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Methods of Legal Reasoning

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held by Melancthon), every written work is created in accordance with the same rules and principles. Accordingly, one may build a universally valid theory of the interpretation and understanding of a text (in this case the Bible) without appealing to tradition. (N.B. this conviction was incompatible with the position of the Trident Council.) Under this account, interpretation becomes a sort of logical game allowing one to reconstruct the structure of an analyzed text. In sum, Flacius' conception undoubtedly constitutes an important stage in the process of building general humanistic hermeneutics.

In the seventeenth and eighteenth centuries there appeared new works concerning the interpretation and understanding of biblical texts. Good examples are the works of the following authors: Dannhauer, the author not only of the afore-mentioned *Hermeneutica sacra sive methodus exponendarum sacrarum litterarum*, but also of *Idea boni interpretis*; Chladenius, the author of *Einleitung zur richtiger Auslegung vernünftiger Reden und Schriften*, and Baumgarten, the author of the five-volume work *Nachrichten von einer Hallischen Bibliothek*. Three scholars from the eighteenth century – Semler, Michaelis and Ernesti – wrote in the same hermeneutical vein – called theological rationalism – to which Baumgarten belonged. Semler undertook an analysis of grammatical and historical interpretation, proposing a specific rational variety of theological hermeneutics, the outline of which is contained in his work *Vorbereitung zur theologischen Hermeneutik*. In principle, Michaelis works along the same lines, grounding his hermeneutical method in philological and historical research. In his view, in the process of interpreting the Bible, one should allow for both historical context and common sense. Finally, Ernesti, the author of *Interpretes* dealt with philological aspects of the Scriptures' interpretation. His philological hermeneutics was to ensure the harmony of biblical revelation and rational thinking.

Thus, two hermeneutics – biblical and philological – begin to form one whole, thereby providing the foundations for general humanistic hermeneutics. Philological hermeneutics becomes only one method available to hermeneutics (first biblical, later general hermeneutics). Consequently, it is no longer necessary to separate both varieties of hermeneutics (biblical and philological), because, according to Meier – the author of *Versuch einer allgemeinen Auslegungskunst* – there exists one general hermeneutical theory, which formulates rules to be taken into consideration while interpreting all kinds of signs.

Philological hermeneutics. The origins of philological hermeneutics, in turn, reach back to the beginnings of philosophy in ancient Greece. It

began with attempts to interpret Homer's poetry, which were undertaken mainly for didactic purposes. Philological interpretation enabled the text to be understood from a grammatical and literary perspective; this interpretation was in fact a sort of game between an interpreter and a text. More solid grounds for philological hermeneutics were provided at the moment when it was allied with rhetoric – a discipline concerned, not only with oratory art, but also with more detailed issues, such as, for instance, the composition of a literary text, the principles of creating rhymes, or the conditions under which metaphor may be used. An important contribution to the development of philological hermeneutics in ancient times was made by the Alexandrian school of philology (during the second century B.C.). According to its main representatives – Aristarch and Hipparch – philology is a discipline based on a profound understanding of language, an art of refined critique and interpretation of a literary text. In a somewhat different direction research developed in the Pergamon school, whose main representatives included Crates from Mallos and Aryston from Chios. Pergamon philology was concerned, amongst other things, with stylistics and rhetoric, developing the principle of allegoric interpretation – known already to the Stoics – which was to play a significant role in later philological hermeneutics.

In modern times there appeared many works devoted to philological hermeneutics. The classically philological treaties of authors such as Scoppius, Clericus and Valesius were already, in fact, complete expositions of hermeneutical theories. In the first part of these works, one can find catalogues of interpretative rules, as well as a discussion of applicable philological methods, which make possible the critical analysis and interpretation of literary texts. As we have already pointed out, somewhat later, a number of works were published that were devoted both to philological and biblical hermeneutics (these are already mentioned works of Dannahuer, Baumgarten Semler, Michaelis, Ernesti and Meier).

Philological hermeneutics played an especially important role in nineteenth- and twentieth-century general philosophical hermeneutics. In many ways the conviction that the primary form of hermeneutics is philological was confirmed. Everything begins with, and not infrequently also ends with, language; understanding can be articulated only through language – there exists an exceptional agreement between representatives of different hermeneutical trends as far as this point is concerned. According to Schleiermacher, all that is presupposed by hermeneutics is language. Dilthey spoke about hermeneutics as a theory of the art of understanding the manifestations of life which are fixed in language; accordingly, he asserted that literary critique is inseparably

connected to hermeneutical process (immanently belonging to it). According to Heidegger, “language is the home of being”; Gadamer, in turn, asserted that “the only being that can be understood is language”; in his view, language is the only medium through which we can accomplish both successful communication with a partner and understanding of things themselves.² Thus, it should be remembered that both early biblical hermeneutics and contemporary philosophical hermeneutics rested on philological hermeneutics.

Legal hermeneutics. Legal hermeneutics is somewhat different. At least until the eighteenth century it developed separately, forming an integral part of the methodology of jurisprudence. Of course, one cannot claim that legal hermeneutics was completely isolated. Even pragmatically disposed Roman jurists, who dealt primarily with concrete cases, appealed to certain ontological, axiological and methodological conceptions worked out in the fields of general philosophy and particular hermeneutics: biblical and – above all – legal hermeneutics. Undoubtedly, the foundations of the science of legal interpretation were built by Roman jurists. It is possible to question further whether legal hermeneutics existed in the methods cultivated by Roman jurisprudence. The answer to this question will hinge on what definition of “legal hermeneutics” is assumed. If one considers as hermeneutical each theory of interpretation and understanding of a text (in this case – a legal text), then, of course, it will be possible to say that legal hermeneutics had already been developed within the framework of Roman jurisprudence. In the early period, there was a preference for the literal interpretation of a legal text, which – with the passage of time – developed to assume the form of grammatical, philological and historical interpretations. Use was also made of philosophical methods: rhetoric and Aristotelian topics, amongst others; as for the latter method, it was most likely used first by Cicero for the purposes of legal interpretation.³

In modern times many works devoted to legal interpretation were produced, yet for the most part they were systematizing, i.e. their objective was to present catalogues of universally valid methods of interpretation with a view to making a “proper” interpretation of the law possible. In this context one can list such works as *Hermeneutica iuris, recensuit perpetuisque notis illustravit* of Eckhardi, *Principia et subsidia hermeneutica iuris* of Wittich and *Hermeneutik des Rechts* of Sammet.

