BETWEEN *IS* AND *OUGHT*: AT THE ROOTS OF REGULATORY OBLIGATORINESS

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Abstract

Facts and values, truth and values. These are the terms that are the premise of this analysis. The aim is to ask oneself about Law and its foundation. In particular, two different questions require a new and more updated discussion: one is dedicated mainly to what the Law prescribes in a certain place and at a certain time (*quid iuris*) (Science of Law), and the other, instead, concerns above all justice (*quid ius*) (Philosophy of Law). It is only from the tension between Law and Justice that the jurist can be reconciled with jurisprudence and fulfill what – in hindsight – is his fundamental task: setting checks and balances to legislation for the protection of human rights.

Keywords

Roots of Law. Facts and Values. Truth. Certainty of Law. Justice. Compossibility.

Summary

1. Comparing positions. 2. *Facts* and *values*: knowledge or evaluation? 3. *Truth* and *values*: theoretical or practical philosophy? 4. Certainty *vs.* justice. 5. Beyond the factual... in search of the foundation.

1. COMPARING POSITIONS[2]

Armed against each other, and if not enemies, definitely unfriendly brothers: [3]

– *supporters of deontology versus the supporters of teleology.* According to the former, the concept of fairness has priority over the concept of good. In contrast to teleological theories, a thing is good only if it is in agreement with ways of life that comply with the principles of fairness that are already available. [4]

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[2] See AMATO MANGIAMELI 2012a, 2012b.
[3] According to a known and wise expression of KAUFMANN 1973, 712.
[4] Cf. RAWLS 1971.

According to the latter, justice cannot be primary in the deontological sense of the term, because we cannot consistently believe that we are the kind of beings that deontological ethics demands us to be. The crucial question is not what purposes should I choose, but rather who am I, and in the midst of this cluster of possible purposes how do I discriminate between what I am and what is mine; [5]

– *ethical non-cognitivists versus ethical cognitivists*. Some support the thesis of the great divide between knowing and evaluating, truth and values, being and having to be. Hence they claim that there are no universal values.[6] In fact, the very historical variety of moral principles demonstrates that they are the result of cultural, social and personal processes that are not attributable to an abstract and metahistorical zone of truth that can be immediately perceived by every human mind.[7]

The others, on the contrary, believe that value judgments have an objective foundation and are in close relationship with reality and with the knowledge of its structural and existential elements. Philosophy, therefore, cannot restrict itself to proposing values, but it must, first of all, know them and reveal their foundation, or their relationship with reality, that can make them communicable; [8]

– *legal positivists versus the supporters of natural law.* On the one hand there are those who – by denying any metaphysical, axiological or value-related reference – reduce law to the *jus positum-conditum*, defining it as the set of rules that are decreed by the legislator and through which a certain behavior is provided for, permitted, authorized or prohibited.[9] That is to say, those who think that legal norms, in order to be considered as such, need not also be fair, but simply valid.

On the other hand there are those who affirm the existence of a meta-positive Law that is intrinsically valid and axiologically superior[10] to written Law: an *unwritten* and unwritable Law which, however, is contained 'in the flesh of the human heart', [11] those according to whom norms have an objective foundation, other than the will of those who impose the norms.

In one case, as in the other and in the other case again, the contrasting positions recall and remind us of some significant distinctions.

The distinction between the *ethics of duties* (or *deontological ethics*) and the *ethics of purposes* (or *teleological ethics*).

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[5] Cf. SANDEL 1982.

[6] It is worth recalling the famous words of Protagoras, according to which – precisely – the good is 'colorful and multifaceted'. PLATONE 1988b, 334 b.

[7] SCARPELLI 1998, 227. See also SCARPELLI 1982.

[8] COTTA 1974, 65.

[9] KELSEN 1960.

[10] D'AGOSTINO 2006, 81 ff.

[11] MATHIEU 1989, 30-31 and 47.

According to the former, the universality of norms must always be safeguarded, regardless of the specificity and exceptionality of a given situation. Thus, according to Kant, the truthfulness of assertions that cannot be eluded is man's formal duty towards everyone else, however great may be the harm that comes to him or to others. [12]

While, on the basis of the latter, *purpose* is the highest criterion that discriminates among the many concrete circumstances. Thus, according to Plato and Aristotle, lies used as a remedy may be beneficial for example in the case of enemies, or even of people we consider friends, when they are about to do something wrong, driven by madness or sudden dementia. [13]

Furthermore, mention can be made here of the distinction between *the exact science of human nature* [14] and *the search for the human spirit according to the principles of common sense*, [15] as well as between *the purely empirical* doctrine of Law and *the doctrine of fair Law*. [16]

We may consequently find ourselves with a deontology that has Hume's face and Kelsen's features: [17] a deontology which, in the light of Hume's law claims that, in the field of legal experience, justice cannot be a characteristic that is capable of distinguishing Law from other coercive systems and this would be due to the relative nature of the value judgments on the basis of which a social order is defined as being fair. [18]

