

THE JUDICIAL TRUTH

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Everybody agrees that in judicial judgment truth is in question. In what sense? In what sense can one attribute truth to the legal process?

"The task of a judge is to decide whether the actual behaviour of one or other parties in dispute, or of both, conformed with the prescription contained in the relevant rule of law. This involves three kinds of knowledge: knowing what actually happened, i.e., the fact-situation; knowing the rule of law to be applied; both of which are part of the third kind of knowledge, namely, knowing how to give the right decision. It is popularly supposed that the first two are objective, the third largely subjective" (Dias, 258).

Usually one thinks that the truth is located only in particular aspects that belong to the judicial decision. I refer to its conformity to empirical truth or to a preexistent norm. However one does not think that the whole decision, i.e. just as a decision, has a specific truth. When one talks about judicial truth, one means the truth *within* the judicial decision, but not the truth *of* the judicial decision.

The judicial decision concerns both facts and norms. Therefore it seems that the truth-question must be divided into the *quaestio facti* (factual truth) and into the *quaestio juris* (legal truth). The two questions cannot be solved in the same way and, consequently, the judicial decision as the final result has no epis-

temological unity. It seems that a decision as a whole cannot be considered true or false.

"The problem of judicial truth does not concern the conclusions, i.e. specifically the decision" (Ferrajoli, 39).

On the opposite side, one observes that the goal of a judicial decision is not the expression of personal convictions. The judge's duty is not to act on merely personal views. According to a traditional conception he is the *bouche de la loi* (Montesquieu). The right decision is that requested by the fact-situation and by the legal system both things considered. If this decision is determined by the personal preferences of a judge, then it is false, because it is founded upon subjective and not objective criteria. If it could be false, then it might also be true. If there is only one right answer for every legal question in a legal system (Dworkin 1978), then this answer is true as well.

A legal process does not aim at persuading anyone, but at justifying the decision. The judge's work is directed to show that his decision is grounded upon the rational and consistent application of rules accepted as valid. The legal arguments are not valued on the basis of their persuasive force, but for their conformity to the objective criteria that must rule a judicial decision. The justification as an activity that shows the reasons of a decision belongs to the field of truth.

This movement towards the truth is rooted in the tradition of legal process and it sustains the conviction that a court's judgment sees the issues as a clear-cut either/or, black and white affair.

"An important feature of the judgments of European courts has traditionally been that they produce a winner and a loser. Informal methods of dispute settlement, through mediators or arbitrators, can result in a compromise that gives something to both parties" (Stein, 27).

All these last considerations support the opinion that the judicial decision as such can be considered in some way true or false. However the decision belongs to the field of practical reason which

- as people commonly think - concerns human will rather than human intellect.

I note by the way that this dispute about the truth of a legal judgment is determined by the general conception of legal judgement as well. If the legal process is conceived as being divided into sectors, that are in some way separable one from the other, then the final decision is only a sum of these separate investigations. I consider this conception only as *accumulative*, but not as a *global* conception of legal judgment. The final decision is the sum of the sectorial decisions concerning validity, interpretation, evidence..., each and every one of them has its truth-criterion. However, following this line of thought, the unity of legal reasoning and deliberation is in serious danger.

Are the sectors of judicial judgement the steps of the same process of action or are they the independent bricks of a building?

Now I shall indicate three different ways, with which the problem of judicial truth is dealt and in which the decision as such is not considered as belonging to the field of truth.

CONSTITUTIVE CONCEPTION VS. DECLARATIVE CONCEPTION

Usually the problem of judicial truth is located only in the ascertainment of the fact-situations that are in question. From this point of view it seems very important to determine the difference, if any, between the so-called judicial truth and the truth stated in the area of empirical science (Wróblewski, 180).

On one side, there are undoubtedly legal rules of evidence that differ from rules of verification accepted as valid by empirical science. On the other, one legitimately thinks that the fact-situation exists only in one way and this is the empirical way of existence. Consequently, there has to be only one way for the ascertainment of judicial truth, i.e. the scientific verification. However, as the judge is also appointed to find and interpret the norms that he has

to apply, the legal process regards also aspects in which the empirical truth is put aside.

