

The phenomenological epochè and the legal process  
- an attempt at a phenomenological science of law-.

termpaper on Husserl  
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BIBLIOGRAPHY

- P. AMSELEK, Perspectives critiques d'une réflexion épistémologique sur la théorie du droit, also edited as Méthode phénoménologique et théorie du droit, Paris, Librairie générale de droit et de jurisprudence, 1964.
- P. AMSELEK, Description phénoménologique du droit, in: Phenomenology and the social sciences, M. NATANSON Ed., Northwestern Evanston 1973, p. 367 - 449.
- R. BÖHM, Zur Phänomenologie der Gemeinschaft. Edmund Husserls Grundgedanken, in: Phänomenologie, Rechtsphilosophie, Jurisprudenz, Festschrift für G.Husserl zum 75. Geburtstag, p. 1-27.
- R. BÖHM, Kritik der Grundlagen des Zeitalters, Martinus Nijhoff, Den Haag 1974.
- C. COSSIO, Phenomenology of the decision (or judgment), introduction to The egological theory of the law and the juridical concept of liberty, separately edited in Latin-american legal philosophy, Harvard 1948, and Essays in honour of Roscoe Pound, Oxford 1947.
- M. HEIDEGGER, Das Ding, Jahrbuch der Bayerischen Akademie der schönen Künste, Band I, 1951, p. 128 ff., Vorträge und Aufsätze, p. 157 ff.
- E. HUSSERL, Ideen zu einer reinen Phänomenologie und phänomenologische Philosophie, Vol. I, Allgemeine Einführung in die reine Phänomenologie, Jahrbuch für Philosophie und phänomenologische Forschung, Vol. I, 1913, Eng. translation W.R. Boyce Gibson, with author's preface to the english edition, 1931, Collier London 1962. (quoted 'Ideas')
- E. HUSSERL, Cartesianische Meditationen, Husserliana 1, Martinus Nijhoff Den Haag 1950, english translation D. Cairns, Martinus Nijhoff 1977. (quoted 'Meditations').
- E. HUSSERL, Vom Ursprung der Geometrie, edited by E. Fink, Revue internationale de philosophie, Vol. I, Nr. 2, 1939, also in Die Krisis der Europäischen Wissenschaften, Beilage III, Dutch translation with introduction by R. Böhm,; english translation D. Carr, in The crisis...

- E. HUSSERL, Die Krisis der Europäischen Wissenschaften und die transzendente Phänomenologie : eine Einleitung in die phänomenologische Philosophie, Martinus Nijhoff Den Haag 1954, english translation D. Carr, Northwestern Evanston 1970. (quoted: Crisis)
- Th. LUCKMANN, Ed., Phenomenology and sociology, selected readings, Penguin 1978, with i.a. M. NATANSON, Phenomenology as a rigorous science, p. 181-199, also in International philosophical quarterly, Vol. VII, March 1967, p. 5-20.
- M. NATANSON, Edmund Husserl, philosopher of infinite tasks, Northwestern, Evanston 1973.
- M. MERLEAU-PONTY, Phénoménologie de la perception, Paris, Gallimard 1945.
- C. VERHOEVEN, Inleiding tot de verwondering, Ambo Baarn 1967.

INTRODUCTION.

This paper was meant as a search for what the phenomenological method could mean for the study of law and its description. This idea was first developed into an endeavour to apply the phenomenological method - as set out by Edmund HUSSERL - in the area of, law, as others have tried to do before me, just like it can be done in other areas.

Wondering about the phenomenological method however showed some processes hidden in it which throw a new light on its bearing upon law. The phenomenological method itself can be read as a judicial process with legal beginnings and a judicative doing. A deeper belonging together of law and phenomenology can be unveiled, whereby the phenomenological method is no longer applied to law as something alien to it, but seen as resounding with it.

The unfolding of this thought belongs to a more elaborated work for which only some points are given here. In them is tried to show some possibilities for a study of law, which lie still undisclosed in the phenomenology of E. HUSSERL, and do not always 'correspond' maybe with the likely understanding of HUSSERL himself. Our phenomenology of law is then maybe only a 'Wiederholung' of his phenomenology. This reiteration, wherein we take up this way, is unfolded in several circles which take up the same process over again in a new glance, and set out respectively the phenomenological method (Ch. I); the phenomenological-transcendental epochè (Ch. II) and the phenomenological constitution of things; the law-thing (Ch. III).

Chapter I. Indications for some processes implied in the phenomenological method.

(1) Transcendental phenomenology as a process of purification.

HUSSERL's aim is to seek the way to pure phenomenology as the most grounded and leading area of philosophy. This asks for a new way of looking at things (phenomena), another standpoint: the development of phenomenological reductions until we have finally before us the free outlook upon transcendently purified phenomena (Ideas, introduction).

A pure phenomenology asks for a purification or cleaning through three reductions: (a) the philosophical epochè as a withdrawal of all interpretations and projections so that things can show themselves; (b) the eidetic reduction making phenomenology a science of essential being; (c) the transcendental epochè which purifies the phenomena from that which lends them 'objective reality'.

What can this attempt to clean the phenomena give us ? Purification is making things pure. This is a ritual attempt to give things their true shape back, their proper shape ( cfr. Fr. propre : pure, clean; t. La. proprius, own), to give back an already lost identity (VERHOEVEN, p. 85 & 89).

