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The Rhetoric of Justification

Carel Smith

1 An Inconvenient Truth

It seems that one can hardly come up with a more apposite characterization of the legal profession than the topic of this book: the rhetoric of sincerity. Let me explain. In a lawsuit, parties involved try not so much to persuade the judge of what, according to their sincere belief, really happened, nor is their alleged “call for justice” the expression of their deepest convictions of what would be a just and righteous sentence or judgment in the case at hand. Rather, lawsuits are settled on basis of arguments. Solicitors, for example, demonstrate their professional mastery by convincing the judge that he or she has to adopt their point of view, that is, that their point of view is the one best vindicated by the rules that govern the lawsuit. Statements of fact, for example, have to be proven when contested. To prove a fact in court is a rule-governed activity: if a fact cannot be proven according to the rules of law, it is considered not to have happened--even if we all know it actually happened. So, whenever it is expedient for the overall argument, the solicitor will contest the facts. Litigations are, therefore, not about truth, but about *legal* truth.

In this respect, litigations are to be conceived not as exercises in sincerity, but rather as games--often serious, and sometimes grim games. In fact, to ask whether the players in a game are sincere is a question that reveals a category mistake, for their sincerity doesn't matter at all. The only thing the players have to do is to play as well as they can. If sincerity plays any role in legal procedures, it is comparable to the sincerity of actors in the theatre: lawyers argue *as if* they sincerely believe that their arguments are true. The title of this book, therefore, seems to be a perfect characterization of the legal profession: the sincerity of lawyers is a rhetorical one.

That, at least, *seems* to be the proper characterization of the profession of solicitors. It is in line with the popular prejudice that you can't trust lawyers, for they make straight what's crooked, and they turn the truth upside down. The prejudice was in line, at least, with my unsettling experience when a textile entrepreneur, for whom I was working when I was an undergraduate law student, told me about a lawsuit he had won. When his solicitor brought the news that his case had finally been decided by the Supreme Court, he revealed to his lawyer that now that nothing whatsoever could change the ruling, he felt free to tell him that his opponent should have won. “Try to avoid a lawsuit,” my employer pointed out to me, “when you're right and the rival is wrong, for you could lose the litigation. But start a lawsuit when you refuse to comply with the agreement, although you legally should--for you might win the case by distracting the judge and the opponent with a flood of irrelevant facts, tons of paperwork and a host of counterclaims.”

That was an inconvenient truth of law. Although we were taught at university that the truth in law does not necessarily coincide with factual truth, this knowledge never struck me, nor my fellow students. We could all

understand that there often lies a divergence between legal truth and factual truth. The disturbing truth was that my employer made it abundantly clear that this divergence could deliberately be sought in court in order to win the case, not only by the parties involved, but also by the solicitors. Insincerity seemed to be king in court.

This glimpse into the factory of mundane justice made a deep impression on me. "Something is rotten in Law's Empire," or thoughts like these, must have crossed my mind--for I was young and utterly convinced that truth and justice were inextricably connected; that is, that justice is connected with *the* truth about what really happens in the world. The revelation of my employer moved the courthouse towards the space of theatre, away from the solemn places that I connected with knowledge and wisdom: libraries, monasteries, and the university.

Nevertheless, I didn't blame my employer for handling the law expediently. That would have been to dismiss my employer's legitimate self-interest and his right to pursue it. Neither did I blame the solicitor, who employed the law so cunningly. It was his professional duty to offer a partisan view on the case and to plead in favor of his client with all legal means. It was, therefore, *his* role to perform this way, whether or not he sincerely held true everything he argued. The courtroom may be a stage for solicitors, it seemed to me--but does this stage turn the *court* into a theatre?

2 The Judge as Mouthpiece of the Law: a Longstanding Myth

What, then, about judges? Is it not their duty to administer justice, that is, to settle the disagreement or evaluate the accusation as disinterested and independent actors? Is it not their office to apply the law to the case at hand, even when their personal convictions are at variance with the legal settlement? Is not at least *one* actor in court--the judge--required to be sincere, that is, to perform according to a true belief of what facts and the law require? If it is insincere to deliberately maintain a myth--if it is insincere to utter performative statements that are known to be at variance with the facts--then judges are insincere. But are they? I shall start with a myth.

