PREFACE

The use of the expression Judicial Epistemology to define an independent field of research was originally presented for the first time in my book in 1979 focusing on Fatto e valore nel Sistema probatorio penale (Fact and value in the criminal evidence system). The volume was published with the support of Gian Domenico Pisapia, my unforgettable Mentor, despite the fact that the theme (then) appeared to many too new compared with the habitual scholarship at that time in the field of criminal procedure.

It was equally courageous of the publisher Giuffrè to accept my proposal to set up a Series of Epistemologia giudiziaria (Judicial Epistemology), the first volumes of which came out at the same time in 1997 thanks to Paolo Garbolino and Claudio Pizzi, two Colleagues who would continue to work on the Series and who have also become good friends as a result of countless discussions (frank and at times rather animated) with a view to channelling our specific backgrounds into the formation of a genuinely interdisciplinary vision, identifying the prospects for bringing together aspects of logical-philosophical profiles and the judicial ones of the various questions.

Finally, in 2014-2015, the Faculty of Law at the Università Cattolica del Sacro Cuore of Milano set up and entrusted to me the first courses of Judicial Epistemology in Italy (and not only Italy), also coordinating it with the courses in procedural law taught in the same Faculty: the issues raised by the subject, do not in fact solely pertain to the field of criminal procedure (my original background and which I continue to study), but also deal with civil and administrative processes, which are indeed frequently mentioned in the course of the following pages.

To all of these (University, Colleagues, Publisher), I can only publicly express my warmest gratitude for having made it possible for me (within the evident limitations of my capabilities) to engage in scholarship and also teach a discipline which fills me with such enthusiasm and the further study of which I firmly believe to be essential for the proper administration of justice.

It is also the desire to express this gratitude which spurred me to bring together here all my reflections on the topic, in an attempt to put some order on what had been discussed on other occasions as well as to make some fresh observations.

At times however (perhaps too often), the enthusiasm for work detracts too much time from family life. Without in any way using this as some sort of a justification (which would in any case be impossible), my deepest heartfelt thanks for having put up with me (and supported me) over the years go to my family, and above all, to my wife Paola whose love fills up my life.

September 2014 Giulio Ubertis

ABBREVIATIONS

Admin. Proc. Cod.	Code of Administrative Procedure
Agg.	Aggiornamento
Ann.	Annali
App.	Court of appeal
Arch. phil. droit	Archives de philosophie du droit
art.	article
Cass.	Court of cassation
Cass. pen.	Cassazione penale
cf.	confront
CFREU	Charter of Fundamental Rights of the European Union
ch.	chapter
cit.	cited
Civ. Proc. Cod.	Code of Civil Procedure
Civ. Cod.	Civil Code
col.	column
Crim. Cod.	Criminal Code
Crim. Proc. Code	Code of Criminal Procedure
Crit. dir.	Critica del diritto
D. disc. pen.	Digesto delle discipline penalistiche
d.l.	decree-law
Dir. pen. proc.	Diritto penale e processo
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ed.	edited
Enc. dir.	Enciclopedia del diritto
Enc. giur.	Enciclopedia giuridica
EU	European Union
ff.	following
Foro it.	Foro italiano
Giur. cost.	Giurisprudenza costituzionale
Giur. compl. cass. civ.	Giurisprudenza completa della Corte suprema di cassazione – sezioni civili
Giur. compl. cass. pen.	Giurisprudenza completa della Corte suprema di cassazione – sezioni penali
Giur. it.	Giurisprudenza italiana

G.U.	Gazzetta Ufficiale della Repubblica italiana
ICCPR	International Covenant on Civil and Political Rights
id.	idem
l.	law
Leg. pen.	Legislazione penale
lett.	letter or letters
no.	number
Nss.D.I.	Novissimo digesto italiano
p.	page or pages
para.	paragraph or paragraphs
prog. prel.	progetto preliminare
Prot.	Protocol
Quad. CSM	Quaderni del Consiglio superiore della magistratura
Quest. giust.	Questione giustizia
Rev. dr. inter. lég. comp.	Revue de droit international et de législation comparée
Rev. intern. phil.	Revue internationale de philosophie
RIFD	Rivista internazionale di filosofia del diritto
Riv. crit. sc. soc.	Rivista critica di scienze sociali
Riv. dir. civ.	Rivista di diritto civile
Riv. dir. proc.	Rivista di diritto processuale
Riv. it. dir. proc. pen.	Rivista italiana di diritto e procedura penale
Riv. trim. dir. proc. civ.	Rivista trimestrale di diritto procedura civile
Scuola pos.	Scuola positiva
Suppl. ord.	Supplemento ordinario
v.	*versus*

CHAPTER ONE
JUDICIAL TRUTH AND JUDICIAL EPISTEMOLOGY

SUMMARY: 1. Judicial truth. – 2. The illusion of "objective judicial knowledge". – 3. Argumentative and demonstrative conceptions of the evidence. – 4. The epistemological neutrality of the process: *a*) the proceedings as a verbalisation of experience. – 5. *b*) the semantic conception of truth and factual reconstruction. – 6. The "logic of judgment": a brief historical explanation. – 7. *Continued*: terminological issues. – 8. Contexts of decision and contexts of justification. – 9. Context of inquiry and judicial epistemology.

1. *Judicial truth.*

The purpose of jurisdiction is to implement the law in a concrete case [1].

A traditional claim and one which is often repeated, it is nonetheless open to the Hegelian objection according to which "the familiar, precisely because it is familiar, remains unknown" [2].

In order to recognise it as the "immediate *knowing*" [3] of jurists and fully

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[1] Nor could it deny the general validity of said assumption, perhaps claiming that it is only valid for those proceedings which serve for the implementation of political choices and not for those aimed at the resolution of conflicts (in line with the distinction proposed by M.R. DAMAŠKA, *The faces of justice and State authority. A comparative approach to the legal process*, New Haven - London, 1986, p. 88 ff.): in the latter case also, the substantial and processual rules should in any case be applicable in the context in which the controversy takes place, characterised by the circumstance of the parties having wider powers of disposal than in the alternative system, but not non-existent (needless to say, as otherwise there would be no legal system).

