

ON THE NATURE OF PHILOSOPHY OF LAW

SULLA NATURA DELLA FILOSOFIA DEL DIRITTO

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ABSTRACT

The main thesis discussed in this article is that it seems reasonable to argue in favour of a strict and structural connection between philosophy and law, so that philosophy of law – interpreted as a metaphysical questioning on law – is a key-component of law and legal knowledge that is not possible to eliminate. This conclusion is reached by reflecting on philosophy, following the explanation given by Enrico Berti, who classifies it as kind of knowledge dialogical, all-absorbing and problematic in its nature, so to be, as Aristotle himself explains, transcendental and undeniable. This same feature is the one that is possible to attribute to dialogue and truth, that are really interrelated and connected with philosophy (and so with philosophy of law): for this reason, also a brief inquiry on the nature of truth, following the explanation given by Franca D’Agostini, is presented in the article, arguing for a realistic and Aristotelian conception of truth.

KEYWORDS: Philosophy. Philosophy of law. Truth. dialogue.

RIASSUNTO

La tesi principale avanzata nel presente saggio è che sussistono buoni argomenti per sostenere una connessione strutturale fra la filosofia ed il diritto, e quindi che la filosofia del diritto – intesa come un domandare metafisico sul diritto – è una component fondamentale del diritto e del sapere giuridico che non è possibile eliminare. Tale conclusione è raggiunta attraverso una riflessione sulla filosofia, sulla base dell’interpretazione datane da Enrico Berti, che spiega come essa sia un sapere dialogico, totalizzante e problematico, tale da risultare, come Aristotele stesso spiega, trascendentale ed innegabile. Si tratta di caratteristiche che è possibile riconoscere anche al dialogo e alla verità, che sono strettamente irrelate e connesse con la filosofia (e quindi con la filosofia del diritto): per tali ragioni, si presenta anche una breve indagine sulla natura della verità, in questo seguendo la lezione di Franca D’Agostini, sostenendo una concezione realistica della verità di tipo aristotelico.

PAROLE-CHIARE: Filosofia. Filosofia del Diritto. Dialogo. Verità.

SUMMARY: 1. Introduction; 2. The transcendental nature of dialogue and philosophy; 3. Dialogue in legal domain; 4. An insight on truth; 5. A possible conclusion; References.

1 INTRODUCTION

The aim of this paper is to present some short reflections on the nature of philosophy of law, by explaining, at first, what kind of knowledge is the philosophical one and, then, by showing the

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relations, if any, between philosophy and law; the thesis I would like to discuss is that, at least from a methodological point of view, the relation between philosophy and law is not accidental and so philosophy of law is a basic component of legal thinking, with its specific identity; I argue that such identity rests, in essence, on the essence of philosophical and legal knowledge, that are dialogical in nature.

In an essay on legal reasoning, published in a previous collected volume of Brazilian and Italian scholars in law¹, I already had the possibility to reflect on the nature of dialogue by looking at this issue from a legal philosophical and methodological perspective. As there explained, after the so called “argumentative turn”, it is quite clear that the communicative context in which legal reasoning is developed is a dialectical one, in which it is not possible to reduce dialogue to one of its aspect, so to say to a mere procedure of rational speech acts – despite, for example, Alexy’s or Aarnio’s or Peczenik’s proposal.

In that occasion, to argue another conception of dialogue, we remembered that, in the Western philosophical tradition, it is possible to see a strict and essential link between philosophy and dialogue. This was one of the basic cornerstone of our legal reasoning’s conception and still it is still fundamental to explain why philosophy and law are so interconnected.

2 THE TRANSCENDENTAL NATURE OF DIALOGUE AND PHILOSOPHY

So, once again, Enrico Berti’s opinion is our starting point. In our tradition

«philosophy has been essentially seen as *logos*, in the word’s great sense, namely not as a mere “discourse”, semantic (exclamation, prayer, order, etc.) or apophantic (statement, assertion, announcement, revelation, observation, discovery, testimony), but as “argumentation” [...]. By “argumentation” I intend a discourse which is not limited to saying

1 F. PUPPO, 2015.

how things stand, but which tries to justify, to motivate, to demonstrate what it asserts, to bring reasons, to “account” for itself»².

