

HERMENEUTIC PHILOSOPHY AND THE STUDY OF LAW.

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HERMENEUTIC PHILOSOPHY AND THE STUDY OF LAW.

INTRODUCTION

This essay wants to understand the event of law and the understanding involved in it as it truly happens. It thus wants to describe the event of truth in law and do justice to its different moments, four of which can be distinguished, being each in their own right as a moment of the complete process of understanding, but not absolute on their own, as each of them is 'aufgehoben' by another one.

They can be characterized as four moments in the legal process, namely the game aspect, the conflict and debate, the motivation and reasoning, the decision and sentence. But they are also moments in the history of understanding of law, characterizing different schools or doctrines. This history runs parallel to the development in hermeneutics in other domains. Some indications of this will first be given in this preliminary chapter.

1. The sixteenth century and rejection of tradition.

It can happen in the history of a culture that a tradition becomes obscure and therefore rejected. This makes the break with the tradition clear and causes conflicts which require a new integration. Such a conflict became overt in the sixteenth century, centering around a new hermeneutical principle, as well in the reformation (in theology) as in humanism (in philology) and in the reception of roman law (in jurisprudence).

All three these trends stand for a break with the medieval synthesis in which the threefold written heritage of antiquity (christianity, classical literature and philosophy, and roman law) had been harmonized slowly with the threefold rootedness of the european nations in paganism, mythology and customary law (unwritten traditions).

The sixteenth century break in each of these domains of rooted tradition was forced in an attempt to purify the antique written language and to give rebirth (renaissance) to her content on itself, and regain it in an immediate way through the 'sola scriptura' principle.

Liberty against the new work of the tradition.

The characteristics of reformation and humanistic hermeneutics described by GADAMER (WM 162 f.) are partly also valid for the jurisprudence of the time then. Even if there was no need for learning a supplementary language next to Latin, as for Greek literature or the Bible, the purification of medieval Latin was considered as much a necessity. And in jurisprudence too, it is the text who is considered to be its own interpret; there is no want for tradition for its correct understanding; the grammatical method of interpretation is the only accepted one and has to be guided by the understanding of the whole. As for the Bible and the works of Homeros, the unity of authorship is presupposed for the Codex Justinianus too, and not yet subject to historical criticism. Instead of the scholastic text-following glossae and commentaries, more systematic treatises of the canon of texts are written and the texts are purified from interpolations (e.g. Jacobus Cuiacius, Antonius Faber).

2. Rationalism and the rejection of authority.

In the seventeenth century however, not only tradition is criticized, but also the authority of the original. The presupposition of its unity and originality is confronted with historical criticism. Baruch de Spinoza (1632-1677) (Tractatus theologico-politicus as a treatise on political and theological authority) analyses the Bible and the Monarchy, Giambattista Vico (1668-1744) later on the works of Homeros^{and Roman law}. In principle, natural reason is used to understand and explain the texts (grammatical interpretation, deduction from principles). But in case of obscurity, understanding is reached by exclusion of all prejudices and a search for the intention of the author through historical data, in order to exclude misunderstandings (cfr. WM p.169). By subjecting the authoritative texts to such rational criticism, more and more difficulties arose. This leads to the "querelle des anciens et des modernes".

Modernism triumphed, and the authority of antiquity, its normative claim, is dethroned in favour of the present. The special exemplariness of classicism is no longer a presupposition for the hermeneutical task (WM 166) and this opens the possibility of writing a new canon which is considered more in accordance with natural reason. This happens as well in philosophy (René Descartes, Discours de la méthode, written in french) as in law (the rise of natural law, i.a. Hugo de Groot) ~~as well as the attempts at new codifications under Louis XIV.~~

3. The french revolution.

A third step in the triumph of modernism was taken towards the end of the eighteenth century, which will finally lead to the violent break with the past in the french revolution. In theology ^{and philosophy} the validity of revelation as given in scriptures is denied, and if Gods existence is not rejected, it is subjected to a framework of natural theology (Deism). The political existence of the monarchy is not yet denied either by the revolution of 1789, but the king is subjected to the constitution, elaborated on the basis of the human rights of the natural law doctrines, and the laws, resulting from rational discussion in a parliament/as representation of the nation. *or from abstract principles of "liberty, equality and fraternity."*

4. Hegel and the Code Napoléon.

The new age opened up by this threefold break with the past, completed in the french revolution, gives birth to two new, more or less opposed tendencies trying to deal with this break. GADAMER characterizes them by opposing integration (Hegel) and reconstruction (Schleiermacher). The same opposition dominates also jurisprudence.

G.W.F. Hegel was aware (1770-1832) that the classical life is only preserved as texts or monuments, teared from

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their world, and that this world can not be restored: all tending of it is only an external doing. The true task of the interpret is then the realization of its Spirit in a higher form than pure representation, namely the Idea, which is on the one hand the state, and on the other hand the complete system of philosophy, the absolute knowledge, in which thesis (the classical) and antithesis (its negation in modernism and revolution) are raised into synthesis. In thinking mediation of the spirit of history and present life, the truth of the past itself is saved. The idea is fulfilling the whole history in a complete system or Gesamtkunstwerk (cfr. WM 160-161).

