

Idealism, Empiricism, Pluralism, Law: Legal truth after modernity

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1. Introduction

Making a connection between ‘post-modernism’ and post-truth has by now become a standard trope, both within academia and popular discourse, despite post-truth’s only recent emergence as a concept. Such claims are often rather vague and fanciful and lack an altogether credible account of either phenomenon in many cases. This Chapter argues however that within a legal context, there is the emergence of a *legal* post-truth which is the direct consequence of a concrete form of post-modernity within legal practice and thought. While law may be called upon to engage in judgments of ‘truth’ in numerous interesting ways, it does not itself have any particular form of privileged access to the truth of statements or allegations, even though it is often treated as doing so. However, the most persistent question which law must deal with, and indeed the most persistent question within legal philosophy, relates to a deeper form of inquiry into truth: the question of legal truth. In simple terms this refers to the correctness of any particular proposition of law. Within legal theory, this expands to the larger question of what makes, in general, any legal proposition valid, or true. Reflecting upon legal scholarship through the lens of truth reveals that theories of law can be broken down into two broad and radically distinct categories. On the one hand, there exist empirical accounts of law which fundamentally understand questions of legal truth as social questions whose answers are empirically demonstrable. On the other hand, there are ‘idealist’ accounts of law which view legal content, and hence truth, as existing in some way or other in a manner which transcends social practice and which is autonomous from it. Both of these classical accounts, while radically different, share an interesting paradox: they see truth in law as an objective fact, but one which is fleeting and distant, far from the paradigm of legal certainty upon which the ideology of law is partly based.

However, such accounts of legal truth share many other unstated aspects, and are largely based upon ideas which place the *separateness* and *completeness* of legal systems at their heart, providing either a unified ideal or a unified empirically observable social practice. However, they share a common flaw, namely the failure to account for what might be called a *post-modern* phase of development in law, in which ordinary legal questions now regularly require the complex and non-hierarchical interaction of competing legal systems with different ‘truths’ and different ways of arriving at such truths. Such phenomena are commonly referred to as legal or, at times, constitutional ‘pluralism’. This *post-modern turn* within law has also produced therefore what we might call a form of *post-truth* within law. This is particularly significant because it places under great strain both the empirical and ideal accounts of legal truth and require us to re-elaborate an account of what makes a legal proposition true. From certain perspectives, this legal post-truth shares certain important aspects with the cultural phenomenon of post-truth, namely its apparently capricious and deracinated nature.

However, it is argued in this Chapter that, in the legal context at least, post-truth allows for the transcendence of the empirical/ideal divide and the revealing of deeper forms of legal truth and our ability to account for them through theory or, put more simply, explanation. Upon greater reflection, legal truth is *generated* by the very forms of argument, or modes, which allow access to it. Such forms of argument exist also to produce legal truths outside and between legal orders where these appear to conflict or collide. While some legal scholars and others claim that such pressures on structures of knowledge reveal the end of the potential for law to generate truth, it is argued here that, on the contrary, they require a more open and more transparent use of the pure methods and modes of reason which both reveal but also generate legal truth in the first place. This is relevant to post-truth more generally in one specific way, despite the numerous idiosyncrasies of legal truth and knowledge: when assertions of truth within structures of power seem to come to embody the perspectivism and relativism used as methods of deconstruction, the post-modern and deconstructionist projects themselves require radical change: they stay true to their goal of deconstructing structures and discourses of power by applying

the classical epistemologies which are rejected by those in power. Just as legal outcomes which are asserted rather than reasoned or justified are most convincingly deconstructed through sober legal modes, so can the post-modernist project find purpose in a world where dominant *epistemes* seem to have come to embody a simplistic version of post-modernist critiques.

2. The mythologies and truths of law's relationship with the truth

Law has a complex and autonomous relationship with *the truth*, in that it has its own cognitive approaches and communities of practice which seek to arrive at conclusions regarding the veracity of certain propositions. This is true in at least two broad but largely disparate ways, only one of which is the concern of this Chapter. The every day encounter with the law, whether through legal practice or through observation of the legal system at work in all its guises, reveals a social institution which makes claims about its ability to judge questions of 'truth' or 'fact' outside the law itself, and even change the 'truth', or social ontology, of that outside world. However, this is not the law's most important relationship with the generation or discovery of truth, nor its most controversial. Even a cursory examination of legal argument or legal theory and scholarship reveals that the most fraught, and perhaps most important, question in law is what it is that makes a *legal* proposition true, or, more precisely, *legally true*. In order to focus squarely on that question, it is first necessary to distinguish it from the separate, perhaps instinctively more central, relationship between law and truth.

As is well-known to all people with a passing interest in the law, each legal system has its own procedures which are used to allow the officials of that system to reach decisions regarding the truth and significance and certain propositions of fact. In this way, it could be said that law possess its own philosophy of science or epistemology (Laudan 2006, Ho 2008). Perhaps more precisely, it could be stated 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. In this manner, legal systems have complex rules of procedure and of evidence regarding how and in what circumstances certain objects, propositions, assertions and arguments may be presented within a legal forum, and how these things are analysed, assessed and rebutted. Such rules often concern the order in which these facts are presented and the ways in which they were obtained. Certain legal systems, and certain areas of law, such as criminal law, have extremely strict rules regarding the consequences of the breach of these procedural requirements, such as the entire exclusion of that purported evidence (Stumer 2010). Equally, the rules will often concern the manner in which evidence is questioned or presented, with important limits on this.

