REVIEW ARTICLE

HERMENEUTICS IN LAW

THERE has been a lot of talk recently about hermeneutics in law[1]; but does it amount to more than academic ornamentation, fashionable eclecticism or the "therapeutic consolidation for a somewhat neurotic dissatisfaction with the state of the legal discipline"[2]? That there may also have been some misuse and misunderstandings is suggested in this lament about the general misunderstanding of a particular brand of hermeneutics: "Many have seen and continue to see in hermeneutic philosophy a repudiation of methodical rationality. Many others misuse the term and that to which it refers . . . this is especially the case now that Hermeneutics has become fashionable and every interpretation wants to call itself 'hermeneutical'."[3]

Yet there is much that could profitably be learnt from hermeneutics; but it is first necessary that it be understood, and its uncritical transposition into the legal arena halted. Just as non legal theorists often fail to appreciate the complexities of legal phenomena, lawyers often fail to appreciate the complexities of the hermeneutical tradition. One is never sure what it is that lawyers refer to when the term "hermeneutics" is used, nor what type of hermeneutics Hart, for example, is supposed to have invoked, since the term is used in a way which groups together aspects of the tradition which are clearly incompatible. The divergent trends within hermeneutics can best be seen as thematic responses to questions different interpreters have raised. If hermeneutics is to have any genuine impact upon legal scholarship, these divergent approaches must be recognised and understood, not conflated and confused.

While it is not surprising that lawyers are attracted towards "legal hermeneutics", the mere fact that "law" appears as an adjective in its title does not necessarily render it relevant to legal argument. It is as if those legal academics interested in hermeneutics have selected particular texts, looked through the index for references to law and then felt satisfied that they had exhausted

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[1] While the phrase "hermeneutics" appears in many places in legal literature, there has been little attention given to Hermeneutics *per se*. There are, however, some exceptions; D. Herman, "Phenomenology, Structuralism, Hermeneutics and Legal Study," 36 U. of Miami L.Rev. p.379; S. McIntosh "Legal Hermeneutics," 35 Oklahoma L.Rev. (1982), p.1; D. Hoy, "Interpretating the Law," 58 Sth. California L.Rev. (1985), p.136. In the U.K., one finds a less direct and more varied focus on "hermeneutics"; P. Goodrich, *Reading the law* (1986), *Legal Discourse* (1987); Ian Duncanson, "Hermeneutics and Persistent Questions in Hart's Jurisprudence," *Juridical Review* (1987) p.113. R. Dworkin, *Law's Empire* (1986) p.62 and notes makes a brief, but well informed reference to Gadamer's hermeneutics. See further note 5.

[2] Peter Goodrich, "Law and Modernity" (1986) 49 M.L.R., p.548.

[3] H. Gadamer, *Philosophical Apprenticeships*, Eng. tr. (1985) p.177.

the relevance of hermeneutics to law.[4] This is an unfortunate practice, since more often than not what is written within the hermeneutical tradition about law is far less interesting than that which is written about hermeneutics as such.

In those rare instances where the hermeneutical tradition is seriously addressed in law, its potential impact is still not realised. For its field of application is nearly always limited to judicial interpretation (or the even narrower area of constitutional interpretation). While an appreciation of hermeneutics is very helpful (perhaps crucial) to an understanding of legal interpretation, its potential relevance extends far wider than this. For hermeneutics is relevant not only for interpretation within law, but also for the interpretation of law. Yet while there can be few doubts about the importance of hermeneutics for the study of law, the descriptive claim that law is a hermeneutical event is far less convincing.[5] Before pursuing the relevance, or otherwise, of hermeneutics for law, hermeneutics must be understood on its own ground.

I. PHILOSOPHICAL HERMENEUTICS

As has already been mentioned, hermeneutics embodies a diverse tradition, a tradition which is best seen as a container for thematic responses to different questions and interests. Rather than concentrate upon this diversity, the focus of this paper falls upon the philosophical hermeneutics of Hans-Georg Gadamer, and its potential relevance or otherwise for law and legal study.[6]

While it is always problematic to outline briefly complex bodies of thought, Gadamer's works are particularly difficult, for they do "not so much signal a doctrine as a direction for questioning".[7] Brief overviews of Gadamer's work tend to imply that his hermeneutics are more abstract, ahistorical and original than they in fact are. In addition, the finality of writing tends to silence the fluidity of the dialectic within his work, and obscure the interrelated nature of his thought.[8] Yet, as Gadamer argues, such problems are

[4] Geertz makes a similar point in his discussion of the relationship between law and anthropology. ". . . what is needed is . . . not an attempt to join Law simpliciter, to Anthropology, sans phrase, but . . . an hermeneutical tacking between the two fields." Clifford Geertz, *Local Knowledge* (1983) p.169–170.

[5] S. McIntosh, "Legal Hermeneutics," 35 Oklahoma L.Rev. (1982) p.1. For less explicit claims of Hermeneutics in law, see D. N. MacCormick, *Legal Reasoning and Legal Theory* (1978); P. M. S. Hacker and J. Raz (eds.), *Law Morality and Society* (1977) Chap. 1; and Raz and Hacker, *Essays in Honour of H. L. A. Hart* (1977) pp.10–13. Geertz makes the claim that "[quite] standard legal or anthropological . . . commentary seems to me also properly to be termed hermeneutic." Clifford Geertz, *Local Knowledge* (1983), p.224 note 88. For an alternative view of hermeneutics in law see W. T. Murphy, *The Right to Housing and the English Legal Tradition* prepared for the Istituto di Diritto Comparato (Florence).

