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The Truth as a Guarantor as an Epistemological Instrument for Limiting Judicial Decisions in Criminal Proceedings

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Abstract

The article addresses the issue of truth in criminal proceedings from a guarantee-based perspective, highlighting the tension between the collective interests of society and the needs of individual freedom. It is argued that adopting a guarantee-based epistemology implies taking sides with individual rights over collective rights. Despite this, it is stressed that this does not imply the denial of collective goods, but the need to find compromises. It is argued that violence is inherent in punishment, and the paradox of criminal law is its attempt to be rational while containing elements of brutality. The total abolition of violence in punishment is desirable, but it would lead to the extinction of criminal law. It highlights the importance of understanding the term "reason" in the context of criminal proceedings and postulates that procedural truth and reason are intrinsically related. The specific objective of this article is to analyze the epistemological characteristics of truth in a criminal process of the guarantor type. The research question arises as to what these epistemological characteristics are. Mention is made of the need for an adequate narrative of the facts and the rules in the proceedings, compatible with a genuine exercise of the rights of defence. The constituent elements of guarantism are explored, with the principle of legality being one of the pillars. Legality is presented as a requirement for the procedural truth of guarantees, requiring an exhaustive and precise description of the conduct prohibited by law. The problem of deficient legislative technique is pointed out as a challenge for guarantism, since it affects the construction of truth by imposing legislative irrationality. In conclusion, the article addresses the complex relationship between guarantees, procedural truth and legality in the context of criminal proceedings, highlighting the importance of protecting individual rights and addressing the challenges arising from deficient legislation.

Keywords: *Guarantees; Procedural truth; Legality.*

Introduction

The Idea of Guarantism as an Epistemological Starting Point

The question of truth in criminal proceedings has the same original origin as all the problems of the branch of law in question: the exercise of punitive power as an area of greater tension and conflict between the individual and the State (Baratta, 2004).

The collective interest of society and the needs of individual freedom dispute its axiological precedence. This tension appears in different areas of philosophical, sociological, legal, and empirical reality. Think of twentieth-century totalitarianisms, capitalism and socialism as ways of understanding the structural relations of the

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community (Zaffaroni, 1998)or even, in the recent pandemic as a symbol of the validity of such a dispute.

As stated in the introduction, adopting a guarantee-based epistemology with respect to the historical reconstruction to which all criminal proceedings give rise implies taking sides in such a dispute. For the individual and his interests above those of society as a whole (Ferrajoli, 1995).

But this does not mean the denial of collective goods. The need for compatibility is what should motivate the theoretical efforts of both "pro-individual" and "pro-society" positions. There is, therefore, a necessary opposition on the ontological level between the demands of the individual and the collective, but this in no way implies the impossibility of persisting in the attempt to achieve compromises (Freedom, Security & Justice: European Legal Studies, 2020). It is only insofar as these demands are irreconcilable that we must turn to individual interests from the paradigm of truth adopted here.

Violence is inherent in all forms of punishment, since retribution implies an afflictive response, harm as a channel of revenge (Zaffaroni, 1998). Thus, the great paradox of criminal law is that it attempts, through various mechanisms of self-limitation, fundamentally constitutional guarantees, to be rational. But, always with a greater or lesser margin of brutality that constitutes it. The total abolition of "violence" in the phenomenology of punishment, desirable from the perspective adopted, necessarily implies the extinction of criminal law itself (Garay, 2018). Indeed, the same would also be true of the other branches of law, but, while materiality, the first instance of criminal law is constituted by physical violence(Zaffaroni, 1998); In the other legal domains, it is the threat of harm that underlies the constitution and modification of rights, which is carried out only by way of exception.(Tomassini, 2014)

From what has been said, it can be inferred that the proper treatment of the term "reason" is of paramount importance for thinking about the criminal process. Locating the meaning and scope of the word in question will allow us to establish the first approximation regarding the theoretical paradigm from which this research is approached. Thus, the following postulate is advanced: procedural truth and reason are two elements that can never be conceived as separated.

Specific objective: To analyze the epistemological characteristics of the truth corresponding to a criminal process of the guarantor type

Research question that answers: What are the epistemological characteristics of the truth corresponding to a guarantee-type criminal process?

References:

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The Meaning of the Word Reason

Sticking here to the classification proposed by Ferrajoli, four valid senses of the term reason can be taken (Ferrajoli - 1995).

