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Legal Hermeneutics and Cultural Pluralism

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In a pluralistic and multicultural society does legal interpretation have to modify its traditional methods, which were worked out for a culturally homogeneous society and in a framework of primacy of state law?

I believe that in order to answer this question we need to take a step back, and precisely this is the object of this paper. The aim is simply to review the preliminary conditions necessary to answering the issue raised.

Even before updating the methods we need to ask ourselves whether it is necessary to reflect again on the role that interpretation has in the context of a legal practice. In particular, we need to challenge the idea that interpretation is l e g a l in virtue of the role of the interpreters and/or the methods used. To this there will be opposed the idea that it is the presuppositions, the goals pursued and the contexts of exercise that make interpretation "l e g a l" at all.

The Role of Precomprehension

Interpretation as such is never a final goal. One interprets for the purpose of understanding. But in turn, understanding, unlike simply knowing, has a practical character, so that it bears in itself the reasons why one wants to understand. Indeed, these reasons precede understanding and help to determine and to direct precomprehension. They are forestructures of understanding. Interpretation as an activity takes on a sense of its own because it takes place within anticipatory understanding, which is the very place in which meanings live. Every activity only has a meaning of its own within a totality of meaning. Accordingly, understanding precedes and affects interpretation, which in turn develops it, corrects it and frees it of misunderstandings.[1] This consideration is based on elementary observations. If we do not anticipate the point of our discourse, we do not even succeed in constructing it. In scientific research too, for the data to be enucleated, we need first to anticipate their point and then to verify it with experimental tests. But for philosophi-

[1] These ideas are famously developed by philosophical hermeneutics, from which this paper derives its inspiration. Cf., in general, Georgia Warnke *Gadamer* Hermeneutics, Tradition and Reason (Cambridge: Polity Press 1987) xi + 197 pp.; *Gadamer and Law* ed. Francis J. Mootz III (Aldershot: Ashgate 2007) xx + 523 pp.

cal hermeneutics all this takes on much profounder importance in that understanding is seen as a way of being, the way of being proper to that hermeneutic animal that is man.

According to GADAMER, not only discourses and writings but all human creations are informed by a general meaning, which it is the task of hermeneutics to extract. The point of an interpretive social practice is the general goal of the enterprise involved. It precedes and illuminates the actions that are set within it. These actions may be correct or incorrect (appropriate or inappropriate, just or unjust, good or bad) in relation to what they aim at, that is so say strictly speaking they can be sensible or foolish. From this perspective the point of a social practice is a task one is called on to perform, an enterprise that is undertaken, a general objective that is pursued. This means that what is at the basis of hermeneutic understanding has a practical character and that a hermeneutic philosophy of law can only be a practical philosophy.

In general understanding indicates—as WITTGENSTEIN pointed out—going towards someone, that is trying to grasp other people's intentions (one understands intentions), but in understanding a social practice the object is broader in that it concerns not only the immediate context that helps to confer relevance on the intentions, but also more in general the traditions and the forms of life to which the intentions belong. Hence comprehension is at one and the same time an apprehension of the "world" of which the intention is part. It is proper to a task and, more in general, to a purpose to set something going without it yet properly existing. Likewise, precomprehension of the thing being dealt with neither contradicts nor prejudges the interpretive search for the meanings in which it is articulated and enacted. In the field of aesthetic creation it cannot be said that the artist simply enacts his intentions. Actually he feels called on to understand something that asks to be grasped in its totality. However, this does not yet exist, since only the interpretation makes it exist. If this horizon of meanings which does not yet exist were a mere chimera, then the interpretive event would be the judge of itself and there would be nothing except the interpretation, as NIETZSCHE thought in the past and the deconstructionists think today. Yet in the name of what do we ask ourselves whether the interpretive action (or the work of art) has succeeded or not? In the name of what is it that the artist in the throes of creation corrects himself and is satisfied with the result of his work? It is the very essence of the thing that does not yet exist that asks to be correctly interpreted.[2]

The Hermeneutic Character of Legal Interpretation

Legal interpretation too, practised in a monocultural state with the monopoly of legal production, has its precomprehensions, its undisputed presuppositions and its anticipations of meaning.

Since the time of *Code NAPOLÉON* the idea of law has been concretized in the image of a national legal system constituted by norms endowed with an internal consistency of meanings and emanated by a formally recognized authority. ALF ROSS has compared a legal system seen in this way to the game of chess. While the rules of chess refer to

[2] Cf., in general, Hans-Georg Gadamer *Truth and Method* trans. Joel C. Weinsheimer & Donald G. Marshall, 2nd rev. ed. (New York: Crossroad 1989).

the movements made by the players, legal rules refer to the social actions of citizens and public authorities, two different kinds of players, and therefore we need the distinction between norms of conduct and norms of competence.[3] For Ross a national legal system is, so to speak, "a legal entity" substantially incommensurable in comparison to other valid systems of law. It is as if there were many different possible games of chess, each with its own internal rules. Their common denominator would only lie in organizing in a consistent and practicable way the movement of the pieces on the chessboard. Likewise, the different national legal systems simply have in common the fact of being a set of rules on the organization of the public force and the operation of the coercive apparatus of the state. This representation of law demands once and for all for a rigorous delimitation of the context within which the game of law is played out. Consequently it tends to identify valid law with the national dimension (German law, Danish and Italian, etc…), that is to say with a particular form of life endowed with its own "ideology of the sources of law". This conviction is still widespread in contemporary legal thought, but it is false for historical and theoretical reasons.

