UNIVERSITÀ DEGLI STUDI DI TRENTO
Facoltà di Giurisprudenza

CONVERGENCES AND DIVERGENCES BETWEEN THE ITALIAN AND THE BRAZILIAN LEGAL SYSTEMS

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A DIALOGICAL PERSPECTIVE ON LEGAL REASONING

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1. Introduction

The aim of this paper is to present some short reflections on legal reasoning, trying to outline, at first, a brief description of some theories developed on this topic and, then, possible guidelines for a proposal able to face some problems entailed by them. From this point of view, our main intention – according to the general aim of the volume in which this essay is contained – is to present legal reasoning as an issue to discuss rather to present a complete overview on it, which is, surely, one of the most important key-topic in contemporary philosophy and theory of law. To be more precise, it should be better to remember that, in this framework,

> there are thus three things (at least, there may be others) which legal theorists could mean by legal reasoning: (a) reasoning to establish the existing content of the law on a given issue, (b) reasoning from the existing content of the law to the decision which a court should reach in a case involving that issue which comes before it, and (c) reasoning about the decision which a court should reach in a case, all things considered[1].

[1] J. DICKSON, *Interpretation and Coherence in Legal Reasoning*, in E.N. ZALTA (ed.), *The Stanford Encyclopedia of Philosophy (Summer 2014 Edition)*, URL = *http://*

For what we would like to discuss here, our attention will be on (b) or, better, on (c). In other words, to speak about legal reasoning it means, for us, to look at courts' work from a descriptive (b) or, better, normative (c) point of view: what court should do when they reach a decision and not what it really does. So, our analysis is not an empirical or sociological one: it is theoretical and analytical. Anyway, it should be interesting that also (a) could be involved by our perspective if someone thinks that «when judges decide a case according to law, they do no more than ascertain the content of the law and apply it to the facts of the case»[2]: a thing that for example, Dworkin thinks[3].

By the way, in this theoretical context, the attention of legal theorist has been mainly directed, at least in Civil law Countries' tradition, to (1) type of reasoning involved by court's decision and (2) problems entailed, in such a type of reasoning, by norms (which are, as we are going to see, reasoning's major premise).

As for (1), we can remember that, generally speaking, the typical form of a reasoning (at least regarded from a linguistic and not from a psychologically point of view) is the following one: «if Premise 1, and Premise 2, … and Premise n, then Conclusion», where premises "P1, P2, … Pn", and conclusion "C", are verbal or written statements[4]. But legal reasoning is a particular form of reasoning, since it consists of a reasoning in which, at least, one of the premises and the conclusion is normative in its essence: from this point of view, legal reasoning is part of the set of all practical reasoning, as, for example, moral reasoning. But legal reasoning is also a reasoning hold by subjects which have public powers in an institutionalized context[5] (typically: courts and judges): they use legal reasoning to reach their decisions and to justify them in front of public opinion and other institutionalized subjects in-

plato.stanford.edu/archives/sum2014/entries/legal-reas-interpret/, 2014, 1, accessed September, 3rd 2015.

[2] *Ibid*.

[3] *Ibid*.

[4] See D. CANALE, *Il ragionamento giuridico*, in G. PINO, A. SCHIAVELLO, V. VILLA (eds.), *Filosofia del diritto. Introduzione critica al pensiero giuridico e al diritto positivo*, Torino, 2013, 316ff.: 316f.

[5] *Ibid.*, 317.

volved in the context (other courts or judges but also lawyers and even legal theorists).

(2) From this point of view, at least for Civil law Countries, it is well known that «essentially scholars in philosophy of law have improved their interpretation and application of written norms […] in terms of renewal (or subsumption) of facts to normative types»[6]. As for the modern idea of law – i.e. the idea of law developed since 17th Century in Europe – legal reasoning is precisely reducible to the model of the so called "legal" or "practical syllogism": a syllogism in which the major premise is a norm; the minor premise is the fact; and the conclusion is the subsumption of fact to norm[7]. As everyone knows (but we will come back on this very soon) this kind of model was especially 'promoted' by Thomas Hobbes and, then, developed by Cesare Beccaria and Montesquieu too, in the search for certainty in law: as someone well said, «the ideals of the law-application model characteristic of Continental law were shaped, historically, in the fight against […] arbitrariness»[8]. A fight conducted by the conviction that, in the name of the division of powers and the reduction of law to a system of written norms, judges have the unique duty to apply law following a formal model of rationality governed by deduction, a *more geometrico* use of reason. Now, as well known, this model is in crisis, and some of the main criticisms point to issues in its major premise: as hermeneutics explain, there is no evident and objective meaning of textual provision and norms are the result of complex operations of interpretation[9]. It is

[6] M. TARUFFO, *La semplice verità. Il giudice e la costruzione dei fatti*, Bari, 2009, 199.

