

CONSTITUTION, HUMAN RIGHTS AND  
REPUBLIC: A NECESSARY DIALOGUE  
BETWEEN GADAMER'S  
PHILOSOPHICAL HERMENEUTICS  
AND BOAVENTURA DE SOUSA SANTOS'S  
DIATOPIC HERMENEUTICS

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When we think about the concept of human rights—including all the possible ways of its realization, and considering the complementarities and also the unity of different dimensions of the concept—we confront several difficult questions. In particular, in an age when constitutions and constitutional doctrine have already incorporated a substantive body of human rights law, we must address how some of the constitutional promises regarding individual rights have not been fulfilled. Additionally, we must consider how rights that foster solidarity in the economic, social, and cultural spheres have not been recognized.

This article operates on two levels. On one level, we intend to point out the need, particularly in Brazil, to face the challenge of making the republican constitutional text a reality in the lives of the people. This challenge requires us to acknowledge and address failures to guarantee basic and fundamental rights identified with a so-called democratic state of law established by the 1st article of the 1988 Brazilian Federal Constitution, which supposes that all “promises of the modern era” should be implemented specially in periods of profound crises.

On the other level, we also intend to demonstrate that we can “learn from” and “teach to” other cultures, starting from our own pre-comprehensions. We

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draw from Hans-Georg Gadamer's philosophical hermeneutics and Boaventura de Sousa Santos' diatopic hermeneutics to demonstrate that the problem surrounding the effectiveness of human rights in a country with delayed modernity, such as Brazil, can be understood based on the proximity between the two hermeneutical "sides" of the debates. Inspired by Gadamer, the task is to promote an opening without systematic coercion and without drama. Santos' diatopic hermeneutics provides additional details regarding this opening.

In practical terms, we will outline the conditions that make it generally possible to implement the fundamental rights that are included in modern constitutional texts as promises of a fair, just, and unified society, as is the case of the 1988 Brazilian Constitution. Even classic rights of individual freedom have been undermined and not fully implemented in Brazil and other countries despite the fact that they are related to the origin and fundamental contents of the liberal economic order, and even though there is broad consensus that the state should protect these rights in order to ensure the dignity of its citizenry.

One important challenge for nations is to implement human rights through juridical practices within the national context, all the while keeping in mind the myriad social and economic ramifications of globalization. Juridical practices are possible only within a language community, but today legal language communities must be open to translation to other cultures and knowledge.

Democratic states governed by the rule of law have a transforming character; they are a humanitarian inheritance that defines part of our present and future.

We can refer to the need for constant revitalization, not only of the proper contents of these humanitarian pretensions but specially to the mechanisms that make them effective, and it is essential that we always have in mind the need to build tools that increasingly facilitate the practice and enable the use of these contents.<sup>1</sup>

We look to the propelling force of republicanism and its instruments to implement constitutional principles and norms, and reaffirm its capacity to enable the fulfillment of the promise of democratic states governed by the rule of law.

I. "CONSTITUTIONAL TEMPORALITY" IN THE REPUBLIC OF HUMAN RIGHTS:  
MUTUAL LEARNING AS EXPLAINED BY PHILOSOPHICAL  
HERMENEUTICS AND DIATOPIC HERMENEUTICS

The need to protect human rights has long been an important theme in modern juridical studies and writings by those, like us, seeking to ensure a better quality of life for individuals, social groups, and humankind in general. Scholars, social scientists, social workers, politicians, and many others have been working to build a trans-disciplinary vision of human rights. This diverse community of human rights advocates is fighting for the development, implementation, and actual achievement of human rights through projects, studies, and research. The goals of these actions include trying to improve knowledge

<sup>1</sup> JOSÉ LUIS BOLZAN DE MORAIS, AS CRISES DO ESTADO E DA CONSTITUIÇÃO E A TRANSFORMAÇÃO ESPACIAL DOS DIREITOS HUMANOS 83 (2002) (translated for this article by Saldanha and Morais).

and juridical practice in order to guarantee the efficacy and accomplishment of recognized human rights—whether traditionally understood, or new rights—while also specifying new instruments and spaces for concretization, including areas in the governmental domain. This effort holds importance for the ongoing debate about the role of constitutional adjudication and its effectiveness, and the recognition of judicial activism by courts and judges.

When discussing human rights, it is important to consider not only changes that have occurred naturally according to societal evolution, but also that, human rights were not born all in one time, they are historical and are created in accordance with political and social historical movements or situations favorable to their development and the necessity that society possesses to implement them because of circumstances and as well as political and economic crises experienced by Nations-States,<sup>2</sup> as Norberto Bobbio argues in his book, *A ERA DOS DIREITOS*. The government has the capacity to determine and to implement those rights. José Eduardo Faria<sup>3</sup> suggests that the idea of human rights includes several dimensions that can be linked to different government branches or functions: Civil and political citizenship (the first dimension) is linked to legislative function; social and economic citizenship (the second dimension) is linked to the executive branch through public policies; and post-material citizenship (the third dimension) is linked to the judicial function in applying and guaranteeing the implementation of those rights.<sup>4</sup>

We think of human rights as being universal, but this means that they are expanding their content and maintaining their temporal character without becoming merely circumstantial. They are historical in the sense of not being definitive, that is, constantly requiring the incorporation of new contents (and, consequently, new instruments) to preserve and effectuate the re-organization of institutional structures of the State. The catalog of human rights will never be dissociated from the tradition and worldviews that have arisen in the public life of a particular community.

