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#### SUMMARY

During his stay as writer-in-residence at the University of Utrecht in February 2009, Claudio Magris delivered the First Romano Guarnieri Lecture in Italian Studies on the topic of 'Literature and Justice'. Here he advocates that literature, contrary to one of her most frequent reflexes, does not turn her back to the law, but works instead towards collaboration, in order to avoid the pitfall of an apparently 'warm' but ultimately egotistic mental horizon, which in the long run cannot be but deceptive and even destructive. Literature and the law are, Magris argues on the basis of a comprehensive overview of Western thought, intrinsically related in their pursuit of general values, as has been recognised and valued as of Antiquity. Even in the present heyday of relativism this orientation on what transcends individual truth remains of utmost importance, since such a perspective offers the best guarantee for an impartial, perhaps indeed 'cold' protection of the manifold varieties of 'warm' individual realities that give colour to our world.

#### KEYWORDS

Literature, Law, Justice, Tolerance, Diversity

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Claudio Magris

1.

*"Allà se lo haya cadauno con su pecado,"* says Don Quixote, seeing the chain of galley slaves; *"No es bien que los hombres honrados sean verdugos de los otros hombres."* Under very different skies and in very different ages literature seems permeated by a denial of law, which it rejects. Novalis, the German romantic who proposes to poeticise or poetically redeem the All, writes in one of his fragments: *"Ich bin ein unjuristischer Mensch, ohne Sinn und Bedürfnis für Recht"*. This attitude of poetry – understood in the widest sense as every kind of artistic creation – towards law is not reducible to a free, anarchic revolt of the imagination against the rules and logic of the legal codes. Every artist worthy of the name has always known that there is no more iron rule than that which presides over artistic creation. Indeed, considered from this angle there is an affinity, if anything, between literature and law, thanks to the similarity between law and language, often pointed out as similar to that between jurisprudence and grammar. In 1907 Croce noted, in an essay on the philosophy of law, the similarity between the work of the grammarian and that of the jurist.

But perhaps there is a similarity yet more profound: just as "grammars and dictionaries, phonetics and morphology do not make a language – writes Alessandro Passerin d'Entreves – so jurisprudence is incapable of saying the final word about law" which cannot get at the truth about itself, cannot satisfactorily answer the ancient question of Alcibiades: "Tell me, Pericles, can you explain to me what law is?" The question *"quid ius, Was ist das Recht?"* said Kant, creates in the jurist the same embarrassment as the philosopher experiences when he is asked: *"Was ist die Wahrheit?"* A sign of this embarrassment is the frequent confusion, pointed out by Hobbes, between *ius* and *lex*, right and law: such terms "ought to be distinguished, because right consisteth in liberty to do, or to forbear; whereas law determineth and bindeth to one of them: so that law and right differ as much as obligation and liberty [...]."

Juridical reflection gets entangled in the muddle between *richtiges Recht*, correct law, and the ethically fair *gerechtes Recht*; between what pertains to law as *iussum*, ordered by a sovereign will, and what pertains to it as *iustum*, universally valid justice. Immanent in the juridical adventure is a dramatic, romantic *peripeteia*,

which resembles in certain ways the odyssey of the modern novel as theorised by Hegel and later by Lukács. With the end of the epic, wherein the meaning of life was present in reality, the novel was constrained to go in search of this lost meaning – in vain: the search, writes Hegel, is an odyssey of disillusion. Likewise the juridical odyssey – at least in some of its directions – pursues in the forest of laws the fleeting essence of right which should give them unity, seeking in vain to square the circle, to reconcile a moral essence immanent in the law – affirmed in particular by the doctrine of natural law – with that distinction and separation between law and morality, between what the law obliges and what is obliged by conscience, which is the fundamental guarantee of liberty and the *sine qua non* for a civil society. This has been affirmed by modern philosophy from Thomasius on, including other and even greater jurists and philosophers of law. Distinction, separation is indeed a great lesson that law gives to intelligence, because it means first of all the ability to separate, just as Fritz Schulz (1944) in the chapter *Isolierung* of his *Prinzipien des Römischen Rechts* says; separation of sacred from profane law, of public from private law, of civil from criminal law. From that point of view, law offers a great contribution to intelligence, to ethics and above all to politics. Through law we learn the distinction between the Church and the State, between what belongs to faith and what can be demonstrated by the *ratio*, between the ‘cold values’ incorporated by the rules of the democracy and the ‘warm values’ such as friendship, love, feelings. In contrast, literature represents a territory of mixture par excellence, it represents the vanishing of all the categories, the ambiguity of life where everything mingles with everything.