In epochs preceding the birth of the modern state and its taking over the monopoly of public force, one certainly cannot speak of "national legal systems", but what counts more is that today these cannot be conceived as closed, even supposing that they once were this. It is a matter of fact that today in order to determine what the sources of law are, we have first to identify their scope of application. A legal system, though being by and large characterized by a constitutional hierarchy of sources, evolves within itself and continually has to put order in the jungle of facts and normative acts. Furthermore, the importance of laws and other constitutive acts of external legal or semi-legal orders, with which the normative system has relations that are not always anticipated or predictable, grows, without considering the anomalous character of sources *extra ordinem*. In short, the rules of the game are not preset once and for all, apart from some general indications, and continually have to be rearranged.

A legal system has its own internal evolution which is far from being purely logical. Legal praxis has to give continuity to the succession of forms of life that collapse on one another. The legal and cultural world of the Framers was not the same as our present world, but, if the law that originates from them can be considered as still in force, this means that its language is somehow meaningful for different forms of life.

This means that, in spite of appearances, legal interpretation has always developed and develops, today even more clearly, inside a precomprehension aiming to fuse different cultural horizons and not rigorously entrenched inside a determined cultural world.

Normality and Normativity

The role of legal interpretation is to translate normative claims originating from past forms of life (or from ones that are simply different) into the present one, which has particular bonds with them. Traditions and institutions are not isolated worlds but develop through an intense exchange and a dense network of relationships among them. This would be impossible if the historical contexts were incommunicable and closed up

[3] Alf Ross *On Law and Justice* (Berkeley: University of California Press 1959) xi + 383 pp.

in themselves, but then law too in its normative sense would be impossible. In a sense normativity is what does not originate from our own world and challenges its normality. For this reason normativity needs a justification, while it is not so for normality. What already belongs to our world or to our form of life is already by definition constitutive of our identity and so we can only raise the issue of whether this or that interpretation is in agreement with consolidated social practices. But we have normativity in a strong sense when we are asked to accept the extraneous or the different and to encompass it in our world.

As is well known, in the wake of Wittgenstein the thesis of the incommensurability of paradigms and the untranslatability of languages was strengthened. I do not intend here to discuss whether it is well founded. However, it is a fact that law as a language of interaction has for a long time faced the challenge of incommunicability of differences. Legal praxis itself is based on the presupposition that the same rule can measure situations differing in time and distant in space. Today this has become even more visible in the attempts to constitute around human rights a stable place of communication of different legal systems. It does not matter to what extent these efforts are successful, but it is clear that the passage from the national state to multicultural societies would be impossible if law was not able to make different cultures converse and only served to resolve family quarrels.

Philosophical hermeneutics, at least because of its origins and in its main developments, is particularly sensitive to the fusion between different cultural worlds, and conceives forms of life not as closed entities, but as more fluid, porous and permeable environments. Nevertheless, it would be wrong to limit the demands of philosophical hermeneutics to the problem of intercultural dialogue. It is not exactly this that we are looking at. The hermeneutical experience is not by chance emblematically represented by Gadamer in the encounter with the work of art and with its normative function. In the interpretation of the work of art or the classical text there is a transformation of the very world of the interpreter, that is to say a process of integration occurs in the Hegelian sense. "The relationship with the work is not simply subjective, nor objectively reconstructive, but represents a form of mediation between our present as interpreters and the traces and the sense of the past that are transmitted to us".[4] Hence it is not directly a meeting between two or more different cultures, but an encounter between the world of the interpreter and something normative, which in turn belongs to a different cultural world. The latter recommends itself not for itself, but as the bearer of something that is also able to talk to those people who belong to other universes of meaning. There is an extension of the work of art beyond its world of origin. This hermeneutic function is not performed only by the work of art, but is also found in other linguistic events. There is no doubt, for instance, that human rights originate from a particular culture, the western one, but are valid and normative only insofar as they are able to talk to different cultures than the one of origin.

[4] Maurizio Ferraris *Storia dell'ermeneutica* (Milano: Bompiani 1988), pp. 269–270.

The Royal Roads of Intercultural Dialogue

A hermeneutic problem is never exclusively internal to a tradition or a culture and cannot be reduced to the correct application of the rules or the lifestyles proper to a specific cultural context. A hermeneutic problem proper only arises when we have to deal with the encounter between different cultural worlds. Interculturalism and multiculturalism are the necessary presuppositions for there to be not merely an interpretive problem, but strictly speaking and to all intents and purposes a hermeneutic issue, that is to say one regarding the relationship between different cultural horizons.

There is not always full awareness of this configuration of the hermeneutic issue. Moreso has rightly emphasised that an important difference between the analytical approach and the hermeneutic one lies in the way of considering the background of our social practices.[5] According to Heideggerian hermeneutics this would be an opaque background, inarticulate and not further analyzable. Precomprehension is therefore that starting point within which we already are and which constitutes our very identity, which it is impossible to abandon, because self-comprehension is incorrigible.

I do not contest that this is the line of Heidegger's thought or even that this result is attained following Wittgensteinian theory of meaning as a social practice. But it seems to me that precisely in this respect Gadamer's hermeneutics intends to go over different orientations, though in a way that is not always clear and unequivocal. In any case it has directly thematized the issue of precomprehension, i.e., the background that confers relevance on human practices. This does not mean that it has been oriented towards the working out of a theory justifying the how of our conceptual apparatus and ensuring its dominion, and consequently control according to the canons of Enlightenment thought.

Between the irremediable opacity of the conceptual background and its unveiling by linguistic therapy there is a third way, which is the one sought, rather than clearly traced out, by Gadamer and Taylor.[6] This is not yet a well defined direction, but is still at the stage of a research project that can develop according to different internal variables. The multiculturalism of our time constitutes an extra stimulus to go all the way with this orientation of thought.

Taking up this point of view, I will only try to clarify, first of all to myself, what problems should be faced with specific reference to law and what spillover there is for the configuration of the contexts within which legal interpretation is practised. I am interested in the general orientation of thought and not directly in the arrangement that it has been given by the authors that have upheld it.

