LAW LANGUAGE AND CULTURE: HERMENEUTIC PRELIMINARIES*

by

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> Zeus warned Hermes that henceforth he must respect the rights of property and refrain from telling downright lies; but he could not help being amused. 'You seem to be a very ingenious, eloquent, and persuasive godling', he said. 'Then make me your herald, Father'. Hermes answered, 'and I will be responsible for the safety of all divine property, and never tell lies, though I cannot promise always to tell the whole truth'.[1]

The name Hermes comes from the Greek *hermenuein* which means "to interpret". Hermes was a translator and mediator between the gods and humankind. He was wise enough to know and perhaps bold enough to proclaim the difference between not telling lies and speaking the whole truth.

In this paper I want to briefly explore aspects of the hermeneutic tradition in Western philosophy in the context of the continuing struggles by many countries to adapt their adopted legal systems to local cultures. In particular this will perhaps indicate the futility of maintaining such systems in non-western cultures with any realistic expectation that they will retain their "essential" or "historical" meanings and functions. This is based upon the view that law cannot be viewed as an object separate from its social context.

To explore these aspects I want to proceed in three distinct but hopefully related ways. The first will be to briefly describe the work of one of the most prominent contemporary hermeneutic philosophers, Hans-Georg Gadamer. In this part I also want to consider several other contemporary theorists whose work may be said to complement his. Secondly, I want to explore the work of Jurgen Habermas. Finally, I want to briefly describe the emergence of what I will call the "dispute processing literature" which obliquely reflects some of the insights and issues of the earlier mentioned theorists and is interesting to consider in this context. It will be seen that the first and last of these theoretical strands emphasise the role of culture in the interpretation of meaning whilst Habermas emphasises the role of language.

The underlying theme of this paper is a hermeneutic one. That is, any explanation of human actions must always include some attempt to interpret the meanings of such actions from the point of view of the agents performing them. The term "hermeneutics" has only come to the fore in Anglo-Saxon philosophy and social sciences over the last decade, although it has a long and firmly established tradition in the German speaking countries. This emergence of hermeneutics has coincided with the decline of the "orthodox consensus" that social science could draw its inspiration from the positivistic or naturalistic foundations of natural science.[2] Hermeneutic philosophy argues for a clear distinction between the social and natural sciences and represents an attempt to provide the social sciences with an alterative framework to positivism for understanding human actions. Hans-Georg Gadamer has been the principal contemporary advocate of the hermeneutic tradition.

Gadamer and the Hermeneutic Vision

Gadamer was born in 1900, but his main work "Truth and Method" was not published in

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1 R Graves, *The Greek Myths*, Book 1 Pelican, London (1975) at 65.

English until 1975. The main theme of this significant work is that the understanding of any social action is achieved, not by the accumulation of fact upon fact, but by a revolving interactive process between subject and object principally mediated through language. Understanding is established by an ongoing process of mastering parts of the "text" (ie, the object or social action being studied or contemplated) and relating that to our understanding of its totality. This process of understanding in Gadamer's view is a dynamic one involving not only the subject's attention, but the subject's preconceptions (and/or prejudices) as well. So, for example, it is not possible to understand the case of *Donoghue v. Stevenson*[3] without some knowledge of the role it has played in the history of law. In this way hermeneutics provides a set of protocols for interpretation. Traditionally modern western positivist thought has attempted to see a text as it is in itself. The assumptions that underlie this method are repudiated by Gadamer in favour of the method which encompasses the context of the text ie, where it is in time and place.[4] He therefore advocates a "fusing" of our horizons with that of the thing we are contemplating. Interpretation and understanding are thereby raised to the level of an ontological category fundamental to being "human".

