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RIGHT THINGS: ON THE QUESTION OF BEING AND LAW

by

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> The event [*Ereignis*] is *the* law in so far as it gathers mortals into the appropriateness of their essence and there holds them. [1]
>
> ... the law is itself a kind of place, a *topos* and a taking place.[2]

I

The current contemplations in what is known as continental philosophy have, no doubt, had a profound influence on the contemporary study of law. One manifestation of this influence has been the attention given to issues related to law and justice in the works of, for example, Jacques Derrida or Emmanuel Lévinas. The philosophical debate has also involved certain thinkers with a juridical background such as Giorgio Agamben among others. A further manifestation has been the influences of this philosophical debate on what we may — perhaps rather cautiously — term critical legal theory, especially in the Anglo-American world.

A figure that persistently appears in this debate is Martin Heidegger. The position of Heidegger's fundamental ontology in philosophy proper is clear enough.[3] Very little has, however, been done to assess the

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1 Martin Heidegger, *Unterwegs zur Sprache. Gesamtausgabe. Band 12* (Frankfurt am Main: Vittorio Klostermann, 1985), 248.

2 Jacques Derrida, "Préjugés. Devant la loi", in Jacques Derrida et al., *La faculté de juger* (Paris: Minuit, 1985), 87-139, at 118.

3 For a general introduction to Heidegger's fundamental ontology, see, e.g., Jacques Taminiaux, *Heidegger and the Project of Fundamental Ontology* (Albany: State University of New York Press, 1991).

significance of Heidegger's philosophy for the study of law. It has, indeed, been argued that Heidegger radicalises the question of philosophy to such an extent that no philosophy of law is thereafter possible. As the philosophy of law does not and cannot address the question of Being, it can — so the argument runs — only reduce itself to legal theory.[4] In critical legal theory, Heidegger has made his way to the footnotes of academic scripture mainly through the influence of the aforementioned contemporary philosophers. But if we take in earnest Derrida's claim in, for example, "Ousia et grammè" about Heidegger's reluctance to take the destruction of Western metaphysics to its conclusion[5], it is even more debatable to embrace references to Heidegger in the study of law as facile and self-evident.

Before the latest generation of ontological footnoting, Heidegger's philosophy has experienced at least two law-related assimilations. The first phase, originating in the 1950s, involves an existential reading of Heidegger and, in its legal applications, is strongly influenced by the social philosophy of Karl Jaspers[6], the existential theology of Max Müller[7], and the existentialism of Jean-Paul Sartre[8]. The principal question of an *existential philosophy of law* is not Being but, rather, human existence and its rapport to the social dimension of law. The second assimilation that takes place during the next decade is the elaboration of an *hermeneutic phenomenology of law* which appropriates its Heideggerian undertow mainly from the philosophies of Hans-Georg Gadamer[9] and Paul Ricœur.[10] The principal question of this approach concerns the interpretation of texts and has since developed into an established field of legal theory. The position of the latest phase, that is, critical legal theory,

4 Rafael Gutiérrez Girardot, "Ist Rechtsphilosophie überhaupt möglich?", *Archiv für Rechts- und Sozialphilosophie*, Beiheft Nr. 41 — Neue Folge Nr. 4 (1965), 155-162.

5 Jacques Derrida, *Marges — de la philosophie* (Paris: Minuit, 1972), 73-78.

6 E.g. Karl Jaspers, *Existenzphilosophie* (Berlin: De Gruyter, 1956), 26-54.

7 E.g. Max Müller, *Existenzphilosophie im geistigen Leben der Gegenwart* (Heidelberg: F.H. Kerle, 1964), 160-183.

8 E.g. Jean-Paul Sartre, *L'être et le néant. Essai d'ontologie phénoménologique* (Paris: Gallimard, 1943), 275-364.

9 E.g. Hans-Georg Gadamer, *Wahrheit und Methode. Grundzüge einer philosophischen Hermenutik. Gesammelte Werke. Band 1* (Tübingen: J.C.B. Mohr, 1986), 258-269.

10 E.g. Paul Ricœur, *Le conflit des interprétations. Essais d'herméneutique* (Paris: Seuil, 1969), 222-232.

is blurred not only in relation to Heidegger but also to its predecessors.

Yet, the problematic question remains. What does Heidegger's philosophy have to offer the philosophy of law? May we simply elude the problem by stating that the claim about the impossibility of a philosophy of law after Heidegger is merely a strategically motivated cathedratic appeal for tradition? Is there any philosophically relevant relationship between the question of Being and law?

Among the few attempts to conceive a fundamental ontology in relation to law is the work of Erik Wolf.[11] For Wolf,[12] an ontology of law is necessarily the ontology of *right* (*Rechtsontologie*), and its question addresses the relationship between right and Being: Is right? Does right exist? A preliminary answer to the *Seinsfrage* of right is offered by the various modes of ontic inquiry into right understood as a being (positivism, rationalism, voluntarism, and phenomenology) but, as the preliminary introduction of *Sein und Zeit* will indicate,[13] an ontic inquiry is unable to attain the Dasein of right, that is, the specific way in which right appears for Dasein. The point of departure of the ontology of right is, then, the ontological difference, the inconvertibility of right Being (*Rechtsein*) and right understood as a being (*Rechtseiende*). Wolf claims that right is neither an inauthentic aspect of a being nor a deficient mode of Being. Its essence (*Wesen*) is not located in the domain of the public; it comes to be (*wesen*) in Being-with and Being-for which are the prerequisites of authentic Being-self.[14] Right is not merely available equipment

11 Wolf was Heidegger's colleague during the strenuous years at Freiburg. As dean of the Faculty of Law during Heidegger's rectorship, he also shares with Heidegger a debatable relation to the Nazi government before the Second World War.

