

# DECONSTRUCTING THE MODELS OF JUDGES: LEGAL HERMENEUTICS AND BEYOND THE SUBJECT-OBJECT PARADIGM

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The linguistic-ontological turn has brought uncountable consequences to the interpretation of Law. However, dogmatic-legal knowledge remains hostage to a judicial protagonism, a philosophy of consciousness that, together with legal discretion, represent two sides of the same coin. The criticism of judicial discretion is a matter of democracy: decisions must be coherent, assuring the integrity of Law by reinforcing the normative power of the Constitution from which arises the need for correct answers in Law.

## I. FROM HERMES TO THE *SUBTILITATES*

The word hermeneutics comes from the Greek *hermeneuein*, and has acquired a number of meanings over the course of history. By using the word hermeneutics, scholars attempt to translate that which is not comprehensible into an accessible language. This is appropriate, given the derivation of the word from the Greek god Hermes, a divine messenger, who transmits—and therefore, clarifies—the content of the message from the gods to mortals. In fulfilling the hermeneutic task, Hermes became powerful. Humans could never know directly what the gods said, but could only know what Hermes said regarding what the gods had said. Hermeneutics represents, then, an (inter) mediation. Unless one believes in the possibility of gaining direct access to things themselves (that is, the essence of things), the metaphor of Hermes reveals the full complexity of human understanding. The hermeneutic problem is about translating languages and things to provide them with a determinate meaning.

The modern tradition in both theological and legal hermeneutics is to understand hermeneutics as art or technique (method) that has a guiding/directive effect. Both legal and theological hermeneutics share a tension between the idea of a fixed text and the fact that meaning is understood through the application of the text in a concrete situation, be it a legal proceeding or a religious sermon. This tension between the text and the meaning to be attrib-

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uted to the text places hermeneutics at a crucial point in the effort to gain access to the knowledge of things.

There is a direct relationship between the crisis through which legal hermeneutics is passing and the epistemological debates that originated in the twentieth century, particularly with regard to the problem of the basis for argumentation. The debates concern the role of paradigms. Various attempts to establish rules or canons for the interpretative process, based on the predominance of either objectivity or subjectivity, or even of the conjugation of the subjectivity of the interpreter with the objectivity of the text, have been overcome by the ontological-linguistic turn taken by Martin Heidegger and Hans-Georg Gadamer, both twentieth century German philosophers. This important "turn" in thought surpassed the subject-object model through the previous ontological understanding of subject and the de-objectification of the text that is provoked by the hermeneutical circle and the ontological difference.

The hermeneutic-ontological turn provoked by Heidegger's *Sein und Zeit* (*Being and Time*) in 1927,<sup>1</sup> and by the publication of Gadamer's *Wahrheit und Methode* (*Truth and Method*) in 1960,<sup>2</sup> is fundamental for the new view of legal hermeneutics. Based on this *ontologische Wendung* (ontological turn), the process of overcoming both the objectivist metaphysical (Aristotelian-Tomist) and subjectivist (philosophy of consciousness) paradigms was initiated. These paradigms, in one way or another, have, until today, sustained the dominant exegetic-deductive theses that has dominated legal hermeneutics to the point that hermeneutics is viewed only in these limited terms.

With regard to both legal doctrine and jurisprudence, many theorists regard method or procedure as indispensable, whether to reach the "intention of the rule," the "spirit of the legislator," the "correct" interpretation of the text, or some other supposedly definitive source of meaning. This approach makes clear that these theorists believe that interpretation is a simple cognitive act, which demonstrates a significant metaphysical problem in this field of knowledge. The common understanding of day-to-day legal hermeneutics has its roots in the discussion that led Gadamer to make an incisive criticism of classic hermeneutics, in which interpretation is understood to be the product of an operation performed in parts (*subtilitas intelligendi*, *subtilitas explicandi*, *subtilitas applicandi*, that is, first know/understand, later interpret, and then apply).

The impossibility of separating these elements results from the impossibility of the interpreter first to "extract" from the text "something that the text contains within itself," a species of *Auslegung*,<sup>3</sup> as if it were possible to reproduce meanings. In contrast, Gadamer's philosophical hermeneutics insists that the interpreter always attributes meaning (*Sinngebung*). The event of interpretation occurs as a result of a fusion of horizons (*Horizontenverschmelzung*), because understanding is always the process of fusion of the supposed distinct horizons of the interpreter and the rule.

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<sup>1</sup> MARTIN HEIDEGGER, SEIN UND ZEIT 437 (Tübingen 1993) (1927).

<sup>2</sup> HANS-GEORG GADAMER, WAHRHEIT UND METHODE 555 (1990).

<sup>3</sup> As I've been demonstrating, before the hermeneutic-ontological turn, interpretation was conceived as reproduction of meaning (expressed by the word *Auslegung*). However, from Gadamer's contributions on, interpretation must be considered as attribution of meaning (expressed by the word *Sinngebung*).

## II. HERMENEUTIC PHILOSOPHY AND PHILOSOPHICAL HERMENEUTICS: THE COPERNICAN REVOLUTION IN THE INTERPRETATION OF LAW

Hans-Georg Gadamer's philosophical hermeneutics has been influenced significantly by the two main theorems of Heidegger's fundamental ontology: the hermeneutical circle (*hermeneutische Zirkel*) and the ontological difference (*ontologische Differentz*). As I have noted in other texts, Heidegger's body of work constitutes the foundation for a new perspective of legal hermeneutics, although admittedly, he did not discuss legal hermeneutics directly. The importance of Heidegger's ontological turn (*ontologische Wendung*) for the field of legal hermeneutics was provided by his disciple, Hans-Georg Gadamer, whose philosophical hermeneutics is deeply rooted in Heidegger's fundamental theorems.