We prefer to affirm that human rights become general, and thus spread to other legal cultures, in the sense we observe a deepening of their contents under the mantle of fundamental rights.<sup>5</sup> This perspective calls upon us to regard individuals as having first dimension rights and to recognize their individual interests.<sup>6</sup>

The first real challenge of this debate is that, despite the legitimacy that follows from the recognition and acceptance of several dimensions of different generations of human rights by many different governments with different ide-

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<sup>2</sup> NORBERTO BOBBIO & CARLOS NELSON COUTINHO, *A ERA DOS DIREITOS* 32 (7th ed. 1992). Several authors write about this theme along with Bobbio. *See, e.g.*, INGO WOLFGANG SARLET, *A EFICÁCIA DOS DIREITOS FUNDAMENTAIS: UMA TEORIA GERAL DOS DIREITOS FUNDAMENTAIS NA PERSPECTIVA CONSTITUCIONAL* (1998).

<sup>3</sup> JOSÉ EDUARDO FARIA, *DIREITOS HUMANOS E GLOBALIZAÇÃO ECONÔMICA: NOTAS PARA UMA DISCUSSÃO* (1997).

<sup>4</sup> There is no conceptual consensus about the dimensions of human rights. Some authors divide them into different generations according to different primary conceptions.

<sup>5</sup> We adopt a simplified concept of fundamental rights in order to understand those written and expressly recognized in a particular juridical order.

<sup>6</sup> For reference, *see* JOSÉ LUIS BOLZAN DE MORAIS, *DO DIREITO SOCIAL AOS INTERESSES TRANSINDIVIDUAIS: O ESTADO E O DIREITO NA ORDEM CONTEMPORÂNEA* (1996).

ologies, attempts to effectuate those rights run into serious impediments, both political and practical. There are several authoritarian governments around the world that reflect crises of the nation-states as institutions, leading to several reform proposals to re-build their fundamentals as social states. This predicament is particularly true in countries based in Roman-German juridical systems that have to relate to similar juridical orders, especially the international order, which then has an enormous influence on the internal public policy choices made by these countries. This motivates our effort to find and develop new instruments, more effective mechanisms—as understood by Jorge Miranda<sup>7</sup>—to regulate human rights in all of its dimensions.

Additionally, we do not ignore the Occidental assumption of a complete conception of human rights that is still largely individualistic in character.<sup>8</sup> On one hand, Gadamer's philosophical hermeneutics facilitates freeing ourselves from an outdated parochialism with hegemonic pretensions, and supplies a critical view of the topics related to the Occidental tradition regarding these rights. Human rights arise from a horizon of meanings that is the product of a fusion of horizons that only appear to be wholly distinct. In language, we can overcome the unproductive prejudice in favor of the individualistic approach to human rights and move toward a broader conception that recognizes the need to reevaluate one's own tradition in order to reinvigorate the legal effectiveness of human rights concepts.<sup>9</sup>

Santos' diatopic hermeneutics<sup>10</sup> relates to Gadamer's philosophical hermeneutics by focusing on how prejudices—pre-judgments or pre-understandings—are confronted by distinct knowledge from different cultures, resulting in an interpretative effort among two or more cultures to identify isomorphic concerns that they share and the different responses that they may present. Brought to bear on the field of human rights, diatopic hermeneutics brings us into proximity with the human dignity of the Occidental world, the Arabic *umma* view and the Hindu conception of *dharma*.

Diatopic hermeneutics makes it possible to exceed the individualistic prejudice of human rights in the Occidental world by recognizing that one's tradition always potentially lacks authenticity, as urged by Gadamer's philosophical hermeneutics by promoting the opening of one's judicial traditions to those of another, and regarding human rights as having a collective and humanitarian character rather than merely an individual character.

It is important to remember that we not only must build legal and social instruments that can help humanity experience human rights, we also have the duty to enable the juridical community to protect human rights effectively. In Brazil, this means bringing our 1988 Federal Constitution, which embodies and

<sup>7</sup> Regarding the international juridical order and human rights, see FLAVIA PIOVESAN ET AL., *COMENTÁRIOS À REFORMA DO JUDICIÁRIO* (2005), and our commentaries regarding recent changes on the 5th rule of the 1988 Brazilian Federal Constitution.

<sup>8</sup> This refers to the individualism that was born with modernity and that put the individual as the center of the social order, which transformed later into possessive individualism and is the mark of contemporary society. On this subject, see the works of Louis Domunt.

<sup>9</sup> HANS-GEORG GADAMER, *ACOTACIONES HERMENÉUTICAS* 16 (Ana Agud & Rafael de Agapito trans., 2002).

<sup>10</sup> Boaventura de Sousa Santos, *Para uma Sociologia das Ausências e uma Sociologia das Emergências*, 63 *REVISTA CRÍTICA DE CIÊNCIAS SOCIAIS* 237 (2002).

guarantees fundamental rights, in line with modern constitutionalism and with the ideals of a democratic state of law. In other cultures, we need to know how to recognize the unwarranted extension of the individualist paradigm of human rights to the degree that it silences the collective perspective in this matter.

Our linguistic nature is the condition for the possibility of this inter-cultural understanding, because language works as a way, not as a bridge, by which people have access to their objects. It is characterized by the constructive space of its own experience of the world<sup>11</sup> in which the objects are human rights.

The question then becomes whether the Occidental pretention regarding the universality of human rights can be valid, given its individualistic articulation. Santos responds in two ways. First, an individualistic conception is too narrow because “if the world is an inexhaustible totality, a lot of totalities fit in it, even if partially.”<sup>12</sup> Second, if there were no social dimension, how can we claim that a better world is possible, and what motivates us to seek its realization?

