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JUDICIAL REASONING

*By Chaim Perelman**

What we mean precisely by judicial reasoning is the reasoning of the judge as disclosed in the grounds of his judgment. The writings of jurists, the arguments of counsel, the indictment filed by the prosecuting officer—all provide grounds which may effect the judge's decision; but it is the reasoned judgment alone which provides all the elements required to unfold the characteristic features of judicial reasoning.

The operative part of the judgment, the very ruling, is preceded by the grounds which constitute the reasoning on which the ruling is based. Judicial reasoning thus constitutes a model of practical reasoning, aimed at justifying a decision, a choice or a claim, and establishing that they are neither arbitrary nor unjust: the judicial ruling is justified if the conclusion following its reasons conforms to the law.

Assimilating judicial reasoning to a syllogism whose conclusion is true because it can be formally proved as deriving from true premises, would deny the very nature of practical reasoning and make it impersonal and devoid of its essential element of adjudication. The specific juridical nature of the judge's reasoning is not the formally correct deduction drawn from premises—in this respect legal deduction bears no distinctive features—but lies in the reasoning which serves to lay down those premises within the frame of an existing legal system.

Short of taking the law into our own hands, we must have recourse to the judge in order to alter an existing state of things by means of legal constraint, or at least to consolidate our position by converting a state of fact into a state of law by means of a judicial decision.

In our legal system a judge does not take the initiative: he is *seised* of the matter. Strict rules of jurisdiction aim at eliminating the possible designation of a judge because of his anticipated attitude during the conduct of the case. An essential guarantee of the impartiality of the adjudication is provided

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by the fact that a litigant may not be debarred from access to the judge having competence in the case. This understandable apprehension of special tribunals underlies art. 94 of the Belgian Constitution which expressly lays down: "No commissions or extraordinary tribunals under any title whatever shall be established." One should bear in mind that the conduct of every trial aims at convincing the judge, who will eventually have to decide whether, in his opinion, the facts have properly been established, and what juridical consequences he should draw from them. As a result, the techniques of proof and demonstration used by the parties should, in order to succeed, adapt themselves to the convictions and to the mental make-up of the persons on whom the decision depends. It is sometimes necessary to provide against their lack of experience. For instance, American law, under which many more cases are argued before a jury, is stricter regarding admissibility of evidence than Belgian or French law, where cases are usually argued before professional judges, more critical and less emotional.

In every proceeding the plaintiff or prosecutor must establish his case by proving "the fact which gives rise to it and the juridical consequences deriving therefrom, having regard to the legal system in force".[1] It is for the judge to say in his decision whether he accepts or rejects the claim or charge, and to set out the reasons on which his decision is based. Those reasons may relate to findings of fact and to legal grounds.

In order to establish the facts, it is important to know the characteristic features of the theory of proof, elaborated by every juridical system.

Admissibility of evidence, the burden of proof, what must be proved and how it may be proved—all these questions will receive different answers depending upon whether the judge is considered neutral, his only task being to appraise the value of the proof adduced by the parties—without straying from the rules laid down by law in this respect—or whether he is called upon actively to seek the material facts, also styled as *objective truth*.

Each of these two conceptions, of which, theoretically, the former appears to dominate liberal civil law and the latter the law of socialist States, has its limits in the fundamental values which the opposing conception wishes to safeguard. In a civil case in Belgium or in France, a neutral judge may examine witnesses, conduct inquiries or appoint experts to enlighten him; his concern to establish the material facts may force him out of the passive role which to some extent ensures his neutrality. In a socialist State, on the other hand, the judge may not, in the pursuit of objective truth, sacrifice the legitimate concern to protect existing situations and the established order. It is difficult to conceive a system of law under which one may dispute the authority of res judicata on any grounds, or adduce oral evidence of a contract whose nature requires it to be established in writing.

[1] H. de Page, *Traité élémentaire de droit civil belge* (2e éd. Bruxelles, 1942) vol. III, 661.

