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Hermeneutics of the Law

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Abstract: One of the most ancient forms of thinking about law is what is today known as positivist or normativist. It focuses on the product presented in the name of the law, the textual representation which not only simply includes, but directly embodies the law.¹ In other words, it is a corpus, whether it is a code, a properly issued rule or a set of ad-hoc decisions: this is the law itself. This represents a short-circuited ready form for cognition, which the conscious follower and the professional agent of the law will both use as a tool. In addition, however, presumably ages later, there emerges a completely different version of the idea of law, rooted in a culture that forecasts the hermeneutic way of thinking. If in the former an approach based on epistemology can be discerned, the latter takes a more ontological approach instead. This focuses, beyond the given text, upon its interpretation and on the understanding that may be drawn from the text, and thus ultimately on the content which the law is supposed to message to the law abider and enforcer alike. In other words, it is concerned with the genuine meaning that actually affects and influences its addressees. Moreover, it is clear that, in contrast to text-centricity, the hermeneutic approach is also aimed at what sociological examination relating to the law reveals: finding the *lebendes Recht* [living law], separated from the *positives Recht*, setting some *law in action* next to the *law in books*.²

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What is Law? And what is meant by its change? Could it refer to the law adapting to and/or assimilating into the changing circumstances? Or is it a kind of symbiosis of law and its environment? The words chosen to express these ideas, and the use of language as a whole, bear the presumption of a background constituting an “objective reality that

¹ It is to be noticed that the Hungarian term (megtestesít [make it a body]) fits and perfectly accords with the English original meaning: ‘to embody something’, ‘to give a bodily form’ or ‘incarnate’ (<https://bit.ly/3NwRG7i>). Nevertheless, the Hungarian word is already more of an image-like usage – “<It makes an abstract thing, idea, concept or characteristic> perceptible, possibly also displaying it in a physical form or <An idea or feature> manifests itself in sy, in sg; takes shape, is realised” (<https://bit.ly/3Q4zP9x> resp. <https://bit.ly/3NRht5>) – and no longer suggests that in the case of the term ‘being embodied’ (<https://bit.ly/3GNAOGU>), what is the ‘body’ and what is ‘embodied’ in this body coincide in logical scope. That is particularly the case in law.

² If not the word itself, Eugen Ehrlich’s background theory was however already born before his great work (Ehrlich, 1913), namely in his rectorial inauguration address at Czernowitz, (Ehrlich, 1907), taking its final form in the programme of Roscoe Pound (1910).

exists independently of our consciousness” and its somewhat reflexive mirror-image in our consciousness,³ as a kind of precondition.

Yet our expressions employed are *figurative* to begin with, and hence *symbolic*, and because all we do is to speak or write these words, thereby we also represent or reproduce the events of the world in thought, so those expressions thus applied to an object, thought to be present and known, are at the same time *fictional*. After all, our entire thinking is fictional.⁴

The very identity of the law itself, in the diversity of its earlier and present forms, is not only a matter of something having been defined by something else to be named, but also about the general need for, and human purpose of, giving anything supposedly known a *name*.

In our topic, for example, ancient law was cloaked in the acts and facts of power and the violence perpetrated by the mighty, even if it was sometimes pronounced and even described, and it was identified simply by being reduced to (as represented by) this description in order to ensure its easier identification, as well as its extensibility and transportability⁵ – and if, on the other hand, another sense of the law happened to clash with it that could only reside in the hearts of its confessors, such as Antigone, whose human empathy conflicted with Creon’s order-centeredness (cf. Varga, 2011b). It may have been that the law hovered in obscurity, as its addressees were intimidated by raw power and thus by the enhanced chance of arbitrariness at any time since, according to the myth of its origin (Livius, 1967, pp. 113–195), in Rome before the *Twelve Tables*, it existed in such a vulnerable status of the plebeians with regard to the patricians. However, once the laws had been put in an enacted text, they could be carried further, as it is evident in the transport of steles carved with passages of Hammurabi to the newly conquered areas of Mesopotamia. In our fundamental ignorance of ancient law, however, it is also worth considering that this so-called *codex* may also have been a reminder of the existence of a divine order of worldly power, rather than a rule in the strict sense of the word (Varga, 2011a, pp. 395–423; cf. Driver & Miles, 1952–1955), as it should be borne in mind that the actual settlement (such as the way in which damage caused by a goring ox was to be compensated, to take the most glaring example) was essentially independent of empires, peoples and subjections; it was practically the same in an area almost the size of a continent, which had known many legal regimes, emanating from the vast territory of the former

³ This was built into a dogma, following the suggestions derived from Marx and Engels by Lenin, 1962.