The most relevant attempt of a unitary solution is that of Kelsen. Kelsen tries to avoid every epistemological break in the legal process, supporting the constitutive character of the judicial judgment, constitutive of facts and constitutive of norms.

From the judge's viewpoint there are no natural facts, but only legal facts, i.e. facts settled by the judge's pronouncement. In place of the empirical verification, through which the scientist knows and constitutes the natural facts, there is the fact of the ascertainment by the judge, who is the competent authority (Kelsen, 244). A *legal fact* is not a natural fact ascertained by a judge in a legal process, but it is the ascertainment itself. Thus the legal judgment has specific truth-criteria that are parallel to those of natural science, but distinct from it. The most relevant difference does not reside in particular methods, but in the normative appointment of a subject authorized to produce legal facts. Therefore Kelsen restores total autonomy to the world of legal knowledge and of legal reality.

Nevertheless the asserted unity of the legal process puts the truth into the shade. According to Kelsen the judicial decision is a creation of law, on the contrary one cannot say that the scientific judgment is normative. Kelsen traces a sharp distinction between reason and volition, between cognition and decision, between science and politics. The whole enterprise of a legal judgement is marked by its final goal, which is a decision and, consequently, an individual norm. According to Kelsen every decision is not an act of cognition, but an act of will.

If a legal fact is the judicial ascertainment of a "natural fact" (Kelsen, 245), then the *quaestio facti* is totally absorbed in the *quaestio juris*. There are general norms that establish who and what ought to determine the fact-situations, i.e. the procedural and substantive rules of judicial ascertainment. A legal fact is produced by a competent authority according to the legal rules of

evidence. Consequently, the truth of this ascertainment resides in the conformity with these norms. According to Kelsen the judicial truth is the relationship of a legal fact, i.e. the judicial ascertainment, to the norms. When the legal system authorizes the judges to use the common empirical criteria (or their free conviction) for the establishment of the fact-situations, this means that these criteria become "legal" in every respect. Consequently, only another judge at a higher level (the judge of appeal) can verify the truth of a legal judgment, i.e. this normative conformity.

Three serious difficulties arise from this constitutive conception of judicial truth and all three are bound to the kelsenian view of legal interpretation.

Firstly, we may observe that the total transformation of *quaestio facti* in *quaestio iuris* has completely internalized the problem of judicial truth. The autonomy of legal reality and of judicial truth is reached through the reproduction of facts inside the legal process. According to Kelsen the relevant problem from a juridical point of view is not the correspondence of legal judgment to external world in some way, but the conformity of the judicial actions to legal norms. It is possible to control only this conformity and, through it, the judicial actions, however for the rest we are in the field of discretion, of decision, of will, i.e. not of cognition nor truth (Luzzati).

A judicial decision is also normally based on reasons that are partly not in strict terms "legal" (Aarnio). They concern the application of general rules of logic and argumentation, common sense, the framework of culture and consensus regarding experience and values, the recourse to probability, and so on. The authorization given to a judge using these reasons is not a delegation of arbitrary power. In these fields we can find objective criteria of judgment and we can distinguish an arbitrary use of reasonableness from a well grounded one (Tapani Klami). Therefore a judge is obliged to justify his decision with a strong motivation. Besides, the judge of a higher level normally controls

not only the normative conformity of a court's judgment (*quaestio juris*), but also the soundness of justificatory reasons concerning the establishment of the facts (*quaestio facti*). However these criteria compel us to leave the mere normative conformity and so confront reality in every sense.

Secondly, we note moreover that effectively the judge of a higher level does not consider the judicial ascertainment of fact-situations as a fact itself, but as a judgment about facts and as such he examines it. If it is a fact, then it cannot be criticized. It is not possible to put a fact into question, but only to ascertain it. Nevertheless Kelsen confuses facts and their ascertainment, or, more in general, truth and knowledge of truth, and this is not acceptable. One may say that according to Kelsen the problem of judicial truth can be seen only in the process of appeal in relation to the previous decision that is considered as legal fact.

