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Is There Fact in a Trial? A Rhetorical Account of Legal Reasoning

ABSTRACT

This paper treats the question of knowledge of fact in the legal context, especially in the paradigmatic context of a trial. Moving through the analysis of its fundamental dialogical structure, and lingering on the transcendental value of dialogue, attention is given to the activity of the parties involved in a trial (namely lawyers and prosecutors), with the aim of understanding how they come to acknowledge and represent fact. The idea is to avoid the extremes of both dogmatic and sceptical stances with regard to the existence of fact, stating that both facts and interpretation exist, in the sense that it is impossible to acknowledge facts without interpretation. The final aim is to show the peculiar role that vagueness of language plays in a trial so as to outline a "classical" model of legal logic.

KEYWORDS

Cognition of Fact in Trial; Dialogue; Legal Reasoning and Argumentation; Vagueness of Language and Legal Logic

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1. *Introduction*

The aim of this paper is to present some reflections on the issue of the cognition of fact in trials (in the adversarial system), which is highly important for the practical dimension of law and for an examination of legal reasoning. Nevertheless, at the very beginning of this analysis it is important to remember that «essentially scholars in philosophy of law have improved their interpretation and application of written norms, but not their analysis of facts, unless in terms of renewal (or subsumption) of facts to normative types»[1].

We think that one of the reasons for this situation could probably be traced back to the modern idea of law. In fact, if one examines major modern philosophical conceptions of law (doctrine of natural law, legal positivism and legal realism), in spite of their distinctions, it is possible to find a common feature, which is exactly the main relevance assigned to the dimension of norms, which are the paradigm of law itself: to think of law means, in other words, to think of norms. So it is no accident that when we speak of the «renewal or the subsumption of fact to normative types», according to the modern idea of law, legal reasoning is reducible to the model of the so-called legal or practical syllogism: a syllogism in which the major premise is a norm; the minor premise is the fact; and the conclusion is the subsumption of fact to norm (i.e. law). But we do not want to discuss here the structure of legal syllogism[2]. It is sufficient to remember that, by now, this kind of model is in crisis and some of the main criticisms point to issues in its major premise: as hermeneutics explain, there is no evident and objective meaning of textual provision and norms are the result of complex operations of interpretation[3]. It is also clear that it is not possible to look at facts (the minor premise) in terms of mere descriptivism: according to epistemological outlooks revealed by criticisms of contemporary philosophy of science of the modern idea of knowledge, now it seems more suitable to speak of storytelling of facts[4] or construction of facts[5], and there is no lack of hermeneutical explanations for the constitution of legal facts[6]. Besides them, beyond the idea of

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1 TARUFFO 2009, 199.

2 A formal representation of legal syllogism is in ALEXY 1978, or BERNAL 2013; a recent study on legal syllogism is NITSCH 2012; for criticism of the syllogistic model, see above all, MANZIN 2009; MANZIN 2012; and PUPPO 2012b.

3 See for example ESSER 1970; GADAMER 1960; VIOLA, ZACCARIA 1999; ZACCARIA 1990.

4 As exposed, among others, by DI DONATO 2008.

5 See TARUFFO 2009.

6 For example, HRUSCHKA 1965.

reasoning as a sort of deduction, and reconsidering the crisis of the positivistic paradigm of knowledge, the form of legal reasoning is now better described in terms of constructivism[7] or as a complex set of rational operations in which abduction plays a constitutive role[8].

But, generally speaking, all these theories seem mainly focused on the role played by the judge in a trial and these different (but for several aspects converging) analyses are aimed at explaining how the judge can know facts and how he/she can relate law and facts, analyzing the peculiar forms of reasoning that he/she adopts for these operations[9].

Obviously, these are all important and significant issues which interest practice and theory of law and it is really impossible not to consider them as crucial problems. However, we would like to examine another aspect of the question, perhaps a prior or at least a concurrent one: instead of thinking of the judge's activity, we should stop and look at other subjects' activities involved in a trial, namely the parties (i.e. lawyers and prosecutors), trying to understand how they might know and represent facts. I think that these activities might be considered prior or at least concurrent to the judge's activities since, according to due process of law, facts enter the trial with the parties, who are obliged to present arguments to uphold their own defence in respect of the burden of proof.

The context in which these activities take place is indeed characterized by a special nature both from a structural and a linguistic point of view: and I think it could be useful to say something about these peculiarities since in some way they also condition the problem of the judge's cognition of fact in a trial.

