ENGLISH SUMMARY

M. WEYEMBERGH, *In memoriam Jacques Ellul* 7

THE TRIAL

Marie-Anne FRISON-ROCHE, *The Philosophy of Trial, Introductory Remarks* 19

Nicole LORAUX, *The Athenian Trial : Justice as Division* 25

As *Δίκη* designates at the same time Justice and the actual trials, the question is: why are trials frequently considered as introducing division into the city? The opposition between a trial and an arbitral procedure will be studied in the historical frame of the great amnesty of the end of the fifth century in Athens.

Jean-Louis GARDIES, *What Reason owes to Trial* 39

The Athenian democracy elaborated a very peculiar form of trial, which, in its turn, shaped the style of argumentation, specially in mathematical demonstrations. The process of reason that Athens bequeathed upon us was therefore initially build into an imitation of the judicial trial.

Virginie LHUILLIER, *The Trial of Socrates* 47

The origin of Socrates' indictment is to be found in political, economical and social motives. But its condemnation is, itself, closely linked to the relations the Wise man had with trial and judicial logic. Socrates recognised no legitimacy in the Athenian trial. And the fact that Socrates disqualified his own trial directly led to his being sentenced to death.

Michel HUMBERT, *The Roman Trial: a Sociological Approach* 73

At the end of the Roman Republic, the motives for action refer back to behaviours dominated by *pietas* and *fides* as far as the parties are concerned and by the wish to constitute a network of clienteles as far as the orators are concerned. Therefore, the trial plays an essential part in the moral cohesion and the socio-political structure of the City. On the other hand, the purely legal function (claiming a right, condemning a culprit, securing obedience to the law) appears subsidiary, maybe even incidental.

Robert JACOB, *God's Judgement and the Development of the Function of Judging in European History* 87

Whereas the ordeal, ritual way to resolve conflicts, has been known in many different cultures, God's Judgement properly speaking, understood as the stepping in the trial of a perfect, omniscient, God, absolute holder of the discrimination between good and evil, is a particularity in the history of Latin West in the first millennium. Far from trivial, this episode was fraught with consequence for the development of the judiciary function in European cultures. One may advocate that the spirituality of the act of judging and its necessary autonomy towards the political power, among other things, stem from it.

Gérard D. GUYON, *Religious Utopia and Criminal Trial. The Historical Inheritance: V-XVth century* 105

The criminal trial cannot be separated from an history where the sacred, from the revenge side, is a constituting element of utopian nature. The Christian bequest is added to initial sacrifice contract and to the consequences of antic impiety. The probatory techniques, and avowal mainly, as well as the penalties, receive there a complete sacralisation. The trial winds up into a probatory certainty, in grief. The ritual quality of the judge leads him to be the coercive instrument of a never ceasing search for universal unanimity.

R. C. VAN CAENEGEM, *The Trial from an Historico-Comparative Point of View* 125

One could discuss at length on the relative weight of legislation, doctrine and case law as sources for the knowledge of ancient law. However in order to

analyse more specifically the role of judges, one must face a considerable amount of archives; this is why the author starts by an inventory of fixtures and of the various undertakings to peruse the funds of the great courts of justice in Europe before tackling procedure.

From the quick, public and oral character of the primitive procedure, the attention is drawn towards the civil and criminal jury through the English experience in which it represented the sole place where the *vox populi* was still heard in judicial proceedings. From this point, the author moves on to the questions of proof and to the force of precedent, while at the same time recalling the present evolution in Great Britain. But the procedure whose significance must be stressed remains the procedure of appeal which can be seen either as the product of the schools as an element in the evolution of legal science, or as an instrument for social control: in this case, the appeal seems to express the balance of power between States, or with the Church, or between central governments and cities. Here again, the interest rises from the comparison between the various experiments in European monarchies.

Patrick VALDRINI, *The Canonical Trial* 139

The Code of canon law of the catholic church contains a set of rules concerning the canonical trial. Two essential aspects can be highlighted. In the first place, the position, the role and the function of conciliation reveal the pathological character of the conflicts in the Church, which have to be solved by the access to a court provided, however, an express necessity to implement every mean in order that justice be dispensed. And next the judicial organisation itself is the result of positions taken by canon law when receiving Roman procedural elements. The latter shows an organisation whose finality is the direct satisfaction of the plaintiffs demands more than the direct defence of the legislative entirety.

François TRICAUD, *The Trial of Criminal Procedure in the Age of Enlightment* 145

From 1748, date of the *Esprit des Lois*, until 1788, the time for royal decisions announcing deep reforms of the repressive system, public opinion progressively, but quickly and completely, relinquished the criminal philosophy illustrated by the Ordonnance of 1670 and linked itself to new principles, widely spread by authors such as Beccaria and Voltaire. The article's purpose is to follow this evolution, mainly from the point of view of the questioning of criminal procedure.