Common law systems have traditionally tried to interpret a text not only in terms of its meaning, but in terms of how it can be incorporated into everyday life. They implicitly recognise the importance of incorporating the object (the body of law under scrutiny) in the worlds of those who seek to understand it. In many ways law provides a very useable hermeneutic model. Nevertheless, this implicit recognition is countered by a rather positivist inclination to see law, as it is interpreted, as some rather solid object operating over and above society. The law can only be "entered" by the means of steadfast and immutable principles. In this way the law has been drawn into the post-enlightenment claims of clarity, logic, and impartiality to too great a degree. A hermeneutic philosopher may say that the "solid object" looks only solid sometimes in some places and to some people. In Gadamer's view things cannot be reconstructed in their original time and place: rather, they can only be understood in their present sense.[5]

The lawyer or judge like the social scientist cannot hope to divorce him or herself from the law, but instead must interpret meaning from within it. In other words, the law's horizons are fused with those of the lawyer and therefore like the social scientist the lawyer is confronted with a "double hermeneutic".[6] That is, the lawyer attempts to understand the social world through the actions of those who produce and reproduce it, yet must interpret this through another social world -the law. This is unlike the natural scientist whose field of study, being inanimate, cannot speak back! It is within this conundrum that the framework or underlying structures of meanings are built up in the law, as in the social sciences. It presents a real challenge to the legal innovator who would seek to incorporate alien legal structures or reforms into a society.

If one accepts Gadamer's argument, then the implication for many non-western countries seems clear. Namely, that whilst the outward form of the legal system may be reproduced, its essential processes will be different to that experienced in western cultures. The case studies and analysis provided by Upham in his informative 1987 book "Law and Social Change in Postwar Japan" both reflect and support this view. He demonstrates that whilst the Japanese have successfully introduced formalised Western legal structures, this has not prevented the continued operation of traditional extra-judicial systems of dispute processing. Further, the adopted structures have themselves been transformed to reflect such powerful socio-cultural symbols as harmony, consensus, and tradition, mediated and controlled by powerful governmental, bureaucratic and industrial elites.[7] In Upham's view, law cannot be understood simply by referring to

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2 A Giddens, *Profiles and Critiques in Social Theory*, University of California Press, Berkeley (1982) at 1.
3 [1932] AC 592.
4 H-G Gadamer, *Truth and Method*, Sheed and Ward, London (1975) at xxi.
5 *Ibid* at 149.
6 Giddens *supra* n.2 at 7. A Giddens, *New Rules of Social Method*, Hutchinson, London (1976) at 158.
7 F Upham, *Law and Social Change in Post War Japan*, Harvard University Press, Cambridge Mass (1987) at 16.

its outward forms, but must be interpreted through the stories and symbols it portrays, and the visions it projects which allow and enable people to give meaning to their social life.[8]

This analysis can be further extended by a consideration of the work of Roberto Unger who has conceptualised law as constituting "... the chief bond between its culture and its organisation, the external manifestation of the embeddedness of the former into the latter".[9] Like Upham, the early work of Unger utilises a comparison of ideal types although he sees the crucial historical conditions as political and cultural rather than economic.[10] Unger defines three types of law: customary law; bureaucratic law; and the liberal legal order.[11] To be a rule of law each of these types must satisfy three conditions: it must be related to concerns for the legitimacy of the legal order; it must reflect the nature of social relations within the group and outsiders; and it must represent a meaningful totality. Customary law occurs primarily in tribal societies. Bureaucratic law emerges in larger agrarian societies and is characterised by being both public and positive. The liberal legal order besides being public and positive, also has the characteristics of being both "general" and "autonomous". It is "general" in the sense of being committed to the formal equality of citizens before the law. "Autonomy" is achieved because its norms are not restatements of non-legal norms (eg moral or religious beliefs), its institutions are autonomous, the methodology it uses is mainly reasoning by reference to rules, and the lawyers are separated into an elite group through occupational specialisation.

According to Unger, the liberal legal order arose in the West because of the synthesis of two unique conditions: political compromise between monarchy, aristocracy and the bourgeoisie where not one of these groups could establish a permanently dominant position; and the belief in a natural or higher law which made it possible to articulate a body of principles to reflect this compromise and which was purported to apply universally. This allowed the development of the ideal of the rule of law and its characteristic features of autonomy and generality. However Unger argues that this ideal of the rule of law has been undermined by the rise of the welfare state, which is not general or autonomous, and by the growth of corporatism which is neither public or positive.

Thus Unger claims the law in the West has therefore become "post-liberal".[12] In other words the ideal of the liberal legal order is increasingly challenged by the emergence of law types which are not based upon the characteristics which are associated with it. This is accompanied by the rise of centres of power (government and corporate) which are transforming the political foundations upon which this ideal was originally built.