2. *The dialogical structure of a trial*

Beyond the differences among their theories, one of the most important common results of the argumentative studies of Perelman and Toulmin is the attack on the modern and Cartesian idea of knowledge, in an attempt to regain forms of rationality different from the deductive one and informal criteria of logical validity. But it is advisable to remember that «an element of argumentation [...] neither Toulmin nor Perelman nor formal logic enhanced – which is instead the keystone of the researches conducted on argumentative rationality from the 1970s onwards – is dialogue»[10]. Without going into the different contemporary approaches developed in the field of argumentation theories, I think the point is extremely important, since, in my opinion, the rediscovery of dialogue is the main factor that allows us to find a rigorous foundation for argumentation[11].

To understand this point it is, however, necessary to explain what "dialogue" means, because (as everybody knows) it is possible to assign different meanings and several semantic values to this word. For example, according to Douglas Walton «a dialogue is defined as goal-directed type of

[7] As it is well explained in VILLA 1984; VILLA 2004.

[8] See TUZET 2010.

[9] For an analysis of the concept of fact in law, and for a discussion of the problematic distinction between law and fact in trials, see for example VOGLIOTTI 2007.

[10] CANTÙ, TESTA 2001, 132.

[11] CANTÙ, TESTA 2001, 132 remind us that studies on dialogical contexts are developed in contemporary argumentative theories, such Erik Krabbe and Douglas Walton or van Eemeren's school: see for example WALTON, KRABBE 1995; WALTON 2002; VAN EEMEREN, GROOTENDORST 1984; FETERIS 1999; VAN EEMEREN 2010. An analysis of the types of dialogue (also with reference to Walton's and van Eemeren and Grootendorst's theories) is presented in MACAGNO, WALTON 2007; Walton and Krabbe's theory was recently discussed by VAN EEMEREN 2010 (see in particular ch. 5, sec. 5.2). For an outlook on contemporary argumentative theories see VAN EEMEREN et al. 1996. A cross-disciplinary perspective on legal argumentation theory was recently offered by DAHLMAN, FETERIS 2013.

conversational exchange in which two parties reason together, taking turns to ask questions, give replies, and put forward arguments to each other»[12]: in this way we have a proposal of a «practical approach to argument evaluation [which] is called dialectical in the ancient Greek sense»[13]. So I believe that a good way to understand the profound meaning of "dialogue" is to look at it from a philosophical perspective, namely to remember that, in the Western philosophical tradition,

> «philosophy has been essentially seen as *logos*, in the word's great sense, namely not as a mere "discourse", semantic (exclamation, prayer, order, etc.) or apophantic (statement, assertion, announcement, revelation, observation, discovery, testimony), but as "argumentation" [...]. By "argumentation" I intend a discourse which is not limited to saying how things stand, but which tries to justify, to motivate, to demonstrate what it asserts, to bring reasons, to "account" for itself»[14].

As is well known, the distinctive form of argumentation we find in philosophy is dialectical confutation, «that is to say to state the truth of a statement through the verification of the impossibility of the statement opposite to the first one»[15] thanks to the use of the principle of non-contradiction and of the principle of excluded middle. From this point of view, dialectical confutation is the result of a dialectical confrontation, i.e. of a dialogue, which entails argumentation.

In fact, Enrico Berti continues, this kind of argumentation «takes place necessarily within the frame of a dialogue, real or fictitious, between two interlocutors, each one of whom claims a thesis conflicting with the thesis of the other»[16].

In this way a strict (or we could say an *essential*) relationship is reached between argumentation, dialectical confutation, truth and dialogue. And this is the reason why, when we speak about dialogue, according to Berti, we have to understand:

> «dialogue [...] in a strong sense, that is to say not as simple conversation, but as discussion, as comparison between opposite theses, aiming to determine which of them is true and which of them is false. [...] When somebody says that dialogue could be fictitious too, it hints at the possibility that someone holds talks with himself, that is to say someone who represents to himself the negation of his own position trying to confute it. [...] From this point of view, dialogue, for philosophers, is not a mere state of affairs, or only an ethically advisable behaviour, but a sign of willingness to listen, of respect of others, of self-criticism. Dialogue is the unavoidable condition of dialectically arguing, and so of philosophically thinking. [...] I consider dialogue not simply a fact, but a transcendental structure of philosophical argumentation, given its non-apodictic, namely monological, nature, which is dialectical, therefore dialogical»[17].

According to this lecture, it is clear that in our philosophical tradition, which can be dated back to Thales and Parmenides and then to Plato and Aristotle, the link between *logos*, dialogue and truth is essential.

Logos is, however, a word which has many meanings, such as "discourse" and "argumentation", but also "reason" and "logic": in this way, our philosophical tradition points out to us a model of knowledge in which all these elements are in some way strictly interconnected.