12 Erik Wolf, "Rechtsphilosophie", in *Rechtsphilosophische Studien. Ausgewählte Schriften* (Frankfurt am Main: Vittorio Klostermann, 1972), 69-82, at 71-72.

13 Martin Heidegger, *Sein und Zeit*. Gesamtausgabe Band 2 (Frankfurt am Main: Vittorio Klostermann, 1977), §§1-4 (hereafter SZ). In my references, I have indicated the paragraphs in question to facilitate cross-checking with international editions. Several English commentaries to *Sein und Zeit* are also available. I have found some of Hubert Dreyfus' clarifications to the standard translations of Heidegger's key notions well motivated and useful: see *Being-in-the-World. A Commentary on Heidegger's* Being and Time, *Division 1* (Cambridge/London: The MIT Press, 1991). In other references to Heidegger, I have consulted the standard translations whenever they were available. In order to maintain a consistent English terminology, some alterations were, however, necessary. As for Wolf, I have had to rely on my own judgement.

14 I hesitate to translate *Wesen* as essence and, thus, participate in a reduction of

that Dasein manipulates isolated from other Dasein but, rather, assignment (*Weisung*).[15]

In this essay, we shall attempt to think the relationship between right and Being by way of "road marks" set out by Heidegger and Wolf. We shall commence with an hermeneutic phenomenology of *law*, with an understanding of legal norms as equipment Dasein uses while being concernfully absorbed in the world. We shall then proceed to the predication of law as *right* with what Heidegger calls an assertive sign. With such an account, we will be able to formulate what Wolf calls a *regional ontology of right* (What is right? How is right?). This will, however, indicate that, while asserting the right of law in a regional ontology, Dasein is still caught in the inauthenticity of fallenness. In order to assess the possibility of authenticity in Dasein's relation to right and the relationship between right and Being in general, we shall finally attempt a *fundamental ontology of right*, an analysis of right as the *advening* of Being, as the coming order that becomes all beings in the original temporality (*Zeitlichkeit*) of Being.

II

The starting point of an hermeneutic phenomenology of law is the way in which Dasein encounters individual beings while being absorbed in its everyday practical activities. As Dasein confronts the world concernfully, it does not come across senseless existents. For Dasein, beings appear in a meaningful way as purposive tools, as equipment (*Zeug*) that it manipulates in accordance with a specific in-order-to (*Um-zu*) that designates the tool. The in-order-to of an equipmental being is not its function but, rather, a referential totality interconnecting one being to another without which any one being would remain senseless for Dasein. (SZ, §15). As equipment, a being is, then, defined by its in-order-to, its

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Wolf's ontology to naïve essentialism. The old German verb *wesen* that is also frequently used by Heidegger has usually been translated as "to occur essentially" and "to come to be and unfold".

15 "In Greek, to assign [*zuweisen*] is *nemein*. *Nomos* is not only law but more originally the assignment [*Zuweisung*] contained in the dispensation of Being. Only the assignment is capable of conjoining man into Being. Only conjoining is capable of supporting and binding. Otherwise all law remains merely a fabrication of human reason". Martin Heidegger, *Wegmarken. Gesamtausgabe. Band 9* (Frankfurt am Main: Vittorio Klostermann, 1976), 360-361.

purposiveness within a structural totality. For a being to make sense to Dasein, it must function within a context of meaningful activity that Heidegger calls involvement (*Bewandtnis*). In its purposive involvement with beings, Dasein encompasses a for-the-sake-of-which (*Um-willen*), a conclusive albeit non-intentional motivation for Dasein to use equipment. By using equipment, Dasein displays a particular knowledge about how they function within a totality, within a wherein (*Worin*) of available beings.

As Dasein is concernfully involved in its everyday activities, it is not reflectively aware of the equipmental being used or the totalities that define it as a particular being but, nevertheless, displays a pre-theoretical familiarity with these merely by knowing how to use it. By using a shovel, a farmer digs a ditch into his field demonstrating, at the same time, a necessary understanding of agriculture and, yet, does not reflect on the shovel or farming in any theoretical way. But without such an understanding, the individual being "shovel" would remain senseless: "ditch", "soil", "irrigation", "cultivation", and so on. Heidegger calls the general phenomenon of Dasein being "always already" socialised into a world of meaningful beings Being-in-the-world (*in-der-Welt-Sein*). The fundamental characteristics of any given being are determined by its in-order-to, its use as equipment in relation to a particular for-the-sake-of-which. As Dasein uses an equipmental being in its everyday practical activities, the tool has a specific way of Being that Heidegger calls availableness (*Zuhandenheit*).[16]

The particularities of legal tradition present obstacles in trying to conceptualise an example relevant to law. Legal thinking seldom regards law as operative except when it is violated against and, for reasons that shall be taken up later, this is a plausible solution to a certain extent. But law exists in the world of Dasein even when things are running smoothly: it secures safe passage within urban traffic, it sets standards for commerce and trade, it directs social comportment within certain parameters, and so on.