Addressing the first problem, which essentially contests the effectiveness of human rights, Santos proposes the “translation theory” as an alternative. This consists of the possibility of creating a reciprocal intelligibility among the diversity of experiences in the world, which opens the space between the existing and the possible. The work of translation brings into sharp relief the hegemonic character of many social experiences and the potential for moving beyond them. Diatopic hermeneutics relates the isomorphic concern with the same topic presented in different cultures. In the field of human rights, the shared concern is human dignity, and this concern is addressed variously from an individualistic or collective approach. By appreciating these differences in a fusion of horizons, new understandings may emerge.

In our view, the connections between diatopic hermeneutics—translating the efforts of different cultures to address the same topic (in the specific case of this article, the implementation of human rights to respect human dignity)—with the philosophical hermeneutics of Hans-Georg Gadamer is particularly obvious when we consider that Gadamer regards understanding not as an individual activity directed at the text, but rather in textuality and linguisticity. Seen in this way, the text is not an “expression” that needs retrospective resuscitation of the expressive movement in which it was produced.

By using the frame of philosophical hermeneutics to explore the effectiveness of human rights, we can examine the limitations of the liberal scheme while acknowledging the successful creation of rights. If Gadamer is correct that texts pose a persistent challenge to our prejudices, then the Federal Constitution can provoke our recognition that the communitarian model is raised even by the present individualistic understanding. Dialogue between Gadamer and Santos helps us to chart the passage from an individualistic to a communitarian conception by focusing on the isomorphic concern with human rights and dig-

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<sup>11</sup> Eduardo Carlos Bianca Bittar, *Hans-Georg Gadamer: A Experiência Hermenêutica e a Experiência Jurídica*, in *HERMENÊUTICA PLURAL: POSSIBILIDADES JUSFILOSÓFICAS EM CON-TEXTOS IMPERFEITOS* 199 (Carlos E. De Abreu Boucault ed., 2002).

<sup>12</sup> *Id.* at 30 (translated for this article by Saldanha and Morais).

nity, as expressed not only in cultures such as our own, but also in others in which communitarian interests are viewed as the most significant.

The importance of this debate has to be acknowledged in legal thought because law exemplifies the hermeneutical situation due to the historical and contingent character of law. However, we must keep in mind the need for effective constitutional protection of basic rights, not only in the political spectrum, but also at the level of civil society that can undermine the civil rights already consolidated and in effect. Civil society must respond to new challenges and promote strategies independent of the public policies of the legal realm in response to the daily disrespect of human rights affecting not only the content of social rights, but also the content of legally-implemented civil rights that ensure individual rights.

The challenge we embrace is to reconcile two conceptions of human rights—individual and social—in a social environment in which individualism is the guiding value, and the tradition is fundamentally understood in terms of an economic model. But it cannot be forgotten that part of the tradition's essence is to appropriate and reproduce, and so it is also intrinsic to the human condition to break, critique, unmake, and (re)make. If we find on one side the need to understand the limitations on the substantial effectiveness of implementing human rights, and, on the other side, the claim to universality, philosophical hermeneutics teaches that understanding is, in truth, a project.<sup>13</sup> That's why Gadamer claims that it is "only through others that we understand ourselves."<sup>14</sup> With that in mind, we can regard understanding as the intersection between philosophical hermeneutics and diatopic hermeneutics. Gadamer leads us to search for "wisdom" from different cultures as the appropriate response to the recognition of our own culture incompleteness, and this is particularly important in the human rights field.

## II. A HERMENEUTICAL APPLICATION TO ASSIST IN EXPANDING HUMAN RIGHTS

Furthermore, we might ask why we should seek to expand the implementation of human rights based on hermeneutical strategies to enlarge the spectrum of constitutional guarantees and procedural mechanisms of protection, given the normative crises of the State in general as state form losing its power of enforcement and collapsing under economic and parastatals<sup>15</sup> structures. The answer is that we cannot constrain our ongoing debates about human rights by assuming that success and effectiveness depend exclusively on strengthening law-related mechanisms, given their occasional collapse in confrontation with the public-privatized sphere.

In addition, there is a direct relationship between democracy and human rights. When democracy is weakened, human rights are the first casualty. And

<sup>13</sup> See HANS-GEORG GADAMER, *TRUTH AND METHOD* 34 (3d ed. Continuum Books 2004) (1975).

<sup>14</sup> HANS-GEORG GADAMER, *O PROBLEMA DA CONSCIÊNCIA HISTÓRICA* 12-16 (2003); Hans-Georg Gadamer, *The Problem of Historical Consciousness*, 5 *GRADUATE FAC. PHIL. J.* 8-56 (Jeff L. Close trans., 1975).

<sup>15</sup> Parastatal is an autarchy that has state intervention on its frame and administration.

where democratic institutions do not have sufficient power to sustain all dimensions of human rights, Renato Janine Ribeiro reminds us that the very legitimacy of the state is put into question.<sup>16</sup>

We must honestly embrace the fact that the law expresses itself by symbols. In order to be recognized, symbols must be effectuated in the context of human practice. Such a process consists in the passage from the rule to reality, which is a reconstruction of the rule through hermeneutic application. We, as historical beings, must always recapture the past and actively cultivate the tradition, recognizing our embeddedness in tradition while also recognizing the demands of the present. This process is enriched if human rights are pursued with the recognition that diverse cultures, that is, those that are distinct from ours, have common concerns about the minimal standards of democracy.

