

# HERMENEUTICS—THE PATH OF THE HERMENEUTIC-ONTOLOGICAL SHIFT AND THE DECOLONIAL SHIFT

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The purpose of the reflections that follow is to highlight the meaning and importance of the hermeneutic shift produced by the work of Gadamer, to consider some of his themes and categories, and to extend the meaning of this hermeneutic rationality to the legal field in terms of a new conception of interpretation. A second objective is to catch sight of new theoretical perspectives, having as a starting point the unfolding of practical philosophy into hermeneutic philosophy carried out by Gadamer. This article aims at recuperating, among other things, the fundamental hermeneutic problem, so as to obtain a glimpse into the possibility of new theoretical prospects (just as Aristotle's proposed division of philosophy into practical and theoretical generated new theoretical perspectives for Gadamer). However, this objective will not be developed in-depth in its concepts and categories, but only suggested in the final paragraph.

## I. PHILOSOPHICAL CONTEXT

The philosophical context of the hermeneutic philosophy of Hans-Georg Gadamer can be situated within what is called “linguistic turn.” The “turn” in question can be understood as a paradigm change, as that term is articulated by Thomas Kuhn. This paradigm change, which was welcomed by philosophy to classify its own history, led to the *paradigm of language* in the second half of the twentieth century, after going through the paradigm of the being (the ontological paradigm) and the paradigm of the subject (the paradigm of consciousness). In order to clarify the new hermeneutic rationality, the reference to the shift of *philosophy* itself, in the sense of paradigm change, allows us to specify its departing point—language. However, the linguistic shift serves to emphasize the multiplicity of its voices, not to reduce the amplitude of human rationality. Thus, the unfolding of the paradigm of language indicates the presence of a typology that could be classified as follows: first, communicative rationality, as promoted by Karl-Otto Apel and Jürgen Habermas; second, systemic rationality, as promoted by Niklas Luhmann; and third, hermeneutic rationality as promoted by Heidegger, and especially by his student, Hans-Georg

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Gadamer. Considering this analytical framework, the theme of hermeneutics, according to the current philosophical meaning, is situated in the context of the linguistic pragmatic overturn of contemporary philosophy. It is according to this premise and also in this paradigmatic context that we conceive the specific Gadamerian hermeneutic rationality. We borrow from this theory to outline a way to go beyond the horizon of epistemology.

We begin with a preliminary observation about the role of language in philosophical production, considering the paradigmatic shift. It is important to highlight that this “shift” of philosophy does not mean the inclusion of language as another relevant theme for philosophical reflection. It means that philosophy itself, or the way philosophy is understood, has undergone a change. Language is placed in a new dimension, moving from the object of reflection to the *foundation of thinking*. Philosophizing means philosophizing through language and within its limits. According to Karl-Otto Apel:

It might be possible to easily reach—among the ones who are knowledgeable about philosophical literature—the consensus that in our century the occupation of the philosopher with his own conscience, something characteristic of the modern era, has more recently given place to the occupation of the philosopher with language. This seems to mean that the philosophy of language came to take the place of the traditional epistemology—the philosophy of language not as the thematization of the object language among many other objects that can be known, but as *reflection about the linguistic conditions of cognition*.<sup>1</sup>

This change in the attitude of the philosopher led Apel to understand that this was a movement that went from cognitive critique, as an analysis of consciousness—the paradigm of the philosophy of consciousness—to cognitive critique as an analysis of language—the new linguistic paradigm. This shift of philosophy led to speculation about the possibility of a new criterion of validation. The central point of the matter, according to Apel,

seems to be in the fact that the problem of *validation of truth* cannot be seen anymore as a problem of *evidence* or *certainty* (“certitude”) for an isolated conscience in the Cartesian sense, nor as a problem of *objective validation* (therefore, intersubjective) for a “conscience in general” in the Kantian sense, but, in the first place, as a problem of the intersubjective formation of consensus based on a mutual linguistic (argumentative) agreement.<sup>2</sup>

The displacement present here—of the evidence, or of the certainty of an individual or general conscience for the linguistic agreement—shows that there are two things at play. The first indicates that there is a rupture between modern philosophy and the philosophy produced from the second half of the twentieth century to the present: a shift from the certainty of cognition and cognition as certainty to the idea of cognition as an argumentative consensus. The second indicates that there is continuity, which is present in the reflection about the conditions of possibility and validity of knowledge: before this was consciousness, today it is language.

It is productive to reflect on this constant movement between rupture and continuity, between the consciousness paradigm and the language paradigm. The Kantian matter of the possibility and validity of meaning is relevant, even

<sup>1</sup> KARL-OTTO APEL, TRANSFORMAÇÃO DA FILOSOFIA 353-54 (Loyola 2000) (1973).

<sup>2</sup> *Id.* at 354.

currently, but in varied philosophical fronts that do not ignore this context. There were many attempts to find an answer when there could be no univocal answer. The linguistic-hermeneutic philosophy developed by Hans-Georg Gadamer, working from Heidegger's initiatives, is one of the answers that currently contributes substantially to a better understanding of the theme of *comprehension*.

## II. HERMENEUTIC PHILOSOPHY

### A. *Hermeneutic and Critical Reason—the Practical Reason*

In Hans-Georg Gadamer's work, hermeneutic reason clarifies the relation with critical reason.<sup>3</sup> The debate between hermeneutic and critical reason involves two contemporary German philosophers: Jürgen Habermas and Hans-Georg Gadamer. Considering the controversy that unfolded in the 1960s and 1970s, this article will focus on the topic of the return of hermeneutic questions to the center of the philosophical debate. Although hermeneutics has always been an important subject in philosophy, in the last fifty years hermeneutics has acquired new meaning and has become a vital topic of discussion. This renewal of hermeneutics constitutes a change in the fundamental orientation of hermeneutics from a special and occasional field (restricted to a theory about, or the art of, interpretation) to the broader field of philosophy. It became the core of philosophy in the sense of conceiving reason, before any other determination, as hermeneutic reason. It extended from *special applications* to *philosophical problems in general*. According to Gadamer, hermeneutics now holds such importance that philosophy itself has become hermeneutics. The importance lies in the transformation of modern epistemic rationality into the current conception of hermeneutic rationality.