Hermeneutical phenomenology makes it possible to go beyond the subject-object model that has historically held legal thinking hostage, and which is defined by means of either the Aristotlean-Tomist objectivist paradigm or the subjectivist paradigm. By recognizing the vital role of the anticipation of meaning, the hermeneutical circle cuts across the subject-object relationship and undermines the objectivist and subjectivist manifestations that characterize metaphysical thinking. Comprehension (*Verstehen*) occurs within this virtuous hermeneutical circle. An interpretation that contributes to comprehension must have already understood what is to be interpreted, Heidegger would say. One cannot forget the "what has always been" and the historicity of the *Dasein*<sup>4</sup> are the characteristics of our own way of seeing facts. This pre-structure projects our understanding and anticipates the meanings that we have of the world.

This does not mean, however, that we are prisoners of this pre-structure of meaning. Comprehension is not a way of knowing, but a way of being. As Gadamer explains in detail in *Wahrheit und Methode* (*Truth and Method*), comprehension—and, therefore, interpreting (which is explaining what has been understood)—does not depend on a method.<sup>5</sup> This bold move leaps from

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<sup>4</sup> Heidegger constructs a specific concept to account for the entity (*Seiendes*) which understands the being, and in this understanding there is an implicit understanding of his own being (*Sein*). This entity (*Seiendes*) is *Dasein*. The German term *Dasein* traditionally means existence (in this sense it is used by philosophers of the metaphysical tradition, as is the case with Kant, for example), but finds serious problems in translation into other languages. This is because Heidegger gives the term a different connotation that keeps the original meaning of existence, but in the sense that entity (*Seiendes*) that, among all others, exists, that is the man. For Heidegger only *Dasein* exists, because existence implies possibilities, projects. There is a semantic charge around the term *Dasein*. For didactic reasons, we will always use the expression *Being-there* as a translation for *Dasein*. Clarifying the question of *Dasein*, Michael Inwood says: "Dasein is Heidegger's way of referring to both the human and the type of being that humans have. *Dasein* comes from the verb *dasein*, that means 'to exist' or 'to be there, to be here'. The noun *Dasein* is used by other philosophers, Kant, for example, uses it to designate the existence of any entity. But Heidegger is restricted to humans. . . . Why does Heidegger speak of the human being that way? Being of human beings is markedly different to the beings of the other entities (*Seiendes*) in the world. *Dasein* is an entity to which, in its Being, that Being is an issue." MICHAEL INWOOD, HEIDEGGER 33-34 (Wiesbaden 2004) (1997). Still on the question of terminology, see the American version of *Sein und Zeit*: MARTIN HEIDEGGER, BEING AND TIME 1 (John Macquarie & Edward Robinson trans., Harper & Row 1962) (1927).

<sup>5</sup> See GADAMER, *supra* note 2, at chs. 2-3.

*the epistemology of interpretation to the ontology of understanding/comprehension.* Heidegger identifies a double level in the phenomenology of understanding: the deep hermeneutical level, which structures the comprehension, and the apophantic level, which is logical in nature and merely explanatory or ornamental.<sup>6</sup> This dual level permits us to demystify procedural argumentative theories. Heidegger questions the procedural forms of access to knowledge, an issue of great relevance for legal thinkers who are so fixated on the issue of method, which scholars consider to be the *supreme moment of subjectivity* and the guarantor of the “correctness of the interpretative processes.”<sup>7</sup>

In short: in order to interpret, we need to comprehend; and in order to comprehend, we need to have a pre-comprehension, composed of a prior meaning—which is essentially based on a prior attitude (*Vorhabe*), prior view (*Vorsicht*) and prior conception (*Vorgriff*)—which brings together all the parts of the “system.”

Interpretation is our way of being in the world. We are condemned to interpret. The horizon of our sense of self is given by the understanding that we have of something. Understanding, along with possibility, facticity, and others, is existential; it is a category that forms part of man’s constitution. It is from our way of understanding as a being-in-the-world that “meaning” arises as a product of the “hermeneutic synthesis” of the interpreter’s facticity and historicity.

Surpassing classical hermeneutics, especially as it has defined legal hermeneutics to be a technique at the heart of the day-to-day practice, implies admitting that there is a difference between the legal text and the meaning of that text. That is, the text does not “carry” its meaning in a material sense, as a bucket carries water within it. Between the text and the meaning of the text there is neither equivalence nor total scission.

The difference between the text and the meaning of the text is ontological. Here lies the importance of the two fundamental theorems underpinning philosophical hermeneutics: the being is always the being of an entity and the entity only exists in its being. The being exists in order to give meaning to the entities. There is, then, an ontological difference (not ontological-essentialist) between being and entity, *a thesis that I introduced at the level of legal hermeneutics in order to overcome both the problem of equating authoritativeness and validity, and the total scission between text and the meaning of the text*, the vestiges of a legal positivism that exists alongside a total discretion in the interpretative act. To put this thesis in different words: the being is always the being of an entity, in that it is not “free-floating”, but rather only exists in things (entities), and is never, in itself, an entity. Meaning is the realm within which significance emerges, and is later expressed as the predicated content of a statement. Hermeneutic phenomenology uses the concepts of opening (*Erschlossenheit*) and of concealment (*Verborgenheit*) in which the meaning is made possible by opening and it disappears by concealment, but always within a range of meaning that depends on the way of being of the *Dasein*. Herme-

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<sup>6</sup> HEIDEGGER, *supra* note 1, §§ 42-44.

<sup>7</sup> *Id.*

neutic phenomenology describes things as they occur through opening and concealment.

Against this backdrop, we can see that the fact that the interpreter always attributes meaning (*Sinngebung*) to the text in no way suggests that the interpreter is authorized to attribute meanings to texts arbitrarily, as if the text and the meaning of the text were distinct factors that exist autonomously from each other. As Gadamer says, when the judge attempts to adjust the law to the needs of the present, the judge engages in a practical task, which demonstrates the importance that Gadamer gives to the Aristotelian-like program of a *praktische Wissenschaft*.<sup>8</sup> Judicial interpretation of the law is not an arbitrary translation.