[2] G.W.F. HEGEL, *Phenomenology of spirit* [1807], New York, 1977, p. 18, which continues as follows: "Quite generally, the familiar, just because it is familiar, is not cognitively understood. The commonest way in which we deceive ourselves or others about understanding is by assuming something as familiar, and accepting it on that account; with all its pros and cons such knowing never gets anywhere, and it knows not why".

[3] It is characterised by a merely apparent immediacy, since it concerns situations where "truths, which we know very well to be the result of the most complicated, highly mediated studies, can present themselves immediately in the consciousness of those who are well versed in that kind of cognition. Like anyone who has been instructed in a science, a mathematician

comprehend it, we need at least to clarify what we mean by "law" (but this goes beyond the scope of this work) and explain that the identification of the "concrete case" is the result of the gnoseological process which takes place in the course of judicial activity, with regard to which it therefore becomes necessary to examine both the methods used and the validity of the knowledge obtained.

In fact, the judgment of truth[4] concerning the reconstruction of facts which constitutes the "juridical case" emerges in the context of the proceedings as the basic cornerstone for issuing a *just decision* "independently of the legal criteria used to define and evaluate the justice of the decision"[5], since this (whether in accordance with procedural theory or the fundamental theories of justice"[6] could not be deemed to possess the required qualification should its basis in fact prove erroneous or unreliable. The ascertainment of this truth is not therefore, in itself, the ultimate goal of the proceedings, but – "compatibly with the other values implicated by the same"[7] – the prerequisite for an adequate decision as to which law is applicable in the particular case. For this reason, the connection (and therefore rejection of homologation) be-

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has solutions at his fingertips that were arrived at by a very complicated analysis; every educated human being has a host of general points of view and principles immediately present in his knowing, which have only emerged from his meditation on many things, and from the life experience of many years. The facility that we achieve in any kind of knowing, and also in art and technical skill, consists precisely in the fact that, when the occasion arises, we have this know-how, these ways of handling things, *immediately* in our consciousness, and even in our outwardly directed activity and in the limbs of our body. Not only does the immediacy of knowing not exclude its mediation in all of these cases, but they are so far connected that the immediate knowing is even the product and result of the mediated knowing". (G.W.F. HEGEL, *The encyclopaedia logic (with the Zusätze). Part 1 of the encyclopaedia of philosophical sciences with the Zusätze* (1830), Indianapolis, 1991, p. 115).

[4] In accordance with usage in procedural language, it must be pointed out that in the context of this work, the term "truth" – when correlated with others such as "research", "ascertainment", and others of that kind – is essentially concerned with reconstruction of the facts. This, however, does not rule out its also being used with reference to the resolution of issues relating to the identification of the rule to be applied in the case in which judgment is to be pronounced (as is also the case in L. FERRAJOLI, *Diritto e ragione. Teoria del garantismo penale*, Roma - Bari, 1989, p. 21 and *passim*) nor the recognition that the "truth" concerning the *questio facti* is in any case connected to that inherent to the *quaestio iuris* (in accordance with what is specifically illustrated *infra*, ch. III, § 6).

[5] M. TARUFFO, *La prova dei fatti giuridici. Nozioni generali*, in *Trattato di diritto civile e commerciale*, originally ed. by A. Cicu - F. Messineo and continued by L. Mengoni, III, 2, 1, Milano, 1992, p. 43.

[6] The difference between them is summed up in the observation that "while one disposition strives to keep political, ethical and legal issues distinct, the other finds this separation artificial and inappropriate" (M.R. DAMAŠKA, *The faces of justice and State authority. A comparative approach to the legal process*, cit., p. 67-68.

[7] G. UBERTIS, *Prova*: II) *teoria generale del processo penale*, in *Enc. giur. Treccani*, *Agg.*, XVII, Roma, 2009, p. 2.

tween truth and justice is also normatively confirmed in the wording of the oath required for lay magistrates in the Assize Courts (art. 30 para. 1 l. 10 April 1951 no. 287), where the judgment is formed, prescribing that this "serve as society must expect it to: an affirmation of truth and justice".

In other words, that which pertains to jurisdiction is a *judicial truth*, characterised by the fact that it is both contextual (i.e. dependent on knowledge, including methodological knowledge, given the moment in which it is being pursued, as occurs in every field of research) and functional to that "objective of justice" which is historically determined by the varied composition of the values held by the people in whose name (pursuant to art. 101 para. 1 of the Italian Constitution)justice is administered [8]. Thus the reconstruction of facts as the basis of a "just" decision, must comply with a truth which, in order for the entirety of the choices laid down by the rules to be obeyed throughout the entire proceedings, also in order to ensure the consensus of citizens with its findings, must not become the ultimate or absolute goal of jurisdictional activity to which everything else is subordinated, but must be seen as the end result of the parallelogram of the individual and collective forces which interact during the course of the proceedings.

What is most relevant in relation to the latter, axiologically and legislatively regulated (also according to what is pointed out subsequently [9]), is the method rather than the result: "the thrill is in the chase, not the capture" [10] and "the justice of the judgment'is due to the process involved in reaching the result" [11] or better still, the result obtained through the process is such (in Hegelian terms) "in the dual sense of final event and unit composed of the totality of other events; which are therefore its *antecedents* and *moments* (particular constituent aspects)" [12].

2. *The illusion of "objective judicial knowledge".*

Furthermore, one outcome of the epistemological studies not always noted by jurists, but which has been an integral element of contemporary philo-

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[8] G. UBERTIS, *Fatto e valore nel sistema probatorio penale*, Milano, 1979, p. 137. Similarly, also see CH. PERELMAN, *La preuve en droit, essai de synthèse*, in *La preuve en droit*, ed. by Ch. Perelman - P. Foriers, Bruxelles, 1981, p. 364.