We have said that the hermeneutic issue arises more in the presence of several cultural universes. There are necessarily at least two of them: that in which the interpreter is and that to which the object to interpret belongs. Now it is possible that the hermeneutic objective, that is to say the fusion of horizons, is attained, on condition that a point of contact is found between these different cultural universes. A common framework cannot be taken for granted, but has to be discovered and, in a sense, justified. Indeed, at

[5] José Juan Moreso 'Notas sobre filosofía analítica y hermenéutica' in *Prassi giuridica e controllo di razionalità* ed. Lucia Triolo (Torino: Giappichelli 2001), pp. 217–219.

[6] Cf., e.g., Charles Taylor *Philosophical Arguments* (Cambridge, Mass.: Harvard University Press 1995) xii + 311 pp.

the beginning there is diversity and extraneousness. Nevertheless, the search for a common framework between the cultural horizons implies that the precomprehension of the interpreter must be challenged. If there is unwillingness to accept this, then hermeneutics has to forego any cognitive claim regarding its object, irremediably swallowed up in the conceptual background of the interpreter. Instead, the claims of hermeneutics go in exactly the opposite direction: the text or object to be interpreted broadens the original horizons of the interpreter, or at any rate modifies their arrangement, since the object plays a normative role, that is to say it presents a validity claim which the interpreter has to reckon with. This—in my opinion—is the sense of Gadamer's d i a l o g u e between different worlds.

Challenging of the precomprehension by the person that is immersed in it first of all means "comprehending it" better, identifying its real expectations and managing to discern the prejudices in it that make communication impossible. Precomprehension has to be purified of prejudice, an "inevitable drawback" but one that can be remedied.

In the hermeneutic outlook this work of reflection and correction of misunderstandings is not the fruit of a theory deriving from the practice of concepts, but is work of adjustment *in itinere* following on from the promptings of the object to be interpreted. It is not a matter of working out the grammar underlying or implicit in the use of concepts, not because this grammar is not there, but precisely because it has to be challenged in order to understand worlds regulated and governed by different grammars. Hence the analytical task is not so much rejected as foolish or unreasonable, but as inadequate to explain the ongoing hermeneutic undertaking. The latter has the objective of comprehending the other or the different and not in the first place comprehending itself. To this it must be added that in order adequately to comprehend oneself one needs to be able to converse with those who are different.

The ambitious goal of the hermeneutic undertaking is to overcome particularism from inside, through progressive understandings with other cultural particularities. The awareness of being in a particular context is essential for the hermeneutic pathway, blended however with openness towards other cultural universes for the purpose of constituting a horizon of understanding among several particulars.[7] This means that the interpretive action is far from being a mirroring, but its result, that is to say comprehension, is precisely an event in which sharing of cultural horizons is enacted.

According to philosophical hermeneutics comprehension has a radically temporal character. Human experience is not made up of atomistic and punctiform states of conscience, but of connections between meanings implying incessant rearrangement, retrospective and prospective. Hermeneutic awareness is historical awareness; it is exposed to history in such a way that its action cannot be objectified without eliminating the historical phenomenon itself. But epistemological objectivization introduces in this awareness a sort of estrangement [*Verfremdung*] which destroys the original relationship of affiliation. So it will be necessary to recover the deep unity of historical awareness, showing the possibility of overcoming the rift between the tradition in which and on which the interpreter lives and the one to which the text, or more in general the message, belongs

[7] "Good" universalism is the horizon of agreement of at least t w o particulars when they are capable of universalization.

[*Horizontverschmelzung*]. Every approach to historical documents is never neutral. Each interpreter brings with himself or herself models instilled by his or her own tradition and culture. These pre-judgments [*Vorurteile*] lead him or her to have particular expectations regarding the meanings of a text. Hence comprehension will be a circular movement between the interpreter's expectations or anticipations and the meanings nested in the text. The meeting and fusion of horizons is possible, because, on one side, awareness of the prejudices makes it possible to govern and correct them, and hence the expectations and, on the other side, the meanings to be comprehended reach out beyond the author's intentions. For this reason hermeneutic comprehension is not mere reproduction, but has a productive aspect and itself develops as a historical event, which is available in turn for further actualisations.

Legal experience too has an ineliminable historical character. The past makes its weight felt in the present, which in turn feels somehow bound by it. Legal practice is everlasting work of mediation between different cultural universes: the world in which the legal text (or other equivalent) has originated, and the world of its interpreters or its present users, that is to say of those people who use the text nowadays to complete the undertaking of coordinating social actions. The interpreter is traditionally a mediator and a translator. It is not only a matter of establishing communication between different cultures, but also between different situations, historical events distant in time and conflicting expectations. This requires a capacity not only to engage in a particular linguistic game, but also to grasp what a particular form of life can communicate to a different one and what this can receive from the past.

Because of the historical character of legal experience, one may well wonder whether law is to be identified as a particular linguistic game[8] or as a way of establishing communication between different forms of life and separate historical events. Is law a form of life in itself or a way of governing communication between the multiplicity of languages? Is legal coordination of social actions only possible inside well-defined and circumscribed contexts or does it take place in the interrelation of forms of life distant in time and space?

I believe that the most adequate way to answer such questions is to consider law as a seeker of common values without indissolubly tying it to a specific form of life or a particular anthropology. The general conditions for this to be possible all lie in the way of considering the common framework of a dialogue that is not one between deaf people. And here different variants or different pathways of research are possible that can be seen as alternative or as cumulative.