(2) Transcendental phenomenology as a judicial process.

In HUSSERL's Ideas and Cartesian Meditations, this process of purification is mainly described as a judicial process.

He starts setting the sources of law (Rechtsquellen) and the distinction between a legitimate idea or grounded judgment and prejudice (Ideas 19 and Meditations 3). He acknowledges the right of the self-governing reason as the only source of law in matters of truth, and ascribes the right-conferring function for legitimate rational

statements to immediate seeing as their final source of justification (Ideas 19). He affirms the original right of all data (Ideas 26), given in primordial data to intuition as the only source of law (Ideas 24). He looks upon every judgment as justified when it does nothing more than to give expression to such data by unfolding their meaning and adjusting it rightly (Ideas 24). He describes the judicative doing as an agreement of the judgment with the judged state of affairs or as grounded in evidence (Meditations 4). He questions the validity of truths, asks legitimation of meanings and the application of the principle of evidence (Meditations 5). He searches into the range and validity of the claims of the world (Meditations 7). He states the epochè as a certain refraining from judgment about any other reality (i.e. non-legal reality, as there is no evidence), as a passing off from judgment into a bracketed judgment (Ideas 31). In relation thereto is the theoretical natural standpoint a statement which claims validity but cannot be accepted as such (Ideas 32).

He further distinguishes absolute and relative rights (Ideas 78), and gives a description of the proposition as judgment (Ideas 94). He studies the warranty (Berechtigung) apart from self-evidence (Ideas 140) and again the problem of the sources of law (Rechtsquellen) (Ideas 141). He describes a legal conflict and process (Ideas 149) and speaks about the essential conformity of propositions to law and order (Ideas 153).

These examples show that there is in any case a legal terminology involved. Its meaning becomes clearer in CH. II and III.

(3) Transcendental phenomenology as a critique of a merely theoretical standpoint.

a) Especially in the Crisis, but already in the Cartesian Meditations (15), phenomenology is set as a third stage in thinking, trying to find back on a higher level an originary process by suspending the natural standpoint as it is set forth in the theoretical scientific outlook.

a) the original natural life.

The original natural life is the unity of original subjective processes forming the life-world. This life-world is always present as an all-embracing horizon. Living wakefully in it, we are always conscious of it, whether we care for it or not ( Crisis P. 358). It is a horizon of things and a horizon of our fellow men. I can deal with them, enter into single modes of communication with them, and then know, in a habitual way, of being so related (ibid.). But the world as such is not thematic : thematic is only whatever one is directed towards. (Crisis, p. 281). This directedness is an immediate and practical knowledge, a routine dealing with familiar situations and movements (cfr. M. NATANSON, Husserl, p. 137). Its criticism is always practical, relative to the end in view (D. CARR, Crisis p. XXXIX).

In this life-world we find the first creative activities of men. We find the first, still practical, constitution of ideal objects, of culture. This creation is described by HUSSERL as the successful realization of a project , which is for the acting subject self-evidence (grasping an entity with the consciousness of its original Selbst-da). In this self-evidence, what has been realized is there, originally , as itself. It is present for the first time as actual success (Crisis p. 356).

These creative activities take place in a life-world of civilization to which there belongs already a common language. Men and language are inseparably intertwined in it (Crisis p. 358-359).

When the original vivid self-evidence passes away into the passivity of the stream of consciousness, this past can be reawakened (recollected), and the product of one subject can be actively understood by others in the community of language, the community of communication (ibid). This communication always requires an immediate or mediate personal address.

This whole life-world as a horizon is pre-given in relation to theory, envelops or underlies all theoretical interpretations of it (D. CRRR, Crisis p. XL)

b) the theoretical attitude.

The theoretical attitude takes place within the horizon of a pre-given life-world and does not deny its familiarity. But in starting the interpretation of the world, it isolates the knowledge from its practical involvement, separates it from its roots of self-evidence as actual success. Science especially practices its own methodological suspensions in which the realm of immediately experienced reality and everydayness is bracketed. It wants to remove itself as far as possible from the contingencies of everyday life (M. NATANSON, Husserl p. 142). Science separates out specific aspects of the life-world and renders them thematic, independent from their being intertwined with other things, other men and common language. The theoretical attitude is thus naïve in two ways : it is naïve because it doesn't thematize yet the ground which it presupposes, the world as a whole; it is naïve also because it separates knowledge from the life-world, cuts out familiar parts of the world, so that the life-world is not anymore the horizon within which familiarity and strangeness can present themselves (M. NATANSON, Husserl p. 142).

This naive theoretical attitude towards the world can be stated in a general thesis, which does not necessarily exist as an explicit judgment. Some of its characteristics can be said of natural life too, but only in the first sense of naivety. This general thesis considers the world as (a) familiar, (b) our world, (c) identical and ordered, and (d) objective and independent.

(a) The world is considered as familiar : things are simply there, definite, more or less familiar, agreeing with what is actually perceived without being themselves perceived (Ideas 27). It is also reliable, as a ground upon which we can rely without further proof.