The judge is entitled to hold that evidence as to certain facts is inadmissible. He may refuse to admit proof of irrelevant facts having no material bearing on the solution of the case, as well as facts whose proof is prohibited, such as those alleged in a defamatory statement, a prohibition aimed at protecting the reputation of individuals. Evidence of facts contradicting an irrefutable legal presumption, such as res judicata, is also inadmissible. Similarly, it is only the husband, presumed to be the father of a child conceived during the marriage, who may disprove the presumption, and solely by establishing that it was "impossible for him physically to cohabit with his wife between the 10th and the 6th month preceding the birth"; and the time within which he may file action is limited to a very short period of one or two months. The judge will also exclude evidence of facts barred by limitation. These few instances show that considerations of an overriding social interest may oppose the establishment of "objective truth".

Again, social order would be disturbed if plaintiff and defendant, prosecutor and accused, were treated alike in the matter of the burden of proof. Under Belgian and other systems of law the accused is presumed innocent until the contrary is proved; no one is called upon to prove his innocence. It is for the prosecutor to adduce proof of the guilt of the accused. It is for the plaintiff seeking to obtain from the court a decision tending to alter an existing state of facts, to prove that that state is contrary to law. The defendant need do no more than deny; it is only when he makes an allegation in his defence that he is called upon to prove his allegation.

This division of the burden of proof, which appears normal and just when applied to civil dealings between private citizens assumed to be more or less equal, ceases to be so when we deal with the relations between an individual and an administrative authority which is often in sole possession of documentary evidence. Therefore, in administrative tribunals the judge may call upon the public bodies or officials to produce all the relevant documents, even if it entails the disclosure of evidence which may be used against it. This tendency, inevitable in administrative law, is conceivably that which prevails in a socialist State where most contracts, such as contracts of labour and employment, or of sale and purchase, presuppose the intervention of an official body. In order to counteract the initial disparity between the parties, the judge is expected to facilitate by his own active intervention the establishment of the material facts.

What must be proved? All the relevant facts whose proof is admissible, and which are not within public knowledge, conceded nor presumed.

From the facts which may bear on the result of the case it is not necessary to prove those which are within common knowledge: those which, in our society, are known to every normal person. Nor need facts on which the parties are agreed be proved, except where public interest is involved. It is also not necessary to prove facts which are presumed.

Presumptions, according to art. 1349 of Code Napoleon, are consequences

which the law or the judge derive from a known fact to a fact unknown. As a result, a presumption determines the shift of the burden of proof, whenever the fact from which the presumption is derived is itself in issue. In the case of legal presumptions, proof of the contrary is frequently inadmissible, but in certain cases the effect of the presumption is merely to displace the burden of proof. This, in any event, is the case for all inferences drawn by the judge.

Proof is said to be free when the judge may in his own discretion assess the probative value of the facts alleged, in the light of his own conviction. But where proof is legal, that is to say regulated by law, the judge is free to evaluate the evidence only when the law authorizes testimonial proof—when facts must be proved. On the other hand, written evidence is nearly always required when juridical acts are in issue.

When called upon to establish facts, the judge's reasoning is explicit only as regards matters which are specifically juridical: the admissibility of evidence, the interplay of presumptions and the resulting burden of proof. Indeed, once he has indicated his conformity to legal requirements in the matter, the judge need not show how he based his findings and may merely state that the facts are or are not sufficiently proved.

Let us note, to conclude this examination of judicial reasoning concerning proof of facts, that the judge, particularly in last instance, may have recourse to a fiction in laying down, contrary to the evidence, that certain facts did or did not occur, and thus reach the desired judicial ruling without contravening the law. Thus, a Belgian jury dealing with the case of a mother who had caused the death of her child, born abnormal, and wishing to acquit the accused, who inspired them with more pity than abhorrence, gave a negative reply to the question relating to the material findings. Such latitude demonstrates the usefulness of juries which may, by a suitable finding of fact, avoid the harsh application of the law in cases when this would run counter to public opinion.

