

<<I will clearly tell you
all you desire to know,
without any enigma,
but with a straightforward speech,
as it is correct to open one's mouth
with friends>>
[ESCHILO, *Prometeo*, tr. it. di G. Galli,
in *La sapienza greca*, Adelphi-Milano, 1977].

The lawyer between truth and secret (*)

by Roberto G. Aloisio

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1. How should a lawyer act with respect to truth ¹ and secret is something I shall try to explain further on, as it is preliminary, for the purpose of this speech an *actio finium regundorum* between these two categories (of the spirit).

Franco Cipriani ² ends his pages with a sentence of Capograssi; I would like to start them, in a subdued voice, quoting another one, extracted from the same essay³: “when we hear the word truth we nowadays no longer know what it exactly means [...*omissis*...]. However always in front of the truth, the soul that does not love truth, asks itself the abstract question: *quid est veritas*? In abstract one can ask such a question to hide its disdain for truth. But in reality when crisis arise, the spontaneity of life - one could almost say the instinct of life - doesn't see but one way and one principle, recognizes what it

* In memory of Franco Cipriani. This matter was suggested by the Director of the Magazine, Avv. Dario Donella.

¹ A small volume, full of profound thoughts, entitled *Processo e verità*, by **A. Mariani Marini** was dedicated to the theme of truth. This volume gave me more than one inspiration, particularly referring to *Presentazione* by **Alpa** (pp. 7-9), *Verità e interpretazione* by **Vattimo** (pp. 11-15) and *Probabilmente vero: avvocato, giudice e verità* (pp. 17-30) by **Mariani Marini**.

² *L'Avvocato e la Verità*, in this *Magazine*, 2003, n. 3, p. 224.

³ **G. CAPOGRASSI**, *Giudizio processo scienza e verità*, in *Opere*, vol. V, Milano-Giuffrè, 1959, p. 73.

is, how things went, the law as it exists and what it wants [...*omissis*...]”.

For men [...*omissis*...] this is the supreme certainty that **the truth** must be recognized and that **the truth**, as mentioned with the nice words of an old teacher, Gravina, is **the mother of justice**”.

The words of Giuseppe Capograssi reveal all the difficulties in achieving the truth, since in the path *intuition* and *thought that thinks* play a decisive role in trying to overcome the many errors that interfere on the way to truth. Thus Benedetto Croce explains to us that “from the infernal circle of error there isn’t a gradual outcome, and it is impossible to save oneself, unless entering all of a sudden in the celestial circle of truth, in which the mind rejoices as in its native land. The *wandering* spirit escaping from the light, must convert itself into *researching* spirit craving for light, relinquishing its place to humbleness [...*omissis*...]. In research, truth is at the beginning of the range of errors [...*omissis*...]. Therefore researching means, in conclusion, **to climb a range of errors**”.⁴

The elevated minds I had to disturb,⁵ in order to have a compass during the course of this work, allow to collect a very simple concept, which is that truth requires (behind its back) a *good will* – humble, but not lazy – that in its laboriousness desires to approach the knowledge of the *data* in its human disclosure.

This in conclusion is the cognitive methodology that a large part of the Bar uses in fighting the battles in and of the trial (civil,

⁴ **B. CROCE**, *Logica come scienza del concetto puro*, Bari-Laterza, 1981, pp. 275-278.

⁵ **GADAMER**, *Verità e metodo*, Bompiani-Milano, 1983 advises to seek refuge in philosophy to draw on knowledge, and he says that (p. 19): “One of the most elementary experiences in philosophizing consists in the fact that the classic philosophers, when one tries to understand them, impose themselves with a power of truth that today’s consciousness can neither reject nor overcome”.

criminal and administrative): “thus it is not by chance” – Franco Cipriani writes– “if the civil trial is compared to a race, more precisely an “ability race”, in which far from being allowed to cheat, it is necessary to be upright and loyal (art. 88 c.p.c.), but it is as well always permitted to fight with all one’s strength, including the *bluff*, to win”⁶. There is a bluffing in the civil trial, when one pretends to take into serious consideration the defensive strategy of the other party in order to prove that it is groundless, skirting on the weakness (in fact and/ or in law) of one’s own thesis. The good lawyer – that wishes to be more clever than the smart fellows – “will have as an evident purpose that one to appear the most foolish among the fools and to simply deform any tangle, showing its intent to unravel it, but putting specific traps along the way of Ariadne’s thread”. ⁷

2. So all this complex speech (at least for those who *cotidie* practice the legal profession and don’t do philosophical speculations) aims, in a much more simpler way, to say that the lawyer itself has all the instruments to know the truth of the facts and, if he studies, to reach the exact solution of the *quaestio iuris*.⁸

But is it this the goal a defender must achieve ?