In the first place, the term reason refers to the theory of crime, to the construction of specific crimes, and to the general practices of criminal law application, i.e., to procedures. Each penal system in force for a given territory tries to be a more or less coherent system. From this perspective, and as long as it achieves this task, its rational character can be predicated. (Garate, 2012)

Secondly, the allusion to reason implies a journey through the discourses related to punishment, its necessity and the elements that justify it. These are all questions of legal

philosophy. The object of this work is constituted in the field of criminal procedure. However, it should be stressed that in order to build a non-arbitrary legal system in this area, values must be coordinated (Benavides-Benalcázar - 2019). Thus, from this point of view, the guarantee is imposed transversally to the entire punitive legal system, postulating as maxims: the value of the person above any need of the collective, the idea of indispensable prerogatives that must be recognized as prior to the law and the necessary separation between law and morality. Therefore, in order for an order to be "rational", from this perspective, the principles enunciated must appear constant (Benavides-Benalcázar, 2019).

The third sense of the word reason is the one that is most interesting for the purposes of addressing the question of guaranteed truth and its epistemological requirements. Reference is made here to the rationality of procedural decisions. That is to say, the way in which the processes of attribution of conduct and imposition of penalties take place (Duce J., 2018). It should be clarified that, for this work, the cornerstone of reflection is the way in which the judge thinks about his decision with respect to the facts and the rules.

The tension between the notion of knowledge and valuation will appear here in an increasingly irreducible way, to the extent that the analysis of the logical content of the judge's decision deepens. And it is desirable that this be the case because this will also show that sufficient theoretical efforts were made to limit the margins of discretion in the historical reconstruction that any criminal process implies.

On the other hand, the discrepancy with Duce is advanced insofar as the criminal attribution, from the perspective of the present work, is carried out not only by the judge, but also by the criminal prosecution body. Although the deontology of the accusation exceeds the object of inquiry of this work, it is still a component of the judicial syllogism in its construction of the truth. (Boiso, 2021)

The clarification is pertinent because the discourse through which the facts are reconstructed and the sentence is enabled, is an eminently collaborative elaboration, in which, from now on, the judge has a very important role (Santos, 2007).

The requirements relating to this third sense, that of the path to judicial decision, are not addressed only to the judge, as may appear in an initial approximation. On the contrary, it is the penal legislator who is the first recipient of the cognitive prescription (Aguilar, 2018). This is explained by the fact that in the elaboration of the norm that describes the conduct and prescribes the penalty, the maximum possible exhaustiveness and factual denotation must be achieved.

On the other hand, it will be the judge who, based on his reasoning, induces the facts and deduces the rules (Mendoza et al., 2017) Come up with a decision that reflects what you knew, and not what you think is best in axiological terms.

The reader must be warned of the necessary distinction between the technically deficient law and situations of deliberate absence of a penal norm because it is not formulated with the minimum of its consubstantial elements.(Aguilar, 2018)

In the absence of a criminal law, the court is, so to speak, cornered by a criminal offence that presents extreme inadequacies that go beyond the strictly technical-legislative. These are norms in which the consecration of criminal copyright law appears manifest and voluntary, as is the case of Article 41 quinquies of the Argentine Penal Code, which enshrines "terrorism" as a generic aggravating circumstance (Penal Code of the Argentine Nation, art. 41 quinquies Law 11.179, 1984); or in which imprisonment is provided for in order to be dangerous (Urios, 2017); or in the face of circumstances of blank criminal offences for various reasons, such as elements of the crime that directly appeal to valuations as a "common good"; "Good Manners" (Bohórquez Ruiz, 2019)or criminal

offences directly related to suspicion, very often relating to narcotic drug legislation, for example "indubitable use for commercialization" (Corda and Filomena, 2019).

The subject will be dealt with in extenso throughout this chapter, since the principle of legality is one of the pillars of the guarantee truth.

However, the following is anticipated: despite being cornered within an inescapable discretion, here the judge must rule. The obligation to give a decision remains regardless of the technical deficiencies of the law (Cafferata Nores, 2012) and even when, as is considered for the case, there is no criminal law.

It is understood that the declarations of unconstitutionality of the norms do not represent a structural resolution of the problem, much less in systems where the control of constitutionality is "diffuse" (Pavón and Rubio - 2014).

It is argued that, despite the clarification made in the preceding paragraph, since it is incompatible with the exercise of the right of defense in court, the violation of the principle of strict legality renders any decision that presupposes it unconstitutional. (Maier, 2003)

Beyond this, the possibility of investigating the procedural discourse and its construction, in what is considered legal narratology, seems reasonable. This is because in the proposal of the regulations to be applied, the prosecution body is the one that defines the relevant criminal types (Maier, 2003). Any law that is positioned in regulations that are incompatible with minimum criteria of exhaustiveness, in the orbit of the procedural, must necessarily involve the prosecutor. (Boiso, 2021)

Finally, it will be said that it is desirable not to reach the judicial decision-making instance when the norm presents fallibilities such as those that have been alluded to. In any case, and by the principle of congruence (Musco, 2014) there are possibilities for the State to avoid the prevalence of instances of procedural "construction of truths" that are at odds with individual freedoms, that is, avoque, imputation, accusation; long before reaching the end of the criminal process. (Musco, 2014)

Returning to what is strictly related to the task of the judge, the construction of the procedural truth corresponding to a guarantor epistemology implies the obligation of the judge to give an account of what he thought and what he knew through reasoning. The judicial duty consists of communicating through language how he constructed his knowledge of the factual-legal (Campoverde, 2019). This is the only way to arrive at a valid proposition about the events that have taken place and their legal implications. The validity of the law is conferred by the fact that it is verifiable, refutable and therefore less irrational in terms of its retributive effects.(Baratta, 2004)

Thus, it can be anticipated that guarantismo is a system of values aimed at minimizing state power in the framework of criminal decisions.