Interestingly, Unger then compares post-liberal Western society with "traditional societies" and revolutionary socialist countries, neither of which in his view, have solved the tension or dialectic between the experience of personal dependence and an ideal of community. He uses Japan to illustrate the major characteristic of traditional societies is to incorporate aspects of the western legal order superimposed over a customary hierarchical rank system and industrial bureaucratic law.[13] There is therefore only a partial or transitory reconciliation of Western liberalism with traditional outlooks and institutions. He states that sometimes this partial reconciliation has been a more or less deliberate policy on the part of an indigenous elite that wanted to increase national power through drastic economic and technological change while maintaining the social order and the attitudes on which its hegemony depended.[14]

It could be argued therefore that societies like those which exist in non-western societies have a "dual structure" divided between Western and non-Western sectors.[15] In law this dualism takes

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8 *Ibid* at 205.
9 R Unger, *Law in Modern Society*, Free Press, New York (1976) at 45.
10 H Collins, "Roberto Unger and the Critical Legal Studies Movement" (1987) 14 *Journal of Law and Society* 4.
11 Unger *supra* n.9 at 48.
12 *Ibid* at 199.
13 *Ibid* at 224.
14 *Ibid* at 225.
15 Upham *supra* n.7 at 225.

the form of a parallel existence of both a central legal order which has a smaller hold on traditionalistic society than in the West, and an informal customary law that embodies a dominant consciousness and buttresses the social rank order. Upham states:

> Alongside the central legal order, there is an informal system of customary law that embodies the dominant consciousness of traditionalistic society and buttresses its rank order. Just as "traditional" institutions are turned to account by developments that might seem inconsistent with them, so there often emerges a symbiotic relationship between the central legal order and informal custom. To return to the Japanese example, one finds the official legal system referring disputes to non-official means of conciliation or relying, through its own general clauses and open-ended standards, on customary understandings. Conversely, customary law is influenced by the central legal order, and its informal procedures are often increasingly legalised.[16]

The interesting paradox created by this view is the interplay between economy and technology on one side and culture and social structure on the other. The adoption of western style industrialisation and technology has the tendency to erode the customary forms of consciousness and organisation. These forms, whilst they may not stay intact, can still constitute an essential element in the society and will continue to operate in some way. The result is a society which cannot be either completely differentiated from a post-liberal Western type but neither can it be seen as necessarily being on the way to becoming this type of society.[17]

Both "post-liberal" and "traditional societies" according to Unger, are concerned with the tension between personal dependence and ideals of community or as he puts it "the sense in which the extent to which individual freedom can be reconciled with community cohesiveness". However, they differ in the way they respond to these problems. In traditional societies like Japan, this problem finds its chief expression in social life (work) that is increasingly depleted of its traditional meanings. For post-liberal societies the problem is centred upon the failure of law in resolving issues of power. Traditional societies also tend to define the meaning of community in hierarchical terms whereas in the postliberal type there is a rivalry between left (egalitarian) and right (individualistic) views.[18] In Unger's view, these similarities and differences do not necessarily mean a convergence or separation of these types of society. The outcomes are not preordained. What this analysis suggests, for the purposes of this paper, is that simple calls for adoption of aspects of one system onto another may ignore these fundamental historical, political, and socio-cultural processes.

Habermas and Communicative Action

Unlike Gadamer who emphasises the cultural field, Jurgen Habermas emphasises communicative action as the centre of understanding. He rejects Gadamer's contention that hermeneutics is the universal principle of philosophy and criticises Gadamer's reliance on tradition. However, he draws on the hermeneutic tradition in his ongoing critique of positivism and the overblown role given to science as the only valid kind of knowledge.[19] Like Gadamer he argues that science cannot be used as a viable model for understanding.[20]

For Habermas, the way to understanding is through the development of what he terms "the ideal speech situation" where there are no external constraints which prevent participants from assessing evidence and argument, and where there are open chances of entering into discussion.[21] This is important because it represents an ideal inherent in the nature of language. That is, anyone

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16 *Ibid* at 229.
17 *Ibid.*
18 *Ibid* at 236.
19 J Habermas, *Theory and Practice*, Heinemann, London (2 Vols) (1974) at 195.
20 J Habermas, *Knowledge and Human Interests*, Heinemann, London (1971).
21 J Habermas, *The Theory of Communicative Action*, Beacon Press, Boston (2 Vols) (1984).

who communicates something presumes that they can justify it on certain criteria.

