A CRITICAL ANALYSIS OF ESTABLISHING THE JUDICIAL TRUTH

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ABSTRACT: *The article represents a brief analysis of the effectiveness of the judicial act by referring to the necessity of establishing a judicial truth. In establishing limits for the determination of judicial truth, the article examines the prevalence of the notion of rule of law, the rigor of applying the rules of procedural or material law, the implication of equity in judicial matters and the need to establish a correspondence between factual truth and judicial truth.*

KEY WORDS: *Judicial truth;, truth finding; equity; the rule of law; double standards.*
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1. IN PURSUIT OF THE TRUTH

The Law consists of compulsory provisions that mean to regulate certain aspects of life and the purpose of the law is to be applied to particular cases as they arise from facts occurring in the society. When a judicial conflict emerges between two parties that have opposite interests, it is often the duty of a judge to solve the conflict by applying the law to the circumstances of the case. Therefore the law is regarded to be an endless series of judicial rulings (Georgescu, 1942, pg. 9-10)

When an individual addresses himself to a judge, it is to demand a decision; and that decision must relate either to a matter of fact or to a point of law. In matter of fact the question is, whether the judge shall hold the fact stated to him to be true or not; and in that case, the decision can have no other foundation than evidence. The duty of the judge is, to collect all the proofs on both sides, in the best form possible; to compare them; and to decide according to their proving power. Thus, the art of procedure is in reality nothing but the art of administering evidence. (Bentham, 1825, p. 2)

In reaching a solution, the judge must successfully establish the circumstances of the case *quaestio facti* and then to apply the law *quaestio iuris*. The first stage can be done either intuitively through directly perceiving the facts, or rationally, by deducting an unknown fact from a known one. (Georgescu, 1942, p. 11)

Most of the times, the judge cannot arrive by itself to a conclusion through perceiving the effect on his own *propriis sensibus*. There are only three cases in which the judge directly perceives the crime or aspects of the crime and these are: (1) the personal inspection on the scene; (2) the conclusions of an expertise, given the fact that the expert

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is appointed by the judge and is regarded to be an extension of the judge itself and (3) the exceptional situation of witnessing of illicit act in court (hearing offences) or catching the criminals in the act (flagrant offences). In rest he is using intermediate means that lead to the discovering of the truth, he needs to deduct his findings through evidence (Georgescu, 1942, p. 18).

Tributary to the continental legal system, establishing the truth is one of the principles that govern the judicial procedure in front of courts, both civil and criminal ones. The Article 5 of the Romanian criminal procedure code states that the judicial organs have the obligation to ensure, on the basis of evidence, finding out the truth regarding facts and circumstances of the case as well as the person of the perpetrator. The civil procedure also states in article 22 that the judge has a duty to ensure, through every legal means, that there is no error in establishing the truth taking into consideration both the facts and the correct application of the law.

The principle was criticized as being the reason for which the current criminal system prioritized truth finding in disregard of the defendant rights, but it`s importance tends to fade away since the new Romanian criminal procedure code (Crim.P.C.) departs from the principles of officially and the active role of the judge (Mateuț, 2020, p. 75).

In contrast to the continental system, the adversarial system does not recognize the principle of establishing the truth because in this system the goal is to find the *judicial truth* that is reconstructed by administrating evidence through the exclusive contribution of the parties. Each side has its own truth that it tries to impose after a fair confrontation. (Mateuț, 2020, p. 75)

Nevertheless we argue that the judicial truth is not an exclusive attribute of the adversarial system. Even in the continental system the *objective truth* is impossible to reach. The absolute certainty can be obtained only in abstract, and while gathering evidence and administrating them the judge does not work with abstract concepts but with factual reality and as it was shown the pure truth can be obtained only operating with abstract concepts. (Georgescu, 1942, p. 20). Examining the facts only allows obtaining the contingent truth, a truth that can be interpreted in both ways. (Georgescu, 1942, p. 20) Therefore, even in the continental system the judge can only establish the *judicial truth*.