Equally, different legal systems will task different types of person with different types of task in assessing the 'truth' of any such assertion, and the legal consequences of such finding will depend on the purpose and type of legal proceeding in the first place. In some cases, judges are tasked with making such decisions, whereas in other legal systems or types of cases a mixture of judges and laypersons or exclusively non-lawyers will be required to make decisions regarding such questions of fact (Dammer and Albanese 2013). Sweeping typological categories of legal system are often presented to draw general distinctions between types of procedure in this regard. Thus we talk of *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. Equally we talk of jury and non-jury based approaches, regarding whether non-legal professionals are required to make certain types of decisions. In this manner we see that law purports to make decisions regarding non-legal states of affairs or events in order to reach conclusions which may have dramatic effects in the real world, such as the incarceration or even execution of the accused in a criminal trial, or the awarding of damages or other remedy in a dispute between private parties. Of course, courts, as we shall see in the remainder of this Chapter, are not only tasked with this form of epistemic task, as they also are required to decide on the truth of propositions of law as well as fact. However, this function of the Court as a forum for the purported resolution of fraught questions of disputed truth is rather curious.

Regardless of one's understanding of the nature of truth, to be discussed in detail in the remainder of this Chapter, our treatment of the legal forum as an adjudicator of such matters probably bears little resemblance to other considerations of the truthfulness of propositions. While 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 (Stumer 2010), 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. There is no requirement, it would seem, for legal decisions to fit with broader social conventions regarding decisions of truthfulness or their findings. Despite the legal process's privileged societal role in resolving questions of 'truth' for the purpose of settling disputes and for questions of liability in a more or less satisfactory or fair manner, such procedures and practices can tell us little about truth or the law's relationship with it more generally.

A more subtle version of this relationship between law and truth is to be found not in the law's adjudicatory role but in its legislative or law-making guise, that is its ability, or at least purported ability, to 're-cast' the world in its own image, forging its own truth in the world in a broadly constructivist manner (Luhmann 2004). This occurs in two connected ways. In a straightforward sense, the law changes the rules regarding behaviour and its consequences (Raz 1975). To the extent that these rules are either followed or enforced, law has a peremptory relationship with certain ontological arrangements, with consequences for the truthfulness of propositions. Slightly more complex is the impact which the law has in creating agents, actors, institutions or pathways for action through its regulatory structures, such as creating the private law 'person' or the 'employee' of labour law, by granting certain rights and responsibilities through their enactment (Sinzheimer 1976a, 1976b). The point here is important but should not be laboured: law has the ability, alongside many other social institutions and phenomena, albeit in an often more deliberate and codified manner, to project a 'truth' about the nature, identity and interaction of people, and thus recast social ontology. In a society in which law is effective and possesses this social function, the 'truth' of propositions of social affairs will depend, to some extent, on those same propositions being contained within law, however implicitly.

The concept of truth, as evidenced in this volume more generally, and indeed subsequently in this Chapter, is contested. The respective roles of epistemology and ontology and their relationship with what we consider to be truth are recurrent themes within centuries of debate on this matter. As the preceding paragraphs have demonstrated, the law, in its *adjudicatory* and *legislative* guises has both an epistemic and ontological 'contribution' to matters of truth and their nature. However, these are rather minor and far from unique, in that major institutions and social phenomena possess similar characteristics, with the law's being more significant and visible due to the law's significance in resolving, for practical purposes, disputed propositions and in arranging states of affairs pre-emptively through a projection of its perspective onto the world through the social function and/or enforcement of its rules. These questions are of minor significance in our discussion of post-truth simply because they are socially and historically contingent. The content of these rules could be different, and their significance and social role could change. They tell us little about law's special relationship with truth itself. This relationship is to be found elsewhere, that is in questions of the truth of legal propositions.

Legal procedure might often appear to be centred around propositions of events or states of affairs outside the law and their truthfulness, however in reality this is not the nature of most legal practice. Legal practice is in fact largely based around propositions *of law*, that is regarding what the law says or what it means. Questions of whether someone 'did it' or is telling the truth are not questions which the law has any privileged way of answering, although it is at times required to do so and is treated as doing so. On the other hand, questions of whether, by way of arbitrarily selected example, Article 11 of the European Convention of Human Rights (ECHR) concerning Freedom of Association grants a right to strike, and if so to whom and in what circumstances, is matter upon whose truthfulness legal thought

and legal practice has some form of privileged access. It is this question which this Chapter seeks to analyse.

