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# Strategies for Securing the Judicial Truth in Western Judicial Practices

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**Abstract**

The issue that this paper investigates is the relation between the subject and the judicial truth, more precisely, the way in which Western Law, during history, resorted to different strategies in order to secure a fundamental relation which lies at the core of the Law itself – the problem of correspondence of the Law to the facts, which belongs to a broader problematic, the one of the correspondence of language to reality. In this context, certain judicial strategies regarded the subject as a source of truth and as a threat to the established correspondence of the Law to facts, and tried to secure the privileged relation to reality that the judicial truth assumed.

**Keywords:** judicial truth, judicial practice, trial by ordeal, private revenge judicial practice

## 1. Terminological Clarifications

It is a rather common gesture for any post-structuralist approach to think of Law as a set of texts whose most transparent effect, since it is enforced by a national or super-national power, is maybe more perceivable than the ones of other social institutions. When one thinks of the modern penal law, for example, certain clear immediate effects of the enforcement of the Law come into mind, with all the ceremonial dimension of the acts performed by the authorities in relation to the one who allegedly broke the law, in order to hold him accountable. A clarification is in order when talking about the Law with a capital L – it refers to the sum of texts belonging to particular legal traditions in the Western cultures, which prescribe a certain conduct for the subject and which are enforced by a legitimate power. As text, Law presupposes a legal subject which may roughly be assimilated for the purposes of this article to the function of the author, divine or human, which may also be the enforcer of the Law, a correlative counter-part, a legal object, and the subject who plays the function of the reader of the text, the receiver of the legal message. The legal object is nothing more than the presupposed entity in the text, which is always supposed to act in a certain way prescribed by the law. Especially with regard to the criminal law, the legal texts quasi-unanimously refer to conducts which are prohibited to the legal object and the failure to abstain from committing those acts leads to certain consequences, to a certain punishment.

## 2. The Judicial Truth

From the perspective of the Law, the one who allegedly broke the law is a subject until a judicial decision links him to the legal object, by establishing the fact that the subject indeed broke the law by committing the acts prohibited in the legal text. There is a widely common reserve to all Western legal cultures which stops the immediate assimilation of the one who allegedly broke the law, who is a subject, with the legal object – the presumption of innocence. The process of articulating the legal object on the subject, that is to say the correspondence of the subject who performed the prohibited act as a concrete instantiation of the legal object, is the judicial practice whose purpose is to establish such an univocal relation of correspondence between the legal text and reality, between the abstract legal object whose conduct is forbidden in the legal text, and the concrete subject, who committed the acts in reality.

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This relation of correspondence is the expression of the judicial truth, which is imposed to the subject who judicially qualified as legal object once the correspondence of the conduct of the subject to the facts prescribed by Law was established, with all its particular elements, such as the subjective position of the subject when committing the act, which is the criminal intent, the concurrence between the committed acts and the subjective position, the causality and the responsibility. The judicial truth established during trial, even though the trial is adversarial and allows for all the parties involved to have an equal saying with regard to the facts, has, from a certain point, only an unilateral dimension. The judicial truth once established as a result of debates on both facts and law is imposed on the subject, and thus he suffers the consequences prescribed by law for the legal object.

## 3. The Philosophical Issue of the Relation between Language, Reality and Truth

The problem of the correspondence of language to reality has constituted a major philosophical debate during the 20th century, since the "linguistic turn" (Rorty, 1967) oriented the Western philosophical concerns towards issues regarding language. In all Western philosophical traditions, continental (from the structuralism of Ferdinand de Saussure to the post-structuralism of Jacques Derrida), analytical (from Willard Van Orman Quine to Ludwig Wittgenstein) and pragmatic (Richard Rorty), the issue of correspondence of language to reality was given different answers. The traditional perspective on this relation assumed that signs, words, units of language function as labels on different objects in reality. Against this perspective, Ferdinand de Saussure argued that a sign has a dual nature, and it does not link an object in the real world to a name, but a representation to a phonetic expression (Saussure, 1916/1997). The linguistic sign is a unit composed of two elements – Saussure calls the sound "signifier", and the concept "signified", and, since the linguistic theory of Louis Hjelmslev, the sign is understood as a unit containing both expression and content. The sign is characterized by an internal contradiction, which consists in a connection between entities that are not related in a natural manner – the connection between sound (expression) and concept (content) is not natural, but arbitrary (Eco, 1976/2008, 32-33). The fact that this relation between expression and content is arbitrary reflects on the nature of the sign, which is entirely a social and historical one, a matter of social convention (Eco, 1976/2008, 33). The arbitrary of the sign means that it is not subjected to an external determination, that there is no natural or predetermined relation between expression and content. The sign is delimited and characterized in relation to other units of expression and content, that is to say in relation to other signs within the language, and draws its value only through this internal relation within the language (Derrida, 1972/2001). Therefore, the linguistic sign is not an independent, autonomous, unit, which has meaning due to its own correspondence to reality, but rather meaning occurs through the differences in form and content from other linguistic signs (Eco, 1976/2008, 30-35).

