

Call for Papers

Issues of Fact: the Pathologies of Fact and the Fictitious in Law and the Humanities

A three-day conference organized by Jeanne Gaakeer and Frans-Willem Korsten

To be held September 24-26, 2015

Erasmus School of Law & Erasmus School of History, Culture and Communication – Leiden University Centre for the Arts in Society

Deadline application: **a proposal of max. 300 words should be sent to issuesoffact@gmail.com before May 15th, 2015.**

Introduction

Truth in law is not written in stone. In all legal systems, actors submit their findings and views on what is to constitute that all-important category called “the facts”, in order to have judgment. What, then, in that process, is “fact” and what is “fictitious”, and how do we “know”? These basic questions draw the attention to both etymology and epistemology: fact as the act of “facere”, the act of giving something a recognizable form is that is in itself a also mode of fiction, a “making up”, in literary narratives as well as, historically, when it comes to postulates of science. To Giambattista Vico, for example, any scientific endeavor is equivalent to knowledge of the way in which things came into being. If we have a strong belief in, and thorough acquaintance with a *factum* as a man-made thing, then on this precondition and presupposition we are able to reach a *verum*, cognition of a truth.

So much is obvious, stating the facts in law is advancing a claim of (referential) truthfulness: “*This is what happened*”. This means that jurists should bear in mind the influence of their own interpretive frameworks and unconscious choices or preferences on both fact and norm. What is more, ascertaining the facts in the sense of the selection of what may be looked upon as relevant legal facts is always done literally *ex post facto*. That too provides a good reason for more research on how a number of facts “out there” come to be regarded as a string of causally connected events with consequences as far as imputation and accountability are concerned, and what factors are influential in the process of the construction and re-construction of (legal) reality. This is acute because the way in which the facts of a case are narrated determines to a large part the outcome of that case. The flipside of the meaning of fiction as noted above is the fictitious, as the act of pretending, and even willfully deceiving in order to produce a false belief. In the context of law, it leads to injustice, given the reciprocal relation between fact and legal norm, i.e. the always combined effort in law of the perception and assessment of the facts against the background of what the legal norm (including the academic propositions made for it) means.

From the very start of law as we know it, people have tried to meddle with the (meaning of) facts in court cases, - think of the god Apollo in Aeschylus’ *Oresteia* -, precisely because trials were aimed first and foremost at establishing the facts of what had happened (or what *might* have happened, in Aristotelian terms) and what that meant. In other words, narrative plays a role in the forensic statement of fact, the narration. Enter fiction, with the danger of the fictitious.

It appears that in the contemporary situation the questions after ‘factuality’ are acute because the powers of the so-called ‘triers of fact’ are confronted with, and perhaps lag behind with, the growing powers of those who benefit from the specific construction, deliberate deceitful fabrications included, of the facts. The problems involved have been dealt with in many forms of art: literature, theatre, film, the visual arts, participatory forms of art and so on. This conference wants to read how works of art have been dealing with the contemporary issue of factuality in the juridical domain, i.e. to place the factual-fictional distinction in a wider context than that of the original domain.

Five aspects of the matter

The first aspect of factuality concerns the rapid growth and growing complexity of scientific possibilities in establishing the truth of the matter. We would like to consider how works of art have reflected on the ways in which, on the hand, new techniques and technologies have allowed prosecutors, judges and lawyers alike to make their case on the basis of facts that would have been irretrievable in former circumstances. Yet the flipside is that the officials working in court often miss the basic expertise to assess the validity of the facts being handed to them. So, for every prisoner being freed after a miscarriage of justice on the basis of results procured by new dna-technologies, there are also cases of miscarriage of justice precisely because scientifically produced facts were either read in the wrong way or did not prove to be that factual. For judges, for example, who are unaccustomed to the specifics of a discipline other than their own, it can therefore be most helpful to gain insight in the way other forms of cognition function. This brings us back to the epistemological debate about the facts and the concept of cognition and knowledge, and reminds us of the distinction, problematic as legal practice shows, between the *factum probandum*, the fact which is the subject of proof and the *factum probans*, the fact from the existence of which that of the *factum probandum* is inferred. Put differently, is there a chain of circumstance “out there” or does (some)one carefully fit together the facts and evidence, and the other established facts and so on and so forth?

The second aspect of factuality concerns the societal respect for the court’s prerogative to establish the facts. Many works of art have been focusing on the problem that in a growing number of cases people have been declared guilty in the context of a ‘society of the spectacle’, or ‘trial by (social) media’ that thrives on the dynamic of opposing parties that pick their favorite and already appear to know beforehand what the facts of the matter ‘really’ are. For example, in many societies people suspected of pedophilia are no longer able to live their own lives safely. Or there may be controversial cases that have become the subject of a society’s spectacle as a result of which the judicial outcome of the case will always lead to a disqualification of the court (or the legal system) by one of the societal parties involved. What happened to the respect for facts in the society of the spectacle?

