

Law and Interpretation

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Abstract: The article deals with the problem of relationship between law and interpretation. Arguing that the ontological origins of legality can be found not only in the Greek *Nomos*, but also in the Roman term *ius*, it is shown how the fundamental basis of law opens up in a hermeneutical perspective. The article analyses Gadamer's contribution to the rethinking of legal hermeneutics and reveals the nihilistic groundlessness of law found in Vattimo's hermeneutics. And such nihilism discloses not abstractly, but effectively and actually – i.e. in the interpretative perspective of the application of Law (laws). It is shown that it is precisely in the (nihilistic) interpretation we can see, that application of law is not only *techne*. From the perspective of the ontology of law (Law), this is not only the retrieval of the significance of application to legal hermeneutics, but also a move that enables the transition in the ontological problematic from *Nomos* to *ius*.

Keywords: Law; *Nomos*; *Ius*; Interpretation; Hermeneutics; Ontology; Nihilism.

1. Introduction

Before my recent academic trip to Rome, I read a desperate “post” of an Italian publicist – an article reposted on “Facebook,” in which he voices a deep regret that in his country – Italy, the cradle of Roman law – for quite some time now, law hasn't been treated as a part of culture, but only as a pure technique. Just look, he says, where the law books are placed on the shelves in bookstores – among children's books, yellow literature and esoteric literature. I looked.

And what I saw, and not in some book kiosk, but in the spaces of the solid Feltrinelli and Mondadori bookstores, confirmed the essentially comic but at the same time sad experience described by the abovementioned publicist. But no description can match the disorienting sight that a culturally engaged person sees upon entering the realm of books.

No matter what kind of theoretical text we look for on the shelves dedicated to law, what strikes our gaze first is a large number of compendiums of specific legal acts – not only codes, but also, for example, sets of acts regulating the procedure for competitions for academic positions. And if you try to ask where they have legal theories and legal philosophy books, you will be shown, with a wave of the hand, a line half the length of the shelf. You can, of course, find something there. You just don't have to be picky. Another interesting experience occurs when one tries asking in the philosophy section where the philosophy of law books are. Again, a similar wave of the hand points to the shelves devoted to law, there, in that direction towards children's books and esoteric literature. And the circle closes.

But what does this paradoxical experience theoretically have to do with the general situation of law? Does this situation refer to the “situation” of law, its status in general, or does it exclusively refer to the ambiguity of the position of the philosophy of law?

Lawyers complain that a place is no longer reserved for legal theory. And the philosophy of law? By the way, it should be noted that for many these are simply identical things. And this is not theoretically insignificant.

These questions are not prompted by a contingent theoretical interest, aroused by the abovementioned popular publication, but by turning to the theoretical problem of the relationship between law(s), Law and justice.

2. *From Nomos to Ius*

However, if the question of the being of the ground and the meaning of legality emerges in the philosophical perspective of examining *Nomos* and is especially acuminated after the diagnosis of the ontological crisis of the notion of legality, then ontologically important philosophical considerations of the question of Law often remain derivative from the considerations of the law or simply remain *ad marginem*. This ontologically faulty situation of law is not always easy to discern, because a certain attention to the problem of law/right seems to enter the field of *Nomos*, the considerations of legality. This is partly true. With only one reservation – law enters the horizon of philosophical

investigation by becoming a synonym of operative, positive laws. Therefore, we can talk about the ontological forgetfulness of law. We would think that the situation described in bookstores, visible to the naked eye, is an expression of that very ontological forgetfulness of law.

So – what is law? Where is it located? Wouldn't the disclosure of the meaning of *Nomos* lead us to the ontological remembrance of the origins of law anew?

The famous world-renowned Italian legal theorist Aldo Schiavone writes:

And so while we freely talk about Mesopotamian law, and Egyptian, Greek, or (to move beyond the ancient world) Hawaiian or Aztec law, it was Roman law alone that provided the paradigm enabling us to recognize as "legal" the prescriptive practices that were originally integral parts of radically different contexts and systems—theological apparatuses with varying links to royalty, kinship ties, and political institutions (Schiavone 2012: 3; Schiavone 2017: 5).

Analysing the emergence of the Code of Justinian, Schiavone raises not only the historically significant idea that *ius* is a specifically Latin term, and that its translation into any modern language does not correspond to the meaning that was given to it during the period of its emergence and functioning.

According to Schiavone, the West took two important things from the *Digesta* part of the Code of Justinian: 1) Greek paradigm of politics as the idea of popular sovereignty (even if such formulation was only adopted recently) as well as the idea of law that is equal to all (the concept of *isonomia*); and 2) the directly Roman conception of law as conformity with a self-sustaining system of rules defined by reason.

Antiquity, according to him, created these two models separately from each other. Only the modern West has connected them. Thus, this is how the attempts to associate law with democracy, and the juridical order with the people as the sovereign were born.

But what was the true vocation of Roman Law itself? How to describe it? First of all, it was the desire to capture, to give shape to “bare life” – relations between (private) persons – to shape it with verifiable and disciplinary procedures, to encompass, fix it as a special object of knowledge through a network of measures and conceptual formalisms. And to contain that new object of knowledge by fixing it with a firm statute – legal science – understood as the analytic of the rational normalization of power (see Schiavone 2012:12 and 2017: 13).

Such are the theoretically oriented origins of the functioning of *ius*. And they definitely signal that Right is not only connected to what the law(s) is/are, but that it is also identical to the laws, to their totality.

But does the Roman legal experience unequivocally point to the existing laws, trying to include them, coinciding with them?

Schiavone reminds us that the Romans, who lived a century later than the law of the Laws of the Twelve Tablets, did not hesitate to refer to *ius* as the primordial background, holding *ius* to be that what their predecessors held to be. But for Schiavone, this is not simply a reference to the customary origin of Law. The word *ius*, according to him, actually had the meaning of “*del passato remotissimo*” (Schiavone 2012:46; 2017: 48). Here, the author’s appeal to the form of time is particularly significant: *passato remotissimo* – it is not just *passato remoto* (remote past) – it is not only the time of distant past – the Italian suffix -issimo refers to the past immemorial to the origins. And, of course, the word *ius* had no Greek equivalents in the cultures of classical and late Hellenistic Greece.