An attempt is made to arrive at a truth underpinned by objective knowledge and not at a determination executed by power.(Baratta, 2004)

Epistemological Characteristics of the Truth of Criminal Procedure

An approach to the idea of penal guarantees seems to be the origin of the current of thought on which the postulates are based is contemporary, but different in terms of the schools that promoted and complemented it. (Ferrajoli - 1995)

A certain doctrinal consensus can be found in that the idea of guarantees began in the nineteenth century with the rationalist ideas of the Enlightenment (Barzallo, 2016) but it also responds to a mixture of philosophical-juridical schools such as the contractualism of Hobbes or Rousseau(Portales & Sánchez, 2004); the Italian classical school of Carrara or Becaria(Effer, 2016)

or embryonic legal positivism, whose main exponent is H. Kelsen. (Barzallo, 2019)

Leaving aside their nuances of irrationality, it is possible to investigate the meeting point between these currents. To notice this common space is to delimit the minimum deontology of guarantees. Thus, although positivism is the origin of the principle of strict legality, it can also be considered as an open door to the sovereignty of the norm over the individual (Alterio, 2011); The same can be said of classical Italian thought, which on the one hand promotes the need for a minimum of suffering in punishment, but on the other, validates statist and authoritarian expressions such as the ideas of special prevention. (Grajales & Galeano, 2017)

By noting the areas of liberal agreement between the schools of thought in which guaranteeism finds its origin and sustenance, the teleological independence of the notion is also observed. That is, guarantees, and therefore the truth to which it gives rise, can and must be the result of a series of principles linked to the weighting of the individual, freedom and the rational limitation of power. (Carrillo & Llanos, 2019) This, regardless of the iusphilosophical current from which they come. In any case, systematic coherence will be given by the logical compatibility of the concrete postulates relating to the protection of the individual with the minimum essential elements of the guarantee truth described in this chapter. (Barzallo, 2016)

This implies that guarantees are a dynamic concept that can incorporate new clarifications beyond their theoretical origin, with the sole condition of systematizing them in a coherent scheme of criminal procedure. (Carrillo & Llanos, 2019)

Disagreeing with Ferrajoli on this point, it can be said that it is not the use of reason and thought that distinguishes guarantism from other forms of conception of the criminal process. The distinguishing element is the need to protect the individual from the arbitrariness of the people who command the state (Baratta, 2004).

The differentiation is not minor. Any authoritarian model can have a more or less logical legitimizing discourse behind it and respond to inhuman values. It is a question of putting reason at the service of the person and above the collective, of creating as many humanist fences as possible to control and make reliable, if you can call it that, and predictable the advance of the State, or the collectivity over the person (Musco, 2014). That is why, among many other inferences, it is advanced that the guarantee is not democratic and should not be. Guarantees must protect the human person, even from consensus that is not necessarily rational.(Barzallo, 2016)

Constituent elements of guarantees

Ferrajoli, when he enunciates the following two as constituent elements of guarantees: on the one hand, the need for strict legality, that is, the exhaustive determination in a criminal law of deviant conduct; and, on the other hand, the condition of legal proof of behavioural deviance for the imposition of a penalty (Alterio, 2011).

However, its correctness, the reference of the Florentine master is insufficient. At present, it can be said with Bosio that among the essential elements of the criminal process, an adequate narratology of the facts and the rules in the process must be added to the two mentioned above, compatible with an authentic exercise of the right of defense. (Boiso, 2021)

On the other hand, these principles are enshrined in modern constitutions as penal and procedural guarantees. For example, in the Argentine Constitution, in its article 18 which establishes: "No one may be punished except by virtue of a prior trial based on a law prior to the fact of the process" (1994). It is from this way of normativizing the referenced principles that the term "guaranteeism" arises.

The Principle of Legality and Procedural Truth

The exhaustive description of the conduct prohibited in the previous formal law has been postulated as the first constitutive requirement of the guarantee truth.

It is a requirement that, a priori, is not proposed because of the axiological value of the content of its postulates. On the contrary, it is valuable for penal rationalism that there is a prior prohibition of conduct, described with the greatest possible circumspection, to base the decision to prosecute, and eventually, to punish. (Cafferata Nores, 2008) The criminal judge, on the basis of this mandate, can and always must only classify as a crime what is contemplated as such in the criminal law.