3. The truth of legal propositions

In common parlance it is often uttered that ‘it is the law that...’. This might be followed with a curious anecdote, such as ‘it is the law that you cannot take lions into cinemas’ in a certain municipality, or something rather more serious or prosaic. Such statements are made as if they were propositions about something with some kind of ontological status in the world, worthy of linguistic formulations that mirror propositions about the natural and social world, such as ‘elephants have tusks’. What is it to say that a proposition of law is true therefore, and what can such reflections reveal about the present collection’s focus on the phenomenon of post-truth? It is true that *lawyers* also make similar statements about the law, containing propositions of legal truth, although they often leave unsaid the qualifying premise that they are talking about the law. However, much of the discourse among lawyers revolves around disagreement, or at least the search for clarification, about propositions of law (Dworkin 1986). Taking the example given at the end of the previous section, it might be (and indeed is) plausible to disagree in myriad different ways regarding whether and to what extent Article 11 of the ECHR does include a right to strike (Ewing 2013). Such disagreements are not simply incidental to legal practice or discourse. On one view, it is the function of legal practice, and of legal reasoning, to provide for an appropriate forum to arrive at the resolution of such disagreements.

Law’s mythology and surrounding political philosophy, such as the notion of the Rule of Law, might be couched in terms which present the law as providing a solid framework of justice based on clear and knowable rules (Fuller 1969, Kramer 2004, Wiener *et al.* 2012). However, the realities of legal discourse are far removed from this in many ways, revealing the elusiveness of the resolution of questions of the truthfulness of legal propositions (Mason 2014). As well as being seen in the disagreements between practising lawyers and court judgments, this can also be seen in two crucial ways within legal scholarship. Firstly, the great majority of legal scholarship, filling thousands of pages every year on every area of law within every legal system, concerns discussion regarding the content of the law, that is the truthfulness of certain propositions of law. Secondly, and possibly more importantly from the perspective of this discussion, legal scholarship of a more general nature, sometimes called ‘jurisprudence’ or the philosophy of law, is primarily concerned with the *nature* of law (Hart 2012). While this is a complex question with all manner of component parts, its most central and fundamental aspect, and indeed the elements around which there is most animated disagreement, is the question of truth within law, that is what it is that makes a proposition of law ‘true’ (Dworkin 1986, chap. 1).

The philosophy of law, or *general jurisprudence* as it is sometimes known, is a surprisingly fraught area of scholarship to those who are unfamiliar with it. It seeks to interrogate the fundamental components of the rather mysterious social practice and/or ideal which we refer to as law. Attempts to characterise even the central tenets of law and legal systems vary wildly, with heated debates regarding the inclusion or exclusion of supposedly central elements. Such debates find their roots in the philosophy of Ancient Greece, in particular Aristotle, and can be traced directly through the work of Aquinas, to enlightenment philosophy of various stripes and all manner of Nineteenth and Twentieth Century philosophical movements. Debates within legal theory have clear links to political philosophy, the philosophy of language, ethics and metaethics and theories of social action and social ontology, among other fields. However, legal philosophy is also a mature field with an identifiable, if internally contested, canon of its own. The major disagreements within legal philosophy tend to focus around the extent to which law can be reduced to an observable social practice, and in which case of what type (Hart 2012). Critics of such perspectives tend to underline the apparently inevitable moral component of law, either within identifying the nature of law itself (as an inherently moral question) (Finnis 1982) or within the content of the law itself (Dworkin 1986). However, this debate, between perspectives which sometimes reductively labelled ‘positivist’ and ‘natural law’, in fact hides are far broader and

richer discussion within legal scholarship regarding how lawyers go about determining the truth of legal propositions. A small amount of explanation of the complexity of this theme is warranted at this stage, before examining the competing theories of truth, and the importance of ideas of post-truth within law.

Take the question posed above, regarding Article 11 of the ECHR. Paragraph 1 of that provision states that ‘Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.’ All, or at least most, lawyers and legal scholars would agree that this provision is what we might call a valid ‘ground’ of law, at least if it remains in force in a relevant legal system. It is a ‘ground’ in the sense that it might form the basis of a legal proposition which flows from it. As a written source of law in this respect, Article 11, and the ECHR itself, is neither ‘true’ nor ‘false’, although a proposition regarding its validity may be of course. The reason why the truth of legal propositions is fraught is that these are things which are built upon legal grounds, which require additional work to enquire into their *meaning* (Patterson 1999). Propositions of a very general nature do often flow directly from grounds of law in an uncontroversial manner, such as, in the case of Article 11, ‘there is a right to freedom of association’, but as soon as any detail is added to such a proposition, such as who is the bearer of such a right, for instance individuals or organisations, or both, a large space has emerged between the ground itself and potential propositions of law regarding its content.¹ What might make any proposition of law true in any particular legal system will of course, in the first instance, depend on the rules of interpretation and application within that jurisdiction. This might include the place of certain rules of statutory construction, the role of previously decided cases, and so on. The matter might also require other grounds of law to be taken into account which might provide other assistance in resolving the status of any proposition of law as true or otherwise. Such matters, in particular in legal systems in which ‘constitutional’ or ‘supreme’ courts have an important role in interpreting the constitution and setting the limits for legislative action, are of huge political and cultural import, and the controversy around the resolution of such matters is well known.

