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A Flusserian Perspective on Legal Due Process

1. Introduction

Truth is a noun only to God; to men, truth is really best known
as an adverb, ‘truly’... Hence it must always remain partial.

Rabbi Jacob Agus (1941: 191)

This essay aims to explore a possible application of Vilém Flusser’s insights into the nature of communication on the fields of jurisprudence in particular and of legal philosophy as a whole. We propose to explain and qualify the relational instances mediated by language, the commitments that pertain to those relational instances and how they come together to effect due process. In other words, it is an inquiry into the nature of due process, supported by the core of Flusser’s first published book, *Língua e Realidade* (Flusser 2007b) and Martin Buber’s *Ich und Du* (Buber 1999). Our ambition is that this discussion can serve as an initial step towards a wider Flusserian agenda in legal philosophy.

2. Vilém Flusser’s *Língua e Realidade*

Flusser’s core tenet in *Língua e Realidade* (Flusser 2007b) is that humans seek to impose order in a chaotic world through language. In explaining how this is done, Flusser vivifies a phenomenological perspective that leads to a distinction between different relational possibilities (all mediated through language), two of which, dialogue and discourse, interest us the most for the purposes of this essay.

We must, however, underline that Flusser is writing in Portuguese, which has three distinct words which can be translated as “language”: the first is *língua*—living, human language, which intimates passion as well as reason, even identity; the other is *idioma*—which expresses a formal typology of languages for regulatory and instructional purposes; and finally, there is also *linguagem*—which is formal, all-encompassing, abstract and includes any modality of communicative coding, as in “machine language”, thus including algorithms and binary instructions.

The fact that Flusser wrote *Língua e Realidade* in Portuguese is impregnated with meaning. To write in Portuguese meant, for Flusser (2007a: 19 *et seq*), to phenomenologically immerse himself in a reality completely distinct from his pre-war upbringing in Prague, one that would allow a more immediate and proximal relation with his subject matter, unconstrained by the philosophical underpinnings of the German tradition. Once freed from those underpinnings, Flusser could experience and practice a phenomenology of *língua*—and write about it, and of other human languages—instead of conceptualizing in accordance with a pre-existing framework (Finger et al 2011: Chapters 1 and 3).

For Flusser, *língua*—which would imprecisely translate to language—*is* reality. Outside of human experience there is only the direct connection between a sensory input and a corresponding action (Torey 2009: 39). Existence, as opposed to “reality”, is made up of a succession of fleeting moments of necessity: food, shelter, reproduction. Humans use *língua* to create reality—the institutionalized, stable version of the world we live in, one which exists beyond, and to an extent, independent of the senses.¹ The evolutionary processes that led to modern *Homo sapiens sapiens* allowed the development of language, and more to the point, of the “word”. It is through words, or better still, through the conception and enunciation of a word, that we fix a particular aspect of reality in space and in time (Torey 2009: 41-50)—first to ourselves, and then to others. As we communicate the word, it dissipates—but it may be, perhaps, fixed in memory and further uttered in future conversations. It is precisely through this process, as we perceive ourselves as speakers of words—or “creators of reality”—that our sense of “reflective awareness”, and ultimately, of *self* comes to be (Torey 2009: 115 *et seq*).

Flusser (2007b: Ch. 2) exemplifies this argument by a series of ontological analyses of sentences successively translated into different languages, showing us that even concepts as seemingly universal as “time” are indeed *língua*-dependent—the perception of these concepts differs as a function of differing grammatical and lexical structures.

¹ In addition to Torey (2009), see generally Dawkins and Wong (2016) at Rendezvous 0 for a complementary view of the evolution of human beings as compared with our immediate shared ancestor with chimpanzees and bonobos; McGilchrist (2021), who in Part II explains the constraints on our ability to reason truthfully given the existential choice to submit to the brain’s left hemisphere’s tendency to objectify the world and others while eschewing the right hemisphere’s ability to relate to the whole, and, more specifically in chapter 10, how this leads to a belief in an ‘objective truth’ instead of considering truth as a “relationship,” a “commitment,” and that truth is “... intrinsically incomplete, but constantly in the process of completing itself... incapable of being grasped except through embodied being, through a consciousness that is in the flesh and *engaged* in the world...” at ch. 10, subitem “Truth: as a thing or a process,” emphasis from the original. McGilchrist’s novel synthesis leads to conclusions in line with Flusser (2019: 15–16), especially regarding placing the objectifying of everything in human relations at the root of the civilizational crisis faced by the West, with Buber (1999), regarding distinct relational patterns (that are evocative both of I-Thou and I-It relations), as well as several others contemporary to Buber and Flusser regarding the importance of phenomenological analyses in philosophy.