This Hegelian Idea was already realized in 1803 - i.e. three years before Hegel finished his 'Phänomenologie des Geistes' and saw Napoleon, and seventeen years before the publication of his 'Grundlinien der Philosophie des Rechts' - in the form of the Code Napoleon. Its authors were also aware of the need of mediating the past tradition (mainly POTHIER) with the present developments. *One could also see the late 17th century structure of the "Allgemeines Landrecht" in Prussia*
This mediation could not be a mere representation of those views but requires a realization in the form of a legal system which is complete, coherent, absolute and in binding force. These characteristics were reached by the prohibition of denial of justice (art. 4: le juge qui refusera de juger, sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi coupable de déni de justice), a rule for avoiding antinomies (lex specialis derogat lege generale), the prohibition for the judge to decide by way of general disposition (art. 5: Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises), and the promulgation and enforcement of the enacted code. In this work, the history of law is completed and fulfilled, as the history of philosophy in Hegel's Encyclopedia.

5. The historical school.

The idea of reconstruction however, is defended by the historical school, and F.D.E. Schleiermacher (1768-1834) finds a worthy partisan in Carl Friedrich von SAVIGNY (1779-1861). As Schleiermacher rejects Hegel's philosophy of world history (WM 186), von Savigny rejects a codification (Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft; 1814). Both ground their vision on the continuation of history, which is not abolished by the realization of the system (WM 187) and advocate the discovery of the actual content of a text through historical research, finding its starting point in the mind of the author.

For von Savigny, this author is the 'Volksgeist' for customary law, the juriconsult or legislator for written law. Systematic or grammatical interpretation has to be complemented by a psychological-historical interpretation, as misunderstanding can only be avoided by returning to the origin of a thought in the conscience of its author (WM 174). In both ways of interpretation, the meaning of a text can only be understood in the total grammatical or psychological context (WM 178).

But both Schleiermacher and von Savigny ignore the tension between the original and the present meaning.

6. The 20th century.

Even in the 20th century, some parallellisms can be indicated. Wilhelm Dilthey (1831-1911) and Henri Bergson (1859-1941) still correspond more or less to the free-law-movement (Freirechtsschule) in Germany and François Gény (Science et technique en droit privé positif) in France. Kelsen's 'reine Rechtslehre' (1928), in requiring the suspension of all non-legal criteria in order that the legal system can be seen in its positive structure, and postulating a basic norm (Grundnorm) as foundation for this legal system, is clearly influenced by the Kantian school, but also corresponds to Husserl's (1859-1938) transcendental idealism, where a trans-

- cidental reduction is required to let the noetic-noematic structure of intentional consciousness appear.
- And Heidegger (1889-1976) was not only in contact with the theology of K. Barth and R. Bultmann, but can also be compared with C. SCHMITT (° 1888) : their first writings can be called decisionistic (Sein und Zeit 1927; resp. Gesetz und Urteil 1912, Die Diktatur 1921,...), and both move later on towards a concept of earth to understand world-order (Ursprung des Kunstwerkes 1936, resp. Ordnung und Ortung ¹⁹⁵¹, 195. ?)
 - The hermeneutic philosophy of Gadamer e.a. is more or less represented in legal philosophy by Viehweg (Topik und Jurisprudenz 1953), Perelman (La nouvelle rhétorique 1958) and Jozef Esser (Grundsatz und Norm 1957).
 - *System theory (Niklas Luhmann, ...)*

First chapter - The game of law.

As Gadamer did for his description of the ontology of the work of art, we too want to take the game as guiding principle to begin a description of the understanding of law. To begin with this key is not only meaningful in general, as the game can be called a fundamental human experience from his birth on, a foundation for further experience, but also meaningful for the understanding of law in particular, as an outsider regarding a lawsuit will certainly be hit by the game character of certain legal proceedings.

For the game appears first of all as a back-and-forth movement repeating itself continually. In a competition (Wettkampf) this movement consists of moves and counter-moves (cfr. the greek 'polemos')? Even there, the course of the game is not bound to an exterior end with which the game ends (WM 98). The movement of the game extends itself in space and time and arranges them in this way (cfr. einrichten: arrange, orient), thus buoying or staking out the playtime and playground (Spielraum: playground, scope, elasticity) from within. The lawsuit (Geding: thing-at-stake) is likewise defined by this movement of the legal activity.

The game expresses the ritual aspect of law : the same actors play over and over again the game of law under a certain ritual of words and acts, style and attire. This ritualization gives law a sacred character, separating it out from the world. Just like space for the religious man, is not homogeneous, but broken in sacred and profane places (M. Eliade, Das Heilige und das Profane, Rowohlt Hamburg 1957), so is the playground for playing man standing over against the world of particular ends without mediation (WM 102).

legende de Amstel (Amstel group) word ce este zipspeel opschouwd

Through such a ritual or game movement, this room is staked out as a circle wherein the game takes place. Likewise, a playground is defined by judicial ritual - the court-room, and also a playtime between opening and closing of the lawsuit (Geding), and a plaything (Spielding) as that what is at stake (aufs Spiel, in Geding). This playground forms the (squared) ring wherein the judicial contest can be played : only within such a ring can justice be done and said (juris-dicere, jurisdiction).

dit de keuze van een bepaald speltype of programma inhoudt. (Hindman)

It is thus within this ring that the game takes place, and plays itself off. This playing-itself, as medial voice (WM 99), is the primary verbal voice of the game, wherein the game has priority over its players. The game has properly speaking no subject outside itself, precedes subjectivity, is anonymous. It still expresses an All-Eins-Verbundenheit (greek 'hen kai pan'). The event transcends and masters always its participants, and they are played by the game. In it, they also find their own unity, just as the playing child, from whom Hölderlin could say: 'es ist ganz, was es ist' (Hyperion I,I, Brief 3).

zoals men niet meer bezit de spelruimte van de spelruimte te vergeten, zo ook hand het binnertreden is het fiding te paalde regelen.