In such situations, Dasein encounters law as an equipmental being with a specific in-order-to and for-the-sake-of-which. An obvious parallel to the farmer and the shovel would, of course, be the professional lawyer using law as equipment in her work. The lawyer displays a pre-theoretical familiarity with law by, for example, recognising a document as a contract laden with legal significance without having to reflect on the

16 SZ, §§12 and 15.

matter theoretically. At the same time, she must necessarily possess some understanding of a referential totality without which law would remain senseless to her: "commitment", "obligation", "process", "settlement", and so on. In the case of the professional lawyer, law functions as a "normative yardstick" against which the legal character of social relations is measured.[17] Law is not, however, equipment restricted for the use of legal professionals. Regardless of the merits of the professional approach, it can hardly touch the surface of a being as complex as law. We shall attempt to think law as it is encountered by the non-professional Dasein.

In its everyday activities, Dasein is involved with available law continuously without being reflectively aware of it. For Dasein, law functions as equipment with which Dasein directs its social comportment within the world; we do not pick pockets or threaten others with violence because, regardless of the contents of individual statutes protecting the property and personal integrity of others, we abide by the law. The fundamental characteristics of law are not, then, revealed exclusively in its professional use as a yardstick for measuring the legality of social relations as the bulk of legal theory contends but, rather, in the way in which Dasein encounters law in relation to its own comportment within the world. The referential totality of law, its in-order-to, is, in a sense, self-referential: if a shovel "is" in order to dig ditches, law "is" only to be abided by. Dasein abides by the law encompassing a specific for-the-sake-of-which: law designates Dasein a place or a position from which it attempts to maintain a meaningful world. Law standardises Dasein's comportment.

A literal translation of the German expression for abiding by the law (*das Gesetz einhalten*) would read: to keep law as one, to keep it intact. The connotation is similar as in the English expression "to keep a promise" and other such idioms. We do not keep a promise because we abide by its dictates or direct our own behaviour in accordance with the contents of its normative authority but, rather, because we wish to secure the unity of the promise. Should we break the promise by refraining from an obligation, its unity would be in jeopardy. In a similar way, law seems to manifest a two-fold tension between the order of unity and the disorder of decay. On the one hand, law has become one and, by abiding by the

17 On a phenomenological account of such an approach, see Paul Amselek, "La phénoménologie et le droit", *Archives de la philosophie du droit* XVII (1972), 185-259, at 200-228.

law, we uphold its integrity. Its originary structure is not one of unity but, rather, of conflict and chaos. On the other hand, law has an inclination to disintegrate back into chaos, to lose the unity that only our law-abiding comportment can maintain. Because of this inclination, we act, not to maintain ourselves in accordance with the law, but to keep law itself as one.

The primordial mode of Being, *for Dasein* and *for* law appears in a way that does not involve any form of reflective awareness. What Dasein encounters is, quite simply, availableness: as an equipmental being, law is transparent and dissolves in such a way that Dasein is not aware of its characteristics. In order to be available, law must paradoxically withdraw from Dasein concernfully engaged in its practical activities. As law-abiding citizens, we are normally unaware of law that we keep intact by acting in a certain way; we pay for a paper at the newsstand without being reflectively aware that the unity of law requires us to do so. In a corresponding way, Dasein's own grasp of its law-abiding comportment is not inspection in the sense of a methodological stance in relation to a set purpose but circumspection, that is, purposive involvement "in the world" to which both Dasein and law belong; by paying for the paper, we are merely engaged within a world encompassing both us and law (SZ, §15).

Dasein articulates its understanding of law by comporting within three consecutive totalities. Firstly, there is an equipmental totality (*Zeugganze*) of law including such interrelated equipment as, for example, "law", "norm", "rule", "principle", and so on. Secondly, there is a referential totality (*Verweisungsganzheit*) of law which comprises the structural relations between the individual beings. Thirdly, there is an involvement totality (*Bewandtnisganzheit*) of law which adds Dasein's purposiveness, its concern to keep law intact, to the two former (SZ, §18). Structurally the involvement totality makes up what is known as the world or, in other words, significance (*Bedeutsamkeit*), the background against which law "always already" makes sense in the disclosure of Dasein and world.

Should Dasein always be involved in its everyday activities in such a transparent way, it would never be able to account for the world in which it and its equipment dwell. The primordial mode of Being of Dasein and of law lies, however, in the way in which available law is used in absorbed coping, in the way in which Dasein is involved in keeping law intact. An awareness of the fundamental characteristics of law is only possible when it fails to perform in the way it usually does and becomes unavailable (*Unzuhandenheit*) unravelling all that it normally performs with. In such

a case, the world, that is, the specific way in which individual beings such as law and referential totalities are accessible to Dasein in a meaningful way, is discovered. Heidegger, however, denies that the fundamental characteristics of beings could be explained by referring to a subject/object-relationship in which, for example, the subject intentionally theorises about law.[18]

From the modes of disturbance defined by Heidegger (SZ, §16), we can distinguish three different ways in which law is unravelled to Dasein. Conspicuousness (*Auffälligkeit*) is the brief acknowledgement that law has somehow not performed in the way it should. We pick up a paper from the newsstand and start to walk away suddenly remembering that we have not paid for it. The law that we are to keep intact by directing our comportment in a specific way suddenly becomes unavailable but, as we pay the attendant, quickly withdraws back into availableness. Obstinacy (*Aufsässigkeit*) occurs when the function of law, that is, that it is kept intact, becomes impossible. As we are looking for the attendant of the newsstand who has mysteriously vanished, we become more fully aware of law, of the requirement to keep it intact, and of the referential totality that encloses the requirement: "law", "payment", "price", "merchandise", "business", and so on. Only after reflective thinking can we secure the unity of law by, for example, leaving the coins at the counter and be on our way. In the third variant of disturbance, obtrusiveness (*Aufdringlichkeit*), a transition occurs from involved practical activity to a theoretical reflection of the impossibility to fulfil the task, that is, to keep law intact. Sitting in the underground with an unpaid paper under our arm and no possibility to rectify our infraction, we reflect on the matter with ambiguous sensations of unaccomplishment. We are fully aware that we have broken the law and are withheld from resuming our practical activity, that is, keeping law intact, and helplessly gaze at the paper we have unlawfully taken into our possession. Only now does a theoretical position enabling the explanation of the causal relations between law, commerce, and our own behaviour become possible but, at the same time, law has become occurrent (*Vorhandenheit*) and is deprived of its worldly