[12] WALTON 2002, xvi, nt. 2. In a similar way WALTON 1992, 133 states that «a *dialogue* is an exchange of speech acts between two speech partners in turn-taking sequence aimed at a collective goal».
[13] WALTON 2002, 163, with reference to HAMBLIN 1970.
[14] BERTI 1995a, 1.
[15] BERTI 1995a, 2.
[16] BERTI 1995a, 3.
[17] BERTI 1995a, 3 f.

Furthermore, I think it is not without substance to remember that the transcendental nature Berti assigns to dialogue is also attributed by him to Karl-Otto Apel's transcendental pragmatics and to Jürgen Habermas' theory of communicative action, since «communicative situation seems to be untranscendable, i.e. unquestionable, because it is exactly necessary to put it up for discussion in order to communicate»[18].

In the same way, Berti explains, it is possible to deny dialogue if and only if somebody brings it into question; but to do this he/she is obliged to carry out a dialogue (maybe a fictitious one, but this is not important) to determine which claim is true: the one which states dialogue is undeniable or the one which states it is not[19]. This is a very peculiar situation, which echoes Aristotle's *Protrepticus*, according to which it is impossible to not philosophize, since if we want to say that it is not necessary to philosophize we are obliged to assume a philosophical position, precisely the one according to which it is not necessary to philosophize. So, whether somebody wants to philosophize or not, it is necessary to philosophize.

I think that this kind of approach to philosophical dialogue could be considered valid for the structure of dialogue in general and then also for that special kind of dialogue that is a trial, since the transcendental nature of a dialogical situation is the same in all these argumentative contexts. But we think more precise information is needed, since we might think, from a phenomenal point of view, at least of some types of dialogue Enrico Berti does not take into consideration: but I would like it to be clear that his theory is totally shareable and that what I propose here is simply a contribution to the theory of dialogue[20].

As we have seen, he talks about two types of dialogue: dialogue in the strong sense of the word, in which interlocutors try to understand which discourse is true; and dialogue in the weak sense, that is to say a mere conversation in which there is no interest at all in truth (maybe, we say, because interlocutors believe that truth does not exist and so all opinions are misjudgements or all opinions are true, which amounts to the same thing). Now it is quite clear why Plato and Aristotle attacked the Sophists and Eristics, who denied the presence of truth in rhetoric and the dialectical power of confutation[21]. As already mentioned, we have dialogue in the first and strong sense of the word when: i) there are two interlocutors, each one of whom claims a thesis conflicting with the other's; and when: ii) the interlocutors are concentrated on determining which opinion is true through the dialectical verification of the opposite opinion's impossibility. Dialogue in the strong sense of the word could be fictitious too, since it is possible that somebody, as it were, speaks with himself to criticize his own opinion trying to confute it and so verify if his opinion is true or false. A note only: even if we say "opinion", we are perfectly aware that, concerning the epistemological basis of dialectic (which is now at stake), Aristotle clarifies that the premises of dialectical confutation are *èndoxa* and not mere opinions, which are different from *èndoxa* since *èndoxa* are opinions which «are "generally accepted", which are accepted by everyone or by the majority or by the philosophers – i.e. by all, or by the majority, or by the most notable and illustrious of them»[22]. So it is clear that opinions and *èndoxa* are not the same thing, since «opinions [...] do not coincide with *èndoxa*, but [...] these are comprised by

[18] BERTI 1995a, 4.

[19] BERTI 1995a, 4.

[20] In this sense, what is argued here is that we should think about the relationships between Berti's and Walton's theories with regard to the characterization of dialogue and in particular the normative framework presented in WALTON 1992, and WALTON, KRABBE 1995, according to which trial is persuasion dialogue in the sense recently discussed in WALTON 2002, chs. 5, secs. 2 and 4, and ch. 9, sec. 5.

[21] For an explanation of the necessary presence of truth in rhetoric see for example ZADRO 1983.

[22] ARISTOTLE, *Top*. I 1, 100b 21-23.

those»[23]. But I think I can continue talking about opinion, making it clear that when I use this word in a dialectical context according to Aristotle I mean *èndoxa*.

As mentioned, besides to these types of dialogue I think it is also possible to consider at least other types of dialogue in the strong sense of the word, in which we could, however, find some aspect of real dialogue and some aspect of fictitious dialogue, but also a few differences. I think, in fact, it might be possible to imagine dialogical situations which present different phenomenological aspects compared to the one I have already analyzed; and it might be interesting to point them out, and to contribute to forming, so to speak, a taxonomy of dialogical situations one might come across in real life, trying to contribute to providing an as exhaustive as possible illustration of it.