⁶ CIPRIANI, *op. cit.*, p. 224, there specific and important references in the notes, among others to CALAMANDREI, *Il processo come giuoco*.

⁷ S. Andreani in M. PALOMBARA, *La Bugia. Da un Codice Reginense del sec. XVII*, by Anna Maria Partini, Edizioni Mediterranee-Roma, 1983, p. 9.

It is correctly said with respect to the lawyer and his way of acting on the scene of law that “his language must be more than ever <<all things >>, he must speak <<to say>>, as already warned many years ago by Enrico De Nicola. Therefore for clients, colleagues and judges, his real charisma shall not reside in the incomprehensible and winged words that he will pronounce, but only in the preparation, the talent, the honesty of the proposition and the behavior and in his superior capacity to associate ideas”. (F. GRANDE STEVENS, *Vita d’un avvocato*, Cedam-Padova, 2000, p. 15).

⁸ FERRAJOLI, *Principia iuris*, 1, *Teoria del diritto*, Laterza-Bari, 2007, p. 71 note 15 talks about “factual truth” and “legal truth”. L’*Opus* of Ferrajoli (in three volumes) can be defined (speaking like Cicerone) a cultural *monstrum* and in this a lawyer (no matter in which legal field he practices) can find “all sorts of good things” of legal knowledge.

I don't think so, because, all over, it is written that to defend or to assist does not mean to research the truth, but (on a higher level) **to defend the interests and the** (sometimes also fundamental) **rights** of the citizen, due to institutional factiousness, better constitutional (art. 24 Cost.), that distinguishes the lawyer.

In such sense, significant are two domestic rulings – a part from the fundamental rules of the Constitution and of the Charter of Fundamental Rights of the European Union and the Charter for the Protection of Human Rights and Fundamental Freedoms:

a) the Preamble, at the beginning, of the Code of Conduct in the legal profession according to which “the lawyer practices its activity in total freedom, autonomy and independence, in order to defend the right and interest of the individual [...*omissis*...] for the purposes of **justice**”⁹;

b) the Preamble of the Code of Conduct for European Lawyers in the part where it is said that “in a state of right the lawyer is indispensable for **justice** and for those for which he **must** defend rights and freedom”

Article 12 of R.d.l. of November 27, 1933 n. 1578 does not mention the citizen's rights referring instead to the “supreme interest of the Nation”, but this rule is old and it disappeared with the arrival of the republican legislation.

3. The problem of truth (and of telling it) would arise for the lawyer in all its significance (at least) under a theoretical point of view

⁹ “The discovery of the rules of **law** – or ‘laws of law’, or, certainly, **justice** – is the higher result of science. They remain, while the right is temporary and transitory; and they become judges of the legislator, while we are judged by the legislator”, **N. IRTI**, *La <<metodologia del diritto>>* by Francesco Carnelutti, p. XVIII, in **F. CARNELUTTI**, *Metodologia del diritto*, Cedam-Padova, 1990.

if we were sure to be in front of a (unconditioned) value¹⁰, but this is not the case because the **truth** is nothing else but a real data that you achieve through a cognitive process.