The game mastering the players is a game of still boundless possibilities, of pure energy, and in that sense unreal. In the arranging of the playground, they are distributed by the game over the players, thus distinguishing player and opponent (Gegenspieler), protagonist and antagonist, plaintiff and defendant. By the spell of possibilities and risk, the parties are tempted to combat within the ring of the playground. Who attempts (tries) the game, is already tempted (seduced) by it: 'Wer versucht, ist in Wahrheit der Versuchte' (WM 102). Within the playground, the game is then fought out as conflict between different possibilities. They exclude each other part-

ly and therefore conflict with each other, as they can not be realized all at the same time within the same game. Reality stays always behind (hintenbleiben : be behind, stand out, zurückbleiben : reserve oneself) the possibilities of the game and the thereby raised expectations of the parties (WM 107): reality always retreats (entstellen : retreat, slip away). (cfr. Heidegger. cfr also Entstellung as 'le glissement du signifié sous le signifiant', J. Lacan, L'instance de la lettre dans l'inconscient ou la raison depuis Freud, Ecrits).

But in order to let the game retain its power, the parties have to enter fully into the game, have to be earnest and play seriously. Otherwise they are spoil-sports. When however, this earnest is redoubled by being earnest about this earnest, a reduplicated earnest, then a party doesn't get lost anymore in the game, but in his self-consciousness about it. This moment of consciousness is described as 'stage of the mirror' in J. Lacan (Le stade du miroir comme formateur de la fonction du je, Ecrits p. 93 f.).

By looking into the 'mirror' and identifying himself with the image in it, the other side is considered more real and the game as unreal. The spell of the game is broken, and through the looking-glass broken open to that reality. The game doesn't any longer master the parties, and they are no longer embraced and received (aufgenommen) (absorbed) in the unity of the game as an end in itself, but want to press the possibilities of the game into the service of particular, i.e. partial, ends: " when a work loses its original and unquestioned authority, this whole world of experience becomes alienated into an object of aesthetic judgment" (Phil.-Herm. 4). Therefore the parties really come to a stand over against each other as opponents.

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Second chapter - Subjectification and conflict.

A. The seductions of spoken language.

In different periods of history - Socrates, modernism from the reformation to Kant, romanticism and the historical school - as well as in each legal event, a certain subjectification has taken place, as it is described by Gadamer in the field of aesthetics in reference to Kant (WM 39 f.). In the process of law, this is the moment of judicial consciousness wherein the parties stand as subjects against each other. And as they were seduced by their image in the mirror and tempted to spoil the game and enter instead into the world of particular ends, so they are seduced in this world by the illusion of absolute subjectivity.

In fact, they are seduced by spoken language, by speech, addressing itself to them as claim or charge, or claimed by them as a right (Aanspraak, Anspruch, Ansprache: claim, right, address, speech; aansprakelijk: responsible; aanspreken: to address, to sue). This spoken word (logos) wherein the explanation (legein = auseinandersetzen: put apart, explain, (jur) agree) of reality takes place, appears as a mirroring of this reality. And the idea which is intended (aimed at, viewed) and expressed in this speech, appears as its essential outlook (greek ^{eidos} eidos, ^{idea} idea). And as the passers-by seduced by Socrates to accept through a spoken dialogue of questions and answers the idea of ^ggoodness as highest reality, so the opposing parties are seduced to believe in an absolute justice, a law-in-itself, which corresponds to the subject-in-itself and its address or claim.

The characteristics of speech by which man is seduced to such ideas, are given by P. Ricoeur (Qu'est-ce qu'un texte 184; the model of the text 317), who distinguishes them from the characteristics of writing (cfr. infra chapter III).

Spoken language consists of sentences which are :

- 1) each time temporally realized in a present, coinciding with the moment of their pronunciation;

- 2) referring (verweisen) immediately back to a speaker, subject of the sentence, and his subjective intention.
- 3) pointing at (weisen, zeigen) the world all round as object of the conversation, a world which is immediately all round present as 'Umwelt' and as visaged, showed world, wherein the conversation and its speakers are situated. This pointing at or showing the world (cfr. Heideggers equation of sagen, speaking, and zeigen, showing) happens through grammatical indications, as the tenses of the verb, personal and demonstrative (anweisend) pronouns, adverbs of space and time.
- 4) always addressing a listener, who is present at this address and able to respond in immediate interaction.

