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TABLE OF CONTENTS

INTRODUCTION: THE FOUNDATIONS OF A EUROPEAN LEGAL METHOD <i>Sanne Taekema</i>	1
THE COMMON HISTORY OF EUROPEAN LEGAL SCHOLARSHIP <i>Tammo Wallinga</i>	3
THE VICISSITUDES OF THE HERMENEUTIC PARADIGM IN THE STUDY OF LAW: TRADITION, FORMS OF LIFE AND METAPHOR <i>Carel Smith</i>	21

INTRODUCTION: THE FOUNDATIONS OF A EUROPEAN LEGAL METHOD

Sanne Taekema

The methods of legal scholarship today are not self-evident. There are various reasons for the growing self-consciousness of legal scholars about their methodology. One of these is the internationalisation of legal research, which among other things has generated a change in the culture of legal publication towards peer-reviewed journals with stricter norms for methodological justification. Another reason is the weakening link between academic legal scholarship and national legal practice, which raises questions about the identity of legal scholarship as something distinct from legal practice and the extent to which methods define legal scholarship. A third reason is the popularity of interdisciplinary research in law, which gives lawyers reason to compare their own methods to those of other disciplines.

In many respects, the debate on legal method takes its cue from American debates about the character of legal research and the directions to be taken. This is visible, for instance, in the call for interdisciplinary research and in the still growing popularity of law and economics, both of which started in the American academic world.

However, there are also distinctly European developments, many of which we can connect to the Europeanisation of law in the context of the European Union. The expansion of the European Union has renewed the interest in the legal cultures of European countries, giving rise to comparative law research in the European context. In private law, ambitious projects abound proposing, for instance, pan-European legal norms of contract law.¹ These themes involve exploring the differences and similarities in European legal systems and their cultural contexts.

In this issue of *Erasmus Law Review*, we take a step back from the study of the legal norms to look at European legal scholarship. The methods of legal scholarship are an underlying factor influencing the diversity of developments of legal systems. The divide between common law and civil law is not only visible in the particularities of the law in practice, but also in differing methodological approaches. For some comparative law scholars, the different style or *mentalité* of the common law and civil law approach is reason to be sceptical of all attempts to integrate law in Europe.² The idea of this issue is to approach the possibility of a common European legal method with an open mind, with no prior commitment to either belief or scepticism.

To that end, we present general reflections on the history and present character of European legal scholarship. The central aim of the issue is the identification of common strands in the heritage of European legal scholarship that could serve as starting points for a common legal method in Europe. This question is approached from two angles, namely by studying the historical development of legal scholarship in Europe and by studying the philosophical basis of legal method.

Looking at legal method from a historical perspective, the acknowledged common thread of legal scholarship in Europe is the study of Roman law. In his contribution, Tammo Wallinga takes this as his starting point. However, he argues that Roman law was not the only common core: canon law was a second important component of legal scholarship that served to develop general legal concepts, accompanied by moral theology and the idea of natural law. Wallinga shows how legal scholarship in the universities on the European continent developed as a series of attempts at systematising law, mainly by applying logical and critical methods to the texts of the *Corpus Iuris Civilis* and *Corpus Iuris Canonici*, but also by criticising Roman law with the help of natural law principles.

¹ See, for instance, the EU Commission's Green Paper of 1 July 2010 on policy options for progress towards a European Contract Law for consumers and businesses, COM (2010) 348.

² Pierre Legrand, 'Against a European Civil Code' (1997) 60(1) *The Modern Law Review* 44 at 45.

To this, two observations can be added. First, Wallinga's article shows the dynamics between sources of case law, which is essentially the nature of the *Corpus Iuris Civilis*, and general concepts of law. The desire to merge the two can be seen as the major impetus for a systematic legal method. Solving the difficulty of remaining true to the authoritative texts, while at the same time constructing general legal principles, has stimulated methodological creativity from the scholastic period until now. Secondly, the historical relationship between academia and legal practice merits attention. Currently, the close relationship between legal scholarship and legal practice is regarded suspiciously. The fact that legal methods in scholarship have largely been the same as those in, primarily, judicial practice is one reason why legal scholarship is not regarded as equal, academically, to other disciplines. Looking back to the Middle Ages, we can see that these methods actually originate in university teaching. The development of legal interpretation and argumentation started with the study of Roman texts. These academic achievements turned out to have practical relevance, although not all scholarly approaches were well received: humanism's historical and critical approach was an unwelcome challenge to textual authority.

Whereas Wallinga finds his point of departure in the historical practice of legal scholarship, Carel Smith in his article explores the philosophical basis of legal method. His main claim is that hermeneutics can be regarded as the paradigm, in Kuhn's sense, of legal scholarship. Hermeneutics is not itself a methodology for lawyers, but an account of the conditions for the understanding of law. Both legal doctrine and, more abstractly, legal theory are premised on the philosophical idea that understanding of law requires taking the internal, participant's point of view. Although the routes towards acknowledgement of this idea in legal theory are very different, Smith shows that the work of the European philosophers Gadamer and Wittgenstein can serve to explain the common underlying theory. The constraints for legal interpretation and research are social, bound up with institutions and interpretive communities.

These historical and philosophical reflections on legal scholarship and method yield an optimistic, albeit tentative, conclusion about the possibility of constructing a common European legal method. As Smith argues, the paradigm for legal theory is shared by Anglo-American and continental European theorists, which provides a basis on which to build a European legal method. However, this paradigm also encompasses the idea that culture is an important determinant of legal interpretation. If culture matters so much in law, the diversity in legal cultures may also influence, and interfere with, the development of a common method. Studying methodology in the context of legal cultures and the concrete possibilities for common ground would therefore be an interesting next step, building on the general work presented here.

THE COMMON HISTORY OF EUROPEAN LEGAL SCHOLARSHIP

*Tammo Wallinga**

Abstract

This paper traces the common history of European legal scholarship from its beginning in the late 12th century to the development of national codifications which started some six centuries later. During this period, Roman law was of great importance in the universities, and Justinian's *Corpus Iuris Civilis* was the central text for legal studies. We will look at the different approaches to this body of text that legal scholarship has taken over the years. Still, Roman law did not have a complete monopoly: we will have a look as well at Canon law and Moral Theology, which also developed a system of legal norms, but on an entirely different basis. They paved the way for Natural law, which – in a critical dialogue with Roman law – paved the way for modern codifications.

Keywords: Roman law, *Corpus Iuris Civilis*, Glossators, School of Orléans, Commentators, Canon law, Moral Theology, School of Salamanca, Legal Humanism, *Usus modernus Pandectarum*, Natural law, Historical School, *Pandectenwissenschaft*

1 Introduction

Europe is not a small place, its legal scholarship has a long history, and for many parts of Europe it is a common history. One may say that, for centuries, there was a European legal scholarship, until the appearance of national codifications caused lawyers to focus mainly on their own national law. This contribution will therefore focus on the period between the emergence of universities in continental Europe (starting with the legendary founding of the University of Bologna in 1088) and the development of national codifications of law from the 18th century onwards. It will be historical rather than methodological, if only for the simple reason that there has to be legal scholarship before we can look for a method in it and because the development of methodology as a specific branch of academic activity is only a relatively recent phenomenon.

A significant part of the contribution will be devoted to the reception of Roman law. This implies a focus on private law – which may easily be defended, since private law has by far the longest history of all areas of the law. In continental Europe, Roman law, in the form of the Emperor Justinian's *Corpus Iuris Civilis*, was by far the most important element in legal training from the Middle Ages to the times of the national codifications, and as such it retains a certain importance even today. Moreover, with local laws and customs being rather fragmentary in most places, Roman law had a part to play in legal practice, as subsidiary law. This means that the *Corpus Iuris Civilis* was, for many centuries, the main point of reference for lawyers all over Europe, even if its exact role has varied with time. In the era of the Glossators (ca. 1100-1260) it was mainly a tool for university education, and much energy was spent on making it more readily accessible with their commentaries and through a system of cross-referencing. The School of Orléans, which blossomed in the 18th century, paved the way for a freer interpretation of its texts. The Commentators (or Post-Glossators, ca. 1260-1500) built on the methods of both the Glossators and the School of Orléans, and started to use the *Corpus Iuris Civilis* in legal practice as well, as a source of law – which raises interesting questions about the relative authority of statute law, local customs and Roman law. Legal Humanism (ca. 1500-1750) started to challenge the authority of Roman law by calling into question the textual basis of the *Corpus Iuris Civilis* through the application of a much more fundamental method of textual criticism. It also

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introduced another methodological innovation in that it tried to arrange the texts of the *Corpus Iuris Civilis* in a logical system, that of Justinian's *Institutiones*, which derived from the work of the Roman lawyer Gaius. A kind of synthesis of the methods of the Commentators and Legal Humanism was achieved in the *Usus modernus Pandectarum* (16th-18th centuries). And finally, the German Historical School and its offspring, the *Pandectenwissenschaft*, carried out a late but very important re-examination of Roman law in order to develop new technical concepts and an improved systematisation, which made possible the German codification of private law in the *Bürgerliches Gesetzbuch* (BGB) of 1900.

Roman law did not have a complete monopoly, however. Especially during the Middle Ages, canon law was another important part of the curriculum in the universities. It made a major contribution to the development of legal procedure. In the field of private law, it helped to develop a general law of contract and a general concept of tort/delict. Key to these important contributions was the influence of moral theology, especially that of the works of Thomas Aquinas. The application of principles of moral theology to law blossomed especially in the Spanish School of Salamanca (16th century), which in turn had considerable influence on natural law. Canon law and moral theology form an interesting contrast to Roman law: their approach is based on general principles, unlike Roman law, which mostly consists of case-law originating in a system of specific actions.

Natural law is a third important approach to law. It is already present in canon law and moral theology in the shape of general principles with an essentially theological background. Secularised by Hugo Grotius and turned into a rational approach to law in the 17th century, it became a competitor for Roman law in the universities, where chairs for natural law were established in the late 17th and 18th centuries. It contributed to the criticism of Roman law and paved the way for the national codifications that were the eventual outcome of the Enlightenment.

As we provide a more detailed overview of the reception of Roman law below, we will devote special attention to two interesting, methodological points. First, if Roman law was so important as a vehicle for legal teaching, to what extent did it earn a place in practice, where it had to compete with statute law and customary law? What exactly was its place among the possible sources of law that a judge would apply to the case he had to decide? Second, how did legal scholars who were trained in Roman law, which is essentially case-law, manage to eventually develop codifications of private law that consist of general rules forming part of a system of law?

2 Roman Law; Justinian's *Corpus Iuris Civilis*

There is a continuous line of development of legal scholarship on the European continent, starting in the Middle Ages. The starting point lies in Bologna, a university founded against the background of the power struggle between the German emperor and the pope and the rise to prosperity of many cities in Northern Italy. Following Charlemagne's example, the German emperor presented himself as the successor to the Western Roman emperor, and found a certain amount of support for his claims to power in the Roman legal texts. The Emperor Frederick Barbarossa employed a large number of Bolognese lawyers to determine his exact rights in Italy. And the economic growth of the cities meant increasing employment for lawyers, not least in the function of *podestà*: an outsider – not a member of one of the local rivalling families – as the highest magistrate, someone who of course needed to have a solid legal training. This was the market that the University of Bologna – and others, of course – catered for.

The central text in legal education, especially in the early centuries, was the major text of Roman law: the *Corpus Iuris Civilis* of the (Eastern) Roman Emperor Justinian (527-565). Under his aegis, three important works were compiled in 528-534 in Constantinople: the Codex Justinianus (first published in 529 and in a revised edition in 534, containing legal advice and decisions issued by Justinian's predecessors and by himself), the Institutes (an introductory work for beginning students, but with force of law, based on the Institutes of the Roman jurist Gaius written around 160 AD) and

the Digest (or in Greek: *pandectae*; a collection of fragments from the works of the Roman jurists of the classical period, ca. 100 BC-250 AD, issued as one constitution of Justinian). After the publication of these works, Justinian continued to issue new *constitutiones* which are called Novels (*novellae*); a collection of 168 of these together with the three works mentioned earlier forms what is called the *Corpus Iuris Civilis*.¹

The Institutes, Digest, Codex and a collection of Novels extant at the time were taken to Italy when Justinian's generals had managed to gain control over a good part of it in a campaign that had started in 534. The texts were given force of law in Italy, supposedly at the request of Pope Vigilius, in 554.² Little is known about their exact fate during the next five centuries. What is certain, however, is that towards 1100 Justinian's *Corpus Iuris Civilis* formed the basic text for legal education in civil law³ as this was taking shape in the *Studium* of Bologna. Legal education at university spread across the European continent, and its tradition remains unbroken until today. For much of that period, the Roman legal texts formed the mainstay of the legal curriculum.⁴

We will first look at the way the Roman legal texts were used in teaching at medieval universities. It is common to distinguish three – not radically, but still – different approaches to the Roman texts: that of the Glossators, the School of Orléans and the Commentators. We will follow this distinction and treat all three in turn.

3 Glossators⁵

The beginning of this first period is traditionally put at 1088, the year considered by the University of Bologna to be the year of its foundation. The end is the death in 1263 of Accursius, who brought together the glosses produced during the first century and a half of legal scholarship in his *Glossa ordinaria* around 1260. Of course, this does not mean that the methods employed by jurists suddenly changed dramatically after 1263 – though it is true that the writing of new glosses went out of fashion after Accursius.

Much of the work done by scholars from this period consisted in writing glosses to the text of the *Corpus Iuris Civilis*. The glosses – notes in the margins and sometimes between the lines of the Justinianic texts – range from simple explanations of words and alternative readings of the text to thorough analysis of the legal contents. They provide the professor with material for his classes. The Glossators made the first efforts to come to grips with the rather unstructured work that the *Corpus Iuris* is. Apart from providing commentaries in their glosses, they set up a system of references (*allegationes*) that made it easier to relate texts on the same subject matter from the Institutes, Codex, Digest and Novels to each other. In accordance with Justinian's instructions, they tried to interpret the texts in such a way that no contradictions – Justinian's compilers had actually left plenty of these – remained.⁶ This they achieved by grouping together the texts in favour of and against a certain argument or rule, and then interpreting some texts as the rule and others as the exceptions to it by means of distinctions. The approach is essentially a-historical: the Glossators studied the *Corpus Iuris Civilis* as one body of authoritative texts and were not interested in the *inscriptiones* of the Digest, which provide information about individual jurists and make it possible to give each his own place in the historical development of Roman law.

Apart from the glosses, there are several other types of legal literature, partly originating in the teaching of the *Corpus Iuris Civilis* at university.⁷ Some follow the

¹ J.H.A. Lokin and W.J. Zwolve, *Hoofdstukken uit de Europese codificatiegeschiedenis* (2006).

² *Sanctio pragmatica pro petitione Vigili*, to be found at the end of the Schoell and Kroll edition of Justinian's *Novels*.

³ Civil law is used here as meaning the received Roman law, as opposed to canon law.

⁴ P. Koschaker, *Europa und das römische Recht* (1958).

⁵ G. Wesenberg and G. Wesener, *Neuere deutsche Privatrechtsgeschichte* (1985) at 22-28; E. Cortese, *Il diritto nella storia medievale. II: Il basso Medioevo* (1995); H. Lange, *Römisches Recht im Mittelalter*, Band I, Die Glossatoren (1997); H. Schlosser, *Grundzüge der Neueren Privatrechtsgeschichte, Rechtsentwicklungen im europäischen Kontext* (2005) at 36-53.

⁶ Const. Tanta § 15; P. Stein, *Regulae iuris. From Juristic Rules to Legal Maxims* (1966) at 131-132.

⁷ P. Weimar, 'Die legistische Literatur und die Methode des Rechtsunterrichts der Glossatorenzeit' (1969) 2 *Ius Commune* 43-83; P. Weimar, 'Die legistische Literatur der Glossatorenzeit' in H. Coing (ed.),

ordo legum, that is, they treat the texts in the order in which they are found in Justinian's works. This is the case for the *commentum*, later called *lectura*, which is essentially a report of the lectures given by a professor, written down by an experienced student or assistant and sometimes revised by the professor himself. The older *commentum* is normally somewhat condensed, whereas the *lectura* is a full report of all what was said and done in the lecture hall, including remarks of the *reportator* about the behaviour of the students and the stories, jokes and gossip about their colleagues that the professors would tell to enliven their lectures. Another type of literature is the written record of the *quaestio disputata*: this was meant to teach students to analyse a problem and to argue their case in a structured plea. The question could either be a purely theoretical one or one taken from legal practice.⁸

Another kind of commentary, which does not have its origin in the classroom, is the *summa*. *Summae* are summaries, mostly of entire titles of the *Corpus Iuris*. Unlike the *commenta* or *lecturae*, they are systematic works, even if the system does not extend beyond the scope of the title in hand. The oldest ones are not from Bologna, and many are from France – the reason being that the production of books was less well organised there than in Bologna. Azo wrote a number of *summae* on different parts of the *Corpus Iuris*, to which others were added during the first half of the 13th century, to form a standard *summa* on the entire *Corpus Iuris*. No new *summae* were written after that.⁹ It must be stressed that the *summae* are different from the *commenta* and *lecturae* in that they do not follow the order of the text in the *Corpus Iuris* but – at least within the title they treat – establish their own order and system to treat the fragments within the title. To some extent, the *summae* paved the way for the later systematic approach of the Legal Humanists.

