

Hans Lindahl

Gadamer, Kelsen and the Limits of Legal Interpretation*

1. Introduction

In a well-known section of *Truth and Method*, Hans-Georg Gadamer argues that legal interpretation has a paradigmatic significance for a philosophical hermeneutics. Indeed, legal practice has consistently resisted the historical school's attempt to sever the link between interpretation and application, for the jurist or judge must interpret legal norms from the perspective of their possible application to the case at hand. By retaining the internal connection between interpretation and application, legal interpretation provides a privileged perspective from which to evince the nature of the hermeneutic problem and, more broadly, of the circularity that governs the human understanding of the world.

Gadamer's thesis about the paradigmatic character of legal interpretation reflects what might be called the „natural“ way of approaching the law. In effect, it is natural – and perhaps inevitable – to begin an inquiry into the structure and conditions of possibility of legal interpretation by raising the following question: What defines legal interpretation as *interpretation*? Once this question has been settled, one can then go on to determine the „specific difference“ that distinguishes *legal* interpretation from other forms of interpretation. On this reading, a closer analysis of the properly legal form of interpretation has a secondary interest from a philosophical point of view, for this analysis focuses on the particular features of a „regional“ hermeneutics. Not surprisingly, Gadamer goes no further in his account of legal interpretation than what is necessary to show that the process of applying legal norms illustrates and confirms his general thesis about the structure of human understanding.

While „natural“, Gadamer's approach involves a risk, a risk that, as far as I can see, he does not deal with in either *Truth and Method* or the *Kleine Schriften*. Could a detailed analysis of what he considers to be a secondary question – „What defines interpretation as *legal* interpretation?“ – turn back on, and chal-

* The author thanks Ulises Schmill, Michel Troper, Oscar Sarlo and Bert van Roermund for helpful comments to a draft of this paper presented at the IVR Congress in Amsterdam, June 2001. Thanks are also due to Emilios Christodoulidis for detailed comments on an earlier version of this paper.