18 According to Heidegger, the theoretical reflection of science requires the decontextualisation of aspects into occurrent properties that do not belong to the equipmental whole. For example, the efficacious aspect of law is decontextualised into "efficacy", an isolable property that can then be attached to any other entity, as well. In Heideggerian terms, this would mean "overlooking the equipmental character" of law. See SZ, §69b.

character and, accordingly, its fundamental characteristics.

III

As an hermeneutic of everydayness, the first division of *Sein und Zeit* attempts to define the proper "method" for the interpretation of Dasein's involvement with meaningful beings in its everyday practices. Heidegger claims that the tradition has overlooked Dasein's primordial relationship with the world and has, thus, evaded the question of Being: What "is", for example, law for Dasein? (SZ, §5)

The hermeneutic interpretation (*Auslegung*) of law is already implicit in Dasein's everyday understanding of law. Interpretation is always the articulation of a latent capacity that Dasein usually exercises in its everyday purposive involvement: by keeping law intact, Dasein interprets law that it must necessarily already possess an understanding of. For Heidegger, interpretation is grounded on a threefold fore-structure of understanding. Firstly, Dasein must necessarily possess a fore-having (*Vorhabe*), understand the functional totality to which law belongs ("norm", "rule", "position", "social world", and so on). In other words, in interpretation Dasein manifests its understanding of using law and other related equipment for a variety of purposes. Secondly, Dasein must possess a fore-seeing (*Vorsicht*), understand that, as serviceable equipment, law can be used to achieve a specific end. In other words, in interpretation Dasein displays its understanding of law as a being that can be kept intact. Thirdly, Dasein must possess a fore-conception (*Vorgriff*), an understanding of how law must be manipulated in order to achieve this end. In other words, in interpretation Dasein anticipates that by comporting in a specific way it can keep law intact (SZ, §32).

In designating us a place within the world — for example, that of a paying customer at the newsstand — law directs our comportment in a specific way. Dasein directs itself in relation to law due to a certain pressure present in its Being-with (*Mit-sein*) in the world with other Dasein. It occupies positions in relation to other Dasein in a way that is, so to speak, proper. Dasein directs itself towards a "normality" in the sense that, for example, paying for the paper is "what one does". This involves no normative pressure in the legal or moral senses; "one keeps law intact" (*man hält das Gesetz ein*) because that is what is expected of Dasein. For Heidegger, the "one" (*das Man*) of the passive modus is a non-ethical, formal description of Dasein's tendency to conform (SZ, §27). By

conforming to the normalising impetus of law, that is, by keeping law intact because that is what one usually does, Dasein avoids differentiation from others and aims at an averageness, a shared background necessary to sustain the world and, as a part of it, a place or position without which an understanding of individual beings would be impossible. Law-abiding Dasein is merely conforming to the normality of the one. Conforming, however, prevents Dasein access to its true Being. Therefore, Dasein's relation to the normalising impetus of law is supported by common normality. In other words, Dasein's mode of Being in relation to law can only be inauthentic (*uneigentlich*).[19]

If Dasein keeps *law* intact, it is not merely conforming to a norm in order to designate itself a place within the world; Dasein does not relate to norms and law in the same way. Even if simple norms constitute the bulk of positive law, we do not write out an official document according to a prescribed formula in the same way as we pay for a paper at the newsstand. Unlike norms, law indicates to a norm that can be kept intact and, at the same time, specifies such comportment as right (*recht*). We pay for a paper and, simultaneously, contend that it is right to do so. Moreover, law does not require actual use: law states that it is right to keep law intact. The unitary structure of law (*Gesetz*), its intactness, is right (*Recht*). We must, accordingly, work out how Dasein accounts for the right of law.

For Heidegger, there are beings that do not function merely as equipment that Dasein uses in its practical activity but that, at the same time, serve as indicators revealing their mode of Being and the referential context in which they function. Heidegger calls such beings signs (*Zeichen*). In its functioning, a sign points out the shared background in relation to which Dasein understands it, that is, the world.[20] A legal sign proper such as, for example, a trademark is not merely a representational relationship between a name and a product. Like all beings, a trademark is equipment serviceable in differentiating one product from another but,

19 In some interpretations of Heidegger, there is a disposition to understand "inauthenticity" as a pejorative mode of existence. This is, however, not the case. For the most part, Dasein's relationship with the world is inauthentic as in, for instance, coping with the everyday and, indeed, should remain so.

20 This passage would require a more elaborate analysis of Heidegger's critique of Edmund Husserl's conception of signs: *Logische Untersuchungen. Zweiter Band. Untersuchungen zur Phänomenologie und Theorie der Erkenntnis. I. Teil* (Tübingen: Max Niemeyer, 1980), 23-61. I must, however, leave this for another occasion.

at the same time, it must necessarily be enclosed in an involvement totality in which the sign appears as meaningful for Dasein: "*Levis®*", "fashion", "distinction", and so on. In its functioning, a sign points out this totality. For Heidegger, then, a sign does not only point to any other being and is not a representational relationship between the two. The working of signs, that is, their use in Dasein's everyday activity and their indicative function, presupposes a shared understanding of the world which the sign simultaneously reveals (SZ, §17).