Writing in 1979,[22] Habermas argued that language is based on four validity claims. That it is intelligible, truthful, justified, and sincere. Effective and consensual interaction through language can only be carried on to the degree that each of these claims are sustained. Intelligibility is, in a sense, separate from the others because it is the starting point and basis of all communication. Sincerity is also separate from the others because essentially it can only be demonstrated in how a person behaves. However, the truth and justification (or correctness) of a statement can be subjected to discursive discourse. This then makes apparent the major types of social discourse. One is a discourse based upon the development of theory allied with empirical observation, to sustain truth claims, and then applied with law-like generalisation. The other is a more pragmatic practical discourse concerned with justifying normative positions through the interpretation of values and with appeals to moral ideals. It is with the playing out or balancing of these two streams of discourse that Habermas is most concerned.

In this way language through the "ideal speech situation" produces a measure against which the adequacies of existing social institutions operate. The consensus that is built on this foundation can then be measured in terms of its "rationality". Consensus built upon domination, or tradition, would be seen as deviating from this rationality, that is: the way in which a statement can be justified in terms of its validity through the process of argumentation.[23] He argues that these are universal characteristics in communicative action and that they can be linked diachronically to social change and the opportunity this gives for increased rational argumentation.

Habermas argues that societies go through or are going through three stages. The mythical, religious-metaphysical, and the modern. He likens this to the process of "de-centring" that a child goes through when it is growing up based on Piaget's theories. The process is characterised by an increase in rational argumentation and understanding and the development of arenas in which this can be carried out.[24] This line of argument is similar to Max Weber's view of the rationalisation of Western culture. However, Weber's view is a pessimistic one which does not equate increasing rationalisation with "rationality". This Habermas disagrees with and argues that the West alone is marked by what he calls the pre-eminence of "postconventional" cognitive domains which are free from traditional codes of conduct and organised according to warranted principles.[25] It is here that law performs a vital task (along with science) in emphasising this organising principle of modern western societies. The role of law is instrumental in the development and dominance of truth discourses in Western societies. He states:

> The positivisation, legalisation, and formalisation of law mean that the validity of law can no longer feed off the taken-for-granted authority of moral traditions, but requires an autonomous foundation, that is, a foundation that is not only relative to given ends.[26]

This analysis therefore implies that the balance in non-Western societies' communicative action still relatively favours the pragmatic normative discourses based on tradition. It would follow that the operation and meaning of law in these contexts will be fundamentally different.

Dispute Processing

We can think of the conflicts that underlie disputes not as discrete isolated events, but instead as representing a dynamic interplay between latent conflict structures or positions which move through several stages of mobilisation and activisation before becoming manifest (or "open").[27]

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22 J Habermas, *Communication and the Evolution of Society*, Beacon Press, Boston(1979).
23 Habermas *supra* n.21 Vol.1 Ch.1.
24 *Ibid.*
25 *Ibid* Ch.2.
26 *Ibid* at 260.
27 M Deutsch, *The Resolution of Conflict: Constructive and Destructive Processes*, Yale University Press, New Haven (1973); R Rummell, *Understanding Conflict and War*, Wiley, New York (1976).

In this way disputes can readily be understood within the social contexts in which they occur. If we understand one of the crucial functions of a legal system is providing an avenue for dispute processing, then again the need to examine the differences in socio-cultural structures and the way meaning is interpreted through them becomes apparent.