It is one of the doctrines of institutional theory, and a consequence of the ideal of democracy, that the ruling power in democratic societies is the legislator, whereas the administration and the judiciary are subordinate powers which wield their authority in accordance with the law. This doctrine is famously expressed by Charles de Secondat, baron de Montesquieu, one of the founders of Western institutional theory. According to Montesquieu, the judges are practically inanimate beings who give voice, or more precisely, "mouth" to the law [*bouche de la loi*].¹ They administer justice *according to the law*, that is, according to the rules issued by the legislator. Judges are, at best, *tools* of the law, linking law and case, not inventing new and better rules. They decipher the law and ferret out the facts of the case. Once they have figured out what the law prescribes, the ruling surfaces, as it were, after subsuming the facts under the determined rule.

In legal theory, this doctrine is known as *legalism*. Legalism flourished in the nineteenth century but came fiercely under attack by its end. In its primordial form, legalism is no longer accepted on the grounds that it gave a methodologically false image of legal adjudication. Today, we all agree that the law is not complete, that its meaning is sometimes blurred, and that regulations may mutually clash. Whenever the judge meets those problems--in what is called "hard cases"--he has to consider the law in relation to a set of "background values" that are enclosed in the alleged brute facts of legal history: statutes, precedents, legal practices, and institutions² Such a construction or reconstruction of "the law" cannot be made by a mere tool, like Montesquieu's generic *bouche de la loi*, but it demands a lawyer who considers the law from an internal point of view, that is, as a participant in legal practice.³

Although the interpretation and application of the law in some way always involve judges' moral convictions and prejudices, it is posited that the law itself, as well as the institutions by and with which the law exists, offer sufficient constraints to prevent judges from going their own way.

3 Two Maxims of Legal Adjudication

Legal theory takes pains to reconcile the apparently opposing notions of interpretation as a normative activity with the demand that interpretation may not deteriorate into inventing the law. Its calibration is sought in the development of methodological standards that enable judges to decipher the law's true meaning on the one hand, and in demanding that the ruling is to be justified on the other. To justify the decision is to justify the interpretation of the law. In the justification, judges account, besides other things, for the rule that underlies their decisions, unfolding the reasoning that either has led to the interpretation of an existing rule, or the framing of a new one, which is nevertheless supposed to preexist in the body of law. The requirement of justification is thought to force judges to derive their premises and final judgment from the law only. The alleged sincerity of judges, then, is located in the justifications of their verdicts, reiterating and containing the *true grounds* of the decisions.

In this respect, current legal theory accepts one important methodological basic assumption of legalism: the ruling is still conceived as the application of a rule of law to the facts of the case. Or to put it differently, the discovery of an apposite rule and the determination of the precise meaning of this rule are considered to *precede* the ruling. In short: *decision follows interpretation*.⁴

Here we meet, in my opinion, an ideologically animated premise of legal theory and practice. It is *postulated* that the rule precedes the ruling--and it *has to* precede the ruling, because of the political ideal of democratic sovereignty. This sovereignty demands that concrete cases have to be decided according to the law's regulations, that is, according to prescriptions that, in one way or another, exist or pre-exist in the body of law. And it is this prescribed procedure of legal reasoning that seems to guarantee that the ruling is ordered by the law, and not by the contingency of the judges' whims.

But legal practice does not confirm this doctrine. Often, the decisive argument to interpret a rule one way rather than another is directed by the fairness of the ruling that would result, so that the decision could be said to *precede* the rule that serves as justification of the ruling. The maxim “decision follows interpretation” should, therefore, be complemented by the maxim “interpretation follows decision,” together offering a better account of the reasoning processes that result in the ruling. To evince this thesis, I will discuss the decision of the Dutch Supreme Court in what is known as one of the “Asbestos cases.”

4 From Case to Rule

The legal issue addressed in this case, decided in 2000, was whether a shipbuilding yard could be held liable for the physical injury of a former employee more than thirty years after he had been exposed to asbestos, a notorious carcinogen. The legal problem here concerned the limitation period for damages like these. According to Dutch law (art. 3:330 paragraph 2 Civil Code), claims of damages for injuries caused by exposure to hazardous substances expire thirty years after the event that caused the damage. In its decision, the Supreme Court considered that the limitation period had been fixed at thirty years for the purpose of legal certainty, for employers and insurers have to make provisions in order to indemnify potential claims, and, therefore, they are in need of a limitation period that is neither too long nor too flexible. The legislator had explicitly rejected a limitation period spanning more than thirty years, partly because of the interests of employers and insurers, and partly because the injuries were supposed to reveal themselves within thirty years after exposure to hazardous substances.