It was not until the nineteenth and twentieth centuries that an essential change occurred in how hermeneutics was conceived and cultivated. Schleiermacher, and later Dilthey, put forward a new, universalistic account of hermeneutics, whose task – in their view – was to work out a

methodological basis for all humanistic disciplines, including jurisprudence. Still another kind of ontological and methodological universalism was brought into play with the phenomenologically oriented hermeneutics of Husserl, Heidegger, Gadamer and Ricoeur. The influence of this variety of hermeneutics on jurisprudence can be described as follows. Jurisprudence believes that philosophical hermeneutics offers the opportunity to solve jurisprudential problems (which are mainly of a methodological nature). The acceptance of entire hermeneutical conceptions, and of its particular theses, has been accomplished. The older, technically understood legal hermeneutics continues to lose significance, becoming in fact a mere object of historical research. The binding link between old legal hermeneutics and more contemporary – philosophical – versions is the conception of Savigny, expounded in his work *Juristische Methodenlehre*. On the one hand, Savigny defended the methodological autonomy of jurisprudence, but on the other hand, he availed himself of solutions proposed by Schleiermacher. Thus, it was not “a pure reception” (which, by the way, will become characteristic for legal hermeneutics inspired by philosophical conception). The thinkers who appealed to the hermeneutical tradition of were Coing and Betti, and to the hermeneutical tradition of Heidegger and Gadamer – Reinach, Maihofer, and Kaufmann. However, it is difficult, if not impossible, to classify unambiguously the views of many contemporary representatives of legal hermeneutics. To give an example: how should the views of Larenz or Esser be classified? Their versions of hermeneutics were modified and transformed to a high degree (mainly for the purposes of a dispute over the method of jurisprudence pursued in the German science of law at the time). We shall return to these issues in Sections 5.2–5.4 whilst considering different versions of philosophical and legal hermeneutics.

5.1.2 *What Do We Not Know About Hermeneutics?*

Now we would like to deal briefly with the most hotly disputed issues connected with every possible lecture on philosophical hermeneutics. Criticism of these issues usually constitutes the point of departure for all approaches that reject hermeneutics as a philosophy of interpretation. We shall successively present eight of the most frequently formulated objections against hermeneutics. (1) It has often been emphasized that no single, and acceptable to all adherents of the hermeneutic approach, definition of hermeneutics exists. (2) As a result, it is very difficult to set the boundaries between particular hermeneutical conceptions (this concerns internal boundaries), and between those positions which are

hermeneutical and those which are no longer so (this concerns external boundaries). As a result, the concept of “hermeneutics” has often been abused, because it has been used to assess different interpretive philosophies (of the analytical, structuralist and argumentative types), which do not necessarily have much in common with hermeneutics. (3) A similar situation exists in the case of other – for hermeneutical philosophy – basic concepts: understanding, pre-understanding and the hermeneutical circle. Unambiguous definitions of these notions are lacking; besides, these notions are given fundamentally different interpretations in different hermeneutical conceptions. (4) Ultimately, we are not able to determine what is meant by the term understanding: a form of cognition, a form of existence of an individual being, or perhaps both. (5) Even if we assume that understanding is also (besides representing a form of being) a form of cognition, we are not in a position to determine what kind of cognition it is: direct or indirect. As shall be argued more extensively in the last section of this chapter, plausible arguments exist for both alternatives. (6) In assuming that understanding is a form of direct-intuitive cognition, we are confronted with a further problem, namely that of determining what type of intuition we are ultimately dealing with: psychological, analytical or, rather, phenomenological.⁴ (7) The thesis of hermeneutical universalism is not entirely clear. Dilthey’s defense of this thesis, based on a division of naturalistic and anti-naturalistic methodologies adopted is quite weak, for the division itself gives rise to serious doubts. Moreover, it represents a particular type of universalism, because it is limited solely to the field – difficult to define unambiguously – of humanistic disciplines. It is also risky to defend the phenomenological thesis of hermeneutics’ universalism as “the first science”. This argument can be refuted by reversing it, i.e. by claiming that hermeneutics finds its main, if not exclusive, application specifically in humanistic disciplines and not in the pure and natural sciences. (8) Ultimately, we do not know exactly how hermeneutics can be applied usefully in interpreting law, or the potential and admissible scope of its application, considering that the object of understanding and interpreting law may often be the regulations (norms) of valid law. This problem is closely connected with another – the freedom of interpretation, which is restricted, at least in continental legal systems, by a prohibition on making interpretations *contra legem*.

Do the above objections provide grounds for rejecting hermeneutics as a method, or philosophy of interpretation? We would answer this question in the negative: we include hermeneutics in a group of the basic methods of jurisprudence. Yet we must be mindful of the specificity of

hermeneutics as a method of jurisprudence. Its specificity lies in the fact that it is not a method in the strict sense of this word. Hermeneutics is different from logic, analysis and argumentation in that its structure, assumptions, procedure, and inter-subjective criteria for acknowledging and rejecting solutions can hardly be reconstructed. Hermeneutics – as a philosophy of interpretation “without the Archimedean starting-point” – does not offer a method, but, rather, intuition – understanding, that is: something which is “softer” and deprived of formal structure. A call for this kind of philosophy of interpretation appears at the level Ricoeur terms reflexive-existential, especially with reference to cases of interpretation that are usually called “hard”, where more formal methods are simply insufficient and useless.⁵ In order to decide such cases, the interpreter cannot help appealing to unconventional methods. In addition to legal values, they must appeal to social, economic and political phenomena, or – ultimately – to some sort of intuition enabling the understanding of a difficult case.

Moreover, one must not forget that both in general philosophy and in the philosophy and theory of law, most assumed views and theses are also “soft”, even if they arise in the field of “harder” methodologies. It is easy to oppose such views and theses (manifesting a similar level of precision) which will have the same or even better justification. It is to be noted, however, that the problem of defining basic notions is encountered not only in the case of hermeneutics, but also in the case of other methods. Similarly to the defenders of hermeneutics, supporters of the application of logic, analysis and argumentation in legal interpretation claim the universality of their methods. Furthermore, a dispute over the usefulness and the scope of application is pursued not only in hermeneutics, but also in remaining methods. Thus, notwithstanding the many fundamental differences between hermeneutics and other methods, they also have many points in common, though these, unfortunately, are often controversial.

5.2 HERMENEUTICS AS EPISTEMOLOGY

We begin our presentation with a discussion of methodological current in philosophical (Section 5.2.1) and legal (Section 5.2.2) hermeneutics. At this point, we wish to enter the reservation that the division here introduced into epistemological and ontological approaches is neither sharp nor unambiguous with reference to some views. The problem of classification will emerge with reference to such philosophers as, for instance, Habermas, Apel, and to such lawyers as – to give two examples – Larenz

and Esser. This is why no special or ultimate significance should be attached to the divisions and systematization proposed below.

5.2.1 *Methodological Current in Philosophical Hermeneutics*

The new – epistemological – tradition in hermeneutics was initiated by Schleiermacher. Another notable representative of the methodological current in hermeneutics was Dilthey. We shall discuss each of their views in turn.