Or, according to an equal and opposite viewpoint, we may have a teleology with Reid's face and Radbruch's features. A teleology which, by adopting Reid's common sense, maintains that where justice is not even sought after, where equality, which constitutes the very heart of justice, has been deliberately denied in the creation of Positive Law, this Law is not only an 'unjust Law', but it is also completely devoid of any juridical nature. [19]

I would like to point out that, also because of the complexity of the distinctions and sub-distinctions, the combinations could really be very many, not least because, in turn, each of the contrasts mentioned here recall a whole series of other issues. Issues that are decidedly open, such as the relationship between *facts and values* (and, if you prefer, between *knowledge* and/or *evaluation*) or, the issue concerning the complex relationship between *truth and values* (and, if you prefer,

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[12] KANT 1797b.

[13] PLATONE 1994, II, 382, III, 389. See also: PLATONE 1988a, 371; ARISTOTELE 1979, IV, 7, 1127.

[14] HUME 1740.

[15] REID 1764.

[16] According to the classic distinction made by KANT 1797a.

[17] The expression 'with Hume's face' comes from SANDEL (1982), although he refers to the ethical liberalism of Rawls and to the primacy of Law over good, as well as of the Self over its ends.

[18] KELSEN 1960.

[19] RADBRUCH 1946, 105 ff.

between *theoretical philosophy* and/or *practical philosophy*). Issues that, still today, require reflection by jurists (and philosophers of Law in particular).

2. *FACTS* AND *VALUES*: KNOWLEDGE OR EVALUATION?

With regard to the Sermon on the Mount and the scientific refutation of the maxim *don't resist evil* or *turn the other cheek*, Max Weber wrote that it is clear that from the secular point of view, it preaches an ethics of the lack of dignity. One needs to choose between religious dignity, which is the foundation of this ethics, and virile dignity, which preaches something quite different: you must resist evil, otherwise you too are responsible if evil prevails. And whether one is the devil and the other is god depends on one's attitude towards the ultimate end, and it is up to the individual to decide which one for him is god and which is the devil. And this is so for all the segments of life. [20]

Therefore, we cannot claim that values and their orders are either true or *deceptive appearances*. This eternal conflict cannot be quelled, since it is possible for us to understand only what is true, fair, and divine, within the framework of one or the other order of values. Rather, it is the antagonism among different values (and different divinities) that dominates fate and with regard to which decisions are taken in the various circumstances on the basis of compromises and relativizations. And indeed whenever the issues being discussed are ultimate in nature, the solution rests on a fundamental matter of fact: since it is based on itself and is to be understood within its confines, life knows only the mutual and eternal conflict of the divinities. Leaving aside the metaphor, life knows the antagonism among ultimate positions and in order to solve the conflict the decision will have to be at times in favor of one position and at times in favor of the other. [21]

Hence the distinction between the world of facts and the world of values, hence the separatist solution between science and philosophy, between cognitive activity and decision (choice). Science would therefore be the realm of the non-evaluative (descriptive) knowledge of facts, while, philosophy would be the realm of the proposal of values. On a practical level, then, there would be the corresponding distinction-separation between competent people and politicians: the former (experts, technicians, scientists) having the task of providing opinions-advice based on science, while the latter would take decisions based on values; in other words, a positive stance vis-à-vis the accepted values and at the same time a negative stance towards the rejected values. [22]

And again: the Science of Law would have the task of knowing precisely what Law really is and what differentiates legal propositions from other propositions; vice versa, the Philosophy of Law would have the task of discussing the criteria

[20] WEBER 1919.
[21] *IBIDEM*.
[22] WEBER 1922.

according to which the rules established by some authority should satisfy their implicit claim to being fair[23].

In reality, every decision implies a judgment that is not only evaluative, but also knowledge-based. While it is true that a purely empirical doctrine of law is (like the wooden head in Phaedrus' story) a head that may be beautiful, but, alas, has no brains, it is equally true that positive laws are an excellent golden thread when we are looking for the origins of those judgments in pure reason as the sole foundation for any possible positive legislation. [24] Not surprisingly, Kant distinguishes the metaphysical principles of the Doctrine of Law from the metaphysical principles of the Doctrine of Virtue, and endeavors to derive from the former the rules related to real rights, to the Law on Obligations, Copyright, Family Law, Criminal Law, Public Law, the Law of Nations, through to Cosmopolitan Law. And once again, not surprisingly, Kant's reconstructions and teachings are much more complete and more concrete than anything professional philosophers usually state about Law today and certainly cannot be said to result only from the self-reflection of Pure Reason. [25]

Beyond preferences – Philosophy of Law of jurists versus Philosophy of Law of philosophers [26] – it is however necessary not to lose sight of the real object of our reflections, which means we cannot do without knowing the results provided by Science: Science that investigates the structure and the systematic link that holds together the juridical norms (normative provisions), Science that studies Law in the form of institutions, contexts of actions and procedures. In short, Science as a cultural fact among other cultural facts.