(b) This world is 'our' world, not only as a world to which I and all other men belong (Ideas 29), but also <sup>since it is</sup> useful, manipulative, <sup>and</sup> seizable, available, at one's disposal. In the scientific interpretation is concealed the hypothesis of usefulness or power as a criterion of truth (M. NATANSON, Husserl p.143).

(c) This world is ordered, in a fixed order of being, as a spatial present, and ordered in a succession of time (Ideas 27). This order can be understood in terms of objectively valid principles and rules.

(d) The world has its independence as existing out there (Ideas 30), standing over against a subject, which is considered as individual consciousness, as an objective reality, absolute in itself, independent from any consciousness (universal or individual)

c) the attempt of phenomenology

The phenomenological method tries to recover the original meaning as it was evident in natural life and give it finally a philosophical status (MERLEAU-PONTY, Phén. de la perception, Avant-propos, p.I). A first step is the philosophical epochè which suspends the theoretical attitude as an interpreting doing. All factual interpretations which are or have been given in this way, are put aside.

This is a suspension of history as an external causality which effects the succession of historical configurations (Crisis, p.370), but not a suspension of internal history. On the contrary, its proceedings include a historical search which is internal in the sense that it understands something as being necessarily made through human activity and thus having an a priori history.

Together with this philosophical epochè goes the transcendental epochè of the natural theoretical attitude. In this epochè, the different processes of phenomenological method are taken up and worked out.

Chapter II. The transcendental epochè and the phenomenological constitution of things.

According to its character of judicial and purification process, phenomenology wants to examine the general thesis of the theoretical standpoint.

(4) The moving off of the transcendental epochè.

In this thesis, the world claims 'objective' being. We look for the validity and range of that claim (Meditations 7), by inspecting it in its own right (M. NATANSON, Husserl p. 58). In this examination, the non-existence of the world appears as imaginable; the evidence the world presents, (in support of its claim, is not apodictic. Opposite to it stands, as anti-thesis, as opponent, the supposition of its non-being. This anti-thesis brings up this possibility of non-being? Its disclosure makes a breach in the closed circle of evidences (VERHOEVEN, p. 16-17). This bringing-up by the anti-thesis brings the thesis before an instance of doubt. This is a modification of the anti-thesis which

gives a new standpoint, and conditions a certain suspension (Aufhebung, epochè) of the thesis (Ideas 31). In this suspension the thesis is 'put out of play' (Meditations 8). The suspension of the claim for reality adjourns the judgment about it and sets the world in motion, to examine the evidence.

This movement is nothing else than wonder about the world, which is the beginning of all philosophy according to the Greeks (PLATO, Theaitetos 155 d). In this wondering, the being of the world becomes inexhaustible (VERHOEVEN p.27); a manifold of possibilities is disclosed and each thing resolves in a concrete infinity (id.p. 29). The identity of the world appears to be only a moment, a standstill between two motions (id., p.73) and gets lost in this movement of standpoint which is wonder. This is a dispossession of the already anticipated and already identified (M. NATANSON, Phen. as a rigorous science I): things lose their familiarity and independence. They are placed 'in abeyance' and 'in dependence'. The modification of standpoint, the moving off of the transcendental epochè, makes it possible for a certain strangeness to show itself (ibid.)

This epochè as a negative move set <sup>in motion</sup> by the antithesis, is an essential step in a method which seeks to be a purification (cfr. VERHOEVEN p. 85 and infra(6)).

- (5) The epochè, as phenomenological reduction, putting the world in dependence.

By the suspension of the general thesis of the theoretical standpoint, the world loses its place out there and is put in its place in the list of affairs, to come within the lists. We can also say that the world is in dependence, both 'sub judice' and losing its independence. Not only the world thus becomes dependent, and each thing in it, but the human community also loses its inde-

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pendence (Eigenständigkeit) ( cfr. R. BÖHM, Festschrift p. 5 ff): men are interdependent.

The dependence of things and men appears from their possibility of being different or non-existent: all men are mortal, and most things of our world subject to wastage: they become useless or get lost. Therefore, the putting in dependence of things stresses their identity as a given identity. Their givenness is a being donated as a gift. Their dependence is a dependence on a giving. They are dependent on good graces, or on givenness, ... Their identity is a given unity of meaning, 'geborgen' (salvaged and concealed) in a 'bergende' (covering and recovering) manifold. This manifold consists of organisations of pure consciousness which dispense meaning.

The world is thus seen as correlate to consciousness, as pure intentional being dependent in its being on pure consciousness (Ideas 49). The relation between both is not rigorously bilateral, but consciousness is a condition for the possibility of the world, i.e. transcendental (cfr. MERLEAU-PONTY, ibid. p. III-IV)

- (6) The epochè as purification : a transcendental epochè with a domain of intentionality.

The epochè opens the way for pure consciousness, a transcendental being, prior in itself (Meditations 8). The being immanent within this domain is absolute, i.e. not dependent on a 'thing in itself' out there (Ideas 49). This domain is staked out by the epochè, and within it consciousness finds its unity (as a universal) and correlates with the world. Their belonging together (Meditations 41) is expressed as intentionality: it is a resonance (cfr. G. 'zusammenhören' for belonging together) between<sup>a</sup> so-called object and the subjective process (cfr. M. NATANSON, Phen. as a rigorous science, II). This belonging together is described in Meditations 17, and Ideas

97 & 98 as a synthesis of the noetic and noematic correlates. On the noetic side, a structure of multiplicities, of manifold manifestations in which a meaning is appearing and concealed, intended and constituted, forms the correlate of non-identity. On the noematic side, the meaning which is intended and concealed and manifesting itself in the changing perspectives of the noesis, forms a unity, an identical, but dependent given 'Bestand' (Ideas 98).