[9] *Infra*, ch. V, § 2.

[10] F. CORDERO, *Diatribe sul processo accusatorio* (1965), in ID., *Ideologie del processo penale*, Milano, 1966, p. 220.

[11] T. ASCARELLI, *Processo e democrazia*, in *Riv. trim. dir. proc. civ.*, 1958, p. 858.

[12] G. PRETI, *Praxis ed empirismo*, Torino, 1957, p. 170.

sophical-scientific thought since the 1930's, is the acknowledgement that any result of an investigation is dependent on the context in which it is carried out, the methodology used and the goals set [13]. The problem of the "objectivity" of science is thus resolved not by the obtaining of a so-called absolute and incontrovertible knowledge, but, for example, by the most precise possible clarification of what working hypotheses are driving the research, what implicit assumptions are behind the investigation, and to what extent the instruments used affect the goals to be achieved. Consequently, it would hardly be possible to compare the results by applying the rules of two different disciplines such as, for example, those of history and jurisprudence, to the study of the same event: "even when the two different investigations yield diverse outcomes, it would still be impossible to decide which one was 'better'. In order to make such a choice, one would need to be able to observe from a higher point of observation than the historical or judicial one, from which to reach an incontrovertible truth, a second instance ruling as it were. But it would still be nothing more than an illusion ... [given] the unattainability of an incontrovertible truth: and in any case this secondary outcome would not be able to replace the previous ones, given the difference in the context, instruments and purposes of the research" [14].

In this regard, and belying those who insist that it is possible to obtain an absolute "Truth" which leads to the comprehension of an equally absolute "Objectivity", suffice to remember that in 1927 and 1931, two results emerged in the fields of Physics and Mathematics respectively, which may be interpreted in such a way as to remove any illusions about the gnoseological capacity of mankind, or rather, the attainability of knowledge capable of "calming" consciences on the basis of their supposed irrefutability [15].

In a sense, as regards what Leibniz called "truths of fact" [16] and Hume believed to be inherent to the "matters of fact" [17], both are dealing with Heisenberg's uncertainty principle [18] which states the impossibility of accurately and

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[13] Cf., expressly, though expressed in a different manner, L. FLECK, *Genesis and development of a scientific fact* [1935], Chicago - London, 1981, p. 101-102, and K.R. POPPER, *The logic of scientific discovery* (1934), London - New York, 2002, p. 88 ff.

[14] G. UBERTIS, *La ricostruzione giudiziale del fatto tra diritto e storia*, in ID., *Argomenti di procedura penale*, II, Milano, 2006, p. 153-154.

[15] "The old scientific ideal of episteme of absolutely certain, demonstrable knowledge – has proved to be an idol ... is not his *possession* of knowledge, of irrefutable truth, that makes the man of science, but his persistent and recklessly critical *quest* for truth". (K.R. POPPER, *The logic of scientific discovery*, cit., p. 280-281).

[16] G.W. LEIBNIZ, *Monadologia* (1714), English translation, Oxford, 1898, p. 235-236.

[17] D. HUME, *An enquiry concerning human understanding* [1748], in *An enquiry concerning human understanding and other writings*, Cambridge, 2007, p. 30.

[18] For an utterance of said "uncertainty relationship" expressed in "the simplest manner", see W. HEISENBERG, *Nuclear Physics* (1949), English translation, London, 1953, p. 29.

simultaneously measuring the position and velocity of an atomic particle because "in atomic physics it is impossible to neglect the changes produced on the observed object by observation" [19]. "Science no longer confronts nature as an objective observer ... by its intervention science alters and refashions the object of investigation ... method and object can no longer be separated" [20], to which it is inevitably and dialectically connected, so that "the only theory of knowledge which can be valid today is one which is founded on that truth of microphysics: the experimenter is part of the experimental system" [21].

On the other hand, with reference to Leibniz's "truths of reason" (which Hume called "relations of ideas") in relation to analytical or logical-mathematical propositions, reference must be made to what is known as the Gödel tests [22] which proved the existence in the field of arithmetic of undecidable problems; undecidable insofar as "they cannot be formally deduced by any set of axioms by means of a closed set of rules of inference" [23], even though they may also be true. It also seems legitimate "to say that this occurs because the horizon of true propositions is wider than that of demonstrable propositions, of 'theorems', and therefore that which the human intellect is capable of comprehending and recognising as true necessarily goes beyond the sphere of that which can be proven" [24].

Transferred to the judicial sphere, these considerations give rise to two corollaries of particular importance:

a) if the result of any investigation cannot be reduced to a pure and absolute "givenness", even the factual material used by the judge for the decision is not the consequence of a passive reception of the evidentiary findings;

b) judicial reasoning cannot be traced back to an exclusively logical-deductive structure.

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[19] W. HEISENBERG, *The teachings of Goethe and Newton on colour in the light of modern physics* (1941), in ID., *Philosophic problems in nuclear science. Eight lectures*, English translation, London, 1952, p. 73.

[20] W. HEISENBERG, *The physicist's conception of nature* (1955), English translation, London, 1958, p. 29.

[21] J.-P. SARTRE, *Search for a method* (1957), New York, 1963, p. 37, footnote 14.

[22] It can be found in its entirety in K. GÖDEL, *On formally undecidable propositions of principia mathematica and related systems* (1931), New York, 1962, p. 37 ff.

[23] E. NAGEL - J.R. NEWMAN, *Gödel's proof* (1958), revised edition, New York - London, 2001, p. 109.

[24] EV. AGAZZI, *Introduction to the problems of axiomatics*, Milano, 1961, p. 199. Not surprisingly, at the conclusion of a wide-ranging investigation into the theoretical-deductive aspect of geometry, F. GONSETH, *La preuve dans les sciences du réel*, in *Rev. intern. phil.*, 1954, p. 29, recognises that "the axiomatic method appears as the very means of specification of the theoretical. It does not however manage to purge it of the input from experience and intuition".