Think, for example, of dialogue between two interlocutors (as in real dialogue) who, however, share the same idea, so that we have not a duplicity of positions (as in fictitious dialogue): so, even if we have two interlocutors, it is possible to not find any clash of opinions. In my view[24] what prevents a dialogue between people sharing the same opinion from degenerating into a mere conversation could be the fact that, as in fictitious dialogical situation, one of the interlocutors, or maybe both of them, hypothesizes a possible confutation to their common opinion, to verify its truth. But, unlike fictitious dialogue, in this case it could be easier to analyze the problem, since in fictitious dialogue somebody is alone to discuss his own opinion and maybe it could be harder to think about objections to it. To sum up briefly this point, I could say that if we have many people speaking together but sharing the same idea without trying to confute it, we have only the guise of dialogue even if we have various interlocutors: despite appearances the situation would be in fact monological and not dialogical.

Another example of dialogue to enhance our exemplifications could be one in which we have two interlocutors without difference of opinions because one of them does not have a precise opinion. Think, for example, of a dialogue between doctor and patient: maybe they do not have a different opinion about treatments (even if this could be possible) since the patient does not have an opinion at all. But it could be the case that the doctor speaks to persuade the patient about the treatment's efficacy, discussing different medical possibilities to show that the treatment he prescribes is *truly* appropriate. So, also in this case it is necessary to imagine other hypothetical possibilities to discuss, trying to explain which is the best. And the same thing happens, for example, in a dialogue between lawyer and client, with whom it is necessary to discuss the case for the defence, imagining the opponent's objections. And so on.

I think that these examples allow us to specify that when speaking of multiplicity of interlocutors in dialogue it is better to think of the multiplicity of positions than the multiplicity of people, since it could be the case that we have one but not the other. Obviously, a thesis is defended by someone, and so to think of objections it is necessary to imagine a supposed interlocutor to assume, in a monological context, a dialectical opposition, which is what is needed to check the alethic values of the opinions.

All things considered, I think it is possible to say that, at a basic level, we are in the presence of dialogue:

– when we have two or more people in a reciprocal relation (or just one for fictitious dialogue), speaking together about a common subject in a rational way, namely to bring a thesis up for discussion with the aim of assessing if it is true or false; if they share the same opinion (or always in fictitious dialogue) to reach this alethic aim they (or he/she in fictitious dialogue) are obliged to think of an opposite thesis and to discuss it by trying to confute it;

[23] BERTI 1995b, 188. About the value of *èndoxa* in Aristotle's conception see also BERTI 2001/2.

[24] From this point of view, I repeat that what I am saying here is not a confutation of Berti's thesis, but only an enhancement of his exemplification; on the other hand, a close examination of contemporary theories of argumentation about this proposal is surely a point which cannot be discussed here.

– when there are two or more people with a difference of opinion; in this case, dialogue could assume a controversial form, in which we should expect that people would be clearly willing to discuss their own opinion, searching for truth and trying to persuade one another. (I say that dialogue *could* assume a controversial form because it is possible that people do not agree to discuss their opinions or discuss them in respect of rationality; but in this case there is no space for dialogue and peaceful coexistence, but for violence only);

– a peculiar form of controversy is the one we find in a trial, since it is characterized, beyond two or more people with different opinions, by the presence of a third person (namely the judge) who has to be persuaded by parties involved in the trial and who is called on to determine in an impartial way which party is in the right according to substantial and procedural laws, pronouncing about the trial's truth[25]. So I think it is possible to say that a trial is a peculiar form of dialogue, namely of controversy.

As already mentioned, these examples probably do not exhaust the different types of dialogue we might find in real life, but I am quite sure that every kind of dialogue presents this basic dimension: *two* (or more) people in reciprocal *relation*, speaking *together* about a *common* topic, searching for an affirmation of *truth* putting into question the different opinions they argue, trying to confute the opponent's one (this is valid for fictitious dialogue too, since it is sufficient to say that one is obliged to imagine an opposite opinion and so another interlocutor). So, I think it is possible to say that, from an ontological point of view, in a dialogue we have:

a. *Difference*. This is the difference of dialectical opposition among opinions discussed in dialogue, and so the difference of subjects involved in it. For fictitious dialogue and for dialogue in which people share the same idea, it is necessary to think of hypothetical interlocutors who defend opposite theses;

b. *Identity*. This is the identity indicated by the intercommunity of topic, since we have a common topic with different points of view;

c. *Relationships*. This is the relationship between subjects and between subjects and topic, since different subjects speak together about a common topic.

In other words, I think we can say that dialogue is the place in which we find difference, identity and relationship among them. This is extremely important, since here we have, I think, the explanation of the undeniabilty of dialogue as a transcendental situation: dialogue corresponds in fact to the structure of the Principle (in Greek, *Arché*) in which we find the relationship between identity and difference or, along the same lines, by unity and multiplicity[26]. As is well known, this classical comprehension of *Arché* would entail a similar dimension of logical activity, which we have already encountered along our path, since it is known by the name of *Logos*.