The Flusserian argument goes on to expand the idea that *língua* is reality to the idea that *língua* “creates” reality—and, from there, that reality is therefore relational (Flusser 2007b: Ch. 3). Here, it is important to emphasize that the difference between *língua* that creates and that does not create reality is expressed in different patterns of relationships. There are several levels of reality-creating instances in *língua*, but for the purposes of this essay we will focus on the reality-creating pattern of relationships called “conversation”—*Rede*, in German, or *conversação*, in Portuguese—and on its lower counterpart, “chatter”—*Gerede* or *palavrório* (Flusser 2007b: 167).

Conversation requires a dialogical exchange based on openness to unpredictable and even “risky” results and, as a consequence, to accept—or even to seek—the possibility of changing one’s mind and creating a new reality (Flusser 2007b: 162–164). Furthermore, conversation is an exercise in authenticity—to oneself, to the other, to the exchange between one and the other; it is a commitment to rigor in substance as opposed to vacuous formality. Chatter, conversely, is mostly conversation’s opposite—there is no expectation of novelty, no unpredictability, no jeopardy: it consists merely of parroting existing expressions (Flusser 2007b: 167–169). There is no authenticity in chatter, and if anything, *chatterers* are more committed to the *appearance* of conversation—or in other words, with some level of formalism related to structure, circumstance, function, or role.

3. The Institutional Heritage of Law and the Notion of Truthfulness

It is a given that the law and what is objectively and subjectively right are *institutions*, and since they are institutions their roots lie, as with all other institutions, in *língua*. Through *língua* humans have carved out an existence of regularity and bounded predictability as opposed to nature and its chaotic “out-there-ness” (Flusser 2007b: 34–37). Institutions do not stabilize the world—natural or otherwise—but they do stabilize our relations both with the world and with others (Gehlen 1977: 107). They create a “second nature” in which humans can exist in relative stability.

Once we connected pointing at something “in the world” to naming it with a word, that object was fixed in human experience, limited only at first by the reach of memory, and then by the media it had been committed to in writing (Ong 2002: 31–34; Flusser 1987: 11–12). Words emancipate our actions from a situated experience—they create an empty space-time to be reconstituted and ressignified at will. This is of course the product of an evolutionary process, but also of a historical process—as humans faced incredible instability on their quest for survival, they found themselves cognitively and existentially overburdened in light of the ever-changing natural world. Without the benefit of institutions, it would have been impossible to face this task, carving out a space where existence could be subjected to the artificiality of stability (Gehlen 1961: 71).

Law and legal dogmatics have functioned along comparable mechanisms. They propel humans towards unilaterally stabilized actions, which admit a particular behavior in light of a given situation—but not others. They require the autonomization of a structure of habits to guarantee that these external signaled behaviors are indeed intelligible—which, again, can only come about through *lingua*. This assumption dialogues with several key concepts in legal philosophy. In a dualist—e.g. German legal-positivist—perspective, “that which is objectively right”—*objektives Recht*—states certain desired behavioral states through *lingua*, whose existence, however, is not—or at least should not be—divorced from the world. The relationship between norm and the world under this perspective is explained using the categories of *Sein* and *Sollen*, which, while pertaining to separate realities, are connected to one another through further concepts such as typicality and valid tokens.² This way, when a certain action in the “Is” corresponds to a valid token of a particular norm—which can only exist in the “Ought”—the latter produces certain effects which manifest in the “Is” (Pattaro 2005: 37 *et seq*).

Our approach to the relationship between institutions—or, more broadly, stable and enduring human utterances—and the world is not particularly incongruent with this perspective. However, we shall see that an approximation to the ideas of typicality and valid tokens in human relations more generally speaking—a special case of which is due process—is that valid or stabilized utterances require that those in relation commit to truthfulness in such a way that said utterances are upheld by the world.

In a monistic—e.g. Scandinavian legal-realist—perspective, language—as communicative phenomena—, norms, authority, laws, and even legal systems are viewed as part of a cultural or sociological setting, one which we would simply describe as “institutional”. According to this view, normativeness—a concept akin to duty—amounts to “intrapsychic motives of behavior... a basic structural component of the individual and social identity of every man and woman” (Pattaro 2005: 116). Law as an interference in human behavior cannot exist in and of itself, absent authority, a sense of duty, and the communicative apparatus that connects one to another.