The distinctive form of argumentation we find in philosophy is dialectical confutation, «that is to say to state the truth of a statement through the verification of the [logical] impossibility of the statement opposite to the first one»³. From this point of view, dialectical confutation is the result of a dialectical confrontation, i.e. of a dialogue, which entails argumentation. In its turn,

«dialogue is defined as goal-directed type of conversational exchange in which two parties reason together, taking turns to ask questions, give replies, and put forward arguments to each other»⁴.

If we regard from, so to say, a ‘structural’ point of view, dialogue presents this basic dimension: two (or more) people in reciprocal relation, speaking together about a common topic, searching for an affirmation of truth putting into question the different opinions they argue, trying to confute the opponent’s one (this is valid for fictitious dialogue too, since it is sufficient to say that one is obliged to imagine an opposite opinion and so another interlocutor). So, I think it is possible to say that, from an ontological point of view, in a dialogue we do have:

- *difference*. This is the difference of dialectical opposition among opinions discussed in dialogue, and so the difference of subjects involved in it;
- *identity*. This is the identity indicated by the intercommunity of topic, since we have a common topic with different points of view;
- *relationships*. This is the relationship between subjects and between subjects and topic, since different subjects speak together about a common topic.

2 BERTI, 1995, p. 1.

3 *Ibid.*, p. 2.

4 WALTON, 2002, p. 16, fn. 2.

In other words, I think we can say that dialogue is the place in which we find difference and identity and relationship among them.

But, according to Berti (and we share the same opinion) when we speak about dialogue, we are referring to a concept of dialogue in a strict sense

«dialogue [...] in a strong sense, is not a simple conversation, but a discussion, a comparison between opposite theses, aiming to determine which of them is true and which of them is false. [...] From this point of view, dialogue, for philosophers, is not a mere state of affairs, or only an ethically advisable behaviour, but a sign of willingness to listen, of respect of others, of self-criticism. Dialogue is the unavoidable condition of dialectically arguing, and so of philosophically thinking. [...] I consider dialogue not simply a fact, but a transcendental structure of philosophical argumentation, given its non-apodictic, namely monological, nature, which is dialectical, therefore dialogical»⁵.

For the issue here in discussion, the key-word is “transcendental”: to explain what philosophy (and philosophy of law!) is, it is in fact necessary to remember that, among other possible meanings, “transcendental” means undeniable. Dialogue, in other words, is a transcendental structure of philosophical argumentation – but, I would say, of every kind of rational inquiry – since it is not possible to deny it.

In fact, it would be possible to deny dialogue if and only if somebody brings it into question; but to do this he/she is obliged to carry out a dialogue (maybe a fictitious one, but this is not important)⁶ to determine which claim is true: the one which states dialogue is undeniable or the one which states it is not. So, to deny dialogue it is necessary to make a dialogue: and so, dialogue it is undeniable, so to say transcendental.

It is a very peculiar situation, which echoes Aristotle’s *Protrepticus*, in which he encourages young men to philosophize,

5 BERTI, 1995, pp. 3f.

6 «When somebody says that dialogue could be fictitious too, it hints at the possibility that someone holds talks with himself, that is to say someone who represents to himself the negation of his own position trying to confute it» (*ibid.*).

by claiming that

«If we ought to philosophize we ought to philosophize, and if we ought not to philosophize we ought to philosophize; in either case, therefore, we ought to philosophize. If philosophy exists we ought certainly to philosophize, because philosophy exists; and if it does not exist, even so we ought to examine why it does not exist, and in examining this we shall be philosophizing, because examination is what makes philosophy».

From this point of view, philosophy, as dialogue (and it is not a case), is undeniable: in other words, philosophy is necessary. In fact, it is impossible to not philosophize, since if we want to say that it is not necessary to philosophize we are obliged to assume a philosophical position, precisely the one according to which it is not necessary to philosophize. So, whether somebody wants to philosophize or not, it is necessary to philosophize. The necessity of philosophy is in this way explained.

3 DIALOGUE IN LEGAL DOMAIN

So, if we are in dialogue, truth is the focus of our discussion. In a ‘pure’ philosophical dialogue, we use dialectics; but it is not the only type of dialogical situation we are involved in.