With regard to law, this identifies the trial as the original dimension of law instead of rules understood as a State's formal will, for which a multiplicity of parties (State and citizens) is needed but not a multiplicity of opinions (for example, in the Hobbesian conception, legal positivism conceives obedience of law only or, otherwise, ways of bringing somebody in line with law), so as to make truth extraneous to law.

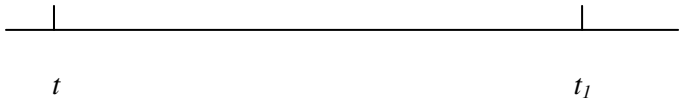
Up until now I have tried to clarify the particular structure of the trial, namely the context in which we find the problem of the cognition of fact. Now it is time to explain what is meant by the word "fact" in a trial and then to understand how it is possible to have cognition of it in this dialogical context.

[25] A defence of trial's alethic dimension (centred on the main role played by the judge, in some way sacrificing the dialectical dimension of dialogue between the parties) was recently presented and discussed by TARUFFO 2009.

[26] As it is well clarified by MANZIN 2008.

3. *Fact in trial*

As we have seen, for modern ideas of law the model of legal reasoning is reducible to a practical syllogism, a model that is in some way, and especially at a practical level, still very much alive. In a previous article[27] I had the opportunity to discuss the model of knowledge which is correlated to this model of reasoning, arguing that, with regard to the development of modern legal science, scholarship's "North Star" has been for some time scientific knowledge. For my part it is quite clear that when Cesare Beccaria – who can be considered one of the first and greatest representatives of that way of conceiving legal reasoning – presents his own conception, he is thinking of a monological and not a dialogical legal context, conceiving the judge as a sort of scientist and the trial as a sort of laboratory, in which the judge can reach the certainty of his/her decision *describing* fact and, in the end, knowing law *as* a fact, since any interpretation of it is forbidden. To represent the theoretical background of this kind of model, I think it would be useful to look at the following graph, which represents the timeline in a modern spatial conception, in which fact occurs in time *t* and trial takes place in time t_1:



(Fig. 1)

According to this way of conceiving experience, from an epistemological point of view there is a distance between trial and judge (they are in time t_1) and fact (it happened in time *t*), which is similar to the distance that occurs between a scientist and his experiment (i.e. between subject and object): and it is this kind of distance that allows the division between subject and object, and so an objective and neutral knowledge of law and fact. In this conception, a judge can reach the truth: but "truth" stands for certainty, according to the foundationalist idea of modern knowledge, in which the two souls of the Cartesian and empiricist model coexist[28].

As I have already stated at the beginning of this article, this model is directed in particular towards the judge's work and also, if now it is in crisis I think that, in some way, it concerns the trial as a whole (and so the parties' positions too) and it continues to live as a sort of undercurrent in our way of conceiving the trial. A "secondary evidence" of this situation could be the fact that it is quite normal to hear these days, from lawyers too, that investigations and trials are directed towards the search of an objective (factual or material) truth, as if truth could remain as an object before, or in any case outside, the trial. It strikes me that what lawyers do not understand is that this common way of conceiving trial, and the relationship between trial and truth, paradoxically condemns them to silence, which is the same result they achieve by thinking that there is no truth in trial. For my part, I think that the only way to envisage the parties' presence is to remember the dialogical and dialectical dimension of trial together with the real nature of truth we find in it, which is argumentative and not objective (even granting that objective truth could exist; and I think it cannot).

Among other things, I think that one of the wrong bases of that modern conception is to believe that facts are before or, so to speak, outside the trial, namely outside the dialogical and subjective situation in which parties bring them to a judge's knowledge: from the epistemological point of view

[27] We refer here to PUPPO 2012b.

[28] See PATTERSON 1996, ch. 8.

this way of conceiving the existence of fact implies believing that facts "stand alone", in the sense that they exist as objects.

I think that it is not necessary to spend much time explaining how and why this kind of epistemological position, at least in its realistic naïve version, is no longer defensible. It is sufficient to refer to the development in the philosophy of science in the 20th century and to remember the well-known phrase by Nietzsche, according to which «there are no facts but only interpretation»[29]. Obviously, this is not the right place to recall all the epistemological revolutions brought about by Quine, Popper, Feyerabend and so on[30] or to analyze Nietzsche's thought[31]. I only quote Nietzsche, since I am quite convinced that, in quoting him, it would be necessary to avoid both dogmatism (and this is quite easy, since immediately the phrase allows this interpretation) and relativism, which could trace back to ideas entailed by Nietzsche's phrase as outcomes of some development of the so called "linguistic turn" (and maybe this might not be immediately so easy, as in the case of the attack against realism).