Schleiermacher. The scientific climate that prevailed in Germany at the turn of the eighteenth century was favorable to Schleiermacher's projects: on the one hand a theory of the interpretation of works of art, proposed by Wickelmann, was developing; on the other hand, there arose the idea of "entering into the spirit of something" (epochs, peoples) in the work of Herder, as well as new philological conceptions of interpretation, developed by Heyne, Wolf and his disciples (especially Heindorf). A breakthrough occurred as far as the attitude of philosophy towards history is concerned. There also appeared a strong need for a "secondary" understanding of the historical world – this need was revealed in the views of scholars from this period such as Hegel, Böckhe, Dissen, Rank, Savigny. A thinker who exerted a considerable influence on Schleiermacher was Schlegel, who encouraged him to take up the task of translating Plato into German.⁶

The sources of Schleiermacher's hermeneutics are complex. They embrace Plato's philosophy (which fascinated Schleiermacher), biblical hermeneutics, philology, literary criticism, philosophy of history, and – finally – psychology. Schleiermacher makes an attempt to create universal (at least from the viewpoint of the humanities), philosophical hermeneutics grounded in philology and psychology. In his view, hermeneutics is not – strictly speaking – theoretical knowledge, but rather a practical art of interpreting and understanding all kinds of text (though mainly written ones).⁷ As a practical art, it must be – and it is – closely connected with criticism. Schleiermacher started from philological research, yet he did not confine himself – as his predecessors had done – to drawing up catalogues of universally valid rules of interpretation. He went much further, because he embarked upon an analysis of the process of understanding, which underlies every interpretation. In Schleiermacher's view, a degree of the artistry of interpretation is directly dependent on a degree of understanding; he distinguished two kinds of understanding: clairvoyant and comparative, based on material and grammatical-historical cognition. Both kinds of understanding are complementary – they operate together.

The process of understanding possesses, in Schleiermacher's view, historical and psychological dimensions. In order to reconstruct this process, we must recreate the historical and psychological situations in which the author of an interpreted work found himself. We must endeavor to understand him better than he understood himself.⁸ Understanding is a relative and never-ending process. It has a circular character. Schleiermacher devoted much attention to the problem of the hermeneutical circle (which is expressive of the nature of the process of understanding and interpretation), stating that "(. . .) the unity of the whole can be understood on the basis of single parts, and the value of single parts can be established (understood) on the basis of the unity of the whole".⁹ Thus, when taking up an interpretative activity, one must begin with a cursory view of the whole work that one wishes to interpret (translate). This initial understanding will be a necessary condition for further interpretation. Schleiermacher gave up the division – assumed by his predecessors – into grammatical, historical, aesthetic and material interpretation. He developed several canons of interpretation, and illustrated their function, using the exegesis of the New Testament as an example.

Thanks to Schleiermacher hermeneutics became a philosophical problem. According to his account, hermeneutics is a universal theory of the cognition of the products – expressed in (written) language – of human words, or, to put it differently, a universally valid method for the humanities. This method appeals to three types of analysis: critical-philological, psychological and historical.

Dilthey. Thus, Dilthey, whilst formulating his conception of hermeneutics, already had at his disposal a prepared theory of humanistic interpretation connected with a philosophical theory of understanding. He was fully aware of this fact, and this conviction found expression in his 1900 essay *The Arising of Hermeneutics*. The objective that Dilthey set himself, though, was different – more far-reaching – to that pursued by Schleiermacher: he attempted to create "a methodology of understanding" for the humanities. The novelty of this, however, is not to be overestimated, because Vico, in his *Scienza Nova*, had already written about the understanding of science, which was to constitute an alternative to the Cartesian model of science based on mathematics. A point of departure for Dilthey was the opposition between natural sciences and human sciences. This anti-naturalistic division was introduced into the methodology of the humanities by Droysen, who distinguished and opposed two aspects of our cognitive reality – namely, nature and history. The purpose of the natural sciences is,

according to Droysen and Dilthey, explanation, whereas the purpose of the humanities is understanding.

In order to capture the essence of the process of understanding, it is necessary to appeal to psychology, which Dilthey treats as a descriptive discipline. In his opinion, what is at issue in the humanities is not a methodical knowledge of psychological processes, but a repeated experience of these processes, that is: an understanding of them. The purpose of the humanities is to know the objectified products of human life, and this knowledge simply amounts to understanding. Thus, understanding is a fundamental category of Dilthey's hermeneutics – the most typical activity encountered in the humanities. This is a process through which one achieves cognition on the basis of those manifestations of psychic life which are given to senses. And even though the manifestations of psychic life which are given to the senses are immensely variable, the very purpose of this sort of cognition ensures that the understanding of these manifestations must have common features. Dilthey's conception of understanding appealed to the psychological principle of the identity of human nature. In particular, understanding can be reduced to the psychological operation of "putting oneself" (*Hineinversetzen*) in the psychological situation of the person whose work is being interpreted. However, in his later works, Dilthey departed from these strongly psychological assumptions.

Under the unquestionable influence of Schleiermacher, Dilthey considered those expressions of human life (spirit) which are fixed in writing to be the privileged objects of understanding. Accordingly, he defined hermeneutics as a theory of the art of understanding the manifestations (which are fixed in writing) of life – of the traces of human existence contained in language. What underpins this definition is his conviction that it is only through language that human inner life (spirit) finds full expression. This is also why Dilthey asserted that the primary, profound meaning of hermeneutics is philological. An examination of these – fixed in writing – manifestations of life, if compatible with rules, is called interpretation. Understanding, which is attained through the medium of interpretation, is objective, because its subject is the whole human species (one can easily notice here a reference to the Kantian concept of the transcendental subject). Understanding is ultimately the most fundamental activity encountered in the humanities. Dilthey also assumed the principle of the hermeneutic circle – described already by Flacius, Ast and Schleiermacher – stating that "(. . .) From what is singular – the whole, from the whole – again what is circular. The whole of a work requires proceeding towards the individuality of the author and towards

literature with which it [its individuality] is connected. Only comparative activity enables me ultimately to understand each and every single work – and even each single sentence – more profoundly than I understood it before. Thus, understanding is realized on the basis of the whole and yet the whole is realized on the basis of what is singular (. . .).¹⁰

Ultimately, though, “a methodology of understanding” cannot be reduced to the hermeneutics of a text. Its objects are all the products of human life (spirit). Thus, hermeneutics was elevated to the status of an epistemology of the humanities. Dilthey wanted to provide the humanities with a method equal in objectivity to that at the disposal of the natural sciences. For precision, we must add that the sharp opposition between understanding (characteristic of the humanities) and explanation (characteristic of the natural sciences) which he initially defended was mitigated in his later works. In these works, he asserted that understanding and explanation are two complementary research steps: explanation is usually the initial step, which often takes so long that few succeed in achieving full understanding.