Apart from these works, there were also short monographs about specific topics: *summulae* or *tractatus*. And an important category is formed by the literature about the law of procedure: *ordines iudicarii*. The *Corpus Iuris Civilis* does not contain a specific comprehensive section on the law of procedure; the *ordines iudicarii* sought to compile all the relevant material on procedure in general and on specific actions, and provided instructions on how to produce a writ. One of the most influential works of this kind is the *Speculum iudiciale* of Wilhelmus Durantis (± 1270).

The Glossators saw Justinian's *Corpus Iuris* as valid law for their own time, since it was of imperial origin. Consequently, they did not hesitate to add constitutions of the German Emperors Frederick Barbarossa and Frederick II to the Codex. Apparently they had no problems with accepting the validity of texts from a fairly distant past in their own day. And not because they were ivory tower jurists unaware of the realities of legal practice: many Glossators can be shown to have been active as legal advisers, advocates or judges. However, little or nothing of their practical experiences shines through in their commentaries on the *Corpus Iuris*, which remained a rather isolated object of their academic interest: they did not pay attention to legal norms outside it, like statute law or customs. If they used the *Corpus Iuris* in practice – which in itself is not unlikely – the fact has remained unrecorded in their writings.

There was a strong connection between the Glossators and the emperor, in the sense that Roman law provided the emperor with a historical basis for his claim to power. Charlemagne (742-814) had been the first to claim that he was in fact the heir to the throne of the Western Roman emperor – much to the dismay of the Byzantine emperor – and this ideology had been taken up again by Otto I (912-973) when he became German emperor in 962.¹⁰ Frederick Barbarossa (1122-1190, emperor since 1152) employed a good number of Bolognese professors as his legal advisers in his conflicts with the Italian cities and granted them privileges, e.g. exemption from ordinary jurisdiction

Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte. I: Mittelalter (1100-1500), Die gelehrten Rechte und die Gesetzgebung (1973) at 129-258.

⁸ F.P.W. Soetermeer, 'Une catégorie de commentaires peu connue. Les "commenta" ou "lecturae" des précurseurs d'Odofrède' (1991) 2 *Rivista Internazionale di Diritto Comune* 47-68.

⁹ A famous phrase about it is *chi non ha Azzo non va a palazzo* – he who doesn't have Azo should not go to the Palace (of Justice). See E.J.H. Schrage, *Utrumque Ius. Eine Einführung in das Studium der Quellen des mittelalterlichen gelehrten Rechts* (1992) at 58-59.

¹⁰ Koschaker, above n. 4, at 38-54.

(*Authentica Habita*).¹¹ However, one thing that neither Frederick Barbarossa nor his successors ever did was declare Justinian's *Corpus Iuris* to be valid law. The legend that Roman law had been introduced in Germany through a law of the Emperor Lothar II (1125-1137) has been proven to be false by Conring.¹²

Irnerius († after 1125) is the oldest Glossator to whom certain glosses can be attributed. Differences of opinion among Glossators can be demonstrated as early as the 12th century, with Bulgarus de Bulgarinis (†1166) and Martinus Gosia (†ca. 1160) – two of the so-called Quattuor Doctores – as famous adversaries. Bulgarus eventually turned into a kind of founding father of the 'mainstream' of the Glossators, who stuck closely to the text in their interpretation, with Martinus and his pupils representing the dissident line, which preferred a more liberal interpretation based on the principles of good faith, possibly inspired to some extent by canon law. Bulgarus' pupil Johannes Bassianus was the teacher of Azo (†ca. 1220), who in turn was the teacher of Accursius (†1263). The latter is responsible for what came to be the culminating work of the period: around the middle of the 13th century he compiled a dense apparatus¹³ of glosses on the entire *Corpus Iuris*, using all the material that had been prepared since the beginning of the 12th century. This *Glossa ordinaria* or Accursian Gloss became the standard commentary on the *Corpus Iuris* for many centuries to come. With it, writing glosses had reached its zenith and the attention of legal scholars shifted to different approaches, made possible because the *Corpus Iuris* had by now been completely cross-referenced and provided with a full commentary.

4 Methodological Aspects: The Scholastic Method;¹⁴ Sources

The essential medieval scientific method is the scholastic method, or dialectics: formal logic applied to an authoritative text. Just as the theologians dealt with the Bible as their main text, and the students of Medicine with Galenus, the jurists had the *Corpus Iuris* of Justinian. The objective was to be able to read the text as a logical unit. In the case of the *Corpus Iuris*, this involved finding a way of harmonising texts containing opposite opinions about or solutions for the same legal problems. In the introductory constitutions to his codification, Justinian had foreseen this problem of *antinomiae*, and had given the legal world the imperial solution: that in fact there were none, provided one interpreted his books with sufficient subtlety. This is exactly what the medieval civilists¹⁵ set out to do. The same happened in canon law: the very title of Gratian's *Decretum* (*Concordia discordantium canonum*) indicates that it is about harmonising texts that disagree with one another – see below.

The formal logic applied was largely based on a work by Abélard, *Sic et non*, written around 1120. This was an important and influential book, in which Abélard applies the principles of formal logic laid down by Aristotle¹⁶ to texts of the Church fathers. He juxtaposes contrasting texts, points out the differences of opinion and treats them in a critical, dialectic manner without giving a final decision. *Sic et Non* contains a philological method applied to authoritative texts. It raises a series of common doubts: has the text been corrupted, has the author made a mistake, do we really understand

¹¹ W. Stelzer, 'Zum Scholarenprivileg Friedrich Barbarossa's (*Authentica "Habita"*)' (1978) 34 *Deutsches Archiv für Erforschung des Mittelalters* 123-165.

¹² H. Conring, *De origine iuris germanici* (Helmstedt 1643). Two centuries earlier, the Italian Humanist Lorenzo Valla had proved that the famous *Donatio Constantini*, which supported the claim that the Emperor Constantine had transferred power over the Western Roman Empire to the Pope when he set up a new capital in the East, was in fact a forgery. See W. Setz, *Lorenzo Vallas Schrift gegen die Konstantinische Schenkung* (1975).

¹³ An apparatus being a full commentary – as opposed to incidental glosses – which fills the margins around the text.

¹⁴ M. Grabmann, *Die Geschichte der scholastischen Methode I-II* (1909-1911; reprinted 1961); G. Otte, *Dialektik und Jurisprudenz*, Ius commune, Beiheft 1 (1971).

¹⁵ I.e. lawyers working in civil law, as opposed to canonists.

¹⁶ That is, the works of Aristotle that were known at the time: the *Logica vetus*. This consisted of Latin translations, partly made by Boethius in the 5th century, and by further translations of Arabic translations.

him?¹⁷ Texts are grouped in function of their similarity (*similia*) or contrariety (*contraria*) and reasoning *per analogiam* or *a contrario* is applied, with distinctions (*distinctiones*) being established that explain the differences between the groups. This so-called *scholastic* method could be applied to any authoritative text, whether in the field of theology, medicine, philosophy or law, and it reigned supreme in the Middle Ages, without, however, becoming extinct in later ages – in fact, it remains an important part of legal reasoning to this very day.

As far as the sources of law are concerned, Schrage notes that among civil lawyers in the Middle Ages there was no specific hierarchy of the sources of law. There was a distinction between civil and natural law, but neither of the two was seen as more important than the other. It is not until Azo in the *Summa* that anyone puts forward the idea that some sources of law are more important than others: Azo – remarkably for a civil lawyer – singles out the decisions of the great Councils of Nicaea, Constantinople, Ephesus and Chalcedon as more important than other rules. It seems that the idea of a hierarchy of sources of law has a Christian background, and through canon law influenced medieval civil law as well.¹⁸

5 School of Orléans¹⁹

The School of Orléans may be traced back to 1235 as a place where legal education was organised; it was upgraded to a university in 1306. It had already won fame in the 13th century: Thomas Aquinas mentions Paris, Bologna, Salerno and Orléans as the four great *studia generalia* of his day. The first professors were Frenchmen and Italians who had studied at Bologna, and may well have belonged to the opponents of Accursius. Later there were some important figures who had had their training in France, like Jacques de Revigny (Jacobus de Ravanis, †1296) and Pierre de Belleperche (Petrus de Bellapertica, †1308). They had more interest in legal theory than the Italian Glossators and a more historical approach to the Roman legal texts. Revigny is known to have criticised the Glossators for sticking too closely to the text of the *Corpus Iuris Civilis* and for ignoring the *ratio* of a given passage. The members of the School of Orléans also had their eyes wide open for legal practice: they gave examples taken from contemporary cases. And they contributed to non-Roman areas of law, like international private law and penal law.

In their approach to Justinian's *Corpus Iuris*, they were generally more original than the Italian Glossators, and they treated its texts with more freedom. Revigny and Belleperche are known to have considered the views of canon law. An important innovation by Revigny was the creation of the legal person – later to become known as a *persona repraesentata* among the Commentators in Italy. It must be noted, however, that this particular subject was extensively treated by canon law as well; Revigny appears to have shared an interest with canon lawyers for a number of different topics.

Eventually, the works of the School of Orléans were to form a source of inspiration for the Commentators in the 14th century; Cinus de Pistoia, in particular, speaks with great respect about Revigny and Belleperche and quotes them frequently. Though it continued to be an important centre of learning in France, the heyday of the School of Orléans was apparently over by then – although this may also be due to the fact that the later period of the history of this school remains rather underinvestigated.²⁰

¹⁷ J. Huizinga, 'Abaelard' *Handelingen en levensberichten van de maatschappij der Nederlandsche letterkunde te Leiden 1934-1935* [s.a.] 66-82 at 78.

¹⁸ E.J.H. Schrage, 'Rechtsquellen aus der Sicht der Glossatoren' in *Iuris vincula. Studi in onore di Mario Talamanca* (2001) VII 409-424 at 416 and 423.

¹⁹ E.M. Meijers, 'De universiteit van Orléans in de XIIIe eeuw' (1918-1919) 1 *Tijdschrift voor Rechtsgeschiedenis* 108-132 and 443-488, (1920-1921) 2 *Tijdschrift voor Rechtsgeschiedenis* 460-508; French translation in Meijers, *Études d'Histoire du Droit I-IV*, R. Feenstra and H.F.W.D. Fischer (eds.) (1956-1966) III, 3-148; Wesenberg and Wesener, above n. 5, at 29; H. Lange and M. Kriechbaum, *Römisches Recht im Mittelalter. Band II, Die Kommentatoren* (2007) 130-137, 518-567.

²⁰ Only recently has a thorough study on the School of Orléans in the 14th century been published: M. Duynstee, *L'enseignement du droit civil à l'université d'Orléans du début de la guerre de cent ans*

The *Ultramontani* (the French lawyers at Orléans, but also at Montpellier and Toulouse) used essentially the same methods as their Italian colleagues at Bologna, even if they may have been a bit more adventurous in applying them, and wrote the same types of legal literature. Many *summae* were written in France, perhaps because book production was less well organised there, meaning that copies of the *Corpus Iuris Civilis* were not readily available.²¹

One genre that blossomed especially at Orléans was the *repetitio*: a separate lecture on especially difficult texts. These were not treated in the context of the normal lectures, but at another time, in the afternoon. During the *repetitio*, the central text (*sedes materiae*) was studied in connection with other texts, which in the end often gave rise to a complete and systematic treatment of a certain theme. Some form of systematic treatment of the law is therefore also found in the School of Orléans.

6 Post-Glossators, Commentators and Consiliators²²

The representatives of the direction that legal scholarship took after the Glossators are often simply called Post-Glossators – a name that apparently does not give them much credit for any achievements in their own right. A more favourable name would be Commentators, and – with reference to the important activity of many of them as legal advisers who wrote *consilia* – Consiliators has been suggested as well. There is no clean break; the Commentators built on the work of the Glossators and the School of Orléans. The three most important figures among the Commentators are Cinus de Pistorio (†1336), whose tribute to Revigny and Belleperche has already been mentioned, Bartolus de Saxoferrato (±1314-1357), a pupil of Cinus, and Baldus de Ubaldis (±1327-1400). Bartolus became the emblematic lawyer of his time, immortalised in the expression *nemo iurista nisi Bartolista* – nobody is a lawyer unless he is a follower of Bartolus.

Accursius' *Glossa ordinaria* is the watershed between Glossators and Commentators. It is the culminating point of a century and a half of legal learning, but also forms a point of reference for the future. The new era of the Commentators saw more involvement with legal practice, a further development of the dialectic method – helped by the fact that new translations of the works of Aristotle, some of them unknown thus far (*Logica nova*), became available – and the spreading of the learned law (*Ius commune*) across Europe.

The time of the Commentators saw the true beginning of the reception of Roman law. With economic prosperity and development in the Italian cities during the 11th-13th centuries, the need for legislation had been met by local authorities with a great mass of local statutes. Together with all sorts of local customs, this did not make the picture any simpler: sources of law were many, inconsistent and incomplete. Given this situation, Roman law had a part to play as a more complete legal system in the background, a framework that could serve to assign local statutes and customs a place within a greater whole. At the same time, lawyers with university training in Roman law were ready to meet the demand for legal expertise in everyday practice. Legal thinking along Roman lines became increasingly important, a development both promoted and underlined by the establishing of high courts of law that were manned by lawyers schooled at university: the Parlement de Paris (1273), the Great Council of Malines (1473) and the Reichskammergericht (1495). The fact that Roman law was of imperial origin was an important factor, but it started to impose itself by the sheer weight of its intellectual authority as well.

(1337) *au siège de la ville* (1428), *Studien zur europäischen Rechtsgeschichte* 253 (Frankfurt am Main 2010).

²¹ On the organisation of book production in the Middle Ages, see F.P.W. Soetermeer, *Utrumque ius in peciis: die Produktion juristischer Bücher an italienischen und französischen Universitäten des 13. und 14. Jahrhunderts* (2002).

²² N. Horn, 'Die juristische literatur der Kommentatorenzeit' (1969) 2 *Ius Commune* 84-129; N. Horn, 'Die legistische Literatur der Kommentatoren und der Ausbreitung des gelehrten Rechts' in Coing, above n. 7, at 261-364; Wesenberg and Wesener, above n. 5, at 28-39; Lange and Kriechbaum, above n. 19. Following Lange and Kriechbaum, the name Commentators will be used.

The increased attention for legal practice is visible in the genre of the *quaestio disputata*: from the middle of the 13th century onwards, the Bolognese professors increasingly based their *quaestiones* on local statute law or even customary law, which were thus analysed by means of the methods of civil law.

Giving legal advice and being active in legal practice was not necessarily a new development that started with the Commentators, but they certainly showed more of their practical activities in their writings. The *consilium* – the academic advice of a law professor on a practical problem – became probably the most important form of legal literature of the time. Baldus made a name for himself as *consiliator*; according to the – not entirely reliable – printed editions, he wrote almost 2500 *consilia*. Judges were often obliged to ask for a *consilium* before giving their decision. In the *consilia*, the difficult mixture of local statutes and customs is tackled through the techniques of interpretation and argumentation of the Roman lawyers. In other words, through the *consilium* the science of Roman law based on the *Corpus Iuris* acquired an important influence on legal practice. Roman law was used as the main argument; statute law was treated within its context, mainly as a deviation from it, and experienced a Romanising influence as a result.

Typical of the Commentators is also that they were more inclined to take their cue from a specific theme or question (*materia*) rather than from a text of the *Corpus Iuris*. The corresponding form of literature is the *tractatus*, which consequently is not structured in function of the texts of the *Corpus Iuris*; the structure follows from the *materia* and incorporates texts from the *Corpus Iuris* as they fit the arguments and counter-arguments. Thus, the Commentators worked further towards a more synthetic and systematic use of the texts of the *Corpus Iuris*. A useful tool for them to achieve this was the last title of the Digest: *De diversis regulis iuris antiqui*, about different rules of ancient law. It contains 211 fragments which each consist of one or more rules or maxims. This title was considered to be a kind of summary of the entire contents of the Digest.²³

In the time of the Commentators, there was a stronger connection between civil law and canon law. Baldus, for instance, wrote commentaries both on Civil and canon law. In the 14th century, it became customary for students to study both subjects and thus become *doctor utriusque iuris*, doctor of both laws.

7 Canon Law²⁴

During the Middle Ages, canon law was every bit as important as civil law, both in practice and at university, specifically in the fields of family law, contracts, testaments and the law of civil procedure. Canon law courts had a far from negligible jurisdiction.

Originally, canon law had no manageable *corpus* of text comparable to civil law's *Corpus Iuris Civilis*. This changed around 1140, when a monk called Gratianus made a collection of texts of very diverse origin – writings of the Church fathers, decisions of Councils, texts from the Bible – which is officially called *Concordia discordantium canonum* (harmonisation of disagreeing canones), but is usually known as the *Decretum Gratiani*. Given the character of its source material, it gained great authority, even if it was only a private collection and not an official codification. It provided a comprehensive and systematic collection of canon law, trying to bring together all the law of the Church into one systematic whole.