André LAINGUI, *P. F. Muyart de Vouglans or the anti-Beccaria (1713-1791)* 169

P. F. Muyart de Vouglans still seems to be the most conservative criminalist of the ancient penal law. Authors of textbooks always oppose him to Beccaria. In fact we have just a work of the French jurisconsult aimed against the book of the young Milanese author, which was published at the same

moment everybody was praising him. In these few pages, we wish to show the intemperate nature of the infatuation for the "treaty" *of offences and penalties* by Beccaria, and the inaccuracies in many of the criticisms the latter directed toward the rules of the ancient criminal case law. Muyart de Vouglans, like he always does, exposes these errors ponderously and without any kind of wit.

Jean HILAIRE, *Judgement and Case Law* 181

The issue is envisioned from an historical point of view and from a particular, even if fundamental, aspect which might be the most interesting: for if one considers the transference from a judicial decision (particular by definition) to a principle (even suggested), that is, passing from a unique and concrete case to an abstraction of general scope, one might easily see in the French legal system an antinomy between judgement and case law. The contemporary notion of case law developed at a very lazy pace and only with the upcoming of the Revolution of 1789 which have permanently set its basis into a new conception of law (adopted by national representation) and the principle of the unity of civil law. But this recent triumph of case law remains uncertain due, among other things, to the ambiguity that still surrounds the notion of interpretation (is case law merely an *authority* or a true *source* of law?) and by the arbitrariness accompanying the (private) publishing of legal decisions in a liberal system (offering only an approximate knowledge, except for cassation's cases).

Tony WEIR, *Aspects of the English Trial* 291

I. Introduction. II. Three recent events. III. Orality. IV. Silence. V. Surprise. VI. Roles. VII. Errors.

Guy HAARSCHER, *The Trial in Perelman's Work* 201

In Perelman's work, the trial is considered only from the point of view of the decision by the judge. This is to be understood by reference to the general Perelmanian philosophy: from "De la Justice" to the "Traité de l'Argumentation", Perelman tries to find a middle way between the universal and the particular.

The decision by the judge and its motivation constitutes for Perelman the paradigm of such a middle way.

Valentin PETEV, *Legal Judgement and Moral Judgement* 211

The analysis discloses the similarity of structure in moral and legal judgements. Both judgements are intertwined in politico-legal discourse. In making legal decisions, moral assessments of social facts, contained in the

related legal norms, are ineluctable. The achievements of meta-ethics allow us to give a more sound justification of moral and legal judgements.

Sergio COTTA, Quidquid latet apparebit: *The Issue of the Truth of the Judgement* 219

In the field of the traditional analogical relationship between the human judge and the "just judge" (Kant... Levinas), the figure of the first one is brought back to its essence of hunter of the truth in the case of a controversy. Unbiased, disinterested, independent third party but however fallible, contrary to the divine model.

Alessandro GIULIANI, *The Role of "Fact" in the Controversy (about the binomial "rhetoric-judicial proceedings")* 229

According to the contemporary theory of law, the "fact" remains outside legal hermeneutics. This happens whether the fact is viewed as a data external to the knowledge of the judge, or whether it is considered as a creation of the judge. The judicial rhetoric may well represent an alternative: considering the controversy as a "mixed question" allows the reintegration of the role of the fact into the phenomenology of argumentation.

Frédéric ZENATI, *The Trial, a Place for the Social* 239

The trial appears at a certain level in the evolution of societies under the form of a rite, the way used by the group to heal the violence that go through it. But its essence is not to be look for there, if one is to believe the deritualisation that carry with it the extension of the trial phenomenon in modern societies. The structural social dimension of the trial must be searched in its function of elaboration of values on a rhetorico-dialectical and argumentative mode. An atomised society cannot only do without this function, but this function tends to irradiate the whole social activity by providing it with a new form of genesis of morality.

Pierre CATALA, *Data Processing and the Analysis of Trials* 249

The computerised study of trials naturally finds its bedrock in the analysis of judgements, which means in the same material as juridical databanks. However the documentary *corpus* is here constituted otherwise: it includes all the decisions pronounced in a particular matter, in a given period, by a given court (if possible, of the first degree). Each data contained in each case is compiled and treated by computer, according to the usual processes of statistics. The interpretation of the results may be able to bring substantial understanding about the population and the behaviour of those who are judged, as well as that of those who judge.