In legal domain, normally we face different types of situation: to simplify, political debates (if we are in lawmakers’ domain) or trial (if we are in judicial domain). In these kind of dialogical dimensions, we find people with different opinions who discuss their own opinions and a third party (the political audience or the judge) who has to be persuaded by parties involved in the controversy.

Dialectics, however, is not sufficient for this kind of reality, and we need something more complex and wider: we need rhetoric, which is dialectic with something more addicted. It is still argumentation, but a bit more complex, since dialectic, in its pure form, is *mainly* confined in using logical tools. It is, mainly, the domain of *logos*. An example of dialectical confutation is the one we proved during the discussion on the transcendental nature of dialogue: it is a typical logical operation.

But when we are in political or legal fields (which means judicial field too), *logos* is not sufficient to reach the aim of persuading our audience: we need also *pathos* and *ethos*, that assume an huge role. In other words, and in our opinion, *pathos* and *ethos* are also present in pure dialectical field, as *logos* is, but in this field, *logos* it is the main character. In rhetorical fields, *pathos* and *ethos* increase their own role. In other words, we must think not only to the logical part of our discourse, but also to the domain of emotions and character involved in discussion. Consider

«the materials to be used in supporting or opposing a political measure, in pronouncing eulogies or censures, and for prosecution and defence in the law courts. [...] Since rhetoric exists to affect the giving of decisions – the hearers decide between one political speaker and another, and a legal verdict is a decision – the orator must not only try to make the argument of his speech demonstrative and worthy of belief; he must also make his own character look right and put his hearers, who are to decide, into the right frame of mind»⁷.

Here I cannot analyse the way by which *logos*, *ethos* and *pathos* could live together and could work together. I deem that we cannot forget we always are in a dialogue-domain, in the strong sense. And so that argumentation (based on *logos*, *ethos* and *pathos*) is still directed to truth. By saying this, I would like to stress out the fact, against relativism, that in legal domain truth (as in every kind of dialogical domain) is, another time, undeniable: when we think to legal discussion we cannot deny the presence of truth.

Obviously, a deep discussion of this point would be completely outside our first intention: but I think that a brief analysis of the concept of truth involved in my conception cannot be avoid.

4 AN INSIGHT ON TRUTH

At this point, what is now necessary to discuss is something about truth: to do so, I immediately remember that I will completely share Franca D'Agostini's explanation of truth⁸. According to her,

7 ARIST., *Rhetoric*, II, I, 1377b.

8 D'AGOSTINI, 2010.

truth is ‘something’ we always meet in our discourses: it is so present that normally we do not need to think about truth or we speak without specify that what we are saying is true.

For example: suppose I say “Today it is Wednesday”, it seems that it is not necessary to speak about truth; but what I am really saying is “It is true that today it is Wednesday” or “Today it is true that is Wednesday”.

Or, again: if I say “The pen is on the table”, what I am really saying is “It is true that the pen is on the table”. And so on.

So, normally we do not think about truth, but in everyday communication we always use it. And this is particularly true in argumentative context. We already said that dialogue is really a dialogue when it is directed towards the search of truth: and, as dialogue, also truth is transcendental. Every kind of claims we may conceive directed to deny the existence of truth, or to undermine it, exactly imply what they would like to deny or to undermine.

As well known, this claim is typical of sophists and relativism⁹: man is the measure of all things, meaning that there is no absolute truth and that everything is relative. In his dialogue *Theaetetus*, Plato already shows that it is a self contradiction. If one postulate that there is no universal truth, one is making at the same time a claim on truth. This claim on truth is that there is no truth. Thus this claim defeats itself.

The result is the same if we think to other versions of scepticism about truth¹⁰: for example, you may say that only relative truth exists. And this is not possible, since by saying this, it is necessary to admit that your claim about truth (being true) is relative and so it exists universal truth too.

9 Relativism may be defined as the theory according to which «the truth (or falsity) of any proposition is always relative to certain sorts of psychological attitudes on the part of the person who states, believes or otherwise judges the truth of the proposition [...]. A proposition which I state is true only relative to my interests or my point of view. Thus according to relativism so defined, a proposition might be true for me but false for you» (SEARLE, 2001, 1). And this kind of position must be rejected as inconsistent, as J. Searle himself rightly explains.