A conversation thus knows no distinction between the act of speaking and the meaning of what is said (Aussage, dictum or predicate), the act still coincides fully with its intention. The same characteristics of acts of speaking can also be said -mutatis mutandis- of unmediated actions, namely direct interactions between persons present, without form or institution. This 'speaker-listener-paradigm' forms also the model for the interaction of 'legal subjects' (Rechtssubjekte) outside of any lawsuit or judicial intervention, situated in the world of particular ends. The legal act is still considered to coincide with the subjective intentions of its authors. When two persons act conforming to each other with the same intention, an agreement can be effected, when they conflict with each other because of different intentions, their action can become a tort.

The paradigm of conflict is private justice, when the subject takes justice in its own hands, following its own idea (namely the 'justice' he intends in his subjective act).

B. The ideal image of law.

The ideal which is always held up as model for the law is the consent of sovereign subjects, called social contract. This agreement expresses the truth as a correspondence between subject and object.

Descartes developed the criterion of evident intuition for this correspondence. His theory is however developed out of a situation of 'natures simples' or simple actions or things,

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who are supposed to be knowable in themselves. Furthermore, it is presupposed that what is evident for simple natures, is also valid for complex entities (^{Heidegger de l'argumentation} ~~AR~~ 146-147). The criterion of immediate intuition for evidence also releases one from the burden of proof of facts, from the codification of rules and from the interpretation of texts (Perelman, Qu'est-ce que la philosophie du droit 35). On the other hand, everything not corresponding to this certainty has to be excluded, stigmatized as 'idol' by F. Bacon, as 'prejudice' by the enlightenment, as 'misunderstanding' by romanticism. This has finally to be secured by the rejection of tradition and authority as perpetuating such prejudices.

It is also required that the conversation should not be broken off by a sentence or decision before such a consent is reached. This ideal is furthermore expressed in liberalism as well as in romanticism. For the basic idea of parliamentary liberalism is that truth can be found through a continuous, rational conversation, and expressed or represented by a statute, an act of parliament. This act is considered as corresponding fully to the subjective intention of the legislator and has to be interpreted according to his intention (criticism on this idea by C. SCHMITT, Gesetz und Urteil 28 f., and Die geistesgeschichtliche Lage des heutigen Parlamentarismus). The seeming antithesis of romanticist historicism, finding the truth of law in customary law, departs also from similar presuppositions. A custom is, in the definition of von Savigny, a common practice attended with an 'opinio iuris', a subjective conviction that one is fulfilling a legal obligation. This 'opinio iuris' is an expression of the 'Volksgeist', a collective subjectivity representing the subjective will of the people. Both 'Volksgeist' and parliament find their validity in this representation of a subjective will.

idée vs
essence
purpose

Even in the contemporary 'new rhetoric' or topical theory of law, the seduction of language comes into play. Theodor VIEHWEG (Topik und Jurisprudenz) synthesizes the classical topic with a 'Problemdenken' (problem-bound thought, as opposed to systematic thought or conceptual thought, 'Systemdenken'), rejecting law as a unitary system (p. 16-21). A topos or commonplace is legitimated, according to Viehweg, by its acceptance by the parties in the conversation, with this conversation itself as the only check (p.24). The accent lies entirely on the parties to it (p.25) as subjects of the conversation. The connection between the different topoi extends only as far as the parties are maintained in a common understanding: the thing itself is limited in its elbow-room (Spielraum) by the possibility of understanding of the parties. (p. 23). Even Otto Pöggeler, addressing a similar criticism to Viehweg (cfr. infra) maintains the accent on the conversational aspect, on the connection with the listener, but transcends it anyhow by connecting this rhetoric with politics as a historical and finite conversation of a political community.

Perelman also starts from spoken language without distinguishing it from written language (N.R. p.9). For rhetoric is always concerned with the impact of speaking in all its immediacy, and tied to the immediacy of its effect (Phil. Herm.23), even when it, as defendant of probable truth, is set free from cartesianism.

C. The reality of conflict.

This idealized image of law however, leads in reality towards a perennial conversation, wherein, it is true, the back-and-forth movement of the game is preserved in a dialectic of question and answer, but nevertheless the unity of the game is broken, and truth as unconcealment (Heidegger's aletheia) can not present itself anymore. KAY DECK

Reality keeps retreating (entstellen); remains always behind the subjective intentions expressed in speech. But the back-and-forth of the dialogue pursues reality, haunted by the image in the mirror, displaces and disguises itself continually and shifts constantly (verstellen: to displace, distort, disguise, shift, bar, feign) to catch and seize the truth in an immediate unity of intended and intention.

This displacement can be characterized by the trope of metonymy.

Thus the reality of this perennial dialogue, as a moment in the course of law, is not that of an ideal dialectic leading through exchange of question and answer towards a common solution, but of an eristic : a polemical disputation where contrary instead of common interests are asserted and come into play (cfr. ESSER, Motivation und Begründung 137-138). This moment can never be the final moment in the course of law, but has to be 'aufgehoben' before a decision or sentence can establish the truth in a historical and finite form.

Third chapter - Objectification: } heuristic and motivation.