Our approach is conceptually closer to this perspective, albeit with some important differences. We would argue that legal systems—including law, normativeness, authority, and organized power—are an institutional medium which allows particular patterns of relationships to unfold. These relationships happen through *lingua*, but, as we will explain more fully in the following

² See Pattaro (2005: 33–112) for a critique of German legal positivism. As for some recent periodical discussions in, say, *Ratio Juris*, *inter alia*, there are distinct, but related highlights around this foundational understanding that offer a shared concern for the discussion: Pattaro (2010); Troop (2018); Bassham and Ostrowski (2022); Plunkett (2023).

section, those relationships can only be deemed “fruitful”³ if the duty that propels them includes a commitment to the truth. Again, this is not to be taken as polysemy: a commitment to the truth leads to utterances that are upheld by the world.

Our perspective is, indeed, closer to anthropological philosophy in that it recognizes, *ab initio*, that *lingua*, as “the mother of all institutions” (Gehlen 1977: 50–54), is conceptually much more than a communicative device—it allows humans to engage in relations that produce institutions, and, taken as a whole, these institutions create a “second nature” or an institutional environment in which human life is not subjected to the chaos and unpredictability of natural, genetic life. For that reason, humans are “a premature birth of biology into norms” (Gehlen 1977: 69), the latter taken to mean institutions in the broadest sense. Institutions allowed early human activity to prosper in a number of different natural environments and, as the technologies associated with language progressed to allow phonetic-alphabetic writing, from inscriptions all the way to the printing press, human institutions also progressed to give us life—including life under the rule of law—as we know it today.

Franz Rosenzweig (1921: 22) synthesizes his understanding of the relationship between truth and law by arguing that “For the world, truth is not law, but content. Truth does not prove reality, but reality upholds truth. The essence of the world is this upholding (not the proof) of truth.”⁴

Different modes of relations lead to different possible results. We can try to impose a particular thought or perspective; we can refuse to hear what the other tells us. However, fruitful relations go beyond this apparent mismatch: they provide a space where the unexpected might arise and, once it has, to verify if it was upheld or not. The idea of “uphold” is somewhat comparable to the idea of legal validity as a means to verify if a token has validly instantiated the Is-effects of a particular norm.

That truth is content, not law, is a direct reference to the relational modes that can lead to truthfulness—and a reference to what these modes don’t entail can be helpful. To begin with, truth is not something that can be produced through utterances directed at others. For this reason, “truth is not law”—something handed down that would shape the world, even the institutionalized “human world”, by itself. Truthfulness results from a commitment, a relational attitude, a willingness to submit to the relation between utterances and the world but not to a particular outcome or expectation. Utterances can bring us closer to truthfulness, because it is through our utterances

³ See Gehlen (1978: 299–302). Fruitfulness relates to the property of statements or, more to the point, relational patterns that are capable in themselves of leading to new and potentially novel understandings or actions. In a sense, this is the dialogical (e.g. as in Flusser) dimension of truth: moving beyond the mere reaffirmation of that which already is, towards possibly unexpected outcomes.

⁴ “Die Wahrheit ist für die Welt nicht Gesetz, sondern Gehalt. Die Wahrheit bewährt nicht die Wirklichkeit, sondern die Wirklichkeit bewahrt die Wahrheit. Das Wesen der Welt ist diese Bewahrung (nicht Bewährung) der Wahrheit.”

that we can vivify this commitment. They can bring us ever closer, but never quite there—much alike the mathematical concept of a *limit*. This is the content of truth. In this sense truth and justice require analogous relational patterns, or, in other words, the contents of truth and justice are analogous.

4. Discourse and Dialogue

Flusser defines discourse as “the method of distributing available information to preserve it against the entropic action of nature.” (Flusser 2023: 19), whereas dialogue “is the method by which information stored in various memories is exchanged with a view to synthesizing it into new information.” (Flusser 2023: 28) Thus, in a way, discourse can feed dialogue, building up the information storage that allows one to engage into dialogue.

However, the preservation of information presupposes that its content cannot be altered during the distribution process—“the problem of fidelity to the information”—, and it must also aim towards an “eternal flux of the information” in which receivers are potential future emitters—“the problem of progress”. (Flusser 2023: 20) Since these two problems seem to lead toward contradictory solutions—fidelity contradicts progress, and vice-versa—, Flusser identifies the need “to find structures of discourse that would conciliate fidelity with progress”, analysing these structures “not from the point of view of informatics (mathematically) but from that of communication proper (in terms of human participation).” (Flusser 2023: 20) Following Flusser’s approach, we can reflect on judicial utterances focusing not on their internal significance to legal dogmatics as a whole, but instead on the relational nature involving those seeking redress and those responsible for adjudicating.