Another simple intuition helps us to understand that we are not in front of a value, and that is the one according to which “*the truth is a mean but not an end*”. And one can easily understand it is a mean – without any philosophical showing off – listening the popular wisdom or, if you prefer, the common way of saying, that allows us to understand that truth may lead to a depraved aim: therefore, it is said that the truth **(a)** is like the arsenic that requires a slow giving, in small dosage, **(b)** can be used to kill, **(c)** must be revealed only to those that are about to die, because they are cleansed from human kind feelings (shame, envy, passion, hatred ecc.), **(d)** it is a way even to lie.¹¹

¹⁰ The term *value* is used here in its most demanding sense, the philosophical one, as a “principle or idea of universal validity (*the supreme v. of the spirit*) or as a principle, mainly of moral life, that depends on a practical and subjective evaluation”. Also under a sociological point of view of social behaviors a *value* is considered “any condition or state that the individual and more often a group considers desirable, usually recognizing in it a particular meaning and importance and according to which other actions and behaviors are evaluated: *i v. della giustizia, della lealtà, del bene ecc.*” (lemma “*Valore*”, in *Il vocabolario Treccani*, vol. V, Enc. It. Treccani-Milano, 1997, p. 795). According to Cicerone *Value* is “whatever complies with nature or whatever is worth to be chosen (*selectione dignum*) (*De Fin.*, III, 6, 20). To say it in conceptual words a *value* is the transcendental “*a priori*” of Kantian memory; but the value, I would like to add, can not be captured by **reason**; it is more the son of intuition, that takes root in the **feeling**, which is “*a form of experience whose objects are completely inaccessible to the intellect, that is blind in their respect like the ear and the hearing with respect to colors*” (**SCHELER**, *Der Formalismus in der Ethik*, 3^a ediz., 1927, p. 262). **IRTI**, *Il diritto nell’età della tecnica*, Editoriale Scientifica-Napoli, 2007, pp. 62-63, instead, believes that the values are “*made by the will, that elevates its own content and it fills it with its own energy*”.

On the major axiological matters, we must recall, in our field, the legal one, **A. FALZEA**, *Introduzione alle scienze giuridiche (il concetto del diritto)*, Giuffrè-Milano, 1975, pp. 35-197; the **Author** had already written, on the axiological legal matter, the masterly pages of *Efficacia giuridica*, in *Enc. dir.*, Giuffrè-Milano, 1965, vol. XIV, spec. pp. 438-454).

¹¹ It is said by **Stepan Trofimovič** in **DOSTOEVSKIJ**, *I demoni*, Einaudi-Torino, 1994, III, 7, 2.

The *truth*, moreover, can acquire also a revolutionary connotation¹²: how many among us would be ready to declare in public the truth on their own or on others wrong-doings ? how many among us would be ready to denounce that president or that (public or private) as a chronic swindler that uses other's interest in order to satisfy its own?

In conclusion one can not have a fetishist approach with respect to truth, nor fall (as someone does) in ideological fanaticisms, that are baleful and unlucky: thus the *truth*, is neither an absolute, nor a relative value; it is simply an instrument that must be handled with care, because who grasps it can inflict wounds to others, but never remains unhurt from serious negative consequences and, in such respect, Jorge Luis Borges invites us “not to exaggerate in the worship of truth: there isn't man that at the end of the day didn't lie, **for a good reason**, many times”.¹³

4. Here – the data is evident, but I have to enounce it and then justify it – I did not want to make this effort (for me unusual) to prepare the weaving of **the praise of mendacity** and allow to say– to some malicious (and there are) – that the lawyers claim the privilege to lie (as a subjective right deriving from a *status*).

¹² And Francesco Galgano talks about revolution with respect to “words”, “that can acquire a consistency of the most hardened steels and become sharp as the sharpest of swords, or like the blade of the guillotine. The French Revolution offers a clear example of a similar ability to materialize. Many ingenuously think that the French nobles were decapitated by the '92 guillotine. Ingenuity really dove: dott. Guillotin's invention only served to cut off he head of some thousands of aristocrats, certainly not toc rush the aristocracy. The true scaffold was erected in 1804, concealed under the guise papers of the Napoléon code. The death sentence was carried out with no drummers, by these ten words of article 742: <<the inheritance is divided equally among the descendants>>” (F. GALGANO, *Il diritto e le altre arti (Una sfida alla divisione fra le culture)*, Editrice Compositori-Bologna, 2009, pp. 16-17).

¹³ J.L. BORGES, *Elogio dell'ombra*, Einaudi-Torino, 1998, p. 101 (da *Frammenti di un Vangelo apocrifo*).