After the publication of the *Decretum*, the popes kept making laws, taking administrative decisions and giving sentences as judges. These texts (*decretales*) were later gathered together in other collections. The *Liber Extra* is a collection of decretals in five books, published in 1234 by Pope Gregorius IX. It was followed in 1298 by a collection of decretals of Bonifatius VIII (and his predecessors), called the *Liber Sextus*. Both these collections are real codifications of canon law: they were officially issued as

²³ Stein, above n. 6, at 148.

²⁴ K.W. Nörr, 'Die kanonistische Literatur' in Coing, above n. 7, at 365-382; Schrage, above n. 9, at 90-109. See also J. Brundage, *Medieval Canon Law* (1995).

such by these two popes, and to make sure that they would be applied in practice they were sent to the university of Bologna with the urgent recommendation that students of canon law should study them and apply them in practice after their studies. Together with the *Decretum* they form the bulk of the *Corpus Iuris Canonici*, which additionally contains decretals of Pope Clemens V dating from 1317 (*Clementinae*), decretals (*Extravagantes*) of Pope Johannes XXII (1316-1334) and some more decretals of later popes (*Extravagantes communes*). These three further sets of texts were never officially issued as codifications and consequently did not quite have the authority of the earlier ones.

In material law, canon law made a significant contribution to the development of a general law of contract. In civil law, contracts were treated as separate categories, each with its own action or actions that defined the legal consequences of the contract. An agreement that could not be brought under one of the predefined categories was no contract in civil law, and therefore – in principle – not actionable. Canon law applied the principle that all agreements should lead to actionable obligations: *pacta sunt servanda*, a famous phrase that can be traced back to the Council of Carthage of 348 AD²⁵ and that was reinforced by a passage from the Gospel of Matthew (5:37): ‘But let your “Yes” be “Yes” and your “No” be “No”. Whatever is more than these is of the evil one.’²⁶ In other words, a good Christian should always be true to his word.²⁷

The same general approach – as opposed to one based on specific actions – was applied by canon law, supported by moral theology, to the field of compensation for damage caused. Rather than applying a number of actions, each with its own specific and limited reach, canon law considered that anyone who through his fault (*culpa*) caused damage to another should pay the latter compensation. This eventually – Hugo de Groot’s work is an important link here, as we shall see below – led to the general approach we find in modern codifications, such as the French *Code civil* (Art. 1382) and the Dutch civil codes of 1838 (Art. 1401) and 1992 (Art. 6:162).

Canon law – together with civil law – also did much for the development of the law of procedure. This was a particularly poorly treated subject in the *Corpus Iuris Civilis*, which contains no specific section on procedure in general – there are many smaller sections on aspects of the law of procedure, but they are scattered all over the *Corpus Iuris Civilis*. These smaller sections were eventually brought together into systematic overviews of the law of procedure, often called *ordines iudicarii*. The most influential of these is the *Speculum iudiciale* of Wilhelmus Durantis (±1270). Canon law contributed much to the discussion about general principles of the law of procedure that helped to construct these *ordines iudicarii*.

The method of canon law is essentially the same as that of civil law.²⁸ The official title of the *Decretum* expresses very well what it was about: reconciling apparently disagreeing texts so as to form one authoritative whole. This was done with the help of the well-known dialectics: through arguments *per analogiam* and *a contrario* and by establishing *distinctiones* that explained the differences between the texts that were in agreement with each other and those that expressed another view. There were *summae* as well, the most important one being written in the middle of the 13th century by Hostiensis – it is full of references to civil law, giving the author the well-deserved name of *monarcha utriusque iuris*, the king of both laws.

Just like civil law, canon law ended up developing more or less systematically treated doctrines. It did so, however, on the basis of different source material – the *Corpus Iuris Canonici* – and while concentrating on different themes: especially the law of persons and family law.

²⁵ The relevant text may be found in the *Liber Extra*: X 1:35:1.

²⁶ Translation from World English Bible.

²⁷ Cf. A. Söllner, ‘Die causa im Vertragsrecht des Mittelalters bei den Glossatoren, Kommentatoren und Kanonisten’ (1960) 77 *ZRG Rom. Abt.* 182-269 (partly reprinted in E.J.H. Schrage, *Das römische Recht im Mittelalter*, Wege der Forschung 635 (1987) 131-186.

²⁸ Stein, above n. 6, at 132; cf. W. Fikentscher, *Methoden des Rechts in vergleichender Darstellung. Band I: Frühe und religiöse Rechte* (1975).

8 Moral Theology²⁹

Moral theology is a branch of theology that concerns itself with moral questions, which it tries to answer in the light of the Christian faith. It is concerned with good and bad in human behaviour and typically centres more on what man is supposed to do than – as dogmatic theology does – on what he is supposed to believe. To that extent it comes quite close to law, which also concerns itself with questions of what is wrong or right, or what should be done in practical situations where people come into conflict with each other. Sources of moral theology are the Old and New Testament, but may also be found in a not specifically religious area, like philosophy, especially ethics, and natural law.

The greatest figure in moral theology, without any doubt, is Thomas Aquinas (±1225-1274). His most important work is the *Summa theologiae*, a manual for beginning students of theology on all aspects of the relationship between God and man. It contains many passages about legal subjects. In Part I, Thomas writes about natural law, defined as man's participation in God's eternal law, which can be discovered through reason. It is derived from general principles, like the promotion of good and avoidance of evil. Part II of the *Summa* contains Thomas's ethics, which are to a large extent derived from the ethical works of Aristotle. Thomas was able to profit from recently made – possibly at his request – translations of the works of Aristotle by Willem van Moerbeke, which had made available several works that had not been in circulation before.

Important for law is Thomas's doctrine of restitution. Building on Aristotle's *Ethica Nicomachea*, on the one hand, and on Saint Augustine, on the other, it states the very general principle that whenever anyone through his fault has caused another to have less than what is due to him, he must restore (*restituere*) the latter to his original position. When this is not physically possible, he must pay him a compensation in money. Causing damage to another is a sin (*peccatum*) which cannot be forgiven before restitution has taken place.³⁰ This is a very general approach that fits a great number of different situations and may be applied to both contracts and torts or negligence. It is a totally different approach than that of Roman law, where specific actions with a limited reach determine both the law of contracts and that of the *delicta privata*. Thomas based himself on Aristotle's concepts of *iustitia distributiva* and *iustitia commutativa* in the *Ethica Nicomachea*. The role of the *iustitia distributiva* is to establish an initial situation of equality, where every man has a position and goods in accordance with his worthiness and talents. Whenever this equality is disturbed, it is the role of the *iustitia commutativa* to rectify the situation and make sure that the initial order is restored. Legal actions, therefore, may be considered as individual manifestations of the general principle of *iustitia commutativa*.

The thing to note about the doctrine of restitution is that it lays down a general approach to the law of obligations, equally applicable to the law of contracts as to the law of tort, negligence or delict. It is on a far higher level of abstraction than the Roman case-law built around the specific actions on a limited number of contracts and delicts.

9 School of Salamanca³¹

Moral theology continued to base itself on the doctrines of Thomas Aquinas (Thomism) for a long time, until early in the 16th century when the traditional ideas about man and his relationship with God and the world started to be challenged by Humanism, Protestantism and the discovery of the New World. The School of Salamanca took up these challenges and tried to provide an answer to them. It was a school of theologians

²⁹ R. Feenstra and L.C. Winkel, *Vergelding en vergoeding. Enkele grepen uit de geschiedenis van de onrechtmatige daad* (2002) at 15-17; the central text of Thomas Aquinas is *Summa Theologiae, Secunda Secundae, Quaestio 62, art. 2 ad secundum*; in his *Opera omnia* (1897) 42-43.

³⁰ This idea is expressed in a letter by Saint Augustine incorporated in the *Decretum Gratiani* (C. 14 q. 6 c. 1) and repeated in the *regula Peccatum* in the *Liber Sextus* (VI 5:12:4).

³¹ O.W. Krause, *Naturrechtler des 16. Jahrhunderts. Ihre Bedeutung für die Entwicklung eines natürlichen Privatrechts*, Diss. Göttingen 1949 (1982) 39-101; cf. G. Nufer, *Über die Restitutionslehre der spanischen Spätscholastiker und ihre Ausstrahlung auf die Folgezeit*, Diss. Freiburg im Breisgau (1969).

and jurists who intended to reconcile Thomism with the new social and economical order. Its most famous representatives are Francisco de Vitoria (±1483-1546), Martín de Azpilcueta (1492-1586), Domingo de Soto (1494-1570) and Fernando Vázquez (1512-1569). The main objects of study of the School were man and his practical problems of a moral, economical or legal nature.

The School did important work in the field of economics; it is considered to be the founder of economic science.³² But for law it was at least as important. The members of the School developed a theory of natural law that yielded interesting conclusions: equality and human rights and the idea that sovereignty rests with the people, which can transfer it to the monarch. Vitoria developed a theory about *ius gentium* and thus became the founder of public international law. Another creation of the School are theories about just war. And finally, some of its members took part in the famous debate between Juan Ginés de Sepúlveda and Bartolomé de las Casas about the legitimacy of the conquest of the New World (Junta de Valladolid, 1550-1551).

The ideas of the School of Salamanca reached the Netherlands (in the broad sense of the term) along different lines. One of these is the Jesuit Lenaert Leys (Leonardus Lessius, 1554-1623) of Louvain. During his studies in Rome he had met one of the members of the School of Salamanca, Francisco Suárez (1548-1617) with whom he remained in correspondence. Lessius taught moral theology for years at the Jesuit *studium* at Louvain, introducing the ideas of the School of Salamanca. For the weekly debates about ethical questions he used a work by Martín de Azpilcueta (alias *Doctor Navarrus*, 1492-1586). He was known for his clear style of writing; one of his works was *De iustitia et iure ceterisque virtutibus cardinalibus* (1605). In the Northern Netherlands, it seems that Hugo de Groot (Grotius) was inspired by Domingo de Soto's *De iustitia et iure*, which he had brought to him when he was a prisoner at Loevestein castle in 1619. He also quoted from the works of Azpilcueta. It was through Grotius that the general principles of moral theology would cross over from theology to law.³³

10 Legal Humanism³⁴

Legal Humanism – a new approach to civil law – was inspired by the general spirit of inquisitiveness and no longer taking things for granted that ended the Middle Ages and ushered in another era. It is characterised by a great interest in classical antiquity and a desire to get to know it directly from the sources. Rather than just studying the legal texts, the Humanists developed an interest in their historical and linguistic background.

Legal Humanism had two periods during which it blossomed, in two different places: it started in France in the 16th century, especially at the University of Bourges. Some important figures who must be named in this context are Guillaume Budé (Budaeus, 1468-1540), Andrea Alciato (Alciatus, 1492-1550) and Jacques Cujas (Cuiacius, 1522-1590). More than a century later, it was prominent again in the Republic of the Netherlands, roughly from 1670-1730. The young, prospering Republic attracted the interest of scholars from many countries through the high academic level of its antiquarian approach to the Roman legal sources, known as the Dutch Elegant School.³⁵

³² J. Schumpeter, *History of Economic Analysis* (1954) 94-115.

³³ See R. Feenstra, 'L'influence de la scolastique espagnole sur Grotius en droit privé: quelques expériences dans des questions de fond et de forme, concernant notamment les doctrines de l'erreur et de l'enrichissement sans cause' in *La Seconda Scolastica nella formazione del diritto privato moderno*, Incontro di studio, Firenze, 16-19 Ottobre 1972, Atti [= Per la storia del pensiero giuridico moderno, 1] (1973) at 377-402, reprinted in R. Feenstra, *Fata Ivris Romani, Études d'histoire du droit* (1974) at 338-363.

³⁴ G. Kisch, *Humanismus und Jurisprudenz. Der Kampf zwischen mos italicus und mos gallicus an der Universität Basel* (1955); H.E. Troje, 'Die Literatur des gemeinen Rechts unter dem Einfluss des Humanismus' in H. Coing (ed.), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte. II: Neuere Zeit (1500-1800), 1. Teilband, Wissenschaft* (1977) 615-795; Wesenberg and Wesener, above n. 5, at 60-71.

³⁵ G.C.J.J. van den Bergh, *Die holländische elegante Schule, ein Beitrag zur Geschichte von Humanismus und Rechtswissenschaft in den Niederlanden 1500-1800*, Studien zur europäischen Rechtsgeschichte 148 (2002).

Perhaps the greatest figure is Gerard Noodt (1647-1725, professor at Leyden from 1706), but outside the ranks of university professors we must also mention Henrik Brenkman (1681-1736), who worked for many years on a new edition of the Digest that he never managed to finish; his notes, however, form the basis of the important edition by Gebauer and Spangenberg,³⁶ and Mommsen's preface to his *editio maior* of the Digest owes much to Brenkman's book *Historia pandectarum*.³⁷

With Legal Humanism, there began a completely different approach to the *Corpus Iuris Civilis*. The Legal Humanists were interested in the historical context of the texts of the *Corpus Iuris* and tried to read them against that background, relating them to the information provided by non-legal sources from antiquity. The typical publication in this field is the *observatio*, a short essay in (elegant) Latin making a specific point.³⁸ Also, they tried to return to the oldest possible version of the texts and find the manuscripts that would help them to do so: *ad fontes* (back to the sources) sums up this approach. For the Digest, in particular, this meant an increased interest in the elusive Codex Florentinus, which was eventually reproduced in a kind of quasi-facsimile edition by Francisco and Lelio Torelli in 1553.³⁹ Another innovation was that, unlike their medieval predecessors, Humanists did read Greek texts (*Graeca leguntur*),⁴⁰ which enabled them, for instance, to use manuscripts of the Basilica⁴¹ to improve the text of the *Corpus Iuris*. The new historical and critical approach to the legal texts came to be known as the *mos gallicus* as opposed to the traditional Bartolistic method, the *mos italicus*.⁴² It was not necessarily welcome in legal practice; quite the contrary. Practical lawyers did not like any doubt being cast on the texts they used to base their arguments on.

The Legal Humanists were also responsible for the beginnings of interpolation criticism and palingenesia. Interpolation criticism aims at eliminating the changes made to the legal texts from the classical period of Roman law (roughly 100 BC - 250 AD), when they were inserted into the Digest by Justinian's compilers. This is not easy to do with any degree of certainty unless one has an uninterpolated text for comparison, and over the centuries some scholars have been overzealous in assuming interpolations. Whatever the merit of early interpolation criticism, it certainly strengthened the impression that the text of Justinian's codification was anything but perfect.

Palingenesia profits from the fact that every fragment of the Digest is provided with an *inscriptio* giving the name of the original author and where in which work of that author the fragment belonged. They allow a sort of reconstruction of the original works – always with the Justinianic text – to the extent that fragments from them were used in the Digest. The *modus operandi* is simple: separate all the fragments contained in the Digest, maintaining the *inscriptiones*, sort them by jurist and then for each jurist sort them by work and then by book (e.g. *Ulpianus, libro octavo decimo ad edictum*). The project was begun by Jacobus Labittus at the instigation of Cujas: he made a list of authors with references both to texts of those authors contained in the Digest and to

³⁶ *Corpus iuris civilis ... recensuit Georgius Christianus Gebauer, et post ejus obitum editionem curavit Georgius Augustus Spangenberg* (1776-1797).

³⁷ H. Brenkman, *Historia Pandectarum seu Fatum Exemplaris Florentini [...]*, Trajecti ad Rhenum, apud Guilielmum van de Water (1722). The Codex Florentinus is the manuscript of Justinian's Digest, probably written in the 530s in Constantinople and therefore considerably older than the manuscripts normally used by the Glossators and Commentators. It was taken by the Florentines from the Pisans in 1406 and been jealously guarded in Palazzo Vecchio ever since; very few scholars at the time got a chance to see it.

³⁸ Troje, above n. 34, at 671-689.

³⁹ The famous Torelli edition is *Digestorum seu pandectarum libri quinquaginta ex Florentinis pandectis repraesentati*, curavit Laelius Taurellus, Florentiae, in officina Laurentii Torrentini (1553).

⁴⁰ H.E. Troje, *Graeca leguntur. Die Aneignung des byzantinischen Rechts und die Entstehung eines humanistischen Corpus iuris civilis in der Jurisprudenz des 16. Jahrhunderts* (1971).

⁴¹ The Basilica are a Greek integrated version of Justinian's Digest and Codex made by the Byzantine Emperor Leo the Wise around the year 900. Its text contains many fragments of literal Greek translations of the Digest and Codex.

⁴² F. Carpintero, "Mos italicus", "mos gallicus" y el Humanismo racionalista. Una contribución a la historia de la metodología jurídica' (1977) 6 *Ius Commune* 108-171.

passages in the texts of other authors where they are mentioned. He did not yet try to restore the original order in the works of individual jurists; this was only done in the 19th century by Lenel, the author of a more definitive *Palingenesia*.⁴³

Given that Justinian's compilers only retained 5 per cent of the available texts, the *Palingenesia* was never going to achieve a complete reconstruction of the original works. However, in the case of jurists of whose works much has been used, it is possible to get a good impression what the structure of a given work was. Thanks to the *Palingenesia*, separate Digest fragments may be read within their original context, which can be very helpful for their interpretation. Thus it serves both a legal and an historical purpose.