In a text written by Gadamer in 1976, this register of a new hermeneutics is clearly defined and adopted:

In itself hermeneutics is old. But in perhaps the last fifteen years it has taken on a new relevance. If we wish to assess this relevance and clarify the significance of hermeneutics and its relation to the central problems of philosophy and theology, we need to work out the historical background in the context of which the hermeneutical problem has taken on this fresh relevance. We have to trace the way hermeneutics has expanded from a specialized and occasional field of application to the vast field of philosophic questioning.<sup>4</sup>

<sup>3</sup> For more on the famous Habermas-Gadamer debate regarding the respective roles of hermeneutics and critical theory, see JÜRGEN HABERMAS, *DIALÉTICA E HERMENÊUTICA* [DIALECTIC AND HERMENEUTIC] (Ivaro Luiz Montenegro Valls trans., L & PM 1987); HANS-GEORG GADAMER, *A RAZÃO NA ÉPOCA DA CIÊNCIA* [REASON IN THE AGE OF SCIENCE] (Angela Dias trans., Tempo Brasileiro 1983) (1981). The subject is also an object of reflection in the work of JOSÉ CARLOS MOREIRA DA SILVA FILHO, *HERMENÊUTICA FILOSÓFICA E DIREITO: O EXEMPLO PRIVILEGIADO DA BOA-FÉ OBJETIVA NO DIREITO CONTRATUAL* [Philosophical Hermeneutics and Law: The Privileged Example of Objective Good Faith in Contract Law] 74-81 (2d ed. 2006). In this work, the reader will find studies about the main hermeneutic categories proposed by Gadamer.

<sup>4</sup> HANS-GEORG GADAMER, *REASON IN THE AGE OF SCIENCE* 88 (Frederick G. Lawrence trans. 1981); GADAMER, *supra* note 3, at 57.

This new *status* shows that reason—a central theme in the history of western philosophy—starts to be seen as a *hermeneutic reason*.<sup>5</sup> It is through this more comprehensive and less cognitive conception that Gadamer centers his concept of reason as primarily hermeneutic, therefore establishing a difference in relation to Habermas's conception of reason, which is understood as *critical reason*. This difference is emphasized in the way that reason comprehends its possibilities, limits and critical power. In the end, the difference between the two philosophers concerns a central matter: For Gadamer, defining reason as hermeneutic means to understand it as practical reason.

### B. *Overcoming the Theory of Method*

Comprehension moves beyond method. The philosopher builds a theory of comprehension with the objective of showing that, contrary to what happens in the discourse of modern rationality, hermeneutic inquiry is not a matter of method. In the very beginning of his work, Gadamer argues that, "The hermeneutic phenomenon is basically not a problem of method at all."<sup>6</sup> With this statement he shows that he is not interested in developing a theory of the art of interpretation, as if he were merely advancing some steps on a field that had already been explored. His theory breaks up with the theoretical-instrumental meaning of production of knowledge. His concern is comprehension itself. The question he asks is directly related to the phenomenon of comprehension: How is comprehension possible?<sup>7</sup> He makes clear that his objective is not to develop or describe a system of rules that serves as a guide for the methodological procedure of human sciences. His focus is the philosophical character of understanding and not an effort to define the procedure to use in understanding. He explores the condition of the possibility of comprehension and thereby investigates what happens with us "beyond" our "wanting" and "doing" when we understand something. According to Gadamer: "It is not as much what we do, but what happens to us above our wanting and willing."<sup>8</sup>

Indeed, the issue is not what we should do, in the philosophical sense of asking for rules to follow. That would be a matter of method. Gadamer's philosophical reflection is directed to what is common to every form of understanding. He concludes that comprehension is not a subjective behavior about a given object; it belongs to the being that is able to be understood. For this reason, "[T]he hermeneutic problem is basically not a problem of method at all";<sup>9</sup> rather, it is a theory of understanding that conceives of reason as something prior to method.

<sup>5</sup> HANS-GEORG GADAMER, *TRUTH AND METHOD* 306 (2d ed. Continuum 2004) (1960) [hereinafter GADAMER, *TRUTH*]; HANS-GEORG GADAMER & FLÁVIO PAULO MEURER, *VERDADE E MÉTODO I: TRAÇOS FUNDAMENTAIS DE UMA HERMENÊUTICA FILOSÓFICA* [TRUTH AND METHOD I: FUNDAMENTAL TRAITS OF A PHILOSOPHICAL HERMENEUTICS] 459 (Flávio Paulo Meurer trans., 3d ed. Petrópolis 1997) (1960) [hereinafter GADAMER, *VERDADE*].

<sup>6</sup> GADAMER, *TRUTH*, *supra* note 5 at xx; GADAMER, *VERDADE*, *supra* note 5, at 31.

<sup>7</sup> GADAMER, *VERDADE*, *supra* note 5, at 16.

<sup>8</sup> 1 HANS-GEORG GADAMER, *HERMENÊUTICA EM RETROSPECTIVA: HEIDEGGER EM RETROSPECTIVA* [HERMENEUTICS IN RETROSPECT: HEIDEGGER IN RETROSPECT] 115 (Marco Antônio Casanova trans., 2d ed., Petrópolis 2007) (1995) [hereinafter GADAMER, *RETROSPECT* 1].

<sup>9</sup> GADAMER, *TRUTH*, *supra* note 5, at xx-xiv; GADAMER, *VERDADE*, *supra* note 5, at 31-36.