But the problem with physical injury caused by asbestos is that the injury often reveals after *more* than thirty years. As a result, a whole class of victims of hazardous substances--those who have been exposed to asbestos--is more often than not excluded from the opportunity to sue the company or (former) employer for the injury, a result which not only happened to be at variance with the legislator's intent, but also contrary to the principle of legal equality. The latter principle requires that like cases be treated alike; hence, to expel the class of asbestos victims from compensation that can be claimed by other victims of hazardous substances discriminates between both classes without justification.

In these preliminary considerations, the Supreme Court outlined the legal dilemma that had to be settled. In short, the question was if the victim's claim should be dismissed following the demand for legal certainty, or should it be assigned because of the principle of legal equality? According to the Supreme Court, this decision was entwined with the facts of the case. Although the principle of legal certainty entails that the ultimate limitation period of thirty years should be applied strictly, it allows for deviation from this rule in exceptional cases. The Supreme Court, then, enumerates seven circumstances that have to be taken into consideration when weighing and balancing the competing interests or principles in cases like these. The judges must take into account, among other issues:

- the type of damage (pecuniary or moral damage);
- whether or not the victim or relatives are entitled to benefits on account of the damage;
- the degree of reproach with which the author of the damage can be charged;
- whether or not the author is still able to defend himself against the claim.

In enumerating these and other circumstances, the Supreme Court actually refers implicitly to those facts of the above case that made it so unsatisfactory to apply the limitation period strictly.

It is the task of the Supreme Court to judge only the interpretation and application of the law by lower courts, not to settle the case finally: after the ruling, the case will be referred back to a lower court that has to settle the case according to the Supreme Court's directions. In this case, however, the Supreme Court in effect judged--granted that the case satisfied all enumerated aspects--that it would be reasonable and fair not to abide by the limitation period of thirty years. The Court arrived at its decision not by interpretation in strict sense, but by weighing and balancing both competing principles--the principle of legal equality and the principle of legal certainty. But the principles were not weighed and balanced *in abstracto*; the Supreme Court actually brought varieties of the case to mind and determined which circumstances were decisive to outweigh one principle in favor of the other. In so doing, the Supreme Court explicitly referred to the standards of reasonableness and fairness, asserting that in light of a mixture of some of the enumerated circumstances, the application of the rule is to be considered highly unreasonable and unfair and therefore should outweigh the demand for legal certainty.

5 Myth or Belief: Outside and Inside the Office

The reasoning process by which the Supreme Court arrived at its decision in the Asbestos case is not an exceptional one, even if we acknowledge that many cases do not require the weighing and balancing of fundamental legal principles. But except for what is called "clear cases," most cases ask for judgment, that is, demand the weighing and balancing of different points of view or different interests.

It is lawyers' parlance to characterize the processes of weighing and balancing--that is, of judgment--as the weighing and balancing of the *principles* involved. In my opinion, the Supreme Court did not primarily weigh and balance competing principles, but cases, that is, a variety of cases similar to the case at hand, in order to decide which circumstances, or mixture of circumstances, no longer justifies a strict application of the fixed limitation period. Seen from the angle of heuristics--the reasoning process--the judges focuss on the case itself, asking which decision is the fairest one, all things considered, and it is *this judgment* in advance that serves as the starting point for the justification, which then grounds the decision in the verdict. The relative weight of these competing principles is, therefore, not determined firstly to settle the legal issue. It is the other way around: their

relative weight is the *result* or *outcome* of the judgment that, under these circumstances, a strict application of the rule would be unreasonable and unfair. Or to put it differently, the law is as much determined by the ruling as the ruling is determined by the law. For cases like these, the maxim “interpretation *follows* decision” seems to characterize the heuristics of legal adjudication far better than the legalist’s view on adjudication.