[6] While one may not agree with Gadamer's analysis of the legal interpreter (*Truth and Method*, Eng. tr. (1979) p.289ff), this does not imply that his Philosophical Hermeneutics are not important for law; *cf.* 97 Harvard L.Rev. (1984), p.6, note 11.

[7] H. Gadamer, *Philosophical Apprenticeships* (1985), p.186.

[8] J. Weinsheimer, *Gadamer's Hermeneutics* (1985) p.xi. To appreciate Gadamer's hermeneutics it is necessary to understand the tradition he is working from and against, for it is "rooted in a very definite German philosophical and cultural heritage", H. Gadamer, *ibid.*, p.179.

inescapable, for all interpretation involves the spotlighting of particular aspects of a work. Here we can do no more than isolate those aspects of his work which appear most relevant to law, and pursue the questions this raises.[9]

For some scholars, hermeneutics is the body of methodological principles that underlies valid interpretation.[10] With Gadamer, however, hermeneutics takes on a different task as it "seeks to discover and bring in to consciousness something that methodological dispute serves only to conceal and neglect."[11] Gadamer's task is to outline descriptively the act of understanding, and the conditions which allow us to understand. "It seeks to throw light on the fundamental conditions which underlie the phenomenon of understanding in all its modes . . . that constitute understanding as an event over which the interpreting subject does not ultimately preside."[12] With Gadamer's philosophical hermeneutics we see a shift away from "methodological hermeneutics" towards an ontology of understanding, towards an explanation of "what happens to us over and above our wanting and doing"[13] whenever we understand.

In the simplest of terms, Gadamer's philosophical hermeneutics can be separated into two parts:

(1) The ontological or structural element of understanding (what Gadamer call "effective-history");
(2) the interpreter's approach to this ontological given (what Gadamer calls "effective-historical consciousness").

(1) *The structural element of understanding*

In his effort to acknowledge the historicity of understanding and meaning, Gadamer found it necessary to challenge the contemporary "prejudice" against prejudice and tradition. Unlike most post-Enlightenment thought, in which prejudices are seen as the remnants of an unenlightened mentality impeding understanding, prejudices for Gadamer are the very things which enable us to understand at all. Following Heidegger's ontological analysis of understanding, Gadamer argues "that prejudices in the literal sense of the word constitute the initial directedness of our whole ability to experience. Prejudices are our biases of openness to the world. They are simply conditions whereby what we encounter says something to us."[14] Because the interpreter views the "present only in terms of judgments that he has drawn in the past, the

[9] For an excellent example of the use of maps as interpretation see, Boaventura De Sousa Santos, "Law: A Map of Misreading. Towards a Postmodern Conception of Law," 14 *Journal of Law and Society* (1987), p.279.
[10] For example, see E. D. Hirsch, *Validity in Interpretation* (1967); E. Betti In J. Bleicher, *Contemporary Hermeneutics* (1980) Reading 1.
[11] H. Gadamer, *Truth and Method*, p.xvii.
[12] H. Gadamer, *Philosophical Hermeneutics* (1976) p.xi.
[13] H. Gadamer, *Truth and Method* p.xvi.
[14] H. Gadamer, *ibid* p.261.

interpreter's past judgments predispose him to judge the present in the same way. The interpreter always approaches the text with certain expectations that reflect his past experience."[15] Prejudices are not a prison that isolates, but are a particular starting point from which understanding always advances.

A person trying to understand or interpret is always performing an act of projecting. This preunderstanding or projection, which allows us to recognise our objects of interpretation in the first place, is always with us and is dictated by the nature of our prejudices, for they provide our initial direction towards our objects of interpretation. Yet as we can only see as far as the prejudices allow us, prejudices can be seen both to limit and allow interpretation to proceed. To emphasise the way in which the interpreter's prejudices both permit and constrain interpretation, Gadamer calls the situation in which the interpreter finds himself his "horizon" of interpretation, for it is "the range of vision that includes everything that can be seen from a particular advantage point."[16] Interpreters do not approach their objects of interpretation as a tabula rasa; rather they bring with them certain horizons of expectations, beliefs and practices. Interpreters see their objects of interpretation only from and within the perspectives opened up by this horizon. This is why Gadamer argues that no understanding or meaning is objective in the Cartesian sense, since "all understanding involves projections of meaning that arise out of one's own situation."[17]

Gadamer's denial of objective interpretation does not imply that he views interpretation as a subjective process, for Gadamer explicitly rejects the Cartesian view of interpretation, which sees subjective and objective interpretation as polar opposites. Gadamer is able to avoid this dichotomy by resorting to the concept of tradition. Tradition is crucial, argues Gadamer, for it defines the ground and hence horizon which the interpreter occupies, as well as determining "in advance both what seems [to be] . . . worth enquiring about and what . . . appears as an object of investigation."[18] Tradition is the medium in which we swim, in which we stand, and through which we exist. To belong to a tradition means to be historically situated within, and by, that tradition. To be historically situated means to be inextricably located within an horizon that bears the stamp of the past, and implies that the interpreter cannot encounter the present without a given direction that is dictated from the past. This given direction sets out the boundaries of the interpreter's project and perspective. The interpreter's past not only provided the possibility for

[15] J. Hamula, "Philosophical Hermeneutics" Brigham Young L.Rev. (1984), p.356.
[16] H. Gadamer, *Truth and Method* p.261.
[17] G. Warnke, *Gadamer: Hermeneutics, Tradition and Reason* (1987), p.77.
[18] H. Gadamer, *Truth and Method*, p.268.

interpretation (by supplying the necessary preunderstanding) but also limits what can be seen.