This belonging together and resonance shows the intentionality as a mediation for unmediated things (cfr. R. BÖHM, Festschrift, p. 12). Thus phenomenology tries to recover the immediate and originary evidence of things through pure consciousness.

(7) Recovery of the originary givenness of the world.

In pure consciousness, things are given in their unmediated and originary manifestation (M. NATANSON, Phen. as a rigorous science, I) and in their strangeness. There, they appear between their being-identical and being-different (non-identical) (VERHOEVEN, p. 30) in a givenness which makes their identity possible. This given identity is a being donated, and its presence a present or gift (cfr supra p.9).

Their being given becomes only clear by putting them in dependence, which manifests itself as a dependence on an act of donation. This is a dependence on pure consciousness as a universal and absolute being. Its givenness is always a limited givenness, a present which is given between a past and a future. It can be used and enjoyed, but only in a limited way. Therefore, it is by its possibility of wastage that it can be rendered strange and thus show us its original being as a limited gift,

handed over, given out-of-hands (cfr. M. HEIDEGGER concerning 'κατὰ τὸ χρεών', Holzwege, Der spruch Anaximand-  
ders, p.335 ff.).

Contrary to the thesis of the theoretical attitude, being manifests itself not as availability, but as a being given which requires a thanksgiving, a giving back of things to the whole out of whose hands they were handed over. Phenomenology endeavours to fulfill this duty of gratitude as an infinite task.

By putting things again in resonance with and in their belonging to a sphere of absolute being, it becomes clear that their familiarity and givenness are a limited sphere within a horizon contrasting by its strangeness. They appear as presented disclosure dependent on a concealed (i.e. not wholly given) life-world within which familiarity and strangeness can appear. In this life-world, they belong in the first place, in it they are recovered, and on its background they can be thematized.

Through the mediation of intentionality, things appear again in their immediacy in an inadequate perception. An adequate perception would require the thing to cease being and resounding with the thing (G. 'aufhören') (R. BÖHM, Festschrift p.11). As thing, it stays behind, it is deficient in adequacy. The mediation of intentionality which shows their identity as a given identity, is an identification which constitutes their unity in a plurality in the first place; the unity is always given in a certain perspective, appearing within a general, indeterminately extending horizon ( cfr. Meditations 9 ).

(8) The sedimentation of meaning.

We have indicated so far how the phenomenological method, first characterized as a purifying, grounding and judicial process criticizing the general thesis of the natural theoretical standpoint, tries to establish knowledge with apodictic certainty and opens up a domain of transcendental being. This domain is especially opened up

by a transcendental epochè which reveals the original givenness of things. But phenomenology also wants to be a rigorous science in giving this original givenness finally a philosophical status. Our arguments thus seem to turn around in circles; we have to start again the unfolding of phenomenology with the aid of the indications of a former circle.

The examination of the structure of the transcendental being showed a synthesis between a unity of meaning and its manifold manifestations. The unity thus appears within a horizon which has an infinite number of possible perspectives. This horizon is described by Husserl as found for the first time in the continuous consciousness of internal time (Meditations 18). This founds an all-embracing cogitatum of transcendental being as a universal a priori, founded at different levels on the manifold particular cogitata (ibid.) and containing an infinity of a priori forms (ibid. 34).

This universal a priori with time as its universal form, provides a formal regularity pertaining to a universal genesis, with universal laws of genesis. Only in conformity with these is the constitution of objects in the transcendental domain possible (Meditations 36). The constitution of meaning (an object) has its a priori history. Meaning is sedimented at different levels, and the ready-made theoretical science at our disposal, accounts only for its upper level.

It thus becomes the task of phenomenology, not only to open up the domain of transcendental being, but to clarify its structure and unfold its meaning (Ideas 69, Meditations 19 & 29). This requires a tracing back of the

constitution of all details of meaning to original self-evidence (deconstitution) and to reconstitute the process of unfolding these evidences without losing them again.

The deconstitution can go back to original evidence as the successful realization of a project (cfr. supra (4)) and its communication within the horizon of common language. The constitution of ideal objects however, requires a transformation of the original mode of being of the meaning-structure: a written linguistic expression (Crisis, p. 361). The writing down makes it possible to think in terms of things that have been taken up merely passively, without any self-evidence of the original activity (ibid.). The sedimentation of meaning is built upon this possibility. No part of it can be immediately reactivated itself (Crisis, p.363). Therefore the writing down of propositions can never happen adequately. Again, an adequate proposition would require the thing to cease to be and resound with the thing (cfr. supra (8)).

The recovery of the original self-evidence is not in the first place the setting of propositions which are adequate and would each on its own be valid, but of the whole in its collective meaning, though it stays one-sided and variously undetermined (cfr. Ideas 138). This whole necessarily conceals in itself components of emptiness and indeterminacy (ibid.). What is given thus appears within an indeterminate horizon, which however has a determinable structure. The horizon of predelineated possibilities has to be unfolded by separating out into a series of presentations, until the object passes into perfect presentation (Ideas 69).