3. *Argumentative and demonstrative conceptions of the evidence.*

Evidence[25] – the cornerstone or key to the process or, to use yet another metaphor, the fulcrum of the entire judicial process – is identifiable, *in a broad sense* (see here below[26], for further details on the same concept), with what is "intended to establish a conviction on an uncertain point"[27] pertaining to the knowledge of the fact which gave rise to the legal controversy; but the very awareness, more or less explicit, of the influences of empiricism and rationalism on the configuration of the probatory instrument[28] in the progression from the medieval period to the present day[29] has led to the theme of evidence being placed in a historical dimension: from this we can deduce the existence of two antithetical perspectives in the description of our subject.

The *argumentative conception of evidence*, developed from classical antiquity onwards and which lasted up until the Middle Ages, according to which judgment of human actions inevitably made reference to the categories of verisimiltude, debatability, and hypotheticalness. Within this, the theory of *probability* was defined on the basis of values and from a *subjective* viewpoint, be-

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[25] In this regard, it may seem superfluous to recall that in legal language, "evidence" traditionally refers to the "process of fixing the fact" (F. CARNELUTTI, *La prova civile. Parte generale (Il concetto giuridico della prova)*, Roma, 1915, p. 15, footnote 1) and that it "does not refer to the rule of law" (M. TARUFFO, *Prova giuridica*, in *Enc. dir.*, *Ann.*, I, Milano, 2007, p. 1019). "Since the rule of law is assumed to be known to all, the problem of knowledge of the rule cannot therefore exist except as a problem of interpretation of the rule: the problem of knowledge of the material existence of the rule is a problem which is resolved outside of the legal proceedings and may arise only as a practical problem and not as a juridical problem" (F. BENVENUTI, *L'istruzione nel processo amministrativo*, Padova, 1953, p. 93): see, for example, art. 205 implementing rules of Crim. Proc. Code for the text on foreign law.

[26] *Infra*, § 4.

[27] H. LÉVI - BRUHL, *La preuve judiciaire. Étude de sociologie juridique*, Paris, 1964, p. 15.

[28] Nor does this preclude the recognition of a mutual interaction, within which we can perceive the inverse influences of judicial methodology on scientific methodology: for F. GIL, *Prove. Attraverso la nozione di prova/dimostrazione* (1986), Italian translation, Milano, 1990, p. 36, rather, "without going so far as to say that the epistemological criteria was generated directly by procedure – although this may indeed have been the case – in a certain sense, the legal proof of the fact remains the paradigm of the empirical evidence in general". Similarly, for S. TOULMIN, *The uses of argument* [1958], revised edition, London, 2003, p. 7, "logic (we may say) is generalised jurisprudence ... lawsuits are just a special kind of rational dispute, for which the procedures and rules of argument have hardened into institutions".

[29] For a reconstruction of these influences, see A. GIULIANI, *Prova in generale*: a) *filosofia del diritto*, in *Enc. dir.*, XXXVII, Milano, 1988, p. 549 ff. The entire entry, moreover, constitutes as it were, a systematic synthesis of studies on the subject published by the author over a thirty year period: since the results of this work have been widely used for the historical and ideological reflections expressed in this paragraph, see their bibliography for further readings from this perspective.

ing aimed at the evaluation of the degree of confirmation of a hypothesis with regard to a defined set of information: the "theory of the probable and normal [was] not formulated in objective, statistical terms (*id quod plerumque accidit*), but constructed in relation to the human sphere and ethically oriented" [30], therefore "not all the probabilities [were] on the same level ... some [were] to be preferred for reasons of an ethical nature ... the 'probable truth' – considered the only degree of truth possible in human matters – [was] seen in opposition to the necessary truth: there [was] such a thing as a logic of the probable like a logic of the necessary" [31].

Moreover, the concept of penal judicial investigation in particular could not but be influenced by the different structure of the substantive system, where the technical inadequacy of the legislator in describing the crimes and the imposition of the penalty was combined with the power of the judge to make recourse to analogy, custom or even *arbitrium* [32]. But the regulation of the judicial process was in any case based on "centres of argumentation" (*status*), upon which depended both the discipline of the evidentiary relevance and the existence of a complex system of rules which excluded certain paths of research, deemed inimicable to a proper ascertainment of the truth [33]. Only by following this methodology could the parties, in the course of the hearing, reconstruct the facts and subject them to the examination of the judge, in the context of what is known as the *isonomic order* of the process [34]. While nonetheless recognising the inevitable existence of a margin of doubt and the axiological implication of every judgment, it emphasised the argumentative physiognomy of the evidence, closely connected to the perception of rhetoric as a branch of dialectics. Dialectics, understood as the theory of probable reasoning based on generally accepted premises, was subjected to procedures analogous to those used in the necessary reasoning utilised in logic, so that even

[30] A. GIULIANI, *Il concetto classico di prova: la prova come "argumentum"*, in *Recueils de la Société Jean Bodin*, XVI (La preuve, I, Antiquité), Bruxelles, 1965, p. 359.

[31] A. GIULIANI, *Problemi metodologici nello studio del diritto processuale comparato*, in *Riv. trim. dir. proc. civ.*, 1962, p. 658-659.

[32] Cf. U. NICOLINI, *Il principio della legalità nelle democrazie italiane. Legislazione e dottrina politico-giuridica dell'età comunale*, Padova, 1955, spec. p. 87 ff. and 308 ff.; G. SALVIOLI, *Storia della procedura civile e criminale*, in *Storia del diritto italiano*, ed. by P. Del Giudice, III, 2, Milano, 1927, p. 173; G. VASSALLI, *«Nullum crimen sine lege»*, in *Nss.D.I.*, XI, Torino, 1965, p. 497 ff.