As the scholar Marie Thérèse Fögen, who died recently, points out, *nomos*, law, means also poem, the founding poem of a civilisation. The first laws (Solon) had actually song-forms and this form made it possible to express things which – in a state governed by a tyrant – couldn’t be said in the agora, in a public discussion. *Das Lied vom Gesetz*, the *Poem of Law*, is the title that Marie Thérèse Fögen gave to a wonderful book of hers. Codes – as bodies of laws – were often preceded by preludes and preambles whose function was to explain their reasons as well as to celebrate their values. While doing that, they transcended the positive law in the name of the life which found them, in other words they made literature. It was Robespierre who abolished those preludes by presenting the Constituent ‘*sans préambule*’ in 1792; nevertheless this tradition continued. The problem ‘*Kodifikation oder Novelle*’, codification or narrative, still occupied Schmitt. Besides already Cicero had defined rules a ‘*carmen necessarium*’.

Poetry’s aversion to law has another deep-seated reason. The law finds its empire and proclaims its necessity where there is, or could be, a conflict; the kingdom of law is the reality of conflicts and the need to mediate them. Pure human relations have no need of law – they ignore it; friendship and love do not require codes, judges, lawyers or prisons: but codes, judges, lawyers and prisons suddenly

become necessary when love or friendship are transformed into outrage and violence. Law then, appears to be linked to the barbarities of conflict; necessary, but as amputation is to gangrene or armed defence to armed attack. In poetry there is often, whether evident or hidden, the dream of the golden age, of the innocence of every impulse, of the wolf and the lamb drinking amicably together from the same spring. This poetic redemption of all compulsion, which Novalis and perhaps even Rimbaud considered possible, also tinges with its sky-blue colour certain revolutionary movements bent on creating the politically and existentially New Man. Thus during the Paris Commune the Communards fired at the clocks to symbolise the end of the historical and juridical time of injustice and the advent of a new, messianic age. Revolution as orgasm, preached in '68, is also the umpteenth repetition of this dream of abolishing the law, inseparably intertwined with violence. *"Die Herrschaft des Rechts – so runs another of Novalis' fragments – wird mit der Barbarei zessieren."*

## 2.

Rejection of the law draws poetry closer to faith. No one has so indicted the law as St Paul and the Protestant-type theology which derives from him. "The law provokes the wrath of God" he writes in the Epistle to the Romans; it is this, he goes on to say, that makes sin come alive, and in excess. Luther follows hard upon: *"Vor war ich frei und ging bei der Nacht ohne Laterne; jetzt, nach dem Gesetz, habe ich ein Gewissen und nehme eine Laterne bei der Nacht. Also ist Gottes Gesetz nichts denn eröffnen mein böses Gewissen?"* The response of the religious man to the horror of the law is the leap into grace, the surrender to faith, which saves on the other side of judgement because it is not based on the examination of actions, whether meritorious or criminal, but rather on the total union with God, independently of every moral evaluation: "Abraham saves himself", writes Karl Barth, not for what he does but rather because "he believes in Him who declares what is wicked to be right." At the opposite pole Grotius, one of the founders of the modern theory of natural law, in his *De Iure Belli ac Pacis* (1625) states that "not even God can accomplish that what is intrinsically evil is not evil". St Thomas, too, with his 'light of natural reason' which is at the basis of his concept of natural law, follows this line. In Kierkegaard the religious moment (Abraham's obedience to the order to kill Isaac) is opposed to the ethical moment, which commands opposition to that order. As for example Dostojevskij or Singer show, there is often a very close connection between mysticism and transgression.