Therefore, one needs not wonder and only to remember that in the course of time, *ius* did not refer to the same, that is, it did not evoke the same reality. Thus there is a significant difference between what a late republican Roman called with the word *ius* and what a modern person associates with the word “Law.” Schiavone believes that there is a certain asymmetry between the long-term use of the word and the change in things it refers to, which it denotes.

However, casting a glance at the Greek context, it becomes clear that although the Hellenic culture thought largely about *Nomos*, nevertheless, law itself (projecting that concept retroactively into the totality of existing laws), as well as the question of its ground and nature, arose as a problem – as the problem of the actualization of the idea of justice within the existing laws.

Perhaps, in trying to assess that circumstance in one way or another, or more precisely, focusing on the fate of justice – *Dike* – predicted by Jaeger’s interpretation of Greek texts,¹ the contemporary Italian philosopher Massimo Cacciari asks: “To what purpose is the Law/Right (*Il Diritto*) made up from the totality of laws directed (*diretto*)? To make it simply valid and lasting for as long as possible? No well-education polis could have imagined that it could rely on such a labile foundation” (Cacciari 2019: 82)².

¹ Jaeger, Werner. “Elogio del diritto”, In: Cacciari, M., Irti, N. *Elogio del diritto. Con un saggio di Werner Jaeger*. Milano: La nave di Teseo editore, 2019.

² Translation from Italian of this and other Cacciari’s quotes by the author of the article.

This conclusion by Cacciari does not simply confirm the obvious thought of the late Plato, that even outside the totality of positive laws the Greeks always looked for justice as the ground, but at the same time it signals about what is called Law (*Il Diritto*). Law (*Il Diritto*) here is considered to be positive, effective laws.

Cacciari, however, speaking about the ontological crisis of *nomos*, with which Dike's fate is undoubtedly connected, does not see the possibility of solving and explaining this problem without connecting it to the desacralization of the law and the process of secularization in general.

And the fate of Justice, Dike for him is related with the great event of European Law, and "this great event of European Law is unthinkable without the Roman *ius*" (Ibid.: 104).

So here Cacciari not only clearly appeals to *ius*, but also claims that no Law (*Il Diritto*) cannot want to be just, or at least to appear so. With this, he clearly expresses the idea, already influenced by Roman jurisprudence, that Law (*Il Diritto*) itself seeks justice, that it itself cares about its foundation (justice).

Thus, we would think that the deliberation of the question of justice in Cacciari's philosophy opens up nothing else but the perspective of considering the relationship between *Nomos* and *ius*, those two communicating vessels, oriented towards the same idea – justice.

And at the same time, it allows us to direct the search for the ontological ground of Law/ Right towards *ius*.

3. Law/Right and interpretation

If we shift our gaze from *nomos* to *ius*, it is easy to see that Law/Right enters the field of philosophy first and foremost in the context of hermeneutics.

In claris non fit interpretatio, as the well-known hermeneutical aphorism goes. Another well-known fact of the history of hermeneutics that among the various areas that require interpretation, the areas that were "chosen", although not exclusively, were areas whose texts had a canonical significance for the historical community, such as religious, legal and literary texts. In them, as is known and is acknowledged by many authors partial to hermeneutics, the reference to the divine message and to the divine or the semi-divine nature of Hermes is combined with the problem of a certain ambiguity, lack of

transparency, that is, with the fact that interpretation is required where there is a certain veil that obstructs the understanding of the message.³

In this context, it is worth asking whether the following words of the hermeneutics classic Kerényi, that give the notion of hermeneutics and its development meaning, and fixing not only that experience of the lack of transparency and ambiguity in face of some texts, but also the relation to language and not with Hermes, are significant to juridical hermeneutics, which entered the hermeneutic tradition as certain “region,” precisely as hidden or hiding behind a veil of ambiguity:

“*Hermenéia*, word and thing (thing), is in the ground of all the of derivatives of the same root and in the ground of all that they “declare/communicate” : *hermenéus*, *hermeneutés*, *hermeneutiké*. The root may be identical to the Latin *sermo*. Meanwhile, it does not have any linguistic-semantic connection, except for the similarity of sound, with *Hermes*, the god, who was mentioned by August Boeckh in his presentation of philological hermeneutics. (*Encyclopädie*, 1886, p. 78). He demonstrates the accuracy of his <knowledge> of the Greek when he renders *hermenéia* as *elocutio* and as *verständlich machen*. But in one case he went too far when he equated *hermenéia* with *exéghesis*, the function of *exegetái*, the interpretation of sacred things. Such a function already belongs to the area of sanctity, sacred (sacral) law, or simply law, that is, a specialization that narrows the meaning of *hermenéia*. The latter is not simply unfolding (*dis-piegare*), which is the *hermeneusis* (Pollux 5, 154), it is a function of pronunciation, speech, *glotta*, primarily in the original sense of the term [...]. The original meaning of the word *hermenéia* is the efficiency of linguistic expression, which today is rightly considered the alpha and omega of hermeneutics” (Kerényi 1964, 42-52)⁴.

Thus, when Kerényi’s quote is argued, it is first emphasized that the usual origination of hermeneutics from Hermes is questionable, that it is a “reconstruction *a posteriori*.” At the same time, however, it is worth noting that in this quote, hermeneutics is also associated with language, and at the same time, with understanding and the expression of meaning. Thus, the double

³ As Maurizio Ferraris observes in his *History of Hermeneutics* (*Storia dell'ermeneutica*): “up until the end of the 18th century there are examples of hermeneutics that refer not only to texts and discourses in the strict sense, but also starts to interpreting various types of signs, understood as natural (*interpretatio naturae*). When interpreting literary, theological, juridical, oracular texts or a text that is considered a book of nature, hermeneutics seemed to present itself as an auxiliary, serving art.” *Storia dell'ermeneutica*, Milano: Studi Bompiani, 1997, p. 6. Translation of the quote by the author of the article.

