LEGAL DISCOURSE: THE PROMISE OF CLASSICAL PRACTICAL PHILOSOPHY

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1. Legal discourse: the promise of classical practical philosophy

The knowledge of classical Roman jurists was, due to its practical character, both juristic and 'practical' in the philosophical sense. This way of thinking, however, was abandoned after Renaissance humanism[1] by the modernists, who tried to construct closed, axiomatic and deductive scientific systems. The modern image of law, conceived as a legal or rational order closed into a scientific system, has lost its practical philosophical nature characterised by classical natural law and dialectic argumentation. In the second half of the 20th century, practical philosophy was rehabilitated (it is the case of the well-known debate on the *Rehabilitierung der praktischen Philosophie*) in Germany (and in continental Europe) as well as in English-speaking countries. This brought with it some concepts of justice and practical philosophy (prudence, political friendship, dialectic argumentation, topics, etc.) back into mainstream philosophical discourse. The Aristotelian, and partly Thomistic, concepts of practical philosophy have played a key role in this process and the subsequent debates alike. Aristotelian influence, in the form of 'classical natural law' (Michel Villey), first appeared in the thought of (classical) Roman jurists, and was, after a long gap, received by today's legal philosophers. The major part of philosophical debates about law is now conducted along Aristotelian, and partly Thomistic, lines. In the last three decades, Aquinas has been rehabilitated by advocates of 'neo-classical' natural law within a peculiar framework of moral and political (i.e. practical) philosophy. Certain exponents of this current also draw inspiration from the thought of the analytic philoso-

[1] See Manzin (1994), (2007), (2008).

pher Herbert L.A. Hart, who describes law as a social practice, thus opening the way for a philosophy of law that concentrates on practical reasons and justification.

We can agree with Ulpian, and the greatest authorities of ancient Roman law in general[2], that *lawyers* are the 'experts' of justice and fairness. We may also add that by virtue of their practical approach, they follow legal *principles* (as for instance the principle of 'giving everyone his or her due') rather than applying rigid statutory provisions unjustifiable by justice. Yet the application of principles needs the *juristic* (i.e. *legal* skill), of pursuing justice in a *practical* (prudential) sense – hence the expression *iuris prudentia*. Ulpian was convinced that law, justice and fairness are organically connected within natural law, which is made to work by the practical 'philosophy' of lawyers, through their art aimed at what is good and equitable, that is to say, through their actual legal knowledge.

Roman juristic thinking was linked to Greek dialectical argument rather than rhetoric with open arguments, and so the Greek tradition did not appear among Roman jurists in the form of rhetorical argumentation before the courts but through the use of Aristotelian dialectical arguments. The material of arguments included legal-philosophical categories which were regarded from the perspective of practice.

Today, when the practice and epistemic form of rhetoric is regaining popularity, it is important that a deeper reflection on justice and law should not be replaced. One way of saving this kind of reflection may be to rediscover the *philosophical* importance of classical (ancient and medieval) dialectical argument for legal discourses[3]. As Michel Villey emphasised, ancient rhetoric, which was the source of the jurists' logic as well, was not a mere technique of persuasion, but 'controversy was a much worthier and more fruitful art leading to probable truth; it ensured the "places" and the selection of questions for a meaningful debate; it

[2] See Hervada (1990).

[3] On ancient dialectic as the heritage of European culture, see Berti (2003). On the relationship between dialectic on the one hand and practical philosophy and Gadamer's hermeneutics on the other, see Berti (2002).

was also a rich source of other useful advice; and, finally, it led to good legal solutions'[4].

Of the best known scholars who contributed to the rehabilitation of ancient Greek dialectical or topical thinking, one may mention Chaim Perelman whose 'new' rhetoric actually returns to Aristotelian rhetoric and the modes of ancient dialectical argument, but also Theodor Viehweg in Germany[5], and Michel Villey in France[6]. The active interest in the exploration of ancient dialectic, that manifested itself in the second half of the 20th century[7], has brought particularly valuable results through the work of Enrico Berti in Italy, whose findings in the field of ancient Greek dialectic have much to offer contemporary legal philosophy[8]. Speaking of philosophers, also the dialogical dialectic of Hans-Georg Gadamer should be mentioned. Gadamer's intersubjective and situational approach still throws new light[9] on the whole process of legal hermeneutical understanding and the reality of law itself, being at the same time faithful to its Aristotelian roots and up-to-date. The link between Gadamerian hermeneutic and Greek dialectic is highlighted also by the title of a volume dedicated to Gadamer[10]. Finally, it should

[4] Villey (1967).

[5] Viehweg (1953).

[6] See Villey (2003).

