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THE ART OF TRUTH. REMARKS MADE BETWEEN POLITICAL AND LEGAL DISCOURSE[1]

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Abstract

In 1873, Nietzsche claimed that a generally and uniformly valid designation is invented for things. This designation has normative force: as a matter of fact, the «linguistic» legislation dominating the practice of language establishes the first laws of truth (*On Truth and Lies in a Nonmoral Sense*). In other words, for Nietzsche the artificial nature of truth, given the artificial nature of language itself, was out of discussion. In this paper, I approach the contemporary debate on post-truth by juxtaposing it with the idea of «artificial» or «conventional» truth typical of legal discourse and by showing the aporia behind each search for truth. In order to do so, I focus on the specific nature of «legal» truth and I invite to consider the centrality of the performative force of truth-making procedures – crucial for lawyers and legal practice – in order to underline the importance played by *technology* in the construction of truth also in the political discourse.

Keywords

Post-Truth, Law, Ordeal, Procedure, Art, Artificial.

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Resumen

En 1873, Nietzsche afirmó que, para las cosas, se ha inventado una designación válida general y uniforme. Esta designación tiene fuerza normativa: de hecho, la legislación «lingüística» que domina la práctica del lenguaje establece las primeras leyes de la verdad (*Sobre verdad y mentira en sentido extramoral*). En otras palabras, para Nietzsche, la naturaleza artificial de la verdad, dada la naturaleza artificial del lenguaje mismo, estaba fuera de discusión. En este artículo, abordo el debate contemporáneo sobre la posverdad yuxtaponiéndolo a la idea de verdad "artificial" o "convencional" típica del discurso legal y mostrando la aporía detrás de cada búsqueda de la verdad. Para hacerlo, me centraré en la naturaleza específica de verdad "legal" y propongo considerar la centralidad de la fuerza performativa de los procedimientos de creación de la verdad –crucial para los abogados y la práctica legal– para subrayar la importancia que la *tecnología* juega en la construcción de la verdad también en el discurso político.

Palabras clave

Posverdad, Derecho, Prueba, Procedimiento, Arte, Artificial.

Disclosure and «making of»: Divergent Perspectives on Truth

It is hardly (if not entirely) impossible to find an unambiguous meaning for the term 'truth'. In fact, such term and some related concepts have been at the core of Western philosophical tradition and, like language, constitute by now a perspective and a fundamental lens for philosophical reflection. Since Plato's allegory of the cave, *themes* like Maya's veil, which was supposed to hide truth from our eyes, humanity has tried to explain the relationship between what actually, essentially and finally *is* in the world (*ontology*), and what we *know* or think about what is in the world (*epistemology*). Moreover, the history of the idea of truth is the history of a gap, of a disparity and unevenness. All accounts recount a route connecting possibility and impossibility, presence and absence, that in Derridean terms could be defined as «*différance*» (Derrida, 1978). In particular, the cornerstone of all theories on truth seems to be the attempt to reveal the structures behind it: the procedures of truth-making are based on a certain structure. And, as suggested by Derrida,

> Structure then can be methodically threatened in order to be comprehended more clearly and to reveal not only its supports but also that secret place in which it is neither construction nor ruin but lability. This operation is called (from the Latin) *soliciting*. In other words, shaking in a way related to the whole (from *sollus*, in archaic Latin *the whole*, and from *citare*, *to* put in motion). (p. 6)

Truth lies behind, because it is the product of an art, a technology, a series of passages that could be defined as 'truth-making'. This seems to be quite undoubtable, and yet in the age of emergence of the so-called "post-truth" a new and different analysis, a return on themes already explored, appears to be useful.

Before going back to a brief genealogy of the reflections on the artificial or natural character of truth, let us first recall some of the main aspects of what is named, today, with the term 'post-truth'. In a recent edited collection, post-truth has been labelled as a

> pervasive trope in media coverage, public speech, public expertise, cultural initiatives and policy agendas (…). This term and its cognates are increasingly setting the frame of our discussions in domains of private and public interest. Its vocabulary is sprawling across all sorts of conversations – from public health to elections, journalism, research, international relations, technology and business. Terms like

> 'post-truth' and 'fake news' (and you could add 'alternative facts', 'post-facts' and 'truthy') are featured in political debates and talk shows, in documentaries and pop songs. Journalists use them to describe the impact of social networking on information. (Domenicucci, 2019, p. 32)

The term was created to fill in a gap and to clarify the unclear: the fact that the gap, *différance*, between truth and lies, like that between reality and fiction, has become (more) fluid and subtle (Andina, 2019, p. 1) – where it has not vanished. Truth and falsity, today,