In literature such religious violence is secularised, nevertheless preserving its own radical quality: in place of the surrender to God there is often substituted surrender to the totality of life, harmony, with its flow beyond good and evil. The commentary on the law par excellence, the Torah, becomes the great Talmudic narrative. For Kafka the law places the individual outside life, outside the territory of love, as he writes to his friend Milena. But this awareness prompts the individual to a

sin yet more serious, according to Kafka, namely of claiming not to be involved in the mire and darkness of life, but to be pure. Such a hubristic claim constitutes his guilt, alienating him from mankind and condemning him to remain for ever outside the portals of the law, as in Kafka's famous parable, to remain outside life, to "*sich bis zum Schluß zu Verteidigen*", as Kafka writes in one of his diaries, guilty precisely for being so obsessed with legalistic defence.

With such anxiety about perfect innocence and purity it is impossible not to violate some codicil or other: "*Alles verstößt gegen das Gesetz*", says Fischerle in Canetti's *Auto da fê*. The law, before which the individual finds himself guilty, is the community – for Kafka, the Jewish community, which he portrays as anything but pure and ordered; rather it is chaotic and sometimes soiled, but nevertheless sacred, like the Law and life – they, too, being soiled and disorderly. There is almost a tragic, *a priori* guilt in being outside the community, as if the accused were already guilty not because his crime has been proved but because he, by declaring his innocence, sets himself against the community that acts through the law. Even in the American legal thrillers – Turow, Grisham – the trial formula 'The People against Rozat K. Sabich' already sounds, grotesquely, almost like a verdict.

Many literary masterpieces stem from the confrontation with the Law. Kleist's *Michael Kohlhaas*, perhaps the greatest, shows the conflict between 'legal' justice turned false and true justice, but shows in particular the tragic guilt of making oneself a judge, even though innocent of worldly ills, and therefore an executioner: the violence of him who turns himself into the Angel of Judgement and discovers, by meting out justice, "*die Arglist, in welcher die ganze Welt versunken*". Following this line of Prussian ethos one arrives at Arnold Zweig's *Streit um den Sergeanten Grischa* with its conflict between the law that founds the State and the State of law, which in certain circumstances cannot but ride roughshod over its own principles, though with no moral justification. In another masterpiece, Melville's *Billy Budd*, Captain Vere – the naval commander who has to pass judgement on the pure, morally guiltless Billy Budd, who has killed his villainous, persecutory superior officer Claggart – knows that Billy Budd is 'an angel of God' and has performed an act of natural justice, but believes that he must pay for this act, potentially charged as it is with the most serious of consequences in time of war. So with death in his heart but convinced that the heart "must here be ruled out", he sentences Budd to be hanged.

### 3.

From the founding origins of our civilisation we find, opposed to the codified law, the universality of human values: to the iniquitous law of the State enacted by Creon, which denies universal feelings and values, Antigone opposes the 'unwritten laws of

the gods', those absolute principles and commandments which no authority can violate. Sophocles' masterpiece is a tragic expression of the conflict between humanity and the law.

Creon's evil decree is a positive law with a specific content. Antigone opposes it with a non-codified – customary, traditional, common, we could say – law, handed down by the *pietas* and the *auctoritas* of tradition. And tradition, wrote Pindar, the poet who also defined the law as 'sovereign' (*nomos basileus*), is 'queen of all'. On the other hand tradition has sometimes been opposed to nature to the point of identifying itself almost with convention, with *nomos* which, for the Sophists – but not only for them – was antithetical to *physis*, to nature. But the 'unwritten laws of the gods' to which Antigone makes appeal are not traditions but rather absolute categorical imperatives. Antigone is the eternal symbol of resistance to unjust laws, to tyranny, to evil: we venerate as heroes and martyrs Sophie and Hans Scholl or the theologian Bonhoeffer who, like Antigone, sacrificed their lives in rebelling against the law of a state – the Nazi state – which was trampling humanity underfoot.