Therefore I bar the way to ambiguity, pointing out at first that the *lawyer-lier* is the one that forges and unchanges the facts (it is not the one that sustains the most daring legal thesis, and those extreme, dull or odd). Now, it is forbidden to the lawyer to alter the factual truth and this, in clear words, is said by Franco Cipriani ¹⁴:” it appears with no doubt that, for lawyers, ‘to swindle’ the papers doesn’t mean and can not mean to cheat or lie, but, simply, to put them back into place in order to be useful for their own client. In fact, the National Council of the Bar in its jurisdictional session and the various Bars in their disciplinary session have always stated that the lawyers have no right to lie or swindle the papers”.

Beyond the categorical deontological rule (“do not lie”), the **lie** is not useful to a good lawyer under a strategic point of view, because it is a sign of weakness (when it is perceived by the other party or by the judge). Descartes declaims it in the *Fourth meditation*: “*although the possibility to cheat appears to be a sign of keenness or of power, however the intention to cheat proves, without a doubt, weakness*”¹⁵. The lie, strength of the weak, is eloquent/ a good orator/ persuasive ¹⁶, meant to make the truth become likely¹⁷.

5. So, how do the jurist have to act in front of the *truth*?

¹⁴ *Op. cit.*, p. 223.

¹⁵ R. DESCARTES, *Meditazioni metafisiche*, tr. it., in *Opere filosofiche*, Roma-Bari, 1986, vol. 2, p. 81.

¹⁶ H. DE BALZAC, *Il colonnello Chabert*, tr. it., Rizzoli-Milano, 1996.

¹⁷ F. DOSTOEVSKIJ, *I demoni*, cit., II, 1,2.

About the lies, **Franzo Grande Stevens**, in giving his “*Consigli ad un giovane avvocato*”, says: “Young Friend, don’t choose this profession if you do not burn with intellectual curiosity, [... omissis...], don’t choose it if you do not want to band the tricks and respect, and advice to respect, also the laws and moral. A great Jewish banker wrote to his son in his will <<**If not for vocation, be honest for convenience**>>”, in F. GALGANO – F. GRANDE STEVENS, *Manualetto Forense*, Cedam – Padova, 1996, pp.75-76.

Here I offer my opinions, that I submit to the reader's critical meditation:

a) the **judge** – that represents the *logos* in the trial – is the one that must ascertain the truth of the facts and assert the correct legal solution, that is to implement the order, using the well known figurative expression of Salvatore Satta.

For a moment I will put aside the question of **law**, using a few words on the fact, to ascertain which the judge must not nor can't independently research the truth, since he is a third party (impartial) and not a part.

The falsification of the fact or the (illegal) bending of law in favor of one part is for the judge the worse shameful behavior that, apart from the main and secondary sanctions, is punished with the disrespect in the professional environment (the lawyers and the honest judges) and it is exposed to Matthew's curse: "**you will be judged with the meter with which you rendered justice**".¹⁸

Therefore the judge on one hand researches the truth in the laboratory of the trial respecting the principles it is governed by (availability of evidence, debate and defense), on the other hand

¹⁸ "If the history of the penis is a story of horror, the history of judgements is a story of errors", says **FERRAJOLI**, *Diritto e Ragione (Teoria del garantismo penale)*, Laterza-Bari, 1996, pp. 619-641.

elaborates and states – with the aid of the opposite dialectic of the counsels – the *correct* legal solution, that is therefore *true* and *right*;¹⁹

b) the **university professor** – I believe – researches the “truth” of law in the aseptic laboratory of the Academy, finding correct solutions which are consistent with the system. On this figure of jurist I can’t say more because, as Antonio De Curtis said, “I am not acquainted with theory, but I help myself a little with practice”²⁰;

c) the **lawyer**, through the common experience, is not bind to the obligation of truth, because the oath he takes (with the ritual formula) is to practice its professional duties with loyalty, honesty and dignity in the interest of justice (also if in the interest of one party). Lets also say, that for the lawyers the meditation on the truth appears to be a little boring, because they rarely confront each other (with) and they debate (on) the dilemma of the truth, because they are busier and

¹⁹ “*Veritas non auctoritas facit indicium*”, **FERRAJOLI**, *Principia iuris*, cit., p. 876.