In particular legal systems, such matters are debated around the legitimacy of certain approaches to legal reasoning, such as the fraught debate regarding originalist, textualist, purposive and evolutive interpretation of the United States Constitution (Sunstein 2015). Similar such debates are ongoing in most societies, and in all communities of lawyers and legal scholars (Choudhry 1998–1999). However, such issues exist around the content of law in all fields of law, not limited to large constitutional controversies (Dworkin 1986). On this reading, it is perhaps less surprising to learn that the nature of the truth of legal propositions might be said to be the most controversial and indeed central issue within general jurisprudence or the philosophy of law. A general account of law seeks to understand law from outside the perspectives of the snapshot perspective of one given legal order, and instead attempts to understand law in a more universal sense. A general account of law thereby seeks not to understand ‘what makes a proposition of law true in legal system *x*’ but rather ‘what makes a proposition of law true in general’. In this way, legal philosophy can transcend the parochial legal practices of given legal systems and attempt to understand the nature of law more generally and its relationship with other important concepts and institutions, such as the State, politics, economics, morality, justice, coercion and language (Raz 2008, Hart 2012). This is of course a tremendously ambitious project, seeking to overcome the myriad differences between legal systems and their own philosophical quirks. Indeed, some celebrated legal theorists abandon this catholic project to some extent, deliberately seeking to explain a certain form of legal system in order to draw out broader lessons from its exemplarity

¹ This question has recently been heard before the European Court of Human Rights, and these precise issues were raised, with the Court ruling for the first time that Article 11 did include a limited right to strike. In particular, see *Demir and Baykara v Turkey* (Application no. 34503/97) [2008] ECHR 1345. The same question has been asked within other legal orders in which there exists a legal protection of freedom of association, with sometimes differing results, reflecting differing views of the nature of that right (Fudge 2004, Langille 2009).

(Dworkin 1986). The following sections seeks to locate the dominant themes of general jurisprudence within a broader scholarly discourse about the nature of truth.

4. Truth and legal truth

Broadly speaking, philosophical accounts of the nature of truth can be categorised into two categories: those which seem questions of truth as questions of *correspondence* as those which see them as questions of *coherence* (Kirkham 1995, Küne 2003, Burgess and Burgess 2011). While such a distinction would be resisted by many commentators for numerous subtle, and indeed valid, reasons (Strawson 1949, Tarski and Corcoran 1983), this distinction serves our purposes here. On the one hand, therefore, there are accounts of ‘truth’ which are related to an *ontology* and a *metaphysics* of the world, which exists outside the content of the pronouncement of any proposition which might be said to be true or false. Such accounts can be called the correspondence thesis (Russell 1906, Vision 2009). For instance, to say that the proposition *mice eat cheese* is true would require there to be such things as mice and cheese and for mice to eat cheese, and for this to refer to an action which exists in the world. This presupposes a series of metaphysical assumptions or theses about the world, including that there exist metaphysical facts. The alternative view of truth, which can be labelled the *coherence* thesis, sees accounts such as the correspondence thesis as problematic, in particular due to the atomistic nature of any given ‘truth’ in its account. The coherence thesis locates truth within a broader, more holistic account of knowledge, understanding truth as stemming from a proposition’s coherence with a more overarching understanding of the world or a particular field (Joachim 1906, Walker 1989, David 1994).

While a correspondence thesis therefore sees truth as connected to a series of ontologically extant discrete ‘facts’ within a myriad of truths and falsehoods, the coherence thesis tends to speak more generally of ‘truth’ in the singular, that is as an overarching approach to knowledge. And while the correspondence thesis can be understood as linked to an understanding of truth as linked to metaphysics and ontology, the coherence thesis can therefore be seen as connected to viewing truth an epistemological question. There are all manner of other central controversies within the philosophy of truth which may also help us understand certain questions within legal theory, primarily the centrality and nature of language, however this will not form the basis of the discussion of the remainder of this Chapter. Instead the discussion will focus on the *non-linguistic* analysis of legal reasoning and practice and what this tells us about how propositions of law might be said to be true.

The truth of legal propositions is crucial because of the question of the requirement to find the meaning of the law in any given area, whether to resolve a dispute in an adjudicatory context or to work out the requirements of the law in relation to one’s conduct and what the law requires of it. Twentieth Century legal philosophy was most markedly characterised by the distinction between legal theorists who argued that law was essentially a question of man made rules or standards of some kind which had an ultimate source, probably socially generated, and those who argued that, on the contrary, so deliberation regarding the correct content of the law could be reduced to brute empirical facts in this way, and that moral reasoning was ultimately the arbiter of legal content (Dickson 2001). Such questions generated a tremendous amount of rich, detailed scholarship which had a huge influence within the practice of law itself as well as the philosophical and empirical study of other fields, from ethics to anthropology. However, what this debate revealed was the centrality, as discussed in the preceding sections, of the question of the basis for the truth of legal propositions in understanding the more general mature of law. This allows us to open up the question to a far broader range of perspectives than are usually included in those afforded the glamour of being included within ‘general’ accounts of jurisprudence. Legal analysis from movements such as law and economics, critical legal theory, legal realism and various theories of legal interpretation also qualify, on this basis, as theories of law in this central sense, in that they seek to explain what makes a proposition of law true.