The third aspect of factuality concerns the growing intertwining of forms of subjectivity and agency that used to be clearly distinguishable in previous times. A worker handling a machine could be held responsible for using it rightly or wrongly, intentionally or not, because it would be a matter of fact who was doing what. Yet the issue of “who” is it that acts has become acute, for instance, in cases that robots (like cars) have become entities that can make assessments on their own, and decide ‘on their own’, or in the case of devices, as yet a fantasy but a serious one in ambient intelligence, such as ‘Digital-Me’, a personal assistant that impersonates its owner and takes his decisions independently. Here questions of personhood and legal personality come in. A comparable problem concerns the conflation of

the machinic with the human, or of animals that are produced technologically. The question is not so much what all these new forms of bodies can do. The question is: what are they, as a matter of fact? Which works of art have been doing research in this domain, and how did they do it? The paradigm shift in scientific thought that technological advancements have brought about has not yet been fully understood in and by law. New technologies are as yet 'undecided' since they are 'undecidable' from a legal point of view. As Charles Taylor already in 1991 urged us to do, it is time to reconsider the primacy of instrumental reason in modernity. So one question we have to ask is whether we dominate technology or technology dominates us, given the risk that instrumental reason becomes framed in a project of domination that seriously affects our freedom in the sense of our capacity to remake the conditions of our existence.

The fourth aspect of factuality that we want to address concerns the inequality of arms and/or imbalance of power between the so-called 'triers of fact' and those who aim at fabricating or manipulating the facts. We think here of works of art that focus on different variants of so-called 'grey zones' in which things happen that are often impossible to reconstruct on the basis of facts. Secret services may be operative that willfully produce and use grey zones in order to have the ability to act without leaving clear traces. Another example would be all those circumstances where political, juridical, and criminal forces have become intertwined as a result of which the very idea of a system of adjudication, let alone one under the rule of law, has become so perverted that its principal aim of establishing the facts has become non-existent. A third example would be all those cases where powerful organizations are at work in, and with circumstances in which other actors do not have the financial resources to get the proper legal expertise that would be required to test the facts of the matter, on the view that the fact section of a narrative before a court of law decides the case. A fourth example would be new forms of warfare that might be war crimes but that are hard to assess as such because of missing or basically blurred evidence.

Finally, the overarching question at the meta-level is how to think of a critical response to the current malleability of facts. One specific historical irony, here, may concern the way in which pivotal building blocks of post-structuralism and deconstruction (leading to the so-called establishment of 'critical legal studies') have been incorporated by forces of the opposition. The major target of criticism for post-structuralism and deconstruction was the state's power to 'make truth', with the ideologies underpinning it, and in response these approaches focused on the malleability of facts. To read this as a support for principal relativism would be simply wrong. Post-structuralism and deconstruction wanted to break the power grab by ideologies or states as for their ability to define what was fact and what was not. The contemporary situation appears to be far more that the malleability of fact has become part and parcel of an ideology's or state's ability to remain in power. So, should we rethink the philosophies underpinning the malleability of facts entirely anew, or should we reframe the critical project of poststructuralism and deconstruction in order to revitalize them? To return to our opening statement, this question is especially acute if we consider the ways in which "facts" have their place in law, but, more importantly, if we reconsider the question whether facts can be thought of as "objects", or "the way things are" without considering the cognitive burdens of their disciplinary, conceptual frameworks and underlying assumptions.

Call for papers

We invite contributions from scholars who are working in the interdisciplinary domains of Literature and Law and, more broadly, Law and Humanities in order to include other

(interdisciplinary) fields, such as philosophy, law and theatre studies, law and film studies, cultural legal studies, and law and technology.

We invite contributions on one or more of the following aspects of the matter on the basis of the following questions:

- a.) Has the establishment of facts become a matter of scientific expertise that, in some sense, lies beyond the horizon of cognition and control of those judging the case?
- b.) Does the court of law's prerogative to establish the facts still get the respect it once had in a 'society of the spectacle', engendered by modern (social) media that pit parties against one another and declare people to be guilty before they have had the ability to defend themselves in a court of law?
- c.) Has the establishment of fact become a matter of juridico-political-societal concern because formerly distinguished and accepted forms of subjectivity have now become mixed or blurred due to recent developments in technology?
- d.) Have the powers of those who manipulate or fabricate facts grown stronger so that in a growing number of cases, legal and otherwise, the very establishment of what happened has become almost impossible?
- e.) What would be the philosophical or strategic requirements for a critical response to our contemporary perceptions of the malleability of facts?

Send your proposal of max. 300 words to issuesoffact@gmail.com before May 15th, 2015.

We intend to publish the outcome of the conference and will therefore be working with texts of 3000-5000 words (notes excluded) being sent in beforehand, if your proposal is selected. We envision an event where not so much academic presentations, but discussion or dialogue is primary, so selection will be based on the quality of the proposal to bring in new perspectives or provoke discussion.

Kindly note that a conference fee will be charged.