⁴ In our Western culture, two vast classical oeuvres, which also raise issues of law, have professed language and, along with it, our entire human thinking to be fictional from the beginning, and necessarily so. See, on the one hand, the later generalised recognition of Jeremy Bentham (1843b, p. 199) “of nothing [...] that has place, or passes in our mind, can we speak, or so much as think, otherwise than in the way of fiction” – and, on the other hand, the fundamental work of Hans Vaihinger (1911), dedicated to this very explanation. As to the doctrine of legal fiction, cf. Varga, 2018, pp. 105–130.

⁵ In legal history, this motif has been present from the beginning, for example from the Code of Hammurabi (16th–17th centuries BC), the diorite specimens which symbolised the extension of the empire, until the British codification debates, when the common law material was protected all through from being recorded in a code, yet, during the 19th century, everything which the British wanted to enforce in India had to be brought into a didactic-regular form, in order to be able to export it at all (Varga, 2011, ch. II and VI).

Fertile Crescent (Van Selms, 1950; Yaron, 1966; Finkelstein, 1973; Jackson, 1974; Watson, 1974).

The perpetual and, so to speak, insoluble dilemma of contemporary research into the history of ancient times that is inclined to project today's notions and objectifications into the past reveals the fact that it is not known but may only be assumed what the actual status or function of these legal objectifications was or could have been. Was it a reified *Gesetz-buch*; in other words, a corpus embodying the law, or merely a *memento*, that is, a memory aid – whether for more precise evocation, or for teaching newcomers in the community or prospective law enforcers; or was it merely for descriptive purposes, or, ultimately, simply intended to make a solemn declaration of the unity and identity in the respective community (Varga, 2011a)?

The Ciceros still chanted, rhythmically and poetically, the content of the *Twelve Tables*. Nearly a millennium later, the English *acquis*, the *Magna Carta*, was posted in every church on Holy Week every year and read aloud at masses while preaching (Varga, 2012a, p. 26 note 8), similarly to Luther's points, which were nailed to the church gates in a similar vein, *pro memoria*. Was it *the* law? Or was it more a way of engraving the law into the people's consciousness or, more literally, their hearts?

Evidently, while the recognition of *hermeneutics* can be traced back to ancient times, it is nevertheless a modern invention as a methodology, deriving from studies on the Bible, and required because God spoke only once, then and there. It was also necessary because, after one and a half millennia of debates, controversy, and frequently the extermination of some or all of the past senses and meanings, happening in bloody fashion, biblical scholars still hoped to extract some kind of extra message from the revealed and sacred texts; perhaps an additional or underlying message from the Lord, where (and if) they could find and also reinterpret layers hitherto considered to be hidden but revealable, by means of various kinds of some new systematism.

Thanks to the hermeneutic way of processing texts, it has become increasingly clear that, despite the fact that there is a text-object in front of us, when deciphering its message it is really nothing more than *two subjects* being present: a *sign* which we believe *speaks to us*, and *ourselves, who address it*, and this game (in which our being, the basic meaning, dignity and nobility of our existence, i.e. our authentic identity in the divine image are at stake) lasts until we become satisfied with its actual result, or at least until the start of our next attempt to decipher some further message.

It was this hermeneutics, which placed the study of the Bible on a new footing by its genesis, which today provides the framework and approach to the interpretability of all textual analysis and communication, from the mundanity of everyday language to the products of literature or law. It is especially applicable to law, and this must be emphasised here, because, in its classical continental form, the law – based on the wording by the legislator – displays the most (pyramidal) structural and (deductive) procedural community with theological thinking built on divine revelation (see Kraft, 1993; Krawietz 1984).

