Lawyers and Hermeneutics

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1 Gadamer's Universal Hermeneutics

Interpretation has always been lawyers' most important task. In contrast to humanists and aestheticists, lawyers and theologians have a common subject and therefore a related method, namely normative texts, and a dogmatic exegesis.

It is not the receiver but the sender who stands in the foreground when the message is interpreted. The normative element in authoritative texts necessarily brings the condition of a "right" interpretation which is presupposed to be independent of the receiver's conceptions.

The content of meaning – the intention – is therefore an important element in the theological and the legal interpretation, and the practical element – the fact that legal rules are to be applied to concrete events – is emphasized, especially by Gadamer, as exemplary for the universal hermeneutics.

The fact that the historical element is important to "the understanding" of a text, is pointed out by the older hermeneutics, but the historical "horizon of understanding" is broadened by Heidegger in that the understanding for man becomes a primary and unavoidable way of relating himself in and to the world (and not just to a text or source, which on the first going over is not understandable). Therefore, the historical, contextual element cannot be eliminated from the text nor from the interpreter, but on the contrary creates the possibility for meaning in every concrete textual interpretation. Gadamer's contribution is that he has seen the importance of the connection between text and reality in the concretization of the language in practical situations.

Gadamer has developed this insight in his "Wahrheit und Methode" (1960), and he developed it further in the preface and epilogue of the 2nd edition (1965). The relationship between language and reality, and also the nature and limits of knowledge, is the subject for his "universal hermeneutics", which is not just an interpretation of texts but an ontology.[1]

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1 See also Hans Georg Gadamer, *Rhetorik und Hermeneutik: als öffentlicher Vortrag der Joachim Jungius Gesellschaft*, gehalten am 22.6.1976 in Hamburg, Göttingen 1976; Hans Georg Gadamer, *Rhetorik, Hermeneutik, Ideologiekritik*, in Kleine Schriften 1, 1967, pp. 113 ff.

In the following I will sketch the meaning of the hermeneutic-rhetorical tradition in the formation of legal theory up to its actual effect through Gadamer's universal hermeneutics. Today we can refer to a number of modern legal theories that – with or without Gadamer – are hermeneutically imbued.

2 The Theory of Law

It is not remarkable that in particular legal historians and especially German legal historians developed a hermeneutic theory; but also the legal dogmatic theory in Germany, after the war, was inspired by universal hermeneutics. The three most important representatives of the latter theory of hermeneutics are Helmut Coing[2] (the first director of the Max-Planck-Institute of European Legal History), Joseph Esser[3] (one of the post war's most significant civil law lawyers and like Coing a prominent representative of a comparative jurisprudence), and Franz Wieacker (civil law historian, specialist in Roman law and dogmatics).[4]

However, a common thread connecting these three jurists is the fact that their theories are not derived from Gadamer but have resulted from a parallel development. Relying in part on Dilthey's older hermeneutics, they have treated hermeneutics as an extension of rhetorics which was rooted in antiquity and developed in the middle ages into one of the most important sources for scholastic sciences which undertook to harmonize the authoritative classical scientific, religious, and legal texts.[5]

Consequently, jurisprudence has currently accepted the necessity of a scientific theoretical prerequisite for the dogmatic jurisprudential and interpretative theory. Already in the mid-1960's, jurisprudence had given up the empirical-analytical stance and recognized a fundamental point of departure in hermeneutics or critical theory. We were no longer satisfied with asking the question: how? but we also asked: why?, since we had admitted the impossibility of an objective description of reality, which was in another logical category than language.

In opposition to the systematic and deductive theory, which dominated the 20th century's idealistic legal theory, jurisprudence currently emphasizes the topical rhetorical theory of argument and law's conceptually open nature, the rhetorical dialectical element in legal usage having previously been recognized in the works of Chaim Perelman,[6] Theodor Viehweg[7] and Stephan Toulmin.[8] In

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2 Helmut Coing, *Die juristischen Auslegungsmethoden und die Lehren der allgemeinen Hermeneutik*, Köln 1959; Helmuth Vetter und Michael Potacs (Hrsg.), *Beiträge zur juristischen Hermeneutik*, Wien 1990.

3 Joseph Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung*, Frankfurt a.M. 1970.

4 Franz Wieacker, *Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung*, 2. Aufl., Göttingen 1967; Franz Wieacker, *Bemerkungen zur rechtshistorischen Hermeneutik*, Mainz 1964, p. 4.