We are going to define the ***judicial truth*** as being a summary of facts and circumstances that the court can establish through evidence legally administrated in the trial proceedings. The ***objective truth (real truth)***, is an abstract concept that includes all the factual circumstances of an event (everything that really happened). It can never be determined, not even the rare instances when it is directly perceived by the judge, as this perception is a subjective one.

We sometimes encounter other classification of truth. The European Court of Human Rights had to take into consideration the ***journalistic truth*** as the applicants pointed out in one case regarding the freedom of speech that they had not proved the truth of their allegations in the national courts due to objective considerations relating to the principle of protection of sources, and from the attitude of the national courts, which had not actively sought to establish that their allegations were true. They submitted that journalistic truth pursued the aim of informing the public speedily about matters of general interest and was accordingly different from judicial truth, which the national

courts established with a view to determining the responsibility of those who acted illegally[1]. (Cumpănă and Mazăre v. Romania, 2014)

In other cases whilst analyzing the judicial truth the doctrine identified a need to draw a parallel with other sciences such as history. The similarities in pursuing the truth from both perspectives were obvious but so were the differences. Historians have the commodity of time as in establishing the truth they are not pressured by the necessity of a reasonable length of the procedure, the way jurist are. Furthermore judicial evidence is almost always pre-constituted, unlike historical evidence. (Georgescu, 1942, p. 43)

2. A CORRESPONDENCE BETWEEN JUDICIAL TRUTH AND OBJECTIVE TRUTH

The social capacity of a judicial decision and the tension determined by the judicial conflict impose an outcome a final solution one way or the other the necessity of a solution in the limited time allocated for investigation constraints the judge to be satisfied even with half measures or half-truth or suppositions if there is no other way. For reasons of social appeasement it is preferable to have a rough, approximate ruling than not to have a ruling at all. (Georgescu, 1942, p. 41)

Therefore we postulate that the judicial truth is a necessity even if there is no perfect correspondence with the objective truth. The desire is to have such correspondence or, as it was argued, the aspiration is that judicial verdicts should conform as nearly as possible with the truth (Roberts & Zuckerman, 2010, p. 18). But the question that arises is should this correspondence be obtained *at any cost*?

The judicial truth is established through evidence in accordance with the legal principle of establishing the truth (art 5.1 Crim.P.C.). The judicial bodies have the obligation to ensure, on the basis of evidence, the truth regarding the facts and circumstances of the case, as well as the person of the suspect or the accused. Evidence therefore represents the foundation of the judicial decision (Mateuț, 2020, p. 445). This truth is always artificial, being the result of a selection of facts as perceived by others.

After the facts are gathered the judge arrives to the position of exercising his true function which is that of *ius dicere* (providing the ruling). That means in fact to adequately integrate the fact in the judicial order to scrutinize them through a rule of law and to give the proper consequence to their meaning. (Georgescu, 1942, p. 46)

In criminal cases we tend to disregard the factual truth in favor of judicial truth in respect for instance in relation to evidence gathered illegally even if such evidence tend to alter the result of the ruling. This is because the legality of obtaining the evidence is a principle stipulated in the Romanian criminal procedure code.

Furthermore we argue that it does not matter what the prosecutor or the judge know it matters what he can prove, due to the presumption of innocence (art. 4 Crim.P.C) that expressly stipulates that everyone is presumed innocent until proven guilty by a final criminal ruling and that after the administration of all the evidence, any doubt in forming the belief of the judicial authorities shall be interpreted in favor of the suspect or the accused. (Coman, 2017)

[1] The Court did not accept the applicants' argument that the Romanian courts did not actively seek to establish the judicial truth on that reasoning.

In civil cases we tend not to disregard factual truth as the procedural law regulates the principle of availability (art 9 Civ.P.C.), the active role of the judge in establishing the truth (the above mentioned art. 22. 2 Civ.P.C.). The judge has the duty to persist, by all legal means, to prevent any mistake regarding the finding of the truth in question, based on establishing the facts and by correctly applying the law, in order to make a sound and legal decision.

Another question arises: Should we allow double standards in finding out the truth depending on the subject or the nature of the case?