Dialogue is only possible between one and an “other”, and this “in-betweenness” is the home of dialogue—every dialogical relation is an encounter with an alterity, and demands an openness to the possibility for a sort of communion that reciprocally marks interlocutors with something of the other’s being. Through this kind of reciprocal interference, dialogue expands the breadth of both *lingua* and reality—to engage each other, interlocutors must be willing to interfere and to accept interference as a true mark of the dialogical process. In sum, it is an exercise in the “otherness of dialogue”.

In any relational exchange, much inevitably remains opaque—about the other, about the world, about ourselves—but some of which, perhaps, may be revealed in the course of mutual discovery through dialogue. Furthermore, to identify equality as a prerequisite for dialogue is not only a conceptual mistake, but also a practical impossibility that goes against the continuity of life. There are fewer dialogical connections more asymmetric than the bond uniting mother to infant,

and yet, few would argue that such a bond does not exist, or that it is not profoundly transformative for both involved, nor yet that this asymmetry is somehow detrimental (Jonas 1979: 234-40). After all, without this dialogical connection, the baby would most likely perish. It is through opening oneself to dialogue—even asymmetric dialogue—that one can affirm one's sense of self, ultimately to become an I through one's relation with a Thou (Buber 1999: 9-12).

Dialogue, meaningful dialogue, ultimately takes place between different interlocutors. There is no dialogue in the comfortable echoing of what is known and foreseeable, in the self-reinforcement or mere repetition of that which was already there prior to the exchange. On the contrary, to engage in dialogue is to open oneself to surprise, even to seek asymmetric and aprioristically undecipherable exchanges. It is to experience the interference of different forms of fullness. In other words, while the choice to engage in dialogue is reciprocal, the experience and interference that emerges from dialogue is particular to each conversant. To engage in dialogue is to be willing to accept whatever comes as a result.

Conversely, discourse is a message to be conveyed, acknowledged, accepted, further transmitted, repeated, obeyed—neither rebutted nor denied, for rebuttal or denial are the negation of discourse. Discourse is most often directed at many, especially when further dissemination is paramount in the expectation of spreading conformity in thought or action according to its prescription. A political speech, for example, seeks to garner adherence by shaping understanding, directing efforts and instigating action, as exemplified by the successive speeches of Brutus and Mark Anthony in *Julius Caesar*. All manners of discourse seek all manners of adherence: doctrines, technical manuals, and other records of procedure or proposals of decorum. They seek to stabilize orders or processes where variation would lead to undesirable or undesired results. Discourse can only lead to detached continuity of what is already known and admits to no surprise, for transmission of the message is paramount: discourse entails correctness in service of predictability, in service of conformity.

Dialogue presupposes an openness to alterity in the world, wherein the commitment to truthfulness can flourish and be realized. In discourse, there is a commitment to correctness: the message is paramount. As such there are no surprises, only confirmations.

Using these two categories will allow us to approach judicial utterances from a different tack to most philosophers of law. Phenomenologically, any judicial utterance is both a relational product of a particular circumstance—involving judges and the parties to a lawsuit—, and of history—involving the legal ruling itself against a preexisting corpus of legal doctrine. If we focus on these relational instances, we can observe differing manners in which truth is upheld (or not) instead of how or even whether a particular ruling affirms or contradicts prevailing dogmatic and philosophical underpinnings. Furthermore, this allows us to divert our attention from the legal

ruling as an object to be described in regards to its semantic or its symbolic significance against the backdrop of other objects and instead to consider its value in supporting meaningful human relations.

5. Conclusion: Constraints on Judicial Utterances

The distinction between dialogue and discourse is the chosen interpretative key to further our discussion towards due process and judicial rulings. The gist of our argument is as follows: a just ruling is necessarily preceded by an authentically dialogical due process.

Like any other institution, legal norms purport to provide human forms of stabilization for different modes of being in the world. Statutes result from the legislative process, whose political nature leads to different dialogical and discursive possibilities. As such, they lie beyond the scope of our argument. Judicial rulings in Western legal systems, on the other hand, result from due process bound and guided by constitutional rules and principles.