Apart from this more antiquarian approach, there was also a tendency – already noticeable especially among the later Commentators but now becoming more important – to try and achieve a more systematic treatment of the contents of the *Corpus Iuris*. The medieval *summae* and *repetitiones* had introduced systematic treatment for one title at a time, but now it was attempted to present the entire *Corpus Iuris* as one systematic whole. Justinian's Institutes were chosen as a model, since they are the only part of the *Corpus Iuris Civilis* containing a real system, derived from that of the Institutes of Gaius (ca. 160 AD).⁴⁴ The most famous example of such a new systematic treatment is the commentary of Hugues Doneau (Donellus, 1527-1591),⁴⁵ though the method was also applied to other material than the *Corpus Iuris*, notably by Charles Dumoulin (Molinaeus, 1500-1566) to the customary law of Paris (*Coûtume de Paris*) and by Hugo de Groot to the law of Holland.⁴⁶

Another point that affects legal methodology is the fact that the critical approach of the Humanists slowly but surely eroded the authority of Roman law. On the one hand, the hunt for new manuscripts had revealed many doubts about the exact wording of certain passages. On the other hand, the desire of the Humanists to re-establish the *classical* text of the Roman jurists suggested that the traditional Justinianic text was not, in fact, the real thing. This made Roman law vulnerable in the competition with other legal sources, especially natural law. Its authority, which had once rested on that of the (German) emperor, now came to be based on its intrinsic quality, where it had not been explicitly challenged. The change is summed up in a Latin play on words: Roman law applied *non ratione imperii, sed imperio rationis* (not for reason of its authority, but for the authority of Reason).⁴⁷

11 Natural law⁴⁸

During the 17th and 18th centuries, natural law became an increasingly serious competitor for Roman law, and it would eventually make an important contribution to the national codifications that would put an end to the direct application of Roman law in practice.⁴⁹

⁴³ J. Labittus, *Index legum omnium quae in Pandectis continentur [...]* (1557); O. Lenel, *Palingenesia iuris civilis, I-II* (1889).

⁴⁴ It was impossible for them to use Gaius directly, because the text of his Institutes was not rediscovered until 1816.

⁴⁵ *Hugonis Donelli Iurisconsulti, Commentariorum de iure civili libri viginti octo [...]*, Francofurti, apud Andr. Wecheli heredes, Claudium Marnium et Joan Aubrium, 1595-1597.

⁴⁶ Ch. Dumoulin, *Commentaria in consuetudines Parisienses* (1539); Hugo de Groot, *Inleidinge tot de Hollandsche Rechts-Geleertheyd* (1631).

⁴⁷ G.C.J.J. van den Bergh, *Geleerd recht. Een geschiedenis van de Europese rechtswetenschap in vogelvucht* (2007) at 87.

⁴⁸ C. von Kaltenborn, *Die Vorläufer des Hugo Grotius auf dem Gebiete des Ius naturae et gentium, sowie der Politik im Reformationszeitalter* (1848; reprinted 1965); Chr. Bergfeld, 'Johann Gottlieb Heineccius und die Grundlagen seines Natur- und Völkerrechts' in J.G. Heineccius, *Grundlagen des Natur- und Völkerrechts* (1994) 507-532; L. Danneberg, 'Die Auslegungslehre des Christian Thomasius in der Tradition von Logik und Hermeneutik' in F. Vollhardt (ed.), *Christian Thomasius (1655-1728). Neue Forschungen im Kontext der Frühaufklärung* (1997) 253-316; H. Thieme, *Das Naturrecht und die europäische Privatrechtsgeschichte* (1954, 2nd ed.); H. Thieme, 'Die Zeit des späten Naturrechts' (1936) 56 *ZRG Germ. Abt.* 202 ff.; H. Welzel, *Naturrecht und materiale Gerechtigkeit* (1962, 4th ed.).

⁴⁹ Schlosser, above n. 5, at 84-142.

The idea of natural law as an all-encompassing system of law may be traced back as far as the ancient Greek philosophers. Roman lawyers – under the influence of the Stoa – treated it as well, mainly as a body of law equally observed by all peoples, and therefore also called *ius gentium*. The Church father Aurelius Augustinus (354-430) promoted the idea of a divine origin of the law, just after Christianity had become the state religion of the Roman empire (380). The Latin Bible thus became the main source of natural law. We have already seen that Thomas Aquinas (1224/1225-1274) later developed a legal philosophy – also inspired by the works of Aristotle (384-322) – which derived law from the ideal order of God’s creation (*ordo Dei*). During the 16th century, as we have also seen, Thomas’s philosophy was adapted by the so-called *Secunda Scholastica* of the School of Salamanca. The Spanish doctrine of natural law – which maintained a theological basis – had an important influence on legal philosophy and even on dogmatic aspects of law, since it treated specific contemporary problems from a natural law point of view.

The Dutchman Hugo Grotius (1583-1645) – who deserves to be singled out because of the important influence he had on other lawyers in various countries – continued the tradition of the School of Salamanca, but was responsible for an important change: he developed the idea of a rational natural law based on human intellect (*ratio*). In his famous and influential work *De iure belli ac pacis* (1625) he carefully states that even if we were so bold as to suppose that there is no God, there would still be valid natural law.⁵⁰ The idea of a rational natural law was developed further by the German lawyer Samuel Pufendorf (1632-1694), who completely separated natural law from any theological foundation. Pufendorf built up a legal system *more geometrico*, by a method inspired on natural sciences, deducing its rules from a number of axioms.

This rational natural law became an important source of criticism on Roman law. The monopoly of Roman law in university education was undermined by the institution of chairs in natural law from the middle of the 17th century onwards – a case in point being Pufendorf’s chair in Heidelberg (1661). In Germany, Christian Thomasius (1655-1728) and Christian Wolff (1679-1754) developed it further. In France, Jean Domat (1625-1696) applied natural law principles in his book *Les lois civiles dans leur ordre naturel* (1689). The different designs for a natural law system paved the way for the codifications brought about by the political developments and events of the 18th century. An early one was the Bavarian *Codex Maximilianeus Bavaricus* of 1756; it was followed in Prussia by the *Allgemeines Landrecht für die Preussischen Staaten* (ALR, 1794), by the famous French *Code civil* (1804) and the Austrian *Allgemeines Bürgerliches Gesetzbuch* (ABGB, 1811). Introduction of a codification always entailed putting an explicit end to the application of Roman law in practice – however, since it remained an important subject in most universities, its intellectual life as a legal *lingua franca* continued, and has done so until now.

12 *Usus modernus Pandectarum*⁵¹

If Legal Humanism was the fashionable way to work with the *Corpus Iuris Civilis* in the 16th and 17th centuries, in the background there were many more lawyers who used it from a purely practical point of view, continuing the medieval tradition of the *mos italicus*. The work of the Legal Humanists had made some difference through better

⁵⁰ *De iure belli ac pacis, Prolegomena* 11. About the influence of Hugo de Groot’s work on others, see R. Feenstra, ‘Grotius’ Doctrine of Liability for Negligence: Its Origin and Its Influence in Civil Law Countries Until Modern Codifications’ in E.J.H. Schrage (ed.), *Negligence: The Comparative Legal History of the Law of Torts* (2001) at 129-171.

⁵¹ A. Söllner, ‘*Usus modernus Pandectarum*’ in Coing, above n. 34, at 501-516; Wesenberg and Wesener, above n. 5, at 115-119; Schlosser, above n. 5, at 76-83; R. Voppel, *Der Einfluß des Naturrechts auf den Usus modernus* (1996); W. Wiegand, ‘Die privatrechtlichen Rechtsquellen des Usus modernus’ in D. Simon (ed.), *Akten des 26. Deutschen Rechtshistorikertages* (1987) at 237-252; J. Schröder, ‘Die privatrechtliche Methodenlehre des Usus modernus’ in Simon, id., at 253-278; D. Willoweit, ‘Der Usus modernus oder die geschichtliche Begründung des Rechts. Zur rechtstheoretischen Bedeutung des Methodenwandels im späten 17. Jahrhundert’ in D. Willoweit (ed.), *Die Begründung des Rechts als historisches Problem* (2000) at 229-245.

editions of texts, and historical arguments also made their way into practice to some extent, but the methods of the practitioners remained largely unaffected. In Germany, this practical approach came to be known as the *Usus modernus Pandectarum*, a name taken from the identical title of a book by Samuel Stryk (1640-1710), published in 1690.

This is a wide-ranging term. In its broadest sense, it can refer to any modern and even contemporary use of Roman law – especially the Digest, also known as the *Pandectae* – as a source of law, such as we still find in South-Africa or Sri Lanka. In a narrower, more technical sense, it refers to the approach of positivist German lawyers in the 17th and 18th centuries. Superficially, it appears to be a continuation of the Bartolist method of the *mos italicus*; yet something had changed, largely due to the critical approach to Roman law initiated by the Legal Humanists. The *Usus modernus Pandectarum* developed a different doctrine about the sources of law. The tone was set by Hermann Conring (1606-1681) in his *De origine iuris Germanici* (1643), and Stryk also makes it clear in the introduction to his *Usus modernus Pandectarum*: whereas Roman law has a part to play as a source of law, the position of local law is now different: it is to be studied for its own sake. During the Middle Ages, lawyers had also found themselves having to deal with several sources of law, including Roman law and local law, but they would tend to look upon local law as an aberration from Roman law. The *Usus modernus* instead saw it as a further development of Roman law through custom. This approach ensured a much stronger position of local law in comparison to Roman law, which lost its pivotal position among the sources of law. Scientific study of local law began with the *Usus modernus Pandectarum*.

As far as Roman law is concerned, the name *Usus modernus Pandectarum* is significant, especially the first two words. *Usus* implies that the aim is to apply Roman legal texts in practice and not to make a scientific study of them. *Modernus* further implies that it was related to what applied in contemporary law. The representatives of the *Usus modernus* may have taken some benefit from the work of the Legal Humanists, but they used the Roman texts unhistorically, as just another source of legal norms. It was not, incidentally, limited to Germany; many French and Dutch lawyers worked along the same lines. A case in point, to give but one example, is the well-known work of Simon van Groenewegen, *De legibus abrogatis*, in which he investigates which Roman law texts may still be considered to be applicable law in the Netherlands.⁵²

There was no consistency in the *Usus modernus* as to which Roman legal texts were thought to apply. Some *Usus modernus* lawyers were quick to assume that a Roman rule no longer applied, whereas others would presume its applicability and required proof of the contrary.⁵³

13 The German Historical School / *Pandectenwissenschaft*⁵⁴

It is an ironic twist of fate that the German codification, the *Bürgerliches Gesetzbuch* (BGB) of 1900, was profoundly influenced by the works of a man who in 1814 strongly argued against the feasibility of a codification. In that year, Professor Anton Friedrich

⁵² S. van Groenewegen van der Made, *Tractatus de legibus abrogatis et inusitatis in Hollandia vicinisque regionibus*. Lugduni Batavorum, apud Davidem Lopez de Haro et Franciscum Moyardum (1649). There is a recent edition with an English translation: B.Z. Beinart and M.L. Hewett, *A Treatise on the Laws Abrogated and No Longer in Use in Holland and Neighbouring Regions by Simon à Groenewegen van der Made*, I-IV (1974-1989). Groenewegen followed French examples, see L. Winkel, 'Some Remarks on Groenewegen's *De legibus abrogatis* and the Reception of the Roman Law of Sale' in R. van den Bergh (ed.), *Summa Eloquentia. Essays in Honour of Margaret Hewett*, Fundamina, Editio specialis (2002) at 271-275.

⁵³ G.C.J.J. van den Bergh, *Geleerd recht. Een geschiedenis van de Europese rechtswetenschap in vogelvucht* (2006) at 74 et seq.

⁵⁴ Wesenberg and Wesener, above n. 5, at 170-213; U. von Lübtow, 'Savigny und die Historische Schule' in *Festschrift zum 125 jährigen Bestehen der Juristischen Gesellschaft zu Berlin* (1984) at 381-406; Schlosser, above n. 5, at 143-156; J. Schröder, 'Zum Einfluss Savignys auf den allgemeinen Teil des deutschen Bürgerlichen Rechts', review of Horst Hammen, *Die Bedeutung Friedrich Carl v. Savignys für die allgemeinen dogmatischen Grundlagen des Deutschen Bürgerlichen Gesetzbuches* (1983) (1985) 14 *Quaderni Fiorentini* 619-633.

Justus Thibaut of Heidelberg had put forward the idea of carrying out a general civil law codification (including private, penal and procedural law) for Germany, in order to promote national political unity.⁵⁵ He made no secret of his admiration for the French *Code civil* (which at the time applied in parts of Germany west of the Rhine). That same year, a Professor of Roman and Civil law in Berlin, Friedrich Carl von Savigny (1779-1861), wrote an eloquent and famous answer, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*, in which he argued that Germany was not ready for codification, and that much work still needed to be done before a successful codification could be carried out in Germany.⁵⁶ Whether the delay is entirely due to Savigny is debatable, but the fact remains that it took almost another century before the BGB came into force and Germany obtained its unified civil law.

Savigny's theory is a reaction to the pretensions of rational natural law as a product of the Enlightenment, just as Romanticism in art and literature was a reaction to the dry intellectualism of the previous era. He was, in fact, closely related to such famous German romantic figures as Von Arnim and Brentano, having married the latter's sister Kunigunde in 1804. In *Vom Beruf*, Savigny laid down most of the programme for the Historical School, which he officially founded in 1815, together with his Berlin colleague Karl Friedrich Eichhorn (1781-1854). They edited the programmatic journal of the school, the *Zeitschrift für geschichtliche Rechtswissenschaft* – the predecessor of the modern *Savigny-Zeitschrift*.

In *Vom Beruf*, Savigny opposes the idea that law can be constructed in a mathematical way, *more geometrico*. In his view, the law of a nation is as characteristic of that nation as its language. It is not made for the people, but grows organically with the people; it is a historical phenomenon – Roman law being the most eminent example. A codification, therefore, can only be successful if it builds on the historical tradition of the law of the people, and intimate knowledge of this tradition is essential for carrying out the right codification. This knowledge of the historical tradition – or rather the lack of it – is pointed out by Savigny as the great weakness in Germany and, consequently, as the main obstacle to a successful codification. His conclusion is that the only way to achieve a better law for Germany is to have a legal scholarship that proceeds organically and studies the tradition from the beginning. And this is exactly what he and his pupils did, starting with the medieval reception of Roman law in Italy. In fact, Roman law – in its Justinianic form – was found to be an important common element in the law of many German countries, especially since it had been applied by the common German Supreme Court, the *Reichskammergericht*, since its foundation in 1495.

Roman law, however, was studied not so much for its own sake, but with a view to the future. Savigny's pupils used Roman law, and especially the Digest or *Pandectae*, to develop general notions that the Romans themselves had never used, like legal act (*Rechtsgeschäft*) or legal capacity (*Geschäftsfähigkeit*). This form of legal scholarship came to be known as *Pandektenwissenschaft*. One of its most famous representatives, Bernhard Windscheid (1817-1892), wrote a manual that has still not lost its importance, and he later became a central figure in the committee that would prepare the BGB. In the German BGB (1900), we find yet another form of reception of Roman law. The BGB certainly is a codification that is much more closely related to Justinian's than, for instance, the French *Code civil*, even if it is almost a century further removed from Justinian in time. It is the most recent example of the influence of Roman law on the formation of modern private law.

⁵⁵ A.F.J. Thibaut, 'Rezension über August Wilhelm Rehberg, *Ueber den Code Napoléon und dessen Einführung in Deutschland* (1814)' in *Heidelbergische Jahrbücher der Litteratur*, 7 (1814) at 1-32; and especially: A.F.J. Thibaut, *Ueber die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland* (1814).

⁵⁶ F.C. von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (1814).

14 Concluding Remarks

It is intriguing to see how long Roman law has been a major point of reference both in legal practice and in the academic training of jurists in (continental) Europe – and that it remains so as a subject in the legal curriculum in many countries.

Let us return to the two points that were raised at the end of the introduction to this article. As far as the role of Roman Law in legal practice goes, we have seen that the Glossators may have applied it, though there is too little evidence to say anything with any degree of certainty. The Commentators definitely used it, and even if the critical approach of Legal Humanism eroded its authority to some extent, the traditional method of the Commentators continued to be used, not only in Italy but elsewhere as well. The *Usus Modernus* is a somewhat modernised version of Roman law that incorporates part of the findings – especially textual corrections – of Legal Humanism. Roman law did, however, lose the self-evident imperial authority it had had during the Middle Ages due to its association with the emperor. The criticism of the Legal Humanists and natural lawyers meant that it eventually only applied to the extent that its intellectual content remained satisfactory. And to this extent it is often still present in modern codifications, albeit on the basis of a new authority.