Thus, Gadamer deconstructs the assumption that following a method is the certain way to achieve and legitimate truth. When comparing method and dialectic, Richard Palmer reveals differences that call our attention for the effects of both. He shows how Gadamerian reflection conceives the relation of the subject with the method:

In method, the theme to be investigated guides, controls and manipulates; in dialectics it is the theme that raises the issues that will be answered. The answer can only be given if it belongs to the theme and is situated in it. The interpretative situation is not anymore the situation of a person who questions and the situation of an object, considering that the one who questions should “build” methods that make the object accessible, on the contrary, the one who questions finds that she is the one being questioned by the theme (*Sache*). In such situation “the schema subject-object” is misleading because the subject becomes the object.<sup>10</sup>

According to this conception, understanding asserts itself as a process of self-understanding as it inserts the subject in the object. Therefore, it surpasses the view of the subject as being the one who can access the object through a method.

### C. *The Importance of “Prejudice” as Pre-judgment*

Gadamer advocates the idea that pre-judgments have a special importance for interpretation. He indicates that pre-judgments are an unavoidable consequence of the historical nature of the human person. Consequently, prejudices are not merely judgments, something that one can accept or reject. They are the basis upon which one may understand. Prejudices—pre-judgments—constitute the *condition of possibility of all comprehension*: they are the presuppositions. The conception of science reduced to method is positivist. Gadamer, however, looks behind this later methodological approach to investigate the pre-conceptual condition of all comprehension.

When dealing with this topic, Palmer inevitably connects methodological reason with modernity, and in particular with the Enlightenment:

If it is not possible to have comprehension without assumptions, if, in other words, the thing which we call “reason” is a philosophical construction and not a court of last resort, then we have to reexamine the relation we have with our heritage. The tradition and the authority do not need to be seen as enemies of reason and rational freedom, as they were in the Enlightenment, in the Romantic period and in our time. Tradition provides a flow of conceptions in the interior of which we place ourselves, and we should be prepared to distinguish among assumptions that are fruitful and others which imprison us and prevent us from thinking and seeing.<sup>11</sup>

The pretensions of reason and the unavoidability of tradition are not intrinsically opposed, because reason is always within tradition. All comprehension is defined historically. And the historicity of all comprehension is a consequence of the originary condition of the human person as a “being-in-the-world.” For this reason, comprehension is always rooted. As being-in-the-world, the human person is always bound to tradition. There is no way of renouncing this condition, since it is this condition that enables the subject to

<sup>10</sup> RICHARD PALMER, HERMENÊUTICA [HERMENEUTICS] 170 (Maria Luísa Ribeiro Ferreira trans., Edições 70 1997) (1969).

<sup>11</sup> *Id.* at 186-87.

understand. The historicity of the human person is the condition of possibility of all comprehension: The human person understands through her pre-concepts—pre-judgments—that are the products of history. This situation of historicity is the “transcendental condition” of all human comprehension. Therefore, tradition is not at our disposal, as a “given” object, that can be manipulated by the will of the subject. On the contrary, the human person originally finds herself in a situation of subjection.

All comprehension takes place within the horizon of a tradition of meaning. This tradition leaves its mark and makes comprehension possible. Thus, a text, be it biblical, scientific, poetic, philosophical or legal should be understood in the hermeneutic situation in which it is inserted, that is, in relation to the present. Likewise, knowledge, values, decisions, interpretations and actions have tradition as a reference, and they condition consciousness itself. It is in this sense that pre-judgments integrate the structure of all comprehension. They can never be eliminated, even though this is the intent of a vigilant critical reason. Pre-judgments are not only preset in the consciousness of the subject, they are part of its foundation.

Regarding the matter of critical and hermeneutic reason referred to previously, the debate between Gadamer and Habermas is important. On one hand, Gadamer insists that the historicity of interpretation as a factor that may not be eliminated from the human condition does not reduce comprehension; it enables and enriches comprehension, giving it the condition of *human comprehension*.

Habermas, on the other hand, understands that the inevitable character of historicity restricts knowledge. Gadamer’s intention is to overcome the philosophy of subjectivity. The fantasy that reflection can do almost anything—a trademark of the philosophy of modern consciousness—is overthrown by the phenomenological structure of reality that does not allow a separation between subject and object. This prevents the intended existence of a subject originally and epistemically conceived as reflective consciousness. Reflection is always guided by pre-understandings; they are a condition of the possibility of all comprehension. From this perspective it makes sense to say that the transcendental condition of possibility of understanding is not a Platonic form or an *a priori* category (Plato), the autonomy of will (Kant), the ideal or transcendental “communication community” (Habermas and Apel, respectively), the “originary position” (Rawls), or the *autopoeisis* of self-referential systems (Luhmann). It is, instead, *historicity*, the finitude and temporality of all being.

Gadamer elaborates the pre-structure of comprehension as a prejudice or pre-judgment in the following way: “Actually ‘prejudice’ means a judgment that is rendered before all the elements that determine a situation have been finally examined. . . . Thus ‘prejudice’ certainly does not necessarily mean a false judgment, but part of the idea is that it can have either a positive or a negative value.”<sup>12</sup>

According to a modern definition, the mediation of the prejudice that connects the subject with the thing to be understood has a more cognitive-epistemological character, and so was seen as a false judgment and therefore as

<sup>12</sup> GADAMER, TRUTH, *supra* note 5, at 273; GADAMER, VERDADE, *supra* note 5, at 407.

something negative. Here, however, Gadamer investigates the positive dimensions of the concept.