[7] On the beginnings of the renewed interest in ancient Greek dialectic see Sichirollo (1961).

[8] Enrico Berti regularly published in journals and volumes devoted to the philosophy of law. It is partly due to his work that Italian legal philosophers started to explore the legal dimension of dialectic argument and its promises for our age. He also contributed to the rehabilitation of practical philosophy: see Berti (2004).

[9] «The art of dialectic is not the art of being able to win every argument. On the contrary, it is possible that someone practicing the art of dialectic – i.e., the art of questioning and of seeking truth – comes off worse in the argument in the eyes of those listening to it. As the art of asking questions, dialectic proves its value because only the person who knows how to ask questions is able to persist in his questioning, which involves being able to preserve his orientation toward openness. The art of questioning is the art of questioning ever further – i.e., the art of thinking. It is called dialectic because it is the art of conducting a real dialogue», Gadamer (2006), p. 360.

[10] Bubner & Cramer & Wiehl (1970).

not be forgotten that ancient Greek dialectical thinking has found some resonance among English-speaking analytic philosophers as well[11].

Underlying the deconstructionist conception of law there is an anthropological view that is not only strongly individualistic but also conflictual. Its exponents claim that (human) rights work through continuous and regular conflicts of power, much like the sophists' idea of debate[12]. In the final analysis, such a view transposes, legal problems into the practical social policies related to the power dimensions of discursive and oppressing hierarchical oppositions, which can then be emancipated and/or 'deconstructed' or subverted. Human rights that – rightly – dominate legal thinking thus become the main point of reference for substantive law and legal decisions in an age where a philosophical concept of human nature is not only abandoned, but seems 'politically incorrect'. How, then, could one *justify* an argument or choice between mutually limiting rights in concrete cases of collision between human rights, if human nature, or its 'true' philosophy (i.e. one that is sound in a juristic sense), or objective and substantive elements of interpersonal justice, can hardly be addressed any more?

The practical and theoretical impact as well as the consequences of anti-essentialist, anti-dualist[13] and anti-metaphysical (neo-)pragmatism which opposes theoretical philosophy cannot yet be fully assessed. We still think that the postmodernist practice of critical politics cannot serve as the basis for a sound philosophy of law, nor, for that matter, for any kind of legal philosophy whatsoever. Thus, the emancipatory practice of postmodernist neo-pragmatism or deconstructivism, or any form of radical criticism, cannot show the way for right practical philosophy that aims at achieving justice.

It is, in our opinion, not the analytic but the continental tradition of practical philosophy that should be followed. It is the one that reaches

[11] See Berti (2003) p. 14, pp. 16 f.

[12] «Ah, là-dessus je suis radicalement du côté des sophistes» – Michel Foucault writes, one of the most important exponents of post-modernism. Foucault, Michel, *La vérité et les formes juridiques*, http://1libertaire.free.fr/MFoucault194.html. The topic of Michel Foucault's first course in the Collège de France was the sophists, a movement he had always considered important.

[13] See Rorty's claim that he is 'anti-dualist': Rorty (1999), p. xix.

back to classical (ancient and medieval) roots in a way that allows for the reconstruction of the spirit of that tradition, both in terms of the form of dialectical thinking and the substance of classical natural-law thought. In light of that, we may state that the questions of practical philosophy, hermeneutical understanding, and dialectical argumentative logic have to be directed to truth in the sense of natural law (i.e. the *nature* of things and relationships). This also applies to an open, argumentative and rhetorically-oriented discourse based on opinions and appearances, the outcome of which is therefore always uncertain. In its Aristotelian and Ciceronian sense, dialectical thinking (to be used by lawyers) seeks to distinguish between *true and false* by way of clarifying the question in a debate between opposed views, through highlighting the contradictions in the arguments of the opponent[14]. (The use of dialectical syllogisms that are true in the sense of formal logic does not, however, exclude the *probable truth* of premises, which are determined on the basis of 'considerable opinions' [*endoxa*] regarded as true. Thus, in a late medieval context we may speak of a *debate of dialectical syllogisms*, which is aimed at determining which of the syllogisms leads to the most plausible and most probable, i.e. most persuasive, truth)[15]. Finally, we may add that according to Cicero, only those in possession of the dialectical method can become lawyers[16]. A dialectically coherent juristic opinion, being either true or false, follows the *nature of things*, as the devices of dialectic follow and exhibit the internal structure and nature of things. It is not so much the middle Platonist dichotomous logic of Porphyry, but the nature of the *field of practical philosophy* that suggests that the determination of the *due* [*iustum*] of the respective Other is possible only on the basis of an assessment of arguments con-

[14] Elemér (1988): Logical coherence, which dialectical argumentation allows for, leads not only to *logical rightness*, but is capable of expressing *substantial truth* (i.e. *the right order of things*). Cicero discusses the virtue and capacity to recognise the natural order of the whole world, and describes human community within that world as something that is based on nature, which still requires the recognition of one another as fellow humans. He then describes the science of rational debate, i.e. dialectic, which is the art of distinguishing between true and false, as something that aims at protecting these recognitions. Cicero, Marcus Tullius, *De legibus.* XXIII (60)-XXIV(62).