This unfolding remains inadequate, because it can never start from a onefold proposition expressing an original self-evidence on its own. Each thing is a manifold, constituted in a certain perspective within an infinite horizon. Its evidence can at best be pronounced in an immediate personal communication.

The deconstitution and reconstitution of meaning thus are an infinite task for phenomenology. The adequacy appears now as a final term of an infinite continuum of a priori determined structures (Ideas 143). The unfolding of things, though with no self-evident axioms and no finite end, follows an internal history as being made by man. The examination of their constitution by man thus shows their process of occurring, shows rules for their occurrence in time, 'natural laws' in the sense of laws of genesis (L. nasci). (cfr. Ideas 139 en Meditations 26). This way of becoming is the essential structure of things, stated in terms of laws.

(9) Phenomenological description of a thing and its rules.

Husserl gives us a more detailed description of the process of (de- and re-)constitution of a thing in Ideas 149-151, which is particularly interesting as the description corresponds to that of a judicial conflict and process.

(a) The process starts with a verbal and perhaps wholly obscure presentation of the thing, as it is presented to the transcendental ego.

(b) A second part of the process gives us the prescribed rules : after the verbal presentation comes the free production of intuitional representations of the same thing in general, to make clear the vague meaning of the word. The essence 'thing' is in this way given to us, but not adequately. We can bring the general thing-meaning to the point of adequate presentation, but the concrete thing-meanings do not contain this essence adequately; this requires an infinite continuum of thing-

intuitions. The concrete thing-meaning, this imperfect givenness, contains however a rule for the ideal possibility of its perfection, for the course of possible intuitions and perceptions. The general idea of the thing, the identical element of meaning appearing in the manifold of appearances, prescribes rules for this manifold. It prescribes a definite inner organization of the development of the series of appearances.

(c) In a third part, we try to find out where the course of things went wrong.

In the ideal situation, the determination of a thing is always a closer determination, an unfolding of this development. This is the case as long as the thing appears 'einstimmig' (unanimous, in consensus). But it also can happen that the theses are not anymore continually confirmed. The determination is no longer a closer determination, but undergoes a cancellation and a substitution through other determinations of the prescribed category. The agreement ('Einstimmigkeit') is disturbed and explodes in an infinite number of possibilities.

This explosion of the agreement is due to errors which occur because of changes in the mode of apprehension or trans- or disvaluings of the previously apprehended as illusion or deception.

(d) Finally, these errors <sup>which</sup> caused the explosion of the agreement -following the development prescribed by the rules of the general idea of the thing- now need to be corrected. Only through corrections by the transcendental ego can the agreement be maintained or restored.

Chapter III. The legal process as transcendental doing.

Just as phenomenology, can legal activity be described as a process of purification which wants to ground apodictic judgments about legal things (states of affairs), by putting in dependence the claims of the natural and theoretical standpoint, in order to ground them in a transcendental being which tries to recover an original givenness of things and determine the rules for their further development.

But what are legal things ? What is their original givenness ? How is this transformed in a theoretical attitude ? What is the transcendental ego in law and which laws can be found in its structure ? These and other questions arise. We will try to deal with some of their most important aspects in this chapter.

(10) The legal thing.

The thing, which is the object of legal proceedings, is the affair or state of affairs (Sachverhalt). The word thing itself expresses this, in expressions as 'he knows his things', 'he knows how to handle things', 'to do great things', etc. But the word itself says already more. The germanic word 'thing' originally means a gathering or assembly to handle or hear an affair which is brought up for discussion (G. 'im Rede stehend'), a controversial matter or case. (cfr. M. HEIDEGGER, das Ding, in: Vorträge und Aufsätze, p. 166-168). This etymology corresponds to that of the Latin word 'res', corresponding to the greek 'ῥῆμα' as 'what is being talked about', brought up for discussion, and of 'realitas' as 'handling of a matter'. It also corresponds to the etymology of the latin word 'causa' and the french 'chose' (thing), as 'an affair which concerns us', a controversial matter, a case.

The thing intended as object in law is the affair which has its course of things and about which there is a conflict. The handling of that affair by intentional activity is the lawsuit (Dutch 'geding', cfr 'Ding'). The history of the belonging together of affair and lawsuit ('ding' and 'geding') can be traced in three stages, indicated in the following paragraphs.

(11) The 'natural life' of law.

(N.B. This paragraph corresponds more or less to (3a)).

The original legal process or 'natural life' of law is an activity going on in the world and in unity with the world. The world is already there, without being thought about thematically. This activity is a practical activity (cfr. AMSELEK, Perspectives, Tit. II, Sect. I, Introduction), not yet following the determinations of a theory, but the usual practices, the usual course of things. Its wisdom is a practical wisdom or 'art'. The greek word 'τέχνη', which means both, is on the first place a practical knowledge, a production in the sense of showing something (cfr. M. HEIDEGGER, Der Ursprung des Kunstwerkes, Holzwege p. 47-48). This 'τέχνη' is a re-creative activity. It is a routine which repeats an original creative activity, consisting of the successful realization of a project. That accomplishment is the original evidence for the givenness of things. The practical wisdom re-creating this evidence shows us again this being given of things, as it was experienced in the first successful realization. This re-creation as a practical knowledge is a re-cognition of this being given and therefore a thanksgiving. This is the original ethical meaning of the practices dealing with familiar situations in a customary way. It is the way we handle all things which concern us, i.e. all 'real' things. As a way of handling things, law is a 'τέχνη' also in the sense of hand-work. This 'τέχνη' is handed over by tradition in an intersubjective community.