Due to law’s status as a social practice which consists of a community of knowledge, ie people engaged in identifying and applying valid propositions of law, most theories of law contain elements of both the

ontological and epistemic versions of 'truth' discussed above in relation to the correspondence and coherence thesis respectively. On the one hand, law is a brute social fact meaning that some aspect of accounting for the facts in the world is usually found within an account of law. On the other hand, that fact is at least partly constituted by shared practices which are used to determine the truth of legal propositions. To this extent, legal accounts of truth therefore cut across the dominant distinction found within general philosophical theories of truth, discussed above. However, it is also true that theories of law tend to accentuate one or the other of these to a greater or lesser degree, focusing on the empirically observable fact of the existence of legal systems in the world as the basis of law, or, alternatively, on the structures of reasoning against which legal propositions are measured. Nonetheless, it is argued here that a different dichotomy characterises disagreement about legal truth. This distinction is broadly between those accounts of law which see the truth of legal propositions as dependent on empirically observable facts, and those who see it as based on ideals or values. This distinction might be superficially seen as mapping loosely onto the correspondence/coherence dichotomy discussed above, however this would be a misleading assumption in various ways.

The most central instance of the empirical theory of legal truth is that exemplified by HLA Hart's (1968) practice theory of law in which law is understood as a system of rules whose validity (ie status as true propositions of law) rest ultimately on an ultimate social practice, a conscious convergence of behaviour amongst legal officials. This social practice is, according to Hart, a *social rule* containing the criteria to make, change, interpret and abrogate the other rules of the legal system. Ultimately, Hart's account of law seeks to explain law as an empirically observable (social) fact which is nonetheless *normative*, that is a question of rules and capable of generating obligations and rights, etc. This also gives us a rather general account of what makes legal propositions true for Hart: a legal proposition is true if it meets the criteria contained within the empirically observable social practices of the legal community in that particular space. From a general perspective, therefore legal truth is simply a matter of observing what people do and the rules they feel under an obligation to follow. In this way, Hart is part of a much broader empiricist 'positivist' tradition within legal philosophy which broadly agree about the notion of law as an observable practice characterised by certain forms. Positivists of this type might disagree with Hart about what the form and nature of that social practice are, or the form that laws come in, however there is a fundamental agreement regarding the socially located nature of answers to questions of the truth of legal propositions (Bentham 1970, Raz 1980, Austin 1995).

More difficult to place in this tradition is the equally influential work of Hans Kelsen (Kelsen 1960), who refused to locate his theory of law into social practice, considering the content of law, and therefore the truth of legal propositions, to be a matter of legal logic alone rather than its ultimately social nature. However, for Kelsen, the validity of a law was dependent upon its having been passed according to the requirements of a hierarchically superior norm within the legal system, a system whose ultimate validity was ultimate simply 'assumed', as the ultimate norms of the legal system were not authorised by any higher norm within the legal system itself. Despite its rather ethereal nature, Kelsen's theory can also be understood as an empirical one when it comes to the truth of legal propositions, as, regardless of the ultimate validity of a legal system, the question of whether a higher norm has authorised an inferior one is ultimately an observable and therefore empirical question, even if the understanding of this structure was a question of something approaching logic, at least an internal, or pure, legal logic for Kelsen. Such accounts as those of Hart and Kelsen were influential in the Twentieth Century, and indeed continue to be so, in that they take legal language and concepts, such as its apparently rule-based nature, seriously, while seeking to separate it from what they saw as entirely separate issues of its specific content and, more specifically, its morality or justice. These were separate questions for Kelsen and Hart. In the end, Hartian and Kelsenian accounts of the nature of law differ regarding law's ultimate source and how we should explain this, however they see legal truth as resting on empirically observable facts.

However, there exists a strong counter current within legal scholarship which rejects this attempt to reconcile the apparently rule-based nature of law with its apparently socially contingent and empirically observable grounding. Such arguments, most commonly associated with a family resemblance concept commonly referred to as *legal realism*, claim that talk of ‘rules’ or similar concepts within law is misleading, because rules are inherently indeterminant in their real world effects, and that the truth of legal propositions comes through the examination of the application of the law in the real world (Holmes 1897). In its most widely known form, legal realism states that a proposition of law is, at best, a prediction of the application of the law by a legal official (Leiter 1995). Its truth is therefore to be determined by observation of that application. This vision of law embraces in a more holistic manner the atomistic form of truth inherent in the correspondence thesis discussed above, rejecting the rule-based components of modern legal positivism as unempirical. Brian Leiter (Leiter 2007) has recently referred to the legal realist movement as *naturalising* jurisprudence, that is, in the terms of inquiry of this Chapter, seeking to locate the truth of legal propositions in the empirical traditions of the natural sciences. There exist other forms of legal realism which differ in extremely important ways, but which can be understood as seeking to identify the truth of legal propositions within observable social practice.