Philosophical hermeneutics avoids all forms of personal/arbitrary and discretionary decisions.<sup>9</sup> The fact that there is no method that can guarantee that the judge reaches the “correct” interpretation—a situation that Hans Kelsen denounced in the eighth chapter of *The Pure Theory of Law*—does not mean that the interpreter is free to choose the meaning that best suits him/her, a freedom that would encourage discretion and arbitrariness. The “intention” and the “knowledge” of the interpreter allow neither the arbitrary attribution of meanings, nor the attribution of arbitrary meanings. As Gadamer explains in *Wahrheit und Methode (Truth and Method)*, if one wants to say something about a text, one must let the text say something to him or her. (*Wer einen Text verstehen will, ist vielmehr bereit, sich von im etwas zu sagen lassen.*)<sup>10</sup>

Put more clearly, hermeneutics has never permitted any form of “personal/arbitrary decision” or “crude realism” (pragmatism). Gadamer definitively defends legal hermeneutics against the accusation of relativism. To speak of relativism is to admit the existence of absolute truths, and there has never been a satisfactory demonstration that absolute truth exists. Jean Grondin, one of the best interpreters of Gadamer, has made this point clearly.<sup>11</sup> Hermeneutics regards relativism as a phantom threat because it denies finiteness no less than claims of certain and timeless knowledge.

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<sup>8</sup> GADAMER, *supra* note 2, at 465.

<sup>9</sup> A certain degree of overlapping—conscious or unconscious—can be seen between the classical metaphysical and modern paradigms at the level of Brazilian (and foreign) doctrine. Some authors place the attribution of meaning in the consciousness of the subject-judge. See, for example, MARIA HELENA DINIZ, COMPÊNDIO DE INTRODUÇÃO À CIÉNCIA DO DIREITO (1998), for whom “knowing is to bring to the subject something that is put as object;” it consists “in carrying to the consciousness of the cognoscent [sic] subject something that is outside him . . . so making it present to the intelligence.” In this context, “philosophy of consciousness” and “legal discretion” are two faces of the same coin. For example, I ERNANE FIDÉLIS DOS SANTOS, MANUAL DE DIREITO PROCESSUAL CIVIL (5th. ed. 1997) affirms that “there is nothing that is above the judge. Not even the law itself . . .” In foreign law, Alejandro Nieto Garcia professes his faith in legal realism in his EL ARBITRIO JUDICIAL 28 et seq. (2000), bringing together ingredients of the positivist discretion with the subjectivist paradigm. Mauro Cappelletti also attributes discretionary powers to judges in JUÍZES LEGISLADORES? 33 (Carlos Alberto Alvaro de Oliveira trans., Fabris 1999) (1984). Not even Mirreile Delmas-Marty manages to overcome the representational paradigm and its consequences in the theory of law, as can be seen in her POR UM DIREITO COMUM (2004).

<sup>10</sup> GADAMER, *supra* note 2, at 79.

<sup>11</sup> JEAN GRONDIN, EINFÜHRUNG ZU GADAMER 232 et seq. (2000).

### III. THE “MODELS” OF JUDGES THAT HAVE EMERGED DURING THE POST-POSITIVIST DECADES

A better understanding of the role that judges play in interpreting the law at this point in history can be achieved by popular characterizations of law and of judging. This task is undertaken by the Belgian professor, François Ost, in *Jupiter, Hercules, Hermes: Three Models of Judges*.<sup>12</sup> Ost proposes a species of post-modern-systemic judge (Hermes) who would act in a network and replace “previous models” of judging represented by Jupiter and Hercules (for Ost, the theory of law works basically with these two models of judges). Jupiter represents the liberal-legal model of the judge who deduces the correct legal result from basic principles that are at the apex of the pyramid of legal practice, and always stated from on high, from some “Mount Sinai.” Jupiter embraces law expressed in an imperative manner, as represented by the tablets of law or codes and the modern constitutions, and it is only within these established parameters that the judge makes decisions.

In contrast, the Herculean model is based on the figure of the judge as the sole source of valid law. As Ost explains, this results in the model of judging being an inverted pyramid.<sup>13</sup> Ronald Dworkin re-assessed in great detail the figure of the modern judge, attributing to the judge the characteristics of Hercules. Although he states that he does not intend to “equate” Dworkin’s thesis to those of the realists or pragmatists, in the end Ost places upon Dworkin’s Hercules the “defects” that characterize the judge that “monopolizes jurisdiction” within the Welfare State, in which the law “is reduced to the fact” that is, the unarguable material nature of the decision.<sup>14</sup>

As an alternative to Jupiter and Hercules, Ost introduces a *tertius genus*, the judge Hermes, who acts within a network.<sup>15</sup> Hermes does not operate on one pole or the other, does not resemble a pyramid or an inverted pyramid, or even a combination of the two. Instead, Hermes works within a multiplicity of inter-related points. The legal field is analyzed as if it were an infinite combination of powers, dynamically separated and linked through frequent interchanging. The law involves a multiplicity of actors, a diversification of rules, and an inversion of replicas; it is not possible to capture such a movement of meanings and information in a code or a decision: it is expressed in the form of a data bank. Hence, according to Ost, postmodern law, the law of Hermes, consists of a network-like structure that can be seen as an infinite volume of instantly available information from which the judge must draw. He proposes a ludic (playful) theory of law. The Hermes judge is neither transcendent, nor immanent. This kind of judge must find the law in the dialectic play of these possibilities, even though this poses a paradox.

Examined in the light of philosophical hermeneutics, neo-constitutionalism and the various theories of law that emerged in the twentieth century, Ost’s thesis raises a series of objections, not so much for proposing Hermes as the

<sup>12</sup> François Ost, *Júpiter, Hércules, Hermes: Tres Modelos de Juez*, 14 DOXA, CUADERNOS DE FILOSOFIA DEL DERECHO, 169-74 (1993).

<sup>13</sup> *Id.* at 176.

<sup>14</sup> *Id.* at 180.

<sup>15</sup> *Id.* at 182.

solution (which, it would appear, has some very relevant aspects), but rather for the criticisms he makes of Dworkin's "Herculean model." I shall provide detailed objections to Ost's characterizations as a way of getting to the fundamental issues regarding judging in the postmodern era.