On the other hand, every question solved by Science not only poses new problems for scientific research, but also opens up new problems of interpretation of a given situation and of human destiny and hence new problems of behavior and morality. It is precisely the development of Science that stimulates a renewal of reflection on man's understanding and his actions. In other words. Science offers renewed stimuli and a problematic expansion of philosophical research. [27]

For example: technical progress and the refinement of technical manufacturing methods pose many practical problems and forces us to make fundamental reflections. As Nikolaj Berdjajew said, utopias appear to be far more achievable today than they were in the past. And we are currently facing a much more distressing question: how can we avoid their definitive realization? Utopias are achievable. Life marches towards utopias. And perhaps a new century is beginning, a century in which intellectuals and the educated classes will be

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[23] See AMATO MANGIAMELI 2004, 35 ff., 2009, 141 ff.
[24] KANT 1797a.
[25] See HOFMANN 2000.
[26] BOBBIO 1965, 40-46.
[27] COTTA 1974, 25.

thinking about how to avoid utopias and return to a non-utopian, less perfect and freer society. [28]

Utopias therefore appear to be far more achievable than was previously believed, and precisely for this reason people who reflect, often wonder whether it is possible to dodge the definitive realization of utopias by trying to jump off the vehicle that is dragging us along the steep slopes of that intermediate zone leading to a perfection that is crushing us. And if Helmut Thielicke, in his *Der Einzelne und der Apparat. Von der Freiheit des Menschen im technischen Zeitalter*, [29] expresses himself in these terms, more or less in the same period, and on both sides of the Atlantic, then there may really be grounds for rehabilitating practical philosophy.

The revival of *philosophia practica* is undoubtedly a phenomenon linked to the German cultural context but it is worth noting that this revival constantly pervades the entire philosophical debate to the point that it becomes the common point of reference, even though positions may be different and methodological (or epistemic) needs antithetical. And so, each approach will, from time to time in a more or less explicit way, focus on the Aristotelian φρόνησις or on the Kantian ethics of duty – at times weakening them, at times strengthening them. This is so for hermeneutics, but also for phenomenology, critical rationalism, constructivism, critical theory, and also for the philosophy of concrete *ethos*, neo-transcendentalism and communicative ethics. [30]

The reason for all this is simple. The rehabilitation of practical philosophy intends to be in its own way an effective response to pressing contemporary issues: scarcity of energy and raw materials, irreparable environmental degradation, conservation of the species, and protection of animals. In short: it intends to propose – and indeed does propose – concrete ethical-legal models. Underlying these models is the idea that the successes of science and technology have compromised practical rationality and forced theoretical rationality to merge with instrumental – i.e. technical-scientific – rationality. In turn, the latter has given rise to phenomena of fragmentation and irrationalism due to which it becomes difficult, if not impossible, to discern the specificities of man's (moral and political) practice. But it is far more important to observe how such phenomena entail a seeping and widespread misunderstanding. It is no coincidence that emergencies (ecological, environmental, energy, etc.) are treated carelessly and, despite the many appeals, are managed without complying with universally binding guidelines and instructions.

It is therefore necessary for philosophy to make its return and be put firmly in charge of the philosophy/science/technology/ethics *querelle*. As written by Hans Jonas, the arrogance with which reason looks to the past is terrifying. Made audacious by science (and by its conquests) and incapable of perceiving the

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[28] This passage is taken from BERDJAJEW as quoted by HUXLEY 1991, 3.

[29] 1964.

[30] For further considerations see my article 1998.

wisdom of the past, reason takes control over the ultimate issues with a wicked attitude. What is missing is humility, without which it is not possible to understand what tradition has to say about the meta-empirical meaning – or non demonstrable side – of things.

In the image that man has of himself he is increasingly the creator of what he has done and of what he can do, and above all he is someone who establishes what he will be capable of doing. And we are not talking about you or me but about all human beings; and the sphere where the issue of responsibility comes up is decidedly the indefinite future, not the current context of the action occurs. This requires a new type of imperative[31].

If the observations made so far make sense, the idea of a static separation of the autonomous and independent fields assigned to scientific research and to philosophical research, needs to be rejected. And if this is so, the distinction among methods remains (or can remain), as does the distinction among the representatives of the problems treated, but what comes to the fore is the process of the interaction of knowledge and of results, as well as the need for cooperation in research. On the other hand, only the continuum between science and philosophy can adequately respond to the contemporary cultural situation, in which on the one hand Science, which is no longer only descriptive but also operational, cannot do without the interpretation of a human situation and of human affairs; on the other hand, Philosophy cannot provide an interpretation in valid terms without taking into account the data and results of Science. [32]