The second point is the development from case law to codifications with a system of legal rules at a relatively high level of abstraction. Roman law in its classical form consisted of case law – a characteristic, incidentally, that it shares with modern common law. Both Justinian's Code and his Digest are collections of solutions of specific cases. In Roman times, these solutions did not have an automatic authority, as this would depend on the prestige of the author.⁵⁷ However, they did play a part in future decision making that was similar to that of precedents in common law. During the reception process in the Middle Ages and later, Roman law was studied and treated in such a way that we eventually ended up with the civil law systems that we have today – which are, therefore, ultimately derived from a system based on case law. This is a very interesting evolution. From the preceding pages, we can see that there were probably two key contributing factors, one interior and one exterior. The interior factor starts in the medieval *summae*, where titles of the *Corpus Iuris Civilis* are treated in a systematic way. The grouping together of agreeing and contrasting texts around a *sedes materiae* made it easier to find the general rules and principles that were hidden behind the solutions to the cases. The rules and maxims of the last Digest title 50:17 (*De diversis regulis iuris antiqui*) were interpreted as a summary of the Digest in succinctly formulated rules and maxims that came to serve as general principles of law. And finally, the systematisation of the whole *Corpus Iuris Civilis* along the lines of the *Institutiones* made it possible to give all the rules and principles their logical place within a greater outline.⁵⁸ The exterior factor is that canon law, moral theology and natural law tended to think much more in terms of general principles than Roman law did. Eventually this made possible the construction of systematic codifications of private law, in which a large amount of Roman law has found a place.

All this underlines that the transition to national codifications – accompanied by the abolition of Roman law as a source of law – was a real paradigm shift in European legal scholarship. The focus of attention for lawyers was now the codification. In some countries, Roman law retained a place in legal education; in others, like France and Belgium, the fixation on the codification was complete: the *École de l'Exégèse*.⁵⁹ Still, this does not mean that the common heritage of Roman law is now sure to slowly fade into oblivion. On the contrary, it seems to be making some sort of comeback. As the European Union aims to achieve greater uniformity in law and a number of study

⁵⁷ Stein, above n. 6, at 2.

⁵⁸ See also J.W. Cairns and P.J. du Plessis (eds.), *The Creation of the Ius Commune: From Casus to Regula* (2008).

⁵⁹ B. Bouckaert, *De exegetische school: een kritische studie van de rechtsbronnen- en interpretatieleer bij de 19de eeuwse commentatoren van de Code Civil* (1981).

groups analyse the differences among European systems of private law in order to try and develop a European Civil Code, Roman law is getting renewed attention as the common element, and even as a possible source of solutions for the future.⁶⁰

⁶⁰ R. Zimmermann, *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today* (2001).

THE VICISSITUDES OF THE HERMENEUTIC PARADIGM IN THE STUDY OF LAW: TRADITION, FORMS OF LIFE AND METAPHOR

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Abstract

Legal hermeneutics carries the hallmark of a genuine scientific paradigm. It is the locus of professional commitment, that is, a generally accepted view about the nature of legal adjudication. But as any genuine paradigm, legal hermeneutics also eludes the production of its full interpretation or rationalisation. Although most lawyers and legal scholars feel compelled to employ some standard set of methods, this consensus does not imply an underlying body of rules and assumptions that fully accounts for legal praxis and legal research. The paradigm of legal hermeneutics, flourishing on the level of legal praxis, is itself a subject of different schools of thought. This article explores different theories of law, sparked off by philosophical and legal hermeneutics. It argues that some of the weaknesses of hermeneutics are remedied by speech act theory. It discusses the increasing scientific interest in the role of metaphor in human thought and emphasises the import of the study of legal metaphor, which is inseparable from culture and tradition, for the study of law.

Keywords: hermeneutics, relativism, speech act theory, metaphor, culture and tradition, legal methodology.

If ... the observer ... does not give up any account of the manner in which members of the group who accept the rules view their own regular behaviour, his description of their life cannot be in terms of rules at all, and so not in the terms of the rule-dependent notions of obligation or duty.

(H.L.A. Hart, *The Concept of Law* (1994) at 89)

1

It seems that the least controversial statement one can make on the topic of legal adjudication is that it is a rule-governed activity. This modest claim rests upon at least two characteristics of legal adjudication. First, the paradigm of legal adjudication is the *application of rules*, whether or not these rules can be found in statutes or have to be extracted from precedents.¹ Secondly, legal adjudication itself, the set of processes of interpretation and application, is *guided by rules*. After all, a large portion of the training as a legal professional is devoted to the acquisition of interpretative techniques and modes of reasoning, such as linguistic and systematic interpretation, analogical reasoning and reasoning from precedent. It is the mastery of these techniques, rather than mere knowledge about the law, that offers the seal of genuine legal craftsmanship.²

If legal adjudication is a rule-governed activity, both on the level of the law itself as well as on the level of the profession, legal adjudication, then, seems to be directed towards a *text* – rules, regulations, rulings and principles. Through these methodological standards, the text is recognised, interpreted and applied. This, at least, might explain the vast literature on the topic of legal adjudication. Different movements or schools, such as legalism, *Freirechtsbewegung* and Legal Realism, and their current counterparts like originalism, Critical Legal Studies, pragmatism and constructivism, vie with one another, challenging the assumptions and purposes of their rivals. Each school asserts to offer a more convincing account of the nature of legal adjudication and emphasises the practical import of the school to which the judge or official belongs. The stakes of

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¹ N. MacCormick, *Legal Reasoning and Legal Theory* (1978) at 45.

² M. Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (2005) esp. the Epilogue.

the debates are high, for the conversion from one school to another is supposed to affect the outcome of the processes of legal reasoning significantly – though one wonders how often a learned judge switches the presuppositions and tacit knowledge of her profession under the pressure of critical theory.

Among these schools, legal hermeneutics takes up a different position. It is not one school among the others, but it sits aside or, more precisely, on top of the row of competing schools that propagate one methodology as the proper one. The concern of legal hermeneutics is not how the judge *ought* to understand the law, but the act of understanding itself. It does not offer a particular methodology, neither does it prescribe which interpretive standards have priority in law, nor does it hold a hierarchy of legal values. Instead, it examines the conditions of understanding in general and of understanding the law in particular. The result is a phenomenology of understanding that includes legal schools of different colours, albeit not *all* colours.³ To the extent that legal hermeneutics offers an epistemology of the study of law that is accepted by most legal scholars, it might properly be said that hermeneutics serves as the paradigm for current European legal theory.⁴

Although hermeneutics offers a philosophical account of the nature of understanding, rather than a particular methodology how to conduct legal research, it nevertheless *structures* the way legal research is actually conducted, from the selection of relevant legal issues to the evaluation and criticism of the legal theories, doctrines and legal solutions. In this respect, one might say, philosophy and theory matter for praxis.⁵ In this article, I would like to address the implications of the hermeneutic paradigm for the nature of legal research. As legal hermeneutics functions as a paradigm, that is, as a generally accepted view about the nature of legal science, from which spring particular coherent traditions of legal theory and research,⁶ I will focus on one topic that ties those traditions together: the alleged distinction between object and subject. This topic, intimately connected with the predicament of relativism, explains the emergence of different traditions or schools that share the hermeneutic paradigm. In this article, I will argue that speech act theory, inspired by the works of the later Wittgenstein, offers an elegant solution for the problem of relativism that hermeneutics raises, but has not convincingly settled. I will argue, furthermore, that both hermeneutics and speech act theory point towards the import of culture in the study of law.

2

Before justifying the bold claim that the hermeneutic paradigm rules contemporary legal theory, I would like to dispel a potential misconception that stems from confusing the *genesis* of a conception with the theory that serves as its *exemplary model*. The thesis that most legal scholars endorse the hermeneutic paradigm merely expresses the

³ Movements like *original intent*, *strict constructionism* and *textualism*, for example, reject the claim of hermeneutics that meaning is not something ‘given’, but the result of the interplay between text and reader. Instead, these movements hold that the meaning is already ‘there’, that is, in the (legal) text or mind of the drafters. For a defence of textualism, see A. Scalia, *A Matter of Interpretation. Federal Courts and the Law* (1997); for a defence of original intent, see Keith E. Whittington, *Constitutional Interpretation. Meaning, Original Intent, and Judicial Review* (1999).

⁴ See J. Lenoble, ‘Narrative Coherence and the Limits of the Hermeneutical Paradigm’ in P. Nerhot (ed.), *Law, Interpretation and Reality. Essays in Epistemology, Hermeneutics and Jurisprudence* (1990) 127-168; B. Bix, ‘H.L.A. Hart and the Hermeneutic Turn’ (1999) 52 *S.M.U. Law Review* 167 at 181.

⁵ For the importance of theory, see M. Bal and I.E. Boer (eds.), *The Point of Theory. Practices of Cultural Analysis* (1994).

⁶ Cf. some of the descriptions of the concept of ‘paradigm’ by Kuhn: Thomas S. Kuhn, *The Structure of Scientific Revolutions* (1962, rev. ed. 1970 (with postscript), 1996) esp. ch. II. Although this concept plays a key role in Kuhn’s work, he did not give a clear-cut definition of it. He calls it, among other things, an accepted example of actual scientific practice, a model from which spring particular coherent traditions of scientific research (p. 10), a single generally accepted view about the nature of something, a standard set of methods that every researcher felt forced to employ (p. 12), an accepted model or pattern (p. 20) and a disciplinary matrix (in the postscript to the 1970 edition, p. 182). Accordingly, I will use the concept of paradigm to connote both a shared viewpoint as well as a methodology, a conception, and a movement, etc.

simple fact that current legal theory conceives of the processes of understanding the law in such way, that it could very well be described as hermeneutic. But the intellectual itinerary towards this position may never have crossed the path of philosophical (or legal) hermeneutics. The introduction of the participant's perspective into descriptive legal theory by H.L.A. Hart, for example, has been seen as a kind of 'hermeneutic turn' in legal philosophy, although Hart's legal philosophy is firmly embedded in analytical philosophy, rather than in phenomenology, of which philosophical hermeneutics derives its inspiration and borrows its vocabulary.⁷ And some authors, like the Dutch legal theorist Paul Scholten, have developed a legal methodology that has been rightly characterised as hermeneutical, albeit at a time that philosophical hermeneutics was still in the making.⁸ It is only with hindsight that we recognise the predecessor.

In this article, legal hermeneutics is used to denote a specific conception of the act of understanding phenomena such as law, a conception that is shared by most legal scholars, although only some of them have arrived at this view through philosophical hermeneutics.

3

What, then, is legal hermeneutics? And what makes it a paradigm for legal theory? To start with the first question: legal hermeneutics is a branch of philosophical hermeneutics. In order to understand legal hermeneutics, we have to turn to its source. For a full grasp of the ideas and thought of philosophical hermeneutics, we have to know what it is opposed to. Originally, hermeneutics was a discipline of the interpretation of sacred, legal or literary texts in the mid-17th century.⁹ *Philosophical* hermeneutics refers to the reflection upon understanding *as such*. The more general character of this project stems from a resistance against the hegemony of the natural sciences, whose compelling rise in the 18th and 19th century led to the predominance in all branches of knowledge of what was considered to be the scientific method *par excellence*: the study of phenomena from an external point of view in order to discover the laws that explain the movements and changes of nature and the vicissitudes of man and society. But according to Friedrich Schleiermacher (1768-1834) and Wilhelm Dilthey (1833-1911), the founding fathers of philosophical hermeneutics, phenomena such as religion, law and literature have to be studied differently. These phenomena are of a different kind – not natural phenomena, but manifestations of the human spirit. The purpose of the study of these phenomena is not explanation, but *understanding*. To understand a work of art, for instance, one is not confined to a causal explanation of its genesis by disclosing the material conditions that constitute it, nor to detached observation of the response or behaviour that it excites. This approach would then miss an entire dimension: the aspect of its value or meaning. Understanding a work of art means that we take into consideration the imprint it leaves on the affects of people. It requires that we ask how the work affects the inner life of those involved. But in so doing, we are no longer a detached observer whose observations are confined to regularities and causal relations. Understanding a work of art requires that we have to conceive of it in terms of the experiences of the inner life – hope, anger, remorse – a task that can only be properly performed if we bring along our own experiences of hope, anger and remorse. Only when we have experienced those affects ourselves are we able to understand the affects operative in others in their reception of works of art and other expressions of the human spirit.

According to Schleiermacher and Dilthey, the methodology of the humanities therefore differs fundamentally from those of the natural sciences. As the purpose of the humanities is 'understanding', its methodology is based not upon a categorical partition between object and subject, between the thing studied and the detached scientist, but

⁷ See Bix, above n. 4, at 167-168. Hart uses the term 'hermeneutics' in later descriptions of his earlier work: H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (1983) at 14, 15.

⁸ J.J.H. Bruggink, *Wat zegt Scholten over recht. Een rechtsfilosofische studie rond het "Algemeen Deel"* (1983).

⁹ J. Starobinsky, 'Foreword' in F. Schleiermacher, *Herméneutique*, French transl. by M. Simon (1987) at 6.

upon the involvement of the scholar, who is not a neutral observer, but whose experience of life is inextricably linked up with the act of understanding. Understanding, then, requires an internal point of view, the point of view of the participant.

This, in barest outline, is the main thesis of philosophical hermeneutics, and this thesis has spawned a whole literature on the distinctive features and problems of the methodology of the humanities. Philosophical hermeneutics bears the stamp of all genuine philosophy: its debates are thorough and profound as well as scholarly and esoteric. In this article, I will address only some of its main issues, as far as it has fuelled the debates on legal methodology. But before doing so, I still have to vindicate the claim that the hermeneutic paradigm is predominant in current legal theory.

4

To state that hermeneutics provide the model for legal theory is, in fact, making two claims. For legal theory is practiced on two levels. It is, on the one hand, the study of a particular legal regime so as to determine as precisely as possible what is prescribed or prohibited by the law on a certain topic. Legal theory here denotes the academic variety of legal adjudication or what is called legal doctrine. But legal theory, on the other hand, also denotes the study of law on a more abstract level. On this level, its concern is not the content of the law of a specific country or field, but the study of the features and function of law as a social institution, as distinguished from other institutions such as religion or morals. This is the province of legal sociology, anthropology and philosophy. My claim, then, is that on both levels of legal theory the hermeneutic viewpoint is prevalent.

This claim is best substantiated by the hermeneutic turn in legal theory in its more abstract manifestation. Paradoxically, it is the legal positivist H.L.A. Hart who has contributed considerably to this approach through his critique on legal positivism of the late 19th and early 20th century. In the wake of the natural sciences, legal positivism advocated that legal theory should be confined to a descriptive-explanatory theory of law, as distinguished from theories or opinions about what law *ought to be*.¹⁰ Its propositions should be based upon observations that could be stated in empirical terms, in order to be susceptible to confirmation and repudiation by other observers of the practice.

But the reduction of legal phenomena, such as rules and obligations, to observable facts only comes at a price. The reduction results in a description of the legal institution that accounts for the power the law exerts over its justiciables only in terms of 'prediction' and 'behaviour'. Alf Ross, for example, one of the leading Scandinavian Legal Realists, reduces the notion of legal validity to two empirically verifiable facts: to say that a rule is a valid rule is in fact to say (1) that courts will under specific conditions apply this rule or regard it as especially important in reaching their decision, and (2) that the courts do so, because they have a certain feeling that accompanies their use of this rule, i.e. an emotional experience of 'being bound' by the rules.¹¹

In a review of Ross's book *On Law and Justice*,¹² Hart remarks that, although Ross's distinction between an internal as well as an external aspect of social rules is an important one, Ross draws the line between these aspects in the wrong places.¹³ If a social group really has rules and not merely a set of convergent habits, these rules function as *standards* for conduct. When, for instance, the judge uses the expression that a rule is 'legally valid', she is not predicting her own behaviour, nor describing her feelings of compulsion. It is used in a *normative* way, that is, as an internal statement in the sense that it manifests her *acceptance* of the standard.¹⁴ 'Acceptance' is, among other things, a state of mind, a disposition, which cannot be empirically observed. The same holds for the claims and justifications based upon the acceptance of a standard. These are expressed by a distinctive normative vocabulary such as 'ought', 'should',

¹⁰ Bix, above n. 4, at 168.

¹¹ For Hart's outline of Ross's position, see Hart (1983), above n. 7, at 165.

¹² A. Ross, *On Law and Justice*, M. Dutton (transl.) (1959).

¹³ Hart (1983), above n. 7, at 166.

¹⁴ Id., at 167.

‘right’ and ‘wrong’. To have a full grasp of what it means to obey or violate a rule, the empirical vocabulary of ‘regularities’ of behaviour following a course of action does not account for the cause of those reactions. For the cause of these regularities is not a law-like response as in physics (the rule does not state that some response *will* follow), but a normative response that encloses the justification of that response (the rule *justifies* the response). The proper study of law needs, therefore, a vocabulary of the inner world of the mind, or, to use Hart’s terms, legal theory must look upon the rules of a legal system from an internal point of view as accepted standards of behaviour.¹⁵ And as the recognition of regular behaviour in terms of accepted standards requires an appeal to the scholar’s own normative experiences, the viewpoint of the legal scholar might properly be characterised as a hermeneutical viewpoint.