The first objection is that Ost tries too hard to fit the "Herculean model" within the model of law that developed as part of the modern Welfare State, making it the antithesis of the "Jupiterian model" of judge that characterizes the Liberal State. It is too easy to create simple categories that are easily distinguished.

The second objection is that Ost fails to understand that Hercules is a metaphor that represents a model of judging that is exactly the opposite of what he argues against. That is, *Hercules is definitely not the incarnation of the "solipsistic judge,"* but rather is the antithesis of the discretionary judge, who is hostage to the philosophy of conscience. Unfortunately, Ost does not discuss the debate regarding the subjectivity of the judge, perhaps because he proposes the Hermes judge acting in a network who is able to break free from the subject/object model.<sup>16</sup>

As a third objection, Ost fails to recognize that the special roles he assigns to the "assistentialist" Hercules<sup>17</sup> can also be achieved without the judge or tribunal resorting to decisionism or arbitrariness—or assistentialism. In other words, Ost forgets that coherence and integrity in Dworkin's account of the Herculean judge are intended to prevent the problems of subjectivism that Ost believes is characteristic of the Herculean model.

Fourth, Ost makes no comment regarding the side effects and consequences for constitutionalism if there is a general principle of "non-interventionism" on the part of the judiciary (constitutional court) in relation to claims concerning fundamental rights. Is Hercules to be prohibited from deciding when fundamental rights have been violated?

Fifth, in saying that, "in the rule of the Herculean judge," the generality and abstraction of the law gives way to the singularity and concreteness of the judge, Ost suggests that we still live under the aegis of the old model of rules, as if there had been no Copernican revolution of neo-constitutionalism. In Ost's description, there are no signs of morality's role in the rule of law in a

<sup>16</sup> This issue is very relevant because the systemic perspective, in decreeing the "death of the subject," approximates the deconstructivist models, that is, in overcoming the subject-object model the systematic perspective annuls its own subject. Accordingly, it is necessary to insist, from a Heideggerian-Gadamerian standpoint, that the linguistic turn in philosophy and the rescue of the practical world did not represent the death of the subject, but merely the death of subjectifying subjectivity (the self certainty of thoughtful thinking).

<sup>17</sup> For example, Ost describes the role of the Hermes judge as being to "conciliate family economies in crisis; deal with firms in difficulties and avoid, whenever possible, their bankruptcy; judge whether it is in the interest of the child to be recognized by the natural father, when the mother objects; assess whether the voluntary interruption of pregnancy can be justified by the 'anguished state' of the pregnant woman.; effectively intervene in labor disputes and decide, in urgent proceedings, whether a strike by the pilots of the national airline, set to begin at six o'clock the following day, is illegal or otherwise; judge whether the increase in capital conceived with the purpose of opposing a public offering to purchase a holding company, whose share portfolio represents a third of the country's economy, conforms to the law; or, further, impose sanctions on workers and companies that threaten the ecological balance." Ost, *supra* note 12, at 184.

democratic state. On the contrary, Ost assumes that the “principles” of constitutional law for him are just “general principles of law” intended to optimize interpretation.

A sixth critique is that Ost offers a reductionist account of the models of law and judges. How can he account for the judge who, following Robert Alexy’s theory,<sup>18</sup> makes use of balancing in his resolution of “hard cases”—cases that cannot be decided through subsumption—seeking a balance between competing principles? And what of the analytical judges, characteristic of methodological models presented by Aulis Aarnio and Neil MacCormick,<sup>19</sup> to mention just two? And what of the role of a judge who acts pursuant to the discourse theory developed by Habermas?<sup>20</sup>

The seventh point of disagreement concerns the fact that Ost’s thesis ignores the paradigm of the rule of law in a constitutional democracy, understood as a normative and qualitative advance over the social and liberal models of law because it takes *account the role of constitutionalism while breaking with positivism and the model of rules*. As André Jean Arnaud notes, “philosophers, theorists and sociologists currently make great efforts to substitute the rigid law, founded on the all powerful statutory, by a more flexible law that takes into account the relativism, pluralism, and pragmatism typical of the post-modern era,” as if theory had not advanced far beyond this debate about surpassing the “rigid model of law founded on the all powerful statutory” and the “monism-pluralism dichotomy.”<sup>21</sup> Indeed, Ost himself says that “to monism one has to oppose, not dispersion, but pluralism, the binary absolutism of permission-prohibition, validity-invalidity, would have to be substituted by relativism and gradualism, which are not transformed, because of that, into skepticism.”<sup>22</sup>

Eighth, Ost’s thesis avoids the confrontation between positivism and constitutionalism and, consequently, of the surpassing of the subsumption model and the distinction (clearly, not logical-structural) between rule and principle. In the current historical period one simply must address this critical issue.

Ninth, by proposing the model of Hermes as an advance over the conventionalism of Jupiter and the innovations of Hercules—because the Hermes-like judge respects the hermeneutical or reflective nature of legal reasoning—Ost’s Hermes winds-up being, paradoxically, the figure that Ost attributes to Dworkin’s Hercules and then criticizes. Likewise, in saying that the frontiers that separate the system from its environment remain movable and paradoxical, as if the limits of law and of non-law were reversible, *Ost makes concessions to Hercules that he himself criticizes*. (After all, as he says, a game, like the law,

<sup>18</sup> ROBERT ALEXY, TEORIA DA ARGUMENTAÇÃO JURÍDICA 334 (2001).

<sup>19</sup> AULIS AARNIO, LO RACIONAL COMO RAZONABLE: UN TRATADO SOBRE LA JUSTIFICACIÓN JURÍDICA 313 (Ernesto Garzoón Valdés trans., Madrid Centro de Estudios Constitucionales 1991) (1986); NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY 298 (1978).

<sup>20</sup> JÜRGEN HABERMAS, FAKTITÄT UND GELTUNG: BEITRÄGE ZUR DISKURSTHEORIE DES RECHTS UND DES DEMOKRATISCHEN RECHSSTAATS 666 (1992).