[7] A formal representation of legal syllogism is, among others, in C. BERNAL, *Legal Argumentation and the Normativity of Legal Norms*, in C. DAHLMAN, E.T. FETERIS (eds.), *Legal Argumentation Theories: Cross-Disciplinary Perspectives*, Dordrecht, 2013, 103ff.

[8] C. VARGA, *Logic of Law and Judicial Activity: A Gap between Ideals, Reality and Future Perspectives*, in Z. PÉTERI, V. LAMM (eds.), *Legal Development and Comparative Law*, Budapest, 1981 (now in: C. VARGA, *Law and Philosophy, Selected Papers in Legal Theory*, Budapest, 1994, 257ff.), 264.

[9] See for example J. ESSER, *Precomprensione e scelta del metodo nel processo di individuazione del diritto*, Napoli, 1983 (= *Vorverständnis und Methodenwahl in der Rechtsfindung*, Frankfurt am Main, 1970); H.G. GADAMER, *Verità e metodo*, Milano,

also clear that it is not possible to look at facts (the minor premise) in terms of mere descriptivism: according to epistemological outlooks revealed by criticisms of contemporary philosophy of science of the modern idea of knowledge, now it seems more suitable to speak of storytelling of facts[10] or construction of facts[11], and there is no lack of hermeneutical explanations for the constitution of legal facts[12]. Besides them, beyond the idea of reasoning as a sort of deduction, and reconsidering the crisis of the positivistic paradigm of knowledge, the form of legal reasoning is now better described in terms of constructivism[13] or as a complex set of rational operations in which abduction plays a constitutive role[14].

All these criticisms highlight that the modern idea of legal syllogism does not work: to better understand which kind of theoretical possibilities do we have, it is better to have a look inside some alternative proposal – and this is what we are going to do in the next paragraph.

2. Criticism of legal reasoning's modern representation

According to some contemporary legal philosopher[15], theories developed against the modern idea of legal reasoning may be grouped together in two different approaches: the anti-formalistic one and the

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2001 (= *Wahrheit und Methode*, Tübingen, 1970); F. VIOLA, G. ZACCARIA, *Diritto e interpretazione. Lineamenti di teoria ermeneutica del diritto*, Roma-Bari, 1999; G. ZACCARIA, *L'arte dell'interpretazione. Saggi sull'ermeneutica giuridica contemporanea*, Padova, 1990.

[10] As exposed, among others, by F. DI DONATO, *La costruzione giudiziaria del fatto. Il ruolo della narrazione nel "processo"*, Milano, 2008.

[11] See M. TARUFFO, *op. cit.*

[12] For example, J. HRUSCHKA, *La costituzione del caso giuridico. Il rapporto tra accertamento fattuale e applicazione giuridica*, Bologna, 2009 (= *Die Konstitution des Rechtsfalles. Studien zum Verhältnis von Tatsachenfeststellung und Rechtsanwendung*, Berlin, 1965).

[13] As well explained by V. VILLA, *Il positivismo giuridico: metodi, teorie e giudizi di valore. Lezioni di filosofia del diritto*, Torino, 2004.

[14] See G. TUZET, *Dover decidere. Diritto, incertezza e ragionamento*, Roma, 2010.

[15] We follow here and sum up D. CANALE, *op. cit.*

analytical one. The first one claims that the modern model of legal reasoning is wrong in itself, since legal reasoning has, in its essence, features which are incompatible with the legal syllogism's scheme; the second one, on the contrary, asserts that, also if this scheme is incomplete, it is useful to explain peculiar features of legal reasoning, even if it is not sufficient to understand how courts really reach their own decisions or to evaluate them.

To have a close look at both of these different approaches, we should remember that the first one is mainly represented by studies on legal rhetoric and by legal hermeneutics. As everyone knows, the interest in legal rhetoric started again thanks to Perelman's and Toulmin's studies, which have been an attack on the modern and Cartesian idea of knowledge in an attempt to regain forms of rationality different from the deductive one – and, as for Toulmin, informal criteria of logical validity. Perelman's main criticism (which have been more influent in legal theory then Toulmin's one) regards the fact that legal reasoning is a dialectical type of reasoning, which has doubtful premises, an unsure conclusion, with inference from premises to conclusion which is disputable too: in this context, Perelman claims, it is no possible to speak about truth, confined to the realm of deductive science, since legal reasoning is governed by a type of 'weaker' reason. For its part, according to legal hermeneutics, what is central in legal method is the role played by interpretation, governed by pre-comprehension and by hermeneutical circle: all things that stress the importance of judges' discretionary powers.