It is easy to notice that Dilthey’s hermeneutics also has more complex sources. One can undoubtedly number among them philology and broadly understood literary criticism (for, in Dilthey’s view, hermeneutical process is inseparably connected to literary criticism, which immanently belongs to this process), as well as descriptive psychology and anti-naturalistic methodology, which grew from an unfortunate opposition between understanding and explanation. It is difficult to resist the impression that this conception of hermeneutics is not free from contradictions. On the one hand, Dilthey conceives of hermeneutics in an individualistic manner – as “the art of ingenious interpreters”, and of understanding as a psychological operation of “putting oneself in” the position, or psychological situation, of the author of an interpreted work; on the other hand, though, hermeneutics is to be an objective and universal method of the humanities, appealing to such categories as “life”, “human species”, and “history”.

Receptions of Dilthey’s hermeneutics. All the above remarks notwithstanding, Dilthey’s conception became an important source of inspiration for many authors continuing studies in the field of hermeneutics (also its legal variety) and, interestingly enough, informal logic. There was even a Diltheyan school founded in Göttingen, in which leading roles were played by Misch, Lipps, König and Plessner.

According to Misch, the world we live in is the world of expressions. Only this world – of language – is universal. Dilthey was still speaking of

a strict connection between experiences, expressions and understanding. According to Misch, we move only in this second world, i.e. in the world of expressions. The “logic of expressions”, informally understood, is to ensure a proper interpretation and understanding of this world.

Dilthey’s hermeneutical philosophy is also a point of departure for Lipps, who supplements his philosophy with assumptions from existential philosophy and philosophical anthropology. As with Misch, Lipps’ logic is informal and this logic aims to enable analysis of the category of “speech”, which is fundamental from the point of view of hermeneutical cognition. This category is transcendental, which guarantees that logic used for the purposes of its analysis may be objective, making – in addition – possible “a return to the sources” of our knowledge, i.e. to pre-understanding (*Vorverständnis*). This pre-understanding is a point of departure for every possible further cognition (understanding).¹¹

Still another contemporary continuation of Dilthey’s thought was given by Betti. Under his account, hermeneutics is both a theory of cognition and a methodology of the humanities. The method of the humanities is reduced to interpretation, mainly the interpretation of a text. Betti is the author of one of the most extensive works devoted to a theory of humanistic interpretation. (N.B. this work bears the meaningful title *Allgemeine Auslegungslehre als Methodik der Geisteswissenschaften*.) In systematizing and arranging the results of the efforts of many generations of philosophers, philologists and lawyers, this work brought a period of evolution in hermeneutical theories to a close: the vein which we have termed methodological. The work was started by, *inter alia*, Flacius, Meier, Schleiermacher and Dilthey was thus – at least to some extent – brought to an end.

Analytical hermeneutics. The variety of hermeneutics described as analytical requires separate treatment. This immediately gives rise to doubt over whether hermeneutics can be analytical, given that the most serious objections levied against hermeneutics were formulated by the representatives of analytical philosophy. If the possibility of such a combination is admitted, then all boundaries – even between competing philosophies of interpretation – are entirely reduced in significance. This may have the following – momentous – consequences, which are in accordance with the spirit of postmodernism, a theory which we find hardly acceptable because there are no boundaries, no methodological paradigms (projects), everything, or almost everything is allowed, and one type of reflection turns into another. It poses the threat of anarchy, of the deconstruction of everything that made sense in methodology and led – partly at

least – to acceptable results; postmodernism makes it difficult – or even impossible – either to make a correct exposition of, or to learn a method. The authors of this book are decidedly against such simplification. On the other hand, though, we must be aware of these mutual influences and therefore unavoidable obscurities, since this will enable us to free ourselves of the necessity of pursuing never-ending disputes over the method of the humanities.

Everything seems to turn on the definition of such notions as “analysis”, “language”, “logic”, “objectivism”. According to Bocheński, whether or not a philosophy is acknowledged as analytical will depend on how these four notions have been defined. At the same time, we would like to stress that all these notions found a place in the lexicon of hermeneutical philosophy (including the variety which we have termed epistemological – methodological). The representatives of ancient hermeneutics and, later, Schleiermacher and Dilthey spoke about philological analysis. The program of language research was introduced into hermeneutics through the medium of philology. As was emphasized both by Schleiermacher and Dilthey, analysis (interpretation) of a written (oral) text is a pre-condition for fully understanding it. Misch and Lipps also wrote about hermeneutical logic. Dilthey devoted much attention to the issue of the objectivity (universality) of hermeneutic cognition (i.e. of the method of understanding). Thus, apart from well-known differences between analysis on the one hand, and phenomenological hermeneutics on the other, there are many similarities between these views. This fact was clearly realized by the analytical philosopher Bocheński: he noted that both views imply that analysis is necessary, and “want to” proceed objectively (“to the things themselves” – “*zu den Sachen selbst*”); moreover, both views stress the analysis of language. Symptomatic of this is Bocheński’s assertion that analytical philosophers should admit the existence of other types of analysis (for instance hermeneutical – our remark: J. S., B. B.) besides their own – rather radical – version of it.

Taking into account all the above remarks and reservations, it is possible to speak of analytical hermeneutics. We mention it during our presentation of the epistemological trend, because analytical hermeneutics is a method of textual interpretation. In twentieth-century hermeneutics one can find numerous references to linguistics and analytical philosophy. The thinker who exerted a deep influence on this kind of thinking was “the second” Wittgenstein. In his *Philosophical Investigations*, he presented the problem of interpretation as a sort of language game played between an interpreter and a text. This account of the problem of interpretation is appealed to particularly willingly by representatives of the

philosophy of law (who will be discussed in the following section, which is devoted to the incorporation of hermeneutical methods into legal interpretation). Hermeneutics has also been cultivated analytically in the terrain of contemporary theology: thanks largely to Fuchs, Ebeling and Robinson, biblical hermeneutics has become “a believing science of language”.

Hermeneutics as a theory of communication. Still another conception of hermeneutics was put forward by Habermas and Apel. Under their accounts, hermeneutics is a theory of the processes of ordinary language communication – a theory that possesses from the start some epistemological sense.