Although Hart’s distinction has been subjected to numerous comments, amendments and critiques ever since the publication of *The Concept of Law*, his claim that legal theory has to understand legal practice in a way that takes into account the way the practice is perceived by, at least, the legal actors, is generally accepted.¹⁶ In this respect, one might claim that the hermeneutic viewpoint is the paradigm for legal theory.

The same holds for legal theory on a more concrete level: legal doctrine. To determine the meaning of a statute or ruling requires that one considers its point or value. This can only be fully addressed from the perspective of the members of society, that is, as someone who considers this particular statute or ruling as a claim that has a normative appeal to her. The perspective of the legal scholar is the perspective of the participants in the legal practice. The majority conceives of the rules of the legal system not primarily as regularities of behaviour or orders backed by threats. They rather regard the law as a normative order that offers justificatory reasons to act as it prescribes and to impose sanctions in case of violation.¹⁷ In this respect, the perspective of the legal scholar is similar to that of the judge. Both judge and legal scholar consider the law as the authoritative source of rights and duties, as a normative order that binds its members. Scholar and judge primarily differ in the degree they feel free to disregard or criticise particular elements of the legal order. The judge, after all, is constrained by the peculiarities of her office – she is part of a body that is subordinate to the legislator or, in common law systems, bound to prior decision (*stare decisis*), and an official whose decisions directly affect citizens and businesses – whereas the scholar is free to criticise a regulation or ruling that is deemed to be incompatible with the basic principles of the system. But in order to make sense as a statement about current law, the critique has to be based on the *acceptance* of the law as authoritative and has to be framed in terms of the system.

This is the position of the American legal philosopher, Ronald Dworkin, one of the most influential theorists of the late 20th century on the topic of legal adjudication. According to Dworkin, each interpretation of the law entails a critical examination of its normative point or value in light of the values of the system. The proper stance of the judge is not neutrality and objectivity (the alleged error of legal positivism), but *integrity*: the disposition of someone whose personal opinions about justice, albeit bridled by the system, are a necessary condition for a true understanding of the law.¹⁸ Interpreting the law, therefore, demands a normative standpoint, a standpoint that entails an internal – participant’s – point of view.¹⁹

Although Dworkin has eloquently elaborated some of the philosophical and esoteric aspects of the methodology of legal adjudication, he is certainly not the first to reject objectivism or formalism as a virtue of legal adjudication. The names of a former generation of influential legal theorists, such as François Gény (France), Benjamin Cardozo and Lon Fuller (United States), Helmut Coing and Joseph Esser (Germany) and, for the Netherlands, Paul Scholten, are associated with a conception of legal adjudication that emphasises the elements of evaluation and judgment.²⁰ As evaluation

¹⁵ H.L.A. Hart, *The Concept of Law* (1961, rev. ed. (with postscript) 1994), at 87-91.

¹⁶ See, among others, Lenoble, above n. 4; Bix, above n. 4.

¹⁷ Hart (1994), above n. 15, at 90.

¹⁸ R. Dworkin, *Law’s Empire* (1986) esp. chapters 6 and 7.

¹⁹ *Id.*, at 14.

²⁰ F. Gény, *Méthode d’interprétation et sources en droit privé positif: essai critique* (1919, 2nd ed.);

and judgment are normative in character, legal adjudication and legal doctrine, which is only the scholarly variety of legal adjudication, presuppose an internal point of view. In this respect, one might with some exaggeration say that philosophical hermeneutics merely exposes the epistemological assumptions that buttress the opinions about the nature of legal adjudication that have been generally accepted by lawyers and legal theorists.

5

Although hermeneutics had originally been developed so as to cut off the hegemony of the alleged ‘scientific’ methodology of the natural sciences and to develop an alternative for the humanities, philosophical hermeneutics ultimately challenged the ontological assumptions of the scientific project as such. The stumbling block for philosophical hermeneutics is the distinction between subject and object. This distinction is prerequisite to the idea that the purpose of science is to give a true explanation of the world, that is, to develop theories about the world as it *is*. However, the problem is how to get access to the world ‘as it is’, since the dominant theory on perception both in the sciences and the humanities holds that all perception is theory-laden, subjective or established by cultural preconceptions. This epistemological claim, strongly argued for by philosophical hermeneutics, has nevertheless experienced strong inhibitions for its alleged consequence of relativism – an extremely inconvenient position for scientists and lawyers, as I will discuss in section 6. The threat of relativism might explain the persistence of the issue of the subject-object partition in legal theory, and the different ways it has been interpreted. The debate between Ronald Dworkin and Stanley Fish on freedom and constraint in legal adjudication offers an illuminating example of the different explanations of the constitutive role of the subject in literary and legal interpretation that spark off from the hermeneutic paradigm.

Dworkin’s theory on legal adjudication is best explained by his resistance against judicial discretion as it appears in Hart’s positivist theory of law. According to Hart, a legal system consists of rules, the application of which requires a choice in what is called a ‘hard case’, as opposed to the plain case, where there is general agreement in judgments as to the applicability of the classifying terms of the rule concerned. In hard cases, says Hart, the judge has discretion, so that if he applies the rule, the conclusion, even though it may not be arbitrary or irrational, is in effect a choice.²¹

This rule-producing function that the courts allegedly exhibit at the margin of rules, is vehemently contested by Dworkin. He challenges Hart’s analysis of the law as a system of (primary and secondary) *rules* only. Dworkin asserts that the law also consists of principles that are not necessarily stated or promulgated, but are implicit in the law. The principles are the normative background of the legal system, offering a justification for the rights and duties that are inferred from the existing body of rules. In this respect, principles direct the interpretation, for the meaning attributed to a rule has to be in accordance with the underlying principles. As a result, the decision in hard cases is not the judge’s free *choice*, but something that is, in an elusive way, already implicit in the body of law. The right decision, then, is the answer on that legal issue that has to be *discovered*. The upshot of Dworkin’s analysis is his famous, but much contested ‘one right answer thesis’, denying that the judge has strong discretion in hard cases.²²

This thesis has been interpreted as a regulative ideal of all interpretation, an ontological claim, a methodological assumption, an anti-sceptical stance, a normative

B.N. Cardozo, *The Nature of the Judicial Process* (1921); Lon L. Fuller, *The Morality of Law* (1964); H. Coing, *Die juristischen Auslegungsmethoden und die Lehre der allgemeinen Hermeneutik* (1959); J. Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung. Rationalitätsgrundlagen richterlicher Entscheidungspraxis* (1970); P. Scholten, *Mr. C. Asser’s handleiding tot de beoefening van het Nederlands burgerlijk recht. Algemeen Deel* (1931).

²¹ Hart (1994), , above n. 15, at 127.

²² R. Dworkin, *Taking Rights Seriously* (1977) ch. 13.

prerequisite of legal interpretation and many other things.²³ It is outside the scope of this article to analyse these responses in more detail. Instead, I would like to focus on one plausible reading of Dworkin's account of legal interpretation, according to which Dworkin defends a subject-object partition so as to avoid the pending danger of relativism that seems to stick to the hermeneutical stance.

Dworkin's article, 'Law as Literature',²⁴ and the response by Fish, 'Working on the Chain Gang: Interpretation in Law and Literature',²⁵ are the fruits of their debate on this topic during several conferences.²⁶ Dworkin's thesis is that, although legal interpretation is an ultimately normative process, judges are nevertheless constrained by the hard data of the law, such as statutory law and precedents. These hard data are given, for it is a judge's duty, as Dworkin states, 'to interpret the legal history he *finds*, not to invent a better history'.²⁷ What he 'finds' are the hard data of the law; and the interpretation of it has to determine 'what the earlier decisions come to, what the point or theme of the practice so far, *really is*'.²⁸ This is the dimension of 'fit' that all genuine interpretation has to display. The normative aspect of legal interpretation consists in the dimension of justification of the legal practice as it is found: it has to show the point or value of that body of law in political terms by demonstrating the best principle or policy it can be taken to serve.²⁹ Although the dimension of justification brings into the processes of interpretation a subjective element, Dworkin assures us that, thanks to the constraints of the hard data of the law – the text – legal adjudication will not deteriorate into inventing better law according to the personal politics of the judge.

Dworkin's account of legal interpretation obviously fits in with the hermeneutic viewpoint as far as it concerns the researcher's or judge's perspective: for genuine interpretation demands that one looks upon the law from an internal perspective, from the perspective of the members of the community, who consider the regulations as standards that serve as justification for their behaviour and that of others.³⁰ But his account of the dimension of 'fit' seems to smuggle in the subject-object partition that philosophical hermeneutics had expelled so boldly from the account of understanding.

The gist of Fish's critique is that Dworkin locates the constraints on interpretation in the wrong place, due to a misunderstanding of the nature of interpretation.³¹ For the real constraints on interpretation are not located in the object; they are social. Texts, says Fish, do not manifest themselves as brute facts, but appear to us only in interpreted form:

[O]ne doesn't just find a history; rather one views a body of materials with the assumption that it is organized by judicial concerns. It is that assumption which gives a shape to the materials, a shape that can *then* be described as having been 'found'.³²

Whether or not an interpretation sufficiently fits the text, is not determined by the text as such, but by the text *as it is read*. The dimension of 'fit', therefore, is not an objective standard, determined by the raw data that everybody 'finds'; rather, it refers to the conventions and strategies of a particular 'interpretive community' of how a text has to be read. These conventions and strategies organise the body of materials in such a way that a particular reading appears to have a better fit than others. Different interpretive communities will, therefore, assess differently the degree of fit between an interpretation and the text, and the dispute cannot be settled with reference to the text, but has to be

²³ For twenty-four varieties of the 'one right answer thesis', see K. Rozemond, 'Vierentwintig varianten van de one right answer thesis' in E.T. Feteris et al. (eds.), *Met recht en reden* (2000) 65-71.

²⁴ R. Dworkin, 'Law as Literature' (1982) 60 *Texas L. Review* 527-550.

²⁵ S. Fish, 'Working on the Chain Gang: Interpretation in Law and Literature' (1982) 60 *Texas L. Review* 551-567.

²⁶ See the introduction to this special issue on legal interpretation, (1982) 60 *Texas L. Review* i-iv.

²⁷ Dworkin (1982), above n. 24, at 544 (emphasis added).

²⁸ *Id.*, at 543 (emphasis added).

²⁹ *Id.*, at 544.

³⁰ A more inclusive group than in Hart's theory, as for Dworkin legal interpretation is about the political-moral justification of the legal system from the perspective of the citizens who are subjected to it: Dworkin (1977), above n. 22, esp. ch. 4.

³¹ Fish, above n. 25, at 562.

³² *Id.*, at 557.

fought out on the field of the alleged goals, purposes, concerns and procedures of the institution – on what Dworkin has coined the dimension of justification. The upshot of Fish's critique is that the dimensions of 'fit' and 'justification' are not distinct, as Dworkin holds, with the former constraining the latter, but are inextricably interwoven. And this proposition entails, in fact, another one that buttresses the entire enterprise of philosophical hermeneutics: the thesis that, in the act of understanding, a strict partition of subject and object is untenable.

6

On the mundane level of judicial practice, the positions of Fish and Dworkin do not differ very much. Both reject the two extremes that divide the field of interpretation 'between those who believe that interpretation is grounded in objectivity and those who believe that interpreters are, for all intents and purposes, free'.³³ They both admit that interpreters' normative opinions, whether or not these may be labelled as ideology, are a constitutive element of interpretation, although the interpreter or judge is not free to invoke *any* set of opinions. In this respect, one might expect that their account carries the general assent of legal practitioners and judges. They feel forced to employ a standard set of methods or 'legal grammar' that constrains the interpretation and application of the law, although it does not wholly determine the decision.³⁴ They share, in short, the same paradigm for legal adjudication.³⁵

The difference between Dworkin and Fish is primarily theoretical. It is concerned with the *explanation* of the nature of the constraints. Dworkin's position is not fully consistent, for he admits that what counts as 'the text' rests upon a subtheory about the identity of a work, and that subtheory, he continues, will also be controversial.³⁶ But if the identity of the text actually depends on opinions, conventions or theories, our interpretation is, strictly speaking, not constrained by the text itself, but by our opinions or assumptions on how to identify the text, as Fish rightly points out.

We can only guess what prevented Dworkin from drawing the inevitable conclusion that even the text cannot serve as an external constraint on interpretation. In my opinion, it is connected with the idea that a constraint we ourselves have called into being, is not a constraint at all – with the idea that if interpretation is not constrained by something 'given', but by contingent practices that we ourselves constitute, all interpretation is, ultimately, arbitrary. Under the surface of the analysis of 'understanding' by philosophical hermeneutics, the spectre of relativism looms. For many, relativism is itself an objectionable position, and it has been contested for a range of reasons.³⁷ Lawyers have at least one specific reason to object to relativism. In our legal institution, judges are subordinate to the law: they have to administer justice *according to* the law. The presupposition is that the law has a meaning, and that it is possible, at least in theory, to determine this meaning. However, if we hold epistemological relativism to be true, it would not be the law that determines the decision, but the caste of judges or interpreters that asserts the meaning of the law. Relativism would therefore subvert the law's authority. The threat of relativism might explain why Dworkin holds on to the idea that the text, even though it rests upon a contested subtheory about identity, nevertheless functions as the frozen limit of all interpretation, as the objective criterion to distinguish between genuine interpretation and mere 'invention'. To put it in a phrase Dworkin

³³ *Id.*, at 551.

³⁴ The term 'legal grammar' is used by Koskenniemi, above n. 2, at 568, signifying a limited number of rules that constitute the system of the production of good legal arguments.

³⁵ Cf. one of the descriptions of a paradigm by Kuhn, as 'a standard set of methods or of phenomena that every ... researcher felt forced to employ and explain'. Kuhn, above n. 6, at 12.

³⁶ *Id.*, at 531.

³⁷ For some of those reasons, see, among many, Larry Laudan, *Beyond Positivism and Relativism* (1996); Paul Boghossian, *Fear of Knowledge: Against Relativism and Constructivism* (2006).

would never use for the obvious fallacy it contains, although it can be extracted from his work: the text is an external constraint, because interpretation *must* be externally constrained.³⁸

7

At best, philosophy is a rigorous discipline, a stringent mode of reasoning, that reveals that we sometimes jump to conclusions that are insufficiently warranted or incompatible with more basic assumptions. It might reveal that a favourite idea rests upon poor grounds, so that we have to reconsider the validity of our beliefs or the grounds on which we hold these ideas to be true. In this respect, philosophy might confront us with inconvenient truths. But an inconvenient truth is still a truth. If our basic assumptions about interpretation – especially the repudiation of a strict partition between object and subject – lead us to the conclusion that interpretation depends upon contingent factors, the inconvenience of this conclusion does not transmute the reasoning into a sophism. In this respect, Fish's critique that Dworkin's account of interpretation is inconsistent or half-hearted is warranted. If all interpretation is directed towards the determination of the meaning, sense or point of a text *for us* – a standpoint that Dworkin advocates – we then are, in a complex way, always part of the text – a standpoint that Dworkin rejects. Dworkin's fear that the lack of an external constraint results in an unsettling interpretive freedom, says Fish, is misplaced, and displays his poor understanding of the nature of interpretation. Interpretation is not an enterprise *in need of* constraints, but a *structure of constraints*. It is the institution, not the thing interpreted, which constrains.

Though theoretically impeccable, Fish's response is unsatisfactory in one respect. A novel is certainly enriched by multiple readings that offer different perspectives on that work. Even when these readings are incompatible or hostile to one another, they often coexist, in that different 'interpretive communities' simultaneously read, reflect and respond on that work of art. Especially in the humanities, different schools or paradigms vie with one another, enriching the soil of our understanding of cultural and social life. But law is a different phenomenon. It is, on the one hand, a phenomenon that can be studied from different disciplines and perspectives. Both our understanding and the development of the institution will, in the long run, benefit from the various voices that comment on it. On the other hand, law is also a social institution that regulates social life. As it interferes deeply in the life of the members of the community, the key values of the legal system are, among other things, legal certainty, uniformity, and predictability. These values are the prerequisites for the functioning of a stable legal system. They are a kind of internal morality of the law that allows the members of the community to adjust their acts and mutual expectations to the directives of the law.³⁹ Even if we agree that all interpretation is always constrained by *some* standards that hold for *some* interpretive community, as Fish states, the principal question for legal practitioners is which standards, out of many, ought to govern the interpretation and application of the law of their community. The legal community needs a standard set of methods that its competent members feel forced to employ, that is, a *paradigm* for the legal profession. Dworkin might have located these constraints in the wrong place, but he rightly considered the legal enterprise as an enterprise in need of constraints, which cannot be substituted for different ones due to a judge's ideological or scientific preferences. And if we credit the hermeneutic viewpoint, the judge must not only feel forced to use these standards, but she has to *accept* them as the appropriate set of standards as well.