In handling our things, our activity is not always successful. There sometimes arise conflicts. The legal proceedings dealing with this conflict are trying to find original evidence as a finding of law (G. Urteilsfindung) in order to re-create it and put things in order again, in their place. They are a trial, held by wise man, to found again a 'commonplace' (Gr. 'τοπος'), where the issue, the thing talked about (im Rede stehend) can be lifted out of the talk of the town (das Gerede des Man), out of its controversy, and brought about on its place. The thing can be put in its place again, in a 'commonplace', by virtue of a language common to all interested parties. This community of language is affirmed by hearing the case, the affair, and pronouncing the judgment. It is by virtue of the pronouncement of the judgment, by its power, that the commonplace for the course of things is restored. The judgment confirms the usual course of things as being the common law or customary law.

Even after the further development of law, this kind of legal knowledge is still prevailing with layman as so-called 'pre-scientific knowledge'

(12) The 'scientific outlook of law'.

(N.B. This paragraph corresponds more or less to (3b)).

In a second stage, law is separated from its original practical activity, and transformed from an 'art' (ἔργον, <sup>ἔργον</sup>handwork, showing the givenness of things) into a science, in the sense of abstract theoretical knowledge.

The acts or proceedings of the wise man are abstracted and recorded. They are abstracted into a process of application of a general rule to similar cases, and

so into a set of rules which have to be applied. By this abstraction, the same rules can be applied in other cases without being a re-creation of an original evidence of actual success. They are separated out of their practical context where they belonged as rules for the usual course of things.

An important step therein is the writing down of the proceedings or transactions of the wise man. This makes communication of the implied rules possible without personal address (HUSSERL, Crisis, p. 360-361). The rules now appear as independent 'realities', existing without their being intended in an actual process which creates or re-creates them, without the process of their being given and the recognition of this givenness in a custom as a ritual of thanksgiving.

Not only the set of rules as a whole, but even each of these rules separately is considered as independent, as conferring certain rights to the person in favour of whom they have to be applied.

The writing down of these abstracted rules makes a pure passive tradition possible. Thus the originally intuitive life falls victim to the seductions of language (Crisis p.362). The words lose their original force : it is not anymore by virtue of their being expressed that law is given, by this act itself, but by virtue of the rule which is pre-existing behind it and which is merely applied in the judgment of the affair. This idea of pre-existing rules 'behind' a judgment leads finally to the idea of a universal judgment existing out there, to which all legal rules and laws have to correspond or of which they are an expression. These norms, finding their validity in this idea or in some secularized form of it, as the state, exist then in-

dependent from the things to which they can be applied, and independent from their actual application in a lawsuit, in a legal process. They are alienated from their being constituted in a thing as the gathering of the human community. Legal proceedings have lost their re-creative and constitutive function and play merely a role as a means of coercion in function of those pre-existing rules.

At best, the lawsuit is considered as the solution of a conflict, which can be decided on the merits of the case without tracing things back to originary evidences, to their being given, their being handed over as a gift in an intersubjective community of fellow men.

(13) Transcendental recovery of law.

In the following paragraphs, the phenomenological method will be considered as a legal process which tries to trace back law to its original evidence and to reconstitute from thereof the legal thing in its essential structure.

(a) philosophical epochè (cfr. supra (3c)).

The philosophical epochè puts 'out of play' all interpretations of law which are not juridical. They have to be removed to make a clarification of law possible. Law can never been fully understood as a political, sociological, economical or other activity judged by these criteria, but has to be understood as a human creation founding its own truth: law stands in its own right.

Its truth can never be deduced from what caused certain legal institutions to exist, seen as an external causality in the usual sense of the word. The truth of a legal institution lies in the possibility to trace

it back to the original evidence of its being given in an actual success, which is its creation, which has to be re-created and reconstituted.

This basically leaves room for two disciplines of law: (a) legal history or comparative law (legal science) as a factual, empirical, not transcendental knowledge describing the legal phenomena and comparing and connecting them. This legal science is however not 'positive' in the sense of practically valid. (b) legal art, positive in the sense of valid law, which however requires a second, transcendental epochè. (b) transcendental epochè (cfr. supra (4) and (5)).

The phenomenological attitude wants to try the claims, who present themselves as legal, on their evidence. In a concrete suit they are presented by the claimant or plaintiff. On the other hand are presented arguments denying this claim. In the concrete suit, they are presented by the opponent or defendant.

Thus, there is a certain conflict. Were there no conflict, there was no interest in the claim, and it would be inadmissible (cfr. Belgian Code Proc. Civ. art. 17 & 18). The conflict shows that neither the claim nor the counter-claim have apodictic evidence: their 'non-being' is imaginable. There are different possibilities, of which none is evident as such. The fact that there is a difference shows the non-identity of the affair and the lack of consensus about it.

