**
di Anna Simone

Through the Lawrence Friedman's notion of "external legal culture" and the notion of "symbolic universe" by the sociologists Berger and Luckmann, the

article explores the images and allegories of justice, meant here as empirical and documental sources, in order to show the links between social representation and conceptual history of justice. From an idea of justice stemming from Christianity, represented by means of a balance only, weighing the good and the evil that should have promoted the idea of aequitas, we move to the symbolism of the sword, emerged alongside the appearance of the early forms of penal law and culture, and, finally, to the double symbolism of the blindfold. The thesis of this work is that justice is, as claimed by Kantorowicz, a Mater Iuris – the very same mother of the law and not only a function of it.

Il processo Honecker / The Honecker Trial
di Hans Boß

The essay reconstructs the stages of the trial against the political leaders of SED (*Sozialistische Einheitspartei Deutschlands/Socialist Unit Party of Germany*) after the fall of the "Berlin Wall" and the collapse of the DDR (*Deutsche Demokratische Republik/German Democratic Republic*). In narrating the events of the process, within the social and political context of those years, the author carries out a series of reflections in the light of his personal experience as President of the Court, pointing out that this legal response to the State crimes made by the political class of the DDR was very important, especially considering the particular historical moment that Germany was living in the years of reunification.

Politiche della confessione e de-centralizzazione della giustizia: i tribunali *gacaca* nel Rwanda post-genocidio / Politics of Admission and Decentralisation of Justice: the *gacaca* Tribunals in Rwanda after the Genocide
di Michela Fusaschi

After 1994 genocide, the Rwandan government re-established the traditional community court system called Gacaca, (justice on the grass), and transformed it into a system of informal criminal courts, based in "every hill". The form and the structure of traditional and modern Gacaca are anthropologically analyzed in this article as well as the strengths and the weaknesses. The Gacaca historically informal courts has become a "formalized setting" that incorporate elements of customary and ordinary justice. This decentralization of justice has determined the diffusion of the narrative of the new Rwanda nation and so the Gacaca courts has become the "real political arenas" in which the "confession" contribute to negotiate a moral leadership of the postgenocide.

La questione della verità: giustizia, memoria e storia / The Issue of Truth: Justice, Memory and History
di Michele Battini

The essay addresses the question of how to ascertain historical truth - while

analyzing the work of the various legal committees for "reconciliation and truth" born in the second half of the Twentieth Century in various States - considering three methodological perspectives: first, the one between two paradigms of the justice of transition (and two models of judicial truth), second, the one between judicial truth and historiographical truth, and third, the one between historiography and memory. According to the author, the historian is particularly interested in any change of the procedures and of the judiciary rhetoric because this introduces a substantial alteration in the method of investigating both about the authenticity of evidences and the search for proofs.

Cliniche legali, *Commons* e giustizia sociale / Legal Clinics, *Commons* and Social Justice
di Maria Rosaria Marella ed Enrica Rigo
This article addresses the issue of access to justice from the vantage point of clinical legal education, which here is considered both as an alternative teaching methodology to more traditional, systematic and hierarchical approaches to law and as a public engagement activity. In the last two decades clinical teaching has become a global movement characterized by a degree of ambivalence. On the one side, it carries with it social justice discourses and practices, on the other side, it also adapts well to the neoliberal commodification of knowledge. Notwithstanding this ambivalence, the authors argue for the possibility of conceiving legal clinics as commons that pursue both the redistribution of knowledge and access to justice.

Giustizia costituzionale in Italia: concetto e realtà / Constitutional Justice in Italy: Concept and Reality
di Giovanni Bisogni
The article sketches a short outline of the Italian Constitutional Court, by answering to two basic questions: what is its impact on political and social life in Italy and, accordingly, what this institution exactly is. My thesis is that the ideas of founding fathers of Italian Constitution on the judicial review of legislation are the best way to tackle these questions. Indeed, the vagueness of those ideas left the Constitutional Court quite free to decide purposes and means of its role in the political system – what it is the "secret" of its success. Moreover, the same indeterminacy explains why it is not so easy to give it a precise identity – if political or judicial, together to a certain inadequacy of conceptual tools used by political science and legal scholarship.

La giustizia sulla scena / Justice on Stage
di Anna Jellamo
The Archaic culture conceived justice as a universal rule that governed the life of everything, including men, including deities. To such a concept,

that has been present since the Homer's time, both archaic poetry and presophists' philosophy testify. Classical culture breaks up this image: democracy breaks the ancient connection between moira and dike as destiny and justice, Sophistic thought deprives justice of its objective foundation. The Attican tragedy was born in the junction-conflict between the declining archaic culture and the advancing classical culture. As Goethe writes, tragedy is always based on an irreconcilable conflict, which cannot find a solution: Attican tragedy puts up the unresolved face of justice, a justice suspended between innovation and tradition, hanging in the balance between men and deities.

Che cosa è la giustizia di transizione ("Transitional Justice")? Uno sguardo d'insieme / What Is the Transitional Justice? An Overlook
di Claudio Corradetti

Transitional justice is an ever expanding interdisciplinary field of study concerned primarily with post-authoritarian regime shifts. Yet, transitional justice actions have extended to include nowadays also new non-standard cases. It appears necessary therefore to conceptualize the state of the art in order to understand the considered actions and social phenomena. The present essay, far from aiming at an exhaustive reconstruction of the existing literature aims to reflect critically on some core conceptual issues where the convergence of philosophical, legal and political disciplines seems particularly significant.

Walter Benjamin. Giustizia come destituzione del diritto e anticipazione / Walter Benjamin. Justice as Destitution of Law and Anticipation
di Massimiliano Tomba

In his Critique of Violence, Benjamin aims at rethinking justice in the interruption of the juridical temporality of the state. The latter is characterized by the relationship between means and ends and is shared by both the positive law of the state and the natural right of the constituent power. On the contrary, Benjamin thinks of a form of violence that interrupts that relationship and finds in itself the criterion of its rightness. This violence, which Benjamin calls "divine," emerges as a third kind of violence beyond both the monopoly of state violence and the opposition between violence and non-violence. This "non-violent violence" converges with ethics and has the temporality of anticipation.