*D. Beyond Subjectivity: Language and Being*

Contemporary accounts of language move beyond subjectivity just as contemporary accounts of understanding move beyond method. Gadamer contends that Heidegger's emergence in the German academic philosophical scene was profoundly linked to the fundamental experience of *language* as treated by him in a philosophical manner. Initially, the impact occurred in the German language. Later, it extended to the whole world. Gadamer asserts that he saw the proximity of language with philosophy as he heard the voice and unique intuitive strength of Heidegger's language.<sup>13</sup> The return to the beginning of philosophy promoted the recollection of certain themes and problems of Greek philosophy, such as the battle between rhetoric and philosophy, the assertion of *logos* as central to finding truth, and the shift of Platonic Socrates in relation to the Attic philosophy; in Aristotle this is even clearer, when *logos* is used in logic due to its capacity of showing itself as a conceptual enunciation, as an *apophansis*.<sup>14</sup> Later, Heidegger directed his own language to this beginning of philosophy, which is determinant.<sup>15</sup>

The arrival of Heidegger in Marburg represented a new era for philosophy. The Heideggerian language and the terminology used were always elaborated due to new conceptual boldness in the elaboration of Heidegger's categories. Language, terminology and concepts—that is, Heideggerian philosophy—constantly confronted the neo-Kantism, which was the contemporary philosophy of the day. This was the context that impressed Gadamer in Marburg. The concept of *life* that had an unmistakable mark left by Heidegger in Freiburg demanded, in Marburg, the challenge of a new clarification. Gadamer explains how this was expressed in the uncommon and vigorous language of Heidegger. Heidegger's constant effort was toward the new through the extraordinary strength of language. How would one accomplish this task? Heidegger's answer was destruction (*Destruktion*).

I always see myself with the task of clarifying an incomprehension that has been widely spread, which was induced by the European languages and was concomitantly blamed for the cold welcome to Heidegger in the world: according to the linguistic feeling of those years, "destruction" did not mean "decimation" at all, it meant a deconstruction with a safe goal: a deconstruction of the sedimented layers that, in the past, just as in the present, does not match with the language that is really spoken. What was at play, in other words, was the task of taking ownership or deconstructing the conceptual language of all the history of thought which leads us to the thought of the Greek, passing by the Latin in the Ancient World and Christian Middle Age, and by the survival of this conceptuality, until the development of modern thought and its national languages. Therefore, the matter of attention was to deal with the traditional terminology in a deconstructive manner aiming at reconducting it to originating experiences.<sup>16</sup>

<sup>13</sup> GADAMER, RETROSPECT 1, *supra* note 8, at 25.

<sup>14</sup> *Id.* at 26.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 29-30.

In this case, what was at play was *to talk as if wanting to show something*, and to avoid the stale, conceptual language inherited by tradition. The direction of the eye must show something. To understand this is to understand the *phatos* of phenomenology. According to Gadamer:

Thus, the formal indication goes back to experiences of the thought relative to the world of life that is sedimented in language, which originally also resided on the basis of the conceptuality of tradition and that the Greek thought had developed. The Greek Ancient world, the Latin Middle Age and modernity return to this conceptuality in its conceptual formation. Thus, it is not a matter of a return to the philosophy of Aristotle, but of a crossing through him.<sup>17</sup>

Heidegger was familiar with Aristotle, since he had studied theology. However, the Aristotle he knew was one interpreted by St. Thomas Aquinas. Later, he read the Greek philosopher with a new inner motivation and discovered a new Aristotle. Through the reading of the *Rhetoric*, Heidegger became attuned to the existential significance of the doctrine of affect. However, something important for Heidegger had been lost; he, the one “who knew what anguish was—anguish in relation to life, to death and to the voice of conscience.”<sup>18</sup> This was the first access to Aristotle, in and through the *boldness of the new language*. Yet, in *Being and Time*, Heidegger commends the analytical-existential meaning of language, as Gadamer highlights.<sup>19</sup>

Gadamer is sensitive to the strength of Heideggerian language, and this is the starting point of his thesis about language. As Gadamer reveals the new direction of the Heideggerian reflections, he announces how his own philosophical path will be guided by the theme of language:

After abandoning the transcendental self-conception in which the *Being and Time* had focused on, Heidegger also abandons more fundamentally the dimension of subjectivity and even discards, after the “turn,” the being-there’s structure of care from his experiences of thoughts, as well as the concept of comprehension and hermeneutic. It was in this pathway that my works were carried out and oriented by the theme of language and the primacy of dialog and initially outlined, which had as a reference the draft of the problem proposed on the third part of *Truth and Method*. Those who think about the ‘language’ move beyond subjectivity.”<sup>20</sup>

Thus, when this direction is defined, Gadamer highlights the lively character of language and human participation in language. He is not concerned with language in its instrumental sense because the human experience does not have a pre-linguistic character, or a non-linguistic nature. Experience, thinking and comprehension are thoroughly linguistic activities. When using words to designate something, we formulate a statement that already belongs to a linguistic situation. In this manner, his thesis eliminates the possibility of metaphysics because the finiteness and linguisticity of every being precludes us from finding the desired methodological foundation of all historical science.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 31.

<sup>19</sup> *Id.* at 43.

<sup>20</sup> 2 HANS-GEORG GADAMER, *HERMENÊUTICA EM RETROSPECTIVA: A VIRADA HERMENÊUTICA* [HERMENEUTICS IN RETROSPECT: THE HERMENEUTIC TURN] 27 (Marco Antônio Casanova trans., 2d ed. Petrópolis 2007) (1995) [hereinafter GADAMER, RETROSPECT 2].

LINGUISTICALITY provides the common ground on which we find ourselves and on which we stand. As Palmer defines it when analyzing the theme in Gadamer:

Language is reservoir and a communicating medium of the tradition: tradition hides itself and language is a medium. Experience is not so much something that comes prior to language, but rather experience itself occurs in and through language. Linguisticity is something that permeates the way of being-in-the-world of historical man. As we have observed, man has “world” and lives in a world due to language.<sup>21</sup>

This new understanding prevents us from uncovering an UNSHAKEABLE AND STABLE FOUNDATION—there is no possibility of requiring a criterion for an absolute truth. Metaphysics—as first knowledge, fundamental, foundational and self-founded—becomes illusory, and gives way to a hermeneutic ontology of historical experience and the interpretation of that experience.<sup>22</sup> The experience of linguisticity results in the ontological shift of hermeneutics guided by language (which is the title of Part III of Gadamer’s *Truth and Method*). After all, the *being that can be understood is language*,<sup>23</sup> which is why language works as a medium of hermeneutical experience. It is through language that interlocutors understand each other regarding the matter at issue. There is no other way. All understanding occurs within the language.