10 See D’AGOSTINI, 2010.

Or, again, you may say that “there is no truth, but this is the only thing that is true” (in this way you would try to escape the problem of self-contradiction given by the claim “there is no truth”). But it is impossible to admit the claim “there is no truth, but this is the only thing that is true” since every kind of argument you may offer to ground this claim must be true: and so it exists more than just one thing that is true and so your claim defeats itself.

Obviously, when we ask what is true or false about our reasoning or claim, we ask about what we say: from this point of view, it is important to remember that reasoning, in itself, is not true or false. Reasoning is logically valid or not. What is true or false is what we say, not the way by which we say something. Reasoning, in itself, from a logical point of view, is only valid. To reason in a logical way just means to respect the law of logic: but logic is only interested in the formal structure of our reasoning, not in its content. If you want: in ‘how’ we think or speak, and not in ‘what’ we think or speak.

When we meet logic, it must be clear that it regards reasoning and argumentation as well, also if, according to someone – for example to Perelman or to his epigones – argumentation is only *pathos* without *logos*. But, as D’Agostini claims, this is not a shareable opinion, since logical validity is the first aspect we must evaluate when we have to judge about argumentation¹¹. Speaking about argumentation, that is (we remember) what we do in philosophy and in law, it is possible to remember that an argument may be defined as an attempt to provide evidence or reasons for some point of view. To be more precise, we should say that

«we define an argument as a set of reasons offered in support of a claim. The reasons may be presented orally, in a written text, or by means of photographs, symbols, and other non-verbal means. They provide the evidence that is supposed to back the claim in question. The claim for which the reasons are given in support is called the argument’s conclusion. The reasons are called its premises»¹².

11 *Ibid.*

12 L.A. GROARKE, C.W. TINDALE, 2013, p. 7.

Obviously, one essential feature of good arguments is acceptable premises, i.e. premises the intended audience will or should accept. When we say that argument's premises should be acceptable, we mean that they should be accepted as true by the audience it is addressed to. And this is one of the first component of good argument: true premises. Another one is a conclusion that is a logical consequence of its premises, i.e. conclusion that follow from these premises.

Put it in another way, the conclusion of a good argument is a conclusion we have good reason to accept if we accept its premises. When the conclusion offered is not a logical consequence of the premises, the premises lead in the wrong direction. Even if they are acceptable, this means that they cannot lead us to the conclusion: we should have true premises, but if logic is not respected we must refuse that argument. And now it is clear why logic must be a part of argumentation: the evaluation of arguments has to do with *logos*, and not only with *pathos*.

Let's have a three examples to better explain this point:

Example nr. 1. True premises; logical consequence; conclusion: we must accept it, the conclusion is true.

If today is Thursday, then Federico Puppo will go to work.
Today is Thursday.
Therefore, Federico Puppo will go to work.

Example nr. 2. True premises; no logical consequence; conclusion: we must refuse it, conclusion is false¹³.

If Juliette is French, then she is European.
Juliette is European.

13 D'AGOSTINI, 2010. What we do have here is a formal fallacy that we must refuse since it is contrary to the logical valid rule called Modus Ponens (or Affirming the Antecedent), according to which: If P, then Q; P; Therefore Q. The example nr. 2 must be rejected for the Affirming the Consequent formal fallacy, according to which: If P, then Q; Q; Therefore, P.

Therefore, Juliette is French.

Example nr. 3. False premises, logical consequence, false conclusion.

All men are four-footed.

Socrates is a man.

Therefore, Socrates is four-footed.

This last example nr. 3 shows us that one thing is to look to premises and conclusion in terms of truth and, another thing, is to look to the logical structure of reasoning. They are independent, but if we are interested in evaluating argumentation they are linked: to have a good argument we must have true premises and a conclusion that follows from them in a proper logical way. What we do have in example nr. 3 is, from a pure logical point of view, a valid argument: but we must refuse it, since its premises are false. On the contrary, if we do have true premises and a valid reasoning, we may reasonably accept conclusion as true (failing this we would meet paradox, that is a valid reasoning, with true premises but false conclusion).