⁴ Translation of the quote by the author of the article.

meaning of hermeneutics is emphasized – between understanding and expressing meaning. It is oriented to *Glotta*. If the hermeneutic function is associated with language, this ambiguity is presupposed (and thus the Platonic and Aristotelian conceptions of the origin of hermeneutics are reconciled by that ambiguity).

However, here we have to make an excursus into a problem of a special interest to us – how does this regional juridical hermeneutics “reload” the consideration of the ontology of Legality, which rather than giving priority to the search for the origins of its being, rather is – by virtue of its hermeneutical move, interpretation – opening up the perspective of being in *ius* itself.

So what is the object of (legal) interpretation? What is hidden behind the veil? What is *non claris*? When the field of Law, laws, jurisprudence is brought to the fore, it is believed that the ambiguity that requires interpretation pertains to legal texts that need to be applied to specific cases. To be applied, they must be disclosed, understood. Thus, the focus is on legal texts, the content of which is opaque, which can be understood ambiguously, or even the justice of which is questionable, and then the application of laws can become the actualization of justice through the understanding of these texts – interpretation. Nevertheless, it is important to note that in any case the object of such regional hermeneutics is *ius*, it appears in the text as effective laws, the meaning of which is ambiguous.

But where does this obscurity of meaning come from and what does it mean? On the one hand, in that very need for interpretation, the ontological significance of the connection of *ius* with *nomos* begins to shine through. On the other hand, it is interpretation itself, the movement of *hermenēia* itself, that is treated unequally: if interpretation is limited to *ius*, the interpretation of legal texts, it tends to be limited to its technical purpose. Whereas, if *ius* begins to look for its connection with *nomos*, then it becomes clear that legality itself is already giving meaning of being to actuality/reality. Therefore, we interpret by setting itself – the very positing of legality itself. And we interpret actuality/reality, not text. Then the legal texts themselves already turn out to be a kind of interpretation, because in them we encounter an expressed actuality/reality.

This provision will later become the conventional maxim of universalized hermeneutics. In the 19th century Dilthey already describes hermeneutics not

as serving (theology, law, literature), but as one that universalizes, becoming a universal philosophical endeavor.⁵

And, we would say, this could not happen without the view on the status of language in hermeneutics expressed by Kerényi. Kerényi's approach to hermeneutics, as is well known, was also adopted by Heidegger and Gadamer, incorporating the hermeneutic experience into the universe of language and logos as *verbum* and as *sermo*.

Expressing meaning/sense (*significatio*) is already a hermeneutic function, tacit understanding is not given, since understanding is realized only when the intended/understood meaning is translated into logos-language. As Ebeling writes, "the meaning/sense of a word is sought in three directions: stating (expressing), 'interpreting' (explaining) and translating (acting as a translator). It is not a matter of linguistically and historically determining which meaning takes precedence. It is about a fundamental modification of meaning, 'leading to understanding', mediating understanding by taking into account different ways of raising the problem of understanding" (see Ebeling 1959: 242-243).

Ultimately, hermeneutics separates itself from such a regional, sectoral purpose in Heidegger's philosophy, thereby demonstrating its proximity to Antiquity. Thus, for both Heidegger and Gadamer, *hermenéia* comes to be understood as *sermo* and as *verbum*. However, is it so easy for legal hermeneutics to overcome its sectionalism?

Thus, the "classical" notion of hermeneutics, the presentation of its history begins to consider the so-called regional or sectional hermeneutics as at a certain moment in the development of hermeneutics as such, a stage when more and more "regions", where something is *non in claris*, begin to emerge. But even in such "regions", the things that are significant for hermeneutics as a whole are overshadowed by the most general attitudes: hermeneutics as a communicative and transformative act is primarily contrasted with the theory of contemplation. Legal hermeneutics is also in the spotlight of such an approach.

⁵ "But there were other moments in history that confirmed the universality of hermeneutics. Despite its regionality and sectionality, when it was dedicated to the understanding of certain texts, it was significant in its universal purpose. For example, the interpretations of Homeric texts were significant not only in the literary sense and were not only the object of Alexandrian philology, but acquired a normative function of *paideia* for the Greek society as a whole, so we cannot talk here about purely technical exegesis, the kind that would only interest a limited community of professional interpreters. This is especially evident in the interpretations of religious texts. That legal interpretation is of concern not only to judges, but to all legal subjects, is a generally obvious fact." (Ibid, p. 7). Translation of the quote by the author of the article.

The universalization of hermeneutics highlights important moments for Law/Right and legal interpretation, but the significance of regional legal interpretation for hermeneutics in general, even for its universalization, on the contrary, remains completely unappreciated and not highlighted. Therefore, we cannot ignore Hans Georg Gadamer's very important contribution to this problem.

We have in mind the position expressed in his great work, *Truth and Method*, to the approach that emerged in the interpretation of Law/Right, which entered the hermeneutic horizon as a certain "region".

4. *Why the application of laws is not (only) techne?*

What influences Gadamer's approach to hermeneutics in general, and – and this is particularly important for us – his approach to legal hermeneutics? According to Maurizio Ferraris, Gadamer's hermeneutics in *Truth and Method*, as, by the way, in Betti's approach, adopts the model of legal hermeneutics in the form in which it was formed by the humanist hermeneutic tradition. The latter itself is not recognized anywhere else, but precisely in legal hermeneutics. On the other hand, "the adoption of humanism in the field of romantic spiritual sciences will also pass through a broad thematization of the problems of juridical hermeneutics (Thibaut, Savigny; v, in fra, II, 1,2,3)" (Ferraris 1997: 46; quote translated by author of the article).

Thus, this model is adopted "both because in Law, as well as in theology and literature, there is a dogmatic dimension of the canonical texts and traditions of experience, which contradicts the pretension of reason without presuppositions; and also because in the field of existentialist philosophy, the relation applied by the judge to what the law dictates forms a general model of the interpreter's practical existential relationship with tradition. Even the approach of the judge is not really abstract, deducing the particular from the universal; it aims to define the objective and universal meaning of the law by moving away from the specific situation of the individual case on which it decides" (Ferraris 1997:46; quote translated by author of the article).

However, Ferraris, in highlighting the perspective of the coupling of the theory of general hermeneutics and legal hermeneutics and its significance for Gadamer's model of hermeneutics, which emerged during the period of humanism, draws very different conclusions when compared to Gadamer himself.