That is why the hermeneutical problem is presented as a special case of the RELATIONSHIP BETWEEN THINKING AND LANGUAGE. We are facing an original evidence. As real language, it cannot be separated from what it says, from what is said, and for what it is said. In this sense, language is sharing, participation, opportunity of being part of and taking part in.<sup>24</sup> Language is part of life, always in the context of tradition. Gadamer uses the term “linguistic tradition,” which means that tradition is essentially language, and transmission of something occurs through its medium: Something is transmitted in historicity, in tradition. It is in language that THE WORLD AND I occur in their original unity. Gadamer concludes that:

When we talk to each other, when we seek words to engage each other and ourselves, when we experience the words that lead to a common language and form such a language, we strive to understand ourselves—and that always means: the whole, world and man; however it is possible that we do not really understand each other.<sup>25</sup>

In this concept of originary language, language ceases to be merely instrumental. Language is not a third thing that stands between a pre-defined subject and an object that stands independently.

<sup>21</sup> PALMER, *supra* note 10, at 210.

<sup>22</sup> MANFREDO ARAÚJO DE OLIVEIRA, REVIRAVOLTA LINGÜÍSTICO-PRAGMÁTICA NA FILOSOFIA CONTEMPORÂNEA [LINGUISTIC-PRAGMATIC SHIFT IN THE CONTEMPORARY PHILOSOPHY] 232 (1996).

<sup>23</sup> GADAMER, TRUTH, *supra* note 5, at 470; GADAMER, VERDADE, *supra* note 5, at 687.

<sup>24</sup> GADAMER, RETROSPECT 2, *supra* note 20, at 38.

<sup>25</sup> *Id.*

*E. Legal Hermeneutics**1. The Significance of Application*

The theme of application is central to a general understanding of hermeneutics, as well as to the special situation of legal hermeneutics. Gadamer seeks to recover the fundamental hermeneutical problem. In TRADITIONAL HERMENEUTICS, the problem was divided into three parts: first, *understanding—subtilité intelligendi*; second, *interpretation—subtilité explicandi*; and third, *application—subtilité aplicandi*. These three moments together characterized the realization of understanding, as a know-how that requires a particular refinement of spirit—a *subtilité*.<sup>26</sup>

The hermeneutical problem formulated in TRADITIONAL HERMENEUTICS FIRST UNDERWENT A change in the Romantic period, which recognized the internal unity of understanding and interpreting. Understanding and interpreting are not separate acts, nor separate moments. Understanding is always an interpretation. Gadamer writes: “Interpretation is not an occasional, post facto supplement to understanding; rather, understanding is always interpretation, and hence interpretation is the explicit form of understanding.”<sup>27</sup>

Although there was a breakthrough in the fusion of these two moments, they still remained completely disconnected from the third moment of the hermeneutical process, the moment of application. As an example, Gadamer states that there is a different understanding from Sacred Scriptures in the Christian preaching and the historical and theological understanding. Following the Gadamerian considerations, understanding always involves the application of the text that you want to understand, and the interpreter’s current situation.<sup>28</sup>

Based on these requirements, Gadamer undertook a further step toward unifying the process of including the moment of application in the process of interpretation. He goes beyond romantic hermeneutics in order to affirm the unitary process, not only of understanding and interpretation, but also of application. Application is now a constituent moment in a unified process, no less than the other two other moments. He recovers the forgotten history of hermeneutics in order to show that the logical and natural task of hermeneutics was to adapt the text to a specific situation to which it referred. This would be the original model, as the interpreter of the Divine Will was the one who knew how to interpret the language of the oracles. Likewise, today it is the interpreter’s task not only to reproduce what the interlocutor says to those who must clarify the intended meaning, but also to opine on the situation by being knowledgeable about the language of both parts.<sup>29</sup>

Gadamer argues that the close bond that united philological, juridical and theological hermeneutics in their origin rests on the recognition that application is an integral moment of all understanding.<sup>30</sup> And in this line of thought, the tension between the text and its application is a constitutive tension. In the case of the theological hermeneutics, the constitutive tension occurs between the

<sup>26</sup> GADAMER, TRUTH, *supra* note 5, at 306; GADAMER, VERDADE, *supra* note 5, at 459.

<sup>27</sup> GADAMER, TRUTH, *supra* note 5, at 306; GADAMER, VERDADE, *supra* note 5, at 459.

<sup>28</sup> GADAMER, TRUTH, *supra* note 5, at 307; GADAMER, VERDADE, *supra* note 5, at 460.

<sup>29</sup> GADAMER, TRUTH, *supra* note 5, at 307; GADAMER, VERDADE, *supra* note 5, at 460.

<sup>30</sup> GADAMER, TRUTH, *supra* note 5, at 307-08; GADAMER, VERDADE, *supra* note 5, at 461.

revealed text and the meaning through the application of the preaching interpreter. In legal interpretation the constitutive tension occurs between the text of law—normative text—and the scope of its application by the interpreter at the moment of decision—the decision of the court, for example. This means that application is a constitutive moment of understanding and not merely a possible effect of it. That is why a text, whether a law or a message of salvation, must always be understood at each moment and in each concrete situation, and consequently, with a new and distinct mode based on the assumption that “understanding is always applying.” Somehow, application as a hermeneutic categorical moment is presented in advance. There is, therefore, a categorical anteriority of application.