[33] A. GIULIANI, *Il concetto di prova. Contributo alla logica giuridica*, Milan, 1961, spec. p. XI-XII, 62-63, 216-217, 224 ("the reconstruction of the fact is resolved in an evaluation of the same, and the rule emerged almost from the reconstruction process. The relevance criteria were not set a priori, but emerged from the inquiry proceedings, in the course of the hearing").

[34] A. GIULIANI, *Ordine isonomico ed ordine asimmetrico: "nuova retorica" e teoria del processo*, in *Sociologia del diritto*, 1986, p. 81 ff.

"rhetorical discourse [became] in a certain sense logical and rigorous" [35].

In the 13th century, however, the gap widened between logic and rhetoric (which was progressively reduced to the "theory of good style and ornamentation") and the pretension arose to bring any reasoning back within a logical-demonstrative framework of a syllogistic style, based on uncontroversial criteria, to the exclusion of doubt and choice. The same period marked the ascent of experimental science based on empirical verifiability, as well as the development of inductive methodology, while in the judicial sphere, there was a gradual refinement in the enshrinement in law of the elements of the legal categories.

If "empiricism on the one hand and rationalism on the other, albeit coming from different directions, each contributed in its own way to obscuring the argumentative aspect and character of evidence" [36], then this eclipse went hand in hand with a shift in the delineation of the objectives of the reconstruction of the facts. The attention was no longer guided by axiology with a view to clarifying an event on the basis of its judicial relevance, but aimed to ascertain whether a particular fact, "scientifically" analysed in its own right, might be subsumable under an established rule, in the sense of a "certain" principle and taken out of the context in which it had to operate. "It no longer [had] any meaning to limit the field of investigation of the fact as a defence measure against potential errors by the judge. The fact which was the subject of the inquiry [had to], more or less, from a probabilistic point of view, be similar to the fact hypothesised by the rule" [37]. The emphasis was on the *objective probability*, which was understood as the "relative frequency of an event in a long series of events" [38], obscuring attention to its uniqueness.

But once a "modern" conception of evidence connected to that of objective probability [39] had been accepted, the awareness of the method used for the very result of the inquiry was lost, so that little by little, a *demonstrative conception of evidence* became established together with an *asymmetric order*

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[35] A. GIULIANI, *Il concetto di prova. Contributo alla logica giuridica*, cit., p. 26.

[36] G. DE LUCA, *Logica e metodo probatorio giudiziario*, in *Scuola pos.*, 1965, p. 44.

[37] A. GIULIANI, *Il concetto di prova. Contributo alla logica giuridica*, cit., p. 226.

[38] A. GIULIANI, *Il concetto di prova. Contributo alla logica giuridica*, cit., p. 14.

[39] This contraposition of the idea of evidence as induction and that of evidence as *argumentum* is dealt with by L. FERRAJOLI, *Diritto e ragione. Teoria del garantismo penale*, cit., p. 164, footnote 23, "unjustified ... [because it would depend] on the false idea ... that the epistemological model of induction requires an objective view, or a statistical or quantitative view of the acceptance criteria for probable truth". Again L. FERRAJOLI (*ivi*, p. 179, footnote 78]), recognises however that "this representation of modern thought ... can be applied ... to juridical thought where evidence is concerned": thus precisely in the field of discourse of the considerations dealt with in the text.

of the process "favouring the solitary operations of the judge's mind" [40].

Judicial logic was therefore assimilated into inductive logic; and judicial evidence into indirect evidence, implying the passage from a known fact to an unknown one: it was no more than "a fact supposed to be true, and then considered as a reason for believing in the existence or non-existence of some other fact" [41]. Thus the *probandum* too, was no longer regarded as a contentious issue, but rather as a "fact" attributable to a particular class and with a "real existence" [42].

It therefore becomes clear how the recognition of complete autonomy of the "world of facts" could lead to the justification, institutionalisation and generalisation of the practice of torture, "the unscrupulous attempt to go beyond the limitations of a *probable* truth in order to ascertain the *real truth*, the fact" [43]. And it also becomes clear how the problem of torture remained "primarily a question of logic, the object thus being the suitability of the torments as a means of discovering the truth" [44] without highlighting either the ethical or – more modestly, but less than one might generally expect – procedural implications: we need only think of all the issues concerning the observation of the adversary system and guarantees of defence.

4. *The epistemological neutrality of the process:* a*) the process as verbalisation of experience.*

The current task of juridical and procedural science is to synthesise the two perspectives dealt with thus far [45], accepting the utility in the judicial field of scientific developments while still recognising the methodological requirement of argumentative controversy, all the more since its usefulness was also recognised in the epistemological field, it being a structural element of intellectual activities [46].

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[40] A. GIULIANI, *L'ordo judiciarius medioevale (Riflessioni su un modello puro di ordine isonomico)*, in *Riv. dir. proc.*, 1988, p. 600.

[41] G. BENTHAM, A Treatise on judicial evidence, London, 1825, p. 8.

[42] A. GIULIANI, *Il concetto di prova. Un contributo alla logica giuridica*, cit., p. 241.

[43] A. GIULIANI, *Il concetto di prova. Un contributo alla logica giuridica*, cit., p. 185.

[44] P. FIORELLI, *La tortura giuridica nel diritto comune*, II, Milano, 1954, p. 207.

[45] For said synthesis, cf. *infra*, ch. III, § 2.

[46] See, for further bibliographical references on the subject, F. GIL, *Kant e la controversia*, in ID., *Prove. Attraverso la nozione di prova/dimostrazione*, cit., p. 151 ff., where it is stated that "the epistemological significance of the controversy can be seen on a number of levels. It ... constitutes a structural element in the exercise of thought" (*ivi*, p. 152).

The humanist notion of law, which postulates the harmonious confluence during the process of the most fruitful contributions of contemporary culture, cannot fail to emphasise how the assimilation at all costs of legal evidence into scientific (or better still, early positivist) evidence, bars the way to any result which aims to respect the different values in play during the process, leading, if coherent, to results which have now been rejected by current social and judicial understanding.