We can believe that the object to be interpreted is normative not only in the sense that it presents itself as what has to be comprehended, but also because it belongs to a tradition that is endowed with paradigmatic value and is therefore able to speak in a way to everybody. In this case the normativity of the object to be interpreted originates from its content and not from the task that the interpreter takes on. Gadamer's reference to classical texts and classicism has to be seen in this light. There are cultural experiences of the past that have an emblematic meaning as representative of the consolidated canons that govern a practical sphere. This does not mean that such models cannot and must not

[8] Cf. Eduardo Á. Russo & Alicia C. Moguillanes Mendia *La lengua del derecho* Introducción a la hermenéutica jurídica, 3rd ed. (Buenos Aires: Editorial Estudio 2001) 163 pp.

be challenged, even with the result of being profoundly modified. After all, this is what inevitably happens when the interpreter actualizes them, applying them to particular contexts. Nevertheless, they maintain their role as a reference point, in that social practices have to justify their specific articulation of paradigmatic models or their moving more or less radically away from them.

There is also another way of going in search of the common framework of values between the world of the interpreter and that of the object to be interpreted. Now this point of contact is found in the sort of practice that is being discussed. The cultural horizons holding a dialogue with one another, however different they may be in contents or in the values at stake, have in common practical reason, that is to say the aims proper to human operations. One can perhaps identify a convergence between the reason why one interprets and the reasons why the object to be interpreted has come to light.[9] Some practices of the past or some texts are emblematic or meaningful precisely because they have been constructed around demands similar to those that drive the interpreter to interpret them. We admit, for instance, that one of the main aims for which law exists is guiding social actions and coordinating them so that in society there will be order and justice, a just order. This implies unifying different cultural horizons, even though in actual fact they have given very different and conflicting answers and have worked out different models of social order and matured different views of what is right. Nevertheless, the fact that we are talking about answers to the same question makes it possible to identify in this the ground for the hermeneutic dialogue. This requires that awareness be achieved of these structural forms of human action that are implicit in precomprehension itself, saving it from mere facticity. These are not purely formal structures if they are governed—as should be recognized—by the same aims, though seen in different ways.

We can consider these two ways of recovery of a common framework as two variants of the hermeneutic approach to interpretation. The first one has a clearly historical character and, if absolutized, can lead to historicism. The second has an ontological character, since it presupposes that there are universal reasons underlying specific social practices and common questions which these intend to answer.[10] This justifies a critical comparison and allows a mixture of lifestyles. The latter approach, if absolutized, can lead to an abstract metaphysics, such as that which at times has characterised natural law.

Within hermeneutic thought a debate is still open regarding these two main souls that it has, represented by the principle of effectiveness [*wirkungsgeschictliches Bewußtsein*], on one side, and by the rehabilitation of practical reason on the other.[11] Nevertheless, in principle, these two orientations are not necessarily conflicting ones, but become so in the presence of a radicalization of the one or the other. It would be possible, instead, to show that in their moderate form each needs the other. The fact is that identification of the paradigmatic texts and the symbolic practices is only possible if one recognizes

[9] Cf. Joseph Raz 'Why Interpret?' *Ratio Juris* 9 (1996) 4, pp. 349–363.

[10] For the distinction between analytic and ontological hermeneutics, see Roy J. Howard *Three Faces of Hermeneutics* An Introduction to Current Theories of Understanding (Berkeley: University of California Press 1982) xvii + 184 pp.

[11] Cfr. Hans-Georg Gadamer 'Hermeneutik als praktische Philosophie' in *Rehabilitierung der praktische Philosophie* ed. Martin Riedel, I (Freiburg: Rombach 1972), pp. 325–344 and Franco Volpi 'Herméneutique et philosophie pratique' *Ars interpretandi* [Journal of Legal Hermeneutics] 7 (2002), pp. 11–42.

that they intend to answer the questions that the interpreter asks himself and the search for which he engages in interpretative practice. By contrast, the demands that justify the search can only be clarified through specific answers that in our view enjoy particular relevance. There remains the fact that historicism and metaphysical abstraction are just round the corner.

I would now like to show how these articulations of hermeneutic thought can be applied to legal interpretation, thus helping to clarify the general sense within which the interpretive methods consolidated in the tradition of legal thought are practiced.

The Interpretation of "Legal Texts"

Hence the primacy of comprehension drives hermeneutics as a philosophy to question itself on the general meaning of human works. We have already noticed that it is not simply a matter of establishing relations between different cultures, that is to say a problem of translation of languages, but also comprehending the t h i n g involved. The latter does not allow itself to be imprisoned in the relativity of a culture, or to be exhausted by the multiplicity of its applications. It is precisely with reference to this "common meaning" that cultures can really communicate. Hermeneutics is set in this interstitial space that does not properly exist, because every interpretive event unavoidably belongs to a cultural process. It asks itself questions about how forms of human life can hold a dialogue through events that yet remain within and proper to each of them. In the name of what do we consider as l a w such different systems of rules if not because the t h i n g in question is in some way common to them? Why do we not consider the science of comparative law a place of foolishness and misunderstandings unless it is because the legal enterprise has in some way a common significance everywhere?

The particular attention that hermeneutics pays to texts is explained by the fact that texts speak to us of something or, more exactly, are the place in which it is possible to grasp the reason why they are interpreted. Since interpretive activity is set going by the cogent demand of the realization of a work, the texts in question are the s a c r e d ones, that is to say those that call on people to perform a task that is perceived as inescapable.[12] We can consider them c l a s s i c a l t e x t s if we give a broad meaning to this expression.[13] The great literary and artistic works are classical texts, but so are religious and legal texts. They are considered emblematic, because in them the sense of the work to be performed is disclosed in a specific and particular way, so that they take on the role of being a reference point for comprehending the meanings of actions. One must not only think of written texts. The way of behaving that is common to men can also take on the role of being a reference system through which we understand an unknown language.[14]

Hence the main difference between the legal positivistic approach to the text and that of legal hermeneutics becomes fully evident. In this connection, the former believes

[12] Cf., e.g., Mauro Barberis 'The Sacred Text: Legal Interpretation between Hermeneutics and Pragmatics' *Ars interpretandi* 4 (1999), pp. 279–297.