To effectuate diatopic hermeneutics, it is very important to keep in mind Gadamer's phenomenological idea of *pre-conception*, the previously-formed concepts that constitute and form knowledge structures. This is the basis of the famous "hermeneutic circle": Because the translator knows things through her pre-conceptions, she can relate them to the present hermeneutic task, and in some cases the present task will illuminate the unproductive character of the preconceptions that she brings to bear.<sup>17</sup>

The emergence of the constitutional state and its recognition of human rights are presented as a great achievement that is inextricably linked to the liberal historical tradition. Consequently, there is tremendous resistance to the implementation of social rights based on a collective profile that, frequently, is trans-individual in character. The rule of law is equated with the values of the neoliberal state—which are the values of mercantile society—although the very language in which this individualistic principle is posited is a social activity.

The liberal tradition is not bad, but we too often apply it without adopting a self-critical posture. Self-criticism is the basis of understanding and knowledge, and, consequently, is essential to society. Acknowledging the logical-formal-liberal definition of human rights, based on the paradigm of rights and negative freedoms, permits us to assess whether these structures will continue to be fully responsive to contemporary reality.

### III. REALIZING HUMAN RIGHTS IN THEIR SOCIAL PERSPECTIVE: THE HERMENEUTICAL CONTRIBUTION TO THE FULFILLMENT OF FUNDAMENTAL RIGHTS BY THE STATE

Although human rights arose within a particular culture, at a certain point in history, and in the context of the liberal mindset, our understanding of

<sup>16</sup> See RENATO JANINE RIBEIRO, *PRIMAZIAS DA DEMOCRACIA* 5-13 (1997). The ethical value of democracy causes its rights to have superiority over all other possible rights, but on the other hand, these rights are only assured when there is a so-called hard center of democratic rights.

<sup>17</sup> Heidegger's concept of the hermeneutic circle is important to the law and to the task of the translator because it articulates the condition of the possibility of the blossoming of singularity. For that matter, Heidegger said, "[E]ach thing is one and not the other." MARTIN HEIDEGGER & CARLOS MORUJÃO, *QUE É UMA COISA?: DOCTRINA DE KANT DOS PRINCÍPIOS TRANSCENDENTAIS* 25 (1992) (translated for this article by Saldanha and Morais); see also Bittar, *supra* note 11, at 184.

human rights is expanded by moving beyond these circumstances. We will highlight human rights whose content have a collective character. Economic, social, and cultural rights not only require legislative recognition and an attitude of abstention from government authorities; they also require a concrete or positive attitude of public officers and legal entities in the manner in which they implement public policies, as well as a jurisdictional recognition of their legitimacy and importance in the democratic sphere.

The juridical practices and procedures developed to flesh out the individual contents of human rights have contributed to a crisis because they have become incapable of dealing with a broader social dimension of rights. These practices developed in a determinate historical moment in which it was necessary to worship the mercantile values of the liberal state.

This narrow perspective is not intrinsically bad, but it follows from an uncritical disposition. Contemporary translators of human rights must always question their own prejudices in order to maximize knowledge.<sup>18</sup> Legal authority is always exercised in a determinate culture, on the basis of a determinate history and within a particular context. We must break free from the logical-formal definition of human rights based on the subject-object separation if these structures are expected to be flexible and adaptive so as to deal with contemporary reality.

Drawing from Gadamer's philosophical hermeneutics,<sup>19</sup> we can understand the consequences of the reproduction of procedural uniformities that ignore history and impose a limited model of human rights. And, drawing from diatopic hermeneutics, which assumes the incompleteness of all uniformity or of all pre-given abstraction, we will look to intercultural translation to give value to social rights that originate from a communitarian conception of world and are found in other political regimes, thereby spurring the democratic imagination.

#### IV. THE FIRST PERSPECTIVE FOR IMPLEMENTING HUMAN RIGHTS

In order to implement human rights with social contents, two different, though not mutually exclusive, perspectives may be utilized. First, one must identify how social human rights can be implemented by the nation-state. This involves verifying the role of public institutions in obtaining maximum effectiveness of their content, and requiring a normative legislative or constitutional recognition, such as Article 5 of the 1988 Brazilian Constitution. Article 5 has played a fundamental role in guaranteeing "negative rights liberties," but has been insufficient to guarantee social, economic, and cultural rights.

Legislative action must be supplemented with an enabling tool to secure "positive liberties" originating in executive mandates by state authorities designed to implement normative rights. There is a granting or serviceable notion linked to the implementation of social, economic, and cultural rights that gather all questioning about state reforms, in particular, those related to neo-liberal and capitalism ideals. Therefore, when implementing those rights, there

<sup>18</sup> Gadamer makes this same point by claiming that historical knowledge can enrich, change, confirm, or modify understanding. See GADAMER, *supra* note 14, at 8-56.

<sup>19</sup> GADAMER, *supra* note 9, at 154.

is a need to understand the crises of contemporary states as a conceptual matter, specifically related to sovereignty problems, structural crisis related to budgetary issues, and ideological and philosophical problems of the welfare state.<sup>20</sup> We must address the power of language if we are to comprehend the meaning of the Constitution and the values it embodies. After the linguistic turn in philosophy during the twentieth century, particularly Martin Heidegger's<sup>21</sup> and Gadamer's<sup>22</sup> philosophical hermeneutics, we now acknowledge that law is not grounded on absolute and primeval truths. In this new era, we acknowledge the shortcomings of modernity and embrace the interpretive nature of knowledge.

Hermeneutical understanding, according to Gadamer, is a response to a message that arrives before the messenger. That is why *being that can be understood is language*.<sup>23</sup> If language is the universal *medium* in which understanding<sup>24</sup> occurs, language constitutes man and society. In language, man has access to things, but also access to the need for an unveiling of a new judicial-political-social human rights structure. Language is not a tool wielded by man. Rather, it is a social medium through which man exists.<sup>25</sup> This undermines the logical-formal perspective by acknowledging that meaning is a product of a particular culture at a particular moment in history. We can never know something in its entirety, abstracted from specific concerns. It is here that logic fails!<sup>26</sup> This is the point where diatopic hermeneutics and the metaphor of translation in philosophical hermeneutics converge and provide a realistic basis for understanding human rights in a social sense, based on community.