However, this view on legal adjudication seems to be at variance with the assumption of sincerity, for legal judgments are supposed to be based on the law, the interpretation of the law not a justification in retrospect, but the verdict’s very reason. To hold the maxim “interpretation follows decision,” then, is to charge the caste of judges of being insincere, and to consider the legitimization of the ruling as mere rhetoric, not containing the true grounds of the decision, but solely those arguments that will presumably persuade the audience. The more effective the rhetoric of the judges, the more we will be convinced of their sincerity, that is, the more we believe the rulings to be grounded in law-based reasons. The aim of the justifications, then, would not be to account for the very reasons of the rulings, but, as it were, to wheedle the audience.

But this conclusion is, in my opinion, hastily drawn. It overlooks the complex interplay between the system of law on the one hand, and our legal judgments on the other. Although every complex legal system is underdetermined and different judges could therefore see, as it were, different “solutions” in hard cases due to differences in political and moral convictions and prejudices, this nevertheless does not justify the inference that they cannot be sincerely convinced of having the best *legal* arguments for their opinion--a belief that can even go with the simultaneous admission that other judges could have reached equally as sincere opinions about what the law requires.

This may seem contradictory, but it can be explained as follows. On the one hand, hard cases only exist within a system of law. One could define a hard case as one in which the law offers different solutions to settle the issue. As such, it is the law that furnishes the arguments that could, in our opinion, justify a decision in one way or another. On the other hand, if we consider one solution to be more reasonable and fair than another, we will, in effect, be more convinced by the arguments that underpin this solution than by the argumentation that justifies the alleged weaker solution. But this valuation will also affect the way we comprehend the law in general. The *reading* of statutes and case law will always be affected by the opinions of what we consider to be just and fair; that is, we will accommodate our reading of the law as much as possible to the decisions we think are best. As a result, we may be *sincerely* convinced that our judgment is ordered by the law itself and not prompted by personal appreciations.

The paradoxical conclusion is, then, that judges’ decisions are based on law, but that their understandings of the law are carried by their decisions. In the interplay between rules and decisions, the decisions have a slight preponderance over the rules, for in hard cases, the law is underdetermined. When at least two different decisions seem to be reasonable within the system of law, it is the judgment of which one is best that directs the understanding of the law in this respect. In doing so, the

intuitive judgment furnishes its own justification. If we are willing to compare the law with a house, we could say that the foundation walls are carried by the whole house.⁵ Like all institutional facts, law is a construction that carries itself: It exists in and by the acts and decisions of all participants, who, at the same time, are compelled by the system which they created themselves and which they continue to create.

Seen from an external point of view, it is a myth that the ruling is the application of a rule on the facts of a case: interpretation follows decision. But seen from the inside-- as a participant who is subjected to the practices, standards and rhetoric of the office--it is the law, not the officials, that determines the ruling: decision follows interpretation.

6 Sincerity as a Function of Form and Procedure

It is a long way from judge to ruling. Between the person who administers justice on the one hand, and the ruling on the other, stand the multiple practices that constitute the judge's office. It is not enough to be a righteous person in order to become a judge. Handling the patchwork of law requires the mastering of techniques and the use of professional standards; the interrogation of suspects and witnesses asks for a vast semiotics of gesture and expressive style; and drawing up the ruling demands a keen awareness of how the words will affect the litigators, as well as society and the judiciary. To be a judge is to be naturalized into these techniques and practices.

This, I think, is sometimes forgotten--at least, *I* did not realize this when I was an undergraduate law student. Especially when the ruling affects us in one way or another, we ask for unmediated justice, the direct application of the rules of law that govern the case at hand. But justice has to be *done*: the facts of the case have to be determined, the spot of the crime visited, witnesses questioned, the evidence investigated, and all this within a procedural framework that ought to guarantee the litigants' equal procedural rights, to protect the immunities of third parties, and to see that the litigation is settled in due time.