Procedural truth entails a more or less arbitrary reduction of factual reality on the part of the legislator. The compatibility between what the judge comes to know rationally and the normative description is the only valid criterion for accepting a phenomenon as procedurally true. (Bermúdez, 06)

Legality or reservation, if observed carefully, contains another mandate that conditions the judge: since the latter is only obliged to classify as crimes human actions described with the maximum exhaustiveness in the law. Conversely, it should refrain from considering descriptions that are ambiguous or unacceptably vague.

Thus, legality implies a primitive directive to the criminal legislator who, in the abstract description of the act, must be as precise as possible, differentiate what is from what is not, and always refer to conducts, not perpetrators (Schulman, 2012).

With regard to the aforementioned point, it only remains to point out that the problem of the deficient legislative technique is a great challenge to the guarantee of the current time. While the substantive rule may be deemed unconstitutional by the judge (Maier, 2003) , and therefore, its application discarded, this does not structurally solve the problem.

In the face of the lack of recognition of the principle of secrecy on the part of the criminal legislator, the truth of guarantees is put in check, because the judge's decision is inevitably affected by legislative irrationality, and by the assessment, contrary to knowledge, that is imposed on him. (Hernández Aguilar, 2018)

Here, for the time being, there is a profound limitation that there is guarantism in terms of the construction of the truth and in terms of the mode of distribution of roles of state subjects. It would be hasty to go further in the reflection because, as can be seen, the problem runs through the entire object of this work.

The subject must be approached with the utmost circumspection because it involves the most complex legal issues. The division of powers as an essential part of the organization of the Argentine system of government (Mejía Turizo & Pérez Caballero, 2014) and the hermeneutical limits of criminal law (Aguilar, 2018) are some of them.

Therefore, it is beyond the scope of this work to exhaustively consider the limitation of the failed legislative technique in terms of the construction of truth.

As anticipated in the introduction, the focus will be on the role of the judge in the creation of truth. In their duties to achieve liberal epistemological standards.

What must be said is that in the analysis of the legal-procedural discourse and in the construction of the narrative of the object of the process, some answers can be found to the questions left by this problem. (Boiso, 2021)

The quaestio iuris and the quaestio facti

The Legal Norm as a Conditioning Factor in the Selection of Facts. Having referred to the principle of legality as a constitutive element of the guarantor epistemology, a step forward can be taken in the analysis of "the normative" in terms of the construction of truth.

The norm itself is not a watertight compartment with respect to the facts, on the contrary, it has a decisive impact on the type of assertions regarding what is considered to be a "historical event". (Lagier, 2003)

The norm helps to delimit the fact that is taken for granted, just as the fact conditions the norm that is to be applied.

To illustrate, a specific type of criminal offence will be used: the Argentine Penal Code, hereinafter referred to as the Penal Code, describes sexual abuse as:

"Anyone who sexually abuses a person of either sex when the latter is under thirteen years of age or when there is violence, threats, coercive or intimidating abuse of a relationship of dependence, authority, or power, or taking advantage of the fact that the victim for any reason has not been able to freely consent to the action" (Penal Code of the Argentine Nation, [CP], art. 119 p.1 Law 11.179, 1984)

The reconstruction of the historical fact will be conditioned by the legislative technique used and by the data that the legislator has decided to describe about an event, which in terms of its circumstances and the causal links it implies, is always infinite (Lagier, 2019)

The legislator has sectioned and with this, has imposed the exercise of an activity of evaluation of the facts on the judge.

In the specific case of sexual abuse, by way of example, it is necessary to refer to some problems of interpretation for which authoritative doctrine has found antagonistic hermeneutical answers: as for the objective type of sexual abuse, it has been understood that there must be contact with the body of the victim, or that it is not (Figari, 2017)

Similar considerations are taken by the fact that the criminal offence requires, in its subjective aspect, to have sexual content. Thus the question arises as to whether, even if the aggressor's purpose is not lewd, e.g.; mockery, vengeance; Conduct that objectively involves sexual behavior would still constitute sexual abuse (Figari, 2017). And in any case, what parameters must be taken into account to understand that a certain conduct implies sexual behavior?

Continuing with the example, it is not unreasonable to think that the touching of the breasts by the doctor who, making an examination that requires such an action, surprises the patient, who, believing that the observation was sufficient, did not give express consent to be touched. Would there be sexual abuse by the doctor in this case? Touching occurs and depending on the definition of "sexual" that is assumed, the act will also correspond to the legal provision.

The punitive solution in the case described is clearly far-fetched, but it is also possible from a theoretical and empirical point of view.