It would be completely wrong to assign a special philosophical meaning to the legal hermeneutics of the humanist period. The essential feature of the legal hermeneutics of that time was that legal hermeneutics understands itself purely as a technical discipline. (cfr. Geldsetzer 1966, XVI ss). Such is the case of Constantius Rogerius *Singularis Tractatus de Iuris Interpretatione* (London 1549, text appears 1463). Legal interpretation is divided there into *interpretatio correctiva, extensiva, restrictiva, declarativa*; its purpose is to integrate the meaning of the law into the procedure of a particular case, to expand it and limit it in terms of its scope, to record/insert it in the final judgment. Those technical operations are supported, according to Rogerius, by the superior instruments of the culture of that time: “intelligentiam, scientiam, sapientiam, prudentiam, quae sunt quatuor intellectivae virtutes, et est quinta, quae dicitur ars (Ferraris 1997: 46-47; quote translated by author of the article).

It is here that Ferraris and Gadamer draw different conclusions. In other words, that quote from Ferraris shows that not everything is *in claris* in the interpretation of humanist hermeneutics itself.

Ferraris focuses on the emphasis on legal technique as *techne* and the consequent limitation of the technical purpose of hermeneutics in later hermeneutics, seeing in the transformation of hermeneutics into pure technique as a limitation and even a distortion of the purpose of hermeneutics. Without denying that the jurist needs *techne* as a craft, he denies the importance of humanistic legal hermeneutics, which emphasized legal technique, to hermeneutics in general.

Whereas Gadamer, without denying that risk, focuses primarily on the problem of the application of the law, expanding it to the importance of application to hermeneutics in general, emphasizing what in application surpasses “*techne*”, analysing the place of “*techne*” in legal hermeneutics and hermeneutics in general.⁶

Gadamer, answering that question, focuses the problem of interpretation of laws and Law on the problem of application of laws, not only to a certain extent opposing the most widespread opinion that the legal texts themselves as such, requiring interpretation, have entered the history of hermeneutics. Once again, we have to remember the well-known formulation that has turned into

⁶ “Thus, administering justice is a special task that requires both knowledge and skill. Is it not a *techne*, then? Does it not also consist in applying laws and rules to the concrete case? Do we not speak of the “art” of the judge? Why is what Aristotle describes as the judge’s form of *phronesis* (*dikastike phronesis*) not a *techne*?” Gadamer, *Truth and Method* (London: Continuum, 2004), 315.

an almost hermeneutical aphorism: *in claris non fit interpretatio*. In the history of hermeneutics, it was precisely the *non in claris* character the texts of a certain field – in this case legal – that was, as is known, associated with the emergence of a special field of hermeneutic – legal hermeneutics. However, in this case, what has emerged as an “unclear”, “opaque” area? A certain corpus of legal texts – laws? Even if we answer this question in the affirmative, there will be a need to explain when, how and why this imperative need arises. Therefore, when Gadamer raises this question, he clearly answers it and his answer: it is the application of the law.

However, Gadamer does not associate the “falling out” of the problem of application from the problem field of hermeneutics exclusively with legal hermeneutics. *Application* in general to him is a certain, we could say, “hermeneutic forgetfulness” in the history of hermeneutics as interpretation; therefore, it is not for nothing that Gadamer devotes an entire chapter of his great book to remembering this forgetfulness, naming it “The recovery of the fundamental hermeneutic problem” with the first subsection “(A) The hermeneutic problem of application”, where Gadamer observes:

The inner fusion of understanding and interpretation led to the third element in the hermeneutical problem, application, becoming wholly excluded from any connection with hermeneutics. The edifying application of Scripture in Christian preaching, for example, now seemed very different from the historical and theological understanding of it. In the course of our reflections we have come to see that understanding always involves something like applying the text to be understood to the interpreter’s present situation. <...> we consider application to be just as integral a part of the hermeneutical process as are understanding and interpretation (Gadamer 2004: 306-7).

Hence, the stance of Gadamerian hermeneutics clearly signals two things – the importance of returning the focus of application to legal (as well as any other) hermeneutics, but likewise – the importance of (historical) legal hermeneutics when hermeneutics becomes a universal philosophical method of understanding and interpretation – when it becomes ontological hermeneutics.

Thus, “<...> the gap between hermeneutics of the human sciences and legal hermeneutics cannot be as wide as is generally assumed” (Gadamer 2004: 321).

But how does Gadamer argue this, as if in advance disapproving of Ferraris’ future opinion about the idea of legal hermeneutics that came from

the humanist period, seeing in the application first and foremost a certain *techne*?

In *Truth and Method*, Gadamer states and not quite rhetorically asks:

It is true that what is right seems equally determinate in an absolute sense. For what is right is formulated in laws and contained in general rules of conduct that, although uncodified, can be very exactly determined and are universally binding. Thus, administering justice is a special task that requires both knowledge and skill. Is it not a *techne*, then?" (Gadamer 2004: 315).

In order to answer the question that can be put quite simply – how does the application of the law, in an attempt to realize justice, differ from other ways or cases of applying one's knowledge, abilities, knowledge – Gadamer refers to Aristotle. We are talking about cases where it is necessary to know certain "technical" things in order to be able to properly apply our abilities to certain specific cases.

It is Aristotle, who separated the lawful form of 'phronesis' (*dikastikē phronēsis*) from *techne*, provides the answer to Gadamer's question:

the situation of the person 'applying' law is quite different. In a certain instance he will have to refrain from applying the full rigor of the law. But if he does, it is not because he has no alternative, but because to do otherwise would not be right. In restraining the law, he is not diminishing it but, on the contrary, finding the better law. Aristotle expresses this very clearly in his analysis of *epieikeia* (equity): *epieikeia* is the correction of the law. Aristotle shows that every law is in a necessary tension with concrete action, in that it is general and hence cannot contain practical reality in its full concreteness. We have already touched on this problem near the beginning of the present volume when we were considering the faculty of judgment. Clearly legal hermeneutics finds its proper place here. The law is always deficient, not because it is imperfect in itself but because human reality is necessarily imperfect in comparison to the ordered world of law, and hence allows of no simple application of the law (Gadamer 2004: 316).

