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Humberto Ávila

Certainty in Law

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Preface

The literature on certainty in law occupies an entire library. A particularly important place is reserved for Humberto Ávila's book in this vast imaginary library.

While presenting itself as a work of jurisprudence on the Brazilian Constitution (and specifically on Brazilian tax law, a field in which the author is an acknowledged expert), this book undoubtedly has a far broader theoretical scope. Moreover, it is probably the most comprehensive and systematic study ever produced on this subject using the analytical method.

Professor Ávila deconstructs certainty in law, reducing it to its constituent elements and showing all its multiple dimensions, both conceptual and institutional.

1. The concept of legal certainty. In the prevailing legal doctrine and theoretical tradition, which dates from the Enlightenment and is rooted in legal positivism, law is certain if and only if everyone can accurately foresee the legal consequences of their own actions and know ex ante the limits of the state's coercive powers and how they are exercised. Ávila elaborates a far more articulate concept of legal certainty in a moderately "realist" theoretical context as far as interpretation is concerned.

   In his view, law can be considered "certain" provided it is (a) knowable and intelligible, (b) reliable, and (c) calculable.

   (a) Knowability in law involves two different problems: the knowability of normative texts and the knowability of their meaning. Normative texts are knowable, evidently, when they are published and accessible. Norms are knowable, in turn, not only when normative texts are intelligible because they are clearly written but also when their interpretation is guided by known and intersubjectively controlled methods of interpretation and strategies of argumentation. In these conditions, the law may be (relatively) knowable, despite its inevitable indeterminacy, about which more in a moment.
   (b) Reliability in law means norms do not have retroactive effects and respect res iudicata, acquired rights, and completed legal acts. However, law cannot be reliable unless it is also relatively stable. This means it must not change very frequently or suddenly, and any changes should always be accompanied by

intertemporal norms (which must also avoid affecting completed legal acts and acquired rights).

(c) Law is not a given, i.e., an object whose existence precedes its interpretation and application. Normative texts do not have a single unambiguous meaning. They often have gaps and express contradictory norms. In this sense, law is indeterminate. The indeterminacy of law means we cannot precisely predict the legal consequences of our actions. Nevertheless, the number of possible (and plausible) meanings of normative texts is finite, and their meanings are identifiable in light of the methods of interpretation and styles of argumentation in use. Law is calculable when it is knowable, intelligible, and reliable, and when citizens not only know the interpretation and argumentation practices in use but also have a significant capacity to anticipate the alternative interpretations available, so that they can predict, at least approximately, the possible decisions of the bodies that enforce the law, and especially of judges. Thus, rational control of interpretive arbitrariness is a key component of legal certainty.

Knowability, reliability, and calculability are evidently closely interrelated.

On the other hand, it is easy to infer that all the concepts involved are quantitative rather than classificatory. In sum, according to the theory propounded by Ávila, certainty is not a concept with two values but a matter of degree. "Absolute" certainty is unattainable.

2. The foundations of certainty. Many constitutions solemnly proclaim the value of "security" and "certainty," understood as the absence of (or protection against) threats to life, health, liberty, and property. The legal certainty principle, however, is rarely expressed in a constitution. The Spanish Constitution is an exception (as is the Brazilian, according to Ávila).

The principle in question, however, appears frequently in the arguments heard by constitutional courts, as a criterion for evaluating the "reasonableness" of laws. A good example of this is a decision by Italy's Constitutional Court which does not refer explicitly to legal certainty but rules partially unconstitutional the principle known as ignorantia juris non excusat (or nemo censetur ignorare jus) because it makes no provision for the impossibility of knowing and/or understanding the law (in this case criminal law) as a justification for ignorance.

Even when the legal certainty principle is not explicitly formulated, it can be "constructed" – obtained via argumentation – from a long list of constitutional provisions common to most liberal democratic legal orders. By this, I mean the kind of order typically referred to as the rule-of-law state, which is characterized by a combination of two symmetrical principles:

(i) The freedom principle – "citizens are (tacitly) allowed to do whatever is not (explicitly) prohibited" – which functions as the framing norm for the set of norms that discipline the conduct of private citizens.