The operative force of tradition over interpretation is what Gadamer calls the work of "effective-history." One cannot underestimate the importance of this force for "in all understanding, whether we are expressly aware of it or not, the power of this effective history is at work . . . This is the power of history over finite human consciousness, that it prevails even where one denies one's own historicality."[19]

While traditional hermeneutics recognised that given texts were historically conditioned, it failed to see that the interpreter was also historically conditioned. Gadamer highlighted this dual historicity when he said "the interpreter no less than the text stands in a given historical context and tradition."[20] The nature of the hermeneutical situation is influenced by the fact that both text and reader have been shaped by their place in history. This dual historicity of text and interpreter (*i.e.* the interpreter's historically based prejudgments of the text) is important, because it provides for both the possibility of understanding and the framework within which understanding always occurs.

From the perspectives (or horizon) available, the interpreter makes a preliminary projection of the sense of the text as a whole. The interpreter's "effective history predisposes him to prejudge the possible meaning of the text."[21] However, with further penetration into the detail of the text, this preliminary projection is revised, alternative proposals are considered and new projections tested. The interpreter is compelled to account for unsettling passages in the text and to revise his fore-meanings accordingly. This revised fore-meaning is challenged again and again as the text is read and as the interpreter's horizon changes; it becomes a new prejudice which is projected on to the text as the process continues on and on. This process continues until there is a "fusion" of these two horizons, a fusion which produces the understanding and meaning of the object of interpretation.

This process of understanding the parts in terms of the projected whole, and the revision of the latter, aims to achieve this "unity of sense, an interpretation of the whole into which a detailed knowledge of the parts can be integrated without violence." (This is Gadamer's version of the hermeneutical circle.) This process is not a denial of one's own horizon, but rather a willingness to risk one's prejudices, for in the fusion of horizons some of our prejudices may be negated while others are reinforced.[22] It is

[19] *Ibid.*
[20] J. Bleicher, *Contemporary Hermeneutics* (1980), p.112.
[21] H. Gadamer, *Truth and Method*, p.273.
[22] Gadamer adds a careful warning to this simile of fusion of horizons, that the interpreter can never leap from his horizon. The hermeneutical task being to move towards this position, but this can only be done by realising that horizons can never completely meet.

through the confrontation with the text that the interpreter encounters an "otherness" which throws prejudgments into relief and thereby opens them to scrutiny. As prejudices are challenged, the interpreter's horizon changes, and so too, accordingly, does the outcome of the fusion of horizons, that is, the meaning. Given the dynamic nature of the interpreter's horizon, the event of understanding and the meaning it produces are in constant reformation.

Gadamer explains this process of understanding in the following way.

> "[A] hermeneutical situation is determined by the prejudices we bring with us. They constitute the horizon of a particular present, for they represent that beyond which it is impossible to see. But now it is important to avoid thinking that it is a fixed set of opinions . . . in fact the horizon of the present is being continually formed in that we have continually to test all our prejudices . . . understanding is always the fusion of these horizons which we imagine to exist by themselves."[23]

For Gadamer genuine understanding is the formation of a comprehensive horizon in which the limited horizons of text and interpreter are fused into a common view of the subject matter—the meaning—with which both must be concerned. This union of text and interpreter overcomes the estrangement of the text, a union made possible by common ground in being (history and language).[24]

With Gadamer the interpreter's present situation loses its privileged position and instead becomes a fluid and relative moment in the light of effective-history. "A moment that is indeed productive and disclosive but one which like all others before it will be overcome and fused with future horizons."[25] Unless there is an end to history, there can be no end to the interpretative process, and so no end to the meanings which arise from that process. For Gadamer "not occasionally but always the meaning of a text goes well beyond its author."[26] Where and how far it goes depends upon the horizon with which it is fused. No longer is the past to be seen as a passive object in investigation, it now appears as an inexhaustible source of possibilities of meanings.

(2) *Effective-historical consciousness*

With the insights of the positive role that prejudices play in interpretation, and the consequential historicity of meaning (the structural element of understanding) we can now examine the dynamics of understanding itself. It is important to note that philosophical hermeneutics is not a synonym for all understanding

[23] H. Gadamer, *Truth and Method*, p.273.
[24] Gadamer's use of "being" is similar to Heideggers.
[25] H. Gadamer, *op. cit.*, p.xvi.
[26] *Ibid.*, p.xx.

or interpretation, rather it is Gadamer's attempt to describe *genuine* understanding as performed by the *ideal* interpreter. The circumstances which differentiate genuine and non-genuine attempts to understand depend upon interpreters' attitude towards their prejudices. While the special relationship that exists between interpreters and their objects of interpretation is an inescapable given, the way interpreters approach this given differs.