Furthermore, with the homologation, theoretical or otherwise, of the two cognitive procedures, it is easy to forget that, unlike the scientist and inductive philosopher who study a fact which is attributable to a class, for whose elements iterability criteria are offered in order to make it possible to check the results of the investigation, the judge must always rule on individual human conduct which has already taken place, even when he may need to evaluate its present or even future effects (such as when he has to decide on the causal link between the past behaviour being reconstructed and the present injuries under scrutiny in relation to which compensation is being sought for the current damages as well as for loss of earnings in the future), and which in principle (especially in criminal justice) is non-repeatable, and therefore with reference to which it is impossible to exactly reproduce events which belong to the same legal category [47].

Finally, it is often overlooked, especially in the "legal world", that the investigator has direct relations not with the "facts" but with "factual utterances" [48]. As "one of the recurrent illusions in the science of law is that we are dealing directly with reality [whereas] ... it *speaks* about reality, *reasons* about reality, [which] ... becomes the 'material' of science through a process of verbalisation of experience" [49], thus an error to be avoided in the study of the procedural phenomenon is that of believing that the evidence deals with a "fact". Although in theory it may be possible to claim that "the truth lies in the facts" [50], in the process, where the research for truth is indispensable (see

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[47] For similar considerations, see G. De Luca, *Logica e metodo probatorio giudiziario*, cit., p. 43; A. Giuliani, *Il concetto di prova. Contributo alla logica giuridica*, cit., p. 250; J.R. Gulson, *The philosophy of proof*, London, 1923, p. 11.

[48] Also in order to avoid annoying repetitions, we shall continue to use terms such as "utterance", "proposition", "sentence", "assertion" or "statement" (for which, in any case, there is non-uniform use in the literature), since this does not influence our considerations, and it should be clear from the context where the reference is to the linguistic expression or where it is to the content (this distinction was recently dealt with in a work on judicial epistemology by P. Garbolino, *Probabilità e logica della prova*, Milano, 2014, p. 20 ff.).

[49] R. Orestano, *Azione in generale*: a) *storia del problema*, in *Enc. Dir.*, IV, Milano, 1959, p. 812.

[50] F. Carrara, *Programma del corso di diritto criminale. Parte generale*, III, Prato, 1886, § 900, p. 201.

also art. 2 no. 73 delegating l. 16 February 1987 no. 81), we cannot go beyond the ascertainment "of the truth of a proposition" [51]. The *evidence* therefore, does not concern a "fact", but an "assertion": "evidence" is used (detailing the concept already introduced [52], to which we shall refer later on in this work when the term "evidence" is used without any further qualification), *in a broad sense of the term*, to mean that set of elements and activities, that procedure, that cognitive outcome, which has the function of allowing us to ascertain the truth or otherwise of one of the factual utterances inherent to the *thema probandum*.

Even though it is often used in common speech, it is nonetheless wrong to speak of "proof of a fact" [53] since it is not possible to prove a fact *a posteriori*, but only to test it or observe it at the moment when it occurs.

In the same way, it is incorrect or misleading to speak of "proof of the truth of facts" [54] or, similarly, of "proof of the statement (of the truth) of the fact" [55]. In both cases, the terminology fails to recognise that there is no such thing as "true facts" or "false facts": a fact either exists or does not exist; only its utterance can be "true" or "false"" [56]. It may be said of a fact (which very often, in a process, pertains to the past) that it may possess the quality of existence, but not that of being true.

Thus, the judge, like any other investigator of an event which has already occurred, has to enter into probatory relations not with "facts", but with "factual utterances", given that "'verification' can only be used with reference to sentences" [57].

The expressions "factual proof" and "proof of the truth of a fact" can therefore be deemed correct only if understood as abbreviated ways of expressing the concept of the "proof of the truth of the statement of the existence of a fact".

Such terminological misunderstandings seem to be connected with the fact that, when evidence concerning a factual utterance has a positive outcome, a

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[51] F. CARRARA, *Programma del corso di diritto criminale. Parte generale*, cit., § 900, p. 201.

[52] *Supra*, § 3.

[53] See, for example, the findings of F. CARNELUTTI, *La prova civile. Parte generale (Il concetto giuridico della prova)*, cit., p. 54, footnote 2, and F. CORDERO, *Il procedimento probatorio*, in ID., *Tre studi sulle prove penali*, Milan, 1963, p. 4, footnote 4.

[54] G. CHIOVENDA, *Principii di diritto processuale civile*, Naples, 1923, p. 809.

[55] F. CARNELUTTI, *La prova civile. Parte generale (Il concetto giuridico della prova)*, cit., p. 54, footnote 2.

[56] F. CARNELUTTI, *Nuove riflessioni sul giudizio giuridico*, in *Riv. dir. proc.*, 1956, I, p. 101; V. DENTI, *La verificazione delle prove documentali*, Turin, 1957, p. 15.

[57] O. NEURATH, *Protocol sentences* (1932-1933) in ID., *Logical Positivism*, ed. by A.J. Ayer, New York, 1959, p. 204.

proposition is obtained which is equivalent to the statement it was intended to prove – called the *evidentiary statement* – and one might jump to the "spontaneous" conclusion that we have, through "an experimental confirmation" [58] arrived at "the knowledge of the fact ... [which] provides proof of the statement" [59]. We fail to notice that the gnoseological movement which has actually occurred is the opposite of the "apparent" one: it is the evidentiary statement which has proven to be true ("proven"), because it has been compared against another utterance, and in fact because it has been shown that the two assertions coincide [60], it may be said to "know the fact".

5. b) *the semantic conception of truth and factual reconstruction.*

Precisely because "to check one judgment, another is required against which to measure the first one" [61] or, to put it another way, "the judge must check his *protocol* propositions by comparison with other propositions of the same type" [62], the process takes place within a *linguistic universe*. Within this, there is debate about a past fact which, for the very reason that it is past, cannot be settled directly in the course of the judicial activity; the aim of this is to verify the utterance by comparing it against the assertions which may be inferred from the evidentiary experiments, but it must nonetheless be carried out as far as possible without prejudice, even of a cultural nature, in order for its outcome to be acceptable to all.