To tell the truth, in this present state of my research I am quite convinced that it is necessary to admit both that fact does not exist as a mere object and that there is no subjectivist interpretation (of fact) only, since it is necessary to avoid the dogmatic position entailed by the view that claims the existence of facts only but also to avoid the sceptical position entailed by the view that claims the existence of interpretations only.

I think that a possible way to resolve this dilemma is to admit that both facts and interpretation exist, in the sense that it is impossible that facts meet our knowledge without interpretations or, in other words, that it is impossible to have facts without interpretations, namely to have object without subject.

I really think that this relation between subject and object is undeniable: fact in itself is completely meaningless to the extent that it is even impossible to think of a "pure" fact or to speak about a fact as a "pure" fact, because in any case there is a subject who thinks or who speaks about fact. Here also it is possible to think of philosophy of science and remember Heisenberg's indeterminacy principle and the idea that observations always modify experiments, to the extent that even a measuring entails the subject's interferences[32]. In other words, there is no such thing as a neutral observation of the world: the role of the subject is constitutive of every kind of knowledge and it is impossible to think of a mere descriptive representation of "facts". And it does not mean to deny realism: rather, it means to give realism its right place in philosophy, since it seems impossible to deny that something we call "reality" exists[33].

This is, I think, the second important step on our path: the first one has been to discover that it is impossible to deny dialogue, which must be understood in the strong sense of the word as argumentation in a dialectical frame in the search for truth. And now we discover that it is impossible to have facts without interpretation, namely to cut off the relationship between subjects and objects which, as we have seen, is typical of dialogical structure.

[29] NIETZSCHE 1911, 481.

[30] To this end see BONIOLO, VIDALI 1999.

[31] We should refer, above all, to BERRY 2011.

[32] As it is well explained by BONIOLO, VIDALI 1999, ch. 3. If we extended the scope of the investigation to the axiomatic method, we would discover that the Gödel theorem makes it clear that «propositions determined by this method are no more liable to be considered either truths or much less absolutely certain truths, but only recognized opinions from an evaluation of reasons for or against them. These propositions have a nature which is very similar to Aristotle's *èndoxa*» (CELLUCCI 2007, 154 f.). An analysis of Gödel's theory in the domain of legal logic and rhetoric is offered by PUPPO 2012a, ch. 4, which develops PUPPO 2007.

[33] We cannot discuss here this basic point of our perspective: for a very well founded position about realism (a position we share) see D'AGOSTINI 2013.

I think that these considerations become particularly clear when we think of the trial. Its dialogical structure is undeniable, since it is impossible to have a trial without dialogue – that is to say without controversy. Obviously, in a lawsuit it is possible to have judgement by default, but even if the claimant or the defendant does not appear before the court, the one who does is obliged to give evidence for their own defence; and in any case the judge is obliged to verify conformity with the judicial process and to allow the interested party to enter the trial if it turns out to be a procedural error. I believe that the reason for this situation is that due process is not merely a legal principle, but is really *the* Principle (at an ontological level) of trial[34]. On the other hand, I think that it is probably necessary to admit that if someone is obliged to produce something as evidence, the fact he/she claims to prove cannot be considered so "objective" and plain. And any lawyer knows that one of the main problems to deal with is to find out relevant documentation for his or her client's claims.

4. *Trial's linguistic dimension*

As I have said, at a general epistemological level, we cannot have facts without interpretations and also the critical outlook of realism has to reckon with the crisis of descriptivism[35]. In the legal experience, facts but also norms depend mainly on the parties' rhetorical activities: each party claims their own interpretation of norms and their own definition of facts. The dialectical confrontation between them will bring to a right interpretation of the norm[36] and to a true cognition of fact.

To be clearer I would like to explain what I mean when I say that fact exists in a trial. I think that this statement could be understood in two different ways:

a. In one sense, I think it could be right to state that fact exists in a trial since, as I have already mentioned, the modern tendency to divide between time in which we have fact and time in which we have trial is unsustainable. So it might seem that facts exist in a trial.

b. But, in another sense, I think that it is not possible to state that we find facts in a trial since, strictly speaking, the only things we have in a trial are speeches, not facts. So it might seem that there are no facts in a trial.

I think it is important to be extremely clear on this point, since there might seem to be a contradiction: but I think that it is not a real contradiction since we have different ways in which it is possible to look at the relationship between trial and fact.

From, so to speak, an "essential" point of view, what we have in a trial are speeches, not facts: the dimension of a trial is linguistic, not empirical (evidence itself, which might seem to be "fact", is inseparable from the parties' speeches, being an essential part of them). So it might be right to say that we have no facts in a trial. But from, as it were, an "epistemological" point of view facts exist only in the linguistic dimension of a trial, namely in the parties' speeches. So it is right to say that in a trial we have facts. Since facts do not exist by themselves, but we have facts with interpretations only, the dimension of a trial is essentially rhetorical and hermeneutical facts really exist in a trial since they exist in that dimension of language, i.e. *Logos*.