Adopting Gadamer's terminology, to understand hermeneutically one must be open to the prejudices of one's horizon and the positive role they play in interpretation (what Gadamer calls effective-historical consciousness). Gadamer describes the situation where one's attitude towards these prejudices is closed as the application of "method." It is crucial that lawyers appreciate the difference between these two styles of interpretation, for while attention has been given to the first part of Gadamer's hermeneutics, the second has been virtually neglected, resulting in a misunderstanding and misapplication of Gadamer's hermeneutics and its potential uses within law. While "method" is generally associated with the natural sciences, this does not mean that it does not, or cannot exist within the human sciences, for method is "everywhere one and the same, and only displays itself in an especially *exemplary* manner in the natural sciences."[27] And as will be argued, legal interpretation has much more in common with method than with philosophical hermeneutics.

For Gadamer, the task of philosophical hermeneutics is not to set out productive prejudices nor to develop a procedure for understanding, but to clarify the conditions in which understanding takes place. From the position of understanding as the fusion of horizons, Gadamer asks what are the conditions in which this fusion or understanding can take place? Despite Gadamer's claims that he is not providing a process or procedure, he does provide the reader with conditions which he believes will allow this fusion to take place. Yet these conditions should not be taken as an absolute position, because, above all, Gadamer's philosophical hermeneutics is an approach that the interpreter must adopt when interpreting, rather than a series of steps to successful interpretation.

To achieve genuine understanding, Gadamer argues that the interpreter must be conscious of effective-history, of being "primarily consciousness of the hermeneutical situation" as such.[28] This is where the interpreter seeks to be aware of prejudgments that control understanding. For Gadamer, the elimination of prejudices can never be complete; we can only ever get a partial glimpse of our horizon. For the ideal interpreter to understand, he or she must be open to the "other" and be

[27] H. Gadamer, *Reason in the Age of Science* (1981), p.156.
[28] *Ibid.*, p.111.

> "prepared for it to tell him something. That is why a hermeneutically trained mind must be, from the start, sensitive to the text's quality of newness. But this kind of sensitivity involves neither neutrality in the matter of the object nor the extinction of oneself, but the conscious assimilation of one's own foremeanings and prejudices. The important thing is to be aware of one's own bias, so the text may present itself in all its newness and thus be able to assert its own truth against one's own fore-meanings."[29]

To understand hermeneutically, interpreters must be "open" to the newness of the text and be willing to expose, challenge and criticise prejudices highlighted by the text. Such openness is achieved, argues Gadamer, through a dialectical questioning of the text, an ability to listen and above all a willingness to admit error. Such openness, however, is not achieved through rhetorical or pedagogical questioning, nor through argumentation, for these modes of operating are the opposite of the "friendly dialogue" that characterises philosophical hermeneutics. In addition, interpreters must seek to understand the horizon of questioning within which the text is determined. They must seek to reconstruct the question to which the text is an answer. These means of achieving openness (which Gadamer calls the dialectic of question and answer) are crucial in philosophical hermeneutics, for they "permit us to state in more detail the type of consciousness that effective-historical consciousness is,"[30] while reinforcing the hermeneutical tenet that there is no higher principle than holding oneself open in conversation.

To achieve effective-historical consciousness, the interpreter must also "recognise in advance the possible correctness, even the superiority of the conversation partner's position."[31] The interpreter must assume that the text says something new, different, truer or more complete than what was previously believed about it and the subject matter it addresses.[32] And as a sign of respect one must "look first at the apparent absurdities and ask how a sensible person could have written them."[33]

The last and probably most controversial of Gadamer's conditions of understanding is his "fore-conception of completion."[34] This "formal condition of all understanding . . . states that only what

[29] H. Gadamer, *Truth and Method*, p.238.
[30] *Ibid.*, p.340.
[31] H. Gadamer, *Philosophical Hermeneutics*, p.189.
[32] G. Warnke, *op. cit.*, p.87.
[33] T. Kuhn, *The Essential Tension, Selected Studies in Scientific Tradition and Change* (1977), p.xii.
[34] Derrida is critical of Gadamer's "anticipation of completion" and his "good-will towards the text." Derrida, however appears to underestimate the importance of "attitude" in Gadamer's work. Gadamer's point being "not that one always adopts the views of one's object in understanding . . . His argument is rather than an openness to the possible truths of the object . . . that one must at least provisionally concede authority to one's object, even if this concession may ultimately be rescinded." G. Warnke, *op. cit.*, p.89.

really constitutes a unity of meaning is intelligible,"[35] and as such, the ideal interpreter must presuppose the unity and consistency of the text. It is only when, in spite of this presupposition, the text remains unintelligible that we start to doubt the transmitted text.[36]

Criticisms made of Gadamer's prejudices of unity and consistency, parallel criticisms made of similar prejudices which arise in legal thought. Rather than look for unity, we are urged to pursue tension and contradictions, inconsistences, and gaps between content and rhetoric.[37] Despite apparent differences between these two approaches, they are not inconsistent. For "the presumption of unity . . . does not preclude the discovery of points at which the text 'deconstructs' itself, instead it is essential to it."[38] It is essential because contradictions and inconsistencies are only ever identifiable in relation to some wider unity.