It should be remembered that the legislative quality of the law is not being reflected on here. It is assumed that it has been drafted with as much precision as possible that language supports. What we want to point out is how the prior rule necessarily conditions the judge's choices of elements that are strictly factual. (Lagier, 2019)

This is because reality is infinite and, therefore, indescribable in all its edges (Iglesias, 2022) Moreover, the choice made in the sense of understanding behavior as typical or atypical will always be evaluative, beyond, for example, whether it is based on doctrinal consensus.(Aguilar, 2018)

On the other hand, this conditioning that the law makes and by which it imposes an axiological exercise on the judge, is prior to the sentence. In fact, prior to the journey of the whole process. (Boiso, 2019) Thus, the facts will be selected from the beginning of the proceedings, through the formal accusation, the accusation, the eventual issuance of preventive detention, until the sentence. The selection will be made according to

subjective criteria, and what appears as novel in the analysis by different state subjects.(Carrillo and Zamir 2019)

However, with regard to the formation of the discourse that contains the premises on which the judgment is based, the problem of terms is linguistic and not legal when the legislator has ostensibly observed the rule of exhaustiveness in the description of the conduct. (Boiso, 2019)

Every language has the necessary limitations in terms of the specificity of what is being said. As noted above, what the accused defends himself against is not a fact, of which its truth or falsity cannot be predicated (Lagier, 2003) It cannot be said that "A's death at the hands of B" is true or false, what this assessment can be made from is the linguistic statement, "B killed A".

The insurmountable evaluations that language imposes on the judge are another bump in the epistemological needs of the truth of guarantees. In this regard, the judge's decision cannot be confused, nor can it be verified, since it is discretionary.

The judicial syllogism by which the sentence is constructed (Lalanne, 2020) It is the result of many other syllogisms that are carried out in the instances referenced above. It can be observed how the court receives a discourse with claims of logical correctness, which has gone through different stages and different authors.

That speech must be reviewed by the judge and clearly and completely exposed to the defense.

In any case, when it is noticed that there have been inconsistencies in the different instances of interpretation of the procedural discourse, beyond the fact that these are admissible from the point of hermeneutics, the ruling must be made on the point in favor of the accused(Martínez & Siloe, 2015). Thus, for example, if the investigating prosecutor, at the time of indictment, understood that the criminal classification of sexual abuse required a sexual connotation of the conduct for the victim as a subjective element, but the judge of guarantees understood the opposite when denying the request for preventive detention, while the prosecutor of the chamber agreed in the interpretation of the type of investigation with that of the investigation when formulating the accusation, The judge of the chamber must rule that there is no crime.

That solution It is a narratological derivation of the dubio pro reo. (Santos, 2007) According to Maier, the in dubio pro reo It is a guarantee that protects the defendant at the time of sentencing. It implies the prohibition of convicting when there is doubt as to the proof of the facts (2003).

In this section of the chapter, we continue to talk about the norm, the quaestio iuris; but it is understood that an institution designed for a case of doubt as to the quaestio facti. This is because, as has been said, the rules inexorably affect the reconstruction of the facts insofar as the defense is exercised with respect to a discourse and not an event (Iglesias, 2022).

It takes up the assertion that the legal aspects, relating to the application of the rules, and the factual aspects, relating to the facts and the proof of the facts, are not entirely separate areas. On the contrary, they are interdependent phenomena. On the basis of this idea, it must be asserted that a contradictory selection of facts cannot be made, however admissible it may be from the point of view of the substantive legislation. In such a case, all the guarantor institutes are available to anathematize the advance of public power over the individual. This is the definitive argument to understand that in addition to the dubio pro reo, the factual reconstruction may be challenged as a whole, at the request of a contradictory interpretation of the substantive rule on appeal. The latter is already supported by the jurisprudence of the CSJ in the Casal ruling, although with unclear

reasons. (Supreme Court of Justice of Argentina [CSJ]; Case No. 1681, September 20, 2005)

Finally, with regard to procedural rules, a minimum consideration must be made. In order to determine the applicability of the rules establishing the relevance of certain evidence, the jurisdiction of a particular court, the admissibility of the suspension of criminal proceedings, among other institutions regulated by the codes of procedure, a prior qualification of the fact under investigation must have been carried out. (Cafferata Nores, 2008)

The epistemological validity of the guarantor paradigm seems to be called into question once again. Since the construction of the object, a historical fact, is based on the establishment of a sort of provisional affirmation, constructed from suspicion, the element of discretion appears replacing the element of reason.

In this way, jurisdiction is established to a collegiate or single-member court depending on the seriousness of the crime (Code of Criminal Procedure of the Province of Mendoza [CPPMza], Law 6730, art.37 to art.71, 1999, Mendoza, Argentina); But paradoxically, the evidence has not even been produced in a debate framed in all the guarantees that give validity to the sentence that determines the existence of criminal responsibility (Maier, 2003)

Undoubtedly, the relevance of the evidence is what best evidences the problem. But in this case, the solution appears somewhat less complex, at least if the reflection is limited to the strictly penal consequences of the process of ascertaining the truth.(Lagier, 2003) The truth of the guarantee is safeguarded with respect to the question of the admissibility of evidence, making a retroactive analysis of the procedural decision on the evidence.