Expounding the stoical doctrine of natural law Cicero, in his *De re publica*, speaks of a "true law, in keeping with nature, universal, unchanging and everlasting, [...] a law which man cannot disobey without running away from himself, without disowning human nature". This law of nature, which perceives humanity as a universal community, passes to Christianity and with the *Corpus iuris civilis* "happily orders things human and divine and puts an end to iniquity", according to the words attributed to Justinian himself. With Christianity natural law is identified with the law contained in the Gospel and acquires an ontological dimension, identifying itself with the order of nature created by God, which no positive law can violate without losing its own legitimacy. The unjust positive laws, writes St Thomas, are not properly laws and no obedience is owed them; on the contrary, the honest man has both the right and the duty to rebel against them.

By a complex and contradictory route, and through a course of progressive secularisation, the law of nature – via Grotius, Pufendorf and others – is ideally, though not explicitly, linked to the civil rights of modern-day liberal democracy. For Locke, the philosopher of tolerance and civil rights, an authoritarian State denies the very nature of man. The American Declaration of 1776 proclaims that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness"; the French one of 1789 also speaks of "the natural, unalienable and sacred rights of man": two revolutionary declarations, which in fact accompany two revolutions and theorise, as the American does explicitly, the right to revolution: "that whenever any Form of Government becomes destructive of those ends, it is the Right of the People to alter or to abolish it". Thoreau, too, will theorise about *Civil Disobedience*, the 'right of revolution', as he says expressly, and the superiority of the individual over the State.

Such ethical and political freedom becomes a way of being, an existential mode; the free life in the woods of *Walden*, the fraternal meeting with all living beings.

But against the natural law there are many voices raised, which contest the very idea of a 'nature constant unchanging and everlasting'. Hume says that "the word 'natural' is commonly taken in so many senses and is of so loose a signification, that it seems vain to dispute whether justice be natural or not". For Hobbes, the state of nature is not an Arcadian idyll, but rather a '*bellum omnium contra omnes*' which must be corrected and therefore opposed by laws. Hobbes writes that "before there was a law, there could be no injustice; and therefore laws are in their nature antecedent to justice and injustice". In this perspective the connection between law and morality is broken; the natural law is rejected as an arbitrary ought-to-be in favour of being, of things just as they are and of the objective way of handling them. No one like Hegel has so scorned the antagonism 'between what ought to be and what is' and thus the natural law, which he regards as but a naïve and abstract ideal inferior to that superior morality which is the actual existence of the State. And the State, in its exercise of force and even violence, may be judged by history alone, because History is the only universal tribunal and ultimately Judgment Day.

This conception of law, too, intersects with literature. In Hebbel's tragedy *Agnes Bernauer*, permeated with Hegelian and historicist pathos, the spotlessly pure and innocent protagonist and her love are brutally sacrificed to Reason of State. Her executioners, like her father-in-law Duke Ernest of Bavaria, acknowledge her sweet humanity and regret having to cut it short, but consider that their action and its concomitant guilt are necessary, and therefore just, in the context of an historical perspective that transcends the single individual. "*Das große Rad ging über sie weg – says Duke Ernest, the one responsible for her murder – nun ist sie bei dem, der's dreht.*"

The 'unwritten laws of the gods' or inalienable human rights are accused of being ideological and moralistic abstractions, to which are opposed the reality of history and the concrete historicity of every human condition, in all their inevitable variety. John C. Calhoun, eminent politician and US political commentator in the first half of the nineteenth century, attacks the egalitarian ideology of the American Declaration of 1776 and in particular its principle 'that all men are born free and equal'. Equality is for him 'against nature', an abstract falsification which corrupts nature. Men – he says – are not born, but only babies who may become men (or not): for him, as for many closer-minded conservatives, children are not yet men, not yet human beings, full subjects. Likewise in eighteenth-century Germany Justus Möser, patriarch of Osnabrück, defended, like Burke, against those of the Enlightenment the bondage of the serf and those institutions, handed down through the centuries, which ratified inequality of every kind. Not surprisingly, he also defends literary individuality against a universal Reason dangerously levelling also in matters of taste and imagination.