For Gadamer, the effective-historical consciousness necessary for genuine understanding is characterised by the logic of question and answer, the presumptions of textual unity and consistency and the goodwill towards the object of interpretation. But above all, it is characterised by a genuine openness, by a desire to understand and learn. While a hermeneutical attempt to understand is characterised by an openness towards one's prejudices, interpretative method is characterised by a rigid dogmatic and closed attitude towards its prejudices. Only if one is willing to change one's pre-conceptions about the object of interpretation is it possible for there to be a fusion of horizons. If interpreters are not willing to change their prejudices when confronted by something new in the object of interpretation, the process of interpretation becomes the domination of one's prejudices over the interpretative object. There is no openness, no willingness to change one's prejudices as the interpreter's horizon manipulates the meaning that arises from this interpretative method.

The denial of prejudices which characterises method does not mean that the positive role they play disappears. All it means is that the role they play in shaping interpretation and meaning goes unheeded, and their power to do so is magnified. Unlike genuine understanding, where objects of interpretation are allowed to influence "meaning", with interpretative method fixed prejudices determine in advance the outcome of interpretation, the meaning (the degree of fixity of meaning depending on the rigidity of prejudices.) In addition to this Faustian manipulation and domination of objects, we find the manipulation and control of the interpreter. For prejudices determine not only the questions we

[35] H. Gadamer, *Truth and Method*, p.261.
[36] *Ibid.*
[37] Much of the work of the American C.L.S. Movement pursues these ends, see for example, D. Kennedy, "The Structure of Blackstone's Commentaries" 28 Buffalo Law Rev. (1979), p.205.
[38] G. Warnke, *op. cit.*, p.84.

ask, the approaches we take, but also the research topics which are undertaken.

II. LEGAL RESPONSES TO HERMENEUTICS

There has been a mixed and varied response to hermeneutics in law, ranging from claims of Hart's incorporation of hermeneutics into jurisprudence, to the suggestion that legal interpretation is a species of general hermeneutics, to the more emotional warnings of the nihilism, despair and "threat to our social existence and nature of public life"[39] that hermeneutics and its historicity of meaning pose if adopted in law. Despite the variety of these responses, they tend to be characterised by a lack of understanding of hermeneutics (that is, an unhermeneutical approach to hermeneutics.) Before outlining some positive aspects of Gadamer's philosophical hermeneutics for law, the folly of uncritically transposing hermeneutics into law will be shown, through an examination of the assertion that legal interpretation is hermeneutical.

In pursuing this question, a somewhat eclectic definition of interpreter has been adopted (primarily non-academic lawyers). Undoubtedly definitions drawn on such a scale are scant in detail, and conceal important differences between legal interpreters. Yet as every act of interpretation involves some sort of compromise, it has been necessary to forego details and differences, in order to gain a broad perspective from which to evaluate the claim that legal interpretation is hermeneutical. Focusing mainly on interpretation in and around the judicial arena, the projection of this eclectic interpreter is not intended to be representative. The focus has been placed on this aspect of interpretation, not because it is considered to be the most important mode of interpretation,[40] but for the reason that whenever hermeneutics is "used" in law, it is nearly always in relation to judicial interpretation (so strong is the prejudice of the appellate court in modern legal thought.)

1. *Hermeneutics and Legal Interpretation*

As was outlined above, Gadamer's ontological description of understanding can be separated into two parts. To determine

[39] M. Fiss, "Objectivity and Interpretation," 34 Stanford L.Rev. (1982), p.763. This critique also sees Gadamer's hermeneutics as draining "the great public text of modern America, the constitution, of meaning . . . threatening our social existence and the nature of public life as we know it . . . It is the deepest and darkest of all our nihilisms." *Ibid.*, p.762–3. For a critique of the way "nihilism" is used here see; Peter Goodrich (1986), 49 M.L.R., p.545. What follows in the text is in some ways similar to Geert's "interpretive anthropology," "for it neither argues for nihilism [*sic*], eclecticism, and anything goes . . . It is, rather, one that welds the processes of self-knowledge, self-perception, self-understanding to those of other-knowledge, other-perception, other-understanding; that identifies, or very nearly, sorting out who we are and sorting out whom we are among." Clifford Geertz, *Local Knowledge* (1983), p.181–182.

[40] As R. Dworkin claims in Chap. 1 of *Laws Empire*.

whether or not there is hermeneutics in law, we must confront each of these in turn.

(i) The Structural element of understanding (effective-history)

As an inescapable given, legal interpreters have no option as to the influence of the structural element of understanding, "for whether aware of it or not effective-history is always at work."

(ii) Effective-historical Consciousness

Unlike the structural element of understanding, an effective-historical consciousness is not an inescapable given; rather it is a state of mind. It is determined by the way one approaches one's objects of interpretation, and the uses to which they are put. Only when such a consciousness is present can there be said, in Gadamer's terms, to be an attempt to understand. If, however, such a consciousness is absent, interpretation is said to be the application of method.