[15] Errera (2006).

[16] Pólay (1988), p. 98.

sidered in the *interpersonal dimension* (i.e. a *dia-logos*, and discussed in a dialectical argumentative debate)[17].

The pragmatism of classical Roman lawyers does not show the characteristics of Platonic essentialism but rather Aristotelian natural law and dialectical thinking. This latter could follow the nature of things, thus being *pragmatically essentialist* and *pragmatically philosophic* in a dialectical-controversial (i.e. *discursive*, way at the same time)[18]. The same applies to the glossators, too. Thus, anti-Platonic arguments of postmodernist criticism do not concern the validity and acceptability of classical practical philosophy.

The way of exerting justice has always been the central question of practical philosophy. The question of right (i.e. just and fair) action has been, since the classical age, part of the more general philosophical problem of *the right way of life*. Juristic arguments concerning human rights can, however, be said – in very general terms – to be problem-avoiding technical and pragmatist, and – in certain matters – politically and ideologically charged in favour of the fashionable intellectual currents already mentioned. Both ways depart from the right (classical) way of practical philosophy. Still, the conception of 'juristic knowledge as true philosophy' advocated by Ulpian seems to show a way that avoids both errors, even for today's lawyers, and even if the great jurist only summarised the fundamental principles. The work and thought of the glossators, in turn, has shown a way that can and ought to be followed even nowadays.

The classical natural-law way of practical philosophy, whose Aristotelian version we regard as desirable[19], was characteristic of both the classical Roman jurists and the glossators. This way of thinking took the nature of interpersonal relations, considered to be *real*, as its starting point. It thereby aimed at giving everyone his or her *legal* due, ra-

[17] See the preface by Francesco D'Agostino (2007).

[18] Villey (2003), pp. 104-106, pp. 429-430.

[19] Here, the cleavage is not within English-speaking theories, but between the analytical post-metaphysical and traditional currents or natural law. Aristotle, the most important figure of practical philosophy, represents a link between the two, his pragmatism allowing only for a minimal metaphysical content in his categories of analysis, method and approach.

ther than fighting for some kind of a presumed 'due' in the sense of whatever political or moral philosophy, which is often the case nowadays. As the above discussion has made clear, the legal epistemology of the classical jurists is intimately linked to the anatomy of human relations they described. This epistemology was characterised by dialectical argumentation, a way of controversy determining the legal nature of interpersonal relations in a constructive way, unlike the (often implicit) conflictual anthropology of postmodernism and the related power-oriented epistemology.

In terms of the sources of law, classical Roman lawyers did not rely on the exclusiveness of rigid rules, not least because their quest for law and justice was oriented in practice by broad legal *principles* of action in today's sense. Thus, the way to overcome the *exclusiveness of rules*, which captured modernist legal thinking, does not lead through a *political and ideological dogmatism* of conceptions of justice formulated in a doctrinaire way, nor through a subjective nihilism of occasional references to these conceptions, but is rather the well-known path of classical Roman lawyers. It is therefore a welcome development that ancient and medieval dialectical debate and argumentation is an increasingly popular field of research, which indirectly contributes to our knowledge of classical legal thinking. 'At the heart of the logic of law there is the study of dialectic' – as Michel Villey suggestively puts it[20]. The method of controversy, he adds, could be the method of right legal thinking and practice, if applied in a well-grounded and self-reflective way. Since, as already mentioned, the classical Roman jurists' way of thinking was shaped by the dialectic of Aristotle, and was preserved by the glossators[21], the study of *Aristotelian dialectic* seems inevitable. This, we should emphasise, opens the way to the exploration of the inter-subjective argumentative dimension of the practical rationality of classical natural law. Dialectic thus transposes the traditional questions of practical philosophy into the *interpretive hermeneutics of inter-personality.* This calls us to explore and re-think the classical sense of the action-guiding function of *legal principles*, and a number of other traditional

[20] Villey (1967), pp. 81-82.

[21] Villey (2003), pp. 105-106, pp. 429-430, pp. 466-467. See also Giuliani (1966); Frivaldszky (2009).

questions of legal philosophy, for example, fairness, observance of law, or the determination of the due share of the Other.