Thus, the application of laws, unlike the work of a craftsman, is always associated with a certain "uncertainty," that is, even after mastering the legal technique, you cannot be sure that you are making the right decision or making the right judgment. Moreover, Gadamer sees a difference of Aristotelian origin

not only between the technical skills of applying the law and the technique mastered by the craftsman, but also foresees a stance that partially underpins that difference. In a non-thematized opposition to the proponents of natural law theory, he observes that schemata:

are concretized only in the concrete situation of the person acting. Thus they are not norms to be found in the stars, nor do they have an unchanging place in a natural moral universe, so that all that would be necessary would be to perceive them (Gadamer 2004: 318).

Thus, Gadamer's conclusion is simple yet significant: the task of legal interpretation is to specify the law in each case, which, in other words, means to apply it. This is a reminder not to forget that concretization is not only knowledge of paragraphs, not only knowledge of legal techniques.

The legal world has tended towards exclusive closure since ancient times. To substantiate this, we could point to many examples, among which – one of the most substantial – is the already discussed book *ius* by Schiavone, which constantly reminds us of legal arrogance and closed-mindedness, when lawyers became an “exclusive” community even at the time of Roman law. Therefore, it is not unexpected that hermeneutics also finds itself in a certain competition with legal dogmatics in the modern situation. Gadamer believes that, in principle, there is always a possibility, “to grasp the existing legal order as such—i.e., to assimilate dogmatically any past supplement to the law”. While recognizing that there is an essential connection between legal hermeneutics and legal dogmatics, Gadamer naturally prefers hermeneutics. “For the idea of a perfect legal dogmatics, which would make every judgment a mere act of subsumption, is untenable” (Gadamer 2004: 326).

In such a situation, Gadamer will be particularly interested in the divergence of legal and historical hermeneutics and the need to examine cases where the object of legal and historical hermeneutics is the same, in other words, “those cases in which legal and historical hermeneutics are concerned with the same object—i.e., cases in which legal texts are interpreted legally, in court, and also understood historically” (Gadamer 2004: 322).⁷

⁷ See Gadamer 2004: 321-324. The position of Gadamer demonstrates that such relationship between the jurist and the historian in the legal hermeneutics can only be disclosed by philosophical hermeneutics.

The meaning of the application involved in all forms of understanding is now clear. Application does not mean first understanding a given universal in itself and then afterward applying it to a concrete case. It is the very understanding of the universal—the text—itsself. Understanding proves to be a kind of effect and knows itself as such (Gadamer 2004: 336).

However, the status that Gadamer gives to application in interpretation, although it mostly comes from legal hermeneutics, is significant for hermeneutics in general, for a hermeneutics freed from a technical, servile purpose.

From the perspective of the ontology of law and Law, this is not only the retrieval of the significance of application to legal hermeneutics, but also a move that enables the transition in the ontological problematic from *Nomos* to *ius*.

In view of this direction, the philosophical analysis of *Nomos*, the uncovering of its forgotten ontological dimension, is not the only way which can bring us to the *Grund*; in the perspective of *ius*, the return to the problem of application also leads us to the disclosure of the *Grund* of Law.

5. Grund of law in Gianni Vattimo

This schism, first of all between jurisprudence (theory) and philosophy, is also mentioned by Gianni Vattimo in one of the first seminars organized by him and Jacques Derrida – meetings of philosophers with lawyers at the end of the last century, called *Diritto, giustizia e interpretazione*.⁸ I would dare to say that the expression that Vattimo uses to describe the situation, which can be somewhat confusing, the *embarrassment/disturbance of the beginning* (*l'imbarazzo del cominciamento*) not only arises from the disciplinary schism between the fields of law, philosophy, ethics, classical philology, but also points to a real crisis of legality and legal ontology.

As Gianni Vattimo writes:

It seems to me that in the case of this meeting between jurists and philosophers, the initial disturbance/embarrassment is at the same time a constitutively essential aspect (rather, an aspect) of the problem to which

⁸ Vattimo, Gianni e Derrida, Jacques (a cura di), *Diritto, Giustizia e Interpretazione*, trad. G. Scibilia. Roma–Bari: Laterza, 1998. All quotes from this book are translated by the author of the article.

we wish to devote our [considerations]. More precisely, it seems to me that the topic of the seminar, formulated in the three listed terms [*law, justice, interpretation*, - R.Š.] is nothing more than a different, an other way of expressing the essential meaning of the disorder/embarrassing of beginning (Vattimo 1998: 276).

And, as if to lessen that “embarrassment” of the beginning by articulating it explicitly, or perhaps, on the contrary, in an attempt to escalate it, Vattimo remarks that:

Whoever goes to court, argues, accuses, defends and defends himself or judges and punishes, or in general reconstructs the meaning of the law and the scope of their application, always does all this in the light of the norms that he finds in the always-already given (*già date*), norms whose legitimacy, in turn, is based on the fact of considering as ground the decisions already made or already formulated interpretations, judicial and jurisprudential precedents (Ibid).

Vattimo ironically points to the reliance of jurisprudence and law application practices on the ground “already” (*già*), which most often indicates nothing but the limits of Law (*Diritto*) itself, its limitation. The observations of Vattimo allows us to ask – does not this reference to the precedent signify the ontological crisis of law and Law? On the other hand, the first thing that emerges here is a suspicion that such an unjustified confidence to find support in that “already,” believing that the search for the “precedent” will lead to the very “nature” of the law, its “justice,” is based on nothing else, but the thinking of modernity and its “logic”. However, one would probably have to take a closer look at Vattimo’s proposed, so-called “already” (*già*) structure in order to see the final perspective into which Vattimo’s thinking intends to take us. In other words, does beginning from the “already” always mean falling into the trap of the thinking of modernity?

In trying to discover the direction Vattimo’s thinking is taking us, first, we cannot, of course, ignore the importance of the “disturbance of the beginning”, and at the same time we have to answer the question of where this reliance on the “already” itself comes from. And the answer here will be primarily practical – from Law (*Diritto*), which means – the application of positive laws in force.