In addition, to evaluate an argument means, among other things, to look at the logical strength of argumentation¹⁴, since we may have:

- the deductively valid argument, i.e. an argument in which the conclusion necessarily follows from the premises (in the sense that it is impossible for the premises to be true and the conclusion false) and
- the inductively valid argument, i.e. an argument that is not deductively valid, which has premises that make the conclusion likely. Such arguments are characterized by a more tentative link between their premises and the conclusion.

Moreover, we must remember that, when judging arguments, it may help to consider at least two more premises' feature, namely

14 *Ibid.*

relevance and sufficiency, to evaluate if premises provide some evidence that makes the conclusion more or less likely and if premises are sufficient to establish that a conclusion is more likely or not.

This picture of arguments' evaluation, obviously, does not exhaust the analysis of argumentation, but it offers a very broad idea about the different levels by which we must look at arguments to accept them or not. And, as we already seen, the first one is the logical one: from this point of view, it is extremely important to remember that the very basic logical law that rules every kind of argumentation or reasoning is the principle of non contradiction. The best way to understand what the principle of non contradiction affirms is to look at Aristotle's *Metaphysics*, according to which it is possible to give three different formulation of the principle which entail, at the same time, its logical, ontological and psychological value:

«The most certain of all basic principles is that contradictory propositions are not true simultaneously. [...].

It is impossible that the same thing belong and not belong to the same thing at the same time and in the same respect [...].

No one can believe that the same thing can (at the same time) be and not be»¹⁵.

In other words, from a logical point of view, the principles of non contradictions states that contradictory statements cannot both be true in the same sense at the same time; but this principle has also an ontological value, since it states that it is impossible that our discourse may refer, in a contradictory way, to what it refers to, to the reality¹⁶; at the end, the principle has a psychological value

15 ARIST., *Metaph.*, 3, 3, 1005b 13-14; 19-20.

16 The discussion of this very basic and important question is offered by GUSMANI, 2010, who finally shows that the right way to read Aristotle's conception of the principle of non contradiction is to conceive a non contradictory relations between discourses and what is said by discourses and not only as a rule to state that discourses must be non contradictory in themselves. This is really important for the comprehension of the realistic conception of truth, that is Aristotelian, we are going to explain.

too, since, if you believe something (rather: that something is, or is in a certain way), you cannot believe its contradiction.

To come back to truth, we may remember that truth concerns our way of thinking and reasoning and speaking: it concerns our language and we use “truth” for sentences, which are statements or proposition (we use statements and proposition as synonymous). According to Aristotle «a proposition is an affirmative or negative expression that says something of something»¹⁷. From this point of view, a statement is a truth bearer.

Let’s give a bit of examples of sentences that are statements¹⁸:

1. It rains.
2. Wales are mammals.
3. The door is open or closed,
4. To kill is a wrong thing.

By looking at them, we may say that

- Statement nr. 1 is true if it rains: it is called ‘contingent truth’, since it depends by the changing state of affairs of the empirical world.
- Statement nr. 2 is true if Wales are mammals: this thing it is stated by an general knowledge, in this case a scientific one. This kind of truth it is called ‘extra-contextual truth’.
- Statement nr. 3 is true by the respect of logical laws: this kind of statements are true for the real meaning of the world we use, they are true in themselves. We do not need to empirically verify the state of affair. It is a tautology: it is always truth. It is a ‘logical truth’.
- Statement nr. 4 is true if we share the arguments one may offer to motivate its own way of thinking. It is a ‘controversial truth’.

17 ARIST., *Prior An.*, 24a 16.

18 See D’AGOSTINI, 2010.

So, we should say that we have, at least, four different kinds of truth:

Contingent truth.
Extra-contextual truth.
Logical truth.
Controversial truth.

In each case, we should say that our statement is true since the statement corresponds with something external to itself: there is our statement and there is something external to it to which our statement refers to.

In this way we reach the realistic conception of truth, that is really related to the Aristotelian conception of reasoning and to his metaphysical approach. It is a correspondence theory of truth since the truth or falsity of a statement is determined by how it relates to the world and whether it corresponds with that world¹⁹.