Ever since humans became literate they have torn something out of themselves, to be able to work on and process what was thought or said, at times using our intellect and at others by utilising various further tools. Science seeks in this way the possibilities of truth, i.e. the truthfulness of our propositions, because they are deducible and thus provable from

some more basic and already approved propositions. And in morality, in matters of community, which presuppose unity and unanimity, and most strikingly in law, the possibility of obtaining an answer that has the persuasive force of obviousness.

Did we succeed? Has there ever been any certainty in the law? Or is there legal certainty at all, which was able to reach its fulfilment by deploying newer and newer means; first recording the law in writing, then putting it in conventionalised forms, then affirming it again by oath, and later reissuing it, and, finally, through all sorts of other invented intermediaries, i.e. additional human artifice inserted as a means of assurance?

Have we achieved more by this? The answer may be both yes and no at the same time. After all, progress always also involves regression. Did the qualitative leap succeed because at the same time it led to a transition to a new quality, as so violently taught by dialectical materialism, initiated in Hungary as the true dogma by Soviet troops (Engels, 1940)? Perhaps, in fact, this is only an illusion, a disanthropomorphisation – as a Marxist writer, a son of our country, once suggested – because its object is also inevitably one with us, since behind it lies our anthropomorphism, supposedly born and dying with us at the end of our lives (Sinkó, 1985, p. 626). After all, if anything leaps, quantitatively or qualitatively, we ourselves, the carriers of that leap, leap with it.

On the final analysis, man therefore takes from himself to make himself an autonomous object, because this is how he attempts to make himself more and more expansive and to become a creator of community or even a creator of science. Those of us who can now, by virtue of the social division of labour, deal professionally with this artificially extracted and shaped object, will also create a unique and then canonical way of dealing with this creature – in law, science, and anything else.

As things now stand, the law is objectified. Its processing, or its treatment, is broken down into stages, separated by functions, regulations and tasks. Careers may even be built upon this, and gradually but consistently law and legal order are established as the henceforth extensively growing so-called legal life, producing an own particular and separate world, which now not only claims autonomy, but also seems to function on its own, as if it were the *automatism of an autonomous machine*, sometimes – fortunately – in organic unity with the development of the surrounding world, but sometimes stubbornly engaged in a Michael Kohlhaas-like struggle with it (cf. Varga, 2012a, pp. 119–120; Von Kleist, 2013; Neheimer, 1979). The self-regulating, almost self-reproducing system of the law is thus akin to that of a machine, operating according to a built-in mechanism, until it is broken by revolutionaries who are angry machine-breakers or their society-destroying offspring.⁶

⁶ Cf. https://en.wikipedia.org/wiki/Ned_Ludd and <https://en.wikipedia.org/wiki/Luddite>. One may wonder whether the machine-breakers of the 19th century were not merely the primitive, self-fulfilling imitators in a single furious act of what the punitive campaigns and religious war-like conquests intended to achieve, from the late mediaeval destruction of the Cathar culture to the Maoist destruction of the legal culture of many East Asian countries, when, in Cambodia, for example (as I learned as a participant in the Nagoya conferences to help regenerate its former legal culture in the strictest sense of the word), practically no remnant (either buildings and books or even juristic professionals) could survive? Cf. Brown, 1993. Was not this perhaps the same destructive rage that not infrequently lurks in movements like feminism or black lives matter today? As Immanuel Kant (1797, pp. 318–323) opines, negation of the law amounts to a revolution itself.

Can it be supposed that the very human component behind this law has ceased to exist? Or is he still there, just made invisible by the machine-building hands of masters?

During the return, manifested as so-called progress, just as during the so-called qualitative leap, *our own original being*, which leaps with it from the past to the present and thus partly into the future, *in the relation between man and his artificial creatures, necessarily reproduces its original conditions* – its endowments – as the naturally given framework of real existence, always and under all circumstances. For whatever new means, limitations, mediating paths we may devise, the interposition of further (and in our inertia, again and again, and almost indefinitely, newer and newer) filtering and guiding institutions of law (by various intermediate forums and procedures), will certainly resemble man's original essential self in this one respect. In other words, there is an irreconcilable and contradictory dichotomy between, on the one hand, demanding secure predictability and thus patternedness through the prior standardisation of the multi-stage process built into the process (i.e. the realisation of law as *patterned practice*), and, on the other, the wish to retain its original intention: that ultimately it is man rather than the impersonal automatism of his own institutionality that will finally rule the law.