But what does Vattimo theoretically do when he turns his attention to the “already”, to the laws in force that represent Law? Legal philosophy in the classical sense usually sought the “real” ground of Law and laws. Vattimo, it

seems, is prepared to follow the same path. The most popular of the “grounds” considered is (admittedly, diversely understood) nature (*natura*), “natural law”, “natural right”. Whereas jurisprudence in general, as well as legal theory, when trying to “practically” rely on the “ground”, usually relied directly or indirectly on precedent.

In Vattimo’s position, we find an unexpected “connection” of theory and practice, the ground sought by legal philosophy and the practical precedent, or rather the recognition of that “connection”.

The constant presence of the idea of natural law in the juridical and philosophical tradition is a clear hint of the fact that any legitimacy requires a precedent – in fact an authoritative precedent, the authority of which in turn consists of its emergence from a former precedent that is also authoritative and so on. In the case of an absolute monarch who “arbitrarily” legislates, he not only does not negate that form of common law, but demonstrates it in the clearest light: the power which enables him to legislate derives from his entire being a descendant of his dynasty, the first-born son of the sovereign... Likewise, legitimation through experimental verification and falsification, through scientific statements, finally manifests this “already” structure, although in this case it is directed more towards the (already) facts than towards already-made decisions/judgments (Vattimo 1998: 277).

But how should we understand Vattimo’s point, which directly connects the idea of natural law with precedent?

We contend that what is important in this approach is not only the shift from the metaphysical treatment of the ground towards an interpretative hermeneutic position. It is crucial that in this stance, the search for the ground of the law – at which the idea of natural law is directed – is associated with Law as Law in force (laws), but also connected *ius*. In this way, the spheres of law and Law approach the same problem of origins (source), ground. But in order for things to get going, one must first find the “beginning,” answer the question of where to start. The classic metaphysical answer would have been – from positive laws, but in order to reverse the hierarchy between them and *nomos*, finding the opposite to positive laws – “something better” – *nomos*; in the second case, “already” is more ambiguous – it does not only focus on what is “already” given in a positive way; that “already,” which deliberately refers to the past time, reveals the point “beginning” to be something different: rather

than a mere preference for the factuality of positive law, the need to disclose the primordial meaning of *ius* begins to emerge.

Only by following this path can Vattimo perform that rather unexpected “connection” of the search for the “ground” of Law and the evaluation of the precedent.

And here Vattimo’s fundamental and hermeneutically significant question arises: how should we view “facts” in Law?

Hermeneutics in general, and this may seem incredible to legal hermeneutics, does not operate with pure facts because it considers them to be non-existent.

As Gianni Vattimo writes:

And what is increasingly evident in various epistemological reflections, the extent to which facts are legitimized/legitimized (and their structure as “certain,” “true” facts with all the methodological rigor) in turn depends on norms, rules, etc., which are not pure facts. (Temporality evoked by the definition of the ancient essence as *to en einai, quod qui erat esse*, would demonstrate itself as inseparable from historicity (Vattimo, 1998: 277).

So what hermeneutic conclusions does Vattimo draw by looking at the “facts” in this manner, that is, from the constant appeal of Law and laws to that which was “already” given, from the appeal to the moment of “beginning”? It is clear that such a treatment of “facts” as dependent on norm will not make the search for a substantial ground possible.

This is a conscious or non-conscious attempt to thematize pre-comprehension – *pre-comprensione*. Considering the problem in this way, we will never find the “fact” of the beginning. Even if that “beginning” – pre-comprehension – is related to our experience.

And the very topic of the seminar, like the title of the book - *Law, justice, interpretation* – (although Vattimo says that the seminar deals with the relationship between those terms) – their very choice testifies of deeper things – the fact that those three terms, their mutual relationship, frames the very hermeneutical problem of *Law*:

<...> Law – understood as a set of codes, the totality of written laws etc., – realizes justice only through the mediation of interpretative acts, the application of laws, carried out by judges in dialogue with lawyers, public prosecutors, various legal experts. The problematic nature of the

relationship between Law and justice leads to the problematic nature of the beginning; and interpretation works with that problematic: or, we can say, by revealing the absence of ground in all its depth <...> (Vattimo 1998: 278).

Law, becoming subject to interpretation and abandoning “facts,” in the search of a ground discovers the absence of Ground. The absence of Ground in Law is disclosed as an ontological perspective grasped by this consideration.

In this discussion, Vattimo does not emphasize ontology as simply a theory of being, but hermeneutics, which he understands ontologically. He notes that once the term interpretation is introduced into theoretical circulation, with all its ontological implications, it becomes difficult to think the relationship between Law and justice in the terms of traditional metaphysics, with which we have been satisfied for a very long time. In his constant opposition metaphysical philosophy, Vattimo, moreover, emphasizes that interpretation was likewise treated differently in it.

In that case, the interpretation was either rising (*risalimento*) to the norm as a final given, at least in the sense of its objectively attainable clarity and definiteness, or grounding the norm on a determinate and real basis, such as natural law, human essence, divine will, etc. I don't know if this way of understanding legal interpretation has ever been formulated in exactly such terms, but it seems to me that at least as far as the relationship of positive laws with law (considered) natural is concerned, the dominant opinion was exactly that (Vattimo 1998: 278).

In this context, Vattimo is discussing with another author participating in the seminar, Pier Giuseppe Monateri. The essence of Monateri's position, in my opinion, consists in the fact that, while recognizing the inevitability of interpretation in law, in the application of laws, he considers the interpretation itself to be “fabulization.” This shows how Monateri sees the relationship between the law and its application to individual cases and facts. Therefore, he looks desperately at the inevitable involvement of law in the interpretative process, believing that as soon as attention is drawn to the phenomenon of interpretation, the concept of knowledge as a reliable mirror of what is objectively defined, “over there,” falls into crisis (See: Monateri 1998: 189-206).