In other words, the correspondence theory of truth claims that true beliefs and true statements correspond to the actual state of affairs. This type of theory attempts to posit a relationship between thoughts or statements on one hand, and things or facts on the other (a relation we already seen involved in dialogue): from this point of view, J. Searle rightly says that this is «a relational version of truth but it is not a version of relativism about truth»²⁰.

Statements are true because they correspond to reality, since they do not contradict it. This is why Aristotle, by giving a definition of truth and falsehood, says that

«falsehood consists in saying of that which is that is not, or of that which is not that it is. Truth consists in saying of that which is that it

19 Be careful: it is possible to say: “whether it describes that world”, but I do believe that to use ‘to describe’ should imply that it is possible to give an objective description of the world – something that is not possible, as post-modern science explains. But we can admit the correspondence theory of truth also if we refuse descriptivism by preferring, for example, constructivism, according to which, very roughly, every description is conditioned by our personal point of view.

20 J. SEARLE, 2001, cit., 1.

is, or of that which is not that it is not»²¹.

But, by stating this kind of relationship between language and world, it is important to clarify which kind of reference external to language we do have. In other words, what the ‘world’, the ‘state of affairs’ to which we refer to when we assert a truth, are. It is no more (or not only) a metaphysical question: it is an ontological one, since it is necessary to clarify, by saying ‘something’, what is the thing we refer to, since it exists different types of fact to which it is possible to refer to. We may offer three examples:

1. If I say “It rains”, my statement is false since today (while I am writing this line) it is false that it rains, since it shines.
2. If I say: “The flag of the Republic is the Italian tricolour: green, white and red, in three equal vertical stripes”, my statement is true, since it is true that “The flag of the Republic is the Italian tricolour: green, white and red, in three equal vertical stripes” it is established by the art. 12 of our Italian Constitution.
3. If I say “Snow White lives with eight dwarfs”, my statement is false, since seven are the dwarfs.

So, as everyone can see, there are different kind of facts we should refer to: we should have fact to refer to in the strict sense of the word (as it happens in example nr. 1); but we may refer our statement (as it is in examples nr. 2 and 3) to a discourse or to a fictitious world.

So, from an ontological point of view, we must admit a soft-idea-of-fact and reality²²: thinking about facts that make my thesis truth means to refer not only to ‘objective fact’²³ but also to

21 ARIST., *Metaph.*, 3, 7, 1011b 26.

22 Reality – as explained by F. D’AGOSTINI, 2103 – is not a stone under snow to discover, but it is thought’s living bread: what do we have here is the proposal of a dynamic and not static conception of reality

23 The use of inverted commas is due because it is clear that is impossible to think of a

imaginary facts, discourses, possible facts etc., as it happens, for example, for counterfactual reasoning in trials. In other words, to speak about fact means to speak of every kind of ‘thing’ to which discourses may refer to: and, we do believe, this is very important for legal argumentation, a context in which, very often, discussion is about something that is not properly a fact (just think, for example, to a certain interpretation of statutes or to the fact that, in trial, we do not have facts but always representations of facts, i.e. discourses).

In other words, we believe that it is necessary to admit that, by speaking or reasoning, we usually refer to something that is and exists (as ‘objective facts’ do), but also to something that is but does not exist (as imaginary facts, discourses, possible facts etc. do). There is an ontological distinction between ‘to be’ and ‘to exist’ that has been developed by Alexius Meinong and that is nowadays well defended by F. Berto²⁴: but, another time, this issue is too wide to be discussed here. I would like to remember just one thing: this ontological conception is clearly related with the Aristotelian belief according to which «being is said in many ways»²⁵ and, as such, it is strictly related to a precise metaphysical conception and methodology.