Therefore, despite the revolutions the law undergoes and its changing objectifications, and the incorporation of various mediating mechanisms as intermediaries, an eternal *hermeneuticum* always reappears in the relationship between the object and its objectifier. Law serves man – and not the other way round: man addresses it again and again, and makes it proprietary, and his own in its humanity and functioning. Hence, man makes the law his own through the means and ways of whichever instrument, procedure, competence or whatever else he happens to have interposed in the course of its objectifications and institution-building.

All this shows that there are two ways of *changing law* from the outset, which cannot be imagined other than by activating the *actuated object* or the *actuating subject*, thus either through a *formal change of the law* or through the informalisms of *daily reinterpretations*.

Is the law therefore a subject in any sense? It is borne by *language*, even if it is rooted in behaviour or in recurrent ways of reacting, as in the case of so-called legal customs. Since the direct personal experience of a custom, whether by the person following it or by an outside observer, can only ever be partial or fragmentary, and the rest of it has to be transmitted or narrated by those who can see through its accessible (though inexhaustibly vast) entirety.

Moreover, language is a deceptive medium. Once we are within it, it is ours. But while the inexpressible range of one's personality and of one's particular state of mind is also condensed in what we say and write in the gesture of a particular moment, talking about this inexpressible fullness of life reduced to a few words,⁷ employing only a fraction of the resources of language, this fleeting and truly irretrievable, but once experienced, total sense of life reaches the other (i.e. everyone else who is interlocutor or participant in this personal "ours" in our linguistic community); and this constitutes a form of upper layer,

⁷ That which is concrete in human practice, that which contains the elements of infinite complexity inherent in human events, is utterly inaccessible and intangible to science, writes Villey, 1995, p. 364: "la pratique qui joue dans le concret échappe au total à la science."

now itself embodying a kind of abstraction, which we usually record in dictionaries as the abstraction of some *meaning*. Such a definition is, therefore, itself a product of generalisation, a kind of compendium. These meanings do not “exist” in themselves, but are merely described by other words, thus by other meanings and their associations, and thus brought into relation in a vast mental-spiritual space in our intellectuality, which does not exist as reality either, as all that is living language only exists in our practice of language, encoded only in lived communication. Communication, as we know, is itself only part and means of our social existence in action, in which every moment (even if we think by ourselves that it is planned or intended) is in fact a response to something, an interactive product of effects.

Is language objective and neutral? Yes and no. Language can only exist for a reason, that is, as long as the answer includes the statement “yes, it is objective”. But our answer may also be “no, it is not objective”, because the meanings are carried by man in his social practice, and this, going through major social changes over long distances or over time, as well as in the most personal formation and shaping of all of us, sometimes perhaps from one moment to the next, exhibits changes, i.e. contractions and expansions, shifts and swings of emphasis, that are certainly hardly recognisable in the short term.⁸

In law, anything and everything is composed of nothing but words. Not only what are referred to as rules, but also what we become aware of when perceiving something as a custom, which we describe as behaviour and which we create and name as an institution (i.e. as a procedure inherent in behaviour, but which is essential for us and therefore has a context to be highlighted, as a forum and as a competence of the latter). For just as the facts do not come to court of their own accord, but are established by the authorities through testimonies of varying value,⁹ so norms emerge only as they are communicated, mediated by humans.

Language is described by its *reference*, by what it stands for, rather than something conceptualised as an external or internal reality. It may be that which is publicly known to exist or it may be that which now exists because it has been revealed through investigation and named by having been given an independent descriptor; it may be that which can or will exist simply because we want it to exist; or it may be that which has not existed so far but which we have created by naming it as a framework, a focus point of ideas, or in short, as an institution, and by recognising it as such, after defining its conditions.