The alleged distinction between Science and Philosophy, between knowledge and evaluation, between facts and values proves to be a completely deceptive request. Indeed Bacon pointed out that the scholars who dealt with sciences were either empirical or dogmatic. Empiricists, like ants, are content with accumulating and then consuming. Rationalists, like spiders, weave their web using their brain substance. The bees, instead, represent a middle ground: they collect the raw material from the flowers in vegetable gardens and fields, which they then transform by processing it through their own activity. The hive of true philosophy is not at all different. Philosophy does not use solely or above all mental forces, it needs not restrict itself to keeping intact in its memory the material provided by natural history and mechanical experiments, but transforms and processes it and holds it in the human mind. Thus our greatest hopes are placed in the intertwined and binding union of these two abilities, the experimental and the rational, a union that has not yet been established. [33]

3. *TRUTH* AND *VALUES*: THEORETICAL PHILOSOPHY OR PRACTICAL PHILOSOPHY?

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[31] According to JONAS (1974).
[32] COTTA 1974, 26
[33] 1863, Aphorism XCV.

The distinction between truth and values has ancient origins. Let us recall the different talent and different predisposition of Plato, philosopher and artist, attentive to image and myth, with a poetic-ironic style, and Aristotle, philosopher-scientist, whose discussion is critical and rational and whose literary presentation is free from irony, linked as it is to 'measuring reality': there are no doubts that what Socrates says in *Politeia* sounds elegant, but it is not satisfactory! [34]

Is it only a matter of style, since Socrates led philosophy from *the starry sky to the city and the houses*, or, does Aristotle propose a different philosophy compared to Plato's, both in terms of its dogmatic content and theoretical and practical approach? [35]

That this discussion is not a question of style is demonstrated by the distinction between theoretical philosophy and practical philosophy.

The central object of the former is truth: and in fact if it is truth, it has an absolute foundation. The principle of the philosopher king – that is, the serendipitous meeting between a young tyrant with excellent qualities and a legislator who adheres to the truth, an encounter on which rests the Platonic hope of a cessation of the evils of humanity – is based on the fact that the true politician is only he who possesses theoretical science, in other words, he who combines political knowledge and metaphysics. Hence, whoever upholds the truth.

The key category of practical philosophy is value: and value is plural, since it is possible only in the concreteness of an action. It does not have an absolute foundation, since it is always depends on the situation. It is no coincidence that Aristotle avoids the principle of the philosopher king. Or rather, he transforms it and reduces it to a specifically political problem, that is, to a problem of constitutional theory and of legitimacy of the monarchy. And in fact, the recognition of the relativity of constitutions forces Aristotle to abandon the correlation between the moral constitution of man, identified with his being a citizen, and the political constitution. Hence the distinction between ethics and politics and the differentiation between man's virtue and the citizen's virtue.

In this regard, Günther Bien[36] observes that the object of practical philosophy is man only as citizen. And the focus of political science, distinct from ethics, is on the determination of a 'more technical' concept of citizen. Just as there are different types of constitutions, there are also different types of citizens. To the

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[34] ARISTOTELE 1966, IV, 4, 1291 a.

[35] Which, according to BIEN (1973), has emptied the human being of meaning between the animal-like and the eternal: mortal human nature, whose description is oriented towards being animal-like, is immediately superseded in that form of existence and being that partakes directly in the eternal. This going of man beyond himself is achieved through the cognitive participation of his immortal soul in the eternal transcendent being. The consequences are that the knowing soul is not in this world, and that the State – in which the administrators of earthly power over men are the holders of supreme philosophical knowledge, which must ultimately be divine –, is essentially only a State for gods and children of gods.

[36] *IBIDEM*.

plurality of the constitutional systems corresponds a plurality of citizens. Being a citizen is therefore a relational definition that matches the relativity of constitutions.

Aristotle encompasses two components, a sophistic and a Socratic-Platonic component. On the one hand, he says about justice: *neither the evening star nor the morning star are so wonderful*; on the other hand, he recognizes the relativity of the laws: laws are to be construed in accordance with the constitutions. [37] The philosopher is therefore believed to have had the great merit of 'saving the phenomena', with their relativities, contradictions and oscillations, and at the same time of 'letting the regulatory and the paradigmatic apply'. [38]

Topical dialectics is the method that is typical of practical philosophy. Indeed, maintaining the right balance between descriptiveness and prescriptiveness, empiricism and normativity, may be considered an indispensable task of any discourse and practical knowledge. Which also means that in the practical-political field the theory of the happy medium is valid. It is therefore important to approach the existing situation with the mere intention of improving it, without thereby burdening it with the violent introduction of 'ideal constitutions'. On the other hand, a characteristic of practical philosophy is precisely that of excluding a natural and absolute criterion that is distinct from what is fair for the individual cases. Indeed a criterion that is natural and absolute, is good and fair in and of itself, and therefore it is not practical nor useful for stating what good behavior is. Thus, the principle of the philosopher king gives way to the politician who finds the possible and plausible value of the here and now through discourse and argumentation.