[13] Cf. Enrico Berti 'The Classical Character of a Philosophical Text' *Ars Interpretandi* 2 (1997), pp. 7–20; Reinhard Brandt *Die Interpretation philosophischer Werke* Eine Einführung in das Studium antiker und neuzeitlicher Philosophie (Stuttgart & Bad Cannstatt: Frommann Verlag & Günther Holzboog 1984) 260 pp.

[14] Ludwig Wittgenstein *Philosophische Untersuchungen* (Oxford: Blackwell 1953), § 206.

that the whole meaning is immanent in the text and contained in it. Legal positivism is not characterized as affirming that the whole of law is a product of human action—an idea that in many respects is acceptable—but fundamentally by its maintaining the self-reference of positive law, i.e., the identification between the point of law and legal texts or, if we like, the self-legitimization of the text. This seems sound both in the case in which legal texts are thought of as having become absolutely independent of their authors, and in the case in which they are always considered as the place of manifestations of authorial intentions. In any case it is felt that texts can be interpreted without grasping the thing that lies outside them and constitutes their basis. Interpretation becomes independent of understanding and turns into a mere linguistic technique. The enterprise is similar to that of Baron MÜNCHAUSEN, who gets out of the slush by pulling his own wig.[15]

In the hermeneutic perspective, instead, it is not a text that has a relevant sense in itself, but a sense that has (or expresses itself in) one or more texts. This means that it is law as a specific form of human action that precedes and confers meaning on texts, which precisely for this reason are considered l e g a l. None of them, however, can seize on and contain in itself the whole point of law, each one only being a more or less adequate instantiation of it. If this were not the case, comprehending and interpreting would be the same thing, and consequently no criteria of evaluation would be possible in relation to the correctness of the latter. Positive law would always and infallibly realize its sense. And this is historicism.

The specific horizon of meanings, which is presupposed in precomprehension, makes it possible to reject NIETZSCHE's affirmation that everything is interpretation. This thesis is inconsistent and self-contradictory, because, if everything were interpretation, nothing would be interpretation, since interpretation is always interpretation of something. All interpretation implies an object to be interpreted which is different from the interpretation itself. If everything were interpretation, one could not even say that l e g a l texts are interpreted. It is certainly not interpretation that makes a text l e g a l, but on the contrary it is legal texts that make the interpretation l e g a l. Indeed, even more radically, we should say that legality itself does not depend on the texts, but, before them, on the form of life of which the texts are expressions.

Interpretation is certainly linked to positivity to such an extent that we can affirm that the very positivity of law is the result of interpretations and the beginning of other interpretations. Nevertheless the horizon of meanings is not strictly interpreted but comprehended, and this results in an endless chain of interpretive events. The methodological issue of the correctness of the interpretation is therefore subordinate to the hermeneutic one concerning the conditions of possibility of the comprehension of legal texts.

Hence the l e g a l t e x t in its own sense is not to be confused with legal texts. Every interpretation certainly addresses legal material (written or oral) from which to derive the meanings of the rules, but this material gets its point from something else, be it a tradition, a social practice that persists in time, or a consolidated way of seeing relationships and social situations. In short, the very text in which to read law is a social

[15] Cf., in general, Joachim Hruschka *Das Verstehen von Rechtstexten* Zur hermeneutischen Transpositivität des positive Rechts (München: Beck 1972) 101 pp. [Münchener Universitätsschriften, Reihe der juristischen Fakultät 22].

practice that is updated in time and in space, preserving continuity, though slender or hardly discernible.[16] This does not mean that every legal epoch has not been marked by legal texts that are in some way emblematic or paradigmatic, like Justinian's *Corpus iuris*, the *Decretum* Gratiani, Napoléon's *Code civil* and, today, the *Universal Declaration of Human Rights*.

In the western legal tradition—as Berman rightly observes—law is conceived as an organic whole, as a unitary b o d y, *corpus iuris*, which evolves in time over the centuries and the generations.[17] This idea, a trace of which can already be found in Roman law, was elaborated in a conscious manner in the medieval age by the European canonists of the twelfth and thirteenth centuries and by the Romanists, who taught Justinian law in the European universities. This organic corpus is made up of norms and doctrines, principles and concepts. Its configuration is closely linked to the rise of legal science and of the class of jurists. In other words, law includes not only the commands and decisions of the political authority, but also the doctrines and the concepts worked out by jurists, and the interpretations and decisions of judges. This means that law possesses within itself the criteria for its own order and for its own evaluation. This is the meaning of the appeal to a 'corpus', which would be betrayed if seen as a 'system' in a logical sense.[18]

This configuration of law is absent in non-western cultures and in European cultures of barbaric origin down to the eleventh century. In these cultures one cannot speak of law as an order distinguished from morality, religion and politics. However, this does not necessarily mean that law is exclusively made up of prescriptions and formal procedures.

One must not confuse this idea with Kelsen's idea of the unity of a normative system deriving from a fundamental norm [*Grundnorm*], which if anything is a reductionist application of it produced by demands for rationalization taken to their extreme. In the medieval age law as a corpus was the result of the integration of different legal systems. This integration was favoured by the doctrine of the hierarchy of the sources of law and by doctrinal criteria for the resolution of conflicts between norms belonging to different legal regimes.

The first example of this way of facing the relationship between norms of different origin is found in the *Concordantia discordantium canonum* of the monk Gratian in 1140. Gratian affirmed that in the case of a conflict custom had to give way to written law, the latter to natural law and this in turn to divine law. This is an emblematic case of "competition between orders", that is to say between the order of law deriving from society (custom), the one deriving from the political sovereign (written law), the one proper to reason (natural law) and the one deriving from divine revelation (divine law). As can be observed, here the unity of the *corpus iuris* is not only compatible w i t h but even constituted by the pluralism of legal regimes. This pluralism extends to everything, that is to say it also concerns the nature of these different legal regimes, which have heterogeneous sources and rules.[19] If precisely this pluralism, on the historical plane, is fully

[16] Francesco Viola *Il diritto come pratica sociale* (Milano: Jaca Book 1990), pp. 5–28.