So, both legal rhetoric and legal hermeneutics claim that the model of rationality typical of legal reasoning is governed by reasonableness, which is different from the logical-rational-criteria of deduction (the one we find in modern legal syllogism): reasonableness it is not based on logical rules – in fact it is weaker than them; but this 'deficiency' is what makes possible to reach a decision based on judgement criteria which are not widespread but, at least, shareable. From this point of view, according to someone[16], these anti-formalistic approaches have

[16] *Ibid*., 331ff. For an evaluative overview on Perelman's work see M. MANZIN, *Vérité et logos dans la perspective de la rhétorique judiciaire: contributions perelmaniennes à la culture juridique du troisième millénaire*, in B. FRYDMAN, M. MEYER

the merit to stress out the importance of judges' argumentative and interpretative practices, underlining the active role played by courts in the formation of law. But, at the same time, this point should be the main critical one of these two approaches: since courts' decisions seem to be strictly connected with values – on which reasonableness is based –, and since values are now governed by a pluralistic view (very often they are in reciprocal contrast), judges' discretionary power seems to be too vast. In this way, the certainty of law seems to be seriously in danger and courts end to be judges of their own work: so, the ancient question *Quis custodiet ipsos custodies?*, rises up again in its all dilemmatic dimension.

To maintaining the focus on the control and evaluation of courts' reasoning is the main goal of analytic approaches, which claim that

> legal reasoning is not characterized by a sui generis rationality oriented to identify the political and moral ends to be realized by law […]. On the contrary, it is possible to build a rational model of fair legal decisions which uses logical tools»[17].

So, according to analytical approach, it is possible to maintain the basic scheme of legal syllogism, which is able to identify some typical features of judicial decisions' logical form: but it is also necessary to integrate it, so to specify the criteria on which judges' choices are based on.

Among these kinds of approach, it should be useful to nominate the one developed by Robert Alexy, who tries to decline the analysis of legal reasoning taking account of hermeneutics and basic features and rules of practical speech. To be more precise, according to Alexy, legal reasoning is a particular case of practical speech,

> «addressed by judge to other subjects advancing, as itself, a 'correctness' claim': statements made by judge in her decision claim to be sus-

(dir.), *Chaïm Perelman: de la nouvelle rhétorique à la logique juridique*, Paris, 2012, 261ff.

[17] D. CANALE, *op. cit.*, 333.

tained as correct, fair, valid, on the base of the reasons which justify them»[18].

The rules which ensure all this kind of requirements are typical of each communicative context but are also, in part, universally valid. What is important to remember is that these rules are useful not to choose judicial speech's premises: these premises will continue to be chosen (as also Perelman claims) by judges taking account of their own values or personal believes. But Alexy's rational speech's rules «prescribe the *procedure* which has to be adopted to justify legal decision»[19]: and this is the unique role they play in the speech. In this way, from a certain point of view, it is necessary to assume that the contemporary pluralism on moral values makes impossible to guarantee a decision as for premises' position: what it is instead possible to do it is to guarantee the reasoning from a procedural and logical point of view, susceptible to be universally accepted.

But, if this (together with its prescriptive value) is a positive aspect of Alexy's proposal, it is also a very problematic one: in fact, «as already noticed by Wróblewski, the application of this set of rules it is not sufficient to justify in a complete way a fair legal decision»[20]. In addition, there is no common agreement on these kind of rules and so, at the end, Alexy's proposal seems to be the one of an ideal situation then a proposal of a real set of indication able to address practical judges' work.

All things considered, since both anti-formalistic and analytical approaches have some features which it is possible to accept and other features we are obliged to reject, it seems that a good proposal on legal reasoning should take into account both anti-formalistic and analytical approaches or, at least, their 'good' aspects. From this point of view, as for example Damiano Canale claims[21], analytical approaches are useful, for example, to describe some aspect of legal decision maintaining the

[18] *Ibid*., 335.

[19] *Ibid*., 336.

[20] *Ibid*. Previously, Canale examines Wróblewski's proposal (another example of analytical approach) on legal reasoning and shows its merits and limits too.