<sup>21</sup> André-Jean Arnaud, *Représenter un Droit pour l’Epoque Post-Moderne*, LE COURRIER DU CNRS, April 1990, at 81.

<sup>22</sup> Ost, *supra* note 12, at 181.

is always at the same time something more than itself, despite the efforts undertaken to make its functioning uniform and to render its data certain.)<sup>23</sup>

Finally, as a tenth objection, Ost charges that the Jupiterian and Herculean models “merely offer impoverished representations of the situation that they seek to describe in their epoch.”<sup>24</sup> However, this is to fall into idealizations or idealisms, as if it were possible to ignore that the rule of law in a constitutional democracy and the model of constitutionalism instituted in the majority of countries following the Second World War greatly increased the demand for the intervention of the judiciary (or of constitutional justice in the form of Constitutional Courts). In other words, we must recognize the inexorable need for “somebody to decide,” if only to prevent the Constitution from being transformed into a “mere sheet of paper.”

To summarize, by opposing the model of Hermes to those of Jupiter (Liberal State) and Hercules (Welfare State), Ost merely proves the enormous dilemma with which contemporary legal thought is now grappling: how judges are to interpret and apply the law. Given this, a thesis in which the model of law in the Social State is opposed to that within a Liberal State does not seem appropriate. It is to ignore the two pillars upon which the third model, that of the rule of law in a constitutional democracy, is based: protection of the social-fundamental rights and respect for democracy.

In other words, if it is inexorable that, since the Second World War, the legislators’ freedom of space to act has diminished in favor of a counter-majoritarian check on power that is based on constitutional justice, it is exactly for this reason that the conditions should be created in order that discretion, arbitrariness and *decisionism* are avoided, that is, *the constitutionalism of these post-positivist times places its pillars upon a new linguistic-philosophical paradigm*, requiring us to overcome interpretative models based on the subject-object model.

In this way, old positivism may be overcome, and it is for this reason that Dworkin’s Hercules cannot be labeled “inventionist” or “solipsist” (or any kind of realist or pragmatist variation). Similarly, although Ost does not address this question, the search for the correct answer within law cannot be criticized because it would require a judge who “carries the world on his shoulders”; on the contrary, the search for right answers is a remedy against the core of the model that, dialectically, engendered it: positivism and its strongest characteristic, discretion.

This is not to suggest that it is appropriate to adopt Dworkin’s Hercules as the model of hermeneutics. (We should not forget that Dworkin’s Hercules is placed within the theory of law in order to demonstrate that discretion is anti-democratic and, by rejecting any personal position from the judge and placing emphasis on his political responsibility, *overcame the subject-object model*.) From the perspective of philosophical hermeneutics, the hermeneutical circle anticipates/crosses comprehension before the subject thinks he could take possession of the interpretation and of the meanings. Accordingly, the right answer that can and should always be found by the judge does not lie in the

<sup>23</sup> *Id.* at 187.

<sup>24</sup> *Id.* at 171.

judge/interpreter acting as the subject of a “subject-object relationship”; rather, it resides in the subject/interpreter comprehending through an intersubjective relationship (subject-subject). Thus, the fulcrum point is not whether the right answer is given by the law or the judge, but how to arrive at it.

#### IV. FROM THE METAPHOR OF THE JUDGE (HERCULES) TO THE METAPHOR OF THE (RIGHT) ANSWER, OR HOW THE RIGHT ANSWER MUST BE CONCEIVED AS A METAPHOR

Given the predominance of positivism, which survives due to the variety of perspectives that reinforce the subject-object scheme, the search for right answers is more than a possibility, it is a necessity.

I have proposed<sup>25</sup> a way of understanding the “right answer” thesis that is based on a symbiosis between Dworkin’s integrative theory<sup>26</sup> and hermeneutic phenomenology (which includes philosophical hermeneutics). Under my approach, the right answer should be understood as a metaphor.<sup>27</sup> After all, metaphors are intended to explain things. In effect, metaphors are created because it is believed that a certain phenomenon may be better explained by using the pre-consolidated explanation of another phenomenon, that is, the “operation by which we transfer non-sensitive significances to images or send sensitive elements to non-sensitive spheres.”<sup>28</sup> Therefore, if we consider that the fundamental distinction between sensitive and non-sensitive does not exist, the use of the metaphor represents a typically metaphysical attitude, inducing the agent to understand it as a universal point of departure.

However—and this warning is of fundamental importance, in order not to produce any misunderstanding—if the metaphor is thought of within the limitations of an apophantic language, which will always have as a base the hermeneutic dimension of the language, it will permit, as with the neologism, an approximation between the said and that which is already understood, since it contains a minimally necessary degree of objectivation. The metaphor is understood, then, as a possibility, based on the ontological difference, of “linking” signifier and meaning. The metaphor means the impossibility of “perfect” synonyms.

Accordingly, the metaphor of the right answer responds to the “hermeneutic state of nature” contained in the legal system. As Ernildo Stein reminds us, in every process of understanding the challenge is to bring the phenomenon to

<sup>25</sup> LENIO LUIZ STRECK, *VERDADE E CONSENSO: CONSTITUIÇÃO, HERMENÉUTICA E TEORIAS DISCURSIVAS DA POSSIBILIDADE À NECESSIDADE DE RESPOSTAS CORRETAS EM DIREITO* 594 (3d ed. 2009).

<sup>26</sup> RONALD DWORKIN, *LAW’S EMPIRE* 225-75 (1986). See also generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

<sup>27</sup> It seems unnecessary to state that the right answer is not, ever, a definitive response. Likewise, the intention to search for the right answer is not the ability to guarantee that the right answer will be discovered. There is always the risk of producing an incorrect answer. But by obeying the coherence and integrity of the law, based on a suitable suspension of the prejudices arising from the tradition, we can ensure to each citizen the first step in the fulfillment of the fundamental right that each citizen has of obtaining a suitable response from the Constitution.