5. The nihilistic hermeneutic of law of Gianni Vattimo

When Vattimo introduces the gesture of interpretation, he sees a possibility of treating it otherwise. This “otherwise” appears simultaneously

with the interpretation by invoking nihilistic ontological connotations. But they are not, in his opinion, acceptable to all varieties of today's hermeneutic philosophy. Vattimo believes that the relationship between Law and justice after the introduction of interpretation, can be explained and the problem solved only by treating the interpretation itself ontologically nihilistic and not metaphysically.

The nihilistic implications of hermeneutic epistemology are explained starting from the notion that knowing the truth is not an action/act of faithfully reflecting data that can be grasped 'objectively', but is an interpretive act which, obviously, although not limited to the expression of the subject, is part of what the constitution of what is called 'data,' makes up that data, so that the two moments "subjective" and "objective" are not absolutely separated (Vattimo 1998: 279).

So Vattimo asks: what happens to the interpretation of Law, to the relationship between Law and justice within such a horizon of thinking, freed from the "grounding metaphysics"? After all, it can happen that the philosophical reflection of Law, even when it does not explicitly state all aspects of the crisis of metaphysics and its nihilistic outcomes, would nevertheless be oriented to analytically support the work of jurists. And this, according to Vattimo, is probably the meaning of the division between philosophical Law (philosophy of law) and the "philosophy of law of lawyers" (See Vattimo 1998: 280).

How does philosophy and Law respond to this situation?

Thinking that takes into account (*prende l'atto*) the insurmountable ungroundability that ultimately marks Law, canceling any effort to legitimize it as "right", may decide that its task is to expose that very situation by unmasking any deception of the grounding claim. It is a position that is known to accompany not only a certain reflection on Law, but permeates much of contemporary philosophy, at least of the kind that chooses to take seriously the Nietzschean-Heideggerian idea of the end of metaphysics (Vattimo 1998: 280).

These detailed descriptions of the hermeneutical situation of Law by Vattimo are essentially considering a twofold possibility of responding to the groundlessness, "ungroundability of Law", revealed by interpretation. There are a number of theoretical positions that respond "apocalyptically", that is, by

expressing a nostalgic relationship to a solid ground, that is, to a metaphysical ground.

According to Vattimo, Kafka's and Benjamin's thinking about the law belong to the latter. Vattimo also associates Kierkegaard's "knight of faith" to such thinking.

Of course, only in the face of the revealed groundlessness of Law, a philosopher – and even more so a jurist, but also an ordinary "post-metaphysical" citizen cannot act like a "knight of faith." In the face of the law, there can be no situation of absurdity that one could be satisfied with.

In that apocalyptic perspective – in which the step towards mysticism is (or is not) made – interpretation functions as a pure disclosure of the non-justice of law (Vattimo 1998: 281).

However, Vattimo shows that this is only a nostalgic return to metaphysics. In this way of thinking, the very meaning of the term "interpretation" is reduced to a strictly metaphysical task of deciphering and revealing what is hidden. In such an approach, interpretation is equated with objective reflection, it becomes its form, which is characterized as being difficult to realize due to the objective "lack of clarity of the *interpretandum*". Here, according to Vattimo, there is no trace of the concept of hermeneutic interpretation as a "form of knowing on the part of persons", where truth is the result of an encounter, an encounter in which the person and the thing are involved in a process in which both are active and where the "event" finds its place.

It is clear that Vattimo's considerations stem from the experience and reflection of simple, even common-sensical things – justice that has not been actualized in one way or another, the grasp of the "facts" established by law, the errors of law that cannot be corrected, its failure to keep pace with life, new emerging rights requiring to be legitimized, the constantly emerging need for a regulated order. "And those various forms of dissatisfaction, the need for a fair law, appear in a situation that (unlike the past – probably) explicated the interpretive element of legal activity" (Vattimo 1998: 285). Vattimo's thinking about Law could be safely called an "apology of interpretation": he believes that rather than satisfying or limiting, it was necessary to increase the need (for just Law)... And the increase of that need is related to interpretation, to interpretation in the application of law.

The hunger for justice can unfortunately lead to very different theoretical and practical paths. One of the biggest risks of satisfying that hunger, for Vattimo, is “an irritable reliance on legal technique (an extreme legal positivism that clings to the precise and careful circulation of formalisms)” (Vattimo 1998: 285). However, the clear choice to politically and ideologically commit to the judicial system is no less risky. And what about the stance of resistance that Vattimo describes as “apocalyptic-mystical detachment from the inevitable injustice of law”? For Vattimo it is the other side of the same coin. This is not the true hermeneutic nihilism, an disclosure of the groundlessness of Law. This situation of the injustice of Law and hunger for justice only appears apocalyptic and mystical if you evaluate it from a metaphysical standpoint. Only then does it seem apocalyptic, but fixable, demanding justice.

So the question is, what would Vattimo’s “positive” program be? What is his response to the elusiveness of legal justice?

<...> those who feel hunger and thirst, in the sense in which it was attempted, vainly it seems, to articulate here, what kind of answer could they expect from hermeneutics, which has recognized the position of the groundlessness (*infondatezza*) of law? (Vattimo 1998: 285).

Vattimo’s answer is, incidentally, only this: it is “a clear (*lucida*) consciousness of insurmountable groundlessness”. However, the consciousness of groundlessness is not unambiguous. The groundlessness cannot be overcome by a negative movement – a messianic leap of faith. Such a “pure and simple liberation from any realistic mode of fabulization” proves its disproportionality because it is divorced from the very motives for which the question was raised.

Thus, Vattimo believes that a less disproportionate and less inadequate, even if problematic and indicative of the beginning (“*incoativo*”), response is one that begins with the effort to accept nihilism, the groundlessness that manifests itself in accepting the ontological conclusions of hermeneutics. Such nihilism operates in terms truly free from the legacy of metaphysics.

Nihilism remains entangled in metaphysics until, also implicitly, it is thought of as the discovery that where we believed to be being, there really is nothingness. Thinking in this way, it would follow that where we thought the principles/grounds of the law to be, there is only the free will of the legislator or the interpreter, an ungrounded (in principle ungrounded) decision, and therefore essentially violent – a will that must be made acceptable by fiction, literature, fabulation aid, or made

acceptable by reasoning mystically (in the manner of ‘Kierkegaardian nihilism’) (Vattimo 1998: 286).