But these historical conservatives and foes of equality mistake a fact for a right, thinking of disablement or injustice as something that is not only difficult or sometimes impossible to rectify, but that is and would be even wrong to rectify. Thus they too fall into the error with which they charge the supporters of natural law, since by rejecting every abstract ought-to-be they make of what is, of the actual, not a statement but rather a precept, an 'ought-to-be'. Calhoun, who considers the liberation of the slaves to be 'against nature', thus becomes a kind of St Thomas or Thoreau the wrong way round.

It is perhaps Marx who paradoxically connects the criticism, even if disdainful, to the doctrine of natural law and an irreducibly 'pure' form of it. For Marx it is history, not nature, which must bring about liberation. Yet nevertheless there remains, in Marx's thought, an ideal of human personality realised in its fullness. For him too, as for Calhoun, men are not born free and especially not equal. But this fact is not for him automatically a right, or better the negation of a right, to liberty and equality. In European culture, and in particular German culture, this growing denial of natural law in the name of historical reality will lead progressively, as Ernst Troeltsch has observed, to the denial of humanity and of every human universal.

#### 4.

A boundless literature thus revolves around the conflict, ever renewed in different forms, between Antigone and Creon. But *Antigone* is a tragedy: that is, not simply a black and white contrast between innocence and guilt, but a conflict in which it is impossible for any of the contenders, however noble, to take up a position which does not inevitably bring with it some degree of guilt. Sophocles does not portray Creon as a monstrous tyrant. The man is not a Hitler, but a governor whose responsibility for governing, for safeguarding the city, demands that he consider the consequences for the lives of all were the positive laws to be disobeyed and chaos to ensue. The only solution is a settlement of the conflict, and this settlement concerns politics. When this collapses or seems to collapse, it is not by chance that Antigone turns to being a – or the – symbolic figure of laceration, as happened in Germany in the leaden years with the prohibition against burying militants of the Red Army Fraction, the German terrorist organisation.

Depending on the socio-historical constellation, liberty and democracy defend themselves by appealing either to the unwritten law, guardian of a whole cultural tradition, or to the positive law. During the Weimar Republic the democrats appealed to the positive laws which punished the increasing anti-Semitic violence, while jurists and pro-Nazi intellectuals maintained that those laws did not reflect the rooted feeling of the German people, and thus to its profound sense of right, and were therefore abstract; during Nazism, those appealing to the 'unwritten laws of the

gods', against the positive racial and liberticidal laws of the regime, were those opposed to Nazism.

## 5.

If there is a shining example of the symbiosis between law and literature it is that of Montesquieu, whose *Esprit des Lois* (1748), with its theory of the division of powers, is at the root of every liberal democracy, and whose *Lettres persanes* (1721) reconcile the maximum of ethical relativism, of joint dialogue with other cultures and their differences, with a *quantum* of inalienable ethical universalism, with undisputed faith in a few non-negotiable values, the foundation of all humanity and all civilised society. Such a position, as Todorov observes, is valid today more than ever, and necessary in the face of globalisation, which increases the need for open comparison with other systems of value (ethical and juridical) and the need to establish the borders of values no longer up for discussion (e.g. equal rights regardless of sex or ethnic identity). Indeed, such problems are particularly alive today, in an age in which the globalisation assailing the world also involves the law – namely the ways whereby to safeguard people, exposed as they are to the force of a mechanism removed from all direct experience, and subjected to a power or powers often difficult not only to control but also simply to identify. This worldwide breaking down of borders requires new forms of safeguard, and therefore new laws and new ways of creating them, in an effort to adapt laws to situations but so that fundamental principles remain intact.