[17] Harold J. Berman *Law and Revolution* The Formation of the Western Legal Tradition, 2nd ed. (Cambridge, Mass.: Harvard University Press 1990) 672 pp.

[18] It can also be shown that the term 'system' originates precisely from the concept of 'organism' in medicine. Cf. Francesco Viola *Autorità e ordine del diritto* 2nd ed. (Torino: Giappichelli 1987), p. 113, note 146.

[19] I observe this to mark the difference from the present-day problem of " competition between legal systems"

compatible with the unitary idea of *corpus iuris*, Weber's thesis of the incompatibility between traditional law, charismatic law and rational law is challenged. The fact is that when rational law has prevailed, the idea of *corpus iuris* has disappeared and has been replaced by the idea of a logical normative system, which in legal pluralism sees a defect or an evil to be fought.

Today in the place of *corpus iuris* there is the "European legal space" in which in a disorderly way there fluctuate norms which have come from no one knows where, applied no one knows how and by whom. In our view a mess arises, a fragmented mass of *ad hoc* decisions and conflicting norms, united only by common t e c h n i q u e s. This situation nurtures cynicism, and in the last resort favours nihilism.[20]

A legal space, which is neither a corpus nor an order, at the same time helps to destructure the state orders and makes it problematic to apply the current notion of l e g a l s y s t e m to them. The fact is that, despite everything, for us the concept of legal system preserves a certain appeal as an expression of the state. I believe that this is also true for Santi Romano[21] when he conceives every legal order as being exclusive on the inside and alternative on the outside, which are characteristics clearly deriving from a state-oriented conception. In this way the pluralism of legal systems is built up with the model of the pluralism of the state arrangements in mind. If we remain anchored to this "state-oriented" notion of the legal system, then we have to recognize that law is no longer a corpus and that the state order now is no longer a legal system in a strict sense. Today, to use the words of Gustavo Zagrebelsky, a well-known contemporary Italian jurist, "law as a system is no longer a fact, as it was in the nineteenth century, but, if anything, we could say it has become a problem, a very serious problem".[22] Nevertheless, if we are prepared to abandon the reductionist idea of a normative system, there is perhaps the possibility of recovering the Roman and medieval idea of *corpus iuris* in a profoundly new form.

This new orientation has an unwitting origin and justification in the very idea (also proper to the western legal tradition) of the Rule of Law, which is not to be seen as an identification of state and law [*Rechtsstaat*]. If law and state were one and the same thing (as Kelsen thinks), then every state in itself would conform to the law and, therefore the principle that states must be subjected to the law, and to nothing but the law, would become void. How can law impose constraints on politics if law is merely the product of politics?[23] If instead the law is a corpus, in some way unitary, of norms, procedures, decisions, doctrines and principles at one and the same time preceding and resulting from the interaction between different legal regimes, then the point of the legal enterprise precedes and justifies all legal institutions, including that of the state.

In the light of a refreshed theory of law we can understand why the western legal tradition has been very careful not to reduce law to the laws produced by the political

in the European Union. Despite the difference between the common law and civil law systems, these orders are much more homogeneous than the medieval ones.

[20] Cf. Natalino Irti *Nichilismo giuridico* (Roma & Bari: Laterza 2004) viii + 148 pp.

[21] Santi Romano (1875–1947) was an Italian jurist whose theory of the plurality of legal orders was very influential in Italy during the first half of the last century.

[22] Gustavo Zagrebelsky 'I diritti fondamentali oggi' in *Materiali per una storia della cultura giuridica* 22 (1992) 1, p. 192.

[23] Cf. Neil MacCormick *Questioning Sovereignty* Law, State, and Nation in the European Commonwealth (Oxford: Oxford University Press 1999), chs. 1–3.

authorities and has turned its attention to other sources, such as divine revelation, natural law and, more recently, human rights, and to the contexts of the civil society inside the nation (cities, regions, workers' associations), as well as to those that go beyond the national confines (*ius gentium*, *lex mercatoria*, international organizations, churches).

In short, it has become clear not only that state law and law are not the same thing, but also that the former is only a part of the law that is applied, a part which is becoming smaller and smaller. Law is not unified by a sovereign institution, but by the complex of historical institutions and by the tradition that links them to one another. In this sense it can be thought of as a corpus, a *corpus iuris*.

The "Thing-law"

In legal experience there is also another way of defining law. Now a common framework is no longer to be sought in the persistence of historical awareness, which actualizes in ever new ways principles or rules coming from the past and consolidated by tradition. One wonders whether there are not persistent reasons for law to exist in societies at all time and in all countries, and whether there are not goods or aims that can only be guaranteed by law or that it is also necessary to reach through law.[24] This does not mean that there are unchangeable legal contents nor that there are fixed structures of legality, but that there are fundamental values or general horizons of good that should be made accessible to every human being and that constitute the point of law and the reasons for its use.

In this connection the pathway of philosophical hermeneutics starts from legal discourses in which the "thing-law" is referred to, to get back to the goals that justify them. It is an inductive pathway and not a deductive one, as is suited to practical reason. The discourse is that "situatedness" of language in which comprehending and understanding are enacted. Inside this, which is first of all an event, there will then have to be rational or analytical checking, but it is not this that can qualify the event itself as 'legal'. On the contrary, it is on the specific character of the discursive situation that there depends the way in which its validity claims can be tested.

What confers relevance on legal discourse and the cooperative enterprise that it substantiates is not given by its specific conditions of practicability, but by the aims that set it going.