This means, in the final analysis, that practical knowledge is first of all a rationalization of popular opinions according to the 'right medium' criterion. And, as we know, the theory of the right measure is variable: that is, it can be reduced to a mere hermeneutics of everyday opinions. But if this is so, Habermas's remarks against the neo-Aristotelians proves to be appropriate: if philosophical ethics and political theory can know nothing other than what is already contained in the moral conscience of any population, then they cannot distinguish in a well-founded way a legitimate power from an illegitimate one. If instead philosophical ethics and political theory are to highlight the ethical core of moral conscience and reconstruct it as a normative concept of ethics, they cannot fail to indicate criteria and foundations. [39]

4. CERTAINTY *VS.* JUSTICE

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[37] ARISTOTELE 1966, IV, 1, 1289 a.
[38] See in that sense BIEN 1972, 370.
[39] HABERMAS 1976.

Probably, the two different libraries mentioned here – one dedicated to values (philosophy of practice) and the other to truth (theoretical philosophy) – require a new and more updated arrangement. In fact, if it is true that diversity implies the possibility of choosing from various alternatives, it is equally true that the new types of intervention (the management of emergencies) make both perspectives, taken in their entirety, precious. Robert Spaemann rightly states, in *Der Streit der Philosophen*, [40] that every philosophy claims comprehensiveness when it comes to their theory and practice. Not to make such a claim would mean that what is being done is not philosophy.

And what's more, because these two different libraries – one mainly dedicated to what laws prescribe in a certain place and at a certain time (*quid iuris*) (Science of Law), and the other, instead, attentive above all to justice (*quid ius*) (Philosophy of Law) – require a new and more updated arrangement. Also because it is only from the tension between certainty and justice – and from its understanding – that the jurist can be reconciled with jurisprudence and hence perform what in actual fact is his fundamental task: provide checks and balances to regulation and rationalization in order to protect freedom versus the legal order, life versus the mind, chance versus the rule, fullness versus outlines, in short, protect what is purpose and value versus what only complies with the purpose and only for this reason is rich in value. [41]

And it is precisely within this framework that the question of the norm is proposed again in terms of dialogue of reason, that is, in terms of the truth, and this above all in order to contrast the decadence and relativism that pervade and partially define the present, suffocating those questions of the spirit, of being free, of knowing the truth, which constitute the possibilities and needs of the human spirit. [42]

In other terms, only a study that pays attention to the philosophical-ontological foundation of the norm is capable of contrasting the calculating and utilitarian conceptions of the law, that is to say the linguistic, methodological and conceptual babel, which finds its arguments in the modern formalist, positivist and rationalist reconstructions [43] and in the postmodern theories of *Law and* ... (economics, ... society, and again law and science, ... and race, ... and gender). [44]

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[40] 1978, 96.

[41] See RADBRUCH 1910.

[42] In fact, when all human demand focuses on material needs, there is the risk of neglecting the questions concerning the spirit, that is, the risk of setting aside what is universal in man. In short, decadence and relativism arise when freedom and reason (capable of truth) no longer know how to oppose the *night of the spirit*. This opens the way to tyranny: on the other hand, courage and reason would be needed to counter it (I draw these thoughts from BRUAIRE 1986).

[43] These visions can be partially justified also by recalling what KANT (1797a) argued. The jurist, in fact, can certainly know and declare what belongs to Law (*quid sit iuris*), that is, what the laws in a certain place and in a certain time prescribe or have prescribed. However, the jurist cannot say if what these laws prescribe is also right, and the universal criterion by which we can generally recognize what is right and what is unjust (*iustum et iniustum*), remains completely hidden from

On the one hand, therefore, Philosophy, which is (nothing more than) the quest for truth, must awaken precisely those questions of the spirit, suspended between identity and otherness, and must go back to being the wisdom of our time. On the other, however, Law, with the metaphysical postulate of freedom, must entitle individuals to all freedoms, always seeking its foundation, suspended between the worker of the last hour and the worker of the first hour, between the prodigal son and the brother, and, leaving aside metaphors, between inaccessible ideal and elementary virtue, between purpose and function.

However, Philosophy can be tempted to abandon the search for truth. [45] Law on the other hand – by going against its own nature – can be transformed into something other than itself, so much so that once it has become abstract and formal it becomes tantamount to the law of the of those who are stronger, unless political power intervenes to ensure everyone's rights. And this would establish the primacy of Politics over Law.

So things are not at all simple. Philosophy has often deceived itself about its own nature, since it has had to deal with an object and a task that are somewhat controversial, unusual and mysteriously original. If it is true, indeed, that – according to the Aristotelian proposition – Philosophy is a science that studies being as being, and the properties that belong to it by its very nature, [46] it is equally true – as Leibniz claimed – that this science lacks a real statute and, therefore, is counted among the sciences forced to go in search of themselves. So it is precisely for this reason that it continuously disguises itself as its opposite – *ideology* - and continues until it ends in nihilism. [47]

In reality, starting from some facts/clues offered by different sources of knowledge (art, economics, politics, technology, and so on), Philosophy is called upon to investigate and interpret everything that surrounds it and, more in particular, to reflect on those issues that affect each of us. And, consequently, everyone is involved. And each of us is involved to the extent that we defend our right to know something other than what science already knows in order to act in

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him if he does not abandon those empirical principles for a time and does not seek the origins of those judgments in pure reason as the sole foundation of any possible positive legislation.