This word, *Logos*, has several meanings, for example "discourse" and "logic". In a previous work[37] I have discussed the idea that "logic" could be conceived at least in two ways: on the one hand, we have the classical thought of Plato and Aristotle, in which "discourse" is conceived as an activity and

[34] For a defence of this thesis see MANZIN, PUPPO 2008.
[35] For a discussion of this topic see TUZET 2010.
[36] For an explanation of the relation between hermeneutics and rhetoric see MANZIN 2011.
[37] See PUPPO 2012a.

not as a static reality, with all implicit consequences for rhetoric, dialectic and so on; on the other hand we have the conception in the Megarians and Stoics, destined to become the seed of modern and formal logic, in which language is an instrument, conventional down to its root, in which rhetoric and dialectic lose their space[38]. What is impressive to note is that in this modern (but ancient) conception of logic one of the linguistic features that is viewed with suspicion is vagueness, considered reason for important paradoxes, namely for the Sorites paradox[39].

This topic might not seem relevant in a discussion about legal reasoning, (description of) fact and trial, but that is just a wrong impression: as stated, the real dimension of a trial is linguistic; and legal language (the language of norms; the language of lawyers; the language of judges; the language of witnesses; and so on) is inevitably *vague*[40].

Obviously this is not the place to discuss the source of vagueness or the Sorites paradox. It is sufficient to recall that the classical example of vagueness, developed by the Megarians – namely by Eubulides of Miletus – for the Sorites paradox, is the puzzle known as *The Heap*: «Would you describe a single grain of wheat as a heap? No. Would you describe two grains of wheat as a heap? No […] You must admit the presence of a heap sooner or later, so where do you draw the line?»[41].

The Megarians developed this kind of example since they wanted to prove that vagueness exists. But since it exists it is impossible to reach certainty[42] and truth in the domain of natural language, which is vague. The main tool to solve the problem was the development of conventional language and to start to think of logic in a formal, still embryonic, sense (this is particularly clear in the theories of Diodorus Cronus and in Stilpo), later developed by the Stoics. In this way, the seed of modern thought is sown: if someone wants to speak about truth he has to think of certainty and so of conventional language and formal logic. Natural language and other kinds of "logic", such as rhetoric, are the domain of opinion, in which there is no truth or untruthfulness, but only the strength of persuasion. Real logic starts to become formalized and in this way we attend to the division between logic, argumentation and rhetoric. And this is the shortest path to the sophistic rise Plato attributes to Thrasymachus, according to whom «justice is nothing but the advantage of the stronger»[43], since «man is the measure of all things», as Protagoras claimed.

But, contrary to the Megarians' view, it is also possible to say that vagueness does not prevent the search for truth, since it is not correct to say that we have neither the right nor the true. We must rather admit that, in the reality continuum, in each case we have to decide what is right and what is true, even if it is not so clear. But since there are right and wrong decisions it is necessary to rediscover the way to judge our choices. I think this is exactly the role of rhetoric and dialectic, as defended by Plato and Aristotle against the Sophists, Eristics and Megarians.

[38] See, among others, BLANCHÉ 1970; KNEALE, KNEALE 1962. On Megarians see in particular GIANNANTONI 1990 and MONTONERI 1984. On the importance of Stoicism for modern legal conceptions see for example VILLEY 1975.

[39] It is impossible to give a complete list of references on Sorites: for an analysis of it, for example, D'AGOSTINI 2009; HYDE 2010; PAGANINI 2008; WILLIAMSON 1994.

[40] A discussion of the relationship between vagueness and law is for example offered by the essays published in the review *Legal Theory*, vol. 7, 2001.

[41] HYDE 2010, 2.

[42] In fact, «vagueness of a term is shown by producing "borderline cases", i.e., individuals to which it seems impossible either to apply or not to apply the term. Thus a word's vagueness is usually indicated, more or less explicitly, by some statement that situations are conceivable in which applications is "doubtful" or "ill-defined", in which "nobody would know how to use it" or in which it is "impossible" either to assert or deny its application» (BLACK 1937, 429).

[43] PLATO *The Republic*, I, 338c.

In this view, which is classical in the strict sense of the word, vagueness of language is no more an obstacle to alethic research: *vice versa* it is the linguistic feature which allows us to build a persuasive argumentation[44].