The third difficulty concerns the judgment of normative conformity itself. We have said that here Kelsen poses namely the problem of legal truth, i.e. the normative qualification of natural facts. Every judgment of normative conformity is obviously an interpretation of norms. Here it does not deal only with the process of cognition of norms that have to be applied, but also with the choosing of one of the several possible meanings of norms themselves. Authentic interpretation, i.e. the interpretation of a competent authority like a judge, is not only the identification of a norm, but also a concrete choice or determination made by the judge (or by another legal authority). So it is the result of an act of will, not of mere cognition (Paulson). Besides, from the judge's point of view, i.e. the application of the law, it is not possible to identify a norm without determining its content. The concrete choice of a settled meaning tends to construct the general frame of a norm and not vice versa. Therefore the judgment of normative conformity is the field of choice and, consequently, not of truth.

In conclusion, the Kelsen's thought, either regarding the ascertainment of facts or regarding the interpretation of norms, really

leaves no room for truth in a judicial decision. The characteristic of legal judgment is not the judicial truth, but the indisputable pronouncement of a subject appointed by legal norms.

The supporters of the mere declarative character of the judicial decision refuse this kelsenian conception (Alchourron-Bulygin). The judicial decision is descriptive of natural facts and descriptive of legal norms. They argue that the kelsenian reduplication of the empirical truth (natural fact and fact of the judicial ascertainment) is not acceptable, because the empirical truth is only one and only upon it the judicial decision must be based.

The question is not only epistemological, but political and ethical too. The sentence "Tom killed Jim" is true if Jim has really been killed by Tom. The truthfulness of this sentence is a necessary condition of the justice of a judicial decision. The pronouncement of a judge is not a starting fact, but a judgment that must be measured by what has effectively happened. The facts are what they are and not what judges say they are. We consider a judicial decision as unjust when the ascertainment of fact-situations does not correspond with reality.

Consequently, if judicial truth is located only in the ascertainment of facts, there isn't any specific truth for the legal judgment. Its truth is the empirical truth of science itself.

The kelsenian conception of the constitutive dimension of the judicial decision frees the judge's ascertainment from the control of empirical truth. In contrast to this conception one may remark that there is only one truth, which depends on the semantic rules of the language used and on natural facts to which the statements are referred. The truth of a judicial decision, as far as it concerns the *quaestio facti*, resides in the conformity to the natural facts. There is only one truth, that is semantic truth, and it concerns all judgments, the legal judgments as well.

Along these lines, however, the epistemological break is unavoidable.

Nevertheless, when the ascertainment of fact-situations is disputed, one must acknowledge that the task of a judge has many peculiarities which are not absorbed only in mere description. The judgment of the facts depends on many determining factors that have a normative character. I do not refer only to the rules of evidence that determine the legal truth of some facts, but specifically to the choice among different descriptions of the same fact. At least in the present structure of a legal process (Stein, 29), the judge is judge of evidence too. A judge must establish if there are sufficient elements for the evidence of a fact.

On the other hand, the identification of some facts is connected to the interpretation of norms. Frequently such interpretation is the presupposition of the judgment on facts as far as the judge must ascertain only all those facts to which a norm has to be applied. Moreover it is possible to design a typology of the facts on the basis of the way in which the corresponding norms define them (Wróblewski, 108).

These observations explain a trend that is present in the judicial practice of Common Law, i.e. the trend of transforming questions of fact into questions of law.

In conclusion, even if we must reject the kelsenian absorption of the *quaestio facti* in the *quaestio juris*, we cannot accept the independence of the one from the other.

The necessary linkage between fact and law strengthens the opinion that legal process must be considered as "a seamless web". The question of truth concerns the whole judicial practice and not only separated parts of it.

Even as regards the truth of fact-situations we cannot assume *sic et simpliciter* the truth stated in the area of empirical science.

For the supporters of verificationism this remark seems to throw the juridical investigation out from the scientific field. The judicial decision falls prey to subjectivism.

The conclusion is that not only the decision as such is subjective but also knowing the fact-situations and the law (Dias, 258). Of

course this subjectivism is not unlimited otherwise people could not have any confidence in the judicial enterprise. The decision is controlled by consensual domains, principally linguistic conventions and shared values.