In the hermeneutics proposed by Habermas, references can be found to methodological hermeneutics (both its classical and analytical versions), phenomenological hermeneutics (especially the assumptions of Husserl and Heidegger), and even to psychoanalysis. For instance, Habermas appeals to the notion (previously used by Husserl) of *Lebenswelt* (Habermas speaks in this context about *soziale Lebenswelt*), but also to Heidegger’s account of understanding (*Verstehen*) and individual existence (*Dasein*). He is, however, skeptical about Gadamer’s philosophy of understanding, because, in Habermas’ view, hermeneutics fulfils rather limited tasks in the sphere of human practice. These tasks are limited to the explanation and description of the processes of ordinary language communication. In other words, hermeneutics is the art of understanding sense which can be communicated through the medium of language (this account is analogous to Dilthey’s). Of paradigmatic significance for hermeneutics thus conceived, would be such notions, or categories, as: communicative action (*kommunikatives Handeln*), communicative competence (*kommunikatives Kompetenz*) and communicative community (*Kommunikationsgemeinschaft*). Ultimately, the task of hermeneutics amounts to an examination of the structure of these communicative actions. The communicative action itself is defined by Habermas as the mutual influence people exert on each other by means of symbols. This influence has to be compatible with valid social norms, which are understood and accepted by at least two actors interacting with each other.

Hermeneutics would ensure the possibility of communication between these actors; it would at the same time condition the self-determination of social groups as well as the process of individualization of members of these groups. According to Habermas, the art of communication has not been acquired by all the members of a given communicative community. For that reason use must be made of hermeneutics, the task

of which is to work out the principles of this art. These principles are meant to improve the process of transmitting tradition and communication between actors. Hermeneutics is meant to fulfill both an important practical function, thereby becoming a concrete skill of language communication, an art of communication acquired by at least some members of a group (communicative community), and a theoretical and meta-theoretical function – thereby becoming a theory of every common process of language communication. Hermeneutics, understood as a theory of the process of language communication, makes references to particular positive sciences, yet hermeneutics itself is not a positive science. Thus, ultimately, we may speak about hermeneutical consciousness of science, but not about hermeneutics as occupying – analogously with physics, chemistry, biology etc. – its own separate field of research.¹²

A similar account of hermeneutics was proposed by Apel. In his view too hermeneutics is a theory of the process of language communication, and one of its fundamental aspects is the notion of the communicative community. Unlike Habermas, however, Apel builds his interpretation on the basis of the philosophy of language, which is – additionally – analytical in nature. Apel could justifiably be included in the list of representatives of hermeneutics that we have called analytical. Apel's analyses, contained especially in the second volume of his *Transformation der Philosophie*, serve to confirm this thesis.

Of course, it is neither possible nor necessary to make a sharp and unequivocal distinction between the two hermeneutical traditions – epistemological and ontological. It is true that the ontology of understanding (which appealed to phenomenological philosophy) separated itself from the methodological tradition of the nineteenth-century hermeneutics of Schleiermacher and Dilthey, yet it remains the case that hermeneutics always had both an ontological and an epistemological sense. The only thing that changed the distribution of accents and the general approach: the approach of phenomenological hermeneutics was decidedly anti-psychological. This fact was realized by, for instance, Ricoeur, because he spoke of hermeneutics as an epistemology of interpretation, at the same time as attempting to solve the conflict between psychological and phenomenological hermeneutics. Thus, the problems of vague divisions and the “softness” (defeasibility) of formulated theses emerge once again.

5.2.2 *Legal Receptions*

Only in the nineteenth century did an essential change in the cultivation of legal hermeneutics take place. This was associated with the rise of

general philosophical (humanistic) hermeneutics, i.e. the epistemological trend described above. Successive attempts were made to use philosophical hermeneutics for the purposes of legal interpretation. The process of incorporation, though, was by no means homogenous. In some cases direct appeal was made to concrete hermeneutical conceptions, especially to Schleiermacher and Dilthey, in others particular solutions offered by general hermeneutics were used and subsequently incorporated into the broader context of discussions concerning, for instance, methods of jurisprudence, the legal decision-making process, adjudication and discovery of the law (*Rechtsfindung*, *Rechtsgewinnung*, *Rechtsverwirklichung*).

Savigny. The binding link between older, eighteenth-century legal hermeneutics and its contemporary twentieth-century versions was provided by Savigny, whose conception of hermeneutics refers to Schleiermacher's philosophy in many essential respects. A sort of paradoxical aspect of *Juristischen Methodenlehre*, proposed by Savigny, was that he aimed to defend the methodological autonomy of jurisprudence by means of methods that were "external" to the science of law – namely, hermeneutical and historical. Let us recall Schleiermacher's assumption that, in the case of comparative understanding (which is the second – besides clairvoyant – type of understanding), we must appeal to material, as well as grammatical-historical, cognition.

He distinguished four basic canons of interpretation: objectivity (autonomy), unity, genetic and technical interpretation. Savigny, by contrast, emphasized that interpretation of the text of a statute, which aims to recreate (reconstruct) the intention of a legislator, should embrace four elements (levels): grammatical, logical, historical, and systematic. Savigny, like Schleiermacher, was an advocate of comparative understanding as well as the grammatical-historical understanding of the act of interpretation. Likewise, he adopted the thesis that the act of hermeneutical cognition (interpretation) is objective in character, and its purpose is to achieve unity between the work of an interpreter and the will of a historical legislator. It was a specific kind of objectivity, which – analogously with Schleiermacher's conception – was to be justified historically and psychologically. Finally, Savigny attached great importance to criticism, the so-called "higher criticism" in particular, whose objective was to restore (rebuild) the meaning of a distorted (incomprehensible) text. This "higher criticism" was to consist of the same elements as any other interpretation. Thus, according both to Schleiermacher and Savigny, the primary form of hermeneutics is philological.

Coing. An important attempt to apply – above all Schleiermacher’s – hermeneutics to the needs of the contemporary science of law was made by Coing. He set forth his proposals in an essay entitled *Die juristischen Auslegungsmethoden und die Lehre der allgemeinen Hermeneutik*, in which he examined the possibility of applying the general canons of interpretation formulated by Schleiermacher for the purposes of legal interpretation. He discussed each canon in turn, making various additions and changes of his own: the canons of objectivity (autonomy of interpretation), unity, genetic interpretation, interpretation of factual meaning (Schleiermacher spoke in this case of technical interpretation), and, finally, the canon of comparison. This approach led Coing to the conclusion that all general canons of interpretation find their confirmation and application in jurisprudence, which ensures the universally valid interpretation and understanding of a legal text. Hermeneutics teaches us how to critically assess an interpretation of the law, while at the same time showing that the science of law as an interpretative discipline uses not only exclusively deductive procedures, but also other approaches, even topical ones. Within the framework of this “interpretative discipline” jurisprudence enjoys a specific status, for it is an example of an “applied interpretative discipline”. As a result, the ‘legal’ method, both universal and objective in character, could constitute part of a universal and objective humanistic methodology, while legal hermeneutics would be just one example of the application of general humanistic hermeneutics.¹³

Betti. The conception of legal hermeneutics developed by Betti clearly has its roots in Dilthey’s thought. According to him, hermeneutics is simply the science of interpretation. Interpretation is in fact the only method that the humanities possess. In *Allgemeine Auslegungslehre als Methodik der Geisteswissenschaften*, Betti discussed the most important kinds of humanistic interpretation, including legal interpretation. Like Dilthey and Coing, Betti understood hermeneutics to be a universally valid and objective method of the humanities. Betti linked cognitive objectivism with axiological objectivism. Legal hermeneutics cannot ultimately be separated from humanistic hermeneutics in general, which assumes an objective and universally valid (for all specific variants of hermeneutics) theory of interpretation and philosophy of understanding.