A rather separate tradition of legal realism seeks to locate the ‘truth’ of legal propositions not in the adjudication of disputes but rather in the social function of the law, ie the usage that is made, in practice of the rules of law, which may be radically different from the abstract principles within legal language (Renner 1929). Again, the truth of a legal proposition can therefore only be grasped by looking into the social practices concern. This second form of legal realism views the truth of law’s content as located within the users’ rather than the adjudicators’ empirical use of the law. A more complex, and harder to categorise, inheritance of the legal realist movement is the critical legal theory movement, which sought to deconstruct in a more aggressive manner the assumptions and categories of the law, but not simply by trying to relocate these within adjudication or usage (Unger 1983, Kennedy and Klare 1984). Critical legal theory instead builds on the work of post-structuralist and deconstructionist theory in particular to seek to break down categories and assumptions, in particular those which obfuscate or legitimate power structures. For the critical legal scholar, the truth of legal propositions is therefore found in deeper ontological structures which are hidden within ostensibly different legal structures. These are accessed through a complex form of deconstructionist epistemology, however the lineage from the legal realist perspective should be clear, at least for the purposes of the goals of this Chapter. Finally, there exist radically sceptical accounts of the truth of legal propositions, which reject out of hand the notion that there is any form of legal truth as such, at least in an ontological sense. Accounts of economic materialism such as that of Marx see law as simply an ideology upon the genuine economic base of social reality: the truth of legal governed relationships is therefore to be grasped entirely outside the law and in the brute social relationships of the world (Marx and Engels 1970, Pashukanis 1978, Cohen 2000). The difference between the various ‘empirical’ accounts of legal truth can be understood, broadly, as different views regarding, on the one hand, the nature and importance of rule following practices and, on the other, the extent to which the law’s ostensible content, directly impacts upon such practices.

There exists a broad set of alternative accounts of the truth of legal propositions which takes a radically different view. Rather than seeing the truth of legal propositions as being located, ultimately, within social practice, such theories of law see the law’s content as autonomous from social practice to a large extent. Instead such accounts of law see the truth of legal propositions as based on one form of reason or another. Ultimately, while such theories *sometimes* also see such legal phenomena as resting on a shared social practice, they transcend a mere empirical account of law due to their understanding of legal reasoning as capable of being presented in an ideal and often holistic form. There are numerous accounts of the truth of legal propositions of this type, many of which are extremely sophisticated. However, they can be grouped together loosely into a broad typology.

On the one hand, there are those theories of legal truth which see the content of law as somehow immanent, stemming from the internal logic of the legal system. Such accounts are often grouped together under the label 'legal formalism' (Horwitz 1975, Weinrib 1987). The answer to any question regarding the truth of a legal proposition can be gleaned, on this view, from an examination of the inherent structures, institutions and concepts of the legal system. This is particularly applied to private law, that is the law regulating questions of civil obligations between individuals, such as contracts, which are often subject to logic-type analysis of the structure of legal thought (Weinrib 2012). What is striking about this account of legal truth is that it sees legal truth as entirely resting on matters internal to law. As we shall see in the subsequent section, this is not as misguided as many of its critics often claim, as there is a certain autonomy to legal reasoning which cannot be neglected in the proper understanding of the revealing and indeed generating of legal truth. However, critics of such a view abound, pointing out that the resolution of questions of legal content often stems not from logic but rather from some other aspect of legal reasoning, which leads to the discovery of the truth of legal propositions (Patterson 1999).

However, the most well-known, but extremely varied, family of ideas in this respect are accounts which are loosely known as *natural law* theories (Finnis 1982, George 1994), although this terms might be refuted by certain proponents of such ideas. This tradition insists that an understanding of true legal propositions depends on an understanding of the moral purpose, principle or aspirations of the law, or indeed of law in general. For certain natural law theorists, this is based on an Aristotelean notion of central cases within epistemology (Finnis 1982, chap. 1), while for other it is based on a more prosaic attempt to understand the purpose of law in regulating behaviour (Fuller 1969). Such accounts of law hold that laws which do not reflect morally good content, are, at best, laws in a less central manner. They are, therefore, less true than morally good laws, or laws which meet requirements for morally good laws. Such views of law see legal truth as resting on certain ideals: those of ethics and justice. It is here where one sees the breakdown in the parallel between the dichotomy between the idealist and empiricist visions of truth in law explained here, and the coherence and correspondence theories which characterise the philosophical literature on truth. Accounts of legal truth which rest on moral coherence in fact refer, explicitly or implicitly to a meta-ethics and an ontology of morals which exists somehow in the real world, to which truth in law corresponds.

On the other hand, certain other accounts of the role of morality within legal content, and hence the truth of legal propositions, seek to explain the inevitably moral component of valid legal propositions through a more coherence-based approach of legal truth. Theorists such as Ronald Dworkin (Dworkin 1986) account for the truth of legal propositions through the importance of the moral interpretation of previous legal decisions and grounds of law, leading to a vision of law in which legal values and principles are diffused across the legal system as a whole. In this manner, Dworkin creates an interpretivist account of law based on the role of moral values within legal thought, but one which echoes the overarching thesis of legal formalism, that is that legal truth ultimately stems from innate answers already contained within that legal system. The ostensibly similar interpretivist account of Stanley Fish (Fish 1980, 1981–1982) sees interpretation as equally central to the question of the truth of legal propositions, but emphasises that the coherence of legal truth stems not directly from moral values, but rather the structures of the legal community's shared practices. Fish's account in this manner, fits less neatly into the empiricist/idealist divide which has been constructed here. There exist other accounts of legal truth which are based on other ideals and the law's coherence with them, such as the law and economics movement, which, in its strongest form, sees the truth of legal propositions as resting on their coherence with economic forms of analysis (Posner 1987). It would be equally possible to construct similar accounts of the truth of legal propositions in relation to other ideologically driven accounts of law and its content.