Among the glossators, due to the influence of the greatest thinkers, the view spread that the science of law (*legalis scientia*) did not merely depend on philosophy but that *iurisprudentia* actually *was* philosophy[22]. Apparently, this idea found support in a relevant passage of Ulpian[23]. At the same time, the definition of wisdom, understood in the Middle Ages as philosophy, said that it was the knowledge of things human and divine, the science of just and unjust. This definition was passed down through the tradition of Roman law, where it was understood as jurisprudence, and it was after this development and with this content that in the Middle Ages jurisprudence and philosophy were identified on the basis of the heritage of Roman law. If the classics generally assert this, then the profession of the lawyer is not to create human relations as some kind of 'god' through arguments or legal acts and according to various fashionable conceptions of justice, but to *explore* the *order* of things, the nature of human relations, as a quasi-philosopher in the classical sense. The same applies to the sphere of validity of one's arguments as well. We therefore accept doubt that stems from opinion in the Socratic sense. This method of continuous questioning, we hope, guides us towards truth through probabilities, by way of carefully constructed questions and answers that are open to reality and the arguments of the Other. This non-sophistic tradition of dialectic warns us that logically sound argumentative justification can never depart from truth, which it seeks to approximate. In this respect, it seems worthwhile to compare the figures of the orator, the sophist, the dialectician, and the philosopher, in their Aristotelian senses. We cannot now discuss the relationship of the orator, who uses methods of

[22] Padovani (1997).

[23] «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. Dig. 1.1.1.1Ulpianus 1 inst. 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», Dig. 1.1.0. *De iustitia et iure*. Dig. 1.1.1pr. Ulpianus 1 inst.

persuasion over an audience, to legal argumentation. The complexity and problems of that kind of relationship are well illustrated in the works of Cicero. Rather, we should have a look at the argumentative and intellectual patterns of the sophist, the dialectician, and the philosopher[24]. In terms of method, the sophist could be a dialectician, whereas the difference is in their intentions: the arguments of the dialectician are directed at the thing itself, while the sophist merely 'utilises' the appearance of justice. Dialectic, on the other hand, takes a middle path between sophistic and philosophy, being a relative of the former in method but not in intention, and of the latter in the intention directed at the thing itself but not in the theoretical deductive (scientific) method (used by the philosopher). The dialectician, rightly understood, looks for the nature of things in an open argumentative debate, starting from the generally shared opinions. If, however, we understand philosophy of law not in the modernist sense of an abstract science that aims at building a theoretical system from axioms by way of deduction, but – as it was suggested earlier on – use dialectic in the field of law in accordance with the scope of practical philosophy, then the deductive element is limited to the internal structure of individual syllogisms (i.e. the logical way to the conclusion). We have already mentioned that the premises of syllogisms are still determined on the basis of probabilities, and dialectical debate aims exactly to determine which selection of premises leads, by way of syllogism, to more plausible conclusions. Thus, the debates of the glossators represent *debates of syllogisms*. In their method of argumentation aimed at a just and lawful solution but oriented by probabilities, they remained faithful to Aristotle, as it can hardly be overlooked how rarely the Stagirite used formal syllogisms in his scientific writings[25]. Nor, therefore, can the science of law follow another method. Classical Roman jurists and the glossators did not choose to deductively construct a system, but followed the way of classical Aristotelian natural law and dialectical arguments[26].

According to the classics, dialectical logic substituted for inter-personal argumentation in the field of questions of practical philosophy

[24] See Sichirollo (1961), p. 113.

[25] Sichirollo (1961), p. 116 f.

[26] Villey (2003), pp. 429-430, pp. 466-467.

dominated by the logic of 'probable truth'. Their exploration of reality thus did not use the scientific means of *proof* by deductive inferences, but wanted to explore truth through dialectical debates, remaining always in the field of probabilities. St. Thomas Aquinas, in turn, made human nature the basis of practical philosophy (i.e. arguments based on the law of nature). Thus, the truths of this nature, i.e. the few fundamental rights (like the right to life) and institutions (such as marriage, family) that stem from those truths by way of apodictic syllogisms, delimit the 'probably true' domain of dialectic argumentation. This completes the heritage of classical natural lawyers.