This raises the question of the *semantic concept of truth* [63], primarily pre-

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[58] F. CORDERO, *Procedura penale*, Milano, 1987, p. 949.

[59] F. CARNELUTTI, *La prova civile. Parte generale (Il concetto giuridico della prova)*, cit., p. 53.

[60] V. DENTI, *La verificazione delle prove documentali*, Torino, 1957, p. 5-6, highlights in this regard that any evidentiary activity results in a proposition, but distinguishes the case wherein the utterance used for "checking" the evidentiary statement derives from the declaration of a third party (as in the case of a witness) other than that in which it was formulated by the judge following on the examination of a document or any object whatsoever: he does not however notice that even in the case of the witness, there is need for the inference of the judge for the passage of the item to outcome of evidence, according to what shall be illustrated with examples *infra*, ch. IV, § 6-7.

[61] F. CORDERO, *Il procedimento probatorio*, cit., p. 6. Similarly, for F. CARNELUTTI, *Diritto e processo*, Napoli, 1958, p. 129, "the proof (of a judgment) cannot consist unless it is of a different judgment".

[62] V. DENTI, *La verificazione delle prove documentali*, cit., p. 6-7.

[63] Its necessary application in the procedural field, already mentioned by G. UBERTIS, *Fatto e valore nel sistema probatorio penale*, cit., p. 91-92, footnote 30, for factual reconstruction, was subsequently raised and discussed in depth by L. FERRAJOLI, *Diritto e ragione. Teoria del*

sented with reference to formalised languages, but by the same proponent applied to ordinary language. According to it, identifying the conditions of use of the term "true" and therefore supplying a nominal (and not real) definition of "truth", "*X is true if, and only if, p*", where "*p*" (for example, "snow is white") is "an arbitrary sentence" of the object-language and "*X*" ("the sentence 'snow is white'") is "the name of this sentence" in the metalanguage [64]: so, as regards the equivalence formulated in the metalanguage "the sentence 'snow is white' is true if and only if snow is white", "the semantic definition of truth implies nothing regarding the conditions under which a sentence like: (1) *snow is white* can be asserted. It implies only that, whenever we assert or reject this sentence, we must be ready to assert or reject the correlated sentence: (2) *the 'sentence 'snow is white' is true"* [65]. And for it, just as for the jurist, "extralinguistic entities are neither true nor false; existence may be claimed or denied for such non-linguistic entities but not, properly, truth or falsity" [66].

In particular, moreover, this intralinguistic conception, which seems to fit the judgment of truth inherent in the judicial reconstruction of the fact, while it solely establishes a relationship between language and metalanguage (in law cases between the language of those who initiate proceedings and the metalanguage of the judge) without any need to claim that there is "an actual correspondence between language and the world" [67], can – because of its nominal nature – be accepted "without giving up any epistemological attitude we may have had; we may remain naive realists, critical realists, empiricists or metaphysicians – whatever we were before. The semantic conception is completely neutral towards all these issues" [68].

As a consequence, there are two results:

1) we do not incur in "verophobia, which leads us to abandon the notion of truth ... [and] embrace utterly absurd definitions and/or abandon the attempt to define knowledge and epistemic justification" [69], but

2) we are not obliged to profess that we have bridged the gap between words and the objects to which they refer by means of the assumption that a

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garantismo penale, Roma - Bari, 1989, p. 21 ff. and 40 ff., also with regard to the solution of *quaestio iuris.*

[64] Cf. A. TARSKI, *The semantic conception of truth and the foundation of semantics* in 4 *Philosophy and phenomenological research* (1944), p. 344.

[65] A. TARSKI, *The semantic conception of truth and the foundations of semantics*, cit., p. 362.

[66] R.S. RUDNER, *Philosophy of social science*, Englewood Cliffs, N.J., 1966, p. 75.

[67] S. NANNINI, *Il concetto di verità in una prospettiva naturalistica*, in *Conoscenza e verità*, ed. by M.C. Amoretti - M. Marsonet, Milano, 2007, p. 60.

[68] A. TARSKI, *The semantic conception of truth and the foundations of semantics*, cit., p. 362.

[69] N. VASSALLO, *Contro la verofobia: sulla necessità epistemologica della nozione di verità*, in *Conoscenza e verità*, cit., p. 20-21.

description of reality which is believed to be true corresponds to a hypostatised reality: this therefore is without prejudice to the acceptance or rejection of either the classical correspondence theory of truth or to any other theories (sceptical, irrationalist or idealist).

And, at the same time, it satisfies two fundamental procedural requirements for the trial:

1) we do not deny that the reconstruction of the facts upon which the judgment is based must approximate as closely as possible (as far is humanly possible) to "reality" (clarifying that the term is deliberately placed within quotation marks to indicate that we do not mean to contradict the linguistic dimension within which judicial activity takes place), in order to obtain the consensus of citizens on the outcome of the process;

2) we guarantee that the judgment, which is handed down in what is now a multicultural society, is not, nor seems to be the outcome of an adherence to *one* of the philosophical-gnoseological conceptions upheld within a specific collectivity.

Neither the judge nor the other parties are required to share one or other philosophical theory about the *notion of truth*, it being sufficient to apply those *criteria of truth* according to which anybody is prepared to assert (i.e., declare the truthfulness of) the utterance representative of the reconstruction of the facts performed at the end of the process.

These, sufficient to substantiate the inference passage from the assertions concerning the gnoseological information brought before the court to the final utterance including the reconstruction of the facts, are identified in the *coherence* of the latter with those statements and the *justified acceptability* of same on the grounds of its explanatory power [70].