The judge is interested in establishing facts only in so far as they may have legal consequences in the case before him; to do so they must be *qualified*: subsumed by law.

The structure of the law may be normally analysed so as to distinguish between two parts. The first sets out the legal conditions and the second, the consequences which the judge may or must derive therefrom. The conditions referred to may, for instance, provide that theft committed *at night* must be punished with special severity, that following a *red* flag in a procession, on the 1st of May, is punishable, and that so is driving a car *when drunk*, or that in *urgent cases* the State may dispense with a tender and deal by private treaty.

Can one say that a theft, committed at midnight in a brilliantly lit casino, constitutes theft committed at night, as defined by law? Does a pink or lilac flag exhibited at the trial come within the provisions of the law relating to

the red flag? What is the exact amount of intoxication required for declaring that the driver of a car is in a state of drunkenness? What are the circumstances which preclude the administration from invoking urgency? A precise description of the facts does not suffice for a uniform reply to all those questions inevitably to suggest itself. The reply must depend upon the appreciation of the judge regarding the manner in which he qualifies the facts and consequently interprets the law.[2]

When the conditions for the application of a law are vaguely defined, the power of appreciation of the judge is increased, and if this power is sought to be diminished, the provisions of the law must be made more precise, for example by replacing a qualifying criterion by a quantitative one. Thus, the Belgian law of the 15th April, 1958, instead of referring to a state of drunkenness, makes it an offence to drive a vehicle in a public place after consuming alcoholic beverages in such amount that the alcoholemia of the accused (the percentage of alcohol in the blood) at the time of the offence is at least 0.15%. Since alcoholemia is determined by expert opinion, it cannot be disputed by the judge, unless a contrary expert opinion, contradicting the first analysis, restores to the judge his freedom of appreciation.

It should be pointed out that a judge-made definition, laid down by a court of higher instance, may, failing a statutory definition, limit the judge's freedom of appreciation; but he nevertheless retains considerable powers in qualifying the facts and their subsumption under a legal norm.

Once the facts are established and qualified in accordance with the law, the juridical consequence may impose itself upon the judge and leave him no discretion ("shall be punished by death . . ."); it may leave him a limited margin of discretion ("shall be punished by imprisonment with penal servitude for a period of fifteen to twenty years") or it may even give him discretionary powers or free appreciation ("the judge may punish by . . .", "the judge will decide according to equity"). While it is true that the law leaves it to the judge to determine the amount of compensation to be paid for damage caused by a tort (art. 1382), case law soon lays down tariffs which will prevent arbitrary awards, and to which the judge will adhere except in exceptional circumstances.

The judge's power of appreciation, to which recourse must inevitably be had when the law is set out in vague terms, plays an essential part in avoiding iniquitous or socially undesirable consequences in applying the law to certain special cases. Here is an example. According to art. 11 of Code Napoleon, "The foreigner shall enjoy in France the same civil rights as those recognized or granted to French citizens by virtue of treaties made with the nation to which such foreigner belongs." In the case of a person having no nationality,

[2] It is often difficult to dissociate the judgment concerning facts from the qualification of those facts. *Fictions* may consequently be considered either as relating to the materiality of facts or as relating to their qualification.

or of a foreigner whose State has signed no reciprocal treaties with France, will he be deprived of the most elementary rights, such as the right to marry, to own property, or to litigate? When called upon to construe this provision taken over by Belgian law, the Belgian Court of Cassation in its decision of the 13th October, 1880, held that, independently of any conditions of reciprocity, a foreigner in Belgium may enjoy natural rights, i.e. rights which may not decently be refused to any human being. The civil rights referred to in art. 11 are therefore limited to those which may not be considered natural rights (such as the right to relief from poverty). Similarly, since the prohibition against contracting on behalf of a third party hampers the spread of life assurance in favour of family members, case law reinterpreted, at the end of the last century, arts. 1119 and 1121 of the Civil Code, so as to make them compatible with this institution, which was deemed socially useful.