[44] On this topic MINDA 1995.

[45] This is the drama of philosophy: entangled in the ephemeral chiaroscuro of the social, and therefore mere caricature of itself, philosophy, *as the thinking about the world*, 'always arrives too late', because 'it begins its flight towards dusk' (HEGEL 1820, *Vorwort*).

[46] ARISTOTELE 1973, IV, 1, 1003 a.

[47] That this outcome is inherent in (in a certain type of) philosophical discourse is confirmed precisely in the forms of scientific reductionism, characteristic of scientists who act as philosophers, that is, of philosophers against philosophy. Propositions such as 'being is reduced to the phenomena that science knows' have no scientific sense, since, if they did have scientific sense, science would not need a method. It has a method to discard what is of no interest for it and, consequently, to build a knowledge exclusively of a subject. If not, it would not give rise to techniques, it would not be an operational science (cf. BRUAIRE 1986).

the natural world. Likewise, the philosophical question [48] appears to be an existential process that takes place within the spirit, an act of inner life, spontaneous and pressing, which of course cannot be avoided, since philosophizing is an occupation which is not only full of meaning, but on the contrary is necessary, something that an individual who is spiritually alive cannot refrain from doing. [49] That is why – as Hegel noted – philosophizing arises from disruptions in the harmony of life. The issues at stake here arise from the conflict between impersonal-objective and personal-subjective demands, from the tension between an external and an internal point of view about ourselves and about the world. In other words, the need to resort to Philosophy emerges when we lose our ability to reconcile the opposites, and the opposites, as they acquire independence, lose their living relationship and mutual action. It is therefore a random occurrence, but, from this split comes the attempt to overcome the impenetrable divide between subjectivity and objectivity, and to conceive the 'having become' of the intellectual and of the real world as a becoming. [50] Philosophy can then regain its role.

Law, for its part, has often shown and shows another side of the coin: the more we identify concepts, unconditional laws, impersonal reasons, the higher the threshold of unhappiness of legal conscience. We therefore realize that abstract universality may lead to non-Law, that is to say to a jungle of power relations. Indeed, the mere reliance on impersonal reason (virgin of desire and will) and on (unquestionable and formal) legality could lead to an understanding of the juridical which, however, has neither the ability nor the courage to capture all of its many nuances, so as not to reduce it to something else.

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[48] Even with the risk of misunderstanding, as DERRIDA (1987) writes, in the footsteps of Heidegger. Philosophy is one of the essential forms of the spirit: independent, creative, rare among the possibilities and needs of the human *Dasein* in its historicity. Precisely because of its essential rarity, a singularity always exposes itself to misunderstandings, as the *Zweideutigkeit* exposes itself to the *Mißdeutung*. The first misunderstanding consists in this (a misunderstanding is in full operation still today): first of all it is required that, in every epoch, Philosophy should provide *Dasein* and the people with the foundations on which to build a civilization; then, if one realizes that from this point of view Philosophy is useless and contributes nothing to the building of civilization, it is disparaged. Second expectation, second misunderstanding: Philosophy, figure of the spirit, needs to provide at least a system, an osmosis, an image of the world (*Weltbild*), i.e. a map of the world (*Weltkarte*), a sort of compass that allows for universal orientation. If philosophy cannot found a civilization, may it at least be able to facilitate and lighten the technical-practical functioning of cultural activities; may it relieve science of the unrewarding task of epistemological reflection on its own presuppositions, concepts and fundamental principles (*Grundbegriffe*, *Grundsätze*). *What is expected of the philosopher? May he be the official of the fundamental*.

[49] As observed by PIEPER 1966.

[50] *"Wenn die Macht der Vereinigung aus dem Leben der Menschen verschwindet und die Gegensätze ihre lebendige Beziehung und Wechselwirkung verloren haben, und Selbständigkeit gewinnen, entsteht das Bedürfnis der Philosophie; es ist insofern eine Zufälligkeit; aber unter der gegebenen Entzweiung der nothwendige Versuch, die Entgegensetzung der festgewordenen Subjektivität und Objektivität aufzuheben, und das Gewordensein der intellektuellen und reellen Welt, als ein Werden, ihr Sein als Produkte, als ein Produzieren zu begreifen"* (HEGEL 1968, 14).