[21] *Ibid*., 339ff.

value of logical tools; and, in their own turn, anti-formalistic approaches are helpful to investigate, for example, what kind of psychological processes judges follow to reach their decisions or to stress which kind of political or value are involved in judges' choices for reasoning's premises.

We believe that this kind of suggestion must be undersigned: some contemporary developments of philosophy (to tell the truth, of philosophy *tout court* more than philosophy of law) make clear, in our opinion, that usual epistemic and philosophical divisions and dualisms – as, for example, the one between Continental and Analytical approaches, which seems very similar to the one we have met in relation to legal reasoning – must be now rejected. Not only because, sometimes, that kind of division has been based on real theoretical mistakes[22], but also because, now, the evolution of philosophy in itself suggests an 'unifying' approach: in other words, it is possible to maintain what is good in different approaches, trying to build an unified theory. We also believe that it is possible to reach a similar end in the field of legal reasoning or legal methodology[23]: for the aim of this brief essay, we would just like to suggest a possible path to reach this end then to develop a complete proposal on possible legal reasoning's unified model. In fact, on the one hand, it already exists a well-founded and good proposal about legal reasoning[24]; on the other hand, as a previous step, maybe it should be of

[22] This has been, for example, the case of division in ontology or in metaphysics, fields in which erroneous interpretations of Kant's thought have become real *topoi* in philosophical debates, without anybody knowing or worrying to verify what Kant really said. All this is very well explained by F. BERTO, *L'esistenza non è logica. Dal quadrato rotondo ai mondi impossibili*, Roma-Bari, 2010 or by F. D'AGOSTINI, *Realismo? Una questione non controversa*, Torino, 2013.

[23] This is what we have tried to do in F. PUPPO, *Metodo Pluralismo Diritto, La scienza giuridica tra tendenze 'conservatrici' e 'innovatrici'*, Roma, 2013 partially following the proposal developed by V. VILLA, *op. cit.*, and ID., *Il problema della scienza giuridica*, in G. PINO, A. SCHIAVELLO, V. VILLA (eds.), *Filosofia del diritto. Introduzione critica al pensiero giuridico e al diritto positivo*, Torino, 2013, 374ff., which is, in our opinion, one of the best example of 'unified' approach in legal theory.

[24] For example, the one developed by D. CANALE, *op. cit.*, or the one developed by the last chapter of M. MANZIN, *Argomentazione giuridica e retorica forense. Dieci*

some interest to stress out a common feature between Perelman's and Alexy's theories which is strictly related with legal reasoning, since it concerns dialogue, one of the most important features of the argumentative context in which this reasoning is developed.

3. But… what about dialogue?

In spite of respective and important differences between their two approaches to legal reasoning, both Perelman and Alexy consider in a right perspective the communicative context in which legal reasoning is developed: a dialectical one, with special features compared to other practical speeches' context. Among other differences, one of the most important one between these two great theorists of argumentation is that

> «an element of argumentation (…) neither Toulmin nor Perelman nor formal logic enhanced – which is instead the keystone of the researches conducted on argumentative rationality from the 1970s onwards – is dialogue»[25].

And it is clear that one of the researches to which it is possible to think is the one conducted by Alexy: but, and this is the point we would like to underline here, when Alexy (but not only) looks at dialogue, he is conceiving it as rational procedure only, a practice which permits to reach a decision in respect of some rules. We have already said about rules' problems, but, in our opinion, this is not the main one in Alexy's approach: the main one is, for us, the conception of dialogue Alexy promotes, which reduces dialogue, at one time, to an ideal situation (as such governed by rules that is impossible to respect in the real world) and to a mere «procedure of justification […] which permits to justify

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riletture sul ragionamento processuale, Torino, 2014, which is the one we prefer for reasons that will become clear at the end of our discourse.

[25] P. CANTÙ, I. TESTA, *Dalla Nuova retorica alla Nuova dialettica: il "dialogo" tra logica e teoria dell'argomentazione*, *Problémata. Quaderni di Filosofia*, 1, 2001, 123ff.: 132.

trial's decisions mutually exclusive»[26]. From this point of view, it is necessary to remember that

> Alexy does not distinguish a separate evaluation component for the result of the discussion. In his opinion, the rationality of the result depends on the question whether the discussion has been conducted in accordance with the rules for rational discussions. Because the discussion rules already contain the requirement that the argumentation must be acceptable according to common starting points, it ensures that the final results is coherent with the starting points and values which are shared within the legal community[27].