Now it is time to come back to philosophy and to state its two main features. To philosophize (which is undeniable) means to have a dialogue; to have a dialogue means to search for truth by

‘pure’ fact or to speak about a fact as a ‘pure’ fact, because in any case there is a subject who thinks or who speaks about fact. Here also it is possible to think of philosophy of science and remember Heisenberg’s indeterminacy principle and the idea that observations always modify experiments, to the extent that even a measuring entails subject’s interferences. In other words, there is no such thing as a neutral observation of the world: the role of subject is constitutive of every kind of knowledge and it is impossible to think of a mere descriptive representation of facts. But it does not mean to deny realism: it only means to deny descriptivism and the wrong objective representation of knowledge given by modern and Cartesian thought. At the same time, all this means to give to realism its right place in philosophy, since it seems impossible to deny that something we call ‘reality’ does exist (as well explained by F. D’AGOSTINI, 2013), also if our knowledge of it is always related to subjects and so it is always disputable.

24 The main reference is to BERTO, 2010.

25 ARIST., *Metaph.*, 3, 2, 1003b 5.

using argumentation, in dialectical and rhetorical contexts. And it is clear that we have a dialogue when we do have a discussion made by questions and answers. In our last paragraph, we would like to say something about the nature of philosophical question.

5 A POSSIBLE CONCLUSION

In its nature, questioning from a philosophical point of view means questioning about everything at the same time: the subject, the object and their relations. Philosophy questions the whole reality. It means that: philosophy questions the whole entirety (in Italian: 'totalità'); this is why it is possible to argue that philosophy, in itself, is a very peculiar form of knowledge that is all-encompassing, all-absorbing (in Italian: 'totalizzante').

At its own very beginning, philosophy questions the foundation, the Principle, the *Arché*. And this is why Aristotle, in its *Metaphysics*, says that Thales was the founder of this type of philosophy. Since he has been the first who questioned the origins of everything ('*physis*', a term that means 'nature' but not in a modern and empirical sense).

So, philosophy questions all, questions everything from a rational point of view since it searches rational answers about the entirety it questions. It is such a so radical question that can also questions itself.

But we already know this: just think to *Protrepticon*, that is a perfect example of philosophical self-questioning. And this is a very particular feature that divides philosophy and other forms of knowledge: obviously you may question sciences, but by doing this you cannot use the same scientific knowledge you are questioning. If you are a mathematician, for example, you may question math: but if you question math, what you are doing is philosophy of math, non math. And so on.

But, if you question philosophy, you are philosophizing.

So, philosophy is a type of knowledge that is undeniable and radical; so radical that it can also questions itself always. The name for this feature is 'problematicity' (in Italian: 'problematicità') that means that when you answer, in a rational way, philosophical

problems you must at the same admit that that problem cannot be finally solved.

But what is philosophy's purpose? The typical purpose of philosophy is purely contemplative: philosophy searches for truth. It is a free truth's research: it is '*philo-sophia*', love for knowledge, free from any kind of practical application.

So, philosophy questions the whole entirety, in a problematic way, with a contemplative purpose, being free: from this point of view it is clear that it is not a systematic form of knowledge and it does not search for certainty.

But, if it is free in its own nature, philosophical questioning cannot be neither eliminated nor imposed. Where it comes from? According to Aristotle, the origin of philosophy is *thaumazein*, astonishment, marvel (in Italian: 'meraviglia'): a situation that cannot be produced, but that can only rise in men's life. Normally as crisis: personal crisis (philosophy questions ourselves) and/or crisis of all certainties.

When it happens, normally you put in doubt everything, and you question the foundation of your own existence. And this removes, or it may remove, the ground of certainty.

From this point of view it is possible to understand why modern knowledge, that has been search for certainty, looked in a suspicious way to philosophy. To remove philosophy means to remove the problem of foundation: and this is the typical anti-metaphysical approach of modern man, who does not question anymore on the Principle. From a certain point of view, you may also say that the history of modern man is the history of the removal of the problem of the Principle.

So, to sum up: philosophy freely questions the whole entirety, in a problematic way, with a contemplative purpose. And so: what is philosophy of law?

If philosophy of law claims to be philosophy (and not only theory of law) it must be a total and problematic reflection on law: it is not theory of law or legal science. To make philosophy of law means to look at law in the proper way of philosophy, by questioning its essence, its core.