> would be a whole in which everything is confused together, depending on the perspective we adopt. Of course, no one argues that lies should be preferred to the truth, but the concept of truth is undoubtedly not doing too well given that it was thought useful to add to the traditional pair of truth and lies a third concept, that of post-truth, which somewhat plays with the idea that there is 'something' beyond the truth. (p. 1)

According to the Oxford dictionary, the term denotes something "relating to or describing circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief". In both cases, what seems to be an underlying characteristic of this discourse – whatever the causes or facts occurred at its emergence – is the confusion between ontology and epistemology, as well as the oscillation between truth understood as an essence that must be revealed and truth understood as the product of a process, i.e. as the outcome of passages that lead to its emergence. There seems to be two crucial differences between truth and post-truth: (1) that "post-truth involves a strong emotional reaction" and that is thus "emotionally connoted: emotions help post-truth come into being" (Andina, 2019, p. 3); (2) that "in the domain of post-truth, objective facts have very little weight and, in any case, much less importance than what we attribute to unfounded opinions. In other words, the facts that we consider objective as verified are irrelevant" (p. 3).

Yet what, in all these comparisons, seems to be more striking is the fact that post-truth emerges as some kind of fictional, fake discourse. Indeed, the vocabulary composing the semantic field of post-truth seems to be related, essentially, to fiction and falsity – as if truth existed naturally and only needed to be unveiled, while post-truth

is always constructed. It is important to recall that Plato had already been concerned with the participation of man in the process of truth-making. In other words, the gap or Derridean *différance* between truth and post-truth seems to be already a concern of ancient philosophy. For instance, in the *Laws*, Plato explains the active role of man in the construction of truth. Truth (ἀλήθεια) is the cornerstone of all divine goods as well as of all earthly goods, and those who want to reach beatitude (μακάριος) and want to be happy (ευδαίμον) must participate since it very origin (*Laws*, V, 730 c). Humankind does not own truth, and by no chance can men or women possess the truth: they can participate in the process of its making. The Greek term '*aletheia*' – ἀλήθεια – i.e. might clarify this confusion between truth and post-truth today. In fact, this term refers to a very broad concept which draws both from the idea of artificiality (since the *aletheia* must be unveiled, discovered) and from the idea of naturality (because what is unveiled is the very essence of the thing, its reality). The word ἀλήθεια thus gives access to the deep and complex structure of truth – which is both human and revealed, natural and conventional. In these terms, it is the outcome of an attempt to measure ontology and epistemology. At the same time, it goes beyond humankind: it belongs to an ultra-human dimension, to a different language.

As recalled by Massimo Cacciari in various circumstances and, recently, during a public lecture,[2] the Greek term has appeared before the birth of Western philosophy. In Hesiod, the Muses tell the poet that they can say (*legein*) many false things and nevertheless they can also say all things that are similar to the *etymon* (i.e., to the very root or essence of things). And when they intend to tell (announce) the truth, they do it by singing loudly. In other words, the Muses can do both things: falsity and truth can have their origin in the same source – the operations of deception and unveiling have the same root. In particular, when they mention the truth, they use the verb 'to remember', to bring back to memory (*re-cordari* in Latin) in their real nature. Truth appears to be both a characteristic of the things and the result of a performative act, in the case of the Muses of annunciation. Thus, the things contain aspects that correspond to reality, and they are 'true' for this reason; but then it is also a matter of how they are led to emerge that also gives validity to the truth making process. Similarly, Plato in the *Republic* (508 e, on the idea of good) claims that good intentions, and good values more generally, are necessary in order to have access to the truth. A true discourse must necessarily be substantially and formally correct: *aletheia* is, in fact, strictly connected to *dike*, i.e. to

2 http://www.festivalfilosofia.it/2019/index.php?mod=c_video&id=719.

justice. If one tries to find the true essence of things, then her thoughts are in order with a principle of justice and order.