In this way, Alexy is one of the theorists – like, for example, Aarnio, Peczenik or pragma-dialectical theorists[28] – which consider legal argumentation in a dialogical perspective as a part of rational discussion. But

> what these theories have in common is that the rationality of the argumentation is related to the quality of the procedure followed in the discussion and to the question whether certain rules for rational discussion have been met[29]

and to these indexes only. The final end – at least for Alexy – is that, also applying rational speech's rules and without disobeying them, it is possible to justify a normative statement but its negation too[30]. This analytical approach has been developed to preserve the possibility to maintain rationality and certainty in legal reasoning: but

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[26] D. CANALE, *op. cit.*, 338.

[27] E. FETERIS, *Fundamentals on Legal Argumentation: A Survey of Theories on the Justification of Judicial Decisions*, Dordrecht, 1999, 197.

[28] An analysis of the dialectical dimension of pragma-dialectics is offered by J. WAGEMANS, *Dialectics and Pragmatics*, *Cogency*, 2, 2010, 95ff.

[29] E. FETERIS, *op. cit.*, 197.

[30] See R. ALEXY, *Teoria dell'argomentazione giuridica. La teoria del discorso razionale come teoria della motivazione giuridica*, Milano, 1998 (= *Theorie der juristischen Argumentation. Die Theorie des rationalen Diskurses als Theorie der juristischen Begründung*, Frankfurt a.M., 1978), 226.

> obtaining absolute certainty […] in each issue by means of rational practical discourse is impossible, because the rules of discourse, due to their perfect nature, can only be fulfilled approximately in real condition. Furthermore, even an "ideal discourse" that ends in success does not guarantee the final certainty […] of its outcome[31].

We believe that this result is due to a wrong comprehension of what dialogue really is: to understand dialogue as a mere procedure of rational speech acts just catch one aspect of dialogue but, at the same time, it undermines its value and power. In our opinion, what we have here is a sort of 'secularized' conception of dialogue, strictly confined in the inner realm of language and discourse, really analytical in its essence if regarded from this point of view. A conception which forgives the necessary realistic relationship between language and world[32], already remembered by Aristotle by founding the undeniable value of the principle of non contradiction, which is based on the essence of every discourse – that is a necessary link between words and things named by words[33]. Something that allows us to speak in term of truth in the realm of argumentation and dialogical context, without putting this term (that is: truth) in quotation mark or feeling the obligation to replace it with the less binding "reasonableness".

To understand this point it is however necessary to explain what dialogue means, because (as everybody knows) it is possible to assign dif-

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[31] A. GRABOWSKI, *Juristic Concept of the Validity of Statutory Law. A Critique of Contemporary Legal Nonpositivism*, Heidelberg, 2013, 88.

[32] The discussion of this point will be here impossible: a deep analysis of realism with the demonstration of the impossibility of alternative positions is offered by F. D'AGOSTINI, *op. cit.* The possibility offered by this approach with regard to argumentation theory is discussed by EAD., *La verità avvelenata. Buoni e cattivi argomenti nel dibattito pubblico*, Torino, 2009.

[33] The discussion of the principle of non contradiction as presented by Aristotle's *Metaphisics* is well offered by R. GUSMANI, *Il principio di non contraddizione e la teoria linguistica di Aristotele*, in F. PUPPO, *La contradizion che nol consente. Forme del sapere e valore del principio di non contraddizione*, Milano, 21ff. Some clarification for the ontological issue entailed by the use of the word "things" – and about the possibility to embrace a Meinongian approach in ontology – is offered by F. BERTO, *op. cit.*

ferent meanings and several semantic values to this word[34]. We believe that a good way to understand the profound meaning of dialogue is to look at it from a philosophical perspective, namely to remember that, in the Western philosophical tradition,

> philosophy has been essentially seen as logos, in the word's great sense, namely not as a mere "discourse", semantic (exclamation, prayer, order, etc.) or apophantic (statement, assertion, announcement, revelation, observation, discovery, testimony), but as "argumentation" […]. By "argumentation" I intend a discourse which is not limited to saying how things stand, but which tries to justify, to motivate, to demonstrate what it asserts, to bring reasons, to "account" for itself[35].