It still remains to be explained how cognition of fact should be intended in a context which is dialogical and connoted by vagueness of language. I have already dealt with the issue in a previous and wide-ranging research[45], which I do not have the space to sum up here. What I can do is to recall that, in my view, the problem has to be tackled by considering that in the legal domain, and in a trial particularly, we have neither the description of a fact nor a mere definition of the predicates' meaning (or of the rules for their use)[46] used in speeches. What we have is the *constitution* of fact. I repeat that fact does not exist by itself, it is not a clear object of the world that we photograph with our mind: it exists in the dimension of *Logos*, and I believe that it might be possible to "work" with the vagueness which connotes our language so as to "build" fact in discourse. The uncertainty produced by vagueness might in fact be reduced to matching vague predicates, so "using" vagueness and not eliminating it (or, better, trying to eliminate it, since it cannot be eliminated)[47]. Different vague predicates can be related to express a concept, to state an opinion and so to illuminate a fact: the aim is to combine them so as to dissipate the semantic halo stating the outlines of fact[48]. What is exacted here is nothing more than to make a speech, namely that someone «say[s] something which is significant both for himself and for another; for this is necessary, if he really is to say anything. For, if he means nothing, such a man will not be capable of reasoning, either with himself or with another»[49]. As is well known, these are the words Aristotle uses when he discusses the undeniable value of the principle of non-contradiction, supporting the link between rhetorical and dialectical levels[50].

In this way our path goes back to the beginning and this would be the time to discuss the Aristotelian conception of language and discourse and the value of the principle of non-contradiction in the domains of legal argumentation and logic – which now, it should be clear, for us is legal rhetoric. But we have to refer to others[51], remembering that to start continuously over again is what is peculiar to philosophical research but also to freedom, since man is free when he can always ask, searching for truth.

5. *Conclusive remarks*

To reflect upon the problem of fact in a trial I have taken account of the structural and linguistic nature of a trial, arguing that its dialogical feature is the main thing which allows us to find a rigorous foundation for argumentation. The analysis of the nature of dialogue in the perspective of the Western

[44] The theoretical foundation of argumentative rules which govern the legal practice is discussed, among others, in CANALE, TUZET 2009.

[45] See PUPPO 2012a.

[46] This is the strategy formulated by nominalism, which is embodied in analytical philosophy of law also for the treatment of vagueness (see for example LUZZATI 1990; LUZZATI 2006).

[47] In this sense my proposal follows in the footsteps of the philosophical and logical tradition which gives credit to the vagueness of language and which is represented among others by Max Black or the so called "second" Wittgenstein, as well explained by WILLIAMSON 1994, chs. 1 f.

[48] As CAVALLA 2006, 6637 claims.

[49] ARISTOTLE, *Metaph*. IV, 4, 1006a 21-24.

[50] As explained, for example, by BERTI 1987 and 1993.

[51] I limit myself to noting that a profound analysis of linguistic meaning in Aristotle's *Metaphysics* is found in GUSMANI 2010.

philosophical tradition, and in particular of Aristotle's conception as examined by Enrico Berti, allows us to understand the essential relationship we find between argumentation, dialectical confutation, truth and dialogue, which gains undeniability as a transcendental situation.

The impossibility of denying dialogue has been just the first important step in our way. The second one has been to discover that it is impossible to have facts without interpretation, namely to cut off the relationship between subjects and objects which is typical of dialogical structure.

The dialogical structure – connoted by difference, identity and the relationship between them – corresponds in fact to the structure of the Principle (*Archè*) in which we find the relationship between identity and difference or, along the same lines, by unity and multiplicity, which entails a similar dimension of logical activity, that is classically known by the name of *Logos*.

A similar kind of relationship is the one we find with regard to subject and object, i.e. with regard to fact and interpretation of fact. From this point of view it is probably necessary to admit both that fact do not exist as mere objects and that there is no subjectivist interpretation (of fact) only, since it is necessary to avoid the dogmatic position entailed by the view that claims the existence of facts only but also to avoid the sceptical position entailed by the view that claims the existence of interpretations only.

To admit that both facts and interpretations exist is the solution to this dilemma, since it would be possible to admit that it is impossible that facts meet our knowledge without interpretations or, in other words, it is impossible to have facts without interpretations, namely to have object without subject, as well clarified by the philosophy of science of the last century.

Since facts do not exist by themselves, but we have facts with interpretations only, just because the dimension of the trial is essentially dialogical, and so rhetorical and hermeneutical, facts really exist in a trial in the dimension of language (i.e. *Logos*). To bring the dimension of a trial to language entails remembering the unavoidable feature of language that is vagueness. The broad analysis of possible different ways to conceive vagueness at least helps us reach the third and last important step in our way: that is to outline two possible models of logic, arguing that the classical model of logic defended by Plato and Aristotle against the Sophists, Eristics and Megarians nowadays allows us to state the importance of rhetoric and dialectic in the search for truth, which is the aim of dialogue in the strong and authentic meaning of this word.

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