Truth and Power

Against the background constituted by the first general remarks on the connected life of truth and post-truth since antiquity, let us now briefly bring the focus on the conflict and necessary connection between truth and politics. And let us do so in order to develop the main argument of this paper: to claim that truth-making procedures (what can be named the «art» of truth) could the key to understand (and resolve) the current "crisis of truth". So, it might be useful to enter a digression a digression into more contemporary reflections. In particular, I would like to recall some core passages of Hannah Arendt's essay entitled *Truth and Politics* (1958). In one of the opening passages, her words are substantial:

> The chances of factual truth surviving the onslaught of power are very slim indeed; it is always in danger of being maneuvered out of the world not only for a time but, potentially, forever. Facts and events are infinitely more fragile things than axioms, discoveries, theories – even the most wildly speculative ones – produced by the human mind; they occur in the field of the ever-changing affairs of men, in whose flux there is nothing more permanent than the admittedly relative permanence of the human mind's structure. (p. 231)

In the modern age, Arendt claims, the ancient link between truth and government disappears: modernity is the time where truth is neither given nor disclosed, but always produced by humankind. This disappearance is rooted in antiquity, since "historically the conflict between truth and politics arose out of two diametrically opposed ways of life – the life of the philosopher, as interpreted first by Parmenides and then by Plato, and the way of life of the citizen" (p. 232-233).

The public space gradually became the area in which potential fake news or false facts could arise for some purpose, and in which opinion started growing parallel to truth and gaining legitimacy. The link between opinion and truth is interesting if observed from the perspective of current post-truth practices. In fact, the very difference between those who lie and those who feed post-truth politics is that those who lie do it consciously, while often fake news can circulate among those who are looking for a con-

firmation of their own theories and that are convinced to be right. To put it briefly, the uses of power and the act of governing are always connected to opinion: pure and absolute truth would be incompatible with recognition and reciprocal legitimation, which are both necessary aspects of the exercise of power.

Against these general remarks, it must be added that, nowadays, the notion of "post-truth" seems to share some of the meanings that identify the concept of "fake" (Andina, 2019, p. xiv) and that some fakes take on a more structured form than others. In this case, when fakes are more structured, we talk about "post-truth":

> We must try to keep in mind is that this transition from truth to post-truth seems to be subject to two conditions: first of all the idea that truth is often placed, or perhaps hidden, in inaccessible or hardly accessible places. This idea then generates a fundamental distrust, accompanied by the feeling that the truth is often intermingled with deceit and that there is no way to separate the two areas: truth and lies tend to overlap and it is seemingly impossible, from an epistemological point of view, to keep them separate. (p. xiv)

In comparison to the force and stability of axioms, opinions, and statements functional to realize some purpose, the fragility of facts and events, mentioned by Hannah Arendt, had already been at the centre of Kant's and Nietzsche's deconstruction of truth. As a matter of fact, the two philosophers had pushed truth first outside the field of metaphysics (Kant) and, more radically, at the edge of the philosophical realm (Nietzsche). For Nietzsche, it is basically impossible to know what is absolutely true, since truth is always relative and functional to some purpose: each individual knows what is useful for himself – thus, gradually utility has substituted reason in the true/false judgement. Such a crumbling of the value and legitimacy of truth would lead (as it did, and post-truth confirms this) to a world where everything has the same value, which is the phenomenon at the core of what is nowadays named «epistemic democracy» (Marconi, 2019). Such a phenomenon can be summarized as follows. A general assumption of every democratic theory is that each citizen should be in the position to check the validity and quality of information collected publicly. Today, "hyper-fragmentation of knowledge has made most disciplinary sub-languages so arcane as to be only intelligible to sub-disciplinary experts. Factual considerations that are relevant to public issues are only accessible to and can only be checked by such experts" (p. 87). This hyper-fragmentation of knowledge has affected the relation between "knowledge and democracy,

by drastically reducing (perhaps destroying) the checking power of that minority of citizens ('informed citizens') who had been able to mediate, somehow, between experts and 'the people'" (p. 87).

Public opinion is going through a quite evident crisis of deference; that process for which the assessment of a judgement used to be measured according to the opinions of experts in a specific field. Epistemic democracy entails "the belief that every opinion is not just as legitimate as any other, but as authoritative as any other" (Marconi, 2019, p. 90). Nevertheless, freedom of expression does not entail the corollary that all opinions are equally valuable. As pointed out by Diego Marconi, in liberal democracies such epistemic entitlements should not be based on birth, wealth, or political allegiance: they should be based on clear and established educational processes.

The Exemplary Art of Legal Truth

For the conclusive remarks of this paper, I aim to bring the focus around the procedural moment, drawing in particular from the exemplary «art» of legal truth. Nobody would object that lawyers, judges and legal scholars have dealt with truth since the antiquity (I stated in Condello, 2019). First, on the relationship between law and truth, we must preliminarily draw a distinction between, on the one hand, the truth-value of a proposition of law and, on the other, the series of rituals, or passages, through which truth is *made via procedure* by the judiciary – what has been termed "judicial truth" (Viola, 1995; Patterson, 1996). Second, and more specifically, it must be recalled that each juridical system has certain procedures, which might differ from those of other juridical systems, used to allow the officials to reach judgements concerning the truth and significance of certain propositions of fact (Mason, 2019, p. 95). More properly, it could be claimed that

> each area of law within each legal system has a complex set of rules constituting its own epistemology for deciding questions of fact in that field, which might, at times, be quite different from other epistemologies within that same legal system. (p. 95)

So, for instance, as far as evidence is concerned, legal systems have precise rules that specify how and in what circumstances certain material objects, propositions,

assertions and arguments may be presented within the legal forum; and, moreover, how these singular things must be analysed, evaluated, assessed and rebutted.