5 Arthur Kaufmann, *Beiträge zur juristischen Hermeneutik*, Köln 1984; Emilio Betti, *Allgemeine Auslegungslehre als Methodik der Geisteswissenschaften*, Tübingen 1967, (original edition in Italien, 1955).

6 Chaim Perelman, *Justice et raison*, 2nd ed., Bruxelles 1970.

7 Theodor Viehweg, *Topik und Jurisprudentz*, 3. Aufl., München 1965.

addition, Karl Engisch[9] and Karl Larenz[10] have emphasized the discretionary element in legal usage arising from the dialectics between the concrete and the universal in the type–concept. The type–concept, in opposition to the universal concept, emphasizes the undefined concept's open character, which is not constituted by the conceptual element's structure, but by its intensity: What is a forest? How many trees does it take?

The debate on the theory of science in the 1960's, in connection with the positivistic criticism, was led by, among others, Jürgen Habermas.[11] In "Law and Society"[12](1970) I collected the results of my earlier articles into a hermeneutical-functionalist legal theory, stressing the intentional character of knowledge and the necessity of an ideological and anthropological approach to the understanding and interpretation of norms which have an abstract purpose and which are made concrete through pragmatic considerations.[13]

Jørgen Dalberg-Larsen refers to the points of resemblance between the German hermeneutics and the modern English analytical jurisprudence, which like hermeneutics emphasizes the "internal" (understanding) element in the concept of law and the creative element in language.[14] In accordance with the starting point in Wittgenstein's later writings, the Finn Aulis Aarnio[15] and the Polish-Swede Aleksander Peczenik[16] have tied themselves to a hermeneutical analytical theory in close cooperation with the Scot Neil MacCormick.[17]

In order to understand the current interest in hermeneutics within the theory of law and its doctrinal method, we can refer to the legal doctrine's beginning in ancient Rome. Here we – through reception of the Greek contribution (Aristotle) – first noticed that the law's or the text's authority could be preserved only if it was interpreted, that is to say actualized with respect to a concrete case or a concrete political situation. Rhetoric came into the picture.

3 Rhetoric and Jurisprudence

In the oldest Roman procedural law during the time of the Law of the 12 Tables (circa 450 B.C.) there was complete agreement between the words and their

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8 Stephen Toulmin, *The Uses of Argument*, Cambridge 1964.

9 Karl Engisch, *Die Idee der Konkretisierung in Recht und Rechtswissenschaft unserer Zeit*, 2. Aufl., Heidelberg 1968.

10 Karl Larenz, *Methodenlehre der Rechtswissenschaft*, Berlin 1960.

11 Jürgen Habermas, *Erkenntnis und Interesse*, Frankfurt a.M. 1968, which on the basis of the hermeneutic *why*? added the critical *why not?*

12 Stig Jørgensen, *Typologi og realisme*, in Nordisk gjenklang, Festskrift til Carl Jacob Arnholm, Oslo 1969, pp. 143 ff.; Stig Jørgensen, *Ret og samfund*, Copenhagen 1970, Ch. 1.

13 Stig Jørgensen, *Values in Law*, Copenhagen 1978; Stig Jørgensen, *Pluralis Juris*, Århus 1982; Stig Jørgensen, *Reason and Reality*, Århus 1986; Stig Jørgensen, *Fragments of Legal Cognition*, Århus 1988.

14 Jørgen Dalberg-Larsen, *Retsbegreb, retsanvendelse og retsvidenskab* (together with Jes Bjarup), Århus 1993, on the relationship between H. Hart and Gadamer.

15 Aulis Aarnio, *On Legal Reasoning*, Turku 1977.

16 Aleksander Peczenik, *Reasoning on Legal Reasoning* (together with J. Uusitalo), Helsinki 1979.

17 Neil MacCormick, *Legal Reasoning and Legal Theory*, Oxford 1978.

meaning. The formulas, which were the foundation of the procedure, should be said strictly according to the rituals, in order to procure the desired results. If one of the parties was unable to provide an evidence that once and for all corresponded with the assertion, then the matter was dismissed.[18]

This perception of the word's ritual meaning is recognized from the magical bewitching formulas in folktales where one single "open sesame" can open the doors or make the brooms start and finish the work. This magical power in the word's content is later transferred to writing, where the magic is preserved. We see this in the runes, which are found in some of our oldest churches' foundations.