Such a consciousness is determined by the way one approaches objects of interpretation and the uses to which they are put. Only if one is willing to change one's pre-conceptions or prejudices about the object of interpretation is it possible for there to be a fusion of horizons, an understanding. The polemical title of Gadamer's central work, *Truth and Method*, offers an insight into "method," it being in effect the antithesis of an hermeneutical approach to understanding. Unlike the openness of the Socratic dialogue, interpretative method, in effect, is a form of tempered dogmatism, as the fixed horizons of the interpreter manipulate the process of interpretation.

Given that "one can only acknowledge hermeneutics to exist wherever a genuine art of understanding manifests itself,"[41] the first question that needs to be asked, in deciding whether or not legal interpretation is hermeneutical is whether there is, in legal interpretation, a genuine attempt to understand. To pursue this question, two further questions need to be asked: whether the legal interpreter, as subject is genuinely trying to understand; and whether the objects of interpretation are susceptible to genuine understanding at all.

(a) *Nature of the subject in legal interpretation: the use made of texts and facts in legal interpretation*

For interpretation to be an act of understanding, there must be a genuine questioning of the text. This involves the interpreter entering into dialogue with the text, a dialogue in which the text is permitted to question the interpreter's prejudices. It also involves the seeing of the text as an answer, and attempting to reconstruct this initial question. Only when the interpreter adopts this logic of

[41] H. Gadamer, *Philosophical Hermeneutics*, p.22.

question and answer can there be a fusion of horizons, an understanding.

The way texts are used in law (in particular by the practitioner) is the antithesis of this logic of question and answer, for texts in law are read teleologically,[42] not openly. The end of such interpretation is that which is most favourable to the interpreter's position. When legal interpreters approach texts, they do so with a fore-meaning of the text to hand: "it is a decision relevant to my case." Rather than allow the text to question this fore-conception (as would occur if there was a hermeneutical attempt to understand), this fore-conception emasculates the object of interpretation. If the text directly challenges this fore-conception, it is distinguished or overruled. A skilful legal interpreter's quiver includes many other fictions for avoiding texts or parts of texts which are problematic.

Once cases are suitably rearranged by the practitioners to fit within their prejudices, they are sometimes presented to the courts. The legal battle which ensues is an attempt to defend opposing interpretations. If legal interpretation was an act of understanding, these fore-meanings would need to be opened up. In the style of interpretative method these fore-meanings continually dominate objects of interpretation. Rather than let legal texts present themselves in their newness, they are used as tools of argument, not approached as objects to be understood.

One rarely encounters legal interpreters who attempt to reconstruct the question to which the text is an answer. One finds, on the contrary, decisions or parts thereof (ratio decidendi, obiter dicta, dissenting judgments) cited out of context, from different cases with different questions, and different stages in the legal process. And when questions are asked, they tend to be more rhetorical, pedagogical and teleological, than hermeneutical.

The dialectic of question and answer, so crucial to Gadamer's hermeneutics, is conspicuously absent from legal interpretation. In many ways legal interpretation is the antithesis of this hermeneutical approach to understanding. For the art of dialectic, unlike the legal art, "is not the art of being able to win every argument. On the contrary it is possible that someone who is practising the art of dialectic comes off worse in the argument in the eyes of those listening to it."[43] This is hardly an approach that one expects of barristers in court, or solicitors in negotiations.

Being a discourse which is not entered into to gain philosophical insight but to defend existing standpoints and prove oneself right, legal interpretation tends, in the Platonic terms Gadamer uses, to be false rather than genuine. It is more akin to the discourse of

[42] "Teleological interpretation" does not refer to the distinction often drawn in E.L.S. between civil law "telelogical interpretation" and common law "literal interpretation," etc. See further, W. T. Murphy and R. Rawlings, "After the Ancien Regime," 45 M.L.R., p.34.

[43] H. Gadamer, *Truth and Method*, p.330.

Sophists than Socrates, to that of artisans rather than philosopher kings.

In the practice of law, there is no time for open conversation and Socratic dialogue. One does not expect to find lawyers with "the integrity of the professor of philosophy" in "always recognising in advance the possible correctness, even the superiority of the conversation partner's position."[44] One does not find "friendly dialogue," one does not find, in short, hermeneutical attempts to understand.

(b) *Nature of the object in legal interpretation: are legal texts susceptible to hermeneutical interpretation at all?*

The discussion so far has proceeded on the assumption that texts in law are susceptible to a hermeneutical attempt to understand. To understand one must, among other things, see texts as answers to questions. This presupposes that what is written in the text is actually a response to a question. However, if one is to understand the nature of legal texts, one should not allow this prejudice to dominate our understanding of legal interpretation; rather one should let the texts speak for themselves.

While Archimedes' discovery may have been a flash of insight as his bath overflowed, the justifications he gave for this were very different. In law there may often be important differences between the way decisions are made (*i.e.* the answer) and the justifications given for them (what appears in the legal text). For that which prompts a judge to decide that litigant X is to succeed may be different from the question of whether there are accepted justifiable reasons for reaching this conclusion. To cast doubt on the nature of legal texts as accurate responses to the questions that motivated them is to cast further doubt on the ability to describe legal interpretation as a hermeneutical act.