(ii) The legality principle – "government is (tacitly) allowed to do whatever is not (explicitly) prohibited" – which functions as the framing norm for the set of norms that discipline the acts of state bodies.

Ávila shows that even when the legal certainty principle is not explicitly formulated in the Constitution, it is instrumental to the realization of the other principles that are expressed and has an evident connection with them, so that it is "implied" by them. Moreover, it is not uncommon to find in the constitutional jurisprudence of several countries the construction of an unexpressed principle based on the argument that it is a necessary condition for the efficacy of one or another explicit constitutional principle.

The explicitly expressed principles from which the unexpressed certainty principle can be inferred are mainly the principles of liberty, equality, and dignity. The latter is in fact an extremely elastic and obscure concept. Very sensibly, Ávila redefines it as the capacity to plan one's own future, so that the protection of dignity requires respect for individual autonomy, and legal certainty is necessary in this case as well.

On the other hand, even when the certainty principle is not expressly formulated, it provides an axiological justification for and is concretized in a long list of explicit principles and rules, some of which are constitutional while others are merely legislative. They include (it would be difficult to enumerate them all):

(a) The rules on publication of normative acts and vacatio legis
(b) The legality of jurisdiction principle (subjecting judges to the law and requiring that all judicial decisions be motivated)
(c) The legality of administration principle (and the related principle of the typicality of administrative acts)
(d) The strict legality and strict interpretation principle (prohibition of analogies) in criminal cases
(e) The tax legality principle
(f) The irretroactivity principle (although in some constitutions, this is circumscribed to criminal law)
(g) The inviolability of res iudicata, completed legal acts, and acquired rights
(h) The rigidity of the Constitution in its entirety, which contributes to legal certainty at the highest level of the source hierarchy

The legal certainty principle, therefore, is instrumental to the realization of higher principles that justify it. At the same time, it is the source and axiological foundation for the subordinate principles that concretize it.

3. The obstacles to certainty. Notwithstanding the above, the legal certainty principle is evidently overlooked or very imperfectly realized in all contemporary state orders. The many phenomena that yield legal uncertainty emerge clearly from Ávila's study.

Leaving aside the direct causes of interpretive discretion (equivocal normative texts, vague norms, norms with an "open texture," general clauses, lacunae, antinomies, etc.), I enumerate below, in no particular order, some of the macroscopic obstacles to certainty.

(A) A first class of obstacles derives from the system of sources, or more precisely from the plurality of heterogeneous sources (central and local laws, government acts with legal force, etc.), not always clearly organized in hierarchical order. This is particularly true, of course, in the European Union, where EU norms interfere with national sources of law in member states.

(B) A second class of obstacles arises from the disorder of normative texts. For example:

(1) The insatiable appetite of the normative authorities, leading to an unending flux of normative provisions that are all in force at the same time

(2) Dispersion of valid provisions in a multiplicity of a normative documents (i.e., insufficient codification)

(3) The diachronic instability of normative texts, due to the fact that new provisions are introduced into the legal order every day while others are repealed, suppressed, or replaced

(C) A third class of obstacles derives from the (poor) drafting of normative texts. For example:

(i) The inclusion, in a normative text on any subject (x), of provisions that pertain to a completely different subject (y) totally unrelated to x, making the law in force on y very hard to identify.

(ii) The many normative texts that do not replace but partially modify a text previously in force, amending not an entire law but only one or two provisions, for example, so that the discipline on the matter in question is dispersed across several different legislative texts; or worse still, changing or striking out only a few words in an existing provision rather than the entire provision, so that to identify the provision in force it is necessary to join up one or more fragments of language dispersed in different normative texts.

(iii) Normative text A modifies normative text B, which previously modified normative text C, making knowability of the laws in force almost impossible.

(iv) Provisions that refer to other, preexisting, provisions without an autonomous meaning of their own, so that they cannot be understood except in combination with different provisions that are part of a completely different normative text; and on the other hand, provisions that refer to future provisions (i.e., provisions that do not exist) and hence lack normative content (unless they are accompanied by intertemporal norms).