Wolf has argued that because right is ultimately connected to Dasein's authentic mode of Being, it cannot merely be available equipment such as law but, indeed, a signal, a meaningful sign that situates Dasein's comportment within a specific order.[21] As sign, right services Dasein as an indicator that points out the significative background against which law appears as meaningful to Dasein. The sign "it is right to keep law intact" or, in short, "law is right" is equipment the in-order-to of which is the communication of Dasein's understanding of law as right. The for-the-sake-of-which of right is the specification of the place within the world designated to Dasein in keeping law intact as right, that is, the structuring of Dasein's lawful existence into a rightful order.

The attribute of right that the sign predicates to law has, however, no specific function in itself. If right is not serviceable as equipment, how can Dasein understand, interpret, or use it? Understanding right, that is, the second step of our thinking, is understanding law *as* right. For Heidegger, any such understanding is articulated in an assertion (*Aussage*). An assertion is a specific mode of sign with which Dasein assigns predicates to beings. Even though predicates such as natural attributes are not in themselves serviceable as equipment, assertive understanding that, for example, "law is right" is interpretation that must necessarily be rooted in Dasein's everyday understanding of the world. Understanding the right of law requires the use of a sign as equipment that asserts that law is right (SZ, §33).

Dasein articulates the meaning (*Sinn*) of the assertion by using it, that is, by asserting that law is right. The meaning of an assertion is, however, not understood as semantic signification. It is, quite simply, that the being in question is, indeed, the given assertion or, in our case, an assertion that can be used as equipment to designate that law is right. A "false" interpretation of an assertion is, then, to use the equipment incorrectly. With assertions, Dasein can, for example, allude to the

21 Wolf, *supra* n.12, at 72.

binding character of law, its essence as power, and so on, but this is not the meaning of the assertion "law is right". Assertions such as "law is binding", "law is power", or "law is just" have meanings in their own right but cannot contest the meaning of "law is right" (SZ, §32).

By asserting that law is right, Dasein points out law without having to use it as conventional equipment. The possibility of using is, nevertheless, always latent. "Law is right" alleges that law is serviceable as equipment. The assertion indicates that it is right to keep law intact by paying for the paper at the newsstand even when we are not involved in the practice of purchasing one. Dasein indicates or points out law without actually using it for its designated purpose, that is, keeping it intact. The assertion does, however, communicate the understanding that in order to achieve this purpose, we must use law in the "right" way. Through assertions, Dasein shares its understanding of the world in which it dwells with other Dasein. This communicative function of assertive signs can be analyzed using the same practical framework as with other serviceable beings that Dasein uses.

"Law is right" is, however, not a theoretical assertion attaching the isolated, occurrent property of "rightness" to law isolated from Dasein's practical involvement in the world. An assertion is a derivative mode of interpretation that presupposes an actual or possible disturbance in Dasein's purposive comportment. By merely keeping law intact, Dasein is unable to designate itself the place that is rightfully its own. The order of law remains "unright", and to overcome this disturbance, Dasein asserts that law must be kept intact in a specific way, it must be upheld within a specific order. Only if it is right to keep law intact or, in other terms, only if law is kept intact in the right, can Dasein realise its purposive involvement within the referential whole of law. In plain terms, only right law is law.

"Law is right" functions within the general structure of assertions in three ways (SZ, §33). Firstly, it indicates to or points out (*Aufzeigung*) a shared context or a referential totality in which law appears as meaningful for Dasein. This pointing-out is, however, motivated. Law embraces a deficiency that obstructs Dasein in achieving what it was set out to accomplish. We can keep law intact by, for instance, paying for the paper merely out of generosity or fear of punishment. Only if we pay in a "right" way can the transaction involve law and achieve the purpose we were set out to accomplish, that is, keep law intact in the right. In Heidegger's terms, assertions make manifest a shared problem.

Secondly, the assertion singles out law from a nexus of available equipment and, through predication (*Prädikation*), indicates to a specific aspect: in order for law to be law, that is, to be serviceable to Dasein as law, it must be right. In its primordial mode of Being, Dasein encounters law as available equipment. In order to function properly, law must, however, possess certain qualities or aspects that can, at will, be pointed out with assertions. Just as a shovel must possess certain aspects of solidity and endurance in order to function properly in the digging of ditches, law must be right. We may, for instance, also pay for the paper because law is binding, but with the assertion we wish to differentiate one specific aspect, right, that makes law what it is. In other words, law can exist with or without binding power but not without right.

Thirdly, the assertion functions as communication (*Mitteilung*) within Dasein's purposive involvement in the world sharing a Being-towards (*Sein-zu*) in relation to what has been pointed out and predicated. Buying papers at the newsstand, an activity any Dasein can take up, involves a specific law-related obstacle that we have first specified and now wish to communicate.

IV

Can Dasein, then, understand right independently as an occurrent property isolated from the everyday use of law? In other words, can Dasein decontextualise law from its practical involvement in the world, postulate context-free properties such as "rightness", and thematise all this into, for example, a theory of law? Heidegger's answer is, of course, yes. Dasein *can* thematise its world with occurrent properties, but even such thematisation must necessarily take place in a shared world that "always already" precedes theoretical reflection; theory is an impoverished form of hermeneutic interpretation. Occurrentness is perceivable but, for Heidegger, intentional states such as perception must necessarily also involve Dasein's practical understanding of the world. To perceive right is to perceive that *something* is right. Therefore, Dasein's understanding of right is necessarily dependent on the use of an assertion that predicates right to law.