The Roman culture preserved these ritualized forms of procedure far into the classical period (from circa 200 B.C.), though in an altered form. However, from this time Greek culture began to manifest itself in connection with the new schism between *verba* and *voluntas*. In the interpretation of contracts and evidence in the procedure, it was no longer the strict wording which was conclusive, but rather the meaning which became the interpreter's aim. During the following period Roman law also included the Greek conceptual ideal *aequitas* as a general control of reasonableness in the interpretation and the use of legal rules. In addition, *actiones in factum* and *bona fide* became mediators to the *praetor's* development of the old strict legal claims and their literal content.[19]

The schism between word and meaning originates in Greek sophism, which as part of the dialectic exercises established the teaching in the meaning of words (etymology), and the schisms between the general problem and the individual case, between essential and unessential, between word and meaning.[20] The sophists carried their subjectivism so far that they were accused of immorality and manipulation. They dismissed all religious moralistic conceptions (the gods have not created man, but man has created the gods; law and society are not controlled by the gods, but rather by man himself through a social contract). Socrates is (through Plato's writings) known for attacking the sophists' ambiguous way of avoiding fixed definitions and arguing from a subjective moral. Plato's and Aristotle's work can be understood as an attempt to find criteria for as broad an objectivistic knowledge as possible. Plato, for example, had to accept Gorgias' teaching in epieikeia (fairness), which had a significant importance for legal usage in later times. In two of his writings on

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18 J.G. Wolf, *Error im römischen Vertragsrecht*, Köln 1961, pp. 107 ff.; Max Kaser, *Das römische Privatrecht*, München 1955–59, Sections 8 and 57; Helmut Coing, *Die juristischen Auslegungsmethoden und die Lehren der allgemeinen Hermeneutik* (*loc.cit.* note 2); Stig Jørgensen, *Vertrag und Recht*, Copenhagen 1968, pp. 152 ff.

19 Salvatore Riccobono in J. Stroux, *Römische Rechtswissenschaft und Rhetorik*, Postdam 1949; H. Meyer-Laurin, *Gesetz und Billigkeit im attischen Prozeß*, Weimar 1965; Ernst Kapp, *Der Ursprung der Logik bei den Griechen*, Göttingen 1965; Stig Jørgensen, "Die Lehre des Grotius vom Vertrag'', in *Vertrag und Recht* (*loc.cit*. note 18), pp. 141 ff.

20 Meyer-Laurin, *Gesetz und Billigkeit (loc.cit.* note 19); Erik Wolf, *Griechisches Rechtsdenken II*, Frankfurt a.M. 1952; Stig Jørgensen, *Vertrag und Recht* (*loc.cit.* note 18); Stig Jørgensen, "Hermeneutik og fortolkning'', in *Lovmål og dom*, Copenhagen 1975, pp. 86 ff. and "Symmetri og retfærdighed'', in *Lovmål og dom*, pp. 118 ff.; Stig Jørgensen, "Juristen og reorikken'', in *Retorik, hvad er det – også?*, Modersmål-Selskabets Årbog, 1994, pp. 47 ff.

logic, which were collected under the name of "Organon", "analytika priora" (the first analysis) and "analytika posteriora" (the second analysis), Aristotle founded the schism between the teaching in the correct logical conclusion (syllogism) and the teaching in the scientific evidence and its principles, for example the validity of the first concepts or statements which are included as the premiss in a syllogism. Only the process of abstraction assigns empirical facts to concepts of language, and only "catalogues of the most accepted meanings" can be employed in the dialectical and rhetorical discussion. While the object of dialectics is to convince, the object of rhetoric is to persuade an audience; their common basis is topics which the second to last thesis of the Aristotelean "Organon" deals with.

When Cicero later on summarized classical rhetoric in his books on the art of speaking (De oratore and Topica), it was based partly on Aristotle's analyses, and partly on Aristotle's contemporary Anaximenes, who wrote the first systematic textbook on rhetoric, which was the foundation of Gaius' textbook in Roman civil law (Institutiones, circa A.D. 150). This textbook had extraordinarily great importance to late Roman jurisprudence (the glossators, from around 1000 A.D.) because it was incorporated into Justinian's Corpus Juris (529–34).[21]

The glossators – like theologians – adopted the so-called scholasticism emanating from the authority of the classical sources, including Corpus Juris. The object of the glossators was to create an unambiguous and exhaustive system on the basis of the scattered and casuistic source material, which was created over several centuries and was valid in a completely different time. The trivial (trivium) science (grammar, rhetoric and dialectics)[22] became the most important tool in this process of harmonization through *distinctio* and *divisio*. The starting point was a grammatical-philological exposition, supplemented with an objective interpretation (ratio = objective intention). Supplementary rules of interpretation were made that took a position on differences – and differences on different levels – and introduced the figures of analogy, e contrario, and a fortiori conclusions as tools in order to obtain harmony. Along with contradiction between different legal sources, other rules of harmonization were made: lex posterior derogat priori, lex specialis derogat generali, etc. Later on different interpretative viewpoints – systematical, historical, sociological, and ethical – were introduced.[23]