As is well known, the distinctive form of argumentation we find in philosophy is dialectical confutation, «that is to say to state the truth of a statement through the verification of the impossibility of the statement opposite to the first one»[36] thanks to use of the principle of non-contradiction and of the principle of excluded middle. From this point of view, dialectical confutation is the result of a dialectical confrontation, i.e. of a dialogue, which entails argumentation. Argumentation demands that every interlocutor involved in dialogue, when tries to persuade his interlocutor, advances a precise claim of truth[37]: when I argue for something or for someone I want that the listener agrees with me, since what I am saying it is true and what my interlocutor in saying is

[34] We already discussed this point in a previous work (namely: F. PUPPO, *Is There a Fact in Trial? A Rhetorical Account of Legal Reasoning*, *Diritto e Questioni Pubbliche*, 1, 2015, 211ff., URL = *http://www.dirittoequestionipubbliche.org*, accessed September, 3rd 2015) we would like here to refer to just to remember what is, in our opinion, a good qualification of dialogue.

[35] E. BERTI, *Logo e dialogo*, *Studia Patavina*, 42, 1995, 31ff. (now available from URL = *http://www.ilgiardinodeipensieri.eu/storiafil/berti95.htm*, accessed March, 4th 2015), 1.

[36] *Ibid*., 2.

[37] All this topic, included the discussion of Tarski T-scheme's version to which we are referring to, is very well discussed and presented by F. D'AGOSTINI, *La verità*, cit., whose main thesis we would simply like to sum up here: every clarification may be find in D'Agostini's already cited essays.

false. And, in this conception, my thesis (so to say: what I assert and the argument I offer to support it) is truth or false because

(a) it respects logics;

(b) there is an external state of affair in the world which makes my statement truth or false.

As for (a), it is clear the difference between anti-formalistic approach: logic is strictly involved in this conception of argumentation, since an argument, to be accepted, must be, at first, valid (so to say: logically observant). Logic is an unavoidable part of argumentation and "logic" means that argumentation admits not only deduction, but also induction and abduction as valid rules of inference. But logical validity is not the only criterion we must aspect to verify for accepting arguments: to accept an argument means to verify that it is not only valid, but correct too. In a word: sound, which means to include reference to (b), which entails a widening conception of argumentative rational practice then the one exposed by analytical approaches. At the end, rhetoric enter argumentation, since arguing means to expose a thesis in a persuasive way, making an argument a good argument. But, by reducing our discussion to (b), it is quite clear that to refer to an external state of affair means to embrace an ontological and metaphysical position according to which we need to assume a 'light' conception of reality[38]: thinking about a fact that makes my thesis truth means to refer non only to 'objective fact' but also to imaginary facts, discourses, possible facts, etc. In other words, to every kind of 'thing' to which my discourse is referring to: and, we do believe, this is very important for legal argumentation, a context in which, very often, discussion is also about something that is not properly a fact (just think, for example, to a certain interpretation of statutes).

In addiction, we should remember that argumentation «takes place necessarily within the frame of a dialogue […] between two interlocutors, each one of whom claims a thesis conflicting with the thesis of the

[38] Reality – F. D'AGOSTINI, *Realismo?*, cit. claims remembering Hegel position – 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, which is, from our point of view, nearer to contemporary epistemological assumption then the modern one we find, for example, in the legal syllogistic model.

other»[39]. In this way a strict (or we could say an essential) relationship is reached between argumentation, dialectical confutation, truth and dialogue. And this is the reason why, when we speak about dialogue, according to Berti, we have to understand:

> dialogue […] in a strong sense, that is to say not as simple conversation, but as discussion, as comparison between opposite theses, aiming to determine which of them is true and which of them is false. […]. When somebody says that dialogue could be fictitious too, it hints at the possibility that someone holds talks with himself, that is to say someone who represents to himself the negation of his own position trying to confute it. […]. From this point of view, dialogue, for philosophers, is not a mere state of affairs, or only an ethically advisable behavior, 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[40].

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

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

And, Berti continues, it is possible to deny dialogue if and only if somebody brings it into question; but to do this he/she is obliged to carry out a dialogue (maybe a fictitious one, but this is not important) to determine which claim is true: the one which states dialogue is undeniable or the one which states it is not[41]. A very peculiar situation, which echoes Aristotle's *Protrepticus*, which explains that it is impossible to not philosophize, since if we want to say that it is not necessary to phi-

[39] E. BERTI, *Logo*, cit., 3.
[40] *Ibid*., 3 f.
[41] *Ibid*.

losophize 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.

We think that this kind of approach to philosophical dialogue could be considered valid for the structure of dialogue in general and then also for that special kind of dialogue that is a trial, since the transcendental nature of a dialogical situation is the same in all these argumentative contexts.