3. DOUBLE STANDARDS

In theory, even talking about double standards sends a shiver down the jurist`s spine in relation to the principle of equality under the law. But even the European Court of Human Rights takes into consideration the existence of a double standard for instance when talking about the concept of "fair hearing" arguing that requirements are not necessarily the same in cases concerning the determination of civil rights and obligations as they are in cases concerning the determination of a criminal charge (Dombo Beheer B.V. v. the Netherlands, 1993).

Sometimes if we look closely we see that the courts tend to deviate from the solution prescribed by law due to concepts that are extra-legal, such as: justice, the good morals, bona fide or public order. Such is the case when the judge rejects an interpretation which perhaps can be more close to the letter of the law, on the reason that it would favor the guilty party therefore encouraging the illicit behavior. Nevertheless, this can be done only in some areas of the law, the criminal law being excluded given the principle of *nullum crimen sine lege* (Georgescu, 1942, p. 54).

Apparently such double standards exist and they should be accepted. We express some reservations. Although it is true that such discrepancy exists, any margin that the judge has is the result of applying the law itself. The doctrine stated that it would be wrong to think that courts are constructing their syllogism based only on the law. This is a true fact, but nevertheless it is not natural to allow decisions that are not expressively authorized by the legislator.

We argue as we suggested above, that this margin is a judicial prerogative in civil cases for example, through a legal text, art. 9 of the Civ.P.C. respectively. When evidence is insufficient or do not concur, it is only natural for the judge to have a margin of appreciation (Georgescu, 1942, p. 21). Within this margin the judge must be able to reach a fair decision, without interfering with the *rectitude* of decisions, which was described as their conformity with the law. (Bentham, 1825, p. 2)

4. LIMITS IN ESTABLISHING THE JUDICIAL TRUTH

Every decision, founded on proof, proceeds by way of inference: such and such a fact being given, I infer the existence of another fact. (Bentham, 1825, p. 8). Judicial evidence therefore helps the judge to determine the existence of an occurrence (the real truth, established through other facts such as papers, testimonies or clues) or as Golbot said it helps the judge to construct the unknown with known facts (Georgescu, 1942, p. 29)

But are there any constraints? Are there some legal limits imposed upon judges? Art. 2 paragraph 3 of Law no. 303/2004 state that judges are independent, bound only by the law (subject only to the law) and must be impartial. (Lucian Chiriac, Roxana Truta, 2017)

In theory the law itself is the limit. Abiding the law is a necessity for exercising the dignity of magistrate. Furthermore the Decizion 171/2001 of The Constitutional Court of Romania has unequivocally established that judges are subject only to the law (as the Constitution says), and not to their own conviction (as the code of criminal procedure said at the time of the ruling).

But in the Recommendation no. R (94) 12 regarding the independence, efficiency and role of judges (Principle I.2.d), the Council of Europe Committee of Ministers established that "Judges must have unrestricted freedom to give rullings impartially, in accordance with their conscience and their interpretation of the facts, *in accordance with the relevant rules established by law*".

Occasionaly it has been argued the law sets it`s own boundaries, for instance the existence of an order of preference among evidence that has been noted in the doctrine. This order includes confession (regarded as the most powerful evidence) authentic documents, followed by written documents, witness testimonies and in the end presumptions. This is an established legal hierarchy, imposed upon the judge, therefore not leaving him a margin of establishing his own hierarchy due to the necessity of disposing of unpredictability and unknown (Georgescu, 1942, p. 43)

Other authors contest the existence of such hierarchy showing that criminal evidence don`t have a predetermined value, and the margin of appreciation of the judge includes establishing pertinent evidence after examining them. (Mateuț, 2020, p. 495).

Leaving aside that in procedural matters there are certain differences between criminal law and civil law we think that evidence doesn`t have a predetermined value. Of course the authentic act is more trustworthy that simple written documents, due to the fact that the will of the participants is checked by a public official. But that does not mean that it is infallible and cannot be overpassed by a simple private document. In case of simulation the apparent (authenticated) act is overpassed by a private one in establishing the will of the participants. However, this situation is also prescribed by law, therefore we argue that the law itself, even if it does not set a hierarchy can be regarded as a limit as unlawfully obtained evidence is to be excluded. Art. 264 Civ.P.C. states that the judge shall freely assess evidence, according to his conviction, *unless* the law establishes their proving power. Therefore he judge, in establishing the judicial truth, benefits from his margin of appreciation established by the provisions of article 264 Civ.P.C. (Gavrila, 2020)