On the other hand, as we mentioned before, it is important to think about human rights implemented through adjudication, which is the third dimension of the implementation of rights. All actors in the legal sphere must understand that the limited character of judicial functions must be appreciated by all law-related actors in order to foster the development of human rights through the efforts of all citizens. We cannot look only to judges when an unstable political scenario underscores the insufficient realization, or complete absence of social human rights, because this context fosters continuing political instability and judicial politicization.

There is a fundamental problem when constitutional theory and practice begin with the understanding of constitutional norms and their role in guaran-

<sup>20</sup> See AS CRISES DO ESTADO CONTEMPORÂNEO, in AMÉRICA LATINA: CIDADANIA, DESENVOLVIMENTO E ESTADO 38 (Deisy de Freitas Lima Ventura ed., 1996), Porto Alegre: Livraria do Advogado.

<sup>21</sup> Gadamer's great mentor was Martin Heidegger. Hermeneutic phenomenology has three evolutionary moments: a) Heidegger I, the existential analytical phase up to 1920; b) Heidegger II, the philosopher of the metaphysical overcoming and the being of forgetfulness in the years following Being and Time; and c) Heidegger III, the contemporary philosopher in the post-War period. These phases join to form a unique Heidegger, who cannot be understood in discrete pieces. ERNILDO STEIN, PENSAR É PENSAR A DIFERENÇA: FILOSOFIA E CONHECIMENTO EMPÍRICO 22-28 (2002).

<sup>22</sup> Hans-Georg Gadamer was one of the main disciples of Martin Heidegger and his main work was TRUTH AND METHOD (1960), which reflected upon the historical and philosophical conditions of comprehension and interpretation.

<sup>23</sup> See GADAMER, *supra* note 13, at 407.

<sup>24</sup> *Id.* at 309.

<sup>25</sup> GADAMER, *supra* note 9, at 25.

<sup>26</sup> ERNILDO STEIN, APROXIMAÇÕES SOBRE HERMENÊUTICA 18 (1996).

teeing the enforcement of rights as abstract matters but do not ensure their enforcement by the authorities, because in this situation citizens do not experience human rights in their lives. This situation underscores the profound necessity for effective state structures in addition to general state-based legitimacy. State structures can be effective only if they are *deconstructed*,<sup>27</sup> which is, without a doubt, a task of hermeneutics when it is freed of methodologism and regarded as a feature of all human communication.

This confirms Gadamer's<sup>28</sup> teaching that the process of understanding is not wholly a reproductive act, which is to say that understanding is not an ideal outside the experience of human life, as in Wilhelm Dilthey's philosophical work, but rather originates in *human-being-in-the-world*. This posture demonstrates that Gadamer<sup>29</sup> went beyond the later Heidegger of "the turn" (*Kehre*). Gadamer does not conceive of philosophical hermeneutics as an inquiry into what we *think and want*, as we see in Heidegger's Letter on Humanism,<sup>30</sup> but rather into what determines our existence. This opens the space for the diversity that is valued by diatopic hermeneutics. In turn, this promotes the translation between hegemonic knowledge and counter-hegemonic impulses present in language—constitutional or not—resulting in the construction of reciprocal intelligibilities<sup>31</sup> that permits concretization of what had formerly been elided, such as social human rights.

Konrad Hesse<sup>32</sup> emphasizes that we must consider how to implement norms that have the promise of instantiating principles such as constitutional unity, practical agreement, functional accuracy, absolute integration, and constitutional normative force (maximum effectiveness). This situation demands that we perceive and acknowledge constitutional provisions in their full normative complexity rather than regarding them as written rules.<sup>33</sup>

Accurately perceiving this problematic demand requires the jurist to have a pre-comprehension that has developed historically. Regardless of the jurisdiction and its particular development of human rights, this process always begins with a traditionary horizon.

It is important to understand that preconceptions are not part of a singular pre-concept embodied in a constitution's interpreter; rather, they are the historical reality from which the interpreter arises.<sup>34</sup> Thus, we surpass the philosophy of subjectivity. The interpreter is always inside the medium of hermeneutic

<sup>27</sup> HANS-GEORG GADAMER, *EL GIRO HERMENÉUTICO* 85 (3d ed. 2007).

<sup>28</sup> See GADAMER, *supra* note 13, at 250-51.

<sup>29</sup> *Id.* at 14.

<sup>30</sup> MARTIN HEIDEGGER, *CARTA SOBRE EL HUMANISMO* 1 (Helena Cortés & Arturo Leyte trans., 2000).

<sup>31</sup> Santos, *supra* note 10, at 34.

<sup>32</sup> See KONRAD HESSE, *A FORÇA NORMATIVA DA CONSTITUIÇÃO* (Gilmar Ferreira Mendes trans., 1991). For the hermeneutics point of view, see LENIO LUIZ STRECK, *HERMENÊUTICA JURÍDICA E(M) CRISE: UMA EXPLORAÇÃO DO DIREITO* (1999).

<sup>33</sup> See FERDINAND LASSALLE, *A ESSÊNCIA DA CONSTITUIÇÃO* 31-32 (Editora Liber Juris 1985) (1933).