Practical discourses (ethical or legal) are articulated on the basis of arguments and means for examining them, in which intersubjectively there are tested out the justification of the actions or omissions and the validity claims of norms, value judgments and institutions are challenged. If we observe them in the light of what these discourses tend to enact or attain, then not only the argumentations but also the normative rules are themselves presented as "reasons" that justify the actions. These reasons can only be grasped in discursive contexts, which confer existence and operativeness on them, but they can only be evaluated and weighed up in the light of the goals that we intend to reach or that identify the social practice at issue.

For philosophical hermeneutics the discourse does not serve only to communicate

[24] On this theme cf. Francesco Viola & Giuseppe Zaccaria *Le ragioni del diritto* (Bologna: Il Mulino 2003), ch. 1.

the intentions of the participants, but above all to weave out a common form of life. This perspective precludes assimilating philosophical hermeneutics to linguistic pragmatics.[25] For the latter, intentions and beliefs are the directive principle, that is to say the state of things that confers relevance on discourse. For hermeneutics the directive principle is what is being spoken about or what is being done. This is the "thing" of the text or what the text speaks about. We are not talking about a determined meaning, as an intention can be, and instead it is a matter of submitting oneself to a normative reality, that is to say to constraints and rules striving at reaching aims. The determinacy of the meaning will instead be the result of the communicative interaction and the participative actions. Indeed law, as the "thing" which legal text speaks about, is marked by indeterminacy.

A work of art has a binding character not through the author's intention, but because it has a truth claim to be respected. Likewise, we have to obey the rules of the game, if we want to play it, and those of a culture if we want to be communicative within it. Now hermeneutics rejects the centrality of the intention precisely because it addresses all its attention to the conditions in which every intention can be formulated and acquires relevance. In short, the point to be comprehended does not come from the intention, but from something else, and at all events cannot be comprehended without it. In this connection Gadamer notes that in play, as in aesthetic enjoyment, the actor is the game itself. In a sense the players are played by the game, which has a dominant character: it dominates the players through and in their actions. As Gadamer affirms, the subject of the game is not the players, but it is the game that is performed through the players: the game plays the players more than the players play the game.

The attention of philosophical hermeneutics is addressed to those forms of common life that the discourse itself reshapes and instantiates. Its central problem is not determination of the meanings within a horizon already constituted, such as a culture or a language already existing and used. This is a matter of interpretation, which presupposes a language of interaction already constituted and moves in a world already marked by reciprocity, cooperation and an intersubjective contextual sense. So the interpreter can in some manner be guided and constrained in relation to the work of ascribing meanings. The real problem of hermeneutics is comprehension of what is unfamiliar and this is only possible insofar as a common meaning is perceived between our world and the one to which there belongs the text to be comprehended. The discovery of this common framework is not possible through purely theoretical and abstract knowledge, but only in the practical event of the discourse, in which participation in a common undertaking takes shape. What is common to the world of the text and the world of the interpreter is the practical goal, that is, the relevance of the text to the action to be performed. If we do not get into the outlook of practical knowledge, it is not possible to seize the demands of philosophical hermeneutics.

In conclusion, it has to be reemphasized that philosophical hermeneutics has as its object problems relating to the comprehension of the point of common undertakings and

[25] Cf. David C. Hoy 'Intention and the Law: Defending Hermeneutics' in *Legal Hermeneutics* History, Theory and Practice, ed. Gregory Leyh (Berkeley: University of California Press 1992), pp. 173–185 and Francesco Viola 'Intention and Legal Discourse: A Comparison between Linguistic Pragmatics and Hermeneutics' in *Ars interpretandi* 2 (1997), pp. 61–81.

believes that it cannot be found outside concrete discursive events. The "thing" which the text speaks of lives in the practice of comprehending and interpreting.

The "thing-law" is not an idea, it is not a value and it is not even a set of social procedures, but is an undertaking jointly participated in by beings that are free and autonomous but need each other in order for each to attain a very successful life. This cooperative undertaking is substantiated in activities guided by rules and serves to coordinate social actions.[26] But all this is still too generic, because it could be equally well applied to other spheres of practical life like ethics, politics and economics.

In the search for the whole set of meanings of the cultural phenomena or of "human things" the best method is not to look for the common element [*genus et differentia specifica*], because this flattens a notion downward and mortifies the possibilities and the richness of manifestation, in which there most clearly appear the reasons for common undertakings. The beautiful is perceived best in the most beautiful things and the good in the most virtuous actions. Hence it is necessary to choose as a hypothesis the emblematic cases accepted by everyone [*éndoxa*] of the cultural phenomena studied for working out the main sense of the concept that one wants to define. Peripheral cases, in turn, will appear as impoverished examples or ones lacking something or at any rate difficult to interpret. They will be clarified precisely on the basis of the significant bonds that they have with the main case. This common framework allows analogical extension of the concept, which thus shows its authentic universality. It is in the paradigmatic case that the principle or the *ratio* of the definition is most easily identifiable. If we started from hard cases, we would never succeed in grasping the fullness of the sense of human things. If there are doubtful cases, it is because there are cases which are not doubtful, and it is from these we need to start in order to clarify the others.

It is not to be believed that this method, unlike the other, is of a deductive type. On the contrary it is the most correct way of conducting an inductive investigation. Indeed, Aristotle at first applied this method to his philosophy of nature.[27] The inductive search does not proceed from the scrutiny of a great many single cases in order to abstract from them the common element through generalizations. This is only possible *a posteriori* for teaching or expository purposes, when the common element has already been found. On the contrary, in the search one proceeds from a particular case taken as hypothetically emblematic, and one verifies whether it can offer authentic universality. The important thing is carefully to choose the paradigmatic case and not to forget that it is only a hypothesis to be verified, which can and must be abandoned if it is devoid of universal scope.