Globalisation has been talked about for only a few years, but already decades ago Carl Schmitt stated that history was driving (and still is driving) towards the formation of 'great spaces' beyond the state's own territories, and was posing the problem of a politico-juridical order able to manage the new situation. Today the law finds itself face to face with the exciting and disquieting challenges of globalisation, of the great spaces Schmitt spoke about, but also the technological transformations which continuously create new possibilities and new risks of oppression, manipulation and insecurity. This innovative, upsetting and threatening competitive race between life and law perhaps today is literature's biggest challenge and a space full of adventure she needs to explore and master more than anything else.

## 6.

The 'unwritten laws of the gods' of Antigone are much more than an ancient law handed down; they are presented not as historical elements but as absolute. So in Goethe's *Iphigenia in Tauris* (1787) – written by Goethe the lawyer – Iphigenia opposes human sacrifice because – she says – a God, a universal value, speaks accordingly to her heart. But when that happens, how is it possible to know whether it is indeed a universal God speaking or an idol of the dark interior maze, which causes the universal to be changed for an atavistic legacy?

The law is tragic because it sets in motion mechanisms which could be necessary and represent a corrective to evil, but are frequently a lesser evil and seldom a good. Between the good and the law there frequently opens a chasm: in Grillparzer's *Jüdin von Toledo* (1850-51) the Spanish nobles, who for reason of State have killed the beautiful lover who rendered King Alfonso of Castille ineffective, do not repent of the crime committed, but feel and declare themselves to be guilty, sinful and ready to expiate; they have acted – they say – wishing the good, but not the right, not what is just: “*das Gute wollend aber nicht das Recht*”. The Law sanctions, therefore, this original sin, this impossibility of the innocence of existence. And it is this which, though setting poetry and law against each other, also brings them close because – as Salvatore Satta writes in his *Giorno del Giudizio* (1977) – “the law is terrible, like life”; and literature, called upon to recount the naked truth of life without moralistic qualms, cannot escape feeling a dangerous closeness to that terribleness.

It is especially the civil law which lays bare this desolation. In criminal law guilt takes on more disquieting expressions – violence, crime – but is connected nonetheless with passions, however distorted, whereas it is the civil law that compels a confrontation with the meaner, the more bruised misery of the human heart, fathers against sons and sons against fathers for a few miserable pence, brothers who strip brothers to the bone, inheritances, even the modest ones, which destroy the attachments of a whole life. Many stories by Balzac depict the sordid power of money – and of the juridical mechanisms manipulated in its service – in the destruction of the human. Cadastral and notarial statements, financial speculation, bills of exchange, contracts, bankruptcies, loans, usury – all become, in Balzac, the Gorgon of existence: “[...] *nous autres, avoués, nous voyons se répéter les mêmes sentiments mauvais, rien ne les corrige, nos Études sont des égouts qu'on ne peut pas curer. Combien de choses n'ai-je pas apprises en exerçant ma charge! J' ai vu mourir un père dans un grenier, sans sou ni maille, abandonné par deux filles auxquelles il avait donné quarante mille livre de rente! J'ai vu brûler des testaments; j'ai vu des mères dépouillant leurs enfants, des maris volant leurs femmes, des femmes tuant leurs maris [...]* toutes les horreurs que les romanciers croient inventer sont toujours au-dessous de la vérité.”

Often literature is the accusation of the violence and injustice of the law; judicial error – with its pathos of denunciation, mercy, police intrigue and murky fascination with the destructive inquisitorial machine – is a favourite theme of the novel, as in the trilogy of Jakob Wassermann which begins with *Der Fall Mauritius* (1928-34). A masterly combination of detective story plot, puzzle with rules and procedural quibbles, social criticism and humanitarian rhetoric, is the basis of a dense narrative, sometimes bordering on pulp fiction, as so many American bestsellers of recent years demonstrate. As Manzoni's *Storia della Colonna Infame* (1842) reveals, literature is also life's advocate against persecutory, judiciary violence, which is often inflicted unjustly upon defendants devoid of any guarantee of

defence; on the other hand, in these years the juridical experience has ventured into new territories, has developed new safeguards and defended new subjects, traditionally weak (women, minors, the disabled, the new immigrants) thereby providing literature with considerable incentive to investigate and explore.