Our thinking has led us to the following understanding of right: as law, right locates Dasein into the world, and this location is structured within an order. Right is localising (*Ortung*, *èthos*) and ordering

(*Ordnung*, *ethos*).[22] But even such an hermeneutic interpretation of right does not involve authentic Being-in-the-world. We localise and order ourselves because that is what one does. Dasein is still caught in the inauthenticity of fallenness. As true Being is still unattainable for Dasein, most Heideggerian analyses of right attempt to proceed into an existential philosophy of right.

For instance, Erich Fechner argues that law serves Dasein as equipment by furnishing guidance, security, and peace within the social sphere; it protects Dasein by granting, in the order it fosters, a relative protection against the insecure and volatile nature of life. But if we understand law as right, it must necessarily engage something more, a supplement that goes beyond the tool-world of everyday life. Fechner equates right with Heidegger's notion of *logos* (SZ, §34) and argues that, as language, right's mode of Being is that of Dasein itself (*Daseinsmäßig*). Therefore, we are not dealing merely with Dasein losing itself in the inauthenticity of the everyday but with true human existence. Hence an existential philosophy of right.[23] In a more or less similar vein, Werner Maihofer contends that right belongs to Dasein's social existence and concludes that such existence cannot be confined to Being-self. Right is ultimately bound to Dasein's Being-as (*als-Sein*) in the world. Dasein exists in the social world in relation to other Dasein "as" someone with specific obligations and rights: as citizen, as father, as merchant, and so on.[24]

22 According to Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (Berlin: Duncker & Humblot, 1988), 13, land is mythologically the mother of right, the root of right and justice. The fruit of the cultivated land is the divine justice every farmer acknowledges; the tillage marks the yardsticks and rules of agriculture; the divisions of land make the localisation (*Ortung*) and the order (*Ordnung*) of communal life public: "Right is bound to land and covered by it. This is what the poet means when he speaks of the allrighteous land and says: *justissima tellus*."

23 Erich Fechner, *Rechtsphilosophie. Soziologie und Metaphysik des Rechts* (Tübingen: J.C.B. Mohr, 1956), 229-231. This is the usual way of reading Heidegger within the philosophy of law: as existential philosophy. Later (at 254-255) Fechner contends that Heidegger's whole *œuvre* is "nothing less than nihilism". See also Charles Donius, "Existentialisme, phénoménologie et philosophie du droit", *Archives de la philosophie du droit* IV (1957), 221-231. On Heidegger and social philosophy, see also Leopold Rosenmayr, "Gesellschaftsbild und Kulturkritik Martin Heideggers", *Archiv für Rechts- und Sozialphilosophie* XLVI (1960), 1-38.

24 Werner Maihofer, *Vom Sinn menschlicher Ordnung* (Frankfurt am Main:

Regardless of its sources of inspiration, an existential philosophy of right, however, reduces the radicality of Heidegger's fundamental ontology into an anthropology, into an account of the human condition as social existence. The question of Being and its relation to right remain open. One possible way to address this question would be to draw upon Heidegger's reading of the so called Anaximander fragment and the interpretation of *dikè* as order (*Fug*).[25] Wolf gives his own interpretation of the fragment in his work on Greek legal thinking acknowledging his debt to Heidegger.[26] Before an analysis on Wolf's interpretation is possible, we must deliberate on his involvement with Heidegger and the Greeks in general.[27]

Vittorio Klostermann, 1956), 42-52. See also Werner Maihofer, *Recht und Sein. Prolegomena zu einer Rechtsontologie* (Frankfurt am Main: Vittorio Klostermann, 1954) and Allessandro Baratta, *Philosophie und Strafrecht* (Köln/Berlin/Bonn/München: Carl Heymanns, 1985), 113-131.

25 Martin Heidegger, *Holzwege. Gesamtausgabe. Band 5* (Frankfurt am Main: Vittorio Klostermann, 1977), 321-373. See also Martin Heidegger, *Hölderlins Hymnen "Germanien" und "Der Rhein". Gesamtausgabe. Band 39* (Frankfurt am Main: Vittorio Klostermann, 1980), 123-129, 135-140; Martin Heidegger, *Einführung in die Metaphysik. Gesamtausgabe. Band 40* (Frankfurt am Main: Vittorio Klostermann, 1983), 167-170 and 174-176.

26 The translation given in *Holzwege* was not yet available. E. Wolf, *Griechisches Rechtsdenken I. Vorsokratiker und frühe Dichter* (Frankfurt am Main: Vittorio Klostermann, 1950), 218, refers to Heidegger's Freiburg lectures from 1941, where Heidegger insists that the fragment speaks of Being and Being alone thus, once again, excluding all juridico-moral interpretations. Martin Heidegger, *Grundbegriffe. Gesamtausgabe. Band 51* (Frankfurt am Main: Vittorio Klostermann, 1981), 99.

27 Within critical legal theory, there is a clear temptation — perhaps triggered by Derrida's recent interpretation of Heidegger's reading of the fragment (*Spectres de Marx* [Paris: Galilée, 1993], 49-57) — to read *dikè* as a juridico-moral metaphysics of justice. In my mind, this would, however, repeat the anthropological error of existential readings of Heidegger: *Dasein* as human Being is understood as the social existence of the *zòon politikon*. "If we translate *dikè* as 'justice' and understand it in a juridico-moral way, the word loses its grounding metaphysical content". Heidegger (*Einführung ...*), *supra* n.25, at 169. For similar reasons, I find Bernasconi's "ethical" assessment of *dikè* and justice (*Gerechtigkeit*) in Heidegger captivating and, yet, paradoxical. See Robert Bernasconi, "Justice and the Twilight Zone of Morality", in *Heidegger in Question. The Art of Existing* (New Jersey: Humanities Press, 1993), 40-55.