Vattimo invokes a different kind of nihilism. The results of that “other” kind of nihilism are connected with the philosophy of Nietzsche and Heidegger. Does anything change in terms of the relationship between Law and justice if Nietzsche-Heideggerian nihilism is accepted? Vattimo thinks so.

So what answer to the question posed earlier about the interpretation of Law that detects the groundlessness of law would follow according to Vattimo’s position and his hermeneutic nihilism?

Schematically – Vattimo says – perhaps it could be said this way: interpretation is neither an apocalyptic-messianic revelation of the coercion (injustice) of law, nor a comforting masking of this coercion through *ad hoc* fabulization; it is a cumulative process of coercion, a process of dissolving [the coercion] associated with the primordial groundlessness of the law. In summary, the perfect hermeneutic circularity, whose logic, logicality and ethical validity, escapes necessarily from those who live in nihilism, as an insatiable mourning for a being that should be (the ground), but is not (Vattimo 1998: 286-287).

Thus Vattimo’s apologia of interpretation in Law becomes the apologia of the hermeneutic circle: “the hermeneutic circle as a virtuous circle”, as the only possible virtue: to interpret, applying laws to specific situations in such a way that they are regulated without coercion – without the “non-coordinated”/“non-negotiated” (non “*negoziata*”) coercive power – which does not mean the disclosure of the primordial coercion, nor its accumulation through *ad hoc* adjustment/correction, but its gradual reduction (see Vattimo 1998: 287).

Vattimo provides examples that orient the hermeneutic nihilistic ontology and link it to precedent, to concrete decisions and judgments, and considers the disappearance of judges, lawyers, legal researchers as confirmation of that connection – they confirm the significance of concrete decisions not only for that case and not in such a way that would metaphysically link Law with (in)justice. On the contrary, their meaning is the already mentioned cumulative one, which discloses not so much the unconditional coercion of the law, but rather its dissolution by concrete decisions.

Thus, the justice that interpretation gives to Law, according to Vattimo, has nothing to do with the revealed metaphysical truth of groundlessness, nor

with the pathetic lie of fabulization. Interpretation is understood as an application that “weakens the coercion of the origin” and only thus realizes the justice of the law. Such an interpretation turns justice against those who accuse it of “producing only *summas iniurias*”. Vattimo’s hermeneutic concept of interpretation shows how to make what is right out of what is coercive.

Thus, the ontological-hermeneutic, meaning nihilistic, conception of the relationship between law and justice (interpretation) – leads to the abandonment of the idea of “substantial” justice, one where Law points out the ways of a realistic compensation of the primordial conditions, because of which it sorrowfully believes to be able to know the truth through reliable and objective reflection. Such a justice - *unicuique suum*, but *suum* is always marked by violence of a “primordial” appropriation, which can only harmonize with another violence as a norm – is impossible, since the very idea of a “true” balance is a coercive invention...

So is there nothing left for philosophy to do but to justify and declare as true the reality of law (*la realtà effettiva del diritto*), its forms and institutions, its reliance on precedents (coercion), that is, that saving “already-decided”? Vattimo believes that here everything depends on whether one relies on a metaphysical model or not.

Therefore, having a hunger and thirst for justice will not mean the ability to demand absolute impartiality from the judge, who would purely and simply apply the ancient law of Talion – but with perfect objectivity. The uncovered interpretive nature of truth will have taught us that what we have seen as a disturbed objective balance is nothing but our interpretation, never a disinterested situation.

Thus, Vattimo solves the crisis of the ontology of Law nihilistically – by abandoning the metaphysical claims of the search for a solid law-grounded justice, oriented in the direction of apocalyptic negative nihilism; instead, he puts forward the “idea” of the “origin” as the gradual deconstruction of the weakening of coercion, which dissolves the solid (objective) ground of legal justice, calling it the nihilism of the positive disclosure groundlessness. And such nihilism discloses not abstractly, but effectively and actually – i.e. in the interpretative perspective of the application of Law (laws).

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Bibliography

- Betti, E., 1955, *Teoria generale della interpretazione*, Milani, A. Giuffrè, 2 voll.
- Betti, E., 1961, *L'ermeneutica storica e la storicità dell'intendere*, Annali della Facoltà di Giurisprudenza dell'Università di Bari 16, pp. 3-28.
- Betti, E., 1987, *L'ermeneutica come metodo generale delle scienze dello spirito*, a cura di G. Mura, Roma, Città Nuova.
- Cacciari, M., 2019, "Destino di Dike", in Cacciari, M. e Irti, N., *Elogio del diritto. Con un saggio di Werner Jaeger*, Milano, La nave di Teseo.
- Derrida, J., 1998, "Diritto alla giustizia", in Derrida, J. e Vattimo, G., *Diritto, giustizia e interpretazione*, Roma-Bari, Laterza.
- Ebeling, G., 1959, "Hermeneutik", in *Die Religion in Geschichte und Gegenwart*, vol. III, Tübingen.
- Ferraris, M., 1988, *Storia dell'ermeneutica*, Milano, Bompiani.
- Gadamer, H.-G., 2004, *Truth and Method*. Translated by Joel Weinsheimer and Donald G. Marshall, London New York, Continuum.
- Jaeger, W., 2019, "Elogio del diritto", In: Cacciari, M., Irti, N. *Elogio del diritto. Con un saggio di Werner Jaeger*, Milan, La nave di Teseo.
- Kerényi, K., 1964, "Hermeneia und Hermeneutik" in Id., *Griechische Grundbegriffe*, Zürich.
- Monateri, P. G., 1998, "'Correct our Watches by the Public Clocs'. L'assenza di fondamento dell'interpretazione del diritto", in *Diritto, giustizia e interpretazione*, Roma-Bari, Laterza.
- Schiavone, A., 2012, *The Invention of Law in the West*. Translated by Jeremy Carden and Antony Shugaar. Harvard University Press.
- Schiavone, A., 2017, *Ius. L'invenzione del diritto in Occidente*, Torino, Einaudi.
- Vattimo, G., 1998, "Fare giustizia del diritto", in *Diritto, giustizia e interpretazione*, Roma-Bari, Laterza.

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