This sweeping survey of legal scholarship and the philosophy of law has revealed that the central questions of legal theory regarding the nature of law can be understood as disagreements about the

nature of legal truth. Truth is a fraught thing in that it is difficult to characterise, and this stems from disagreement about the nature of disagreement in law and what such disagreement is about. As we have seen, the theoretical characterisation of legal truth differs slightly from the more general characterisation of truth within philosophy. This can partly be attributed to the purported 'normative' or obligation-generating nature of law, but also to the inherently socially-located nature of the legal system, and its complex interaction with the world which it seeks to regulate. Accounts of truth of legal propositions place different weights and accentuations on different elements of these aspects.

However, the closed nature of legal thought, in that it is both a self-contained form of truth, existing for legal purposes alone in many respects and in the sense that each legal system will have its own sets of conditions or approaches for producing and finding the law, means that accounts of post-truth at first glance seem either somewhat forced or superficial in nature. Legal truth differs from truth in a more general sense because it is self-contained, at least to some degree. What is 'true' in one legal system might not be true in another, and might not be true at all when the proposition is removed from the legal context. Legal truth is already removed from other accounts of truth and at times indifferent to this betrayal of other standards of the truth of propositions.

5. The transcendence of the legal system and legal post-truth

Twentieth Century legal philosophy has been the site of dramatic disagreements regarding the nature of law, and, as a consequence, the nature of legal truth. This has been animated not only by a desire to fully understand the law's social and moral role, but also due to an attempt to use the law to resolve both complex structural social issues and the most horrendous depths of human individual and collective depravity, such as Nazi atrocities, genocide and war crimes (Fuller 1958, Hart 1958, Messner 1959). However, legal theory has generally focused on law from a different perspective, seeing law as primarily related to its *systemic appurtenance*. For all their differences, legal realists, legal positivists and legal interpretivists see law and legal truth as being contingent on the legal system within which the claim is being made. Those theories of legal truth which do not do this, such as those which see law as based on correspondence with moral or economic theory, can indeed be criticised for failing to take into account this systemic quality of law. In essence, in their starkest form, theories of law which see legal truth as being parasitic on other forms of knowledge, truth or ontology, are insufficiently *legal* in their account. Accounts which see legal truth as doubly bounded by both systemic belonging and a certain account of the epistemology seem to give a more realistic account of legal truth to those familiar with legal processes or the law's social function.

However, it is here where our consideration of legal truth merges meaningfully with a consideration of post-truth. Post-truth is a meaningful term when it fits within a breakdown of traditional epistemic or cognitive frameworks for understanding truth. An examination of the identification of valid propositions in such circumstances might yield either the emergence of a new account of truth, or reveal deeper structures of the nature of truth which are more universal in nature. Legal practice and scholarship has come in recent years to be concerned with an increasingly conspicuous phenomenon which has come to characterise legal processes and practice: legal pluralism (Griffiths 1986, Teubner 1997, Michaels 2009, Itzcovich 2012). Legal pluralism and its close relation, constitutional pluralism (Krisch 2010, Maduro 2012), are observable trends in which more than one legal system occupies the same legal space and purport to give answers to the same legal questions (Walker 2005, Avbelj and Komárek 2008). This might include national law, European Union law, international law, transnational trade law, religious law and sports law also giving different answers to the same question, with no clear rules regarding the hierarchy of such claims. This differs markedly from normative pluralism, a sociological phenomenon in which the law competes with other sources of rules and norms to regulate or structure behaviour, and from the mere co-existence of legal systems, such as two separate national legal systems, whose relationship is regulated by rules concerning the conflict of laws and other frameworks in the case of a potential clash (Twining 2009, Ehrlich and Ziegert 2017). Legal pluralism

has emerged in its modern guise due to the proliferation of specialist, international, supranational and transnational legal systems and sources which claims pre-eminence and peremptory status in their role in determining the truth of legal propositions within any given context. The emergence of legal systems such as that of the European Union, said by its own Court to be an autonomous legal order,² possessing primacy over national law, even their constitutions, has underlined the significance of such developments (Avbelj and Komárek 2008, Itzcovich 2012). This becomes a ‘live’ issue in particular when another legal order refuses to accept the claim of supremacy or primacy in any clash between the demands of the legal system. This has happened on occasion, for instance, within higher courts of European Union Member States, which have refused to accept the general proposition that EU law ranks higher than the fundamental constitutional principles and rights of the domestic legal order.³ It is in such circumstances that one may speak meaningfully of a legal post-truth within the *post-modern* legal order (Douglas-Scott 2013), characterised by claims of ultimate legal truth and status, but whose validity depends ultimately, it would seem at least, on *perspectival* questions. In conditions of legal pluralism, questions of legal truth seem subject to an inevitable deep epistemic pluralism (Walker 2002), in which one’s very way of knowing is relativised. At this point, even if there is a manner of being broadly confident about characterising the truth of legal propositions within legal systems, such accounts become apparently useless when trying to resolve questions of selecting between different answers given by competing legal systems, or indeed seeking to reach a compromise and composite ‘third’ answer which makes room for both approaches.