The hermeneutic dimension of the method of the main case is incontestable, but it lies not so much in the investigation procedure but rather in the need for precomprehension of the horizon of meanings in which to carry out the processes of selection of the

[26] Cf. John Finnis 'Law as Co-ordination' *Ratio Juris* 2 (1989) 1, pp. 97–104. In law it is necessary to pay particular attention to that form of coordination that is called 'cooperation'. See Michael E. Bratman *Faces of Intention* Selected Essays on Intention and Agency (Cambridge: Cambridge University Press 1999), pp. 94–95; Scott J. Schapiro 'Law, Plans, and Practical Reason' Legal Theory 8 (2004) 4, pp. 387–441; Francesco Viola 'Il modello della cooperazione' in *Forme della cooperazione* Pratiche, regole, valori, ed. Francesco Viola (Bologna: Il Mulino 2004), pp. 11–58.

[27] Cf. Wolfgang Wieland *Die aristotelische Physik* Untersuchungen über die Grundlegung der Naturwissenschaft und die sprachlichen Bendingungen der Prinzipienforschung bei Aristoteles, 3. Aufl. (Göttingen: Vandenhoeck und Ruprecht 1992) 365 pp.

reflection. The real starting point is found in an indefinite universal or in approximate preliminary knowledge, but only by freeing oneself of misunderstanding is it possible to arrive at determinacy of principles and therefore to pass from interpretation to full comprehension.

It has been felt that the Rule of Law is the paradigmatic model to which we have recourse in our day and age in order to identify the general characters of the legal enterprise: taking away the exercise of power from the arbitrary will of men and achieving equal concern and respect. But these demands, though part of the general value of justice, are far from exhausting its scope. Though we cannot fault HART when he notes that the rule of law is "compatible with very great iniquity",[28] nevertheless it is also true that a just society is not compatible with systematic violation of the Rule of Law. That a legal system with its set of norms should respect given formal and procedural conditions, that it should work well and possibly be in good health are a necessary though not sufficient component of the objective of a just society seen as an ideal goal. But the value of justice requires much more if it is true—as RADBRUCH affirms—that law is that reality whose point is to serve justice.[29] The Rule of Law serves to identify the presence of the legal demand in culturally different societies.[30] However law is not present in every case in the same way, but is present in a more or less full and complete way, because its aims are more or less clear and distinct and its tools are more or less adequate.[31]

More recently, the most accredited paradigmatic model has become that of constitutionalism. This is a model that is no longer purely formal, since contemporary constitutions contain a list of rights for the defence of individuals and social groups and legitimize claims that can hardly be recomposed in a social order accepted by everybody. Contemporary constitutionalism does not identify justice with social order. It places at the centre the human person and his or her dignity and thus justifies disagreement, which nevertheless it is the task of law to resolve and overcome.[32] All this may seem paradoxical, but it is not, because the value of justice includes both the recognition of rights and the common welfare of society. Justice cannot be seen as fulfilled until satisfaction is given to the one and the other and this is the task of the legal enterprise globally considered.

However, constitutionalism too is a contingent historical model. It would be naïve to think one had finally found or constructed the perfect model of legality once and for all. We can already observe that the general orientation towards multicultural societies and towards more and more articulated legal pluralism is changing from within it the role of constitutions, freeing them from their exclusive reference to the state and transforming them into a language of world legal communication.[33]

A hermeneutic philosophy of law considers legal efforts for organizing social life as

[28] Herbert L. A. Hart *The Concept of Law* 2nd ed. (Oxford: Oxford University Press 1994), p. 207 and also Joseph Raz 'The Rule of Law and Its Virtue' [1977] in his *The Authority of Law* (Oxford: Oxford University Press 1979), pp. 210–229.

[29] Gustav Radbruch *Rechtsphilosophie* 8. Aufl. (Stuttgart: Schneider 1983) p.119.

[30] To the theme of the Rule of Law, VARGA has devoted great attention, with particular reference to different legal cultural relations and changes in cultural paradigms. Cf., e.g., Csaba Varga 'Varieties of Law and the Rule of Law' in *Archiv für Rechts- und Sozialphilosophie* 82 (1996) 1, pp. 61–72.

[31] Cf. Fred Dallmayr 'Hermeneutics and the Rule of Law' in *Legal Hermeneutics...* [note 25], pp. 3–22.

[32] Cf. Jeremy Waldron *Law and Disagreement* (Oxford: Oxford University Press 1999) 325 pp.

[33] Cf. Francesco Viola 'The Rule of Law in Legal Pluralism' in *Law and Legal Cultures in the 21st Century* Di-

more or less successful attempts to create just societies despite the dramatic denials of history. What appears unreasonable in the light of this aim is destined sooner or later to be overwhelmed and swept away because of the devastating effects of practice. Practical reason is verified from the results of its applications more than from the abstract value of its principles. We can therefore observe in conclusion that reflection on the "thing-law" starts from particularly significant historical models, which take on the role of being paradigmatic cases. They speak to us of the point of law, but this is never completely captured by a determined model nor by a particular social order. In these historical enactments the point of law is realized in a more complete way, but not in a way which is definitive and exhaustive once and for all. The sense of law constructs its own historical expression and, at the same time, it decrees its limits.

I believe not only that the pathway of "law as text" is fully compatible with that of "law as thing", but also that the former needs the latter and vice versa. Philosophical hermeneutics has tried to live without the teleological and ontological dimension, trusting in the solidity of traditions and in their compactness. But contemporary pluralism has brought disorder and confusion into the world of practices and traditions, making work of reconstruction and reinterpretation necessary in the light of the general aims of cooperative undertakings. Practical reason works in history. Dialogue and integration between different cultural worlds presuppose a society founded at one and the same time on the capacity to understand languages coming from other worlds and on convergence towards the same horizons of good. If the possibility of communicating is denied, we will also be forced to deny the possibility of cooperating.

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