As we have seen, Berti talks about two types of dialogue: dialogue in the strong sense of the word, in which interlocutors try to understand which discourse is true; and dialogue in the weak sense, that is to say a mere conversation in which there is no interest at all in truth (maybe, we say, because interlocutors believe that truth does not exist and so all opinions are misjudgements or all opinions are true, which amounts to the same thing. Now it is quite clear why Plato and Aristotle attacked the Sophists and Eristics, who denied the presence of truth in rhetoric and the dialectical power of confutation)[42]. As already mentioned, we have dialogue in the first and strong sense of the word when: i) there are two interlocutors, each one of whom claims a thesis conflicting with the other's; and when: ii) the interlocutors are concentrated on determining which opinion is true through the dialectical verification of the opposite opinion's impossibility. Dialogue in the strong sense of the word could be fictitious too, since it is possible that somebody, as it were, speaks with himself to criticize his own opinion trying to confute it and so verify if his opinion is true or false. A note only: also if we say "opinion", we are perfectly aware that, concerning the epistemological basis of dialectic (which is now at stake), Aristotle clarifies that the premises of dialectical confutation are *èndoxa* and not mere opinions, which are different from *èndoxa* since *èndoxa* are opinions which «are "generally accepted", which are accepted by everyone or by the majority or by the philosophers – i.e. by all, or by the majority, or by the most

[42] For an explanation of the necessary presence of truth in rhetoric see for example A. ZADRO, *Verità e persuasione nella retorica classica e nella retorica moderna*, *Verifiche*, 1, 1983, 31ff.

notable and illustrious of them»[43]. So it is clear that opinions and *èndoxa* are not the same thing, since «opinions […] do not coincide with *èndoxa*, but […] these are comprised by those»[44]. But I think I can continue talking about opinion, making clear that when I use this word in a dialectical context according to Aristotle I mean *èndoxa*.

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

Think, for example, of dialogue between two interlocutors (as in real dialogue) who however share the same idea, so that we have not a duplicity of positions (as in fictitious dialogue): so, also if we have two interlocutors, it is possible to not find any clash of opinions. In my view[45] what avoids a dialogue between people sharing the same opinion degenerating into a mere conversation could be the fact that, as in fictitious dialogical situation, one of the interlocutors, or maybe both of them, hypothesizes a possible confutation to their common opinion, to

[43] ARIST., *Top*. I 1, 100b 21-23.

[44] E. BERTI, *L'uso "scientifico" della dialettica in Aristotele*, *Giornale di metafisica*, XVII, 1995, 169ff. (now available form URL = *http://www.ilgiardinodeipensieri.eu/storiafil/berti1.htm*, accessed March, 4th 2015). About the value of *èndoxa* in Aristotle's conception see also E. BERTI, *Il valore epistemologico degli endoxa secondo Aristotele*, *Dialéctica y Ontología. Coloquio Internacional sobre Aristóteles, Seminarios de Filosofía*, 14-15, 2001/2, 111ff. We discussed this issue in relation with legal methodology and legal informatics (in particular with reference to information retrieval processes) in F. PUPPO, *Informatica giuridica e metodo retorico. Un approccio "classico" all'uso delle nuove tecnologie*, Trento, 2012.

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

check its truth. But, unlike fictitious dialogue, in this case it could be easier to analyze the problem, since in fictitious dialogue somebody is alone to discuss his own opinion and maybe it could be harder to think about objections to it. To sum up briefly this point, I could say that if we have many people speaking together but sharing the same idea without trying to confute it, we have only the guise of dialogue even if we have various interlocutors: despite appearances the situation would be in fact monological and not dialogical.

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

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

All things considered I think it is possible to say that, at a basic level, we are in the presence of dialogue[46]:

1. when we have two or more people in reciprocal relation (or just one for fictitious dialogue), speaking together about a common subject

[46] See also the analysis proposed by F. D'AGOSTINI, *La verità*, cit.

in a rational way, namely to bring a thesis up for discussion with the aim of assessing if it is true or false; if they share the same opinion (or always in fictitious dialogue) to reach this alethic aim they (or he/she in fictitious dialogue) are obliged to think of an opposite thesis and to discuss it by trying to confute it;

2. when there are two or more people with a difference of opinion; in this case, dialogue could assume a controversial form, in which we should expect that people would be clearly willing to discuss their own opinion, searching for truth and trying to persuade one another (I say that dialogue could assume a controversial form because it is possible that people do not agree to discuss their opinions or discuss them in respect of rationality; but in this case there is no space for dialogue and peaceful coexistence, but for violence only);
3. a peculiar form of controversy is the one we find in a trial, since it is characterized, beyond two or more people with different opinions, by the presence of a third person (namely the judge) who has to be persuaded by parties involved in the trial and who is called on to determine in an impartial way which part is in the right according to substantial and procedural laws, stating about the trial's truth. So I think it is possible to say that a trial is a peculiar form of dialogue, namely of controversy, characterized by a very specific and well identifiable institutionalized context.