There is a widespread opinion that the specific character of a judicial judgement is not truthfulness, but *rightness* that is based upon norms and value-judgements (Peczenik, 46). According to non-cognitivism these criteria of control can be neither true nor false, because they are not empirical in factual sense.

There is a strong separation between truthfulness and rightness. A decision cannot be true or false, but right or wrong. Consequently, by virtue of the principle of unity in a legal process the ascertainment of facts and the application of law can only be right or wrong too.

Nevertheless also rightness or correctness of a decision can be judged, criticized and controlled in a similar way to that followed by the control of a statement. The difference resides in the criteria of controls itself. One thinks that the control of the decisions is based on social rules that are changeable, contextual and relativist. On the contrary, the control of a statement would be based on the "indisputable" criteria of empirical verification. The rightness of a decision is its capacity to fit correctly into these relativist social rules accepted as valid in a particular social context.

Nevertheless the social model of the judicial interpretation and application of law is disputable. According to this conception the judge must decide the hard cases following the prevailing opinions of the citizens on their juridical duties. In this way he is bound by an objective criterion, even if this objectivity is not that of the truth. However in a pluralistic society, where different moral and social views are in conflict, the judge can use the social consensus neither as an aid for solving the hard cases nor as a limit to his discretionary power. On the contrary, in this situation the judge has to value the different opinions about the identity of a legal practice

(Dworkin 1977, p. 53). What could prevent him from using his personal views?

Consequently, when rightness is not considered as a shape of truth, then the fall into a sceptical solution is unavoidable.

In conclusion, we have a constitutive conception of the legal judgment vs. a declarative conception. The rejection of both seems to lead to the judicial scepticism. From my point of view the constitutive and declarative conceptions are both criticizable and refutable, but I think that the sceptical solution destroys the judicial enterprise and its finality too.

A PLURALISTIC CONCEPTION OF TRUTH

We cannot solve the problem of truth if we don't pay attention to the subjects that look for the truth and to their attitudes. When we ask ourselves what makes a statement true, we must examine the context to which it belongs. This context also consists of the intentions and the interests of those who act in it. The variety of intentions produces the variety of games or of practices.

The wittgensteinian model of a language game is characterized not only by the rules, but also by the specification of the winning situation. Whoever plays must play to win. Whoever accepts to engage himself in the game, also accepts to strive towards the winning situation. Thus the aim at making true statements is attained in different ways in relation to the different fields of experience.

We aim at making true statements in very different fields, including not only factual knowledge, but also domains related to duties, obligations, justice, sense of life. I share a pluralistic, analogical and polysemic conception of truth. Therefore I consider every shape of reductionism a dangerous enemy.

One could ask whether the enterprise of the judge is specifically the attainment of truth. One could affirm that truth is only one

among the conditions through which the judicial judgment is successful in the pursuit of its aim or in the attainment of its goal. However this aim or this target totally considered is not that of an achievement of the truth, but specifically the application of law. The truth concerns the *quaestio facti* and, perhaps, the *quaestio juris*. Nevertheless the decision that is the ultimate goal of the judge's work should not belong to the field of the truth. When one decides, the truth is not in question, but the problem concerns directly the right application of a normative criterion and its use as a guide for a particular action.

A decision must be justified and this justification must be based upon legal reasoning. However the target of this rational process is not the truth, but the acceptability of a decision for the legal system considered. As noted above, rightness seems to be strongly separated from truth. Nevertheless, if we consider the intentions of a judge, through his decision he *will* grasp a truth and *will* make true affirmations. He believes he is playing the truth-game. This is the meaning of the *jus dicere*.

If we accept the pluralistic conception of truth, we can uphold that this belief of the judge is not a mistake.

Here is not the place for an examination or the so-called "correspondence theory" of truth. Without entering this discussion, we can note that a strict conception of the correspondence theory has contributed to limiting a great deal of the variety of the truth-games. However, if we want to concede a wider horizon to the achievement of truth, we are not obliged to reject totally the correspondence theory. Certainly some versions of the correspondence theory are untenable (e.g. the correspondence as a mirror), but something of it must be preserved, because the truth is a relationship between two things so that one of them plays the role of criterion of measure and control for the other.