Larenz and Esser. Representatives of modern philosophy and legal theory make numerous references to a methodological understanding of hermeneutics, especially the German strand referred to as *Methodenlehre*. References to hermeneutics, though, are not, as a rule, systematic;

rather, they serve to justify particular theses. The hermeneutical conceptions of Larenz and Esser constitute an exception to this. It is worth noting, however, that Gadamer's philosophy was a source of inspiration for the conceptions of some authors. This thesis, though, can be disputed on the following grounds. First, these authors make numerous references to Gadamer's views, yet their references are for the most part critical; accordingly, they advance their own proposals and solutions to "Gadamerian problems". Second, even though they reject the Diltheyan account of hermeneutics as an objective method of the humanities, they nevertheless assume – unlike Gadamer – a purely methodological understanding of legal hermeneutics. This is the final argument for covering the views of Larenz and Esser in the section devoted to the epistemological account of hermeneutics.

Larenz seeks justifications for his axiologically oriented theory of types within the framework of legal hermeneutics. Like Gadamer, he rejects the objective conception of understanding, advocated by Coing and Betti. At the same time Larenz does not assign to understanding an ontological meaning: he distinguishes clearly between understanding as a type of cognition and the ontology of law. Thus, ultimately, Larenz does not accept the Gadamerian interpretation of hermeneutics. For instance, the concept of application to him has a different meaning than in Gadamer's theory, and it is not synonymous with the processes of understanding and interpretation. Consequently, in Larenz's view, legal hermeneutics does not possess "an exemplary meaning". Rather, it is a special case on account of a specifically dogmatic interest of "the legal understanding of a statute". Differences between Larenz and Gadamer are also strongly marked over the issues of "pre-judgment" (*Vorurteil*) and "pre-understanding" (*Vorverständnis*). Larenz distinguishes the meaning of both terms, even placing them in opposition to each other. The function of the Gadamerian *Vorurteil* in legal cognition is purely negative – this is "prejudice" (*Aberglaube*) rather than "pre-judgment". "Pre-understanding" (*Vorverständnis*), by contrast, designates a certain kind of interpretative hypothesis, which can be confirmed later by "a successful interpretation"; the hypothesis in question can also be referred to as "the expectation of sense" (*Sinnerwartung*). Ultimately, pre-understanding is a preparation for "adequate understanding", thus it is also a condition for understanding what law is.¹⁴

Esser represents a different example of "the mixed reception". He attempts to determine a philosophy of interpretation that would be suitable for the needs of legal interpretation. In his view, hermeneutics prepares a social and ideological-critical analysis of the reality of law's

application. Esser, again unlike Gadamer, conceives of the process of interpreting positive law as something dogmatic – rather than historical – in character. It is true that legal hermeneutics makes allowance for the results of philological and historical research; it remains the fact, though, that it uses them in the process of “logical interpretation” only in a dogmatic sense.¹⁵ According to Esser, the process of interpretation can be understood as a kind of practical activity; accordingly, legal hermeneutics can be defined as the science of action (*Handlungswissenschaft*). The process of the interpretation or – more broadly – the application of law is creative in character, for it may “produce the content of norms”. However, Esser defines pre-understanding (*Vorverständnis*) like Gadamer, i.e. as a condition for the possibility of understanding. Yet he associates many different intuitions and meanings with this concept, linking it, for instance, with such terms as “interest”, “attitude”, “motive”, “expectation”, “background”, “the image of a future decision”, “initial choice or assessment”, and, finally, “prejudice”. In the course of building his conception of hermeneutics, Esser – like Larenz – stopped at the level of the methodology of legal understanding. In point of fact, his hermeneutics can be reduced to a theory of law’s application (*Rechtsanwendung*) and “finding” a legal decision (*Rechtsfindung*).

Other representatives of the methodological strand of legal hermeneutics included Forsthoff, Engisch, Müller and Kriele.¹⁶ Only occasionally, however, did these authors appeal to the theses of general philosophical hermeneutics, which is why one cannot speak, even generally, of a full reception of this kind of hermeneutics as far as their views are concerned.

5.3 HERMENEUTICS AS ONTOLOGY

Owing to phenomenology a new, ontological, aspect of the problem of understanding developed. Understanding is no longer simply conceived as a method of humanistic cognition, but is also – or, rather, above all – regarded as a property (form) of the existence of being (to which Husserl assigned the name *Lebenswelt* and Heidegger – *Dasein*). Thus, hermeneutics has become the phenomenologically oriented ontology of understanding. Hermeneutics is, however, also a method – after all it has to be. This duality cannot be eliminated even on the grounds of phenomenological philosophy. This fundamental ambiguity is arguably the most serious inconsistency in phenomenology. The rejection of the methodological objectivity of older hermeneutics, accompanied by the assertion that understanding is a form of the existence of an individual

being (*Dasein*) does not seem very plausible or clear, all the more so because phenomenology did not abandon its claim to universality (though it did abandon the claim of objectivity). Hermeneutics is universal, because it is a point of departure for all cognitive activity, it is “the first science” – “without the Archimedean starting-point”, which means – besides other things – that hermeneutics is simply a method, albeit a method that is very difficult to interpret. One may argue that hermeneutics is a method of direct cognition, because, built on the basis of phenomenology, it aspires to be “the first science”. Yet if one takes into account the fact that, on the grounds of hermeneutics, “things themselves” can be known only through the medium of thoroughly analyzed language, as well as interpretative operations such as actualization, concretization, appeals to pre-understanding and the hermeneutical circle, then one may conclude that hermeneutics is in fact a method of indirect cognition. We shall return to this intricate issue in Section 5.4.

The next point to be stressed is that hermeneutics, like the whole of phenomenology, is anti-psychological. This stance can be justified in relation to phenomenological philosophy and the philosophy of consciousness (a variant of the philosophy of *cogito* – the thinking self), but in relation to hermeneutics, justification is not so easy. The assertion that the process of understanding takes place only at the level of “pure consciousness” is a consequence of numerous shady and highly speculative philosophical assumptions. Whether we interpret certain aspects of the process of understanding (such as, for instance, pre-understanding) in a psychological or phenomenological way will depend on our philosophical convictions and habits, as well as the specificity of a concrete case, rather than on universally valid philosophical truths. Indeed, only the conflict between phenomenological and psychological hermeneutics seems objective.