A. The need for a suspension of the subjective dialogue.

Against the conception of truth underlying Enlightenment and romanticism, the philosophical hermeneutics of Heidegger, Gadamer and others ~~are~~ directed. They consider the dominant ideal of reconstruction of meaning as subjective intention and through elimination of prejudice and misunderstanding, itself a prejudice which has dominated science and philosophy since Descartes. They, on the other hand, want to give a description of what really takes place in an event of understanding. This description can start from Heidegger's analysis of understanding in Being and Time (SZ par. 31 f.). Understanding is understood as a constitutive circle between existence and understanding. This 'hermeneutical' circle makes understanding possible in the first place and thus obtains a positive meaning. Gadamer intends to rehabilitate prejudice, authority and tradition and requests a recognition of legitimate prejudices (WM 261 f.). The question of the ground of their legitimation becomes for him the central question of hermeneutics. Gadamer finds this ground in the recognition of an authority through the insight that the authority has more consideration and insight to its disposal and that its judgment therefore precedes one's individual opinion (WM 263-264).

*but from Legitimation durch Verfahren (p. 24 2001 27)
Entscheidungsbedürftigkeit vermindert die Subjektivität
v. 28W2 a. H. legitimiert v. recht.*

tion of the primitive unity of the game, wherein the event of law was a game too. But maybe it can restore a mediated, articulated unity. Whether the final decision concluding the law can bring this about, is treated in Chapter IV.

B. The characteristics of a text.

The importance of a text for hermeneutical understanding and the characteristics of writing are described by Gadamer (WM 367-373) and elaborated by Ricoeur (Qu'est-ce qu'un texte; the model of the text 317-318). Those characteristics, distinguishing written from spoken language, can be stated as follows. And the same characteristics are mut. mut. valid for social, i.e. institutional actions.

- 1) Writing fixes the meaning of an act in positive forms and patterns (written characters), but not the act itself as an event. Through this priority above the act of writing, the enacted (dictum, predicate) comes to a stand out of time and can be synchronous with every present. Writing prints a trace in time, whereas speaking appears and promptly disappears. Through such fixation, a certain text becomes identifiable and thus repeatable, and shares in this manner again in the autonomy and repeatability of the game and its mediality, transcending the subjectivity into which the activity of the game relapsed after the breakdown of its spell.
- 2) A text indeed transcends as well its author as its readers. By writing it down, the meaning escapes the finite horizon of the author and transcends his subjective intention. Thereby, the ties between the text and its author are suspended. But over and above that, the author is first instituted as author by the text. He becomes present within the world opened up by the text.
- 3) This opening of a world is the third characteristic of writing. Spoken words are situated, have an environment (Umwelt), but no world. This reference to an environment is suspended, too. The text is freed from its dialogical situation, from the one-dimensional listening and pointing, and opens a world as a network of "the tracks of birth and death, blessing and malediction" (Heidegger, UdK, Holzwege 33), of which every sign

every knot, refers to every other. Out of each of them a world can be projected (Weltentwurf). Such a world is an ordering of the whole, wherein the meaning of each text is received as fitting into that order, and thus no longer coinciding with the partiality of its particular intention. The interest of the text or action exceeds its relevance in the initial situation. This excess is called the excess of meaning. Every text can communicate with lots of other texts and institute new connections. Its meaning can in this way ever anew be transferred (greek ^{meta-pherein} meta-pherein) under inner connections, according to the context - as opposed to its outer connections, according to the author - . Thus a text acquires an 'effective history' (Wirkungsgeschichte). And these connections are made through transfer of meaning or metaphers.

4) Through the emancipation of the world from the dialogical situatedness, it becomes possible for a text to address other persons who are not present at this address. The address does not occur in an immediate exchange of question and answer. The author and the reader do not speak to each other immediately, but are absent from each other, separated by the text . The text however, can be taken in hands ever anew and is in principle open to everybody who is able and willing to read.

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C. The deference before an authority.

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Paul Ricoeur (Qu'est-ce qu'un texte, 182-183), more than Gadamer, emphasizes the break taking place in the suspension and adjournment of the dialogue and in the 'putting into writing' of the word. Writing is indeed not a mere extension of speech, but substitutes, takes the place of speech, which thus does not take place. Speaking is suppressed, put down, but not abolished. The suppression is a deference (also in the sense of Fr. différence, defer, difference), during which the sentence doesn't take (a) place, and stays as it were 'in the air'; it can possibly eventually take place after transfer of the deferred reference or meaning via other texts. Meanwhile, the meaning comes to a stand 'under' the printed text (suppress

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 from premere, print). The charcter of suppression becomes also clear in a definition of the metaphor as a condensed comparison, a condensation of meaning : the meaning can be transferred only by suppressing one of the terms of a comparison. This suppression of the spoken word, making possible the transfer of meaning and so the production of new sentences, can thus be seen as a display of power in both its positive aspect (creativity, productivity) and negative aspect (suppression, violence). The mechanisms of this display of power have continually been described by M. Foucault (cfr. L'ordre du discours) as mechanisms of exclusion, distribution and selection in a discourse as structure of oppositions and differences.

Heidegger's analysis of Dasein in its average everydayness (as 'Verfallen an das Man' SZ esp.par.27) realizes this already, and Gadamer too treats this theme (e.g. Phil.Herm. p. 90-92).

The linguisticality of man thus has to comprise not only the language 'properly speaking', but also any institution which can be interwoven in a network of signs and actions. Word and act can not be separated from each other when seen under the same aspect.