Philippe THÉRY, *The After-Trial, Sociological Aspects* 259

Even if the word *After-Trial* may receive several meanings, this article restrains itself to the difficulties linked to the forced execution of decisions. When concentrating, in the first place, on the phenomenon of *non-enforcement* that forms the background of the subject, one sees that this non-enforcement is very revealing of the flaws in the rules to be applied. Besides, evolution has turned non-enforcement into a market, with its operators and its technics.

When afterwards one turns towards *enforcement* strictly speaking, it offers matter to sociological observation, considering the actors (debtor and creditor), the distrainable matter or the methods of enforcement. Finally, it is possible that the very conditions of enforcement could, by a backlash effect, modify the litigation.

François TERRÉ, *Sketching a Sociology of Trials* 267

The trial: law, philosophy and sociology. – I. — The phenomenon in the French society. A. — Growing scope and rate of trials. B. — A typology of trials. C. The reasons of trials, legal and extra-legal. Genesis and development. – II. — The solution of the litigations. A. — The distances: geographical, intellectual, temporal, economical. B. — The movement. Individual and collective steps.

MODERN AND CONTEMPORARY GERMAN THINKING

J. G. FICHTE, *Legal Theory on Property* 283

A translation into French of unpublished texts, by Jean-Christophe Merle.

Gustav RADBRUCH, *Legal Injustice and Supralegal Right* 305

In this famous article from 1946 two thesis are formulated, starting from the problem of the juridical reappraisal of national socialist acts of injustice: 1) legal positivism deprived the German lawyers of any protection against arbitrary and criminal laws; 2) the idea of justice as a "supralegal right" constitutes the ultimate and decisive yardstick of positive right. It is in particular the second thesis which has lost none of its topicality, as one could see recently with the trials of the "Wallshooters" in Germany.

Ottfried HÖFFE, *About Habermas Theory of Law and State. Does* Faktizität und Geltung *by Habermas represent a watershed of the Critical Theory?* 319

The 'Critical Theory' of Adorno, Horkheimer and Marcuse has a serious philosophical lack: it does not accept any political claim to power, not even that of democracy. In his second 'opus magnum', *Faktizität und Geltung* (1992), Jürgen Habermas tries to rectify this lack by accepting the importance of political power. Without it laws cannot be in force. Habermas's central concepts "integration", "overtaxing" (*Überforderung*), and "differentiation" (*Ausdifferenzierung*), however, do not achieve their purpose: they characterize the function of law in modern societies in an insufficient way. Other deficiencies of the book are its theoretical abandonment of human rights, its confusion of obligatory and supererogative parts of ethics, and its misrepresentation of modern theories in natural law.

Jean CLAM, *Phenomenology and Law in Niklas Luhmann's Work* . De la déphénoménologisation de la sociologie à la dépolémisation du droit..... 335

The article attempts first to clarify an aspect of the relationship of Luhmann's systemic sociology to the phenomenology. It underlines the break with the phenomenological paradigm of the apprehension of meaning in the Luhmannian functionalism. It shows then how the classical vision of law, which is marked by the empathicism of the philosophical and sociological models of normativity, has been shaken. Law loses much of its expressivity and symbolicity. It is depolemized.

MISCELLANEOUS STUDIES

René SÈVE, *Observations on Slavery in Aristotle* 381

The author tries to show that, despite the inegalitarian character of the Aristotelian politics, they do not require institutional slavery.

Bernard EDELMAN, *Domat and the Birth of the Subject of Law* 389

In the XVIIth century, man discovers himself as being isolated, free and overwhelmed with the loss of an ancient cohesion. Pascal is going to be the philosopher of irreconcilable, of the pros and cons forever divided. For Domat, from one side he will sign the birth certificate of the subject of law and from the other side, he will be the architect of a juridical society, closed and giving a feeling of security, framed by the double Police of soul and body.

The spirit of laws is the very spirit of this endeavour, in which God has become a legislator and the Christian community a juridical community.

Jean-Pierre BAUD, *The Voice of the Lawyer in the Uproar of Bioethics* 421

In order for the lawyer to be able to express himself in a field such as bioethics, it is necessary beforehand to agree on what exactly means bringing semantically together morals and life. One perceives more or less that bioethics are a melting-pot of religious, medical and legal normativities and one usually refuses to question what serves as crossroads to normative systems, that is the *human dignity*, a notion that appears as a sublime obviousness. But one must have the fortitude to look into the significance of the idea of human dignity and to ask if it does not too often covers up a primitive, savage approach of the corporal sacrality. Such an approach stops to look like the pure curiosity of an anthropologist when one realises that the notion of human dignity helped grandiloquence and, by impeding the legal analysis, left the field open to what it was supposed to fight.

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