Through our communication, we thus artificially create *virtual worlds*, which guide and even control our thinking through their own virtual channelling. Since this creates an intricate *web of thoughts*, in which, in its internal interconnectedness and for its conceptual clarification, or for the mapping of possible fields of application, we may have something

⁸ Structurally, this dichotomy is reminiscent of the internal contradiction that Lukács describes as the only possibility for language to fulfil its function at all: on the one hand, it must be sufficiently clear in order to make successful communication possible, but on the other hand, its complete clarity is excluded, and only the physical gesture of pointing to something can make up for this. For if it were not suspended in this internal contradiction, it would be incapable of representing the ever-changing contexture of a world that is ever-changing in infinite variety (Lukács, 1984; Lukács, 1986).

⁹ It was Jerome Frank's (1949, p. 37) revelatory statement that: “Since the actual facts of a case do not walk into court, but happened out-side the court-room, and always in the past, the task of the trial court is to reconstruct the past from what are at best second-hand reports of the facts.”

to do without wanting to concern ourselves with the outside world, with concrete momentary uses in our purposeful human practice, in such a way that we add new abstract constructions to this web of thoughts. Ideally, within the legal profession, for example, the work of a legal scholar or a law commentator is like this.

In the law, as a result of and in the manner of these processes, the primacy of written forms, their hierarchisation and their reworking in a doctrinally systemic manner took place gradually, and was followed by the development of procedural methods, forms and, above all, reasons (or more precisely: possible justifications¹⁰) by means of which any narrowing or widening, reinterpretation, or preemptive or fictional extension of the law (Varga, 2018; cf. Del Mar, 2013, pp. 442–465) can be conceived and, in the event of its consistent mass dissemination, followed, simply by the way in which the subject addresses the term by reacting to it.

Words, words, and more words... Man desires order and conventionally working environment around himself, in a world in which he experiences nothing but constant movement and change in his objects and in projections projected by humans, in this purely human, artificial virtuality, which affects not only individual real objects or their ad hoc positioning, not only a term or the institutional nature of sets of terms, but also their broadest possible contexts – since *man constantly rethinks himself*, as well as the context this man exists in, so to speak, his outside world.

Man is a reactive being, reacting in one way or another to the impulses that reach him incessantly. The more modern a person is, i.e. a man living with literacy, books and knowledge-culture, the more he builds a vision of the future for himself, in addition to concentrating on the needs of the present, and this vision is usually one in which he attempts to make use of the experiences of the past.¹¹ He therefore draws an arc in time, builds bridges and strives for consistency, but never forgets that his task is to shape the present in the present, for the present, in the desired manner.

As the law begins to take on a form that moves away from the immediacy of daily existence and the pleasure of the dominant person or institution at the top of the social hierarchy, the need for consistency and to avoid contradiction becomes increasingly prominent in its emerging independent nature, both as self-justification and, above all, in its efforts for uniformity in making law enforcement efficient. This necessarily appears in its attachment to the past and in its further invigoration of the past: it weaves in and/or cuts off the threads of its former entirety in such a way that the elements it identifies itself with at the moment provides a crystal clear and at the same time more transparent image of it.

¹⁰ In the European continent the theoretical reconstruction that sees the norm as a decision pattern, i.e. as a procedural basis and as a reference for justifying the decision taken in the process of law enforcement that ends with the imposition of a sanction, rather than a reason, has spread with Kelsen. In his posthumous ontology, Lukács called it a system of fulfilment (*Verfüllungssystem*). In this perspective anything in the legal process becomes a successful realisation of law when – and only provided that – it is recognised as the legal consequence of a patterned pattern (i.e. as a decision based on as deducible from the law) rather than when something good happens or occurs in society as a result of it (cf. Varga, 2013, pp. 219–234; Varga, 2012b).

¹¹ In today's terminology, this is *legal tradition* as an alternative to *legal culture*, when the past has a justifying significance in making our decisions today (cf. Varga, 2021, pp. 191–219).

All this, however, takes place in the present, for the present. And the man of a particular present, if he happens to work with the law, understands the *text of the past* in the relational *context of the present*. This includes both what was written centuries ago, and what was written only yesterday.