Once the subject matter of the proceeding is to be definitively established, at the time of issuing the judgment (Maier, 2003); This is when the epistemological flaws implied by the denial of evidence must be corrected based on criteria of relevance.

In this regard, if restrictive regulations have been applied, limiting the possibility of providing evidence to the defence, which tends to prove circumstances that improve the procedural situation of the accused, if the subject matter of the proceedings ends up being different from that which was considered at the time of the denial of evidence and compatible with the relevance of the evidence offered above, The judgment must take as true everything that was intended to be accredited, regardless of the concrete effectiveness of the evidence that did not occur. (Arrieta Burgos & Vélez Vélez, 2020)

Here we find one of the central points in relation to the truth of guarantees and the way in which it can establish, from a principled perspective, the roles of the procedural subjects. As far as this investigation is concerned, the role of the Judge.

The preceding postulation can be exemplified by returning to the assumption of sexual abuse. If, during the pre-trial stage, the accused is accused of aggravated sexual abuse due to carnal access (CP, art. 119, para. 3) for which a minimum penalty of six years' imprisonment is imposed. The defense, in turn, offers evidence aimed at dismissing the fact that, due to its duration, the sexual abuse was "gravely outrageous"; which constitutes one of the two prerequisites of the aggravated type of sexual abuse in the second paragraph of article 119 of the Argentine Penal Code, the other being the circumstances of its execution.

Then, from a guarantee-based epistemology, if the judge notices that carnal access was not proven, more so if the nature of the abuse was seriously outrageous, not because of its duration, but because of its circumstances of realization. In this circumstance, it must nevertheless rule by applying the privileged rate and discarding the aggravating circumstance. This is the only way to arrive at a guaranteed epistemology of truth.

The truth is that, for consecrated doctrine, condemnation would proceed (Maier, 2003). This is because the judge would make a change that was not surprising for the defense in the characterization of the facts made by the prosecution. Therefore, the ruling would not violate the principle of congruence as derived from the guarantee of defense in trial.

In this case, the judge's duty to dismiss any aggravating circumstance of the crime, in addition to the fact that it has not been refuted by the defense, is consistent with the need for any premise on which the sentence is based to be exposed to the certain possibility of contestation. (Cafferata Nores, 2012)

When a piece of evidence is denied as irrelevant and then variations in the factual platform are admitted, comparable to the magnitude of the variation with respect to the procedural object that would have implied the admission of the denied evidence, an epistemological contradiction is incurred, and therefore, an incriminating decision is made that suffers from irrationality. This is an irrationality that can be remedied, and, therefore, any retributive intentionality that has it as a presupposition must be regressed (Baratta, 2004)

It can be pointed out at this point that the procedural truth of guarantees must be the result of the observance of a series of principles that, if they are not provided for in the Constitution as an ideal, can be summed up in the need for all state progress on the individual to be based on holistic criteria of rationality.

That is, that the entire discourse on which the decision is based, whether in its immediate or mediate premises, responds to a vocation of knowledge and refutability as opposed to evaluative decisionism.(Alterio, 2011)

La quaestio facti. It is convenient to return to the idea according to which facts and norms have a necessary interaction in the criminal process, in order to approach the place occupied by the subject of facts and evidence in relation to the construction of a truth of criminal procedure that guarantees it.

Once the conduct in the accusation has been qualified, the task remains to interpret the facts that, through the evidentiary means, are brought to the attention of the judge. Note how now the norms have to be conditioned, not by the facts themselves, but by the evaluative interpretation and therefore, with more or less high degrees of arbitrariness that is made of them.(González Lagier, 2020)

The evidence, and therefore the facts, are also invaded by regulations because, for example, in order to establish whether the injuries were intentional or culpable, it is not enough to determine whether or not the defendant made certain movements, but whether the effect was produced intentionally. The same will happen with the causal relationship between a bodily movement and its result, e.g. in the case of the so-called "intentional damage"; If there is certain information that the defendant lit the fire, but it later spread over thousands of hectares as a result of a climatic contingency that increased the amounts of oxygen in the environment. How far can the fire be attributed? What is the attribution factor and, in any case, what was it that the defendant could have contemplated of all the circumstances of the historical fact? (Lagier, 2003)

The reflections that have been made with respect to the questions regarding the way in which the purely normative question is interrelated with the question of facts and evidence are not intended to discredit the model of guarantees of criminal procedure. Rather, they are warnings about the limitations that this model entails, and in any case, about the challenge for legal theorists that it implies.

Indeed, the desirability of the rationalism of criminal procedure never appears more clearly than when the irreducible limits of reason are noted.