Confronted with the way in which legal texts are used, and the nature of the texts themselves, it is inaccurate to suggest that legal interpretation is an act of genuine understanding, for legal interpretation is methodological and not hermeneutical. Given the non-hermeneutical nature of legal interpretation, interpretation in law will be called the application of "legal-method" (or more accurately legal-methods). This term represents no more than the important role that relatively fixed horizons or prejudices play in shaping the meanings that arise from legal interpretation.

This is not to suggest that lawyers do not understand law nor that there are no instances of hermeneutical understanding in law. All that this is intended to stress, is that the prejudice "law is hermeneutical" is unhelpful and that its place in the legal horizon needs to be challenged. When one considers that the bulk of legal interpretation occurs in courts of first instance, tribunals and legal

[44] H. Gadamer, *Philosophical Apprenticeships*, p.189.

offices, and the speed and nature of such interpretation, it makes the "law as hermeneutics" prejudice even less tenable.

III. LAW AND LEGAL-METHOD

To see legal interpretation as a species of interpretative method has a number of important consequences for the understanding of law. For example, legal-method can help explain the paradoxical situation where on the one hand we have the legal preoccupation with the certainty and precision of meaning, while, on the other, we are increasing told of the uncertain, imprecise and historical nature of meaning.[45] While it is difficult to doubt theories that highlight the fluid and polysemic nature of meaning, the uncritical transposition of those theories into law needs to be questioned. For if we pause and listen, we find that the very idea of fluidity and plurality of meaning is simply not relevant in law, because legal interpretation, as interpretative method, denies the very *possibility* of historicity and its endless potential for meaning. Rather than cry relativism or triumphantly pronounce that the "whirlwinds of linguistic potentialities that characterises post-modernism highlight the illusory nature of the premise of precision in law,[46] legal-method can show how this plurality of meaning is minimised.

For legal interpretation, as method, necessarily leads, controls and manipulates both interpreter and objects of interpretation, since the relatively fixed prejudices of its horizon dominate interpretation. In effect, legal-method constrains the potential plurality of meaning by binding interpretation and meaning to the fixed horizons of the interpreter.[47] Goodrich catches the power of legal method when he says that "the task of the historical legal community . . . has been that of restricting and constraining the scope of possible interpretations, that of defining the dictionary of legal language and of establishing the paradigm of normal legal knowledge."[48]

To say that legal interpretation limits and constrains interpretation is not to suggest that meaning in law is static. For while it constrains the possible meanings that arise from interpretation, it also provides the interpreter with some degree of choice. The exact amount of choice is dependent on the relative fixity of prejudices

[45] This paradox has been expressed in the following way: "In the practical work of lawyers the aim of precision is crucial. Lawyers order meaning via a controllable system of thought that expresses itself in language. But post-modernism, especially in the work of Derrida and de Man, has shattered the certainties of ordinary language philosophy. Language is inherently metaphorical and subject to play." Costas Douzinas, Shaun McVeigh and Ronnie Warrington, "Deconstructing the law," Times Higher Education Supplement, 8/1/88, p.11.

[46] *Ibid.*

[47] As with argument about the ideological aspects of law, one needs to show the effectivity of the plurality of meaning rather than focus on its latent force.

[48] P. Goodrich, "Law and Modernity" (1986), 49 M.L.R., p.555.

(as Llewellyn pointed out in his comparison of Grand and Formal styles of adjudication). In effect the interpreter's prejudices provide both freedom (within the permitted boundaries) and constraint (through the establishment of those boundaries).[49]

To understand legal interpretation and the ways in which "the potentially inexhaustible source of meanings" is constrained, it is important that one does not focus solely on the interpreter's prejudices. As legal interpreters are not neophytes to law, but long experienced in the manners, morals, language and practices of law, it would be a mistake to treat the interpreter's prejudices as if they appeared by magic. To do so would mean neglecting the important role our legal tradition plays in conditioning and creating these prejudices. The influence of the interpreter's compulsory participation in the legal tradition can not be overestimated, for it "means sharing a way of speaking about the world, which . . . shapes forms and in part envelopes the thought of those who speak it and think through it."[50] The tradition provides the prejudices through which the past present and future of law are seen, for it establishes the horizon of vision.

The nature of the legal tradition is such that it ensures that the interpreter's horizons consist of certain sets of stylised prejudices, and since interpretation always proceeds through these prejudices, the resulting meanings are similarly stylised. In effect, by creating specific legal horizons, the legal tradition creates specific styles of legal meaning (or choices within styles), the influence of which is magnified by the relatively fixed horizons of legal-method.

So to understand legal-method one must acknowledge not only the interpreter's prejudices as an ontological given but also the role our legal tradition plays in conditioning and constraining these prejudices and the complex relationship that exists between them. The complexity of this relationship arises because neither interpreter nor tradition are sufficiently independent to be sole source of meaning, nor can either be understood in isolation from the other. While the legal tradition provides the source materials, interpreters and the backdrop against which the interpreter's pre-judgments are brought into relief, "tradition," interpretation and meaning are only possible in the light of the individual interpreter's pre-judgments which serve as creative supplements to the tradition itself. While the individual's horizon is qualified by the constraints of the legal tradition, the interpreter, in turn, qualifies these constraints. As the force of constraint imposed by tradition upon interpreter is greater than that imposed by the individual upon tradition it is possible to find Dennings, but no Salvadore Dalis with the power to interpret the law.