Legal imagination (White, 1973) – an active person in charge today can only think of what he can imagine as valid (correct, controllable, or more precisely: controllable in this way) in the spectrum of the particular time he lives in, while also thinking of the future. These, in other words, are the limits of the legal imagination,¹² within which there is nothing that he cannot conceive from his experience to date. This was, for example, the specific case for a criminal law codifier in the Hungary of a century and a half ago, who, unlike in the German model of dogmatic systemic completeness, would have considered it a disgrace to determine the status of an act if the state itself not only has committed something that it had itself ordered to be punished as a crime, but also prevented its mandatory punishment until the statute of limitation of that crime had run out (for the background see Varga, 1995; for the practice of the Hungarian Constitutional Court see Nagy, 2019). Thus, every word and every context is heard, understood and interpreted in the context of the day.

The eternal lesson of hermeneutics, then, is that *every interpretation is a reinterpretation*, just as every situation in communication is new, however much it may seem like a routine continuation of an act or procedure also carried out yesterday or of one just completed. Whether we are wading in the Danube or in Lake Balaton, the water is always different in it, just as we are different. For every existence is a continuous flow-like process, and every moment and phase of it is an interaction.

It is obvious that as soon as we speak of hermeneutics, we find ourselves in a counter-conceptualisation, since in so doing we practically question or simply negate the self-sufficient role that the set of signs in question, the text itself may play in the human undertaking of conveying meaning. As we are talking about hermeneutics, we are already examining the limiting and channelling effects of a wider environment. The common core of all this is language, which serves the purpose of capturing and transferring meaning. Examining the process in all its complexity, we must therefore conclude that, as the unravelling of meaning takes place within a web of conventions and traditions, it is the newer and newer interpretations of the conventionality of these traditions themselves that give rise to the fluidity that can be perceived in a hermeneutic inquiry. It is a never-ending game of constant movement while maintaining one's self-identity, and ultimately nothing more than a unity of renewal and preservation, as their simultaneous dissolution in each other takes place at every moment of the search. This implies that in the description of the process itself, the direction of the explanation and the argumentation constitutes the centre of gravity – because in analysing its continuity, I am analysing its determination, and if I want to show the discontinuity of the process over lengthy time periods, I am emphasising the accumulation of random surplus effects.

¹² For Carl Schmitt, the idea of conceivability appears as the basis for any kind of regulation (cf. Varga, 2013, pp. 219–234).

Words simply channel the other words we associate with them. If we call upon them, they speak; but what they say, that is, what we ourselves mean by them, is up to us. Ultimately, therefore, language is nothing more than ourselves: in our mass, as a community of language-users, it serves our own understanding by using it for ourselves, yet, if we can, because we have the power to impose it, then for others as well, even for a whole society, as something to be followed by all of us. Just as monks disbanded in a dictatorship may feel the emotional charge of their past attachment to each other and to their common cause, so in my quality as an overzealous police chief I may need nothing but a rule reinterpreted and raised thereby to the level of the law in force on the framework conditions for founding and operating associations, which, if the counter-cause is so important to me, I may order to be applied to threaten them with illegality as a deterrent, to be sanctioned as preparation for a sin. And perhaps in the future there may arise some confusion on my deeds, in another era, with a different order of values and culture, when I may perhaps condemn this in retrospect but as a continuation of the same language game, now perhaps detached from my past culture of the law once made to nihilise any civil arrangement through the arbitrariness of communism. For it is in *culture and not law*, by prudent self-restraint and not law, that a society as a language-user community can attempt *to achieve a certain continuity* of values, or even standardisation, and thus to establish them as fixed for its own life. In England, efforts were once made to encourage the use of *plain language* – to ensure that subjects, predicates and adverbial extensions should be unambiguous, that is, that the proliferation of metaphorical or symbolic terms would not destroy the credibility and clarity of language and linguistic communication. It is no coincidence, but precisely a continuation of such a tradition, that later the unsuccessful great legal reformer of the 19th century, Jeremy Bentham, would speak out against the use of fictions, by naming them a kind of common enemy (Ogden, 1932; Takashima, 2019; for the fore-coded failure of the Plain Legal Language Movement see Assy, 2011; Zódi, 2019).