<sup>34</sup> If comprehension always arises from historical consciousness, tradition can never be absolute and we must recognize that its influence is subject to critique and revision. MANFREDO ARAÚJO DE OLIVEIRA, *REVIRAVOLTA LINGÜÍSTICO-PRAGMÁTICA NA FILOSOFIA CONTEMPORÂNEA* 226-27 (1996).

experience through dialogue, which derives from the *pre-conceptual*<sup>35</sup> structure of all comprehension. Moreover, because hermeneutic consciousness is always limited as a result of the finite character of human existence and the historical character of culture,<sup>36</sup> there is an opening to Santos' diatopic hermeneutics.

Most constitutions have embedded procedural instruments available to all citizens, such as habeas data, habeas corpus, writ of mandamus, collective mandamus writ for diffused interests, and actions to challenge the constitutionality of a statute. This is not an easy task to perform when one is mindful of the structures and formation of contemporary states, all of the actors involved and, the nature of the constitution as a political-juridical document with deep tensions and power disputes. Fundamentally, what must be understood is that study and advocacy for the implementation of human rights rests on a conception of the constitution not as a government program, but instead as embodying norms and principles with which the government must abide. Government programs need to be constitutionalized, and this requires a critical hermeneutic horizon—which according to Gadamer, means not to be captivated by unproductive prejudices but to be able to see beyond them<sup>37</sup>—that will engender a new conception of constitutionalism to provide a new layer of meaning to the jurisdictional function by putting the tradition to the test of questioning.

## V. THE SECOND PERSPECTIVE FOR IMPLEMENTING HUMAN RIGHTS

There is a second major perspective from which to regard the implementation of human rights in a social analysis: making use of humanitarian policies developed and implemented by social actors and aiming at concretizing emerging rights derived from new conflicting zones as fundamental rights. We may regard this process in two ways: First, one must focus on public authorities who implement the precise content of those rights. Second, one must focus on the involvement of civil society, and not simply within the paradigm of neoliberal political thought and capitalist economics. The idea is a collective effort to conceive social welfare benefits in new ways that might have nothing to do with the policies developed by the structures of the welfare state.

In this way, one might develop new experiences that arise from a flexible participation in representative democracy and might even implement independent policies that break with the ideological character of transference typical of the representative model and are closer to the context of a theory that we can only gradually begin to reconstruct. In contrast to the model of science where attaining knowledge rests on the verification of the facts, in a field of a human

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<sup>35</sup> *Id.* at 227.

<sup>36</sup> JEAN GRONDIN, INTRODUCCION A LA HERMENÉUTICA FILOSÓFICA 174-75 (Angela Ackermann Pilári trans., 1999).

<sup>37</sup> GADAMER, *supra* note 13, at 301; *see also* STRECK, *supra* note 32, at 269. In another passage, Streck suggests that if a restricted hermeneutics is pursued, it will be much more difficult to recognize public rights such as giving citizens access to medicines and health insurance on the basis that they are guaranteed by Article 196 of the Brazilian Federal Constitution.

science such as law, the hermeneutical relation<sup>38</sup> between fact and theory is decisive. The feasibility of this inquiry depends on a rupture with the ideal of a static and predictable<sup>39</sup> jurisprudence that produces results in the fulfillment of human rights through unchanging questions.

This is the critical contribution of translation provided by diatopic hermeneutics. Translation is necessary between those who locate rights in the Brazilian Constitution and those agents who seek to fulfill them. Boaventura de Sousa Santos affirms that all practices involve knowledge, and for that reason are knowledge practices. Moreover, translation seeks to create reciprocal intelligibilities between organizational forms and action objectives.<sup>40</sup> In Gadamer's terms, this requires recourse to the field of pre-comprehension and the suspension of inauthentic narrowness.

## VI. RE-THINKING THE ROLE AND FUNCTIONS OF THE STATE

One of the main themes of constitutional theory is the need to revise the role and functions of the state, re-thinking its limits, obligations, and, most importantly, the function of the judiciary in contemporary constitutionalism premised on both democracy and the rule of law.<sup>41</sup> The judiciary has a central and important role in guaranteeing the achievement and enforcement of constitutional rights under almost all of the constitutions formed after World War II.

In this context, constitutional theory obtains a new dimension and is enlarged by comprehending the text not only as a legislative act but also as a historical-cultural document to be interpreted. To understand is to relate to tradition—which includes not only individual human rights but also collective human rights. Through a hermeneutical circle we realize that understanding is not an easy repetition of the tradition, but instead moves beyond it by recognizing that connections do not happen naturally, or without problems. The *mediative* hermeneutical task<sup>42</sup> lives precisely in this aspect. The interpreter finds himself outside his traditional belonging and gains critical distance from the object he seeks to understand, whether it is a legal text, a concrete case, or a constitution.

It means that, *against the arbitrary meaning generated by a comfortable understanding*,<sup>43</sup> we should approach texts differently. This demands an alert view. It means that the interpreter, such as the judge in her daily routine, must

<sup>38</sup> HANS-GEORG GADAMER, PRAISE OF THEORY: SPEECHES AND ESSAYS 55 (Chris Dawson trans., Yale Univ. 1998) (1983).

<sup>39</sup> As a matter of fact, a jurisdiction based on the hermeneutical comprehension and, for that matter, on the rise of the singularity, do not unite with neoliberal thought of having a jurisdiction that is capable of giving predictable results. See the World Bank Report; Ana Paula Lucena Silva Candeas, *Valores e os Judiciários, Os Valores Recomendados Pelo Banco Mundial Para os Judiciários Nacionais*, CIDADANIA E JUSTICA, 1st Semester 2004, at 21.

<sup>40</sup> SANTOS, *supra* note 10, at 134.