The difference asks for a new place where it can be dealt with, a new standpoint. The claim is insufficient on itself and is brought before an instance to try it. This opens up different possibilities. The instance can

confirm the being-such of things and reject the claim, or grant it and confirm the being-different of things.

To bring the case before an instance is not yet a decision or judgment about it, but has already certain consequences. It is in any case the end of the self-righteousness of the parties concerning the things brought up. The parties are put out of play. The judgment is suspended until the evidence will have been examined : the thing is now 'sub iudice', 'in dependence', 'in abeyance'. It cannot anymore be dealt with without the instance before which it was brought.

This new standpoint makes it possible for a certain strangeness to show itself again. This breach of familiarity is already shown by the existence of a conflict. It shows that the individual cannot deal with the thing anymore on its own. He is not independent, but dependent on others. This becomes clear when something is him denied. This gives an experience of strangeness of one men to the others. They are interdependent, belonging to an interdependent and intersubjective community (cfr. R. BÖHM, Festschrift p.7 ff.). Therefore, things have to be replaced in a 'thing', as gathering of this community to found a new consensus, a new 'commonplace' on the ground of which a new agreement is possible and the course of things is prescribed again. The course of things and the 'rules' for it, who became independent 'subjective rights' are put in their place again, in dependence to a community, in order to be traced back to their origin. This trial is an attempt to restore their identity, and the instance of the community is mediating this process as a tribunal.

(14) The domain of transcendental being in legal things.

(N.B. this paragraph corresponds more or less to (6)&(7)).

By this transcendental epochè is opened up a domain of pure being of law in which can be found a purified legal thing, which is given an identity by this pure being. The domain itself, the lists within which this pure being can be disclosed, is the process itself, the lawsuit ('geding'), characterized by an intentionality. This intentionality forms the synthesis between and the belonging together of the judicative activity ( examining, judging and pronouncing) of the judicial body (the judging institution or function) - as noetic, meaning-giving activity - and the intended course of things of the brought up and judged affair - as noematic object -. The identity of the legal thing ( a certain course of things ) is thus always given within a manifold of legal proceedings, namely the different actions in a lawsuit : citation, appearance of the parties, hearing, production of supporting documents, argumentation of evidence for the alleged facts, pleadings, sentence, etc...

These legal proceedings find a unity as the noetic side of the transcendental and intersubjective ego which is formed by the court or instance - the 'thing' as gathering -. The judge or court sits as representative of the interdependent intersubjective community. This transcendental being is not dependent on a thing out there, on a pre-existing law, but discloses the domain where law is possible in the first place, as an intentional belonging together of a judge or judging body and the judged thing which is also the intended course of things. This establishes a new relation between both, expressed by legal terminology and ritual

which tries to be 'a rhetoric resonant with the thing' (M. MATANSON, Phen. as a rigorous science, II).

This requires the judge to be skilled, to be a craftsman, a 'τεχνίτης', an expert. The German word for expert, 'Sachverständiger' or 'Sachkundiger' still expresses the belonging together of the thing (Sache) and the expert. In this belonging together, any merely theoretical interpretation of law has to be retired in order to let the thing manifest itself. The task of the judge is to disclose this manifestation of the intended thing. In this sense he is a ' ' and is phenomenology' the art of realizing the truth' (M. MERLEAU-PONTY, Phén. de la perception, Avant-propos, p. XV).

The judge is also a mediator, who mediates through the legal proceedings a consensus on which the further course of things is dependent. This mediation is a re-creation of the first place, where things are given for the first time. This re-creation is an again and again expressing of the belonging-together (G. 'zusammenhören', cfr. 'hören', to listen) by hearing and pronouncing.

The written law is never sufficient in its self-containedness. The thing in law does not ask for some place where a law is written, but requires an answer on the only place where the law is in its first place. Otherwise ceases to be (G. 'aufhören', cease, not-listen-anymore-to) a thing in law. The re-creation of this first place is a re-presentation of the thing, a once more presenting it as a present and as a present or gift. This gift is a limited gift, which has to be renewed each time. It can be enjoyed or used. But its use is always limited by its being given on the common-place of the gathering of the interdependent community. That this gift is limited because of the life of the community is clea-

red precisely by the fact that the essence of law becomes disclosed for us at the moment that the enjoyment of a claimed 'right' is denied by the other on whom one is partly dependent.

In the ritual of the legal proceedings, this gift is gratefully recognized. The process is the thanksgiving ritual, in which things are given back to the whole out of which they are handed over, the rooted community with its traditions (cfr. La. tradire, to hand over). This giving back of things to the place where they belong is also their purification.

(15) The temporal structure of the legal rule.

The process of law is thus a re-presentation of a course of things ( cfr. P. AMSELEK, Description ..., p. 390, 407 v.) within the domain of transcendental being. This domain has its internal temporality (Meditations 18). This temporality is expressed in the ecstasies of past, present and future. In the process of law, the three ecstasies of temporality belong together, united in one course of things.

The lawsuit recognizes the past as givenness and thus as a present. Thus it makes this past present and re-presents it as a transcendental past, as an internal history? But it also projects an internal history in the future as a transcendental future or intended future course of things. This intended future course of things is also re-presented : the future is founded on a transcendental present.