For Gadamer, legal and theological hermeneutics are the real models of this thesis. What interests us here is the model of legal hermeneutics.

## 2. *The Idea of Practical Philosophy and the Significance of Aristotelian Hermeneutics*

The idea of practical philosophy was developed by Aristotle in response to Plato’s mathematical theology of the good. The subject is presented by Gadamer with the following distinctions:

Nevertheless, the practical philosophy has its metaphysics. The metaphysical distinction of man the logos, to be able to choose, and to have the need to choose. Therefore, having the need to know or find “the good”—each time in a concrete situation. The Aristotelian term for this is: the man—as a free citizen—has *prohairesis*. However, Aristotle distinguishes two forms in which such a knowledge of good finds its perfection, *techne* and *phronesis*, forms that rest on the difference between *poiesis* and *praxis*. The distinction of *poiesis* and *praxis* belongs to the content of Practical Philosophy, in the sixth book of the *Nicomachean Ethics*.<sup>31</sup>

We know the distinctions that Aristotle makes. He separated theoretical philosophy from practical philosophy (and poetical). Man is “*logos*”—he is his knowledge and his thinking—but also *praxis*—action directed toward an end. For him it is *praxis* instead of *poiesis*, it is *phronesis* instead of *techne*. Besides the importance of categorical distinctions when dealing with practical philosophy, practical philosophy also deserves attention in the sixth book of the *Nicomachean Ethics*. The relationship between theoretical and practical rationality, between *sophia* and *phronesis*, is the relationship of mutual conditionality.<sup>32</sup> There is no theoretical person who ignores practice, or a practical person who is not attentive to theory. If Gadamer separated theoretical philosophy from practical philosophy, it is also true that his practical philosophy opened up new theoretical perspectives to which we should pay attention.<sup>33</sup> To develop these new perspectives, Gadamer employs a new interpretation of Aristotle for CONTEMPORARY HERMENEUTICS: practical philosophy as hermeneutics.

GADAMER’S NOTION OF APPLICATION has its origin in Aristotle, particularly in his *Ethics*. However, Aristotle’s treatment of application does not have

<sup>31</sup> 3 HANS-GEORG GADAMER, HERMENÊUTICA EM RETROSPECTIVA: HERMENÊUTICA E A FILOSOFIA PRÁTICA [HERMENEUTICS IN RETROSPECT: HERMENEUTICS AND THE PHILOSOPHICAL PRACTICE] 27-28 (Marco Antônio Casanova trans., 2d ed., Petrópolis 2007) (1995).

<sup>32</sup> *Id.* at 30.

<sup>33</sup> *Id.* at 34.

the dimension, nor the drama, of the contemporary hermeneutical problem as it is proposed by Gadamer. Aristotle focuses on ethical reasoning, namely the tension between the general and the particular in moral thinking. Gadamer teaches that the tension between the general and particular is also a key aspect of hermeneutics. Gadamer says that, "UNDERSTANDING, THEN, IS A SPECIAL CASE of applying something universal to a particular situation."<sup>34</sup> This is the Aristotelian problem with which hermeneutics is concerned. Hermeneutic philosophy is interested in the Aristotelian concept of practical-ethical rationality because it was Aristotle who recognized that ethics was autonomous of metaphysics. In other words, Aristotle gave a different treatment to the practical issues of knowledge as opposed to the immutable principles of things—theoretical knowledge. Practical activities in the face of uncertainty require practical reason. Gadamer shifts the focus from ethics to hermeneutics. Gadamer advocates an Aristotelian reading of hermeneutics: that hermeneutic knowledge has its own being, that it is not cognitive knowledge, nor epistemic, much less pure reason.

Following his line of thought, Gadamer's hermeneutic rationality, conceived by reviving and updating Aristotelian practical reason, leads him to review the virtue of prudence (*phronesis*), which is extremely significant to legal hermeneutics. According to Heidegger, practical reason as a display of Aristotelian *phronesis* was the *eye of the soul*.<sup>35</sup> Here, it is important to review the distinction between *techne* and *phronesis*: The former is knowledge that leads to the production of something; the latter is knowledge that guides the political and social person to act. This distinction was also formulated by Aristotle. Craft, Art or *techne* can be learned as well as FORGOTTEN. *Phronesis*, on the other hand, is moral knowledge. Once learned, it cannot be forgotten because it has become part of the person acting.<sup>36</sup>

If the cultivation of justice is itself a task that requires knowledge and power, Gadamer asks whether it is a *techne*.<sup>37</sup> Is it not the application of the fixed law to the concrete case? But then, why does Aristotle call legal practice a form of *phronesis* rather than a *techne*?

Practical wisdom, or prudence, is indispensable to legal actors, especially judges, because their situation is very different from the task of the craftsman who stands before the object that he will produce. In the case of the application of law, answering his own questions, Gadamer tells us:

In a certain instance he will have to refrain from applying the full rigor of the law. But if he does, it is not because he has no alternative, but because to do otherwise would not be right. In restraining the law, he is not diminishing it but, on the contrary, finding the better law.<sup>38</sup>

Aristotle names it equity, a corrective of legal justice. Therefore, it is not an arbitrary concession. Concessions of the law should aim at achieving the best law, instead of rejecting aspects of justice. Thus, in Gadamerian hermeneutic rationality the subject of understanding is implied in the process of

<sup>34</sup> GADAMER, TRUTH, *supra* note 5, at 310; GADAMER, VERDADE, *supra* note 5, at 465.

<sup>35</sup> GADAMER, RETROSPECT 1, *supra* note 8, at 15.

<sup>36</sup> *Id.*

<sup>37</sup> GADAMER, TRUTH, *supra* note 5, at 315; GADAMER, VERDADE, *supra* note 5, at 473.

<sup>38</sup> GADAMER, TRUTH, *supra* note 5, at 316; GADAMER, VERDADE, *supra* note 5, at 473.

implementation of law, because the application is no longer an effect, the end, or possible understanding, but the determinant factor since the beginning, and as a whole.