As mentioned at the start of this section, the decision requires verification of whether or not the initial utterance (stating the "historical" referent such as "A killed B" – which constitutes the basis for the application at the court) corresponds with the final utterance (which includes the reconstruction of facts deemed persuasive: i.e., for the case under consideration, "A did [or: did not] kill B"; it being possible to state that "the utterance 'A killed B' is true if and only if A killed B", meaning if and only if this correspondence actually exists. Should the case arise however, where the final proposition could not even be formulated because, in the event that the evidentiary experiments were of a merely testimonial nature and concluded with declarations of inability to remember the information requested, the solution in this case would be considered "a non correspondence".

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[70] For similar criteria see L. FERRAJOLI, *Diritto e ragione. Teoria del garantismo penale*, cit., p. 40-41 and 129.

Nor, albeit at times claims are made to the contrary[71], is it necessary to embrace a correspondist vision (radically non-epistemic as it is independent of what is known to us: the truth or falsehood of utterances would exist regardless of us or our beliefs)in order to be able to contest a ruling. In fact, the semantic conception of truth does not imply the negation that the justification of jurisdictional measures may be fallacious. It therefore allows for criticism of decisions considered unjust because they lead to the conviction of someone who is innocent (or the acquittal of a guilty person) on the basis of a reconstruction of the facts considered wrong, due to the lack of cognitive elements or a difference in the evaluation of what was presented during the process. Without adhering to the correspondence theory of truth, the error of the judgment is legally tenable on the basis not only of a different set of propositions, at least some of which derive from data unknown during the course of the process, but also from a different appreciation of the gnoseological elements acquired during the proceedings. Even under such circumstances, however, we are still dealing with a judgment handed down (in the hypothesis given, incorrectly) which is founded on a linguistic comparison made between two alternative utterances describing "reality" – namely, with reference to the previous example, between that describing reality and another asserting the failure to describe it –, of which only one is believed to be true: in fact, without the need for supposing that they are connected with a hypostatised reality outside of the language used to speak about them.

6. *The "logic of judgment": a brief historical explanation.*

It has therefore emerged how evidence is characterised by "an inextricable link" with judgment[72], as well as an indissoluble link with the truth[73]. Evidence serves to verify the utterances which constitute the *thema probandum*, in order to know which of them are justifiably persuasive and to be able to hand down the judgment with which the law is to be enacted in the particular case, following a process carried out according to the evidentiary rules (and not only these) put in place by legislation.

Nonetheless, it is necessary to comprehend the structure of that judgment,

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[71] P. FERRUA, *Il 'giusto processo'*, Bologna, 2012, p. 50-51.

[72] B. PASTORE, *Giudizio, prova, ragion pratica. Un approccio ermeneutico*, 1996, p. 142.

[73] In this regard, it is worth remembering the now "classic" (and for them contemporary) contributions of G. CAPOGRASSI, *Giudizio processo scienza verità*, in *Riv. dir. proc.*, 1950, I, p. 1 ff.; F. CARNELUTTI, *Torniamo al giudizio*, *ivi*, 1949, I, p. 165 ff. (dealt with in greater depth in ID., *Nuove riflessioni sul giudizio giuridico*, *ivi*, 1956, I, p. 81 ff.); S. SATTA, *Il mistero del processo*, *ivi*, 1949, I, p. 273 ff.

also because the judge must be accountable for his procedure: both in order to allow for its examination by the parties and any challenging body and in order to comply with the rule whereby it must be public, which in a democratic society forms the basis of the jurisdictional function (for its express provision, see art. 6 para. 1 ECHR and 14 para. 1 ICCPR). The people, holders of sovereignty (art. 1 para. 2 Italian Constitution) in whose name "justice is administered" (art. 101 para. 1 Italian Constitution), are guaranteed the knowability of *how* this occurs, also in order that they be able to verify the observance, in particular, of the principle of legality of the jurisdictional activity laid down in art. 101 para. 2 Italian Constitution[74] (and that can also be inferred from the more general principle of legality of the process provided for in art. 111 para. 1 Italian Constitution): and the grounds for the judgment, as well as jurisdictional measures generally, provided for in art. 111 para. 6 Italian Constitution and also interpretatively affirmed by the jurisprudence of the European Court of Human Rights[75], have the function (from an extra-procedural viewpoint[76] as well as intra-procedural, with regard, as already stated, to the parties and the judge of the challenge) to allow for checking of the procedures which lead to the handing down of rulings and the congruity of same.

This gives rise therefore to the need for clarification, at least in general terms, of the mechanism by means of which the judge reaches his decision: in other words, to identify a "logic of judgment".

Initially, however, it is worth trying to provide at least a brief overview of the historical context of discourse.

In this regard, it must be noted that a conscientious reconstruction of the work of the judge was only achieved during the Enlightenment when, through its assimilation in that of the application of the syllogistic module already present in an earlier period in the interests of a view of evidence as demonstration[77], the canonical formulation was achieved whereby the judgment was seen as an act composed of a major premise containing the utterance of a rule of law, a minor premise relating to the statement of the occurrence of a fact contemplated by that rule and, finally, a conclusion stating the

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[74] V. DENTI, sub *art. 111*, in *Commentario della Costituzione*, ed. by G. Branca, *Art. 111-113. La magistratura*, IV, Bologna - Roma, 1987, p. 8.

[75] Thus ECTHR, Grand Chamber, judgment 16 November 2010, Taxquet v. Belgium, § 92, briefly stated that, in a jury trial ending in an unfounded verdict, the brevity of the replies the jury members are obliged to respect must be adequately compensated, for example, by instructions or clarifications given to them on the various aspects of the decision and details of the questions which are posed to them.

[76] E. AMODIO, *Motivazione*: II) *motivazione della sentenza penale*, in *Enc. dir.*, XXVII, Milano, 1977, p. 188-189; M. TARUFFO, *La motivazione della sentenza civile*, Padova, 1975, p. 406-407.

[77] Cf. A. GIULIANI, *Il concetto di prova, Contributo alla logica giuridica*, cit., p. 207 ff.