Other than this pluralistic character of the attainment of truth, we should consider that it is an activity and, therefore, consists of acts of application. The assertion, indeed, is an act of application that

concerns the truth criteria, on one side, and a particular sentence on the other. Through this activity a sentence is intended to be asserted of its referents. There isn't any attribution of truthfulness without application. Consequently the application of law must not be considered a mere act of will but also as an activity similar to the application of truth criteria to a sentence.

THE GAME OF PRACTICAL TRUTH

On the basis of these observations we can design three large spheres into which the truth-games are growing in many shapes. These spheres are distinguished as regards the "things" that are related and as regards the different determination of the truth criteria. These spheres are connected to each other in the same way as are concentric circles. One of them may include the others as its presuppositions. One of the most remarkable characteristics of a truth-game is its hermeneutic relation to another language game (Apel, 368). The search for truth is always a second order investigation, embracing other activities and presupposing other games, sometimes other truth games.

If we want to determine the truth game in which we play, we need to know - as I have said above - the intention of the player. Thus we could judge whether he has broken the rules or has complied with them.

The first sphere is that of descriptive or *semantic truth*. The intention of the player is directed to knowing *how* the things are. The elements of this relation are, on one side, the sentences and, on the other, the things themselves. It is clear that the quality of being true pertains to a sentence if it stays in a certain relation to reality, to the actual "state of affairs". The descriptive sentences refer to something which we call for that reason its *referents*. Nevertheless we must not confuse - as the old neopositivism has confused - the meaning and the referent of a term with the meaning

and the referent of a sentence. The referents of several terms may be established directly by means of non-linguistic procedures. The reference precedes and determines the meaning. On the contrary the referent of a sentence is determined by its meaning. Only after an understanding of the meaning may the question arise about the truth of a sentence. The problem of answering this question, which is how a sentence is asserted of its referents, may be solved in many ways. There are different ways of asserting how the things are. This difference constitutes the distinction of the disciplines or fields of investigation. Descriptive sentences tend to be organized according to some fundamental viewpoints under which reality is going to be scrutinized.

Now it is clear that the search for descriptive truth presupposes another activity, i.e. understanding. Understanding as well may be considered not only as an element of the game of descriptive truth, but also a truth game itself. The *hermeneutic truth* does not aim at describing facts, but at grasping the deep sense of the sentences, of the symbols or other non-sentential and non-verbal signs. Here the relation is not between sentences and their external referents, but between what is interpreted and the context in which the sentence is included and in which the sentence finds its meaning. The intention is not that of describing but rather of giving some global interpretation. The totality of the context constitutes the criterion of measure and of meaning as regards its parts. The scientific theories are not a mass of descriptive propositions but rather totalities that confer sense to those sentences that have to be verified. Thus it is now generally accepted that hermeneutic dimension penetrates into descriptive dimension, even if the game of hermeneutic truth has to be distinguished from that of descriptive truth.

This relationship between description and hermeneutic activity may be noted in the work of the judge as well. The *quaestio facti* and the *quaestio juris* are not separated, because here the search for descriptive truth is ruled by an understanding which is based upon a referent that is a normative system. For instance, killing or

stealing are acts which are qualified and defined by legal norms. This is one aspect that the kelsenian approach has grasped perfectly. Nevertheless we must not stop here.

My thesis is that the enterprise of the judge shapes a further truth-game, that includes the descriptive and hermeneutic games but which is ruled by a distinct intention. I shall call it "the game of practical truth". Now the elements of the relationship are no longer sentences and reality, or sentences and discursive contexts but rather actions: the action that has to be judged and the action that ought to be. The problem that the judge must solve is that of their relationship.

The judicial decision encounters a problem of objectivity. The distinction between a judge and a mediator consists specifically in the fact that the former is appointed to apply preexistent normative criteria. Moreover we don't desire that a judge decides according to his personal opinions, however sound and noble they may be. When one appeals to the objectivity, there is a question of truth. The judicial decision must not avoid answering a question of truth. The *res iudicata* is essentially a judgment in which an action is valued on the basis of a model and this is how an action ought to be. The *Sollen* of an action is its measure or its ideal model. Therefore there could be a difference between what the action has been and how it ought to be. The judicial judgment looks for the truth when it determines the right measure of a particular action. Therefore the rightness or the rectification is for an action the same thing as its truth.