Finding the widely shared starting points of thinking [*endoxa*] necessary for practising classical dialectic today seems easy, as these can hardly be anything other than human rights. Still, they do not make a totally secure starting point for argumentation. Libertarian 'human rights' that have been traditionally considered as going against human nature, yet nowadays appearing – and finding radical advocates – in public discourse (e.g. same-sex couples' 'right to marriage'), are shaped by 'public opinion' organised by mainstream media and often ruled by politics. The question, then, is how far, in what sense, and why these 'considerable' views are widely shared. We deny, on the one hand, that all opinions should be held 'true' as the sophists thought, and assert, on the other hand, that public opinion is strongly shaped by powerful actors, with the consequence that most often it is only one opinion that seems 'true'. Given the lack of freely and widely shared opinions necessary for dialectical debate, it is difficult to be sure that the play of opposed arguments is going to lead to probable truth. We therefore think that we should be even more consistently faithful to the moral truths of Aquinas' philosophical anthropology in terms of the basic human-related moral questions – which are truths accessible to every human being through his or her own nature – and it is only within the limits of these that dialectical debate can and should take place. Thus, if our dialectical argument leads to a conclusion that is contrary to human nature as determined by philosophical anthropology or – if you like – the theory of moral philosophy, then however logical or persuasive the argument may seem and however widely shared it is among lawyers, it is substantially incorrect. In such cases, we started from

endoxa or apparent *endoxa* and oriented ourselves towards what was or seemed 'probable', yet we did not come to truth but to falsehood. In order that dialectical argumentation (probably) comes to true conclusions, it has to be based on generally shared wise opinions having in themselves 'arguments containing the seeds of truth' (*argumenta veritatis*) rather than apparent truths distorted by the media. Moreover, argumentation constantly has to be aimed at truth[27], otherwise the truth is lost.

It is therefore an extremely important question, both theoretically and in practice, that what we exactly regard as the content of human rights functions nowadays as *endoxa*. The sophist Protagoras argued that 'man is the measure of everything'[28], yet the question remains what nature and what corresponding rights can be attributed to human beings. We can by no means accept here another one of Protagoras' sayings, according to which 'all opinions are true'[29], nor do we think with Protagoras that an unjust cause should be considered as true just because it is shown in a positive light by effective rhetorical[30] and other means of media. In a final analysis, it seems that the *Universal Decree of Human Rights*, composed in the time of and (partly) by Jacques Maritain, was based on a *de facto* consensus in terms of human rights, which came about spontaneously as a recognition, and found a greater degree of natural agreement than it would nowadays. The factual validity of human rights that is due to an overlapping consensus does not in practice indicate an identity of philosophical or substantive opinions but perhaps only a *coincidence* of formulations on the level of actual normative texts. This is not something to be downplayed, yet the fragility of consensus, which results from its lack of grounds, is shown by the

[27] de La Porrée (1992).

[28] «Man is the measure of all things […]»: Laertius, Diogenes, *Lives of the Eminent Philosophers*, IX. 8. 51.

[29] Here we have to agree with Berti (2003), p. 23.

[30] Aristotle remarks that people rightly found the conception of Protagoras outrageous, according to which a weaker (i.e. false) case can be made to appear as stronger, since this way the argumentation that uses effective rhetorical devices does not proceed from what is generally accepted to what is probably true by way of persuasive arguments, but advocates a lie by way of sophistic argumentation. See Aristotle: *Rhetoric,* 1402a.

fact that it does not give a reliable theoretical or argumentative basis for the philosophical determination of rights whose content is debated or for the application of eventually conflicting rights. Thus, forums of the application of law often merely echo the 'public opinion' oriented by mainstream media in terms of the content of certain questionable human 'rights'[31].

Postmodernist conceptions of truth and justice, which reject any kind of grounding, already show some signs of decay. It seems somewhat aimless to demonise essentialism in the field of legal philosophy, as classical natural-law doctrines have been widely rehabilitated, opening a wide space for practical wisdom, prudence[32], or leading up to these, fruitful professional and open dialectical debates. Today, many scholars follow the path of natural-law practical philosophy, which does not ignore practical truth, while seeking to achieve justice through dialectical argumentation. The question is, then, whether arguments of practical philosophy can be linked to a philosophically determined human nature and its truths. We think that justice is inherently and inseparably linked to truth, of which human nature is also a part. There are a few cogent norms and institutions of fundamental importance stemming from the latter, and these are the marginal criteria of valid legal argumentation. It is *within* these margins that other legal questions can be addressed in dialectical debate, following the internal logic of things (i.e. legal relations).

[31] Berti does not see this danger as he does not approach the question from a juristic perspective. He is thus justified in thinking that a practical consensus in terms of the content of human rights may be a sufficient basis for arguments and refutations based on human rights. Berti (2003), p. 20 ff.

[32] See Nelson (1992); see also the conception of 'practical syllogism' developed by Fulvio Di Blasi, which is intended to reconcile natural law and virtue ethics: Di Blasi (2006).

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