Wolf[28] founds his fundamental ontology of right on two short citations from early Heidegger. The first is from Heidegger's reading of Nietzsche's affirmation on the death of God in *Holzwege*, and Wolf contends that the following passage includes Heidegger's determination of justice: "The just is that which is in conformity with the right; but what is right is determined out of that which, as whatever is, is in being [*was als Seiendes seiend ist*]".[29] A few lines above the quoted passage, Heidegger reminds that, for Nietzsche, justice is not primarily the determination of the ethical and juridical domains. The thinking of justice and right commences from the Being of beings.[30] With the determination of right in the Being of beings, Wolf couples Heidegger's notion of the necessary relationship between truth and Dasein: "'There is' [*es gibt*] Being — not beings — only in sofar as truth is. And truth *is* only in sofar as and as long as Dasein is. Being and truth 'are' equiprimordial".[31]

From these passages, Wolf concludes that the truth of right can only be revealed in its mode of Being (*Rechtsdasein*). The truth of right as a being is the true justness that is determined in accordance with right. Right, on the other hand, is determined from the right-beingness of right understood as a being which is, finally, determined from Being. Wolf insists that these sentences are neither circular nor elements of a chain of rational thought but, rather, road marks that assign the direction of thinking.

Wolf's reading of pre-Socratic legal thinking involves three questions. The philosophical question addresses the dialectical unity of historicality (*Geschichtlichkeit*) and truth; the poetic question addresses the way in which poetry brings something of the essence of truth into the clearing; finally, the historical question addresses how this revelation has been brought to its conclusion in an original and compelling way in the thinking and the poetising of the early Greeks. According to Wolf, a disciplined historical inquiry is but escape from the present whereas historicality is the essence of the ever-present spirit. As right exists historically in the way of a spiritual Dasein and, as part of history, is only comprehensible as spirit, the essence of right is its historicality. Spirit can be and become only what it originally was. The essence that appears

28 Wolf, *supra* n.12, at 72.

29 Heidegger (*Holzwege*), *supra* n.25, at 247.

30 Cf. Reiner Schürmann, *Le principe d'anarchie. Heidegger et la question de l'agir* (Paris: Seuil, 1982), 233-236.

31 SZ, §44, at 304.

as right is the same at any given moment in history and must be comprehended as meaningful in relation to Being-with-another and Being-for-another. For Wolf, history is not, then, what has come about but what comes to be. This takes place in the event (*Ereignis*), the ever-present, the eternal Being of ephemeral beings.[32]

For Wolf, the cultural value of Antiquity is social and ethical in the sense that it involves an obligation to regard the essential and to waive the arbitrary. This obligation concerns primarily the duties of everyday Dasein of which one is the protection and the attendance of right. Wolf responds to this obligation by observing what the early Greeks brought into the clearing as the essence of right. The image of Antiquity so observed is the origin (*archè*), the uncovering of the lasting and primordial essence in which pre-Christian man became herself in her encounter with the gods and the cosmos. In the spiritual world of the early Greeks, the human spirit comes to be in its historical truth. The historical unity of the spiritual attempts to convey the essence of Being-in-the-world into appearance are determined from historical Dasein and indicate back to it. For Wolf, the determination of the historical truth of Being-in-the-world in the thinking and the poetising of pre-Socratic Greece necessarily precedes any Platonic or Aristotelian understanding of right as an idea or category; truth (*alètheia*) is the primordial uncovering of right Being.[33]

Wolf's fundamental ontology of right is mainly built on three words which he reads and interprets from Homeric poetry. Firstly, *themistes* is the ordering aspect of right; it is the rectifying or corrective assignment with which the gods or their human envoys address Dasein's world.[34] Secondly, the order so stipulated is *themis*: "*so gilt es*", "it is so ordered". This does not concern the social sphere of human existence — *themis* is neither natural law nor political order — but is an assertion on Dasein that is "in the right". To exist within the order of *themis* is essential Being, to be "in the right" as that what it is.[35] Thirdly, *dikè* is neither law nor rule as it is usually translated. It is appeal and solicitation, the demand for and the allotment of essential Being as that which comes to be (*Zukommende*). *Dikè* is, then, the coming into the order of *themis* in the assignment of *themistes*.[36]

32 Wolf, *supra* n.26, at 9-12.

33 *Ibid.*, 14-18.

34 *Ibid.*, 72-76.

35 *Ibid.*, 76-84.

36 *Ibid.*, 107-112.

The verb *zukommen* on which Wolf structures his interpretation of *dikè* indicates how right is related to the temporality of Being. The temporal mode of right is the future (*Zukunft*), the *à venir*, the *advening* or the coming into Being of beings. Heidegger interprets *dikè* as the order of Being; for Wolf, however, it is the right of Being. To be "in the right" is the advening of the Being of all beings, their coming into Being. Beings cannot be thought without *dikè* ; the rightless is the unessential, that is, not coming into Being. Hence the following translation of the fragment: "But from where all beings ascend, there, too, their descent takes place; according to their necessary need [*Not*]. From themselves all beings allot one another that which essentially advenes them [*das ihm wesentlich Zukommende*] ... in accordance with the time that it is bestowed at each moment".[37]

In an encyclopaedia entrance on the philosophy of law from 1961, Wolf attempts to gather together his notion of right as the advening of Being.[38] This short and dense passage commences with the statement that right beings exist (*es gibt, il y a*) in the world (*hè gar dikè esti*). Right beings that in truth are also just. Such beings are right things (*rechte Dinge, ta dikaia*). To be truthfully just, beings must be in accordance with right (*kata to dikaion*), they must be correct or appropriate. As a being, right is, then, the predicate in accordance with which beings are in truth just, that is, right (*to dikaion*). The rectitious (*ho dikaios*) responds to right by predictating (*entsprechen*) and, thus, edicts (*aussprechen*) in articulation the beingness of right (*ho logos dikanikos*), and this takes place in the right word (*dikaios logos*). Therefore, the responsive predicating is what is in accordance with right (*to dikaiòma*), and accordance with right (*hè dikaiotès*) determines everything that is just in right.