Although Gadamer unfolds in his thinking some more elements and categories that allow the distinction between technical knowledge (*techne*) and moral knowledge (*phronesis*)—such as the relationship between the means and ends of each, and the relationship between *phronesis* and understanding, issues which are not developed here—the conclusion suggested by Gadamer is that the Aristotelian analysis is a kind of model of problems inherent in the hermeneutical task.<sup>39</sup> Thus we can conclude that Gadamer's approach to legal hermeneutics describes a problem that cannot be ignored by the theory of law, because we have been facing the shift from epistemology to hermeneutics. As such, he is at the center of the critique of modernity. This shift has produced a vigorous critique that has not yet been fully realized in juridical practice.

### 3. *The Exemplary Status of Legal Hermeneutics*

At the end of Chapter 10 in *Truth and Method*, entitled *Recovery of the Fundamental Hermeneutical Problem*, Gadamer considers the very meaning of legal hermeneutics, which he regards as emblematic. For Gadamer, legal hermeneutics is exemplary regarding the fundamental hermeneutical problem. Thus, apart from any other hermeneutics, it plays a paradigmatic role for the interpretation of hermeneutical phenomenon, as a unique process of understanding, interpretation and application. Legal hermeneutics has this status because the jurist always aims at an application. The jurist takes the meaning of the normative text—the law—and goes beyond the traditionary understanding to meet the needs of a particular case.<sup>40</sup> The understanding of the text is subjected to the resolution of the given case. Even if the lawyer has to think in historical terms, the historical understanding in his case is not an end but a means. Thus, the legal text and its application are in a constitutive tension, making the knowledge of the meaning of a text and its application to a specific legal case part of a unitary process, and as such they are inseparable. The legal text, a law for example, is understood by the jurist from a determined given case, whether real or fictitious. The normative content of the legal text is determined—in the sense that it is made, created, or produced—by taking into consideration the specific case to which it will be applied.

At first glance, legal reasoning might appear to be a specific rationality not readily extended to other fields of inquiry. Legal texts are merely auxiliary aids of legal practice; as a result, they would not aim to understand the tradition, the most important characteristic of Gadamerian hermeneutics. However, this is not Gadamer's conclusion. As already noted, it is historical knowledge that is essential for the original meaning of the text in question. Both aspects—historical meaning and application—make legal hermeneutics embody the authentic historical hermeneutic procedure: the relationship between past and present, between tradition and awareness of tradition. Thus, the legal tradition comes to the present mediated through the application of texts to a concrete case. Conse-

<sup>39</sup> GADAMER, TRUTH, *supra* note 5, at 320-21; GADAMER, VERDADE, *supra* note 5, at 480.

<sup>40</sup> GADAMER, TRUTH, *supra* note 5, at 322; GADAMER, VERDADE, *supra* note 5, at 481.

quently, the task of legal interpretation is not a special case of understanding, but paradigmatic of the phenomenon of understanding in general. In Gadamer's words: "In reality then, legal hermeneutics is no special case but is, on the contrary, capable of restoring the hermeneutical problem to its full breadth and so re-establishing the former unity of hermeneutics, in which jurist and theologian meet the philologist."<sup>41</sup>

Although Gadamer has dedicated himself to exploring theological and historical hermeneutics, as well as the historian from this point on, he concludes his discussion of the recovery of the fundamental hermeneutical problem by making explicit reference to the paradigmatic significance of the legal hermeneutics. He notes that the model of legal hermeneutics has proved to be fruitful. When the judge is authorized to make law by fulfilling the judicial function, what he does is what takes place in any process of understanding.

In conclusion, every act of understanding includes application. The concept of practical rationality as hermeneutical rationality includes application as part of the moment of understanding. Moreover, the essential relationship that exists between legal hermeneutics and dogmatic juridical hermeneutics assumes a predominant position. Otherwise, we must conceive that the legal decision will be obtained by the methodical procedure of subsuming the individual case under a pre-established rule, which is unsustainable.<sup>42</sup>

### III. THE DECOLONIAL SHIFT—AN INDICATIVE OUTLINE

By giving prominence to practical philosophy conceived as hermeneutic philosophy, Gadamer leads us to new perspectives. Among the new perspectives is a critical hermeneutic rationality, developed by hermeneutic theorists from the South that could be termed *postcolonial*, or more precisely, *decolonial*. For example, this new perspective has been described by Enrique Dussel as a *transmodern shift through the victims*; Walter Mignolo describes it as "*de-colonial shift*";<sup>43</sup> Anibal Quijano defines it as *the coloniality of power*;<sup>44</sup> Boaventura de Sousa Santos as an "*epistemological shift of the South*";<sup>45</sup> César A. Rodríguez Garavito as *a turning from global North to South*;<sup>46</sup> or in my

<sup>41</sup> GADAMER, TRUTH, *supra* note 5, at 325; GADAMER, VERDADE, *supra* note 5, at 488.

<sup>42</sup> GADAMER, TRUTH, *supra* note 5, at 325-26; GADAMER, VERDADE, *supra* note 5, at 489-90.

<sup>43</sup> See generally Walter Mignolo, *Introduction* to FREYA SCHIWY & NELSON MALDONADO TORRES, (DES)COLONIALIDAD DEL SER Y DEL SABER [DECOLONIZATION OF BEING AND OF KNOWLEDGE] (2006).

<sup>44</sup> See generally ANIBAL QUIJANO, COLONIALIDADE DO PODER, EUROCENTRISMO E AMÉRICA LATINA [THE COLONIALITY OF POWER, EUROCENTRISM AND LATIN AMÉRICA], in A COLONIALIDADE DO SABER: EUROCENTRISMO E CIÊNCIAS SOCIAIS. PERSPECTIVAS LATINO-AMERICANAS [THE COLONIALITY OF KNOWLEDGE: EUROCENTRISM AND SOCIAL SCIENCES. LATIN-AMERICAN PERSPECTIVES] (Edgardo Lander ed., 2005).