7.

It is especially in Germany, and particularly in the Romantic age, that there occurs a singular alliance, almost a symbiosis between poetry and law – understood as common law and not as positive law. The Grimm brothers, great philologists and men of letters, were jurists. By collecting their celebrated tales they intended to save the great heritage of the ‘good old law’, namely of customs, traditions, local usages of the German people in their unanimity, a heritage which over the centuries had been preserved in popular literature. At the same time there erupts in Germany a fascinating juridical controversy between Thibaut, who proposes for Germany a united and uniting civil code on the Napoleonic model – able to render all the citizens equal before the law and to sweep away the feudal privileges but also to offer to the emerging middle-class and to the new capitalism adequate juridical institutions – and Savigny who, seeing in the single code an instrument of authoritarian levelling, wants instead to defend diversity – the local variations, the differences and inequalities of the ancient common customary law, expression of the Holy Roman Empire.

Naturally, according to circumstances, it is one or the other position that effectively defends the freedom of men: the unifying model could be a tyrannical Stalin-style flattening of diversity or a democratic safeguard of the rights of all men. In those years of German Romanticism the polemic between Thibaut and Savigny influences literature profoundly. Charles Nodier traces the flowering of imaginative narrative in Germany back to its “multitude of local areas of special customs”, namely to its Holy-Roman-Empire particularism which – breaking the country up into innumerable petty states and society into classes and associations embedded in the centuries – brought about the beginning of the strange, of the unfamiliar (*das Wunderliche* and *das Wunderbare*) to the gates of every small town.

A highly irregular yet static mosaic, in which hundreds of laws intersect and superimpose: bye-laws, traditions, privileges, exceptions in a particularistic tangle. It is a world populated – as in the novels and tales of Jean Paul or Hoffmann – by characters that revolve around a legal system turned into a maniacal and tormenting fixation: secret councillors of chancery, referendaries, archivists, local scholars, rectors of pietistic colleges, magistrates, learned scientists fascinated by bizarre and sometimes monstrous detail, by the comma and by the exception, in an obsessive relation between the aspiration to the All and the very modest reality, which is

reflected, for example, in the juridical phraseology, in the baroque sprawling syntax of one of its great poets, Jean Paul.

Heine begins as the singer of the traditional, common law, its peculiarities and its organic unity consolidated over the centuries and echoing in the *Volkslied*, in folk song. Later he becomes aware that that tradition turned into law is an aspect of the *Deutsche Misère*, of German backwardness and of the unjust separation of the social bodies. He will become, also as a poet, the champion of Napoleon and of the Napoleonic code, seeing in its unifying action the creation of a new, modern, epic totality. Or to give another example, the plays of Schiller, which in his portrayal of the dilemmas of freedom, are poetically permeated with juridical problems. From *Maria Stuart* (1801) to *Wilhelm Tell* (1803) Schiller confronts the legitimacy of power, the right – or not – to revolution, human rights and their relation to that “ancient maternal law which transcends the modern rational law of the revolution and takes it in” (M.C. Foi). Later the matriarchal law – *das Mutterrecht* – becomes, from Bachhofen to the German culture of the Twenties and Thirties, very crucial for the relation between masculine demand for hierarchy and maternal demand for equality inclined to resolve itself in the equality among the members of a racially homogeneous community.

## 8.

The revolution which assaults – starting from the *fin de siècle*, but with stirrings already in the Romantic period – modern and contemporary literature, radically upsetting forms, structures and values, destroys first of all the idea of totality and of centrality and of every compact unit, both of the Self and of the world. Reality – and its representation – deprived of a centre, makes of each individual a man without qualities, that is, a collection of qualities deprived of a unifying, organising centre. To this eclipse of a central value, and of a subject capable of constructing a harmonious hierarchy of the real, in the juridical centre corresponds the eclipse of the unifying code, overwhelmed by a centrifugal forest of particular laws remote from any totality: this, too, a mere ‘anarchy of atoms’, as Nietzsche (and with him Musil, but already Bourget before him) defined what was once His Majesty the Self.