<sup>28</sup> ERNILDO STEIN, *PENSAR É PENSAR A DIFERENÇA* 69-76 (2002).

representation or expression in language, thus reaching what we call objectivation.<sup>29</sup> By situating us in the world, the metaphor does not imply a *genesis* at each enunciation. Said another way, by means of the metaphor of the right answer—understood within the bounds outlined herein—the (hermeneutic) conviction is established that there is a “since-always” (existential) that minimally conforms my commitment of objectivation.

The construction of the metaphor of the right answer has roots in another metaphor. Hobbes created the metaphor of the social contract in order to explain the need to overcome the barbaric society represented by the fragmentation of the medieval era. But, more than this, it was done to demonstrate that the State is the product of human reason. To this end, he opposed the sovereignty “of one” (absolutist power) in order to overcome the fragmented/dilacerated sovereignty, that is, against the *barbarie* represented by the State of Nature. This was only possible by means of a contract; not a contract *stricto sensu*, but a “metaphorical contract.”

There is an analogy to the situation confronting us today. In some way, it is necessary to confront the “hermeneutic state of nature” into which the legal system has been transformed. The “freedom” in the interpretation of the legal texts proportioned by the “empire” of such currents (theses, theories) that are still bound to the subject-object scheme has generated an “interpretative state of nature,” represented by a “war of all interpreters against all interpreters,” suggesting a repetition of the fragmentation so clearly feared by Hobbes. Each interpreter begins from a “zero degree” of meaning. Each interpreter reigns within his “domain of meaning,” using his own methods, metaphors, justifications, etc. The meanings “belong to him,” as if they were at his disposal, in a kind of re-edition of (neo)feudal “property relations.” In this “war” between interpreters – where each one reigns solipsistically in his “domains of meaning”—lies the death of the legal system itself.

For these reasons the thesis of a right answer in a “non-advanced” system is not a possibility, but a *necessity*. As previously explained, this implies surpassing the subject-object scheme, based on two fundamental theorems of hermeneutics: the hermeneutical circle and the ontological difference. This understanding renders obsolete any possibility of the existence of zero degrees of meaning, and permits us to rescue the authentic tradition (to understand the Constitution as a quest for the modern age promises). Thus, in each case we may rebuild, on these “premises,” the integrity and the interpretative coherence of law.

The right answer is a metaphor, as is Dworkin’s Herculean judge. Therefore—and this is an indispensable warning—the rupture with the “hermeneutic state of nature” will not take place through a delegation of power in favor of a government by judges. This would amount to a “renunciation of the power to attribute meaning in favor of a species of hermeneutical Leviathan.” In other words, in the legal hermeneutics based in a positivist matrix, if the response to the fragmentation of the medieval state of nature was the delegation of all rights in favor of the Leviathan represented by the absolute sovereignty of the State (and that’s how the modern absolutist State surpassed the medieval state

<sup>29</sup> *Id.* at 72.

form), the response of the empire of subjectivisms, axiologisms, realisms or any other name that might be given to such attitudes—which assign to the interpreter (judge, court) the discretionary power to attribute meanings—*cannot be, under any circumstances, the establishment of a super-hermeneuticity or the delegation of that function to a super-rule* that may “foresee all the possible the applications,” which, *mutatis, mutandis*, is the final intention behind the “binding precedent.”<sup>30</sup> The *establishment* responds to the chaos resulting from decisionism and arbitrariness by proposing a “hermeneutical neo-absolutism.”

Binding precedent—as understood within legal dogma (theoretical common sense)—embodies this method of controlling metaphysical meanings; that is, it is believed that through precedent it is possible to deal with concepts without things, without the peculiarities of concrete cases (the novelty in this is that, paradoxically, the “empire” of multiple answers was established, precisely, upon an abstract analysis of texts).

Binding precedents are decisions that are additive/manipulative in character. For example, there is no binding precedent that declares that a certain action is unconstitutional, for the simple reason that, were such an action effectively unconstitutional, it would have been declared so (either this or we will have to accept a certain schizophrenia in our legal system). It is worth remembering that, within the system, there have always been a considerable number of precedents that could be considered *contra legem*, unconstitutional and *extra legem*. Every day, the courts construct new legal interpretations. Through new texts (as well as the building *stricto sensu* of new legal texts), the courts perform a great deal of corrective activity (which can be seen, for example, in the decision of the Habeas Corpus n. 72862-6)<sup>31</sup> which does not even need to be transformed into a binding precedent in order to alter the legal order without causing any perplexity in the minds of the legal experts. Such decisions—because they raise for discussion the supposed dichotomy between adjudication and legislation—cause perplexity only when certain interpretative decisions (whatever classification they may be given) are shown not to conform to the hermeneutical “ceiling” pre-established by doctrine and jurisprudence. In other words, the limit of the meaning and the meaning of the limit remain bound within that which common sense accepts as a constructive possibility.

From the way in which the binding precedents are understood within the metaphysical-positivist imagination, they are held to be successors of the universal concepts pertaining to classical-essentialist metaphysics, opposed by Hobbes (in order not to lose the value of the metaphor that underpins the overcoming of the medieval form of domination), with the aggravating circumstance, here, that they are created from within an institutionalization of subjectivisms, axiologisms, and realisms (all variants of the subject-object scheme). Thus, a vicious circle is formed: first, discretionary acts and arbitrar-

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<sup>30</sup> In Brazilian law, the Portuguese original expression is “*súmula vinculante*,” which is the Romano-Germanic version of the binding precedents in common law system, apart from the difference that, in Brazil, the precedents are created to solve future cases (functioning like a condensation of jurisprudence with general obligatory force), while the common law precedents are created to answer specific cases, which after that will be used as binding orientation for other judicial instances.

<sup>31</sup> Jurisprudence of the Brazilian Federal Supreme Court, D.J. 25.10.96.

iness are admitted in the name of the “ideology of the concrete case,” a situation that, due to the multiplicity of responses, creates an ungoverned, fragmented system; then, in order to control this chaos, attempts are made to build abstract concepts with the goal of achieving universalization, as if it were possible for a legal rule to cover all (future) hypothetical applications.