To speak of a legal tradition in such a manner is really only to talk of the diachronic mass that occupies the spaces created by the

[49] Choice of meaning also arises with the changing of prejudices over time.
[50] Martin Krygier, "Law as Tradition," vol. 5, *Law and Philosophy* (1986), p.244.

permissible channels of legal interpretation. If one is to understand this tradition, one must understand not only the material which flows through these channels but also the practices which create these channels and demarcate our tradition from others. In the same way as someone interested in describing a river acknowledges that the flow of water is dependent upon its banks for shape and direction (while at the same time shaping those banks), we too must appreciate that the legal tradition is dependent upon numerous practices and factors for its direction and shape.[51] To understand legal interpretation one must appreciate not only the interpreter's effective-history (prejudices and tradition), but also the practices which stylise those prejudices and create the boundaries of our legal tradition.

Viewing law and legal interpretation in such a manner opens up many questions for further research. Depending on one's interests, it is possible to study the factors which create these channels of interpretation, describe and map the boundaries (and thus shape) of these channels, or simply jump in and swim with the tide. With the recognition of the inescapable nature of prejudices must come the recognition of the ubiquitous nature of interpretation. To view law in such a way means that we must see legal "theory" and legal "commentary" or "exegesis" as interpretations differing only in scale and projection, and attitude adopted towards prejudices.

For those more interested in describing rather than participating in the legal tradition, it means the movement away from legal-method. To do so, legal scholars need the imagination to sense what is questionable, the courage to open their prejudices to challenge, and the ability to reflect upon the force of tradition.[52] And what better place for the scholar to move beyond the technological thinking of legal-method than philosophical hermeneutics, "which is not so much a philosophy as an antidote to dogmatism . . . a kind of "negative dialectics" that aims above all at the liquidation of fixed and fast-frozen positions?"[53] While

[51] The spatial metaphor of channels of interpretation is important for a number of reasons; it highlights the choice interpreters have in interpretation, albeit limited to that permitted within the channels of interpretation; it shows the folly of arguments which suggest that legal interpretation is arbitrary or purely pragmatic; the concept of "flow" within these channels highlights both the historical nature of tradition and the importance of the banks (constraints) in the creation and continuation of this tradition; such a conception of tradition is important if one is to avoid equating commentary within the tradition for the factors which shape it, as J. Ely did in arguing that "there is more than one American tradition on the question of whether racial majorities can aid minorities, and at best the traditions are ambigious enough to lend support to both sides of the case," cited in David Hoy, "Interpreting the law," 85 Sth. California L.Rev. (1985), p.155.

[52] Gadamer answers his question: "what is it that makes a really productive scholar," by saying—"that he has learned the methods? The person who never produces anything new has also done that. It is imagination [Phantasie] that is the decisive factor of the scholar", *Philosophical Hermeneutics*, p.12.

[53] H. Gadamer, *Philosophical Apprenticeships*, p.xvii.

there may be little utility in pursuing the descriptive claim of "hermeneutics in law," a hermeneutical attitude towards law, opens up existing and interesting horizons from which to view our legal tradition.

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REVIEWS

EXCLUSIVE DEALING IN THE EEC: REGULATION 67/67 REPLACED. By VALENTINE KORAH [London: European Law Centre. 1984. xv and 101 pp. £15·00.]

As is well known, Article 85(1) of the EEC Treaty prohibits agreements and other practices which restrict competition in the Common Market; Article 85(3), on the other hand, empowers the Commission to grant exemptions, provided certain requirements are met. Normally, a party wishing to obtain exemption for an agreement prima facie contrary to Article 85(1) must notify the agreement to the Commission and apply for exemption. This application will then be dealt with on an individual basis, usually after a fairly lengthy delay. In certain special cases, however, provision has been made for block exemptions for whole classes of agreements. Where these apply, there is no need for notification: the agreement is exempted automatically. Naturally this has considerable advantages for the parties concerned. This book is concerned with block exemptions for one such class of agreements, exclusive dealing agreements. Provision for the block exemption of these agreements was originally made by Regulation 67/67. This has now been replaced by two new regulations, Regulation 1983/83 and Regulation 1984/83. The former deals with exclusive distribution agreements (under which the supplier promises to supply the distributor and no one else within a defined territory), while the latter covers exclusive purchasing agreements (under which the distributor agrees to purchase specified goods only from the supplier). The latter regulation contains special provisions dealing with tied pubs and service stations.

The purchaser of Professor Korah's book gets a copy of the regulations themselves, a copy of the Commission's Explanatory Memorandum, which explains how the Commission interprets the regulations, and Professor Korah's text, which is in effect a commentary on the regulations and the Memorandum.

Though written for the competition law specialist, this book can be read with profit by any lawyer with a basic knowledge of the subject. He or she would, however, be well advised to reverse the order of the materials in the book and start by reading the regulations, then go on to the Commission's Memorandum and finally tackle Professor Korah's commentary. The latter, which is 58 pages long, builds on the author's earlier article, "Group Exemptions for Exclusive Distribution and Purchasing in the EEC" which appeared in (1984) 21 *Common Market Law Review* 53. It is written with Professor Korah's customary lucidity and flair and deals both with technical, legal arguments and the broader

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