Furthermore, since the language represents a system of signs and is nothing but a social convention, any knowledge of reality is socially constructed, since it is always mediated by signs and constituted by signifying practices (Eco, 1976/2008, 79). This is how the continental philosophical tradition of structuralism formulated the issue of the relation between signs and reality, and the truth as a correspondence between assertions and facts. Post-structuralism brought forth the anti-essentialist and the anti-foundation list perspectives on the language-reality dualism, claiming that signs do not have a correspondence in the objects of the real world, which have an independent reality, outside the language, and that the linguistic representations do not correspond univocally to the state of affairs in the real world. This dualism between language and facts, which constituted the traditional subject of investigation for philosophers since John Locke, David Hume and Immanuel Kant, was argued against by Quine, a philosopher from the analytical tradition. The traditional view claimed that the truth of assertions is to be confronted with the data from experience. The dualism consisted in a strict distinction between, on one hand, constitutive elements of knowledge (such as ideas, concepts, terms) and expressions (such as assertions), and, on the other, the foundation for the truth of assertions. Kant, for example, operates a distinction between, on the one hand, analytical or explicative judgments, which are truth by their meanings and regardless of facts, and, on the other, synthetic or extensive judgments, which are true when they can be reduced to perceivable data from experience (Scholz, 2008, 346). Quine argued that such a distinction cannot be made, since we cannot separate the perception of reality from the linguistic system used to interpret this reality. His conclusion is that, since all perceivable data from the experience can be understood only through linguistic means, only through language, which organizes our perception itself, there is no place outside the language which allows for an external examination of the correspondence of the language to reality (Scholz, 2008, 350-351).

The argument Quine proposed expresses the fundamental concern of the legal subject, that of the privileged correspondence to reality of the legal text, correspondence which it tries to protect. If Quine is right, then everybody operates only with descriptions of reality, which may all be true, even though they might contradict each other. Furthermore, there is no possibility to claim that a particular description has a privileged relation to reality, and that only one description is true. Whoever claims that has to step outside the language and firstly prove the relation of correspondence between language and reality, and secondly that there is such a reality that can be known without any linguistic mediation. Applied to the judicial context, a trial takes place precisely on this hypothesis that both conflicting parties operate with equally true descriptions of the facts. However, when the judicial truth is established, also a privileged correspondence of a certain interpretation to reality is established as the only true one. This judicial truth, as a privileged relation of correspondence to reality, had to be protected from the existence of any other possibly equally true alternative which would threaten the univocal nature of the judicial truth, especially from the one claimed by the subject, and this issue of security was addressed in different manners in different judicial practices.