Strictly speaking, the real restriction to the guarantee proposal is that what the criminal process seeks to achieve is the truth, nothing less. Beyond the fact that it is the subject of subsequent analyses, it is convenient to point out that the guarantor epistemology, as described in this chapter, cannot account for encompassing all the possible scenarios of the criminal process. In fact, no epistemology framed in the search for the reconstruction of historical facts would avoid the difficulty presented by the attempt to search by limited means for an infinite object. For this reason, the guarantor epistemology is not obsolete as some doctrine proposes(Alterio, 2020). In any case, the entire system of criminal procedure as it is conceived should be described as obsolete, but that is a matter beyond the scope of the present pages.

What appears to be clear is the idea that, both for academic reflection and for the activity of legal operators, particularly state operators, there are a series of calls for a reflexive effort to compensate for the aforementioned limits.(Musco, 2014) Perhaps, since it is a construction of principles, as will be defined ut infra, the deontology of the object of the criminal process must respond to them as one responds to an ideal. Trying to generate the greatest possible closeness between what "is" and what "should be", and here the possibility of making an effective distribution of roles within the debate begins to be glimpsed based on the epistemological needs posed by the object as a discursive reconstruction of a historical fact.

An analytical review has been made of the substantive and adjectival norms, as well as the possible epistemological inconsistencies that arise from the way in which the legal and the factual are interrelated.

After this development, it is noted that the normativization of behaviors within the process brings as a necessary consequence the opening of doors to discretion. (This color is what's going to conclude). It cannot be otherwise, because every norm demands interpretation and complementation of its gaps.

In this order of ideas, the principles of rationality and the priority of the individual over the State appear as an imposition on the legislator and the judge. In addition, this imperative. In dynamics, it has to be understood as an element that assigns roles based on the same value, but, depending on what the specific procedural circumstances demand, they will demand one or another decision by the court. It follows from this that the judge is the one who finishes constructing the truth that conditions him in advance. (Lalanne, 2020)

Jurisdictional Cognitivism as the Second Constitutive Element of Guarantor Truth

The court is the one that will finish constructing the object of the process with its judgment.(Carrillo & Llanos, 2019) In it is the climax of the epistemological requirements of truth. (Lalanne, 2020)

When it determines in the specific case whether the conduct corresponds to the legislated criminal classification and the legal consequence that derives from it, the procedural narrative in the broad sense will be concluded, as well as the syllogism of which it relates. (Santos, 2007)

It is there that it will be possible to fully observe the type of truth that has been arrived at and its correspondence with the model of criminal procedure that has been reviewed.

The Judge, before the prosecution, he is obliged to verify at least three issues: first, that the legal description of the conduct is unambiguous, but that the legal description of the accusing body is also unambiguous. Secondly, that the content of the accusation is refutable due to its logical construction and communication, and finally, as a third requirement, that the existence of the historical events (facts and norms for the case)

has been verified through procedures, proof, that also admit verification and refutation. (Zamora-Acevedo, 2014)

As can be seen, the conclusions to construct a truth that guarantees can never, neither on the part of the court nor on the part of the accusatory body, come from the subjective side. They must be the product of an ascetic knowledge of the external that is arrived at through legal and logical methods. What is intended above all with the aforementioned imperative is the possibility of controlling both the way in which the enabling discourse of punitive power was constructed and the discourse itself. In this way, both the lawfulness of the evidence and the correctness of the logical deduction made by the judge from the incorporation of the elements that were carried out are controlled. (Dobratinich, 2020). It is from this order of ideas that the importance of legal narratology is underpinned.

In addition to this, as will be noted below, the knowledge that is arrived at must be the product of respect for the limits implied by the other procedural guarantees. (Maier, 2003) And to say this may seem like a truism, but the truth is that it has a supreme relevance for the present inquiry. The construction of the object of the criminal process is delineated, on the one hand, in relation to the epistemological object that, in addition to having its origin in the postulates of strict legality and strict jurisdictionality, which are normative but also respond to a pre-legal logic (Ricci, 2015). On the other hand, by normative elements, generally modern constitutional norms or received through supranational instruments, and even by the binding jurisprudence of the bodies to which such instruments gave rise. V.g: The duty to characterize the conduct of the criminal prosecution body at the time of the accusation has been enshrined in the jurisprudence of the Inter-American Court of Human Rights. (Inter-American Court of Human Rights, 2005). This is a conditioning factor of the entire system of the configuration of the truth that impacts on the proper conduct of the judge and his role with respect to the foundations on which he supports his conclusions regarding the historical fact, both insofar as the mandate of supranational precedents is complied with, and insofar as it is ignored. (Polanco, 2014)

Thus, the reflection corresponding to the delimitation of the guarantee truth would be inconclusive if the normative fences that each State is dynamically putting up in the light of the instruments of individual protection that it adds to its constitutions were not added. (Cafferata Nores - 2008)

The liberal truth of guarantees is constitutional truth in the material sense of the term. In any case, it is a constitutional truth that includes the right of defense in all its extension and that incorporates narratological obligations into it. This materiality is, in short, what means that, in dynamics, the role of the judge must be adjusted according to extra-normative or pre-normative variables.