C. The deference before an authority

Only through the suppression and prorogation of the immediacy of conversation can the prejudices, on which it is founded, be made clear and their legitimacy be checked. They can not be verified, but they can be validated. This is the way in which the cited authors try to define the status of a finite and historical reason (de WAELHENS, p. 586-587), a status which testifies a limited but real human freedom in the opinion of Ricoeur and Gadamer.

A similar finite and historical status of law can likewise be recognized, starting from a deference and from textuality. *Wafah*
 The escape from an infinite conflict between legal subjectivities requires the suspension of their claims as rights-in-themselves, together with the suspension of private justice, in order to let the thing itself come into light (into the clearing) as that which is coming up as subject of the discussion (was im Rede steht, cfr. Heidegger, VA 167-168). It is insufficient to limit the human subjectivity as will through the

concept of the 'nature of things', when this presupposition itself remains untouched. Gadamer therefore prefers to talk about the 'language of things' wherein things speak for themselves (Phil.Herm. 74).

Therefore, the lawsuit and its extent are defined by the thing itself, by the case coming up, just like the playground and -margin (Spielraum) is defined by the nature of the game and not of the players. During the legal proceedings, the claims of the parties are as it were suspended until judgment is passed. On the one hand, this deference is only possible in virtue of a whole of institutions forming the administration of justice. Certain positions of authority in this whole are held by a number of judicial persons, with the judge playing a central role.

D. Verfahren (d. Lehmann)

E. Law as conversation with texts - topoi and rules.

(Auseinandersetzung with texts).

On the other hand, the deference enables for the first time a 'conversation' with the law as an autonomous system, appearing as a set of texts. These texts can be considered as expressing original topoi or commonplaces : places where arguments are ready-to-hand (cfr. HENNIS, Politik und praktische phil. 89), viewpoints for the explanation (Erörterung) of a subject (PÜGGELER, Herm.Dial. II 293), possessing a certain probability. Such viewpoints were already collected, catalogued and written down by Aristotle (topikoon). This codification changed however the nature of the topoi : they assume the characteristics of a text, free themselves from the dialogical situation (the socratic dialectic) and are now able to communicate with all other topoi (cfr. Püggeler's criticism towards Viehweg, Herm.Dial. II 299, and our own remarks in Ch.II). They are no longer arguments, but considerations or motivations (cfr.infra).

A codified commonplace thus rather constitutes ~~an~~ an opening or clearing in the conversation, wherein truth can first take place. It can also be compared ~~like~~ ^{with} a square on a chessboard: a place where a move can be made by putting a piece on it -and each move opens new possibilities for the next moves-. Therefore its set can always change (Umbesetzung) (PÜGGELER id. 292). Otto Püggeler wants to link the aristote-

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lian topics with Heidegger's topology of Being. A topos is then an Er-Ort-erung (explanation, consideration), a digression, 'hanging on' historically speaking leading words (Leitwörter) of thinking, and seeking to move into a proper place (Ort, stillresounding in Erörterung) in the display of truth (Wahrheitsgeschehen) (cfr. Pöggeler, id. 299). By inserting such a commonplace, a new place of speaking is opened up in which truth can come up and speak ('zur Sprache kommen'). The display of law as an understanding (Auseinandersetzung and Erörterung) of texts can in this way be ~~performed~~ executed, guided by the language and tradition in which these commonplaces are collected and seized.

Moreover, this understanding always occurs in a certain commonplace, a topos in the sense of a public space (forum, auditorium) and a limited universality (commonness), namely a political community. The different topoi as indications come into play within the playground and -margin (Spielraum) of this political community, just like the pieces in the game of chess can be moved into different squares or clearings of the same checkerboard. Those moves are not only given (gegeben) within this commonness (political community or checkerboard) as possibilities of the game, but also set (aufgegeben) as assignments (Aufträge).

This common place does again justice to the unity of the game. The commonplaces in the sense of usual viewpoints, are becoming rules of the game (possible moves). Another characteristic of the game is thus taken up again by law : it is structured by rules defining the conduct of the players, describing the possible moves. It so forms a model-order or binding project (von BAEYER 28). The different moves or viewpoints open up possible courses of the game - free from the particular situation in which they were at first made -, obtain an excess of meaning, and can in this way be received within the totality of the legal order. This freeing presupposes a suppression of the dialogue, namely concerning the quaestio iuris, the question what is right or just. Only on this ground is it possible that the legal order appears as a closed and all-embracing system that can be applied in every case by transferring rules from one case to another.

B. Mediation of the rule by the judge.

The distinction made between the facts and the texts, or rather between 'quaestiones facti' and 'quaestiones iuris', has something to do with a different auditory. (N.R. 41 f.) A question of facts relates to a well-defined, limited auditory; the characteristics of speech do apply here (esp. the 4th). Whence it can be argued by the parties. The quaestio iuris on the other hand, relates to the connection of a factual situation (Tatbestand) with legal consequences in a legally meaningful way (MICHAELIS 127-128). This is bound up with the adhesion or 'applause' of a universal auditory, i.e. the (political) community as such. This requires mechanisms of exclusion to consolidate the homogeneity of this universal auditory and underline the universal 'plausibility' or possibility of a universal agreement (cfr. N.R. 43 f.). Such exclusions are defined in the rules concerning legal capacity and competency to contract, sue or testify (GIULIANI 235). Besides these exclusions, another mechanism is the appeal to an elite-auditory as model for the universal auditory (N.R. 44 f.) The handling of the quaestio iuris belongs to this elite, having been selected for that purpose through schooling,...