Therefore, it can be stated that law has specific *truth-criteria* that are parallel to those of natural science, and that yet remain distinct from it. The most relevant difference does not reside in particular methods, but in the normative appointment of a subject authorized to produce legal facts. Law is an exemplary field to observe what Ferraris (2007) would define as "*meso*-truth" (p. 190): a truth that is not opposed to a "*hypo*-truth" or "*hyper*-truth", but that stands instead on the mediation between ontology and epistemology characterized by the *procedure*, or *technology*, through which it is reached. In the case of "*meso*-truth", truth is neither the result of epistemology that shapes ontology, nor an ontology that is reflected into an epistemology, but has instead the form of a triangle, composed by three poles: ontology, epistemology and technology – this third representing the passages-procedures necessary to link ontology and epistemology. Truth is made, produced, constructed: it is, therefore, neither revealed nor does it emerge. It is an art, in the Greek sense of a way of making things. Legal truth is indeed a *meso*-truth that respects a positive theory of verification: from the Latin *veritas facere*, i.e. making something true. From this point of view, ontology is a *truth-bearer*, i.e. it is the space from which truth can be obtained. But it is technology, or we could say procedure, that more properly constitutes a *truth-maker*.

Law is a field in which the *mediatory* character of truth is revealed in an exemplary way. The mediated and "technological" nature of legal truth is so unquestionable that, in fact, diverse categories of truth-making procedures exist: we can list "*inquisitorial* systems versus *adversarial* systems of procedure, regarding whether it is the court or the parties (or their representatives) which are primarily tasked with investigating and presenting such matters" (Mason, 2019, p. 95). Similarly, there are "jury and non-jury based approaches, regarding whether non-legal professionals are required to make certain types of decisions" (Mason, 2019, p. 95). Law purports to make decisions regarding non-legal states of affairs or events in order to reach conclusions that may have dramatic *effects* in the real world (e.g. the incarceration or execution of the accused, where foreseen, in a criminal trial; or the awarding of damages or other remedies in private disputes). Following Ferraris, we can say that truth does not emerge with reality but is always subsequent to it (2017, p. 194) – truth has a functional and finalistic character and depends on the procedure through which it has been constructed.

Procedure is a technology and, as such, it is the very essence of legal truth – it is the guarantee for its correctness and the only way to reach it. Like the Derridean

différance, the Platonic *chora*, the Hegelian *dialectics* and the Kantian *scheme*, the technological mediation is a third space which gives sense to both facts and values in the legal realm. Being a space of hermeneutic mediation *par excellence*, law constitutes its objects through procedure. This was the case already in Roman law (Schiavone, 2017), where the ascertainment of facts, the judgment on the *res* and the search for truth all converged in the conflict decided through the trial. Legal procedure has since been the space for the search of truth, for the fight for knowledge, in which every rhetorical activity is aimed at recognizing the truth because all potential consequences depend on this result. Being the outcome of a formalized procedure, the correspondence between ontology and epistemology results from such a procedure. For this reason and because of its nature, the only acceptable correspondence between ontology and epistemology relies in that specific situation. What characterizes such form of truth is that it is a truth *within* the judicial decision, but not the truth *of* the judicial decision (Viola, 1995, p. 249). The very sense of legal truth is thus related to the sense of the whole procedure: it is the most functional form of truth and, for this reason, a very authentic one (following Nietzsche). Unlike other truth-discourses, the legal one is intrinsically embedded in the finalistic and contingent nature of truth, and yet it is oriented towards and influenced by a certain idea of justice and order that the law aims at realizing – which recalls that pre-Socratic connection between *aletheia* and *dike* mentioned at the beginning of the paper.