Hence, when Philosophy explores the Law, it cannot be satisfied with the ordinary definitions of phenomena (historically multiple, variable and sometimes even unreliable), on the contrary, it must transcend the appearances which could preclude the understanding of the phenomena themselves, replacing the changing and disorderly opinions with reflections that are capable of revealing what is really important. In this sense, it can be said that philosophical argumentation makes use of a magic mirror, [51] thanks to which it leaves out what is accidental and fortuitous, and reveals the ultimate and profound meaning of the totality of what we are confronted with.

It is easy to recognize that the issues concerning the norm are located immediately within the philosophical horizon, as the question of the foundation comes with Law itself and those who interpret the laws must, in order to correctly understand the logical operations performed, put themselves in the perspective that the foundation comes first and is to be understood before anything else. In other terms and in a nutshell, we need to recover those dimensions which favor an integral understanding of the juridical phenomenon and face the question of the foundation, placing man in relationship with the truth, [52] even with the awareness of that unsurpassed qualitative limit that distinguishes our knowledge: it is always in progress and never fully realized. [53] It is therefore necessary to reconsider the relationship between norm and existence, duty and being, in the light of the link between the unspeakable and the speakable, between the ineffable and the linguistically available, between the theoretical world and the world of life.

5. BEYOND THE FACTUAL... IN SEARCH OF THE FOUNDATION[54]

Despite the claim that once all the questions of science have been answered, there will no longer be any other question and precisely this is the answer, [55] it is necessary to take into account what Wittgenstein himself states about ethics: what ethics says does not add anything, in any sense, to our knowledge. 'But it is a document of a trend in the human soul that I cannot fail to deeply respect and that I would never ridicule, not even at the cost of my life'. [56]

In its own way, this passage proves useful to underline that dimension which lies within and beyond the Law. But if it is so, it is clear that anyone who believes that the existence of a legal order is equivalent to the existence of regulatory relations

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[51] DELESALLE 1986, 113.
[52] On this topic PAREYSON 1971. Always on philosophy as revealing thought, distinct from philosophies as thought that is only expressive of one's time, PAREYSON 1985.
[53] I'm thinking about BERGSON 1934, 135 ff.
[54] For a broader discussion of the topic, see AMATO MANGIAMELI 2012c.
[55] According to BLUMENBERG 1979.
[56] WITTGENSTEIN 1988, 18.

between authorities and citizens and that it is essential that the authorities support the provisions to be complied with by the citizens with threats of effective punishment for noncompliance, [57] neglects precisely this dimension. Mind you, even the statement according to which the purposes and intents of the authority (that is, the contingent political will) would in and of themselves be sufficient to justify the existence of the norm is, in any case, contradicted empirically. And this is amply demonstrated by the persistence of the validity of many norms, even long after they were adopted and in the presence of different political forms and relationships.

It should also be added that the content of the legal propositions also directly affects the validity of the norms, and consequently, the possible proof of 'a formal relationship between premises and conclusions' [58] does not turn out to be very decisive. Moreover, the fact that it is not a merely formal relationship is already evident in the request for justice, correctness, certainty, security, etc., which each individual expects from the norms. And this request is an expression of the individuals' different and conflicting claims of freedom, whose realization depends on the potential of practical action. And this is where the norm intervenes, mediating between freedom and practical action, and regulating the different claims made by individuals by saying *you must, because you must, whatever your immediate interest, your particular purpose, your personal beliefs*.

In this regard, one might object that in order to mediate, regulate and settle, it could be sufficient to resort to form, and to decisions. But it is not so. Having-to-be is not simply a form (albeit a juridical form: Constitution, law, regulation, and so on), but it is also and above all a normative substance capable of resolving all sorts of conflicts in such a way that one might say: the contrast has yielded to the implementation of the Law. And it is only this regulated and normative substance that justifies the judge's decision: a man who, being called upon to express himself on social values or specific knowledge, might even prove to be unsuitable – as often happens.

It should also be emphasized that the *you must, because you must, whatever your immediate interest, your particular purpose, your personal beliefs*, presupposes the recognition of freedom, without which the norm could not represent the objective structure of the practical action that could be inferred *a priori*. [59]

In particular, even before being written in the tables of the law, man discovers the norm in himself, as a necessary mediation between freedom and practical action: acting in compliance with the norm, obeying the law, as well as transgressing and breaking the legal symmetry, are all expressions which testify to how human action is bound to certain behaviors and not to others, and how it can be thematized by using the criteria that constitute the foundation of each community.

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[57] Von WRIGHT 1963, chap. 7, par.14. Also ID. 1971. About social actions and intentional action – with critical links to the arguments of von Wright – cf. APEL 1979.
[58] WEINBERGER 1981, 34.
[59] PIEPER 1979 and 1982.

If this is so, in order to correctly understand the different recurring terms in legal language, terms designating facts qualified according to the rules (legal transaction, contract, etc.), or designating the qualification of facts according to the rules (lawful, unlawful, etc.), human practice needs to be studied in its constitutive moments and elements. [60] Norms are not driven by a logical necessity, but rather by a practical one, and they are not even contradicted by a behavior contrary to them, since also non-compliance with the norms is always judged within the framework of the same norms[61].