5.3.1 *Ontology of Understanding*

Husserl. The foundations for new hermeneutics were provided by Husserl’s philosophy. The variant of hermeneutics which he proposed was an alternative to Dilthey’s methodology. Husserl criticized both the naturalistic and anti-naturalistic varieties of methodological objectivity. As a result, he rejected the conception of hermeneutics as the epistemology of interpretation. He sought other grounds for its justification, finding them in ontology, in which, in his view, the fundamental meaning has the category of “the world of life” (*Lebenswelt*). This category is primary in relation to the objective, cognitive relations “subject – object”. In

other words, life itself, being the primary source of understanding, is prior to objective cognition. Thus, understanding is no longer a method of cognition, having become a mode of being.

Heidegger. In Heidegger's conception, philosophy is equated with the phenomenology of *Dasein*. Hermeneutics is, then – neither more nor less than – the phenomenology of *Dasein*, i.e. the phenomenology of the individual existence possessing the capacity for understanding.¹⁷ Understanding is no longer one of many psychic activities, or a method of interpreting a text; it becomes a mode of being – a characteristic – of individual existence. This is so because *Dasein* possesses the capacity of self-understanding and self-interpretation; thus, understanding must not be reduced to purely cognitive categories. It is true that Heidegger assumes that understanding is realized in language, yet he adds that in thinking, being turns into language (language is the home of being).¹⁸ Heidegger also gave a consistently ontological interpretation to other notions typical of hermeneutical philosophy like, for instance, “the hermeneutical circle”: in his view “the circle” does not describe the structure of the process of understanding, but expresses “the existential pre-structure of *Dasein* itself”.¹⁹

Gadamer. A special place in the process of the development of phenomenologically oriented hermeneutics is occupied by Gadamer. His work, *Wahrheit und Methode*, ended a stage of development in humanistic hermeneutics, simultaneously confirming the presence and importance of hermeneutical issues in philosophy.

The philosophical roots of Gadamer are complex. He defines himself as a Platonist posing a Kantian question about the transcendental conditions for the possibility of understanding. He answers this question in the spirit of Heidegger, whom in fact he treats as his main philosophical predecessor. Finally, when classifying his own philosophy, he places it between phenomenology and dialectics.²⁰ Gadamer realized that for hermeneutics to be a real philosophy of understanding, it cannot confine itself either to humanistic epistemology (Schleiermacher, Dilthey), or to fundamental ontology (Husserl, Heidegger). In his opinion, hermeneutics must remain open, since only then can it preserve its claim to universality. This openness means in particular that hermeneutics links notions which otherwise seem unconnected: general and concrete, theoretical and practical, constructive and critical, whilst at the same time abandoning the traditional quest for truth and objective cognition. When seen in this light, the different definitions of hermeneutics found

in Gadamer's work come as no surprise. Some examples of these definitions include: theoretical knowledge of the conditions for the possibility of all understanding, the continuation of Plato's theory of beauty – new universal aesthetic, and a practical art of understanding and communication.²¹

Yet hermeneutics is above all knowledge about understanding. In the course of building hermeneutics, we begin from the Kantian (normative) question, to which we do not yet provide a Kantian answer. Ultimately, hermeneutics does not stipulate what understanding should be like, but merely describes the conditions under which understanding is at all possible. As for understanding itself, it is a phenomenon of a special kind. Its essence lies in the fact that it is a process – it is something without a definite beginning or end, it is “the very process of happening” during which we reiterate our effort to realize the general in the concrete, and the theoretical in the practical. As is emphasized by Gadamer, “the hermeneutical problem” always embraces three inextricably linked moments: understanding (*subtilitas intelligendi*), explanation (*subtilitas explicandi*) and application (*subtilitas applicandi*). For understanding is realized through the act of interpretation, and the essence of interpretation is expressed in its practical application.²²

Abandoning the traditional way of presenting the question of truth, Gadamer poses it in such a way that it may also concern the humanities. Within the humanities, the question of truth becomes a question about the conditions for the possibility of understanding. Hermeneutics enables objective, scientific experience to be joined with individual life experience. Thus, the division between the objective and subjective elements of our experience of the external world is reduced in significance. Gadamer – like Heidegger – ultimately assumes that truth is “the disclosure of being” (*Unverborgenheit des Seienden*), which subsequently turns into the openness of language statements. In this context, the dialectic principle of the primacy of question is in force. Thus, truth acquires its own situational and temporal structure.

The historicity of understanding is elevated to the status of one of two fundamental hermeneutical principles (the second one is its language character). According to Gadamer, considerations of the process of understanding lose their sense – especially as regards the issue of hermeneutical application – if they are deprived of their historical perspective (horizon). The process of interpretation pursued beyond the historical horizon of understanding would become anew an abstract and theoretical knowledge of the general principles and rules of interpretation. Our hermeneutical consciousness acts on, develops and is rooted in

history. This historical perspective enables one to be open not only to the past, to the voice of tradition, but also to the present, to what is “here and now” as well as, finally, to the future, for every historical act of understanding contains some projection of a new sense.

The principle of the historicity of understanding is also inter-linked with other components of hermeneutical experience – namely, the hermeneutical circle and pre-judgment (*Vorurteil*). Gadamer examines both the older, formal–methodological principle of the hermeneutic circle and its newer, phenomenological–ontological, version. In particular, this principle captures the connection between the general and the concrete, between the earlier and the present, and between pre-understanding, understanding, interpretation and application.

Gadamer emphasizes that the hermeneutical circle is neither subjective nor objective – it is rather an attempt to describe understanding as a game (mutual influence) between “the movement of tradition” and “the movement of the interpreter”. Thus, “the circle of understanding” is not a methodical circle (a method of cognition), but, rather, a description of the ontology and structure of the process of understanding. Also of momentous significance for the historically understood process of understanding, is the concept of pre-judgment (*Vorurteil*), which refers to something that exists before (in a temporal sense) both our knowledge and ignorance.

The second fundamental principle (besides the historicity) of hermeneutical experience (understanding) is its linguistic character. Language is a sort of medium linking all the elements of the process of understanding in one whole. Gadamer makes a reference to Schleiermacher, who insisted that only can be assumed and investigated within hermeneutics is language (he wrote that the only being that can be understood is language). However, Gadamer does not assert that the above thesis requires that hermeneutics be limited to language research, as was suggested by the older, philologically oriented hermeneutics. For language is “the primary equipment of man”, with which he comes to the world, and which expresses his possession of this world. It is thanks to language that we cannot only speak, think and interpret, but also – or, rather, above all – understand. Understanding is, in turn, something more than merely speaking, thinking and interpreting – it is also a mode of being of man.