This is law’s post-truth moment. What can it tell us about either truth in a post-truth world, or legal truth in general? The resolution of conflicts of competing legal truths can, in reality, only be resolved, if there is a comprehensible language or mode of thought to mediate between legal putatively separate legal orders. Prominent theorists of this area of law differ as to the mode of resolution of such conflicts. Some accounts embrace the apparently extra-legal nature of this scenario, and claim that such legal answers can only be reached in a non-legal way, as such conflicts are, in effect, political (Krisch 2010). If there is a resolution to such issues they lie outside the usual legal frame of reference and truth conditions or framework. This differs markedly from the traditional adjudication-focused legal realist approach, considered above, in that such accounts generally take seriously the idea that in any given legal system one can enumerate with reasonable accuracy the application of general but indeterminate rules. Where the answer depends on radically opposed epistemologies or legal ontologies, such an account also falls short. On this view, the legal post-modern moment is the end of legal truth and a move into a form of post-truth, or perhaps post-legal truth, where law is subsumed by political or other means of resolving legal questions. Alternative visions reject this bleak vision of the interaction of legal ‘ways of knowing’ and their inability to communicate with each other to provide some account of legal truth. Theorists such as Mattias Kumm (Kumm 2005, Wiener *et al.* 2012) argue that legal pluralism creates a forum in which shared values across legal systems can emerge and a dialogue created which allows for the discovery of a legal pluralist truth. The possibility of this depends on their being a meta-epistemic frame to allow for the discoverability of such truths, and the overcoming of a stark form of legal perspectivism.

Such an account of legal truth is only plausible if the empirical accounts of legal truth based on observable, social practices *and* the idealist accounts of legal truth based on coherence-type theories of systemic legal truth are incorrect somehow, or at least both fail to capture the essence of legal truth. If post-modern legal frameworks of law and legal pluralism can yield circumstances in which a legally valid outcome emerges, the nature of legal truth must be subtly different to the dominant accounts which currently exist, as truth within law must be capable of being uncovered in a manner which is recognisable, at least to some degree, beyond the epistemic and ontological frames of putatively hermetically sealed legal systems. It is the contention of this author that this is, at least in part the case.

² Case 6/64 Flaminio Costa v ENEL [1964] ECR 585

³ BVerfG 73, 339, 22 October 1986 (‘Solange II’)

This is due to the fact that legal truth is in fact *generated* through certain forms of reason or argument, that is certain *modes* of reasoning (Bobbitt 1989, Patterson 1999, Altieri 2016). Such a modal account of law flips the correspondence and coherence accounts of law on their head and see legal truth as produced by certain forms of *qualifying* arguments. Legal answers are not true by virtue of their fitting within a certain framework or corresponding to a set of observable facts. Without the modes of argument which 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 which exists somehow beyond those arguments. Instead those arguments *result* in the truth of the proposition. The modes of argument or justification which might justify a certain proposition of law, such as that Article 11 of the ECHR contains a right to strike, might of course depend on the particular legal culture in some ways. However, many of these modes are largely recognisable in one form or another between legal cultures: historical forms of reason based on the grounds of law and their application and interpretation; prudential forms of reason based on the impact of a particular interpretation of the legal grounds; moral considerations of various types; and so on. Once it can be grasped that legal truth is produced by a form of reason, the prospect of legal truth ‘existing’ when legal systems come into conflict can make a far greater degree of sense. The modes of legal reasoning can still apply to questions beyond the accepted answers within each legal system and can mediate between their answers. Of course, there then exists the second order question of meta-modal levels of reasoning, that is, how one mediates between these different forms of reasoning where they generate different answers. This is a problem which exists both within and between legal systems. The major problem with much legal theory, as can be seen in the previous section, is that it prioritises *one* of these multifarious modes of reasoning and states that legal truth ultimately hangs predominantly or exclusively on that. Ultimately, there is no modal resolution to meta-modal conflict: one can only hope that the confrontation between different modes of thought reveals either synergies between them or discrepancies in the application of one or some. Legal post-truth is ultimately a form of legal truth stripped down to its starkest nature: the result of complex multi-modal forms of reasoning. It is only where we deny the nature of legal truth in the first place that this becomes problematic. Within the legal context, truth is not dependent on a pre-existing realism or ontology: epistemology and ontology are interlinked: legal argument produces legal fact. The possession of legal truth is always the possession of the legal modes which generate that truth.

What does this tell us about the law’s ability to shed light on the post-truth phenomenon, and indeed era, more generally? Law’s ontological epistemology, or *modal constructivism*, as sketched in this Chapter, helps us to understand how legal truth in both its classical and post-modern contexts, depends on a deeper form of engagement with its raw methods, and, potentially, a greater openness in their use to see what kind of result this endeavour might reveal. Within the emergence of the discourse of *post-truth*, and the phenomena that this refers to, the worst perspectivist aspects of post-modernism, initially intended as a form of critique or deconstructivism, have become embedded within the practices themselves. This phenomenon, of displacing appropriate modes of thought with critical or deconstructive perspectives, is also seen regularly within law, such as when economic analysis of law gets mistaken for a higher form of legal reason and substituted for a legal mode of thought. At this point, the classical legal modes of reason must take on the deconstructive role, unpicking the perspectival post-truth in critical fashion. This is equally possible in a more general world of post-truth: what is the norm and what is the radical deconstruction depends on the structures of power and control of the dominant discourse, as the post-modern tradition tells us.

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