Law is not the mere accumulation of rules directed towards subjects or citizens, providing rights and imposing duties; it is the interplay of different kinds of rules. As H. L. A. Hart rightly points out, law consists, on the one hand, of rules of obligation, or primary rules, that are concerned with the actions that individuals must or must not do. The rules of obligation are supplemented, on the other hand, with secondary rules which are all *about* primary rules. They specify the ways how to recognize and change the primary rules, and how the primary rules have to be applied in concrete cases.⁶

What, then, according to Hart, justifies judges' rulings when deciding cases of negligence, discrimination or robbery? His answer is the facts of the case and a primary rule of obligation. But what justifies the vindication of the facts and the validity of this rule of obligation? The answer is: rules of a different character, that is, secondary rules, which guide the evidence of facts and the identification, interpretation, and application of the primary rules. These secondary rules consists of a whole body of standards, some of

which are enacted, others as practices that exist as tacit knowledge, and others explicitly stated by the judiciary as guidelines for the interpretation and adjudication of statutes.

In short, legal adjudication is a rule-governed activity. The establishment of a rule of obligation is the result of a complex interplay of standards of adjudication; so is the ascertainment of the alleged facts of the case; and the final ruling is not the mere inference from this rule of obligation and the facts of the case, but a performative act in which ruling, rule, and facts--Inextricably interwoven--come into being. Although the existence of those standards consists in their acceptance and use as standards of correct adjudication, it does not make the judge who uses them their author.⁷ To perform like a judge is to perform according to the ideals, techniques and rhetoric that characterize the judge's office, standards that are incorporated through years of study, practice, and discipline.

It is theoretically possible, but not likely, to be part of the caste of judges and to behave accordingly while still not adhering to the rules of the profession. Such a judge could end up like Paul Magnaud, known as "le bon juge de Chateau-Thierry" (1848-1926), who was offended by the notorious inequity of law and judicature. As a judge, he became immensely popular with workers and socialists for not enforcing the harsh labor legislation, judging solely by (his) standards of equity. In so doing, however, Magnaud ceased to be a judge, or, alternatively, inaugurated a different institution of a judiciary that administers justice, not according to legislation, but to moral intuition. But he himself proved the institution of "le bon juge" to be untenable. When he had been elected a member of parliament and became part of the legislative power, eager to reform the law, he could only do so under the (tacit) presumption of a subordinate judiciary, subjected primarily to law instead of the acute biddings for Justice.

We all long sometimes for a judge like Magnaud, someone who is not bamboozled by form and procedures but grasps the matter at heart, until we realize that part of what justice is, at least in our society, *is* form and procedure. Judge Magnaud is as bad a judge as is the bribable or partisan judge, despite their differences of disposition or ethical codes. The problem is that they do not behave like judges, that is, they do not enact the practices, techniques, and ideals that make up the profession of the judiciary. The same holds for the solicitor who, honest to her sincere convictions, would argue in court that her client deserves the death penalty: being a solicitor is to behave like a solicitor.

The idea that a sincere performance is to perform according to one's true beliefs is both true and misleading. It is misleading, for a true belief depends on circumstances, roles, contexts, and expectations. If the facts of a case are proven illegally--e.g. the testimony is acquired by torture--the existence of a "exclusionary rule" requires that both solicitor and judge have to dismiss the evidence, regardless of whether or not these illegally proven facts actually happened. The judges' true beliefs of what happened are the result of testimony, arguments and tests, all governed by procedural rules. Their "true belief" cannot be separated from the roles they are expected to play.

But the idea that sincerity and true belief are connected is, in some way, also correct. In court, the true belief of what really happened depends on one's role. If judges deliberately declare the accused guilty on the base of illegally proven facts, the sentence would be based, paradoxically as it sounds, on a false belief of what happened, turning the performances of the judges into false, that is, insincere ones.

I was right when I realized as an undergraduate that the courthouse is a theatre, a stage for the performances of solicitors and judges--but my accusation that their performances were *mere* rhetoric, in the sense that it only pivots upon effect, not truth, was heedless. For legal truth, if not all truth, depends on form; at the very least on rules, procedures, and presentation.

Notes

¹ Montesquieu, *Spirit of the Laws*, 6, 301.

² Ronald Dworkin, *Law's Empire*.

³ For external and internal points of view, see H. L. A. Hart, *Concept of Law*, 89-91.

⁴ Explicitly Dworkin, *Taking Rights Seriously*; and, less explicitly, among others, MacCormick, *Legal Reasoning and Legal Theory*, and Peczenick, "Coherence, Truth and Rightness in the Law."

⁵ Wittgenstein, *On Certainty*, 248.

⁶ Hart, *Concept of Law*, 95.

⁷ *Ibid.*, 145.