If right is determined from Being, then Being advenes right. In other words, right will come to be (*hè dikè*). What comes into Being in the advening is sameness (*to heauton*), and the sameness that advenes all beings exists as the temporal mode of to be advenient (*dikaiòs*), to be coming into Being. In this temporality, all beings are in the right (*endikos*). Therefore, advenient beings are the truthfully advening or, in other words, right (*to dikaion*). The advening takes place in righteous honesty (*dikaiosunè*) which is edicted in articulation as seemly telling (*ta dikaia legein*). From this, Wolf concludes that what necessarily advenes right is the ultimate advenient (*to dikaiotaton*).

37 *Ibid.*, 234.

38 Wolf, *supra* n.12, at 72-73.

The advening is, simultaneously, the prevening (*entkommen*) of the other (*to adikon*), and the non-advenient (*hè adikia*) takes place in letting the advening be prevened (*adikein*) with a non-righter (*adikos*). On the other hand, the advening will be received (*dikèn dounai*) by letting the advening advene (*dikèn didonai*). Everything advening will be established firmly (*themisteuein*) in the responsive predictation of corrective speech (*themiton*). The firmly established (*thesmos*) is the ground from which all corrective judgements (*themistes*) addict (*zusprechen*) or grant the advening in responsive predictation. It is the grounding (*archè*), the joining (*tuchè*), and the binding (*anagkè*) of right Being (*themis einai*).

V

As far as right is concerned, Wolf seems to combine two different aspects in Heidegger's philosophy. On the one hand, he seems to agree with Heidegger's interpretation in which *dikè* translates into order (*Fug*), but continues to make a reservation:

> ...although it [PM: Heidegger's translation] touches upon the essential of the matter, it does not say clearly enough what *dikè* "joins", namely the allotment of the advening, the claim to the advening, and the advening as each's own future itself.[39]

In Heidegger, the verb *zukommen* employed by Wolf throughout his fundamental ontology of right can be found in the Marburg lectures on temporality from 1927. Of the three *ekstasis* of original temporality (*Zeitlichkeit*), Heidegger gives priority to the future:

> The Dasein understands itself by way of its own most peculiar capacity to be [*Seinkönnen*], of which it is expectant. In thus comporting toward its own most peculiar capacity to be, *it is ahead of itself*. Expecting a possibility, I come from this possibility toward that which I myself am. The Dasein, expecting its ability to be, *comes toward itself*. In this coming-toward-itself [*Auf-sich-zukommen*], the Dasein is *futural* [*zukünftig*] in an original sense.[40]

Wolf's fundamental ontology of right is, no doubt, prone to the critique of

39 Wolf, *supra* n.26, at 288. Here Wolf refers to Heidegger's Freiburg lectures on Parmenides from 1942/1943. See M. Heidegger, *Parmenides. Gesamtausgabe. Band 53* (Frankfurt am Main: Vittorio Klostermann, 1982), 135-140.

40 M. Heidegger, *Die Grundprobleme der Phänomenologie. Gesamtausgabe. Band* 24 (Frnakfurt am Main: Vittorio Klostermann, 1975), 374-375. Cf. SZ, §65, at 436: "The primary phenomenon of original and authentic temporality is the future."

deconstructive readings on many levels. In addition to the more or less obvious pitfalls, that is, the archaeology of Greek origins, the hantology of the spiritual Dasein, and so on, Wolf cannot purge himself from the double bind of right and Being. Instead of continuing his analysis by way of elaborating on the relationship between right and original temporality, he seems to retreat anticipating the consequences of Heideggerian destruction.

For Wolf, then, *dikè* as the advening is not only right Being but also the right *to* Being of all beings. Such a right can only be thought from a juridico-moral metaphysics that precedes and determines the foundations of the *Seinsfrage*. The interplay between the right of Being and the pre-ontological right to Being suggest a translation of *Zukommende* as *due* rather than advening. Being is not only due as the temporality of advening but also as the advent that occurs and recurs according to rightful necessity. Being which is the due of beings reaffirms the onto-theological ground that a fundamental ontology of right was set to destruct.

Is, then, a philosophy of law after Heidegger possible? Perhaps aware of the strained paradoxes in his affiliation with Heidegger, Wolf dedicates his later years to theological issues related to law. His writings on justice and the other as the neighbour, inspired by the theology of Karl Barth,[41] resonate curiously with much of what is currently done in critical legal theory on law and Lévinas. The danger that lies in such undertakings is that ethics and justice are understood merely as a haven of retreat, a withdrawal from the fundamental questions about the possibility and impossibility of law and right. This is why the use of the predicate "critical" deserves caution.

41 E.g. Erik Wolf, *Recht des Nächsten. Ein rechtstheologischer Entwurf* (Frankfurt am Main: Vittorio Klostermann, 1958).