That is to say, as has been made clear when dealing with another constituent element of guarantees, such as strict legality, in this case the coherence of the procedural system for the preservation of the individual must be sought over the infra-constitutional regulations. This implies that the judge has the duty of a permanent constructive attitude of knowable and refutable arguments and assertions based on empirically verifiable data.(Junoy, 2012)

In the truth of guarantees, the judge, while not issuing the sentence, must check that the links of the great syllogism implied by a trial are not contaminated by evadible discretion, or that, if there is discretion in them, they do not serve in any way as a constituent element of procedural truth. The judge's task is drastically expanded and reduced. It will be more extensive in that it will have to put an end to the discourse that configures the facts and norms in the distances of the narrative instances of the debate, and even more, it will have to put an end to the criminal process before the moment established for the sentence when epistemologically insurmountable discursive constructions are reached.

But the judge's duty is also diminished insofar as he must try to avoid discretionary or evaluative conduct, even when these come from procedural rules. For example, those that promote sound rational criticism as a criterion of evidentiary evaluation. (Benfeld & Escobar, 2018)

It is worth clarifying that from the theoretical paradigm proposed, the final decision on whether or not something happened and to what extent it happened, continues to be the exclusive and exclusive domain of the judge. (Lalanne, 2020)

It is correct to think that teleologically, the guarantor epistemology focuses on controlling and rationalizing power, and not on legitimizing it, while normatively, it is a judicial duty to contain state violence.

It is partially concluded that the paradigm of guaranteeing the legal factual truth distributes the tasks in the state administration of criminal justice as follows: The legislator will describe what is prohibited, trying to be circumspect both in the delimitation of the intended conduct and in the clarity of its circumstances. The prosecuting body must construct a staggered discourse regarding the rigor of the evidence, from the lowest to the highest qualitative volume of accreditation of the compatibility between the abstract norm and the concrete behavior of the accused subject. In this task, it is evident that it must safeguard the objectivity of its discourse, in order to avoid unnecessary procedural delays in the event that it is realized that the punitive authorization will not prevail. (Morales, 2010) This may happen for procedural, evidentiary, or substantive regulatory reasons that will eventually be subject to judicial verification.

Notwithstanding this, it should be noted that the duty of objectivity is the cornerstone of guarantees in the criminal prosecution body. This is because a process aimed at prosecuting the accused at all costs, in which the prosecutor trusts that if no conviction is appropriate, it will be the exclusive task of the judge to affirm it towards the end of the procedure, is in itself arbitrary and irrational conduct. (Morales, 2010)

And as if that were not enough, the control springs of the real construction will not be able to erase the pernicious effects that occur in the life of the defendant. The object of the criminal process will be epistemologically flawed for a guarantor model, if for its construction the purpose of the accusing body was interverted, going from being a splitting of the state in order to clarify the facts to being a blind inquisitor.(Junoy, 2012)

From the specific behavior attributed to a subject and its concordance with a criminal norm, the judge must establish whether or not that happened. (Meroi, 2007) It is desirable to conclude this chapter with a narrow statement such as that of the previous paragraph. The aim is to give the impression that, the lower the judge's powers in terms of historical reconstruction, the lower the risks of incurring in authoritarian schemes.(Martínez & Siloe, 2015)

The judge knows the rule and the facts that have been brought to the debate. And he speaks for what he knows and can communicate, but never for what he believes or for what he knows and cannot transmit. (Rodríguez Romero, 2020)

Finally, it will be said that, in dynamics, that is, with the immense possibility of events that may occur in the phenomenon of debate, the roles of the court will be modified quantitatively. This means that if it is understood that its main function is to seek the protection of the individual using as a means the procedural cognitivism enshrined in modern constitutions (Ferrajoli, 1995) ; The conclusions drawn about the facts and the law will often imply a reflection on the suitability of the discourse and the narratology that was made of them from the imputation in order to allow a criminal sanction.

In this way, the constituent elements of the essence of the guarantee truth are developed, as well as the challenges that the distribution of procedural roles may pose when they are to be included in the structure of the criminal process.

The concept of procedural guarantees

Along with Ferrajoli, it can be said that guarantismo is a theoretical and deontological model of criminal process that understands it as a set of actions aimed at the cognition or verification of facts.(1995)

The conclusions that emerge from the strict application of this model are understood to constitute the procedural truth, and the roles that come from its observance will imply the delimitation of the functions of the subjects of criminal proceedings according to epistemological criteria corresponding to the search for a guaranteed truth.

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