<sup>41</sup> For a full understanding of the meaning of Democratic State of Law, see LENIO LUIZ STRECK & JOSÉ LUIS BOLZAN DE MORAIS, CIÊNCIA POLÍTICA E TEORIA GERAL DO ESTADO (4th ed. 2000).

<sup>42</sup> GADAMER, *supra* note 14, at 8-56.

<sup>43</sup> GADAMER, *supra* note 13, at 269.

always be alert to the need to replace previous knowledge by constantly re-projecting pre-understandings to new understanding.

Diatopic hermeneutics provides the same lesson. Translation embodies the understanding that unites and separates theory and practice—our main concern when we deal with human rights—and determines the limits and possibilities of articulation based not only on reading a constitution, but also embracing models of democracy where social and collective rights are central.

A constitution—considered substantively<sup>44</sup>—raises its own legitimacy and the question of its role. According to Häberle, constitutional texts in the strict sense, formal written constitutions in the broad sense and also the material of classical works of Aristotle (relating to equality and justice), of Montesquieu (in terms of separation of power) or of Hans Jonas on protection of the environment, understood as a Kantian categorical imperative, extended both in space and in time the whole world.<sup>45</sup>

Today there is a conception of a constitution, above and beyond all new contents and strategies that is rooted in its nature as a juridical-historical and cultural product that self-referentially raises the problem of its concretization and the attribution of meaning. This calls for a re-thinking of the typical and classic role of the state in an environment that seemingly offers few options for effective changes in political institutions.<sup>46</sup> In turn, this places a far greater burden on constitutional jurisprudence<sup>47</sup> than merely applying juridical norms and establishing the hierarchy of rules.

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<sup>44</sup> There is also a formalist perspective of the constitution as described by Giovanni Sartori in *COMPARATIVE CONSTITUTIONAL ENGINEERING: AN INQUIRY INTO STRUCTURES, INCENTIVES AND OUTCOMES* (2d ed. 1997). Sartori states that a constitution is above all and primarily a government instrument that limits, curtails and allows control of the exercise of political power. *Id.* at 200. That is, constitutions are “rules” that structure and discipline decisional processes of the state; they are a set of content-neutral procedures whose purpose is “to ensure a controlled exercise of power.” *Id.* Regarding this doctrine, “[w]e must beware . . . of ‘aspirational constitutions’ . . . Aspirational constitutions are, in the end, a deviation and an overload of constitutional capacities that results, in turn, in their failure to function.” *Id.*

Matteucci and Clavero state:

The written constitution draws its legitimacy from two elements: the content of the standards, which are implemented for their intrinsic rationality and justice, in a formal source, emanate from the sovereign will of the people through a constituent assembly and, at times, a referendum . . . The second character refers to the function: a written constitution is desired not only to prevent arbitrary government and establish a limited government, but to guarantee the rights of citizens and to prevent the state from violating these rights. In effect, the constitution not only regulates the operation of state agencies, but also enshrines the rights of citizens, set as limits to state power.

NICOLA MATTEUCCI & BARTOLOMÉ CLAVERO, *ORGANIZACIÓN DEL PODER Y LIBERTAD: HISTORIA DEL CONSTITUCIONALISMO MODERNO* (Francisco Javier Ansuátegui Roig & Manuel Martínez Neira trans., 1998).

<sup>45</sup> See Peter Häberle, *Diritto costituzionale nazionale, unioni regionali fra stati e diritto internazionale come diritto universale dell’umanità: convergenze e divergenze* [National constitutional law, regional unions between states and international law as a universal right of humanity: convergences and divergences], *Conferences at México City and Bologna 2* (April 2004) (on file with authors).

<sup>46</sup> See MORAIS, *supra* note 1.

<sup>47</sup> Jurisdiction is understood here as the exercise of the judicial power and adjudication.

On this basis, it is possible to promote a broader exercise of jurisdiction to advance the role of constitutionalism by developing doctrines through adherence to precedent that follows from a democratic state of law, even while reshaping the character of the practice in order to fulfill the constitutional covenant.

Because the jurisprudential task always implicates application, the interpreter is able to free himself from the apparent circularity of understanding. The fundamental problem, therefore, is to break free of the grip<sup>48</sup> of previous positions, to handle the otherness of what is being interpreted, particularly with regard to cases that involve human rights understood by courts in a pre-established way. This is exactly where the problem of temporal distance resides, which involves the facticity and temporality of ideas. Interpreters must cultivate distance as the ground of a positive and productive possibility of understanding. The goal is not to eliminate the distance by filling the gap with a definitive and complete account of human rights, but to embrace the living elements that form a tradition.<sup>49</sup>

The development of Western constitutionalism opened the possibility that jurisdictional entities with the authority to direct and adjudicate constitutional power—power originally exercised by a constitutional assembly<sup>50</sup> as an expression of legislative power—would promote and develop a new understanding of fundamental rights and constitutions. This development reshaped the understanding and functions of each of the powers of government without surpassing the limits inherent to structural and organizational activities of the state, and it also served as a reminder of the risks that a violation of these limits can cause the temptation of omnipotence.<sup>51</sup>

The reshaping of judicial power, especially with regard to adjudication, threatens to give the judiciary the means to intrude on activities understood as belonging to the other two branches of the government. By changing and creating new meanings for constitutional rules, such expanded power allows the temptation to substitute its assessment of opportunities from those expressed in policy decisions.<sup>52</sup> Of course, it isn't possible to limit this power to the private rights that define human rights in the first version, because this valence is simply its contingent history. We must see every authentic interpretation accomplished by the interpreter in the fulfillment of the jurisdictional power against the backdrop of *baroque ideas that appear from the spirit*.<sup>53</sup>

Because the judiciary has a broader capacity and its activities can reach further, it can be effective in checking the tendency of the executive branch to usurp the power of the legislative branch. The judiciary can serve as an instru-

<sup>48</sup> GADAMER, *supra* note 13, at 270.