There has to be only one, and a certain, way for the ascertainment of juridical truth. This creates a potential break between the factual truth and the artificial truth, which is the output of the trial. As a matter of fact, as the judge is also appointed to find and interpret the norms that he has to apply, the legal process regards as well those aspects in which the empirical truth is put aside in favour of what can has been defined "procedural truth" (Resta, 2008). Among others, Hans Kelsen offers one of the most relevant attempts of a unitary solution between factual and judicial truth: by trying to avoid every epistemological break in the legal process, he supports the constitutive character of the judicial judgment, considered as both constitutive of facts and of norms. Judicial truth corresponds to procedure itself: technology identifies with ontology. From the point of view of the procedure, there are no actual facts, but only legal facts, fixed by the performative force of the judge's pronouncement (Viola, 1995, p. 252). A *legal fact* is not a natural fact ascertained by a judge in a legal process, but it is the ascertainment itself. The most relevant difference with verification procedures in science resides in the *normative* appointment of a subject authorized to *make* legal facts. If legal rules of procedure

> put in place certain safeguards and privileges of access to seek to prioritise the trustworthiness of certain assertions of truth, as well as the rights and interests of the parties concerned (…), it would seem almost axiomatic that the legal process and the courts have no privileged access to 'the truth', even if we were to consider 'truth' a complex matter of social convention. (Mason, 2019, p. 96)

There is no clear requirement for legal decisions to fit with broader social conventions, or with decisions of truthfulness or with their findings. Despite the legal process's privileged societal role in resolving questions of "truth" for the purpose of settling disputes and despite the undoubtable consequences produced by legal processes, such procedures and practices can tell us little about truth or, more deeply, the law's relationship with truth. By the way, judicial decisions in law are also normally based on reasons that are partly not in strict "legal" terms. They concern, and depend on, other aspects, e.g. the application of general rules of logic and argumentation, or common sense, as well as the framework of culture and consensus regarding experience.

Against this background, we can finally and conclusively state that truth in law is not dependent on any pre-existing ontology. Epistemology and ontology in law are interlinked since it is legal argument and reasoning, *via* procedure, that produces legal facts. The possession of legal truth is always the possession of the legal modes that generate that truth (Mason, 2019, p. 109). Legal propositions and decisions are not true (only) by virtue of their fitting within a certain framework or of their correspondence to a set of concrete facts to be proved. Without the modes, the technologies (i.e. the arguments that accompany them and indeed *justify* them), putative legal truths are simply that: putative. Modes of argument within law are not simply ways of accessing legal truth that exists somehow beyond those arguments. Instead, those arguments result in the truth of the proposition (p. 109).

All the procedures aimed at making or producing truth (*veritas facere*: Ferraris, 2017), especially interesting in the age named 'post-truth', can lead to the creation of un-realities that exist parallel to "real" reality, one "riddled with falsity, inconsistency, and confusion" (Fitzpatrick, 2017). The majority of commentators agree on the fact that the main aim of such a "passage" – from truth to post-truth – is to confuse the perceptions of reality and to break down trust in order to achieve the dependence of individuals on the dominating powers. Fitzpatrick has read this transition through the Foucauldian intuition that liberal democracy would have produced the singularization of individuals (Foucault, 2007, p. 89, p.106).

The remarks discussed above suggest a comparison between diverse attitudes towards truth, where law could have an exemplary function for other fields (such as politics). Although finalistic and always functional to a purpose, legal truth (judicial truth in particular) must be the outcome of a certain "art". In fact, new technologies and social media "enable members of groups to strengthen each other's beliefs, by shutting out contradictory information: unlike legal procedures (I would say: opposite to legal procedures) post-truth politics have been made possible by a loss of trust in institutions and by a loss of grounding and legitimation of truth-making procedures and systems. This has caused an extremely serious consequence: truth has lost its *raison d'ètre*" (Condello, 2019, p. 25-26). In other words, be it artificial or constructed-produced, truth is still bearer of certain public responsibilities that cannot be forgotten – even when making the truth becomes easy, all to easy. Those responsibilities can only be met through a certain control on the mediation between ontology and epistemology provided by the technology of truth-making. The consequences and the concrete impact of truth, in law, are directly related to its proceduralization and deliberately recognized artificiality. What is different in current post-truth politics is that, instead, the procedures of truth-making and the constructed nature of truth are often concealed because otherwise post-truth politics would lose their rhetorical force. As a technique, law permanently (and openly) builds connections between language and reality and leads to the attribution of values to propositions and facts: the *iuris prudentia* is indeed a *téchne* (p. 25-26). The *prudentia* of modern law is proceduralized for a reason, and the reason is to avoid the risk of arbitrary phenomena like epistemic democracy and the consequent spread of fake news. Such a knowledge and capacity of judgment is there to prevent from irrationality. And it is prudence, indeed, that often disappears from the political use of truth.

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