³⁸ See Dworkin (1982), above n. 24, at 543 (emphasis in original): 'He *must* interpret what has gone before because he has a responsibility to advance the enterprise in hand rather than strike out in some new direction of his own.'

³⁹ See L.L. Fuller, *The Internal Morality of Law* (1963, rev. ed. 1969).

8

Philosophy exhibits a paradox. It tries to understand man, society and the world rationally. The fruit of this endeavour is an innumerable amount of philosophical accounts, which are each subject to critical philosophical examination. Judged by the rigorous standards of rationality, all philosophical explanation turns out to be inadequate in some respects, for neither its premises nor its criterion of truth can be fully accounted for, that is, rationally justified. The sceptics, evaluating the validity of the rational accounts and explanations of other philosophers and theorists, reproach them with holding a naive faith in reason or, what in fact boils down to the same thing, for not being rational enough. Seen from this perspective, the debate between Dworkin and Fish might be comprehended as the continuation of the fight between some variety of rationalism and scepticism from within the hermeneutic paradigm. Dworkin's 'right answer' thesis is a defence of legal interpretation as a methodologically constrained activity to such a degree that the decision, even in hard cases, can be rationally justified. The sceptic Fish rebuts this conclusion, for the decisions of judges are rational only to the degree that they share a set of interpretive standards – standards that make up the dimensions of fit and justification. To the extent that all theory and all judgment are inextricably intertwined with the mundane banalities of everyday life, our acceptance of a philosophical posture or judicial decision is not rational at all, but, on a fundamental level, illogical or groundless.

Despite their controversy, rationalism and scepticism share a language or grammar, which positions them not as two different worldviews but as two extremes in the same enterprise: the search for rational truth. In my opinion, the sceptics are the more strict rationalists, who draw out the utmost consequence of their analysis: that the mission for truth is doomed to fail, because the criterion of rationality is itself not neutral and objective. Relativism, so conceived, is not the opposite of rationalism, but its extreme consequence. However, the rightness of the relativistic position holds under the assumption that, in order to be true, a proposition must be rationally attested, an assumption that itself cannot be rationally warranted.

The controversy between rationalism and scepticism seems unsolvable. Rationalism incessantly runs up against the limits of reason, whereas scepticism's predicament is that it repudiates rationalism on the basis of a rational critique that presupposes, but cannot prove, its validity. It seems that the only way out is challenging the shared concept of truth as *rational* truth, that is, the idea that a proposition is true if, and only if, its validity can be warranted on rational grounds. In fact, the hermeneutic viewpoint points towards a different approach, although it is *speech act theory* that is most promising in this respect.

The import of speech act theory for legal theory is that it meets the need for a common ground that secures the reasonableness of legal interpretation, while simultaneously acknowledging that reason itself cannot fully account for it. However, the merits of speech act theory for law are not only philosophical. It also suggests a legal methodology for the study of law, one that exposes the deep structure or 'grammar' of argumentative schemes in legal debate and controversy.

In order to fully grasp how the challenge of relativism is countered by speech act theory and, albeit half-heartedly, by hermeneutics, I will first discuss how both approaches deal with the issue of truth and arbitrariness in meaning and interpretation. I will particularly address the works of two philosophers, namely *Truth and Method* by H.-G. Gadamer and Wittgenstein's *Philosophical Investigation* and *On Certainty*, which so deeply influenced speech act theory. In section 10 and further, I will discuss the implications of their approach for legal theory.

9

The decisive shift in philosophical hermeneutics is made by Gadamer, in the wake of Heidegger's phenomenological description of the fore-structure of understanding. 'A person,' says Gadamer, 'who is trying to understand is exposed to distraction from

fore-meanings that are not borne out by the things themselves.⁴⁰ The constant task of hermeneutics is ‘working out appropriate projections, anticipatory in nature, to be confirmed “by the things” themselves.’⁴¹ But the true object of understanding is not the ‘thing itself’, but the unity of ‘understanding one’s own historicity’ and the thing that is the object of understanding.⁴² The real task in understanding is to examine explicitly the legitimacy – i.e. the origin and validity – of the fore-meanings dwelling with the interpreter, for ‘understanding realizes its full potential only when the fore-meanings that it begins with are not arbitrary.’⁴³ True understanding is the interplay of the movement of tradition and the movement of the interpreter: ‘The anticipation of meaning that governs our understanding of a text is not an act of subjectivity, but proceeds from the commonality that binds us to the tradition.’⁴⁴

Although the wording is somewhat ethereal, the main theses of philosophical hermeneutics, as we discussed earlier, are present here. First, the text is not given, but is given shape in the act of understanding (the unity between object and one’s own historicity). Second, understanding always involves the prejudices of the interpreter – the fore-meanings or fore-structure of understanding. Third, understanding is not arbitrary, for the prejudices have to be *secured*, as Heidegger says, by working out the fore-structures in terms of the things themselves.⁴⁵ Fourth, ‘correct’ prejudices are secured by the tradition we belong to (the history the judge ‘finds’, as Dworkin puts it). Although tradition is not simply a permanent precondition – it is produced by ourselves inasmuch as we participate in the evolution of tradition⁴⁶ – neither it is a mere subjective experience of historical events. As Gadamer succinctly states: ‘[H]istory does not belong to us; we belong to it.’⁴⁷

For philosophical hermeneutics, the role of tradition is vital for true understanding. Although we are always situated within traditions, we have to be *addressed* by tradition. We should not approach a text directly, relying solely on the prejudices already available to us, but rather explicitly examine the legitimacy of the fore-meaning dwelling within us.⁴⁸ The problem for true understanding is not that understanding is grounded in prejudice or fore-structure, but that our prejudices might be arbitrary for being poorly connected with tradition. Tradition, for Gadamer, is the whole of texts, institutions and persons, whose authority is recognised in an act of acknowledgement and knowledge – the knowledge that the other is superior to oneself in judgment and insight and that for that reason his judgment takes precedence.⁴⁹ The recognition of authority doesn’t mean that tradition is accepted in blind obedience, but that it is considered, affirmed, embraced and cultivated.⁵⁰ It is not something given, not a brute fact,⁵¹ but something that is, as it were, *produced* by innumerable acts of the participants in the practice. Tradition, in short, is an *institution*. And the correctness of an interpretation is connected with the institution as it rises up out of the practices that constitute it.

The term ‘institution’ refers to another important philosophical tradition of the 20th century: speech act theory. Although the philosophical roots of hermeneutics and speech act theory are worlds apart, they share an important insight. They both discard the idea of the faculty of reason as an independent and autonomous source of knowledge. Both hold that our thoughts and ideas are not the fruits of the individual mind, the meaning of which could only be known by the person who experiences, or produces, them. Rather, they are intimately connected to the way the words and concepts, which are applied to

⁴⁰ H.-G. Gadamer, *Truth and Method*, transl. by J. Weinsheimer and D.G. Marshall of *Wahrheit und Methode* (1975, rev. ed. 1989) at 267.

⁴¹ Id., at 267.

⁴² Id., at 299.

⁴³ Id., at 267.

⁴⁴ Id., at 293.

⁴⁵ M. Heidegger, *Being and Time*, transl. by J. Macquarrie and E. Robinson of *Sein und Zeit* (1962) at 153.

⁴⁶ Gadamer, above n. 40, at 293.

⁴⁷ Id., at 267.

⁴⁸ Id., at 276.

⁴⁹ Id., at 279.

⁵⁰ Id., at 281.

⁵¹ For the term ‘brute fact’, see J.R. Searle, *The Construction of Social Reality* (1995) ch. 1.

express those mental experiences, are used in the community of which she is part. Ideas and thoughts, therefore, belong as much to the social world as they are individual; they are a mental activity as well as a way of acting.

Speech act theory, firmly rooted in the work of Ludwig Wittgenstein and John. L. Austin,⁵² has developed a sociological view on knowledge. According to this view, every statement about nature and man is embedded in a network of statements, which together form an institution. The institution of a natural language might be illuminating in this respect. To speak a language is to participate in an institution. Each language user is subject to the standards of correct language use, but the standards are dependent on their use by the community of language users. As such, language is a social construction that derives its existence from being performed. In this respect, there is no true essence of English, Dutch or Papiamentu, except for the way it is spoken. One might conclude that, as a language is ‘just’ a social construction, and therefore contingent in its shape, it cannot be normative – for there is no absolutely wrong or correct way to speak that particular language. But this is not the way we deal with language. Children learn a language by following examples, and they are corrected when they commit an error – that is, when they deviate from the rule. The rigorous training in correct speaking and writing explains the perception of one’s mother language as a rather fixed and immutable phenomenon to such a degree that purists resist the influx of loan words and expressions, barbarisms that are at variance with what they consider to be the true essence of their language.

What holds for the institution of natural languages, holds for all institutions. The philosophical claim of speech act theory is that all knowledge is based upon institutions. The intellectual superstructure of our knowledge, including those parts that seem purely mental, such as arithmetic, is built upon a way of *acting*. In *Philosophical Investigations* and *On Certainty*, Wittgenstein meticulously analyses what justifies the solution of simple arithmetic problems, or our acceptance of a proposition, the truth of which is beyond reasonable doubt. For these propositions, he states, a rational proof cannot be given, because each reason is itself in need of justification. In the end, we just *accept* the proposition, not on rational grounds, but because it is the way we *do* things. The solution of a complex arithmetic problem, for example, might be justified with reference to a standard set of rules or standards that determines the solution. But the presupposition is that we apply those rules correctly – that we *know* how to handle them – and this kind of knowledge is firmly based upon practices that have been learned through endless processes of copying, repetition and rectification.⁵³ Here, at the foundation of our knowledge, the tight connection between knowledge and action becomes manifest: finally, we can justify the way we count and subtract – following some rule – only by reference to the way we *act*, as Wittgenstein states in a much cited paragraph:

‘How am I able to obey a rule?’ – if this is not a question about causes, then it is about the justification for my following the rule in the way I do.

If I have exhausted the justifications I have reached bedrock, and my spade is turned. Then I am inclined to say: ‘This is simply what I do.’⁵⁴

The same holds for propositions that we take to be certain. Take the ‘truisms’ that G.E. Moore mentioned in his ‘Proof of an External World’, e.g. that he *knew* that there was one hand in the place indicated by combining a certain gesture with his first utterance of ‘here’ and that there was another in the different place indicated by combining a certain

⁵² L. Wittgenstein, *Philosophische Untersuchungen/Philosophical Investigations*, G.E.M. Anscombe and R. Rhees (eds.), G.E.M. Anscombe (transl.) (1953); J.L. Austin, *How to do Things with Words* (1962, rev. ed. 1975).

⁵³ See L. Wittgenstein, *Über Gewissheit/On Certainty*, G.E.M. Anscombe and G.H. von Wright (eds.), D. Paul and G.E.M. Anscombe (transl.) (1969) § 44: ‘If you demand a rule from which it follows that there can’t have been a miscalculation here, the answer is that we did not learn this through a rule, but by learning to calculate.’ Also § 212: ‘In certain circumstances, for example, we regard a calculation as sufficiently checked. What gives us a right to do so? Experience? May that not have deceived us? Somewhere we must be finished with justification, and then there remains the proposition that *this* is how we calculate.’

⁵⁴ Wittgenstein (1953), above n. 52, at § 217.

gesture with his second utterance of ‘here’.⁵⁵ Wittgenstein objects to Moore’s account, for his truisms are not subject to ‘knowledge’ in the same way as statements that are less obviously certain, like propositions about the precise distance between earth and sun:

The propositions presenting what Moore ‘knows’ are all of such a kind that it is difficult to imagine *why* anyone should believe the contrary. E.g. the proposition that Moore has spent his whole life in close proximity to the earth. – Once more I can speak of myself instead of speaking of Moore. What would induce me to believe the opposite? Either a memory, or having been told. – Everything that I have seen or heard gives me the conviction that no man has ever been far from the earth. Nothing in my picture of the world speaks in favour of the opposite.⁵⁶

The same holds for the truism that the earth existed for many years past. This is not something we *assume*, as if we could also reasonably assume the opposite. We do not *know* it, in the sense of knowing it to be true, but it stands fast for us; and to regard it as absolutely solid is part of our *method* of doubt and inquiry.⁵⁷

[I]n the entire system of our language-games it belongs to the foundation. The assumptions, one might say, forms the basis of action, and therefore, of thought.⁵⁸

It is in this sense that Moore’s truisms, although we cannot prove them to be true, are not arbitrary. Their role is like that of the rules of a game. They have a peculiar logical role in the system of our empirical propositions, for it is against the inherited background of those truisms or convictions that we distinguish between true and false.⁵⁹

All testing, all confirmation and disconfirmation of a hypothesis takes place already within a system. And this system is not a more or less arbitrary and doubtful point of departure for all our arguments: no, it belongs to the essence of what we call an argument. The system is not so much the point of departure, as the element in which arguments have their life.⁶⁰

Much more could be said about the role of these truisms or self-evident truths in our thinking, but, for the sake of my argument, the most important aspect is that these truisms are not learned through rules: we are taught *judgments* and their connection with other judgments; and it is this *totality* of judgments that is made plausible for us.⁶¹ That is the way a child learns to believe many things. It learns to *act* according to these beliefs and bit by bit there forms a system of what is believed. ‘What stands fast,’ says Wittgenstein, ‘does so, not because it is intrinsically obvious or convincing; it is rather held fast by what lies around it.’⁶² The truth of these truisms is not *rational* truth, for it is the background of beliefs against which we distinguish between true and false. At the foundation of well-founded belief lies belief that is not founded, but inherited.⁶³

If the true is what is grounded, then the ground is not *true*, nor yet false.⁶⁴

The similarity between the role of tradition in the account of philosophical hermeneutics and the role of truisms in Wittgenstein’s account is obvious. They both serve as the foundation of our judgments and knowledge, a foundation that cannot be rationally justified. Nevertheless, they significantly differ in one respect. Gadamer emphasises the aspect of reason in the acknowledgement of the authority of tradition, whereas Wittgenstein considers the truisms to be beyond true and false. Authority, says Gadamer, must be earned. It rests on acknowledgment and *hence* on an act of reason itself. Authority in this sense has nothing to do with blind obedience to commands, but rather with *knowledge*.⁶⁵ But one might ask, with Wittgenstein, what kind of knowledge it is

⁵⁵ G.E. Moore, ‘Proof of an External World’, *Proceedings of the British Academy* 25 (1939) 273-300.

⁵⁶ Wittgenstein (1969), above n. 53, at § 93. The example is outdated, for nowadays at least *some* men and women have left the earth’s atmosphere.

⁵⁷ *Id.*, at § 151.

⁵⁸ *Id.*, at § 411. See also § 204: ‘Giving grounds, however, justifying the evidence, comes to an end; – but the end is not certain propositions’ striking us immediately true, i.e. it is not a kind of *seeing* on our part; it is our *acting*, which lies at the bottom of the language-game.’

⁵⁹ *Id.*, at § 94.

⁶⁰ *Id.*, at § 105.

⁶¹ *Id.*, at § 140.

⁶² *Id.*, at § 144.

⁶³ *Id.*, at § 253.

⁶⁴ *Id.*, at § 205.

⁶⁵ Gadamer, above n. 40, at 279.

that induces someone to accept one tradition rather than another – for we already belong to tradition. And part of the reasons for accepting one version or reading of tradition is grounded on judgments – judgments that themselves cannot be deliberately accepted, because they are *constitutive* of acceptance and rejection.

It seems that even Gadamer shies away from drawing the conclusion, implicit in his account of understanding, that reason is not at the base of knowledge, but groundless beliefs. By emphasising the aspect of reason in handling our prejudices,⁶⁶ he still contrasts irrationality and arbitrariness with reason. Wittgenstein's account seems more accurate to me: it is on the basis of unfounded beliefs that we can judge propositions to be irrational, arbitrary, false or true. What gives them their credit, is the way we act. Not theory, but *practices* are at the bottom of knowledge.

10

The crucial step by Wittgenstein in his reflection on truth is that he connects knowledge, and therefore meaning and interpretation, with practices. Our thinking is tributary to the way we act, both as a matter of how we actually learn as well as epistemologically. That made him subject to the reproach of relativism. For if truth is a function of groundless beliefs, does this not, in fact, get rid of the notion of truth as such and exclude a right answer in serious disputes, when worldviews clash? That, indeed, is Wittgenstein's position. If a king, asks Wittgenstein, has been brought up in the belief that the world began with him, could Moore really prove his belief to be the right one, if they were to meet and discuss?

I do not say that Moore could not convert the king to his view, but it would be a conversion of a special kind; the king would be brought to look at the world in a different way.⁶⁷

He would, for example, be induced to go over to this point of view because of its *simplicity* or *symmetry*. At the end of reasons, adds Wittgenstein, comes *persuasion*.⁶⁸ This account excludes right answers and absolute truths in the case of incompatible worldviews. But Wittgenstein would dismiss the term 'relativism' as a characterisation of his position. The predicate 'true' or 'false' of a proposition makes sense only within a system of beliefs – or form of life – that we hold fast. But to call a form of life or worldview 'true' or 'false' is senseless, for we would have to judge the very foundation of our judgments – as if we have to determine the 'true' value of a currency *apart from* banks, exchange rates, trade and savings balances, institutions that together make up the institution of money. We can, of course, *say* that different worldviews are equally worthwhile, but such an assertion reveals, at best, something about our own worldview, not about the alleged value of others.