We can, and must, try to mitigate all such possibilities inherent in the nature of language. We cannot, however, change the most important fact (and one mostly unnoticed by those working on its improvement), that language is a creation of man, and thus man remains the master of his language under whatever conditions. He creates it around himself, and even if he cuts the umbilical cord attached to his person he does not, indeed cannot, detach it from the man himself. Because in the man-made so-called second nature we may establish complex systems of relationships, in the context of which we can create man-made virtual contexts of objects by linking things with other things, so that afterwards these – as institutions and the like – can now seemingly move by themselves and even reproduce themselves (which is known as *reification*), and these sets of things may even act as an immutable threatening force against individuals, groups or even the majority of a whole society, independently of their personal stand and wish (which is already *alienation*). This is not, however, related to language or language use, but to the ontological reality of social practice, which also lives in any form of representation through nothing other than language.

This is because *the language* itself is not reality – it does not “exist” – but is located as a *medium of mediation* in the process of its use, with a continuity of the past, so also with

interruptions and of constant change that can only be detected in retrospect, even if it may not be captured at the level of moments.

Starting from culture, that is, from the way we perceive the world and ourselves in it, everything we created as *second nature is conventional*. In toto, it is a function of what we mean by it and in it, even in its smallest element. In social practice, from the outset what is conventional can only be something that is expressed linguistically. Language is thus truly a mediating medium operating in our social existence. To the extent that we build increasingly complex self-contained webs of actions and relationships for our increasingly profiled social activities, to use them in their own terrain, this common so-called vernacular develops into more or less self-contained languages, which may even go as far as partially separating from the common language itself, through specific uses of their nomenclature. This is well known: in law, the colloquial description and designation of a behaviour can only be considered if the so-called subject-language expression of the given behaviour has been transcribed into the meta-language of the law; and the law itself can decide when, under what conditions and to what extent colloquial language can be used in or introduced into a legal procedure in other contexts. In this way, not only are different spheres of action linguistically distinct, but the logic, the process and not least the justification of action within them also becomes self-contained, i.e. they become a function of the sphere in question, for example of the law's own set of criteria. Thus, newer, increasingly more professional and specific conventionalities are built on the overall societal conventionality that maintains the language and the respective community at all.

We gaze in wonder at the theoretical achievements of particle physics and theoretical physics, things we can never see. While the history of physics concerns this, it is also about the fact that, although these discoveries, their so-called laws, are now the well-known reality of our present, in our everyday lives it is sufficient to rely on the worldview that theorised our direct human experience half a millennium earlier, by applying Newton's physics and the tradition of the causality of processes it involves. In the same way, we still hold to the notion of language as a reproduction of reality, the notion of *adequatio rei et intellectus*, that is, that in our language words stand for objects, and thus we can linguistically replicate, represent and thus substitute the external world from its smallest constituent to its infinite correlations, and even make it the object of operations carried out on a purely intellectual plane. Yet it was only a century ago that the first description in jurisprudence was made of the fact that its *systemic terms*, although borrowed mostly from common words, mean nothing beyond the designation of the taxonomic position of an artificial system of thought, i.e. a mere *locus*; their only role is to designate, economically, a single sign for a number of criteria set up by a mass of specific rules (Ross, 1957; Brožek, 2015). What they say, therefore, does not "exist", but they nevertheless serve as signposts in the *reference* debates of the legal game, as incentives or as channelers of juridical action in a certain direction (and not in another): we just use them as concepts, as a means of ensuring its localisation within the conceptual web of the law. All legal terms par excellence are like this, from 'contract' to 'possession' to 'self-defence'. This is because – to return to the previous analogy – we have known since the end of the 19th century at the latest that our world is more and different from what we can experience even indirectly with our senses, and that, in the same way our *language is* not a description of reality, but

the creation of a meta-net of thoughts, which we can then project onto reality with varying degrees of success. And this is because the experience of our intellectuality is also an action, which is subject to conditioning – from interests asserted to any other mental conditioning present in the relevant moment – that affects it.