Gadamer’s hermeneutics is open – it has no point of departure that could be determined. Yet at the same time it sets up the claim to be universal, just as the problem of understanding and language is universal. Moreover, the hermeneutical problem cannot be confined solely to the methodology of the humanities: “(. . .) Hermeneutics is not simply a

science of the method of the humanities, but, rather, an attempt to determine what the humanities in fact are, the attempt, which is not to be limited to a reflection over the methodological self-consciousness of the humanities. (. . .) Hermeneutics should show us the relationship between the humanities and our whole experience of the world (. . .).²³ Gadamerian hermeneutics is dialectic (because – in the spirit of Socrates it gives priority to the question), phenomenological (because it describes the phenomenon of understanding as the phenomenon of being), and in addition, it is the philosophy of unity (because it removes the divisions between the general and the concrete, subject and object, language and the material world). This philosophy is realized in the process of communication, in which all historically developed human communities take part.

Ricoeur. As we have already pointed out, the philosophy of interpretation proposed by Ricoeur is a special “boundary” case, from the standpoint of both ontological and epistemological hermeneutics. According to Ricoeur, a specific property of hermeneutical interpretation is its reflectivity. This is because reflection always appeals to symbolic speech, which, in turn – automatically – necessitates interpretation. Ricoeur’s hermeneutics appeals to many sources: primarily to phenomenological philosophy, but also to the philosophy of language, theology, and even psychoanalysis. Hermeneutics, in Ricoeur’s view, should fulfill three functions. First, it should be an epistemology of interpretation (meta-theoretical function). Hermeneutics must fulfill this function when “a conflict of interpretations” (for instance, phenomenological and psycho-analytical) emerges. Such a conflict makes it necessary to build “the hermeneutics of all hermeneutics”, within the framework of which one can attempt to reconcile otherwise opposed viewpoints. Second, hermeneutics is simply a theory of the interpretation of symbolic language. Third, and finally, hermeneutics is the practical art of interpreting and understanding this symbolic language, which means that it is its own application (this kind of hermeneutics is used by Ricoeur, for example, in his work *La Symbolique du Mal*). Yet in each of these contexts, hermeneutics is primarily an epistemology, and only secondarily – through semantic analysis and reflection – an ontology (the ontology of understanding). Ricoeur, just like his predecessors Heidegger and Gadamer, asserted that language constitutes the medium of hermeneutical experience. In his programmatic essay *L’existence et l’hermeneutique* he says that all understanding – both ontical and ontological – first finds expression in speech.²⁴ Language, or, more accurately, symbolic language,

gives rise to the need for interpretation, which, in turn, does not proceed in a temporal void, but is always “built” into some tradition – it has its own history.

Symbolic language is universal. Symbol is present even in ordinary language, which – by its very essence – seems to have little to do with myth.²⁵ This suggests that hermeneutics is not limited to analyzing particular types of language (for instance, biblical), but concerns itself with the interpretation of all symbolic structures of meaning. According to Ricoeur, the structure of meaning can be called symbolic if its direct, original, and literal sense determines some other – indirect, secondary and metaphoric – sense which can only be captured through the medium of the former.²⁶ Symbolic signs are not transparent, they require interpretation, in other words, they force one to think (*ils donnent à penser*). Thus, the purpose of the interpretative process ultimately boils down to understanding a symbol. Symbol and interpretation are two correlated notions: anywhere there is a multiform sense, i.e. a symbol, there is an interpretation. Ricoeur speaks about three stages of understanding symbol: phenomenological, which consists in understanding the symbol through some other symbol or through all symbols; hermeneutical, the stage at which the proper interpretation of the symbol takes place (only thanks to interpretation can we again hear and understand), and existential, the stage at which “thinking enters the symbol” thereby making possible existential (ontological) interpretation of the symbol.

The concept of hermeneutical experience ultimately embraces three inter-linked elements: a text, i.e. language, in which symbolic meaning structures appear, interpretation and tradition. This “chain”: text – interpretation – tradition may be read in all directions, because a text always consists in entering some tradition, and interpretation, in turn, consists in entering some text. Thus the circle of understanding, interpretation and tradition closes.

5.3.2 *Legal Receptions*

Reinach. One very interesting attempt to apply the phenomenological philosophy of Husserl to the needs of jurisprudence was made by Reinach. Reinach believed that phenomenological analysis lies at the basis of both statements concerning the ontological essence of the law, and statements with a methodological character. He set out his ideas in *Zur Phänomenologie des Rechts. Die apriorischen Grundlagen des bürgerlichen Rechts*, published in 1986. Reinach conceived of the law as an *a priori* category, which we are able to know only thanks to our intuition.

Let us recall that according to Husserl, phenomenology is supposed to enable us to capture what is directly given and evident in the cognitive process. It is not confined solely to the analysis of notions, but attempts to reach – “through these notions” – the *a priori* essence of reality, i.e. “the things themselves”. Such cognition is possible only by means of intuition, for it is precisely intuition that expresses the capacity to know what is directly given and evident. Thus, intuition becomes “the principle of cognitive principles”, the first and irreplaceable source of all cognition, rather than only one of its forms. Husserl enumerated many kinds of intuition – the number of them is the same as the number of direct kinds of data. Thus, the following kinds of intuition exist: rational, irrational (used in emotional acts), capturing phenomena in their concreteness, and capturing the essence of a phenomenon.²⁷ The last kind of intuition, which enables knowledge and understanding of the essence of law, would presumably be of special significance for Reinach. Positive law is in a constant state of flux and development. Such contingency, and the tendency to change make it difficult, if not downright impossible, to know the *a priori* essence of law. Thus we must penetrate further and deeper, through positive laws to the “thing itself”, to the nature and man with his needs, desires, will and actions.

The essence of these essential presentations is expressed in *a priori* sentences, which at the same time are also statements (axioms) of a phenomenologically oriented science of law.²⁸ In this way, besides mathematics and pure natural science, we are dealing with a case of a “pure, in the phenomenological sense, legal science”. Next, Reinach analyzed the relationship – crucial for an *a priori* science of law, between the notion of a claim (*Anspruch*) and the notion of obligation (*Verbindlichkeit*). He found the source of this relationship in the notion of a promise (*Versprechen*). A promise creates a particular relationship (connection) between two persons, by virtue of which one person may require something, and the other is obliged to fulfill this requirement, or at least to see that it is fulfilled in the future.²⁹ Thus, ultimately, the law has not only an *a priori* but also a dialogical nature, because it implies that for every question (claim), there must be a corresponding answer (obligation) from a second person.

Husserl. Another philosopher of law, G. Husserl, the author of the work *Recht und Zeit* also referred to Husserl’s phenomenological philosophy. He was interested above all in the problem of time in law. He analyzed it using at least some theses from phenomenology and hermeneutics. He assumed that every legal system represents a certain phase in the history of mankind. Thus, legal orders have their own history and they are