The systematical arrangement provided the text's unity, which was one of rhetoric's foundations. The historical viewpoint concerned the law's rational meaning (*ratio*), which was the interpreter's object. Besides, the later post-glossatory objective (14th and 15th centuries) was to adjust inherited – down

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21 Manfred Fuhrmann, *Das systematische Lehrbuch,* Göttingen 1960; Ernst Robert Curtius, *Europäische Literatur und lateinisches Mittelalter*, 4. Aufl., Bern 1963, pp. 71 ff.; Stig Jørgensen, *Vertrag und Recht* (*loc.cit.* note 18).

22 They were the basis of the academic education in contrast to "quadrivium'' or "artes liberales'' (algebra, geometry, astronomy and music, the sciences of numbers), which were a superstructure that all students had to go through at the medieaval universities.

23 Stig Jørgensen, *Juristerne og hermeneutikken*, in Philosophia – Tidsskrift for filosofi, årg. 25, 1996, pp. 93 ff.

legal material to an altered reality, and that is why ethical, sociological and pragmatic factors were introduced into the interpretative teaching.

In the 17th century, Hugo Grotius accepted the interpretation theory of the middle ages, which was based on Cicero's writings, and passed it on to the historical school succeeding Hume's and Kant's critical cognition theory, which had removed the foundation for objective reason and therefore gave way to an extensive legal positivism. However, it was not until the middle of the 19th century with the so-called "interest jurisprudence" that sociological viewpoints came to the foreground.

Rudolph von Jhering settled with the previous idealistic "conceptual jurisprudence" perceiving legal rules as the result of a struggle between political interests and the object as the foundational interpretative element. The motive must be the propulsion for human behavior, he thought, in agreement with Schopenhauer and Nietzsche: "Eine Handlung ohne Motiv ist wie eine Wirkung ohne Ursache." Jhering's teleological legal theory, which was strongly affected by Bentham's utilitarianism, was of great importance for future jurisprudence, partly in the form of a "sociological school of legal freedom", which like existentialism wanted to judge every concrete thing in terms of its own attributes and partly in the form of an "interest jurisprudence", which insisted on the legislation as the guarantee of legal predictability, but, as in the case of interpretation, would take its point of departure in the objective subject of the law (teleological interpretation).[24]

4 Hermeneutics and Jurisprudence

Accordingly, rhetoric rather than hermeneutics has formed jurisprudence, although there is considerable agreement between the rhetorical-juridical interpretative method and universal hermeneutics. The text's autonomy and unity in hermeneutics corresponds to the systematic viewpoint of rhetorics (genus/species relationship[25]). The genetic interpretation in hermeneutics (the objective and the subjective teleology) corresponds to the historical teleological viewpoint of rhetorics. The technical interpretation in hermeneutics corresponds to the sociological viewpoint of rhetorics (the relationship between language and reality).

Another common feature is to stress the comparative element and the topical element in the interpretation: the fact that definite rules of the order of priority of the different interpretative viewpoints do not exist, and therefore the interpretation becomes an "art" rather than a science.[26] Nevertheless, rhetorics

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24 Stig Jørgensen, *Die Bedeutung Jherings für die neure skandinavische Rechtslehre*, in Jherings Erbe. Göttinger Symposium zur 150. Wiederkehr des Geburtstags von Rudolph von Jhering, hrsg. von Franz Wieacker und Christian Wollschläger, Göttingen 1970, pp. 116 ff.

25 Manfred Fuhrmann, *Das systematische Lehrbuch* (*loc.cit.* note 21).

26 Helmut Coing, *Die juristischen Auslegungsmethoden* (*loc.cit.* note 2); Stig Jørgensen, *Values in Law* (*loc.cit.* note 13), pp. 91 ff.; Stig Jørgensen, *Retsafgørelsen og dens begrundelse*, in Tidskrift utgiven av Juridiska Föreningen i Finland, 1979, pp. 318 ff.; Magnus Aarbakke, *Harmonisering av retskilder*, in Tidsskrift for Rettsvitenskab, 1966, pp. 499 ff.

rather than hermeneutics has inspired legal interpretation theory up to the present.