On the truth, as the value of the process, see the fundamental contribution of **M. TARUFFO**, *La semplice verità (Il giudice e la costruzione dei fatti)*, Laterza-Bari, spec. pp. 74-134 e pp. 193-245; see also the review of **S. CHIARLONI**, *La verità presa sul serio*, in *Riv. trim. dir. proc. civ.*, 2010, n. 2, pp. 695-706.

The arrogant judge does not pursue the goal of truth and not even the goal of justice: on the fatal effects of this vice see. **L. ZOJA**, *Storia dell’arroganza (Psicologia e limiti dello sviluppo)*, Moretti & Vitali-Bergamo, 2003, that at pag. 47, with respect to the Greek civilization (IV-V sec. a.C.), detects therapeutically that “who fell in uncontrolled emotions, felt tragically excluded by the community, because self control and moderation were among the prior evident necessities of a population that recently became civilized”.

On the creativeness of the law and on the limits of the judges’ discretion, see **ALPA**, *L’arte di giudicare*, Laterza-Bari, 1996, pp. 3-40, 41-51.

²⁰ **M. AMOROSI** (by), *Totò (parli come badi)*, La Stampa-Torino, 2004. Since high level scientific contributions come from the University and very seldom funny works, with respect to these last ones is appropriate the say, always by **Antonio De Curtis**, that “sometimes, also a stupid has an idea” (**AMOROSI**, cit., p. 64). To secrete the honey from the product of the Academy and also to choose the bees that produce the best honey excellent is the lens that gives us **S. SATTA** (*Soliloqui e colloqui di un giurista*, Cedam-Padova, 1968, now edited in the beautiful new Sardinian graphic edition Ilisso Edizioni-Nuoro, 2004, p. 158): to study law at a decent scientific level “*it takes a genius, the famous genius made of patience. The sources are like the spirits: they need to be evoked, and only a mediumistic force is able to make them talk. The importance of a lawyer depends on the amount of this force he has, and for this reason, by discovering law, he becomes source of law. It is difficult to have this genius because it is difficult to have patience: but if one is able to have it, one receives a prize that was foolish to hope, because one really sees life in law, acquires real and not false certainties and enters in communion with others, beyond time and space*”.

dominated by that obligation of which always more rarely it is spoken about: the **obligation of secret**, that is a corner-stone of our profession and that must be qualified as a **value**.²¹

6. Why isn't the lawyer bound to the dogma of truth?

The answer is easy, because the lawyers have the *duty to respect the secret*, that is a larger circle - where truths can be found - in which it is not allowed to access.

Today, if one dares to affirm this dogma, one is condemned to unpopularity, since **the hatred towards the secret** is spread among the most and it would take long to tell why all of this happens in the fashionable world: each lawyer has the clear perception of this hatred towards the secret, given the fact that today everyone pretends to have access to any truth.

The **secret** is a (forensic) value-duty that shouldn't be considered (neither by the judges nor by the power or by the common citizens) like a privilege of a minority; this is a heavy burden on the Bar and it is necessary to protect the most important value of a person, **the value of a free conscience**, that is *freedom to think of oneself and of one own actions what the conscience suggests, proposes, imposes*: the mystery of confession is in this.

7. Therefore here is how one can affirm the sacredness and unquestionability of the choice of a lawyer in not allowing the truth to emerge spontaneously in the trial (and out of it).

The deontological rule in article 14 of the Deontological Code (obligation of truth) contains an *aesthetic* rule, that does not impose the unconditioned duty to reveal the truth (to the judge and to third

²¹ The *secret* as a *value* is rooted in the tradition of the National and International Bar, that gives comfort to the statement, almost an axiom, contained in the text. The pages written by **IRTI**, *Il diritto nell'età della tecnica*, *op. loc. cit.* lead to a meditation of the doubt.

parties); it is a *rule of form and style*, meant to avoid that objective evident data are contradicted. The canon of article 14 D.C. is not of truth, but of dignity, of correctness, of loyalty, because – not denying the truth on the objective facts and opposing the temptation to introduce false evidence – the lawyers defend their own dignity and, at last, they reach the superior interest of justice.

8. The truth, if ever, has another role in the life of the actors of the trial. As a matter of fact, lawyers and judges are subjected, in their daily activities, to the **judgement of truth** that a higher court applies in every instant of their life: it is **the silent court of the consciousness**, that when it is activated, is inexorably right and cruel in its judgement.