The applause of a universal auditory requires also that it is addressed. Such a universal address is precisely made possible through writing, through a text (cfr. supra 4th characteristic) This text then has to be mediated by certain persons holding authority: the members of the elite-auditory, i.e. in the case of law the lawyers. Judges play the central role, advocates appearing for the parties introduce the arguments, and a public or general attorney - as representative of the governing authority - can represent the public interest. Laymen can only be called upon for quaestiones facti: an expert's or survey report can be part of the proofs. When justice is administered through a jury, this jury plays the role of a universal auditory, where in the voice of the people is resounding in such a direct way that their verdict has to be considered as sustained by a universal opinion (cfr. C. SCHMITT G.U.). Such a verdict thus requires no motivation in jure. It doesn't really treat a quaestio iuris.

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H Consideration and motivation as 'wirkungsgeschichtliches Bewusstsein'.

The mediation of the legal texts by the judge in the motivation, forming together with the consideration the consciousness of effective history (wirkungsgeschichtliches Bewusstsein) in law. The understanding of law involves always an understanding of the continuity proceeding from the text up to our age (von BAEYER 35-36), and thus of the tradition which hands down the meaning of those texts to us. This proceeding or 'working on' of a legal provision explains why it can ever anew be interpreted (Von BAEYER 36). The ways of construction of the law are ways of speaking or discourse brought up by the thing itself, to carry on the conversation with the tradition.

Two processes can be distinguished within the motivation (cfr. ESSER; Motivation und Begründung; KRIELE, Offene und verdeckte Urteilsgründe). Together they form a process of pre-understanding whence a project (Entwurf) has to be 'set into motives' validating the project (cfr. Ricoeur, the model of the text). This validation -not a 'verification'- constitutes the hermeneutic circle between the whole and the parts, which is not a vicious circle, because invalidation of a motive is possible every time that there are two of them conflicting.

The first process is a 'topic', in the classical sense of heuristic or 'ars inveniendi' (art of finding). It introduces the various possible premises which have to be taken into consideration (Erwägung) by the judge (VIEHWEG, 18, 22 ...). The meaning of a topos or commonplace thus appears to full advantage. In a system of written law, every consideration out of a legally valid text can form such a commonplace and hence a motive or legitimation. The considerations are mediating the traditions in a pre-understanding, consisting of precedents, prejudicial questions and decisions, legal provisions, etc... Such considerations are brought up through the case itself and can thus differ from case to case (cfr. Aristotle, Rhetorika II, 22.10). From the case (the problem) and through a chain of pre-understanding, a decision is projected. The complex of facts itself is already construed in such a pre-understanding by

means of commonplaces or heuristic models and examples, and in such a way that it can be subsumed under a rule. Besides, the various possible solutions are evaluated, and via analogue cases and the possible consequences of the different solutions (suggestive elements), a back-and-forth movement takes place between the case and the rule (ESSER, Wertung, Konstruktion, Argument; VIEHWEG 61; ENGISCH, Logische Studien 15). We can call this paradiuction, as distinct from induction or deduction. This back-and-forth-movement is only possible on the ground of a written linguisticity. It forms the chain of hidden grounds of a judgment : premises or considerations.

A second process, in interplay with the first one, proceeds in the opposite direction. It forms a chain of public grounds of a judgment : motives or legitimations. They are recorded in the sentence as considerations, as to apply to the whole set of texts and become a part of case law, so that they too, can become in their turn hidden or public grounds, premises or motives. These motives are given by a judge to legitimate his sentence, amidst the various possible solutions, before the parties, but above all before the elite playing the role of universal auditory. The motivation before the parties is a legitimation in reply to the arguments of the eristic or anti-logy of the pleading barristers (cfr. Belg. Jud. C. 780). Their arguments were not heard as motives, but as strategical elements : indeed, the pleadings are speeches and treated as spoken language, whereas the motives can only be found in texts.

But above this legitimation before the parties, it is a legitimation before the elite-auditory, consisting namely of the whole prevailing 'jurisprudentia' - in the english, but even more in the french sense (case law) -. This is unified under the influence of the hierarchy of courts. That this legitimation takes place before the whole of the judiciary means also that a sentence is to be considered right when another judge would have decided likely (C. SCHMITT, Gesetz und Urteil, 71).

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This repeatability is precisely made possible by regarding law as a way of handling texts, whereby the dialogue concerning the quaestio iuris is suspended.

It is the task of the judge to convince this elite-auditory that they would have decided likewise, and the motivation has to render an account thereof by upholding the ideal of the unity and security of law. Thereto the idea of law as a complete and coherent order, as a closed system, has to be maintained. In his legitimation, a judge examines whether it is possible to fit the projected decision into the system by 'tracing it back' (re-ferring) to criteria supporting this system rationally (i.e. in a testable way), thus validating or invalidating his project.