It can be said that, in truth, the fight against the “hermeneutic state of nature” which gives rise to positivist discretionary acts/arbitrariness ends up failing to combat positivism. On the contrary, in the absence of an adequate hermeneutical understanding, based on its two fundamental theorems, any form of jurisprudential linkage (like the example of the binding precedents given here), however paradoxical it may appear, will only reinforce positivism and therefore continue the discretionary chaos. In other words, because binding precedents are texts and positivism interprets texts without things, any attempt to attribute a binding jurisprudential/conceptual nature to the decisions leads to a Darwinian adaptation in accordance with the theoretical common sense of the legal experts.

On this point another warning is necessary: the statement that a binding precedent is (also) a text should be understood from a hermeneutic point of view. A binding precedent is a text that has peculiarities; otherwise there would be no difference between “abstract” rules and a binding precedent. The binding precedent is a text that, in its pre-comprehension, brings something more (or extremely differentiated) than any other legal text to the hermeneutical act. For this reason, the political-hermeneutical responsibility is considerably increased in a country with a Romano-Germanic system such as Brazil.

The binding precedent is the product of a set of other texts (again we remember that text is an event that deals with “things,” that is, concrete situations). Accordingly, the binding precedent does not come about in order to resolve one case, but to resolve “all future cases.” Now, as it is impossible for a text (and the meaning that is extracted from it) to foresee multiple application hypotheses, the singularity of each of these multiple hypotheses is “subsumed,” leading in the end to “legal metaphysics.”

Thus, when I state that the precedent is a text, I mean that this text, upon being interpreted, will have *to result in* a new rule (meaning) that fully respects the coherence and integrity of the law. Otherwise, it will be applied in an objectified manner, that is, it will be a category from which deductions and subsumptions will be made. Now, insofar as the precedent is made in order to resolve future cases (and here lies the fundamentally important hermeneutical error, in a simple comparison with North American precedents) by transforming hard (future) cases into easy cases (this appears to be the main purpose of the precedent), the task of the interpreter will be facilitated. On one hand, cases are decided deductively; and on the other, it will now be possible to decide thousands of cases with just one act. *In both hypotheses, the concrete situation is completely submersed.* This is why the theory of legal argumentation claims to address the problem of the indeterminacy of the law by ensuring that subsumption suffices for “easy cases.” Then the vicious circle begins to turn again! The theorist demands the necessity, and not just the possibility, of obtaining right answers in law.

## V. FINAL REMARKS

A critical approach to legal hermeneutics is impossible if it remains grounded in the subject-object scheme, as exemplified in the (solipsistic) model of judging that is “created” in order to “confront” the harshness of the indeterminacy of legal texts in the era of principle (neo-constitutionalism) and the diverse dualisms pertaining to the objectifying metaphysical paradigms. It is necessary to emphasize this point: consciousness and world, language and object, sense and perception, text and the meaning of the text, legality and validity, rule and principle, easy cases and hard cases, arguments for justification and arguments for application, are dualisms that are installed in our imagination and sustained by the subject-object scheme.

This does not mean, however, that the diverse theories of law are not concerned with finding answers to the crisis which the law is experiencing. Yet, in this search for solutions to the problems of the methodology of law, one cannot “mix” theories with the hope of eliminating the problem. In particular, it is a mistake to mix argumentative-procedural positions and ontological perspectives. I propose eight points that make the impossibility of mixing methodologies absolutely clear:

*First*, one cannot confuse hermeneutics with the theory of legal argumentation, that is, (philosophical) hermeneutics is not similar to any theory of argumentation<sup>32</sup> (therefore, it is not possible to fuse it with—to mention just a few—the theses of Alexy,<sup>33</sup> Manoel Atienza<sup>34</sup>, and Klaus Günther<sup>35</sup>), however sophisticated and important they may be;

*Second*, when it is said that the Constitution and the laws consist of multiple meanings (“open” texts, vague and ambiguous words, etc.), such an affirmation cannot be used to suggest that there are always various interpretations and, therefore, the law allows multiple answers, a situation that, paradoxically, merely denounces—and here I use Dworkin’s criticisms of Hart—the positivist postures that are behind such statements;

*Third*, when Gadamer, for example, confronts methodologism in *Truth and Method*, it does not mean that hermeneutics is relativist and permits discretionary/arbitrary interpretations;

*Fourth*, the linguistic turn in philosophy means more than the death of the subject-object scheme; it means that there is neither a subject that can subjugate the object (contrary to the subjectivism/axiology that still thrive in the legal field) nor objectivisms;

*Fifth*, the popularization of the maxims “to interpret is to apply the law” and “to interpret is to confront the text with reality” does not mean that text and reality are

<sup>32</sup> I have maintained that the theories of argumentation do not overcome the representational paradigm (subject-object), and that the balancing of which Alexy, in particular, speaks is a way of restoring the (old) positivist dispositions, a thesis that the theories of argumentation claim to combat. See ROBERT ALEXY, TEORIA DA ARGUMENTAÇÃO JURÍDICA 334 (2001). The symptoms of these problems can be perceived, for example, in the undue split between easy and hard cases, when Alexy (and his followers, especially in Brazil) say that the easy cases are resolved by subsumption (or deduction) and the hard cases through balancing, a time when the principles are called into place.

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

<sup>34</sup> MANUEL ATIENZA, AS RAZÕES DO DIREITO 352 (Landy 2003) (1991).