Only when hermeneutics – once a theory of interpretation of texts – was generalized and, by Heidegger and Gadamer, was turned into an ontological and a scientific theory, hermeneutics did play an independent role for jurisprudence in Germany and Denmark in the 1960's. The relationship between language and reality became an important theme in the debate on critical theory, and at the same time it became obvious, that empirical-analytical positivism is wrong in its assumption of the possibility of an impartial, objective description of the empirical and legal relationship.

In Denmark the positivistic criticism in jurisprudence is naturally rooted in Alf Ross' realistic legal theory,[27] which is based on the thesis of logical empiricism, stating that science consists of statements having "semantic reference" and that there is a process of verification which objectively can determine whether the statement is true or false. It is a well-known fact that the theory presupposes the possibility of describing reality in objective concepts, and this means that evaluations according to this theory are unscientific.[28]

By contrast, the hermeneutical theory of jurisprudence has emphasized: that all concepts are intentional, that the hermeneutical circle means that we cannot understand a part of the whole without knowing the fractional elements, and that the historical and social horizon of understanding is decisive for the meaning. As a consequence, neither knowledge nor science can be objective as they must be dependent on a number of subjective and intersubjective conditions, which must be specified.[29]

The agreement between language and reality is of decisive importance for the possibility of finding our bearings in the world, and it is therefore also thought-provoking that modern anthropological psychology emphasizes the functional necessity of the knowledge apparatus for the survival of the species. For humans it is important to perceive language as a tool, by means of which we can "do anything"[30] to our environment in order to control it and make it a thing for our objectives.[31]

This awareness of the language's intentionality and the consequent description of reality as a process of evaluation has an immense significance for jurisprudence and legal decision. As Gadamer points out, the commitment of knowledge to practicality may work two ways. Just as knowledge and interpretation are dependent on individual cases, the judgement and determination of those particular cases depend on the interpretation of the

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27 Alf Ross, *Om ret og retfærdighed,* Copenhagen 1953.

28 Stig Jørgensen, *Argumentation and Decision,* in Festskrift til Alf Ross, Copenhagen 1969; Stig Jørgensen, *Values in Law* (*loc.cit.* 13), p. 151; Stig Jørgensen, "Ideology and Science'', in *Values in Law,* pp. 9 ff.; Stig Jørgensen, *Scandinavian Legal Philosophy,* in Reason and Reality (*loc.cit.* note 13), pp. 80 ff.; Stig Jørgensen, *Ret og Samfund* (*loc.cit.* note 12).

29 Hans Fink, *Moralbegrundelse og logik,* Copenhagen 1970.

30 J.L. Austin, *How to do Things with Words,* Cambridge, Mass. 1962.

31 Jens Mammen, *Menneskets bevidsthed,* in Skabelse, udvikling, samfund, ed. by Stig Jørgensen and Ole Fenger, Århus 1985, p. 73.

wording of the legal rules and the description of the situation in relation to those rules, i.e. concretization.

For a millennium, jurisprudence has striven to develop a theory of interpretation which in practice can secure the individual's legal position and make the result of a case predictable with a certain amount of certainty. To this end, rhetorics and hermeneutics have given the lawyers great help. But when we lock and secure our front door, we risk that burglars break in through an unsecured back door. This unsecured back door is the description or qualification of a factual occurrence in a legal language, which can be inserted as the minor sentence in the legal syllogism which the final judgement provides. With this qualification of the facts we refer to the known raw facts with a generalization framed in legal language that cannot be used without our connecting it to the legal interpretation of the rules.

As Karl Engisch emphasized (above note 9), it is a dialectical process, whereby we continually connect the rule's wording and intention with the practical situation and the effects of its different interpretative possibilities. In this dialectical process of adaptation we want continually to connect the rule's teleological elements with the decision's possible pragmatic consequences.[32]

Although we should be wary of swallowing the practitioners' assertion: that decisions are made intuitively and afterwards provided with a "facade legitimation" which fits the rules[33], we must consider the possibility that judges (like magicians)perform their manipulations with reality, imposing on the parties a false sense of safety through the many precautions available when interpreting the rules of law.[34]

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32 Stig Jørgensen, *The Criteria of Quality in Legal Science*, in Reason and Reality (*loc.cit.* note 13), pp. 38 ff.

33 Jørgen Trolle, *Om præjudikater som 'gældende ret'*, in Juristen, 1953, pp. 113 ff.; Ross, *Om ret og retfærdighed (loc.cit*. note 27), pp. 52 ff.

34 Stig Jørgensen, *Sprog og virkelighed*, in Tidsskrift for Rettsvitenskab, 1995, p. 769.