The judge must declare the law. He may not, without being guilty of a denial of justice, refuse to adjudicate "on the ground that the law is silent, obscure or insufficient" (art. 4 of Code Napoleon). Even where the law appears to him to contain lacunae or antinomies, he is bound to deliver judgment and to justify it by setting out its supporting grounds. It is the analysis of those grounds, and their relation to the ruling constituting the judicial decision, which will then enlighten us on the specific nature of judicial reasoning. It may be argued that it is important to disclose the "grounds for the grounds", or the reasons which led to certain grounds being preferred to others. This is doubtless true, but such reasons—apart from the fact that most of them may elude us—do not pertain to judicial logic. The logician studying judicial logic must analyse the *text* of the judgment which the judge submits to the critical appreciation of public opinion, of his colleagues and of courts of higher instance.

The grounds of the judgment will normally include elements of fact and of law. As regards the former, the judge may often confine himself to a statement that the facts have or have not been proved, but he must set out the reasons for overruling the objections of the parties when such objections deal with legal questions of evidence.

The juridical consequences derived from the facts may be justified by mere reference to the legal authorities on which the decision is based. But if the authorities are found inapplicable to the facts, or are interpreted otherwise than is normally accepted, the judge must explain his mode of operation. Consequently, the core of the motivation consists mainly in justifying the rejection of objections overruled. The reasons given by the judge will be arguments which are not compelling as in mathematical proof, but more or less persuasive. The application of one legal authority rather than another, the interpretation of binding authorities, recourse to general principles, the appreciation of the consequences resulting from the application of the law—all these ingredients will normally be used as they arise from the parties' pleadings. As opposed to the case of a strict deductive system, therefore, where once the

premises are accepted the resulting conclusions inevitably impose themselves, theories taking particular account of the social consequences of the application of legal authorities may, in legal reasoning, limit their effect. Thus the doctrine of *abus du droit* (misuse of a right) restricting the provisions of art. 544 of Code Napoleon, will prohibit an owner from using his property with intent to cause malicious damage to another person. Similarly, and contrary to the usual interpretation of art. 3 of that Code, authorizing the application of foreign law to the status and capacity of foreigners, case law has excluded such application whenever it conflicts with what has been termed "international public order".

Judicial reasoning, whilst subject to rules and norms restricting the power of appreciation of the judge in the search for truth and the determination of what is right—for the judge must comply with the law—is not mere deduction confined to the application of general principles to particular cases. The power with which the judge is vested, to interpret and occasionally to supplement the law, to qualify the facts, to appreciate—often freely—the weight of presumptions and of evidence by which they are proved, usually suffice to enable him to support, in proper legal manner, decisions which recommend themselves to his sense of justice as being the most desirable socially or morally.

Should clearly iniquitous legislation prevent him, for any reason, from performing his office with a clear conscience, the judge is morally bound to resign; for he is not a mere adding machine. His responsibility is at stake in every decision and he cannot hope to escape it if he actively contributes to the functioning of an iniquitous order.

The analysis of judicial reasoning, of the way in which formalism—respect for statute law and for judicial precedents, combines with pragmatism—appreciation of the consequences deriving from the application of the law, is useful both to the logician, interested in the structure of a non-formal reasoning, and to the moralist who may see in action the dialectical interplay of general rules and of particular cases. For logicians have too often confined themselves to a study of the techniques of reasoning and the methods of proof of the deductive and inductive sciences; too often have they tried to elaborate a methodology of human sciences—law, philosophy and in particular moral philosophy—on the inspiration derived from that study. It would therefore be useful now to recognize the specific nature of reasonings which, like judicial reasoning, lead to practical conclusions aimed at justifying decisions, choices and claims, or which seek to establish the rationality of a line of conduct.[3]

[3] *Cf.* Ch. Perelman, "La spécificité de la preuve juridique" in *Justice et raison*, Presses Universitaires de Bruxelles, Bruxelles (1963) pp. 206–17, and "Ce qu'une reflexion sur le droit peut apporter au philosophe", *ibid.*, pp. 244–45.