As I have said above, the game of practical truth embraces other truth games, but now I must add that it rules them and in same way it transform them. The semantic and hermeneutic truth are now subjected to particular conditions of practice which are determined by its specific finality.

If we want to understand better the difference between the semantic truth and the practical truth, we must consider the different attitude of the latter with regard to an action. Here the

event and its happening are questioned. This event is no longer considered from the point of view of its necessity; it is not a *fact* in a natural sense, according to which what has happened cannot be put into question any more. A natural fact is how it must be. On the contrary we are now in the field of possibility. The event-action could be (and perhaps ought to be) different from that which has been. A natural fact cannot be disputed but only verified. On the contrary, in the game of practical truth a particular action is questioned. If it could be different, then one needs to value the reasons that justify its happening.

Consequently this historical event cannot be explained only by a cause in an empirical sense, but one must look for the reasons of the actions. These actions must be identified and this task requests the activity of interpreting and balancing reasons. Therefore the judge needs to test the soundness of the reasons that sustain the happening of the actions. In its turn this activity of interpretation as well is sustained by reasons. The judge must justify the ascertainment of the fact-situation and his judgment on it.

The natural scientist looks for the causes of events, while the judge looks for the reasons of actions. The deep difference consists in the different structure of the facts that have to be scrutinized: natural facts in the former case, and *institutional facts* in the latter (MacCormick-Weinberger). To know an institutional fact one needs to value it. Consequently, inside the game of practical truth the semantic and hermeneutic exploration intertwine in an inseparable way.

If the problem was only to say how things ought to be, then it could be doubted whether we are in the field of truth. However this is not the target of the judicial judgement. Instead it aims at knowing whether the things are how they ought to be.

"A judge does not seek simply to 'do justice', nor simply to 'apply law'; he seeks to 'do justice according to law'" (Dias, 274).

It is my opinion that this truth-game must be distinguished from the others, because it presupposes a specific intention of the

player. This finality resides neither in saying how the things are, nor in saying what they mean or in saying how the things ought to be. On the contrary here the problem is that of the relationship between how the things are and how they ought to be. There are, therefore, all the conditions requested by a truth-game: a relation between two things, an examination of their correspondence or conformity and the possibility of an objective control on the basis of non-hypothetical criteria.

Within this cognitive enterprise we encounter the descriptive truth and the hermeneutic truth as well. However they are now absorbed and subordinated to this new dimension of truth, that concerns the total finality of a judicial decision.

The nature of a practice imposes its conditions upon the search for truth. A scientific investigation cannot be limited in any way. The question always remains open to a further exploration. On the contrary, the judicial investigation must reach a definitive result, because its final term is not a theoretical truth, but a practical one. Therefore the pronouncement of a judge has the shape of a verdict, i.e. conclusively *verum dicere*.

Moreover we must note that this judgment concerning the actions is an action itself, an act of application, that fits into the general framework of a juridical practice and preserves its identity, correcting the event which has happened. Through the decision one not only says the truth but also makes the truth. This is the full sense of practical truth, i.e. the concrete rectification of an action.

In conclusion, one could ask why the question of the identity between truthfulness and rightness is so crucial and whether it is only a nominalistic problem that has not any relevance for the concrete solutions. If rightness does not concern the truth, then it is only an expedient or a remedy, albeit rational, for solving the social conflicts in some way. On the contrary rightness may be considered a kind of truthfulness if the criteria of evaluation and control used are provided by a strong normativity, albeit not conclusive.

A legal system must not be reputed only as a set of hypothetical norms and values. There are normative conditions for the identification of a set of prescriptions as a system of *law*. I don't argue that there are determinate moral standards for the identification and assessment of positive law, but rather that there are a range of moral concepts, themselves susceptible to differing and conflicting moral interpretation, in terms of which positive law must be justified and criticised (Duff, 87).

This means to take the law as social practice seriously, rejecting, on one side, the sceptical point of view about truth and, on the other, the absolutist point of view.

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