At this point, unlike what is stated by some legal theories, it does not really seem to be possible any longer to argue that the validity of a norm – thanks to which actions are justified or not – may derive from habit, consent, from the obvious content of the norm itself; or even from the authority (power, force) of those (group, society, state, church) who are able to enforce the norm. Indeed in these cases, it is difficult to understand how norms with this type of foundation could claim universal validity when they are complied with only on the grounds of tradition, blind trust or fear. [62]

It is therefore clear that the thematization of norms cannot be restricted to a merely factual level: [63] acts, decisions, and judgments – leaving aside distinctions (for example, between *Verpflichtungsurteil* and *Werturteil* [64]) – can be considered to be fair and just only when sufficient reason accounting for them, or their foundation, has been identified and made clear. In this way, the solid ground on

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[60] Afterwards it will be reasonable to abstractly repropose the individual moments of reflection and to create a science of norms that qualifies as 'deontic logic' (G.H. von Wright) or as 'ethical modal logic' (P. Lorenzen) (PIEPER 1982, 1385).

[61] Cf.: AMATO MANGIAMELI 2014 and 2019; BRANDÃO 2019.

[62] PIEPER 1982, 1388 f.

[63] Such a thematization could be defined as oblique since it fails to make that leap that is inherent in asking – which according to Heidegger frees the original emergence (*Ursprung*) paving the way towards the question thanks to an already authentically questioning guide. As GADAMER (1960) shows in a particularly clear way, in practical life one finds the possibility of a question that is not such, since it is only apparently placed in the open suspension in which the decision has to occur. The question in this case is called oblique, because behind it lies a real question, an openness, which however does not go in the direction indicated by the explicit question. Oblique means precisely that it has deviated from the direction. The obliquity of a question consists in the fact that the question does not indicate a true direction of meaning and therefore does not make an answer possible. Similarly, we say that statements are oblique when they are not false, but they are not even right. They cannot be called false, because something true is found in them but they cannot even be said right, because they do not correspond to a question that had sense and therefore they do not have any real meaning, unless we straighten them out.

[64] *Verpflichtungsurteil* is obviously an expression of the deontic terms *due* (*gesollt*), *forbidden* (*verboten*) and *allowed* (*erlaubt*), while *Werturteil* stands for all those declarations with normative content (*normativen Aussagen*), to be distinguished however from the *Rechtssäzen*, in which the regulatory form is more important than the content. The question refers to the difference between prescriptive proposition (*Soll-Satz*) and juridical norm (*Soll-Norm*), and recalls the distinction between provision and norm: in fact, provision does not mean the norm, but rather the formula institutionally aimed at stating and identifying the norm; actually, *Rechtssatz* indicates the verbal formulation of the norm (LARENZ 1983).

which the juridical edifice can be built is that of universal validity, rather than formal validity.

At the same time, universal validity implies that the norms require that they be implemented even when they are expressed in indicative form. Think of such expressions as 'it is unfair in a State to discriminate and treat citizens differently because of the color of their skin', or 'justice is good'. These statements have in and of themselves an immediate mandatory nature: the former can be reread in the light of the golden rule according to which all men are equal; the latter can be translated into the formula 'there must be justice' and this, in turn, can be translated into the command 'always behave in the right way'.

And besides, universal validity is common to all (juridical, moral) norms thanks to the principle according to which what determines a moral obligation for a given individual determines the same moral obligation for every other individual. [65]

In its own way, Law recognizes the principle of regulating and judging the different forms and choices of life in the name of a (present and future) compossibility. Which means that not just any form of life (with any expectation, inclination, purpose) can be pursued, but only those forms of life whose rights are all compossible. From time to time, the Law prepares long lists of rights and duties, claims and renunciations, actions and reactions while in the meantime it commands, authorizes, allows, derogates, prohibits.

Anyone who is not a staunch supporter of the sacredness of this form, will recognize that in order to understand it is not sufficient to refer to the legitimacy and correctness of the order, given that those same commands (authorizations, permits, derogations, prohibitions) prompt respect or on the contrary dissent and resentment. It all depends on whether (my) expectation, (my) inclination and (my) purpose are shared, taken seriously and respected, or simply tolerated, or instead denied. This suggests that Law should not be dealt with merely on the basis of contingent logics – because if this were the case, there would be a never-ending dispute of values and cultures, of rights and reasons, if this were the case, every form of life would make its way defending its positions and fighting the others. Instead Law should be dealt with on the basis of that common goal which is the broad and lasting agreement between people of different societies as to what is right and unfair, good and bad. [66]

Only in this way, bound and subordinated to an objective and pacifying system of rules, *can we travel across the world and shout messages at each other that have become ... sensible.* [67]

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[65] See SCHÜLLER 1973.

[66] Cf. BERLIN 1988.

[67] I borrow the words of KAFKA (1931), but, as you can easily guess, changing their whole meaning.

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