(v) Total or partial repeal that fails to produce unambiguous effects unless it is explicit and refers to the repealed normative provisions with precision (by first and last name, as it were). On the other hand, when a normative authority dictates a new discipline for any given factual support without

expressly repealing the existing provisions (merely tacit revocation), the result is invariably doubtful and potentially controversial.

(D) Finally, a fourth class of obstacles derives from case law and judicial practice. Here I refer to such phenomena as:

α Nonuniform and unreasoned interpretation.
β Case-law revisions and departures from precedent (*revirements*), especially by last-instance jurisdictions.
γ The so-called "evolutionary" (or "dynamic") interpretation, which gives normative texts a different meaning than the commonly accepted one.
δ Application by analogy – while judges may redress lacunae (real or imaginary), as indeed they are required to do where non liquet is prohibited, arguments from analogy nevertheless produce decisions that are unpredictable ex ante because they are grounded in norms never hitherto expressed.

In his preface to a previous edition of this book, Jordi Ferrer asks a pertinent question: "Is there a golden thread running through such classic themes of legal theory as the justification of judicial decisions, the one-right-answer thesis, the defeasibility of norms, the dispute between cognitivism and interpretive skepticism, or the economic analysis of law?" And he answers in the affirmative: "Among other things, it is the central role performed in these debates by legal certainty." This is true.

Humberto Ávila's book shows that legal certainty is a kind of Aleph (in the sense used by Borges), which casts a bright light on many key problems of modern legal theory.

Genoa, Italy
November 22, 2013

Dr. Riccardo Guastini

Preface

1. Here is a request for a preface to a book that requires no introduction. The English word "preface" ultimately derives from the Latin *praefatio*, via the verb *praefari*, "to say beforehand," and literally means "fore-speaking." Speaking first or introducing might be taken as a suggestion that the illustrious author still experiences the insecurity of the young academic or, to his credit, will not dispense with an encomiastic foreword from fellow sojourners. Not so. Professor Humberto Ávila himself needs no introduction. His curriculum vitae is long and varied. His seminal works, from the celebrated *Theory of Legal Principles* to this noteworthy investigation of certainty in tax law, have passed the demanding test of critical intersubjectivity ever since their first editions. The enthusiasm with which they have been received is evidenced by the number of further editions and translations from Portuguese into several other languages.

   I hope the reader will therefore bear with me if I say there is little I can add to what has already been said about this book, and said far better. Let me simply highlight a few points, starting with its importance in today's public law environment. First, the title, even with the subtitle "Permanence, change and realization in tax law," does not do justice to the extraordinary richness of the content. This is a new treatise on the "theory of principles," a secure and informative introduction to the structuring principle of juridicity, a profound vision of the foundations of legal certainty and their reflection in the "constitutional superstructure," and, naturally, an irreplaceable investigation into permanence, change, and efficacy in tax law. Moreover, some of the most controversial aspects of method, methodology, and doctrine are discussed here with highly coherent and consistent argumentative rhetoric.
2. I am grateful to Professor Humberto Ávila for giving me this opportunity to point out the special political and legal sensibility of the theses he defends. For any citizen of Portugal, which for some time now has been a "house of horrors" thanks to three "memoranda of understanding" between the Portuguese government and a so-called Troika (the International Monetary Fund, the European Union, and the European Central Bank), Prof. Ávila's book provides an inestimable wealth of knowledge and wisdom. For the "austerity Taliban" anything goes: denying

the subjective right to a pension, decreeing heavy retroactive pay cuts, invoking principles that have nothing to do with tax justice (convergence between public- and private-sector salaries and pensions), or inventing a solidarity contribution and claiming it is not a tax because the revenue stream is earmarked to help pay for pensions.