The rule of law should not be dismissed in the detriment of achieving the goal of accurate fact-finding and establishing the real truth, even if sometimes the law contains awkward solutions. Let`s take for instance the burden of proof: in criminal cases it falls on the representative of the state, while in contravention cases it lies with the suspected person. This issue was addressed by the ECHR in the case of Anghel v. Romania (Anghel v. Romania, 2008) and the Court found that there was a violation of art. 6 of the Convention.

Other times the law institute limits regarding admissibility of proof. For example in the matter of witness testimony in civil cases, art. 315 Civ.P.C. the following categories cannot testify: relatives and in-laws up to the third degree inclusive; the husband, the

former husband, the fiancé or the concubine; those in the service or relations of interests with either party; persons placed under interdiction; those convicted of false testimony.

We propose a revision of this rule, for instance in respect to relatives in contravention cases. An argument in favor of this revision is a pressing social need: most often relatives are witnesses to such alleged contraventions. Furthermore, the law allows in similar situations similar exceptions. For instance in cases regarding filiation, divorce and other family matters, art. 316 allows relatives and in-laws to be listened to.

5. EQUITY

It has been said that the goal of this margin of appreciation is to reset the balance between legality and justice. Exercising its power the judge is not thus obliged to follow the letter of the law but can adapt the norm to the particularity of the case (Georgescu, 1942, p. 21)

But can the judge go any further? Can he ignore the law and give a ruling based only on equity? The answer to the question in this form is no, he can`t. The law cannot be substituted by feelings or impressions. But that in itself does not imply that equity has no relevance. To give the party satisfaction, the trial must be fair, and the fairness of the trail implies an equitable application of the law.

In the original sense the term of equity evokes an equilibrium, but any decision based exclusively on equity tends to be out of control because equity excels of subjectivity, through sentiments, giving way to natural justice, which is not always justice in law. The legislator is the first and the only decider in respect to equity. The judge can relate to equity only if he is empowered by the legislator. Such delegation can be explicit, punctual and within limits or implicit in the case of the margin of appreciation. (Deleanu, 2013, p. 486)

The judicial authorities have under art 8 Crim.P.C. the obligation to carry out the criminal prosecution and court proceedings respecting the procedural guarantees and the rights of the parties and procedural subjects, so that the *facts* that constitute crimes *can be ascertained* in time and completely, so that no innocent person will be brought to criminal liability, and any person who has committed an offense shall be punished according to law, within a reasonable time. Art. 6 of the European Convention of Human Rights states that everyone has the right to a fair trial, in an optimal and foreseeable time frame, by an independent, impartial and established court, and to this end, the court is obliged *to order all the measures allowed by law* and to ensure the speedy execution of the trial.

The European Court of Human rights stated in Kyprianou v. Ciprus (Kyprianou v. Cyprus, 2005) that the role of any adjudicatory body is *not only in truth-finding*. The objective and impartial ascertainment of truth is merely an instrument to the resolution of the conflict. *Judicial truth-finding is not an end in itself.* Once the truth has been established to the best of their abilities, the judges must apply the law.

We therefore assert that any decision of the judge involves equity but should follow the law. As the law is concerned what counts is not everything that happened but what is relevant and what should have happened according to the law. Judicial knowledge is obtained by value judgment that means that the judge must appreciate whether or not

the facts are according to the law which in turn is more or less the expression of the idea of justice (Georgescu, 1942, p. 45)

6. CONCLUSION

In ascearting the truth there should be no duble standards, as judges must evaluate and find facts, in accordance with the relevant rules established by law. Although it is true that there are several discrepancies and different procedures as the law tends to diversify, any margin that the judge has is the result of applying the law itself.

When there is a pressing need for the law to change as it does not correspond to social realities, the law has to do so only through the proper legislative procedure, and not by being ignored or overcome. This is the reason why we argued changing the limits of admissibility of proof when necessary, for insgtance in respect to witnesses in a contravention case.

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