The question, immediately, should be: is this kind of questioning necessary or not? Obviously, being philosophy, it is: it is undeniable. But we may also say that, looking at law from a philosophical point of view, means to look at law from a total perspective, by assuming law as not detachable from ethics or politics or justice. And these are typical philosophical questions. But, at the very end of our inquiry, we should also remember that the connection between philosophy and law is not casual: if we look at the very root and beginning of philosophy in our Western tradition (just think to Plato or Aristotle or to pre-Socratic philosophers) it is quite easy to show that philosophical questions are, at the same time, legal philosophical questions, being questioning on the limit of power, on what is right or wrong and just or unjust, on the nature of law and political power, on the nature of legal reasoning and so on. Furthermore, if we assume Greek tragedy (that is a form of philosophical dialectical questioning) as one of the most representative example of classical knowledge, we may also argue that the very first example of philosophical questioning is related to typical legal philosophical questions. This is the case, for example, of Sophocles' *Antigo*, with its questioning on the nature of law and the clash between written norms and unwritten norms, or Aeschylus' *The Eumenides*, where we find the very first claim for legal principles and rules, such as the due process of law and the right for a fair trial.

So, if we look from, as to say, a philosophical point of view to relations between law and philosophy, we may conclude that philosophy is essentially related to law, and so philosophy of law is undeniable. But the same conclusion may be reached also if we look to this issue from, so to say, a legal point of view. It is sufficient to remember the what Ulpian writes in *Digestum* to remove any doubt:

«Those who apply themselves to the study of law should know, in the first place, from whence the science is derived. The law obtains its name from justice; for (as Celsus elegantly says), law is the art of knowing what is good and just. Anyone may properly call us the priests of this art, for we cultivate justice and profess to know what is good and equitable, dividing right from wrong, and distinguishing what is lawful from what is unlawful; desiring to make men good through fear of punishment, but also by the encouragement of reward; aiming (if I

am not mistaken) at a true, and not a pretended philosophy»²⁶.

But the history of philosophy of law shows that, at a certain point, philosophy of law changed its own nature, when it became impossible to ask “*quid jus?*” and by assuming that it could be possible to only ask “*quid juris?*”. In fact, to question in a philosophical way the nature of law (“*quid jus?*”) means to question the foundation of law and so, in its legitimacy and foundation, the power that produces law (better to say: that produced *leges*, but not *jus*). But the power cannot tolerate that you must doubt it. Law is the formal will of the State and you cannot doubt of it and so the only thing you may ask is “*quid juris?*”.

At a certain point of its development, philosophy of law became theory of law, a systematic account of Legislator’s speeches. As everyone knows «Pure theory of Law» is the title of Kelsen’s most famous book, the acme of formal legal positivism: pure theory, not problematic philosophy. Obviously, as everyone knows, a lot of criticism has been moved against Kelsen’s view, but a sort of radical anti-metaphysical behaviour still remains. For example, according to Joel Feinberg and Jules Coleman «the aim of jurisprudence is to provide an account of the nature of law [...]. Law is a complex social practice, and a philosophical theory of law is an account of that practice, not a definition or an account of the semantic content of a word»²⁷, since, as Hart suggests, «the obligation the law claims to impose are independent of the content of the law»²⁸.

But, again, maybe things are changing another time: probably, nowadays we are living a period in which usual distinctions

26 *The Digest or Pandects of Justinian*, 1, 1, 1, tr. by S.P. Scott (now available from URL= http://droitromain.upmf-grenoble.fr/Anglica/D1_Scott.htm accessed June, 27th 2016): «*Iuri operam daturum prius nosse oportet, unde nomen iuris descendat. est autem a iustitia appellatum: nam, ut eleganter celsus definit, ius est ars boni et aequi. Cuius merito quis nos sacerdotes appellet: iustitiam namque colimus et boni et aequi notitiam profitemur, aequum ab iniquo separantes, licitum ab illicito discernentes, bonos non solum metu poenarum, verum etiam praemiorum quoque exhortatione efficere cupientes, veram nisi fallor philosophiam, non simulatam affectantes*».

27 FEINBERG, COLEMAN, 2004, 1.

28 *Ibid.*

and division (as, for example, is the one between natural law and legal positivist theories) are quickly going to disappear, becoming boundaries more and more vague. We do believe that it is possible to reach an unified theory in the field of legal philosophy, by going past some out-dated approaches, and without no fear in asking on the foundation of law and legal knowledge.

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