But this is not all: we are forced to suffer the worst of both worlds in tax matters. The tax-imposing state massacres workers' incomes. The "fee-based state" (dubbed *Gebührenstaat* in Germany) piles up charges and other levies on top of taxes. If one asks whether this is constitutional, if most of these measures, besides being anti-egalitarian and unfair, do not annihilate completed legal acts, acquired rights and res iudicata, the reply fluctuates between the "duty of obedience to creditors" and the existence of a "state of financial exception." In other words, for the "austeritarians" the subjective and objective inviolability of individual situations have become no more than a figure of speech typical of the ideologues of the "prohibition of regression" and acquired rights. The underlying theological meaning of Prof. Àvila's exposition may well be this: Tell me what tax law you have and I will tell you whether there is law, justice, equity, or legal certainty in your juridical-constitutional system.

Coimbra, Portugal
February 25̌, 2014

Dr. José Joaquim Gomes Canotilho

Abbreviations

AC	Ação cautelar (injunctive suit)
ADCT	Ato das Disposições Constitucionais Transitórias (Constitutional Transitory Provisions Act)
ADI	Ação Direta de Inconstitucionalidade (direct unconstitutionality suit)
AG. REG	Agravo regimental (internal interlocutory appeal)
AI	Agravo de instrumento (interlocutory appeal)
AJDA	L'actualité juridique. Droit Administratif
AöR	Archives für Öffentliches Recht
AR	Agravo regimental (interlocutory appeal)
ARSP	Archiv für Rechts und Sozialphilosophie
BayVBl.	Bayerische Verwaltunsblätter
BB	Betriebs-Berater
BVerfG	Bundesverfassungsgericht
BVerfGE	Bundesverfassungsgerichtsentscheidung
CF/88	Constituição da República Federativa do Brasil de 1988 (Brazilian Constitution of 1988)
D	Recueil Dalloz Sirey
DB	Der Betrieb
DÖV	Die Öffentliche Verwaltung
DStJG	Veröffentlichungen der Deutschen Steuerjuristischen Gesellschaft
DStR	Deutsches Steuerrecht
DStZ	Deutsche Steuer Zeitung
DVBl.	Deutsches Verwaltungsblatt
ED	Embargo de declaração (motion for clarification)
FESDT	Fundação Escola Superior de Direito Tributário
FR	Finanz-Rundschau
FS	Festschrift
INF	Die Information über Steuer und Wirtschaft
IWB	Internationale Wirtschafts-Briefe
JA	Juristische Arbeitsblätter
JuS	Juristische Schulung

JöR	Jahrbuch des öffentliches Recht der Gegenwart
JZ	Juristen Zeitung
KÖSDI	Kölner Steuerdialog
MC	Medida cautelar (provisional remedy)
MS	Mandado de segurança (injunction, mandamus)
NJW	Neue Juristische Wochenschrift
NVwZ	Neue Zeitschrift für Verwaltungsrecht
ÖStZ	Österreichische Steuerzeitung
Orgs.	Organizadores (editors, eds.)
PGE	Procuradoria-Geral do Estado (State Attorney General)
QO	Questão de ordem (point of order)
RBDP	Revista Brasileira de Direito Público
RDA	Revista de Direito Administrativo
RDE	Revista de Direito do Estado
RDDT	Revista Dialética de Direito Tributário
RDP	Revue de Droit Public et de la Science Économique
RDT	Revista de Direito Tributário
RE	Recurso extraordinário (extraordinary appeal)
RePRO	Revista de Processo
RFDA	Revue Française de Droit Administratif
RT	Revista dos Tribunais (editora)
RTDP	Revista Trimestral de Direito Público
SJZ	Schweizerische Juristen-Zeitung
Stbg	Die Steuerberatung
StbJb	Steuerberater-Jahrbuch
SteuerStud	Steuer und Studium
StuR	Staat und Recht
StuW	Steuer und Wirtschaft
StVj	Steuerliche Vierteljahresschrift
ThürVBl.	Thüringisches Verwaltungsblatt
VRÜ	Verfassung und Recht in Übersee
vs.	versus
VVDStRL	Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer
WiVerw	Wirtschaft und Verwaltung
WM	Wertpapier Mitteilungen
ZaöRV	Zeitschrift für Ausländisches öffentliches Recht und Völkerrecht
ZG	Zeitschrift für Gesetzgebung
ZLR	Zeitschrift für das gesamte Lebensmittelrecht

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