Abel, as long ago as 1973, argued that the introduction of "new" dispute structures into a society would not, in the absence of more fundamental changes, necessarily lead to a significant change in the aggregate distribution of dispute processing institutions.[28] Those forces which produce highly specialised, differentiated, and bureaucratic dispute institutions will tend to be "balanced" by those forces which produce opposing forces or values. Abel's model proposes the persistence of traditional and informal dispute processes and institutions alongside those which have been more recently introduced.[29] In other words, according to this view, there is a constantly evolving dynamic relationship between social institutions and culture on the one hand and dispute processes and institutions on the other.[30] Abel's work is paralleled in the research and writings of the anthropological and socio-legal "schools".[31] The methodologies presented by many of these authors directly confront the legalist paradigm by looking at the way conflicts are resolved in addition to law, rather than simply looking at the way law handles conflict.[32] Disputes are therefore treated as "social constructs" where meaning changes with the audience, which is constantly and actively redefining it.[33] This approach critiques and can be seen to be in competition with what has been described as the "New Formalism" in the disputing literature, which assumes as its starting point that there are a definite range of processes that exist in any society for settling disputes and that there is a fit between disputes and those processes which most effectively deal with them.[34] This approach, as exemplified in the writings of Fuller, Danzig, and Goldberg, Sander, and Green, is criticised as not adequately contextualising dispute processing in its socio-cultural and political contexts or meanings.[35]

The debate in this field of study provides an interesting backdrop against which we can consider the aforementioned themes, although it is beyond the scope of this paper to explore it in any more depth.

Conclusion

Whether one wants to give primacy to language or culture as the major agent of interpretation of meaning is probably superfluous in this context and may be best left for debate between philosophers and sociologists. However, I hope it is clear by this stage that my treatment of these rather disparate strands leads the reader to carefully consider that "law" cannot be simply viewed as an object separate from its social context. This leads me to tentatively conclude that its meaning, method, and application are necessarily contingent upon the dynamic interplay that

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28 R Abel, "A Comparative Theory of Dispute Resolution Institutions in Society" (1973) 8 *Law and Society Review* 217 at 300.

29 *Ibid* at 291.

30 *Ibid* at 301.

31 For examples, S Moore, *Law as Process: An Anthropological Approach*, Routledge & Kegan Paul, London (1978); Galanter, "Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society" (1983) 31 UCLA L Rev 37; L Nader & H Todd (eds), *The Disputing Process: Law in Ten Societies*, Columbia University Press, New York (1978); A Sarat, "The 'New Formalism' in Disputing and Dispute Processing" (1988) 21 *Law and Society Journal* 695.

32 S Merry, "Disputing Without Culture" (1987) 100 *Harvard Law Review* 2057 at 2060.

33 L Mather & B Yuguesson, "Language, Audience and the Transformation of Disputes" (1980) 15 *Law and Society Review* 775.

34 Sarat *supra* n.31. J Esser, "Evaluation of Dispute Processing: We Do Not Know What We Think and We Do Not Think What We Know" (1989) 66:3 *Denver University Law Review* 449.

35 L Fuller, "The Forms and Limits of Adjudication" (1978) 92 *Harvard Law Review* 353; Danzig, "Towards the Creation of a Complementary, Decentralised System of Criminal Justice" (1973) 26 *Stanford Law Review* 217; S Goldberg, Sander & E Green, *Dispute Resolution*, Little Brown and Co, Boston (1985).

emerges between subject and object within a particular socio-cultural setting. This further assumes the possibility that the "post-liberal" legal systems of the West are essentially different from those legal systems established in other cultures. Efforts to "transfer" legal systems from one culture to another and supposedly maintain or reproduce the "cultural parent" seem on this view doomed to failure.

My brief analysis of these "hermenuetic preliminaries" raises possibilities worthy of further study and reflection. There is a need to:

1. reframe law within its historical, political and socio-cultural contexts. This necessarily means a movement away from the text itself to a broader fusion incorporating the law in society;
2. recognise the way in which law as a field of social relations "filters" meaning and is in turn itself "filtered". This calls for a greater understanding in our law schools, courts and the profession of the "inner meanings" of law as well as its outward forms. That is, an understanding of laws wider symbolism and visions.
3. recognise the "dualism" apparent in all legal systems between the formal and informal; "inner" and "outward" forms and; rational and non-rational. This dualism can often be more readily appreciated when looking at non-western countries which have grafted western legal forms into traditional structures. However, this should not disguise its continued existence and importance in western societies.

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