With our ancient *topos*, which still survive in us as divine creatures, we have, like *ancilla theologiae*, not only viewed the order of nature, but also human behaviour in our legal thinking, so to speak, following a theological pattern, namely, translating the sequence of “God ° law ° nature” to the formula of the trinity of “legislator ° rule ° compliance/non-compliance” (Krawietz, 1984). It was only from predominantly American anthropological research, starting in the 20th century, that we learned that the whole social process does not take place in such a causal chain, but *stochastically*, interleaved with randomness, even if statistically measurable and perhaps also predictable and pre-plannable as well. That is to say, translated into practical language: in everyday life, we tend to act with ordinary attention and care, and even if we sometimes consider risks and dangers, we are still predominantly prisoners of the potentials and the very chance of the moment as we seek to assert our interests; and only *incidentally*, among other things, mostly when we reconsider or are forced to justify our just-as-it-happened choices, does the law or legal *criterionality* arise, if at all (see Edgerton, 1985; Reynolds, 1994).

In this dichotomy – to put the original conceptual distinction (Pound, 1910) in the sense and context of the present explanation – on the one hand, there is always a given text in law, which in our legalistic worldview we call *the law (law in books)*, and on the other hand, there is the understanding of it as a fact, by which in the given culture of understanding it is enforced as *hic et nunc* concrete law applied to the case (*law in action* understood as a counterpart of the former). Moreover, there may be a wide variety of such interpretations with variability inherent in each of them. This also means that, due to this variable nature, it can no longer be theorised, but at most can be described in other words in a description of the practice of understanding (as dogmatics of or commentary on the law). Nevertheless, as with any text, it can be said that on top of what we create by textual objectification as part of the humans’ second reality, we also add another layer, an exercise in understanding.¹³

It is also worth recalling that an English classic of establishing a historical vision of law recognised the possibility of this a century and a half ago. “I apply the term ‘legal fiction’ to any expression,” wrote Maine (1861, pp. 25–26), “which conceals or attempts to conceal the fact that the law has been modified by the fact that, although its words remain unchanged, its operation has been modified [...]. Because the law as a whole has thus changed; and the fiction is that it remains what it was.”¹⁴ Of course, this did not yet herald the introduction of the idea of *hermeneuticum* into the studies on law or the

¹³ This shows the significance of the doctrinal study of law (*Rechtsdogmatik*). It was also the core of the so-called invisible constitution that the first President of the Hungarian Constitutional Court invoked as the legal basis for many of the rulings the Court made (cf. Varga, 2020).

¹⁴ Cf. Goëtzmann, 2013. It is worth noting that by Maine’s time, Jeremy Bentham’s oeuvre was already complete, and he was passionately fighting against, among other things, “the pestilential air of fiction”. According to Bentham, 1843a, p. 1153: “Fiction, tautology, technicality, circuitry, irregularity, inconsistency remain. But above all, the pestilential breath of Fiction poisons the sense of every instrument it comes near” (cf. Stolzenber, 1999).

practical use of its teaching, since as a natural consequence of his desire for plain language Maine trusted in the plain meaning that follows from it – that is, in the desired fact that in language words and expressions have a kind of natural meaning, which the inherent arbitrariness of the way we form our language can of course distort and further shape as well, but still, as the command of common sense, we must adhere to its given nature and, if possible, adjust to it.

To sum up, an awareness of the role of hermeneutics in law and thus the recognition of the possibility of informal change of law, which can be reconstructed as a continuous process by those who look at change of law not from within, as a formal object of legal analysis, but from a broader social-scientific perspective, for example, from the point of view of the very chance of the legal recognition of the demands formulated in social and political mass movements, can now offer the prospect of influencing and possibly affecting a triple sphere of legal actors and activities, since, in addition to *legislation* on the one hand and the *law enforcement* on the other, an entire sphere of *putting the law into practice* via mass or individual popular implementation is also included as a third sphere (Gustafsson & Vinthagen, 2013, p. 40). And it is perhaps no accident that it is precisely here, in this trinity, that the *hermeneuticum* and the *sociologicum* meet as two components of the direction identified within any ontological approach to law.

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