<sup>45</sup> See generally BOAVENTURA DE SOUSA SANTOS, RENOVAR A TEORIA CRÍTICA E REINVENTAR A EMANCIPAÇÃO SOCIAL [RENEWING THE CRITICAL THEORY AND REINVENTING THE SOCIAL EMANCIPATION] (2007).

<sup>46</sup> See generally César A. Rodríguez Garavito, *Prologue, Una Nueva Perspectiva Sobre el Derecho Internacional: La Mirada Desde Abajo* [A New Perspective of International Law: A Look from the South], in BALAKRISHNAN RAJAGOPAL, EL DERECHO INTERNACIONAL

view, as a *shift from negativity to positivity*;<sup>47</sup> among many other authors. It is certain that many other characterizations are possible to describe the critique of modernity, post-modernity and hyper-modernity.

Among the many possible alternatives, I would like to highlight the broad perspective of critical and decolonial thinking,<sup>48</sup> a perspective that has the historical praxis of irrational domination and oppression as its starting point, in which negativities are the place for the world's most dramatic semi-peripheral and peripheral material (and formal) injustice until today. To provide a short outline of this perspective, I will mention some theoretical presuppositions by Walter Mignolo, in his intellectual, political project that he describes as a “decolonial shift” or “de-colonial thinking.”<sup>49</sup> This thought is produced by considering various parallel and complementary semiotic forms of social movements that move in the margins of the political, economic structure, in rupture with the image of wholeness to which they remain attached. The premise is that this detachment—this rupture from within the wholeness—that *decolonial* thought promotes, helps promote confidence that other worlds are possible, and are already under construction.<sup>50</sup> In this sense the shift of a *decolonial* hermeneutic critique promotes understanding of the linguisticity in which and for which we are—*language as a condition of the possibility of being*, and the condition of what we know and for what we know—*language as a condition of the possibility of knowledge*, and also the condition of what we can do and for what we can do—*language as a condition of possibility of power*.

There are two aspects to consider here. First, regarding linguisticity, Mignolo argues that we are unable to imagine and think beyond the categories of Greek and Latin language, adapted by the six imperial languages of modernity and coloniality (Italian, Spanish and Portuguese during the Renaissance, and English, French and German since the Enlightenment, including the United States after World War II).<sup>51</sup> These categories are historically situated linguistically, semantically defined by the cultural ethos, and ideologically demarcated as COLONIAL, IMPERIAL LANGUAGES. Linguisticity imposes on and overtakes indigenous languages—the original linguisticity of these peoples. Hence, another linguisticity (the linguisticity of the other) is dominated, silenced, invalidated, and finally denied. This is the dimension of negativity, which is real. Mignolo illustrates this point by saying that any attempt to think through categories originating within linguistic traditions such as the Bengali, Aymara, Arabic, Russian, or Bambara, among others, is doomed to failure.<sup>52</sup>

The second aspect to consider concerns the historically constituted linguisticity, that is, the base—the raw material—of historical consciousness. This

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DESDE ABAJO: EL DESARROLLO, LOS MOVIMIENTOS SOCIALES Y LA RESISTENCIA DEL TERCER MUNDO [INTERNATIONAL LAW SINCE THE SOUTH] (2005).

<sup>47</sup> See generally CELSO LUIZ LUDWIG, PARA UMA FILOSOFIA JURÍDICA DA LIBERTAÇÃO: PARADIGMAS DA FILOSOFIA, FILOSOFIA DA LIBERTAÇÃO E DIREITO ALTERNATIVO [TO A LEGAL PHILOSOPHY OF LIBERATION: PARADIGMS OF PHILOSOPHY, PHILOSOPHY OF LIBERATION AND ALTERNATIVE LAW] (2006).

<sup>48</sup> See Mignolo, *supra* note 43, at 9-20, 83-123.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 12.

<sup>51</sup> *Id.* at 12-13.

<sup>52</sup> *Id.* at 13.

linguisticity has coloniality as its main determination. It is in essence a colonized linguisticity. There is a linguisticity produced by the logic of coloniality. And this logic of coloniality operates in three different spheres: the coloniality of power (economic and political coloniality), the coloniality of knowledge (epistemological, philosophical, scientific, in the relationship between languages with knowledge), and the coloniality of being (subjectivity, control of sexuality).<sup>53</sup> Therefore, the linguisticity of the human being—being, knowledge and power—is shaped deeply by the logic of coloniality. And the decolonial shift consists of releasing coloniality, beginning with the decolonization of knowledge, power and being. It arises from the colonial difference, and maybe, from the imperial difference. Mignolo indicates the direction of the colonial shift as thinking of the materiality of other places, memories, and bodies.<sup>54</sup> Thinking, in short, through what was denied by the rhetoric of modernity and effectively eliminated by the logic of modernity. The colonial shift is a global process for the formation of another paradigm, thoughts of coexistence, relative thinking, marginal thinking, and finally, negative thinking. Thus, the decolonial thinking can ask the following questions: What kind of understanding do we need? From whom? For what? And to whom? These issues may lead to the initial steps towards the hermeneutics of negativity, or decolonization.

Concerning the possibility of the decolonial critique, it is important to recognize the greatness of Gadamer's critical work, which emphasizes the centrality of hermeneutics in the world today. From this it opens the doors to new perspectives. For it seems possible to say that hermeneutics is not everything. However, it is also true to say that hermeneutics is *in* everything. We are always interpreting, even as I have just done by interpreting some aspects of the ontological hermeneutic shift by Hans-Georg Gadamer and the shift of a possible *decolonial* hermeneutics.

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<sup>53</sup> *Id.* at 15.

<sup>54</sup> *Id.* at 21-22.