These rules and principles stabilize social relations and legal systems through accepted solutions to conflicts wherein both the solution and its dialogical and legal foundations are expected to endure in time for that particular case (e.g. by litigants' adherence to the outcome) and for adjudication itself (e.g. by setting case-law or interpretation of statutes that either bind or influence future similar decisions).

Both—decision and underlying foundation—depend mutually upon each other so that they might endure. Due process is inherently dialogical. Two opposing sides engage in a ritualized argument that leads to a particular and contextual unveiling of reality that is expected to have the attributes of truthfulness. While the argument is constrained by whatever the applicable procedural codes state and the judge's eventual interference to limit parties' actions in the name of proper conduct, in the common law tradition judges aren't, themselves, part of this dialogue. When a particular reality has been unveiled—as far and for how long as the rules of procedure will allow the dialogue to proceed—the judge adjudicates. At this point, dialogue ends, and discourse begins. While a judge's decision materially affects only the parties to the lawsuit (even if one considers the binding force of certain constitutional decisions or their *erga omnes* efficacy, or even if those parties are, themselves, collectives), its contents are meant to reach beyond: they are communicative artifacts that support the edifice that is often referred to as legal dogmatics.

A decision endures for reasons beyond its discursive quality. Likewise, the procedural dialogue that came before does not endure solely by its intensity in the pursuit of truth. There is a mutually reinforcing relation between procedure and decision, between dialogue and discourse, that amplifies the former's reach and the latter's validity. One cannot subsist in the absence of the

other. Dialogical due process is ineffective without a discursive ruling. However, a ruling that fails to recognize the dialogical process that came before—even if it comes to survive the test of review on appeal—is, to the edifice of legal science, akin to a half-baked brick. It will eventually crumble under the weight of time and require replacement, for it can bear but the lightest loads.

Judges, however, must also deal with ambiguity and vagueness in legal interpretation. In easy cases the relation between judges and the law is essentially discursive: the decision directly propagates an existing legal rule as it applies to the factual reality revealed during the suit—and reinforces the validity of the rule as it pertains to that and other similar cases. However, hard cases—the subject of much jurisprudential debate in regard to judicial reach in the face of constitutional principles, such as the separation of powers and even political debate as to the limits of democracy in the face of the inevitable clash between legislation, policy, and adjudication—require a dialogical commitment to truthfulness on its own level. The ontological value of legal interpretation lies in allowing a judge to solve indeterminacy in a manner consistent with keeping this commitment. In a vein similar to the parties to the lawsuit, that must engage in a dialogue from which the reality regarding facts—and applicable statutes, and how they should be interpreted—might be revealed, the judge must now do the same, relationally engaging law, precedent, and even commentators (Caenegem 1987) to reveal a heretofore unknown reality. While this can and does take parties' opinions into account, in the end it lies solely within the judge's purview.

If authenticity in legal interpretation is pursuing a commitment to truthfulness, as we have argued, then we must argue further that this issue, despite being evidently held hostage to *lingua*, is not a mere matter of semantics. This is how (and why) this framing allows us to reflect on the constraints upon judges and the dialogical and discursive natures of due process.

On the one hand, this entails acknowledging the limits of dialogue, the difficulties of pursuing exchanges that are surprising, enable discovery and may enlarge reality insofar as they are upheld by the world. And herein lie the roots of judicial responsibility: disciplining dialogue to account for what is pertinent, avoid what is false, adhere to reason, so that that responsibility might be faithfully discharged. On the other hand, this entails recognizing the constraints that result from the inherent differences between dialogue and discourse, becoming aware of how this understanding can conceptually contribute to how we reflect on legal interpretation. And yet, in both stages of adjudication—dialogical and discursive—, judges' responsibilities are the same, and, if adequately discharged, lead to a satisfactory settlement of the dispute between the parties, between the ruling and conflicting doctrine and precedent, reaffirm due process as a core societal value and, finally, help sustain stability and predictability in human affairs.

Judicial utterances are not first movers of reality. They are institutional responses to certain events and desires regarding the conduct of human affairs. What impregnates those utterances with

meaning is their ability to fruitfully transform reality. A judicial ruling that affirms or denies that the sun should rise is as nonsensical as those rulings that seek to refute the institutionality of *lingua* by reneging on the content of truth. Neither is upheld by the world, and for the same reason: both undermine the ability of *lingua* to order chaos and shield our existence from the unpredictability of the natural world. Much to Humpty Dumpty's chagrin, words do not mean what one might wish them to mean based on expediency. Still, within those confines, judicial utterances have been able to transform reality through rulings that seek an ever-closer approximation to justice, knowing it can never fully be attained.

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