## 4. Securing the Judicial Truth in the Judicial Practices of Private Revenge and Trial by Ordeal

The problem of the unique nature of the judicial truth seemed to haunt the entire Western legal history. From the private revenge judicial practices to the modern ones, the concern was addressed in different ways and it was tackled in a particular manner in the modern Western legal systems once the Law assumed the task of protecting the social values and the public interest. The judicial practice of the law of private revenge, from ancient combat trials to more recent late-medieval European duels, is the most widespread form of distributing justice across different cultures and times, and it is not dependable on any enforcing institution. In such judicial practices, the concern for the nature of the relation correspondence of language to reality took the form of the necessity to annihilate the subject in order to impose a univocal and permanent judicial truth. The judicial truth in the private revenge judicial practice was the one of the winning party, which was usually the one who managed to impose by force his interpretation of the facts on the other, weaker, party. Unless the wining party annihilated the opposing one, such a relation of correspondence between language and reality was not a definitive one, since the successor of the party who lost was eager to take revenge and overturn the relation of correspondence with his own. If it didn't end in the elimination of one of the parties, the judicial truth was a matter of ongoing dispute between subjects, who got involved in a trans-generational and potentially never ending spiral of revenge. An illustration of the private revenge is to be found in Homer's Iliad and Odyssey, both written around the 8th century BC, and which refer to a time when the Greek social organization was not the one of the polis and, therefore, the society was organized in the absence of a Law in the modern sense. The heroes of the Homeric epics were governed by the forces of anger and revenge, inhabiting a world which was placed entirely under the spirit of war, and where justice had its only expression in the law of revenge, which was enforced by the subjects themselves, without any mediation from legal institutions (Sloterdijk, 2006/2014).

The private revenge judicial practices supposed that the claim for the permanent and unique correspondence of language to reality was to be instituted by the act of revenge itself, which had the purpose to annihilate the other subject as a competing source of truth. However, since this practice degenerated into a spiral of private revenges, the function of distributing justice was delegated to a legitimate political power. In this context, the idea that subjects can take the matters of justice in their own hands is almost incompatible with the social institution of a legitimate power, whose task is to produce the judicial truth and impose it, by enforcing the law and administering justice. The legal subject itself has taken the private revenge in its own hands and the judicial system rationalized it so that it can serve a social purpose (Esposito, 2011). Just as Walter Benjamin argued, the purpose of the political power is to gain a monopoly on violence by substituting the natural violence of the subjects as means to natural purposes with the legal violence which is prescribed by the legal subject. Whenever such violence is exerted without the authorization of the law, it is affecting the politically recognized power itself (Benjamin, 1921/1986). The question of a univocal permanent correspondence of language to reality was found also in forms of judicial practices which presupposed a Law elaborated by a legal subject and enforced by judicial institutions. Such a judicial practice was the trial by ordeal, where the unique nature of the judicial truth was not secured through the same strategy as the in the one of the private revenge judicial practice of annihilating the subject, but through an appeal to divinity. The oath taken by the subject aiming at establishing the univocal correspondence of language to reality and indirectly the correspondence of his assertions to certain states of affairs in the real world was part of this judicial practice in its various forms.

The recourse to oath was an expression of and a response to the deeper concern that language itself has a precarious capacity of corresponding to reality (Agamben, 2008/2011). In this case, the concern for the exclusive nature of the judicial truth was ensured in the judicial process by the presence of divinity, since God himself was called to be the guarantor of the univocal relation of correspondence between Law and facts. The subject which had to suffer the ordeal was excluded as a source of truth not by physical annihilation, although that might have been one of the outcomes of suffering the ordeal, but by including God as part of the trial. Thus, since God himself was part of the judicial process, and since he was the ultimate source of truth, any other truth was excluded. The Law prohibited a conduct, the subject committed the prohibited acts, and the univocal exclusive nature of the judicial truth was secured by the divinity. Unlike the strategy used in the private revenge judicial process, the elimination of the opposing subject was not a condition for the security of the judicial truth. Also, the judicial truth produced during this process was a permanent and univocal one, since God himself was part of the judicial process. The emergence of a legal subject as a legitimate author of legal norms and a political institution charged with the enforcement of the Law, which in most of the Western history were one and the same institution, didn't alter the fundamental mechanism of the judicial practice. This consisted in a mixture of private revenge and trial by ordeal judicial practices, which were this time enacted by or in the name of the sovereign, who cumulated both some divine qualities in his position of God's anointed and the ones of an angry vindicator. As Michel Foucault argued, the criminal trial was very similar to an act of a revenge of the sovereign on the subject, who had to suffer the "suplice", the excess of pain (Foucault, 1975/1995).