<sup>35</sup> KLAUS GÜNTHER, TEORIA DA ARGUMENTAÇÃO NO DIREITO E NA MORAL: JUSTIFICAÇÃO E APLICAÇÃO 424 (2004).

things that subsist by themselves or that they are “apprehensible” in isolation. Therefore, it is a mistake to think that interpreting is similar to “making connections between a legal text and the facts”;

*Sixth*, likewise, when the assertion that the text is not the same as the meaning of the text and that the meaning of the text is the product of the interpretation of the text became popularized, it does not mean that the text is of no value or that the meaning of the text and text are “things at the disposal of the interpreter,” or that the interpreter has the arbitrary power to “determine the meaning of the text”;

*Seventh*, if the text and the meaning of the text are not the same thing, it does not imply the affirmation that they are separated (split) or that the text contains the meaning in itself, but only that there is an (ontological) difference between them; it is necessary to understand that the meaning of the text is the text in the form of enunciations, in which the true content is nothing more than the predictive dimension, that is, *that which is said about it*;

*Eighth*, it is a mistake to suggest that legal text is only “the tip of the iceberg,” and that the task of the interpreter is to reveal what is “submerged,” because this thinking tends to encourage discretion and *decisionism*, which are characteristics of positivism.

In other words, it is not possible to serve the various lords of science at the same time. One must choose, and it is a paradigmatic choice, between attitudes grounded in the subject-object scheme (to a greater or lesser degree) and anti-epistemological postures—and it cannot be mixed. Definitively, hermeneutics is not theory of argumentation, in the same way as truth is not consensus. It is not possible to make use of only the “prime cuts” of each theory (or paradigm) and discard the insufficiencies.

This having been said, it is equally important to emphasize that hermeneutics does not exclude epistemology. The point is not to confuse the levels in which the analysis is working. *The separation between the epistemological and the concrete level is not the same as that dividing the transcendental and the empirical*. At various times, hermeneutics introduces the epistemological element; it does not attempt to eliminate procedures. Hermeneutics already comprehends this situation/circumstance because it is capable of philosophically analyzing the elements of pre-comprehension. When comprehension is (already) explicit, the argument occurs at the logical-argumentative level, and not the philosophical level. And, it needs to be asserted: philosophy is not logic. This “epistemological procedure” is anticipated; *it is not to be confused with the knowledge itself*. Through hermeneutics, we undertake a phenomenology of knowledge. This is not the investigation of a concrete object, but instead is a description of the self-grasping that operates within the concrete grasping. It is within explicitness that there will be a theory of knowledge.

In the post-positivist era of binding, social, and directive constitutions, a legal hermeneutics capable of intermediating the inexorable tension between the text and the meaning of the text cannot continue to be understood as an ornamental theory of law, which serves only to identify the “layers of meaning” of legal texts. Within the core of the virtuosity of the hermeneutical circle, understanding does not occur through deduction. Consequently, the method (the discursive procedure) always arrives too late, because it presupposes theoretical knowledge separated from “reality.” Prior to arguing, the interpreter already has understood.

Aiming to fulfill the unfulfilled promises of modernity, the diverse critical theories (Habermasian theory of discourse, the diverse theories of argumentation, philosophical hermeneutics, methodical structuring, etc.) that work within the paradigm of the rule of law in a constitutional democracy unequivocally have a single objective: to surpass the legal positivism and the dogmatism that have taken root in the doctrine and jurisprudence, which are in large part responsible for the ineffectiveness of the Constitution (a situation that takes on dramatic dimensions in countries with delayed modernity such as Brazil). Each of the philosophical currents or theories, in its way, points toward possible ways of overcoming the increasingly acute legal crisis in Brazil. This intense search seems to reveal that something always remains inaccessible, and therefore there is no way out of the dilemma. Or perhaps that there is no way out, and because of that, something remains inaccessible. In terms of content or procedure, it is this uncertainty that appears to motivate legal experts to undertake this long journey, and this journey is only possible in and through language. After all, as Heidegger said, "*Die Sprache ist das Hause des Sein; in das Hause wohnt der Mann.*"<sup>36</sup> There is no object beyond the gnoseological abyss that separates us from "things," and neither is there a subject—subjectifier—capable of doing so. Hence, Stefan George<sup>37</sup> is conclusive when claiming: *kein Ding sei, wo das Wort gebracht.* "There can be no thing where word fails," he says. Where word fails: nothing! The thing is in need of words to be what it is. And Domin ends: "*Wort und Ding legen eng aufeinander; die gleiche Körperwärme bei Ding und Wort.*" ("Word and thing lay tightly side by side[;] the same body warmth in thing and word.")<sup>38</sup> But, I add, later they separate. Hence the work that we have to unveil, this mystery that has existed since the dawn of time, which leads us to take an anti-metaphysical path: differentiating (and not splitting) text and the meaning of the text, word and things, fact and law.

Perhaps we have received the punishment of Sisyphus; we push the rock to the edge of the apophantic *logos* and immediately we are thrown back to our condition of possibility: the hermeneutical *logos*. That is the punishment or the glory: we are condemned to interpret! If a legal text could incorporate all the application hypotheses, it would be a perfect law. It would be as if we could manage to make a map that fit perfectly with the Earthly/terrestrial globe. But what advantage would there be in that? Put another way: if reality could be transmitted as it is, we would be faced with a paradox, and paradoxes are things about which we cannot decide. Hence the enigma provoked by Hermes's figure. Without him, we would not know what the gods said. We know of the problem arising from the "subjectivity" of Hermes and the complexity this represents. (For example, what is the "level of abstraction of generality" of the "verdict of Hermes"?). But we also know, in the metaphor, that direct

<sup>36</sup> MARTIN HEIDEGGER, ÜBER DEN HUMANISMUS 8 (2000).

<sup>37</sup> STEFAN GEORGE, *Das Wort*, in THE WORKS OF STEFAN GEORGE (1949), available at [http://de.wikisource.org/wiki/Das\\_Wort](http://de.wikisource.org/wiki/Das_Wort).

<sup>38</sup> HILDE DOMIN, *Wort und Ding*, in HILDE DOMIN—SELECTED POEMS 1 (Elke Heckel & Meg Taylor trans.), available at <http://hildedomin.megtaylor.co.uk/index.php/translations-1#WordandThing>.

access to the language of the gods is impossible. Hence the inevitable question: if such “direct access” were possible, what use would this be to men, who are definitely not gods?