<sup>49</sup> Heidegger connects facticity and temporality, which are constituted from two existentials, as it was said: "While there is something, Dasein is never past, he is the vigor of what has been, meaning, 'I am the vigor of what has been.'" MARTIN HEIDEGGER, *SER E TEMPO* 122, 125-26 (Marcia de Sá Cavalcante trans., 8th ed. 2001).

<sup>50</sup> Our reference to a constitutional assembly means only the power exercised by it, without intending any reference to original power or derivate power.

<sup>51</sup> Valério Onida, Conference Remarks 5 (Jan. 20, 2005) (reported by Corriere della Sera) (on file with authors).

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

<sup>53</sup> GADAMER, *supra* note 14, at 8-56.

ment of accountability in a manner that broadens the classic political ideal of democratic representation by developing, defending, and concretizing human rights.

All these circumstances are aligned with the political transformation of a democratic state subject to the rule of law to something that extends beyond formal democracy. Regarding democracy in a substantive sense, the system of checks and balances would be viewed as a means of realizing the fundamental rights of citizens. Furthermore, the doctrine of separation of powers would not be exhausted by limiting the scope of activity of the different branches of government, but instead would be conceived flexibly to promote a unified state that aims to make constitutional substantive ethical values become part of the daily lives of its citizens.<sup>54</sup>

Valério Onida understands that there is a need to reread the tripartite division of powers no longer as the legislative, executive and judiciary, but “the powers of government and politicians, on one side and the guarantee powers on the other.”<sup>55</sup> To address these circumstances we should revise the classification of state functions and align them into governmental functions, with the traditional executive-legislative-judicial division being supplemented with attention to a fourth function of guaranteeing human rights that is linked to the judicial power and to adjudication. This supplementation leads us to rethink and discuss the role of the judiciary in a democratic state and to consider the so-called “guarantee function” in the context of a debate about the character of a democracy.<sup>56</sup> This reconsideration is not a matter of overcoming all prejudice, because before we consciously understand ourselves reflectively, we already have understood ourselves “in a self-evident way in the family, society, and state in which we live.”<sup>57</sup> This means that we already understand what democracy and its implications are before we attempt to theorize them in the context of political theory.

It is the judicial branch, with its adjudicative role and function that shapes and makes concrete constitutional rights. This is a broader role than that suggested by the political questions doctrine. This new approach to government functions and to the structure of the exercise of political power engenders a renewed debate between the so-called “substantive conception theory.” When we renew this debate, we will find that these theories are not mutually exclusive, but can be reconciled. This debate is more than a conceptual revision of constitutionalism as a substantive project to deal with doctrinal uncertainties;

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<sup>54</sup> It is our understanding that Montesquieu’s doctrine of separation of powers leads to a fragmentary State, where the different branches of government work in isolation, not having any relation to the other, and not compromising on developing a Constitutional State. State functions are linked to diverse agendas but without any mutual agreement, without having in mind what Rousseau called the will of the people. An example of such disconnection occurs when the judiciary orders the executive to pay a sum of money, but the executive branch needs the legislative branch to allocate funds in order to fulfill its obligation.

<sup>55</sup> Onida, *supra* note 51, at 5.

<sup>56</sup> See JOSÉ LUIS BOLZAN DE MORAIS ET AL., *A JURISPRUDENCIALIZAÇÃO DA CONSTITUIÇÃO: A CONSTRUÇÃO JURISDICCIONAL DO ESTADO DEMOCRÁTICO DE DIREITO IN PROGRAMMA DE POS GRADUAÇÃO EM DIREITO* (2002).

<sup>57</sup> GADAMER, *supra* note 13, at 278.

its main objective is to concretize human dignity as a constitutional value that originates in the broader civilizing project.

The democratic project is not just a matter of “who?” and “how?”, but most importantly must address “what?” Democracy must be true to the interest of everybody, of all society and not only a part of the society or the will of a group. However, before we connect these thoughts to the role of constitutional law in a contemporary democracy and the specific field of concretizing human rights, we must follow Gadamer and investigate daily experience as something that is part of man’s essence. This is the seat of truth: personal images that all members of society carry, not only as individuals, but also as members of a community, and that give shape to the finitude of human existence. Coming to an understanding is the authentic result of all experience and all “getting to know” in general.<sup>58</sup> In our opinion, this is the productive point of contact between Gadamer’s philosophical hermeneutics, which explores how comprehension comes from tradition, and Santos’ diatopic hermeneutics, which uses translation as a metaphor of how we create reciprocal intelligibilities among cultures—which can facilitate a break with an inauthentic constitutional tradition.

#### VI. THE ESSENTIALITY OF THE CONSTITUTIONALISM IN THE SUBSTANTIVE DEMOCRACIES

We conclude that constitutionalism is vital, especially the judicial role of adjudication when considering contemporary problems. If democracy is to be preserved and embraced with a substantive conception and not regarded only as a game of democratic rules as argued by Bobbio,<sup>59</sup> the implementation of the humanitarian contents of human rights must transform the democratic state with the rule of law as its ground.

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<sup>58</sup> This was also Gadamer’s lesson when connecting experience to consciousness of the effect of history. Hermeneutics does not have its effectiveness in methodological certainty, but in the prompt disposition to the experience that characterizes human life. *Id.* at 368.

<sup>59</sup> NORBERTO BOBBIO, O FUTURO DA DEMOCRACIA: UMA DEFESA DAS REGRAS DO JOGO 170-71 (1987).