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

With regard to law, this identifies the trial as the original dimension of law instead of rules understood as State's formal will, for which a multiplicity of parties (State and citizens) is needed but not a multiplicity of opinions (for example, in the Hobbesian or imperativistic conceptions, legal theorists conceives obedience of law only or, otherwise,

ways of bringing somebody in line), so as to make truth extraneous to law.

4. Concluding remarks

As we have seen, for modern ideas of law the model of legal reasoning is reducible to a practical syllogism. The model of knowledge which is correlated to this model of reasoning refers to a monological and not a dialogical legal context, conceiving the judge as a sort of scientist and the trial as a sort of laboratory, in which the judge can reach the certainty of his/her decision describing facts and, in the end, knowing law as a fact, since any interpretation of it is forbidden. What do we have here is a conception which embraces an objective and neutral knowledge of law and fact: judge can reach truth, but "truth" stands for certainty, according to the foundationalist idea of modern knowledge, in which the two souls of the Cartesian and empiricist model coexist[47].

This is exactly the model of truth we find in Perelman but also in Alexy (and so in anti-formalistic and analytical approaches): a truth that it is clearly impossible to reach in dialogical context.

Moreover, these models are directed in particular towards judge's work, without taking seriously in account parties' presence in trial. Judge's decision is the outcome of trial, but it is after parties' argumentations: it is not a solitary work (and this is what has been really forgotten by modern model of legal syllogism). From this point of view, by remembering the dialogical and dialectical dimension of trial together with the real nature of truth we find in it, which is argumentative and not objective (even granting that objective truth could exist; and I think it cannot)[48], means to remember, at the same time, the real dimension of

[47] See D. PATTERSON, *Diritto e verità*, Milano, 2010 (= *Law and Truth*, New York, 1996), ch. 8.

[48] It is impossible to think of a 'pure' fact or to speak about a fact as a 'pure' fact, because in any case there is a subject who thinks or who speaks about fact. Here also it is possible to think of philosophy of science and remember Heisenberg's indeterminacy principle and the idea that observations always modify experiments, to the extent that even a measuring entails subject's interferences (see for example G. BONIOLO, P. VIDA-

trial which is a trilogue[49], a three-parties speech: *Processus est actus trium personarum actoris rei iudicis in iudicio contendentium*.

To reflect in this way about trial's structure implies to argue that its dialogical feature is the main thing which allows us to find a rigorous foundation for argumentation. The analysis of the nature of dialogue in the perspective of the Western philosophical tradition, and in particular of Aristotle's conception, allow us to understand the essential relationship we find between argumentation, dialectical confutation, truth and dialogue, which gains undeniability as a transcendental situation.

But, in the legal experience, dialogue is consisting of parties' rhetorical activities (in this sense we are referring to judge too): each party (in this sense not judge) claims their own interpretation of norms and their own definition of facts. The dialectical confrontation between them will bring judge to a right interpretation of the norm and to a true cognition of fact. But judge is a party involved in trial's dialogue. To analyse legal reasoning means to develop look at it recognizing, at first, this complexity: a very hard work since, as we already remembered, for several centuries the only subject of legal reasoning's titular has been the judge and lawyers have been systematically removed by legal theorist. But this is a work already started by others[50] and, anyway, it is outside the announced aims of this present brief essay.

LI, *Filosofia della scienza*, Milano, 1999, ch. 3). 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". And it does not mean to deny realism: rather, it means to give to realism is right place in philosophy, since it seems impossible to deny that something we call "reality" does exist, as well explained by F. D'AGOSTINI, *Realismo?*, cit.

[49] As exposed by C. PLATIN, *Le trilogue argumentatif. Présentation de modèle, analyse de cas*, *Langue Française*, 122, 1998, 9ff.; C. PLANTIN, C. KERBAT-ORECCHIONI (dir.), *Le trilogue*, Lyon, 1995.

[50] We refer to the so called "CALS" model of legal reasoning developed by M. MANZIN, *Argomentazione*, cit., which is a very interesting proposal since it takes charge of trial's trilogical structure, explicitly regarding to parties presence in trial's dialogue.