And it is the same Nietzsche who, in aphorism 449 of *Menschliches*, *allzu Menschliches*, observes that “*niemand fühlt eine andere Verpflichtung gegen ein Gesetz mehr, als die, sich augenblicklich, der Gewalt, welche ein Gesetz einbrachte, zu beugen*” and therefore, given its necessity for the life of society, can and must be only imposed, binding and arbitrary, founded on nothing. It is Law that claims to be neither true nor wise nor just and produces rules justified only by the production itself, by the force that compels obedience to them. The law shares with everything else nihilism, become the essence and the fate of the West. The norm, the rule – the Grundnorm of Kelsen, basis of the juridical construction and of legality – rests on nothing, like the lyric of the great Gottfried Benn: “*Das absolute Gedicht, das Gedicht ohne Glauben, das*

*Gedicht ohne Hoffnung, das Gedicht an niemanden gerichtet, das Gedicht aus Worten, die Sie faszinierend montieren [...] Strophen über Katastrophen.“*

Notwithstanding all this, popular feeling gladly sets the passion of poetry against the rationality of law. It is especially its formalism that appears quibbling, arid, the denier of human warmth. Once again it is the great works of literature that probe the muddle of life also by probing the seemingly more quibbling muddles of juridical formalism which, on the other hand, is revealed in all its necessity for the defence of the human. In *The Merchant of Venice* Shakespeare shows us how humanity, justice, passion, life are saved by Portia disguised as a super-subtle and quibbling advocate who is able to appeal to a yet more hair-splitting juridical formalism, which indeed authorises Shylock to take a pound of flesh from the body of Antonio, but without spilling a single drop of blood. It is not a warm appeal to humanity, to feelings, to justice that saves the life of Antonio, but rather the cold forensic recall to the formal letter of the law. This logical coldness saves warm values: not only the life of Antonio, but also the friendship of Antonio and Bassanio and above all the love of Portia and Bassanio, potentially haunted by the fate of Antonio: “For never shall you lie by Portia’s side / With an unquiet soul”, says the lady to her lover, deciding then to free him from that anxiety that darkens eros and thus to save the friend.

Much literature has regarded the law with bitterness, considering it arid and prosaic in contrast to poetry and morality. Democracy, logic and law are often disdained by vitalist rhetoricians as ‘cold’ values in the name of the ‘warm’ values of feeling. But those cold values are necessary to stabilise the rules and the guarantees safeguarding the citizen, without which individuals would not be free, not be able to live their ‘warm life’, as Saba called it.

Unlike those who boast the profound reasons of the heart, thinking in reality that only their own heart exists, the law sets out from an awareness deeper than the human heart, because it knows that many hearts exist, each with its unfathomable mysteries and its impassioned darkness, and that precisely for this alone it is exact rules – which protect all – that permit the single individual to live his unique life, to cultivate his gods and his demons, without being hindered or oppressed by the violence of other individuals, like him prey to inextricable complications of the heart, but stronger than him, just as the galley-slaves freed by Don Quixote are stronger than him and beat him up mercilessly.

Reason and the law have often more imagination than the heart, capable only of feeling its own inextricable complications and incapable of imagining that there also exist those of others. The legislator who punishes corruption in public contracts is an artist who can imagine reality, because in that corruption he sees not the abstract violation of a rule but, for example, the rotten equipment which – thanks to that corruption – was given to a hospital in place of the sound equipment it should

have had. Behind that crime there are, therefore, sick people badly looked after, real individuals who suffer.

The ancients knew that there can be poetry in legislating. Not by chance do many myths have it that poets were also the first legislators.