Legal logic thus tests proposed solutions for their contingency in the general legal order (WIEACKER, Herm.Dial. II 335). And the submission of the judge to the law is to be seen as a formal requirement, namely 1) that justice must not be denied (Code civil art.4) and 2) that the judgment has to be provided with motives (C.SCHMITT, Gesetz und Urteil 10, Belg.Const. art. 10). In his motivation, the judge renders an account which can be checked with possible legal remedies (SCHMITT, o.c. 76).

This explains why this chain of public motives or legitimations moves into the opposite direction of the chain of premises or considerations, and namely from the system of rules towards the concrete case, or from the whole to the part. In order to make this deduction, the judge uses techniques as general principles of law, teleological interpretation, appeal to the ratio legis or reasoning by analogy. By the framing of such a formal legitimation, the system comes to a conclusion (geschlossen) as in a syllogism (Schluss). But this conclusion or closure can only befall by not expressing the hidden premises. They make the transfer of meaning between the thing and the pre-understanding possible, but only as long as they are hidden. When they would 'speak to a close', they could not mediate anymore, and there could be no decision.

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In this sense, the style of the motivation is the metaphor or condensed analogy (N.R. 535) and the form of its reasoning the enthymeme or condensed syllogism. The metaphorical character of the motivation stands for the mediation of the transfer of meaning taking place with every new case by a signifier barring the meaning from incessantly moving aside (cfr. supra Verstellen; J. LACAN, L'instance de la lettre dans l'inconscient ou la raison depuis Freud, Ecrits p.493 f.). An enthymeme is properly speaking not just a shortened syllogism - as it is described by F. BACON - but a consideration which has to be made to make a case credible (Aristotle, cited by HENNIS o.c. 102). It consists of maxims and reasons (Aristotle, Rhet. II 21). Not all possible opinions have to be argued, but only definite ones admitted by the parties in question (Aristotle, Rhet. II 22.3). On the other hand, a judge can only invoke 'ex officio' an 'exceptio' (bar, demurrer, remedy) provided that he re-opens the debates (Belg. Jud.C. 774).

A part of the premises is thus unexpressed, and this precisely because they are probable premises, advanced by a topic or heuristic (HENNIS, o.c. p. 94-96).

That this is the way of producing new discourse is also made clear by the inseparability of the legitimation or public motivation from the rest of the judgment. Whereas the motives for an act of Parliament (subjective motives) are mostly only published separately as parliamentary records, the motivation of a judgment is recorded in the same way as the decision or verdict (SCHMITT, o.c. 69).

Fourth and last chapter

A. Introduction.

The considerations of chapter III on the suppression of subjectivism, the characteristics of textuality and the legal proceedings to find the law (texts, debates, considerations and motivation) express, it is true, a legitimate moment in the hermeneutical process, but can neither be the last, final word, nor a sufficient answer for the query for the truth of the display and event of law (Wahrheit des Rechtsgeschehens).

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Legal positivism can only be grounded on a hypothetical basic norm (Grundnorm, cfr. Kelsen), which has to be postulated, and can represent something like the effectivity of a legal order.

In hermeneutics, Gadamer appeals to the insight of the subordinates for the recognition and thus legitimation of authority, without this being a complete answer either. Is the collective 'we' having priority over the subject 'I' not as formal an instance? A similar question rises in Heidegger's analysis of Dasein: when the being-with-each-other passes always in idle talk, (Gerede), how is then an authentic community possible?

Maybe, there are some other indications given here, too. Heidegger's analysis in the first part of Being and Time - the only one ever published - was held to be only provisional by Heidegger himself, and a turn (Kehre) will be required to 'push out' into a further answer. Indeed, this moment of understanding is described as average everydayness, the nearest and most of the time, but inauthentic mode of Dasein, 'Verfallen an das Man'. This distinction also accounts for the doctrine of original sin. The Fall or corruption of man also explains why the paradisiac situation, as it existed in the unity of the game, cannot simply be restored, but requires after a second and a third moment also a fourth one, namely divine grace.

Having paradise lost, man has to bear the burden of labour, i.e. mediation, before this grace can befall to him and be appropriated (ereignen). This mediation has to lift (aufheben) the immediacy into which man has fallen and where he is subjected to merely particular ends. We have tried to render an account of this moment of mediation in the event of law. This moment accomplishes the suspension of subjectivity required to make possible the reception in the order of divine salvation. On the other hand, this suspension can lead towards legal positivism and then possibly make clear for the first time the phenomena of deficiency preying man, such as tornness or abuse of power.

Other authors than Heidegger have described these harsher forms of 'Verfallensein an das Man' with which the human order can be broken. It is like 'l'homme, quittant la terre pour se saisir des fonctions divines, se heurte à une fatalité d'autant plus terrible qu'il ne peut plus lui donner un nom céleste : sa faiblesse propre, la division des énergies, l'abus du pouvoir' (J.M. DOMENACH, Le retour du tragique, p.29-30, concerning Hölderlin). Therefore it seems that a further step, or maybe a leap, is still needed to fulfill the complete mediation and reception in the order of salvation.

IV

Einkehr
 * legitimer Ansprech Wort

realisatie is voorbereid door de
 dubbele functie van rechtzorg
 (realisatie bezwaart en deelt per)

- 1) bekrift nieuwe realiteit - wordt uitgevoerd
- 2) wordt aan de realiteit gegeven (waar maken)