The representation of a course of things is a rule. Only from the standpoint of the transcendental epochè can it become clear how law is expressed in rules. Rules are represented courses of things, re-presented unfoldings of things. The unfolding as ex-plication, as re-presentation is a rule.

The noematic object of a rule thus has a threefold structure following the three tenses of temporality. The thing (state of affairs) in the past tense is the thing as given, the thing in the future tense is the thing as projected, and the thing in the present tense, which is the moment of identity between this infinite past and infinite future, is the given thing in identity with the projected thing, the thing as corresponding fully to the norm, the norm as presented. In an abstract vision of law, there is only this time. It is the abstract time of law of Gerhart HUSSERL (Recht und Welt, p. 7., (1929)), corresponding to the primacy of the present tense in E. Husserl's philosophy (different from Heidegger's primacy of the future, - Sein und Zeit par. 65 p. 329, and Lacan's primacy of the future perfect).

The noetic activity also has a threefold structure fitted in the legal proceedings and the judgment : recollecting a past course of things, pronouncing and projecting or prescribing the future legal consequences of it.

What explains now the primacy of the present as transcendental sense in the constitution of the thing ? The thing in the present tense is a measure or norm (cfr. AMSELEK, Description ... p. 403 v.), more specifically a qualitative norm, by virtue of which the things are given their measure for the first time, through which they acquire a measure at all in their infinite unfolding course of things. The judging activity in the present tense is a qualitative value judgment - i.e. a judgment that has only two values: positive for conformity and negative for non-conformity, cfr. AMSELEK, ibid. p.392) - which fixes things in a certain moment of their becoming. The transcendental legal norm is the only measure that gives a hold on the course of things and therefore an essential instrument of the intersubjective community.

- (16) An example of the meaning of the legal process in roman law. (Source: J.C. van OVEN, Leerboek van Romeins privaatrecht, Leiden 1945)

A lot of rules and practices of roman law have their origin in the legal process. Some examples of those could show something more of the importance of the legal proceedings.

The oldest form of a lawsuit consisted of two parts. The first part, *in iure*, took place before the magistrate of the city. The claimant or 'actor', the person who acts, cites his opponent, '*is cum quo agitur*' or '*reus*': this is the '*in ius vocatio*'. Before the magistrate, he pronounces the *legis actio*, a very formal, solemn formula. If the defendant does not respond, the is admitted immediately. Otherwise the proceedings pass on to the *litis contestatio*, the statement of the issue, which will be put before another judge in the second part of the process, '*apud iudicem*'.

These *legis actiones* were only available for roman citizens, i.e. the full members of the community.

An example: in the case of a '*rei vindicatio*' or re-verification of a good, the thing itself was first brought before the magistrate, '*in ius*'. This was only possible for movables, but immovables could later be brought too, represented by a part, e.g. a brick for a house. The actor then pronounces the formula of *rei vindicatio* '*Hanc ego rem ex iure Quiritium meam esse aio*' while holding the thing. The defendant does the same thing or its claim is rejected. Then the magistrate commands to release the thing, which is now *sub iudice*, saying: *mittite ambo rem*. A sacramental wager is made under penalty of a certain amount of money due to the treasury of the city. After this *litis contestatio*, the case is forwarded to the

'iudex' and tried on its evidence. Parties have to submit evidence that the thing is their property.

The best evidence for this is its being given. If possible, the parties will trace back their property to its being given, to the process of giving. This could have been a donation, a purchase, or another act of that kind, which was in most cases a ritual act. Through the re-presentation of that original act, they could give evidence for their property.

Let's have a look to these rituals. There were especially three ways of alienation of goods : 'in iure cessio', 'mancipatio' and 'traditio'. Alienation of property could not happen without a certain form, a certain ritual. The most simple one was the 'traditio', which was originally not legally protected. This formalism expresses the original experience of things as a limited gift from the gods on the one hand and as related to the whole community of fellow men on the other. The meaning becomes already clearer when we see that the two most protected forms were mock trials.

This is very clear for the in iure cessio, which took place before the magistrate himself. The thing which was subject to alienation was brought before him. The purchaser pronounced the solemn legis actio, without mentioning a special cause for its acquisition (causa adquirendi). The seller kept silence and his silence meant consent, in this case renunciation. The magistrate then adjudicated the thing: rem addicit.

In the 'mancipatio', the magistrate is replaced by five witnesses and a 'libripens' holding a balance. The purchaser (mancipio accipiens) holds the thing and re-vindicates it, pronouncing the legis actio and a causa adquirendi, e.g. 'Hanc ego rem ex iure Quiritium meam esse aio eaque mihi esto hoc aere aeneaque libra'. The seller keeps silence and thus recognizes the purchase. The purchaser pays by depositing the prize in the balance before the witnesses.

The mancipatio was however only possible for the res Mancipi, namely Italic estate, slaves and 'quadruples quae collo dorsave domari solent', i.e. the family-capital in a rural society. The witnesses were probably in the beginning family members who had to approve of the alienation.

Finally, even the most simple form, the traditio, was formal: the thing itself had to be handed over. This was originally only possible for the res nec Mancipi, the movables who were not res Mancipi, i.e. less important goods. The legal protection was only granted after an usucapio of one year for movables and two years for real goods.

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