The connection between knowledge and practices removes the arbitrariness of our judgments. Truth is a function of being grounded – and our most firm beliefs are grounded, not upon propositions whose truths are, from a rational point of view, self-evident or manifest, but upon a way of acting from which many truisms may be inferred. The existence of an external world, for example, is implicit in the way we act and judge, and we are seldom explicitly taught 'that an external world really exists'. A child does not learn that books and armchairs exist, but learns to fetch books and to sit in armchairs – it swallows their existence, so to speak, together with *what* it learns.⁶⁹ And law students learn more thoroughly that rights exist through courses devoted to property, tort and procedural law rather than by a philosophical account on the nature of law.⁷⁰ The same holds for the institution of law itself. Its structure and foundation rise from the interplay

⁶⁶ By using terms like affirmation, embrace and cultivation, Gadamer points towards the aspects of consideration and deliberation, that is, to reason, *id.*, at 281.

⁶⁷ Wittgenstein (1969), above n. 53, at § 92.

⁶⁸ *Id.*, at § 612.

⁶⁹ *Id.*, at § 144.

⁷⁰ The same idea is expressed by Kuhn, who states that concrete models, that is, *paradigms*, are prior to the various concepts, laws, theories and points of view that may be abstracted from it: Kuhn, above n. 6, at 11.

between practices and regulations, or to use an intriguing metaphor by Wittgenstein: the foundation-walls are carried by the whole house.⁷¹ It is our acting in particular cases, not reason, that *secures* the correctness of our prejudices or fore-understanding.

Wittgenstein's account takes the sting out of scepticism – its paralysing relativism, which does not lead so much to intellectual modesty, but which undermines the credibility of its own account and of the scientific approach as such. But more important perhaps is that it offers a direction how to study social phenomena, such as law. It does not reject rational accounts or explanations as such. Rather, it reveals that these are fertile only if we take seriously the practices through which law, language and other institutions manifest themselves, and thoroughly investigate how words and concepts are used in different contexts. Such an analysis could reveal the deep structure or 'grammar' of a practice, which manifests itself through its vocabulary. For it is through language, conceived of as speech acts, that a social reality is constructed.⁷²

Both speech act theory and hermeneutics emphasise that reason manifests itself through the spectra of culture. In this respect, culture matters in law. What is reasonable or true in law cannot be determined apart from the legal system as an historic (or cultural) phenomenon. One might consider this approach as characteristic of post-war European legal thought, influenced as it is by a distinctive 'continental' (i.e. German) theme in philosophy. Continental philosophy is a generic term, including philosophical movements such as phenomenology, existentialism, structuralism and psychoanalysis.⁷³ It refers to a set of traditions of 19th and 20th century philosophy from mainland Europe that emphasise the import of factors such as context, space and time, language, culture or history, on science and philosophical thought.⁷⁴ This is particularly manifest in the work of Gadamer (a *German* philosopher), who regards 'tradition' as the repository of reason. But this 'continental trait' is also patent in the work of the later Wittgenstein (an *Austrian* philosopher, albeit strongly associated with British analytical philosophy), who treats rationality as an immanent phenomenon, operative on the level of language-games and forms of life. Their influence on European legal thought has been profound. The hermeneutic approach for law has been developed by scholars such as Karl Larenz, Josef Esser and Karl Engisch,⁷⁵ whereas the development of an analytic hermeneutics, merging the philosophy of the later Wittgenstein and hermeneutics, has been undertaken by, among others, Aulis Aarnio and Ota Weinberger.⁷⁶ It is through these authors that the hermeneutic approach has been generally accepted in legal theory.

The import of culture for the study of law leads me to a development in the social sciences of the past twenty years that appears to be very promising for legal theory: the growing interest in metaphor.⁷⁷ An increasing amount of studies reveal the centrality of metaphor in human thought.⁷⁸ These theories are underpinned by a conception of language as developed by speech act theory, and it is this connection that renders the study of legal metaphor a most promising field of legal research.

⁷¹ Wittgenstein (1969), above n. 53, at § 248.

⁷² Searle, above n. 51.

⁷³ See B. Leiter, *The Oxford Handbook of Continental Philosophy*, B. Leiter and M. Rosen (eds.) (2007) at 2.

⁷⁴ S. Crichtley, *Continental Philosophy: A Very Short Introduction* (2001) at 57.

⁷⁵ K. Larenz, *Methodenlehre der Rechtswissenschaft* (1969, rev. ed. 1983); J. Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung. Rationalitätsgrundlagen richterlicher Entscheidungspraxis* (1970); K. Engisch, *Einführung in das juristische Denken* (1964, rev. ed. 1983).

⁷⁶ A. Aarnio, *Linguistic Philosophy and Legal Theory* (1987); O. Weinberger, *Law, Institution, and Legal Politics: Fundamental Problems of Legal Theory and Social Philosophy* (1991).

⁷⁷ I will leave out a second fertile approach, the institutional theory of law, although I have pointed towards this approach in the previous sections of this article.

⁷⁸ M. Black, 'Metaphor', *Proceedings of the Aristotelian Society* 55 (1954) 273-294, reprinted in M. Black, *Models and Metaphors. Studies in Language and Philosophy* (1962) 25-48. For publications on metaphor, see, among others, A. Ortony (ed.), *Metaphor and Thought* (1979); Raymond W. Gibbs, *The Cambridge Handbook of Metaphor and Thought* (2008). Both publications include contributions from different disciplines such as psychology, anthropology, linguistics, cognitive sciences, philosophy and literature.

11

Metaphor structures understanding. That is, in short, the essence of a developing body of work on human cognition. In a pioneering work, G. Lakoff and M. Johnson examine how our thinking is permeated by metaphors, and how they structure the way we understand reality.⁷⁹ They start their book with the concept ‘argument’, and (one of) the metaphor(s) that direct(s) it: the metaphor ‘argument is war’. This metaphor is reflected in everyday language by a host of expressions: claims are *indefensible*, every *weak* point in the argument is *attacked*, someone’s argument is *demolished*, arguments are *shot down*, etc.⁸⁰ This, however, is not just a matter of language, of mere words, but a way of how we conceptualise argument:

[W]e don’t just *talk* about arguments in terms of war. We can actually win or lose arguments. We see the person we are arguing with as an opponent. We attack his position and defend our own Many things we *do* in arguing are partially structured by the concept of war.⁸¹

We talk about arguments that way, because we *conceive of them* that way – and we act according to the way we conceive of things.⁸² Lakoff and Johnson give many examples of metaphors that perform a vital role in our conceptual framework. Some of them are very basic, like the container schema (to see fear *in* someone’s eyes, to have a *full* life, to get *into* trouble), spatial metaphors (for example, the ‘up-down’ metaphors in e.g. ‘*head of state*’, ‘*a higher status*’), and the ‘source-path-goal’ schema (of which the ‘life is a journey’ metaphor is part).

Two aspects of metaphor are especially relevant here. First, a metaphor is a conceptual schema or model that organises the body of statements that could intelligibly be stated about a topic. If ‘love is a collaborative work of art’ (a metaphor, for it is neither work nor art according to the alleged literal meaning of the words), then the elements of ‘work’ and ‘art’ give rise, among other things, to the following entailments: love requires cooperation, dedication, compromise and discipline; and it is an aesthetic experience, valued for its own sake, creates a reality, is unique, etc.⁸³ Each statement is intelligible in light of the metaphor, and together they form a coherent body of propositions.⁸⁴ A different schema (e.g. ‘love is madness’ or ‘love is war’) would have brought about a different complex of related propositions.⁸⁵ Second, although different metaphors are used to describe similar human experiences (e.g. ‘love is war’ and ‘love is madness’, among many others), metaphors are not arbitrary. Like the truisms that Wittgenstein discusses, most metaphors are grounded in systematic correlations with our physical and cultural experiences and the way we deal with them.⁸⁶ The basic experiences provide the organising principles for the construction of conceptual models, like the *container* schema and the *source-path-goal* schema.⁸⁷ These are the way reality is experienced and perceived, and they are neither true nor false, because they are part of the conceptual structure that *frames* judgment.

In this respect – and of special interest for legal theorists – legal theory itself is rife with metaphors. In an article, called ‘“Penumbra”: The Roots of a Legal Metaphor’, B. Henly enumerates a multitude of metaphors, sparked off from the spatial schema, that are used to describe the building blocks of law:⁸⁸

⁷⁹ G. Lakoff and M. Johnson, *Metaphors We Live By* (1980).

⁸⁰ *Id.*, at 4.

⁸¹ *Id.*, at 4.

⁸² *Id.*, at 5.

⁸³ *Id.*, at 139 et seq.

⁸⁴ *Id.*, esp. ch. 16.

⁸⁵ Respectively, the statements ‘to be *crazy* about someone; to be *wild* about someone’ and the statements ‘to be known for his *conquests*; she *fought* for him, but the other *won out*’: Lakoff and Johnson, above n. 79, at 87-97.

⁸⁶ *Id.*, ch. 13.

⁸⁷ For references to empirical work on this topic in experimental psychology, linguistics and anthropology, see Steven L. Winter, ‘The Metaphor of Standing and the Problem of Self-Governance’ (1988) 40 *Stan. L. Review* 1371 at 1384.

⁸⁸ B. Henly, ‘“Penumbra”: The Roots of a Legal Metaphor’ (1987) 15 *Hastings Const. L.Q.* 81.

[L]egal ideas often seem to have weight as well as volume, as when interests are ‘balanced’. Spatial metaphors make it possible to visualize change. Doctrines can be extended, narrowed, expanded, and circumscribed. Branches are separated, but not hermetically sealed off. Legal rules develop frontiers, cores, and cutting edges. Without splitting hairs, fine lines get drawn.⁸⁹

These metaphors do not only describe abstract concepts in a way that facilitates comprehension, they also affect the way we *act* as lawyers. The spatial metaphors add to the view that the law is something that exists ‘out there’, in the world of objects. But if the law is reified, if it is comprehended as a physical object, fixed by spatial coordinates, then it could bring about the view that law is an object that can be studied in a way that resembles the methods of scientists or, more appropriate here, those of the land surveyor, by ‘setting a statute next to the Constitution to see how it measures up’.⁹⁰ The use of spatial metaphors to describe law, in short, might explain that lawyers are still attracted to the dubious idea that legal adjudication could be performed neutrally, as detached as a scientist who measures the distance between the Milky Way and the Andromeda Galaxy.

This example reveals that metaphors have normative effects, even if they were initially used to describe a phenomenon or to grasp the similarities between different phenomena.⁹¹ A prevailing metaphor might explain the deep structure or grammar of the arguments that are put forward on a certain topic; and it might also explain why a strand of arguments sometimes has been discarded.

An example of the latter is provided by the evolution of metaphorical inferences as applied to the Internet within legal commentary and judicial opinion.⁹² As Blavin and Glenn Cohen point out, much of the early thinking about the Internet is shaped by the ‘information superhighway’ metaphor. This metaphor connotes a *transfer* of information. The information superhighway is an account of *space*. The metaphor highlights the resemblances with real highways. Just as real highways are used to transport persons and objects, the Internet can also be conceived of as a means of transportation, for example for messages, like emails. Real highways are regulated by the government, so the metaphor furthers the presumption of (federal) government regulation of the Internet.⁹³ This metaphor was eclipsed by another, the ‘cyberspace metaphor’. The cyberspace metaphor highlights the fluid character of the Internet. Conceived of this way, the Internet is not a ‘real’ place, but rather a *virtual* space, nothing but the flow of digital data through the network of interconnected computers.⁹⁴ Related to this idea is the concept of the Internet as a ‘frontier’, ‘as the 19th century American West in its natural preference for social devices that emerge from its conditions, rather than those that are imposed from the outside.’⁹⁵ The metaphor of cyberspace as a novel place, existing outside any territory, was adopted by the Supreme Court, including the normative inference that the Internet was, *therefore*, potentially immune to real space regulation.⁹⁶ Currently, the ‘internet as real space’ metaphor has become prevalent, on the footing that the Internet can be moulded to coincide with real territorial boundaries and legal jurisdictions through filtering and geographical pinpointing technologies.⁹⁷ This metaphor will also affect and organise the normative choices that can be made, although it does not mean that the metaphor *determines* them.

As the law is framed in metaphors, legal metaphor can be found in all legal fields, from corporate law (the doctrine of corporations as legal persons), to procedural law (the doctrine of ‘standing’) and criminal law (the metaphor of ‘terrorism as war’).⁹⁸

⁸⁹ Id., at 82.

⁹⁰ Id..

⁹¹ For the heuristic function of analogy and metaphor, see M. Hesse, ‘Aristotle’s Logic of Analogy (1965) 15(61) *Philosophical Quarterly* 328-340.

⁹² J.H. Blavin and I. Glenn Cohen, ‘Gore, Gibson, and Goldsmith: The Evolution of Internet Metaphors in Law and Commentary’ (2002) 16 *Harv. J.L. & Tech.* 265.

⁹³ Id., at 273.

⁹⁴ Id., at 276.

⁹⁵ Id., at 267.

⁹⁶ 521 U.S. 844 (1997).

⁹⁷ Blavin and Cohen (2002), above n. 92, at 282.

⁹⁸ Respectively, Sanford A. Schane, ‘The Corporation as Legal Person: The Language of a Legal Fiction’ (1987) 61 *Tul. L. Rev.* 563; Steven L. Winter, ‘The Metaphor of Standing and the Problem of Self-

Metaphors guide the use of fundamental legal concepts, such as sovereignty, will and conscience.⁹⁹ These studies reveal that the use of arguments in law is less arbitrary than pragmatists and critical scholars assume,¹⁰⁰ if we at least connect the argumentation to the metaphors that constitute the particular discourse. The metaphors themselves are grounded in experiences or ways of perceiving and are, therefore, not susceptible to scientific testing methods to validate their truth-value. But that does not render the argumentation into arbitrary conceptual schemes. They mediate, as Mary Hesse states, a kind of *social* knowledge and provide evaluations reflecting social interests and judgments of significance.¹⁰¹

It seems that Heidegger's fore-understanding, Gadamer's prejudices that are secured by tradition and Wittgenstein's 'forms of life' have taken a more concrete and, so to speak, palpable form through these conceptual models or schemes that bring about the spatial, temporal and substantial metaphors in which the law is framed. In this respect, culture matters in the study of law. Although the very foundation of the conceptual framework displays striking resemblances in different cultures – e.g. the metaphors that stem from the *up-down* schema – most metaphors are culturally specific, such as the metaphors of battle, sports and sex that are prevalent in American legal discourse on the adversary system.¹⁰² The study of legal metaphor, therefore, exposes how man, society and reality are comprehended. They offer, as it were, the 'cultural grammar' of a society and deepen our understanding of the argumentative schemes that are operative in legal adjudication.

Governance' (1988) 40 *Stan. L. Rev.* 1371; Louis Henkin, 'War and Terrorism: Law or Metaphor' (2005) 45 *Santa Clara L. Rev.* 817; and B. van Eekelen et al. (eds.), *Shock and Awe. War on Words* (2004). In fact, the literature on analogy and precedent could also be added, as the reasoning processes resemble those in the use of metaphor. See, among others, Scott Brewer, 'Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy' (1996) 109 *Harv. L. Rev.* 923; Dan Hunter, 'Reason is Too Large: Analogy and Precedent in Law' (2001) 50 *Emory L.J.* 1197; and Cass R. Sunstein, 'On Analogical Reasoning' (1993) 106 *Harv. L. Rev.* 741.

⁹⁹ For the concepts of sovereignty and will, see C.E. Smith, 'Soevereiniteit: solipsisme of institutie?' (Sovereignty: solipsism or institution?) in G. Molier and T. Slootweg (eds.), *Soevereiniteit en recht. Rechtsfilosofische beschouwingen* (2009) 33-52; for the concept of conscience, see C.E. Smith, 'Fenomenologie van de gewetensbeslissing: twee varianten' (Phenomenology of the conscientious decision: two varieties) in A. Ellian et al. (eds.), *Recht, beslissing en geweten* (2010) 181-200.

¹⁰⁰ For a pragmatic view on legal adjudication, see Richard A. Posner, *The Problems of Jurisprudence* (1993); a more radical scepticism is defended by, among others, Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 *Harv. L. Rev.* 1685.

¹⁰¹ M. Hesse, 'The Cognitive Claims of Metaphor' (1988) II(1) *The Journal of Speculative Philosophy* 1 at 8, first published in J.P. van Noppen (ed.), *Metaphor and Religion* (1984) 27-45.

¹⁰² See E.G. Thornburg, 'Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System' (1995) 10 *Wis. Women's L.J.* 225, arguing that the metaphorical fixation on the combative, non-cooperative aspect of dispute resolution and the suppression of any duty to other litigants, the court system or the community contributes to a professional role that is severely out of balance.