## 5. Securing the Judicial Truth in Modern Judicial Practices

If in the judicial practices of private revenge and trial by ordeal the judicial truth was secured by physically eliminating the competing subject as an alternative source of truth in the first case and by introducing God as part of the judicial practice in the second case, the modern judicial practices resort to different strategies. The construction of the legal text shifted from punishing to rehabilitating the wrongdoers as the source of legitimacy of the political powers charged with the elaboration and enforcement of legal norms shifted from the divine to the secular – modern Western legal systems derive their legitimacy from the society, whose values and interests became the fundamental goal of the Law. The role of protecting the society did not imply an abandonment of private revenge judicial system in Modernity. In the modern totalitarian states, any ideological opposition was subjected to a judicial practice similar to the one of private revenge, where the state itself, as an absolute embodiment of the society, was seeking to take revenge on the dissenting subjects. The unique, permanent and univocal nature of the judicial truth was established by the same means as in any private revenge judicial practice – by physical annihilation of the subject. Although

Modernity did not assume a radical break from the former judicial practices, a new judicial practice became dominant. The rehabilitation in non-totalitarian states became a central objective in the Western Law, both European – "(…) while punishment remains one of the aims of imprisonment, the emphasis in European penal policy is now on the rehabilitative aim of imprisonment (…)" (Overy) – and American – "The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553 (a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation" . Since modern Western Law made the protection of the social values and the public interest its major and most fundamental role, the legal object appears in the legal text only in relation to the abstract social values which ought to be protected by Law. The consequences imposed to the subject, who qualifies as legal object, are nevertheless the product of a deductive, metaphysical process, since it is stated that, once the crime is committed, the social values are automatically affected by the acts of the subject who breaks the law. Therefore, in modern Western legal systems, the judicial truth covers not only the unique correspondence between language and reality, but also the relation between the breached social values and the subject who committed the crime. However, this last correspondence is an a priori part of any particular judicial truth, since it constitutes the purpose of adopting the Law – once the correspondence between language and reality is established, the violation of the social values derives automatically and the subject becomes suitable for the rehabilitation judicial practice, which aims at reintegrating him into society. As Michel Foucault argued, the practices of rehabilitation have the purpose of preventing the subject to become a 'recidivist', however, the notion of 'recidivist' itself did not exist before penal institutions and criminal anthropology constructed it as such, as an identifiable social object (Foucault, 1975/1995, 100, 271-272). Although in the judicial practices of private revenge and of trial by ordeal the judicial truth was secured by eliminating the subject as a source of truth, the modern judicial practices do not seek to physically annihilate the subject, nor do they eliminate him as a source of truth.

As Michel Foucault argued, by excluding the subject as a source of truth, he was never supposed to admit to the judicial truth, and his relation of correspondence between Law and reality was never supposed to reproduce the unique correspondence presupposed by the judicial truth (Foucault, 1975/1995). The judicial process was to remain unilateral, that is to say, since it didn't engage in any form of dialogue with the subject as a source of truth, the entire process of establishing the judicial truth was only an internal process, a technical algorithm which didn't force him to reproduce the correspondence. The legal process didn't seem to be concerned with the question of whether the subject indentifies himself with the legal object, whether he reproduces an identical judicial truth, but rather with the question of how to secure the judicial truth by excluding the competing source of it. In contemporary Western law, at the end of an adversarial trial, which allows all the parties involved to prove their claims regarding the correspondence of the text to the facts, the judicial truth operates automatically and unilaterally, establishing an undisputable connection between the subject and the legal object. There is no other truth of the subject but the judicial truth. However, since the subject is not excluded as a source of truth, like he was in the judicial practices of private revenge or trial by ordeal, he has to reproduce it himself as a source of truth. In order to secure the unique nature of the judicial truth and to exclude any form of opposition, the subject, by reproducing the judicial correspondence, adheres to the univocal nature of the judicial truth. In various Western legal systems, the Law prescribes milder consequences for the subject who himself validates the correspondence by confessing the crime or by taking part in rehabilitation practices, whose objective is to reintegrate the subject into society (Robinson & Crow, 2009). The subject has to reproduce the judicial truth and recognize himself the correspondence of language to reality, just as in the practice of confessing related to the specific form of pastoral power analyzed by Foucault, in which the subject acts as a subject of power by engaging in a critical and hermeneutical process of examining himself (Foucault, 1978/2009). The strategies of confession and rehabilitation are the modern answer to the concern regarding the unique, permanent and univocal nature of the judicial truth, of the correspondence of the language to reality, of the legal text to facts. The subject as a source of truth is no longer eliminated in the judicial practices – he is recognized as such, and in this particular quality he has to reproduce the judicial truth so that he can no longer threaten it.

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